INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW

VOLUME 11

2000-2001

INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW

Volume 11 2000 Number 1

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CONSTITUTIONAL DIALOGUES IN ACTION: CANADIAN AND ISRAELI EXPERIENCES IN COMPARATIVE PERSPECTIVE.

Gal Dor*

I. INTRODUCTION

Despite being over two hundred years old, the idea of separation of powers remains central to most political theories and is a subject of debate in democratic states around the world.[1] Most notably, the proper role of the judiciary in relation to the other branches of government (the executive and the legislative branches) is a prominent theme of scholarly as well as political discourse.[2] Opponents and proponents of Professor Bickel's classical statement, that "judicial review is a counter-majoritarian force in our system"[3] are engaged in a continuous debate to either sustain or circumvent the judicial counter-majoritarian difficulty—the problem of unelected and largely unaccountable judges invalidating the policy decisions of duly elected governmental representatives.[4] Indeed, the courts and their justices are frequently the pillars upon which scholars structure and focus their arguments. The judicialization or legalization of politics is perceived to be

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* SJ.D. candidate, Faculty of Law, University of Toronto; B.A., M.A. (Sociology), The Hebrew University, Jerusalem; LL.B., The Hebrew University, Jerusalem; LL.M., University of Toronto.

The author expresses her gratitude to Professor Bruce Chapman, Professor Barry Friedman, Professor Mark A. Graber, Professor Mark Tushnet, and Professor Lorraine Weinrib for their helpful comments. I also thank Elizabeth Seally, Pippa Reyburn and Diana Young for reading earlier drafts of this article.

1. The history of separation of powers theory runs from Locke and Montesquieu to the present day. *See generally* Samuel W. Cooper, *Considering Power in Separation of Powers*, 46 STAN. L. REV. 361 (1994).

2. On the European experience see Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 COM. POL. STUD. 397 (1994). On the Canadian experience see MICHAEL MANDEL, THE CHARTER OF RIGHTS AND LEGALIZATION OF POLITICS IN CANADA (3d ed. 1994).

3. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986).

4. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Michael P. Cox, *State Judicial Power: A Separation of Powers Perspective*, 34 OKLA. L. REV. 207 (1981); Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U.L. REV. 333 (1998); Ronald Kahn, *The Supreme Court as a (Counter) Majoritarian Institution: Misperceptions of the Warren, Burger, and the Rehnquist Courts*, 1994 DET. C.L.REV. 1 (1994); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 768 (1991); Martin H. Redish, *The Passive Virtues, the Counter Majoritarian Principle, and the Judicial-Political Model of Constitutional Adjudication*, 22 CONN. L. REV. 647 (1990); Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571 (1988).

the work of judges who, boldly and without qualms, exercise broad judicial-review powers.[5] The overall expanded power and centrality of judicial review is the result of Supreme Courts overstepping their proper boundaries and playing an unduly political role.

Arguments relating to these concerns have been raised in both the Canadian and Israeli public spheres, which are the focus of this paper. In Canada the proper role of judges vis-à-vis the elected officials has become a prominent issue of public debate since the introduction of the Canadian Charter of Rights and Freedoms (Charter).[6] In Israel, the same issue is the focus of a turbulent debate currently taking place in the parliament (the "Knesset") and many other forums.[7] Some scholars argue that the Israeli Supreme Court is willing to thoroughly scrutinize, intervene in and invalidate every act of any governmental agency,[8] as almost all social and political burning questions are now perceived as justiciable.[9] The Israeli debate is especially appealing, taking into account that Israel has not yet adopted a formal written constitution and that its legislature's sovereignty was, and to

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5. *See* Mauro Cappelletti, *The Expanding Role of Judicial Review in Modern Societies*, *in* THE ROLE OF COURTS IN SOCIETY 79 (Shimon Shetreet ed. 1988); Torbjorn Vallinder, *The Judicialization of Politics - A World Wide Phenomenon*, 15 INT'L POL. SCI. REV. 91 (1994).

6. Canadian Charter of Rights and Freedoms, CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), sched. B. For the public debate on the performance of the Courts vis-a-vis the policy making institutions see Sheldon Alberts, *Judge Defends Decisions Affecting Social Policies*, THE NAT'L POST, Mar. 25, 1999, at A4; Luiza Chwialkowska, *Case Inflames Debate Over Judicial Activism: Are Courts Going Too Far?*, THE NAT'L POST, Apr. 17, 1999, at A7; Luiza Chwailkowska, *Legal Minds at Odds Over Whether Supremes Have Too Much Power: A Charter Review*, THE NAT'L POST, Apr. 19, 1999, at A5; Peter Russell et al., *Balancing Rights the British Way*, THE NAT'L POST, Mar. 24, 1999, at A6. *See also* IRPP Conference of the Canadian Judicial System, held at the University of Ottawa (Apr. 16-17, 1999), *available at www.irpp.org/archive.courts.html.*

7. On June 9, 1998, a religious Orthodox Member of the Knesset, Igal Bibi, while responding in the Knesset on behalf of the government to several motions, harshly criticized the Israeli High Court, claiming: "Everything is open; everything is breached; everything is justiciable". HA'ARETZ, June 10, 1998, at 5. The criticism engendered a stormy debate within the parliament and outside of it. *See* HA'ARETZ, June 11, 1998, at 3;HA'ARETZ, June 14, 1998, at 4. For an academic account on the debate see Ruth Gavison, *The Constitutional Revolution - A Depiction of Reality or a Self-fulfilling Prophecy*, 28 MISHPATIM L. REV. 21 (1997) (in Hebrew).

8. *See e.g.*, Stephen Goldstein, *Protection of Human Rights by Judges: The Israeli Experience*, 38 ST. LOUIS U. L.J. 605, 613 (1994); David. Kretzmer, *Forty Years of Public Law*, 24 ISR. L. REV. 341 (1990); Seev Segal, *Administrative Law*, *in* INTRODUCTION TO THE LAW OF ISRAEL 59 (Amos Shapira & Keren C. DeWitt-Arar, eds. 1995); Shimon Shetreet, *Standing and Justiciability*, *in* PUBLIC LAW IN ISRAEL 25 (Itzhak Zamir & Allen Zysblat eds., 1996); Itzhak Zamir, *Rule of Law and Civil Liberties in Israel*, 7 CIVIL JUST. Q. 64, 69 (1988).

9. The common view is that there is actually no legal barrier to bringing any question before the court. *See* Shoshana Netanyahu, *The Supreme Court of Israel: A Safeguard of the Rule of Law*, 5 PACE INT'L L. REV. 1 (1993); Itzhak Zamir, *Administrative Law: Revolution or Evolution*, 24 ISR. L. REV. 357 (1990); Itzhak Zamir, *Courts and Politics in Israel*, PUB. L. 523 (1990); Itzhak Zamir, *Administrative Law*, *in* PUBLIC LAW IN ISRAEL 18, *supra* note 8.

a great extent still is, assumed to be absolute. Instead of a constitution, the Israeli Parliament has hitherto gradually enacted the eleven Basic Laws, which are supposed to be the chapters of a future constitution.[10] The first nine Basic Laws are mainly structural, defining the form of government and dividing the powers between the three branches. Only the last two Basic Laws, enacted in 1992, touch on human rights.[11]

Recently, the Israeli High Court of Justice[12] decided to annul a section of a law passed by the Knesset on the grounds that it was unconstitutional.[13] A week later, a newspaper columnist claimed that the High Court's decision was handed down "*without ruffling many feathers*".[14] Yet, one Knesset Member whose feathers were ruffled, reacted by claiming:

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10. According to the Israeli Declaration of Independence, a constitution was to be established by an elected constituent assembly no later than October 1, 1948 (an English translation of the Declaration can be found in DANIEL J. ELAZAR, CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES 210 (1991)). However, Israel never adopted a Constitution. A political compromise, known as the Harrari Resolution, was embraced instead, prescribing the afore-mentioned way of gradually enacting the chapter-by-chapter future constitution. *See* Dafna Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 312 (1995); Samuel Sager, *Israel's Dilatory Constitution*, 24 AM. J. COMP. L. 88 (1976). However, the status and meaning of the Basic Law vis-à-vis the regular Knesset legislation were left veiled in vagueness. *See* Eliyahu Likhovski, *Can the Knesset Adopt a Constitution Which Will Be the 'Supreme Law' of the Land?*, 4 ISR. L. REV. 61 (1969); Marina O. Lowy, *Restructuring a Democracy: An Analysis of the New Proposed Constitution for Israel*, 22 CORNELL INT'L L.J. 115, 120 (1989); Maoz, *The Institutional Organization of the Israeli Legal System, in* PUBLIC LAW IN ISRAEL, *supra* note 8, at 11. Furthermore, these Basic Laws were not entrenched in any substantive way, except for the technically entrenched section four of the Basic Law: The Knesset, which will be dealt with shortly.

11. These are Basic Law: Human Dignity and Liberty (S.H. 1992-1391, at 150) and Basic Law: Freedom of Occupation. *See infra* note 35. Both Basic Laws contain entrenched clauses. As mentioned, unlike their predecessors, which covered the institutional aspects of Israel's constitutional system, these prescribe some fundamental civil liberties and human rights. *See* David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR. L. REV. 238 (1992); David Kretzmer, *The New Basic Laws of Human Rights, in* PUBLIC LAW IN ISRAEL, *supra* note 8, at 141.

12. The Israeli Supreme Court has a dual function. It is both the highest appellate court in civil and criminal matters as well as the High Court of Justice. As the High Court of Justice, it has original jurisdiction in claims against the state and its organs in matters which are outside the jurisdiction of other courts.

13. The case in question, handed down in September, 1997, involved an appeal by an investment management group which demanded the cancellation of several regulations found in the law that first established guidelines as to who is allowed to advise on investment portfolios. Specifically, the petitioners asked for the annulment of the transitional clauses, dealing with the examinations veteran investment managers were demanded to write in order to be allowed to continue in their former occupation. *See* H.C. 1715/97, The Investment Portfolios Managers' Association et. al v. Minister of Finance et al. (Sept. 24,1997, not yet reported).

14. Gidon Alon, *Who Makes the Law*, HA'ARETZ, Sept. 30, 1997, at 1A (in Hebrew).

> *Until now, there has been a status quo between the Supreme Court and the Knesset. Each of the branches tried hard not to intrude in the other's affairs.* I consider the High Court of Justice ruling a very serious matter. . . . Perhaps on this occasion an insignificant section was under discussion, but henceforth they [the judges] will be able to annul *significant* laws, and so a new reality will be created . . . . [T]his decision sets the stage for the court's intervention in the legislative activity of the Knesset. *Such intervention is unwarranted,* and the Knesset needs to state its opinion on this matter... *The Knesset is sovereign, not the Court.* The Court can recommend that the Knesset amend the law which the Court feels is a contradiction of the Basic Laws, but it can't revoke a law on its own say-so.[15]

These words focus on a presumed new reality in which the Israeli Court counteracted parliamentary sovereignty. Yet this statement ignores two additional facets of the matter. First, the Israeli Court has more than once struck down primary legislation, and the Knesset stated its opinion on those occasions. Second, the Israeli Supreme Court's docket should be checked and analyzed along with, and in light of, the legislature's actions and reactions to the decisions.

This article argues that the proper analysis of counter-majoritarian arguments against Supreme Courts and judicial activism in any constitutional system obliges one to simultaneously look into the actions and powers of the decision-making institutions (notably those of the legislature), as well as their interplay and interrelations. Specifically, this article will compare how the Israeli and Canadian policymakers addressed their responses to similar judicial features and thus substantiate the collating.[16] As shall be elaborated shortly, in both countries a court's declaration of unconstitutionality could be successfully counteracted by the legislature. Thus, the legislature's modes of retort should be considered an important component in analyzing the relevancy of the counter-majoritarian problem to any political system.

Part II briefly discusses the American-type, classic counter-majoritarian difficulty and the arguments suggested in the literature to undermine or overcome it, while elaborating on the constitutional dialogue theory as a possible solution. Part III presents the Israeli case study, focusing on the very first cases in which the Israeli Court struck down laws. Part IV works through the meaning of constitutional dialogues by suggesting a subtle distinction between two kinds of dialogues: substantive and formal. Both

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15. *Id.* (quoting the words of the Knesset Speaker, Dan Tichon)(emphasis added).

16. On the similarity between the Canadian Charter of Rights and Freedoms and the Israeli Basic Laws of 1992 see *infra* notes 25, 137 and accompanying texts. *See also* Lorraine Weinrib, *The Canadian Charter as a Model for Israel's Basic Laws*, 4:3 CONST. F. 85 (1993).

parts V and VI contextually compare some Canadian and Israeli examples by interpreting formal and substantive dialogues occurring in each system. Part VII delves into the question of the responsibility to engage in dialogues, and Part VIII examines whether there are grounds for the theory that constitutional structures affect constitutional dialogues and concludes that they are not necessarily associated, after reviewing the experiences of other countries. This article concludes with a few general comments on the nuances of counter-majoritarianism.

II. COUNTER-MAJORITARIANISM AT EASE: THE CONSTITUTIONAL DIALOGUE

In a nutshell, the counter-majoritarian (or anti-majoritarian) objection to judicial review assumes a situation in which unelected and unaccountable judges are "vested with the power to strike down the laws that were enacted by the duly elected representatives of the people".[17] According to this view, the Court exercises its power of review contrary to the will of national majorities, undermining the policy and decision making institutions.[18] Thus, counter-majoritarianism is an anomaly in a democratic society.

While the expansion of the Court's judicial review power has become a worldwide phenomenon, so has the counter-majoritarian difficulty. Supreme Courts all over the world, including those of Canada and Israel, are being charged with encroaching on the powers of elected officials.[19]

Over the course of the years, many theorists attempted to solve the difficulty, to benumb its sting or to deny it altogether. Robert Dahl, for example, has suggested that "the policy views dominant in the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[20] According to his position, the Court is usually an institution that supports the majority politics of the dominant coalition. Thus, a Court's striking down laws does not really pose any substantial threat to democracy, and the overall danger of Court's

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17. Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 OSGOODE HALL L.J. 75, 77 (1997).

18. Such undermining can take many forms: not only can it displace a current majoritarian decision, but it can also distort and debilitate future ones. *See* Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination for the Counter-majoritarian Difficulty*, 94 MICH. L. REV. 245, 247 (1995).

19. For the Canadian debate see F.L. MORTON & RAINER KNOPFF, CHARTER POLITICS (1992). For the Israeli debate see *supra* note 7 and accompanying text.

20. ROBERT ALLAN DAHL, DEMOCRACY AND ITS CRITICS 190 (1989); *see also* Robert Allan Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957). For a slightly different account of the same argument see William Mishler & Reginald S. Sheehan, *The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on the Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

countering majority will is empirically mitigated.[21] The same argument was recently made with respect to the Canadian Supreme Court: in a study on one-hundred constitutional rulings handed down between 1996 and 1998, it was found that the Supreme Court posed no challenge to parliamentary sovereignty.[22]

Mark Graber has proposed that the anti-majoritarian difficulty is actually a non-majoritarian one, as "justices . . . declare state and federal practices unconstitutional only when the dominant national coalition is unable or unwilling to settle some public dispute . . . [and] prominent elected officials consciously invite the judiciary to resolve those political controversies that they cannot or would not address."[23] Accordingly, courts do not act when there is a clear and certain majority for the specific law at issue, and thus, they are not counter-majoritarian institutions.[24] Inevitably, according to this approach, the difficulty is diminished by the fact that our initial assumption about the presence of an identified majority has been proven wrong. Professor Graber posits that in most cases clashing majorities are indeed involved. Hence, the priority of governments is to avoid deciding controversial moral issues, leaving them to be decided by the courts. If courts so decide, the self-interest of government is upheld; courts deciding non-majority issues are acting according to the officials' preferences. Thus, these decisions cannot be counter-majoritarian.

In the same vein, a somewhat variant approach to tackling the difficulty has recently taken root. Containing both normative and empirical cores, the dialogue theory suggests that counter-majoritarianism might be overcome if one acknowledges that courts and legislatures are engaged in a continuous dialogue. Rather than being the final determination of a contested issue, a court's decision to annul a law or declare a governmental action invalid can be the starting point or stimulus of public debate. The legislature or the executive, the policy-making institutions, are indeed the ones to articulate the final constitutional solution in light of, and in accordance with, a court's decision.[25] In such circumstances, majority will is not circumvented, it is

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21. *See Decision-Making in a Democracy*, *supra* note 20, at 294.

22. *See* Judy Tibbetts, *Top Court Judges Shy Away from Rewriting Laws: Study*, THE NAT'L POST, Apr. 9, 1999, at A5. *See also* Patrick J. Monahan, *The Supreme Court of Canada Constitutional Cases 1998*, CANADA WATCH (1999), *at* http://www.robarts.yorku.ca/.

23. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993).

24. Graber mentions abortion as one American example of a debate in which neither side constituted a clear political majority. *See id.* The same controversy serves Hogg & Bushell as an example of the rare cases in which a legislative response to Canadian Supreme Court's annulment of a law is precluded, since the "issue is so politically explosive that it eludes democratic consensus." Hogg & Bushell, *supra* note 17, at 96. On the Canadian version of the non-majoritarian solution see F.L. Morton, *Dialogue or Monologue*, 20:3 POL'Y OPTIONS 23, 25-26 (1999).

25. The fact that legislative bodies can have the last word, even after the Court has

adjusted; the legislature, not the Court, is still the institution with decisive powers. Courts participate in shaping governmental policies in an appropriate and suitable manner, not by dictating them. The constitutional dialogue approach, instead of identifying the Court's striking down a law duly enacted by the legislature as the critical moment for analyzing the counter-majoritarian action, studies the issue in a broader context. It concentrates not only on the period following a judgment but also on the period preceding the Court's determination. It further focuses on the legislature's reaction more than on the Court's action – that is, on the ameliorated potential of subsequent legislative action. Using empirical data, this approach projects a normative response to the dilemma: if dialogues take place between courts and legislatures and if these dialogues result in the better articulation of the legislature's will the court is not counter-majoritarian but an institution upholding majoritarianism on the one hand, and civil or minority rights on the other.[26]

This seems to be the appropriate perspective to probe concerns that courts run counter to democratic principles. Any assertion with respect to counter-majoritarianism should include an assessment of the political institutions' actions and reactions, resistance or compliance, and modifications or performances. Any observation on the courts' power should emanate from a broader analysis of how the political branches used their own legitimate power to respond to courts' democratic "deviations."[27]

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spoken, has been acknowledged by many scholars in many different jurisdictions. For the American version of the argument see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 13 (1991); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 655-56 (1993). For the Canadian perspective see Allan C. Hutchinson, *Charter Litigation and Social Change: Legal Battles and Social Wars, in* CHARTER LITIGATION 370, 375 (Robert J. Sharpe ed. 1987). The Canadian example is especially intriguing since the Canadian Charter of Rights and Freedoms includes a few features that facilitate the legislature's responses to Court's decisions. *See infra* note 105 and accompanying text. *See also* Hogg & Bushell, *supra* note 17, at 82; Julie Jai, *Policy, Politics and Law: Changing relationships in Light of the Charter*, 9 N.J.C.L. 1 (1997). The Canadian example is of great importance to our study, as the Israeli (as well as the South African) constitutional structure follows that of Canada, granting the legislature the power to limit rights for a justified cause. In Israel the power to override some rights was included in one Basic Law. *See infra* note 137 and accompanying text. For the similarities and influences of the Canadian Charter on Israeli constitutional law see Zeev Segal, *The Israeli Constitutional Revolution: The Canadian Impact in the Midst of a Formative Period*, 8 CONST. F. 53 (1997).

26. When God contemplated creating Eve, he thought to offer Adam an *Ezer Kenegdo*. *See* Gen. 1:18. *Ezer* in Hebrew means helper or assistant. *Kenegdo* has a few meanings, two of which are over and against him or challenging him. Unfortunately, the English translation of "helpmate" loses the oxymoronic nature of the biblical expression. The Court thus, can be the legislature's *Ezer Kenegdo*.

27. Indeed, Friedman, *supra* note 25, at 682, asserts: "The problem of the counter-majoritarian difficulty is that it overstates the role of courts and thus understates society's responsibility." *See also* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 90 (1998).

Such a broad outlook recently found its way into the Canadian discourse.[28] However, as the next sections will suggest in a rather general manner Canadian commentators have paid little attention to the different types of dialogues that courts and legislatures engage in or to their different meanings.[29] In contrast, the Israeli scholastic critique still focuses primarily on the Court's action.[30] It is the Court's decisions, rather than the legislature's responses, that govern the debate in Israel. The next section therefore aims at filling this gap: tracing the Israeli governmental address to the first instances in which the Court struck down laws, while analyzing and interpreting the actions that both preceded and followed those judicial decisions.

Before proceeding, one remark should be made to with respect to the Israeli constitutional system. Due to the absence of a formal written constitution or bill of rights, parliamentary supremacy was accepted as the governing principle of Israel's constitutional regime, as attempts to persuade the Court to review primary legislation traditionally received a negative response.[31] Israel still does not have a full written constitution. Yet the principle of parliamentary supremacy has suffered significant encroachments with the introduction of the two 1992 Basic Laws.[32] Thus, the Israeli deviation from the classical counter-majoritarian problem should be considered: the state could have, at least prior to 1992, prevented the decision to strike down its laws or easily restored the proper order of powers once an annulling decision has been handed. A failure to act in this manner, might point to a different problem. The following sections and the previously quoted statement made by the Knesset Member should be read with this in mind.

III. THE ISRAELI EXAMPLE – RESPONDING BEFORE AND AFTER THE JUDICIAL DECISION

Since its inception the Israeli Court has struck down five pieces of legislation.[33] Four out of the five dealt with Basic Law: The Knesset and

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28. *See* Hogg & Bushell, *supra* note 17; Peter W. Hogg & Allison A. Thornton, *The Charter Dialogue Between Courts and Legislatures*, 20:3 POL'Y OPTIONS 19 (1999); Morton, *supra* note 24. *See also* Lorraine Weinrib, *infra* note 108 and accompanying text.

29. *See infra* section IV.

30. *See, e.g.*, Pnina Lahav, *Rights and Democracy: The Court's Performance*, *in* ISR. DEMOCRACY UNDER STRESS 125, 141-46 (Ehud Sprinzak & Larry Jay Diamond, eds., 1993); Martin Edelman, *Israel*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER 403 (Neal C. Tate & Torbjorn Vallinder eds. 1995); Netanyahu, *supra* note 9, at 1.

31. *See* Kretzmer, *The Supreme Court and Parliamentary Supremacy*, *in* PUB. LAW IN ISR. 303, *supra* note 8.

32. *See id.* at 304. *See also* Barak-Erez, *supra* note 10, at 323.

33. *See* H.C. 98/69, Bergman v. Minister of Finance and Others (1969), 23 P.D (1) 693; H.C. 246, 260/81, Agudat Derekh Eretz et al. v. Broadcasting Authority et al. (1981), 35 P.D.

were decided before 1992,[34] while the last case revolved around Basic Law: Freedom of Occupation.[35] The study hereinafter will concentrate only on three out of the four cases touching upon the entrenched provision in section four of the Basic Law: The Knesset. [36] That entrenched clause states, "[t]he Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be varied save by a majority of the members of the Knesset."[37] The common interpretation of the ending words "save by a *majority* of the members of Knesset" was that at least 61 out of the 120 members should vote favorably for the changing of the section - this is also known as a *special majority*.[38]

In all three cases, the Court found that the challenged law infringed the entrenched clause and thus declared it void. As shall soon become evident, the Court's competence and jurisdiction to decide the cases (the justiciability issue) was not contested either before, or after, the judicial determination. Furthermore, the legislature's subsequent actions in response to the Court's decision missed some important features, resulting in a very futile - and what I will later refer to as formal - dialogue.

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(4) 1; H.C. 141/82, Rubinstein et al. v. Chairman of the Knesset et al. (1982), 37 P.D. (3) 141; H.C. 142/89, Tenuat Laor v. Knesset Speaker (1990), 44 P.D. (3) 529; H.C. 1715/97, The Investment Portfolios Managers' Association et. al v. Minister of Finance et al. (Sept. 24, 1997, not yet reported). The first three cases were translated in 8 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 13, 21, 60 (1992) at 13, 21 and 60 respectively [hereinafter SELECTED JUDGMENTS]. The preceding citations refer to this translation.

34. Basic Law: The Knesset, 1958, S.H 5718, at 69. An English translation of the Basic Law: The Knesset can be found in: http://www.uni-wuerzburg.de/law/is_indx.html. On the meaning of Basic Laws see *supra* note 10.

35. Basic Law: Freedom Of Occupation, 1992, S.H. 5752, at 114. An English translation of the Basic Law: Freedom of Occupation can be found in Itzhak Zamir & Allen Zysblat eds., *supra* note 8, at 157, as well as under the sub-category of Basic Law: Freedom of Occupation, 1994, S.H. 1994-1454, at 90, *at* http://www.uni-wuerzburg.de/law/is_indx.html. For an overview on the happenings of this Basic Law, which was repealed and re-enacted in 1994, see *infra* notes 134-38 and accompanying text.

36. The fourth case, *Laor*, will not be dealt with directly, for two reasons; that case was not translated in the SELECTED JUDGMENTS series, thus the English reader will be unable to access it. Furthermore, the case evolved around a relatively marginal question of whether a law's pre-reading procedure (as opposed to the three-reading process) is also subject to the absolute majority requirement found in section 4 of the Basic Law: The Knesset.

37. It is worth mentioning that section 4 was entrenched once more by section 46 of the Basic Law, which reads as follows: "The majority required by this Law for changing section 4, 44, or 45 shall be required for decisions of the Knesset plenary at every stage of law-making...In this section, "change" means both an express and an implied change." *Id.*

38. *See* Barak-Erez, *supra* note 10, at 326.

A. In-Court Reluctance: The State Representatives' Arguments

The afore-mentioned entrenched clause was at the center of a 1969 petition submitted by a Tel-Aviv lawyer named Bergman.[39] The petitioner challenged the validity of a new law passed by the Knesset that dealt with the endowment of public funding to support the election campaigns of political parties.[40] The law provided that public funding would be granted only to those parties represented in the outgoing Knesset. The petitioner claimed the law discriminated against new parties running and campaigning for the Knesset for the very first time, thus infringing the principle of equal election laid down in the entrenched clause. Since the required majority did not pass the law, Bergman argued that it should be struck down.

The petition raised a number of fundamental structural constitutional issues for the very first time. First, the status of Basic Laws, vis-à-vis other laws, had never before been determined. The issue of whether an entrenched section in a Basic Law could invalidate later legislation remained an open question.[41] Second, the Knesset's authority to bind itself by entrenched clauses had yet to be settled.[42] Third, the petitioner's standing to challenge the legislation was questionable.[43] Finally, and most importantly, the Court's competence to decide on the validity of primary legislation, even if entrenched, was at stake. Recall that such competence is not grounded in a written constitution or any other legal document and has never before been exercised.[44]

Notwithstanding the potentially fatal flaws of the petition, the Attorney General asked the Court for a ruling on the merits, and consequently the

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39. *See* H.C. 98/69, Bergman v. Minister of Finance and Others (1969), 23 P.D (1) 69.

40. *See* Knesset and Local Authorities Elections (Financing, Limitation of Expenses and Audit) Law, 1969, S. H. 53.

41. *See supra* note 10 and accompanying text.

42. Recall that the constituent assembly's sole task was to prepare a constitution. However, that did not happen: the Constituent Assembly became the First Knesset. When the First Knesset dissolved, it adopted the Harrari Resolution and the Transition law, which delegated its constituent power to future Knesset. Was the first Knesset authorized to delegate its power to adopt a constitution? This has been a crucial academic question ever since. On this point see Haim Deutch, *The "Legal Duty" Argument in the Israeli Debate Over the Constitution*, 4 TEMP. INT'L & COMP. L.J. 239 (1990); Claude Klein, *A New Era in Israel's Constitutional Law*, 6 ISR. L. REV. 376, 380 (1971).

43. *See* Klein, *supra* note 42, at 386.

44. *See* Kretzmer, *supra* note 31, at 307. It is worth mentioning that the Court's competence to declare Parliament's legislation inoperative is a weighty question in a system lacking explicit authority. In Canada, before the enactment of the Charter, the Canadian Courts' authority to refuse to apply any law that infringed the 1960 Canadian Bill of Rights was questionable as well. However, the Canadian Supreme Court dealt lengthy with this specific issue in the famous Drybones case (R. v. Drybones, [1970] S.C.R. 282). On this decision and the Court's dealing with its own competence to declare a law as inoperative see WALTER SURMA TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS 132-43 (2d ed. 1975).

Court's decision left most of these issues open for further deliberation.[45] The Attorney General's arguments were confined to rebutting the petitioner's material arguments and to sustaining the validity of the new law. The Court unanimously rejected the Attorney General's arguments and held that the new legislation violated the equality principle to an unjustifiable degree and thus should not be enforced.[46] Notably, the Court suggested two paths that were open to the legislature if it wished to fix the defect of the void law. First, the Knesset could leave the law intact, provided that it reenacted it by a special majority.[47] Alternatively, the Knesset could amend the law by replacing the discriminatory provision with a provision that would balance the Knesset's interest with the equality principle prescribed in the Basic Law.[48]

In 1981, a second petition, in the *Agudat Derekh Eretz* case, challenging a law that allegedly infringed the entrenched provision, was brought before the Court.[49] In this petition, the Elections (Mode of Propaganda) Law–a law regulating the free radio and television broadcasting

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45. *See* H.C. 98/69, Bergman v. Minister of Finance and Others (1969), 23 P.D (1) 69, at 15-16. The court stated:

> This petition raises potentially weighty preliminary questions of a constitutional nature, relating to the status of the Basic Laws, and to the justiciability before this court of the issue of the Knesset's actual compliance with a self-imposed limitation in the form of an "entrenched" statutory provision. . . . *However, the Attorney-General relieved us of the need to deliberate on the matter by stating on behalf of the Respondents that they "do not take a position on the question whether the legal validity of a legislative enactment is a justiciable matter before this court, since they are of the opinion that the petition must fail on the merits"* . . . . We therefore leave the question of justiciability open for further consideration and, clearly, nothing in this judgment should be taken as an expression of opinion on that matter.

Id. (emphasis added).

46. *Id.* at 19.

47. *See id.* at 20. "The Knesset accordingly has two courses from which to choose: it can reenact the financing provisions in the new law, despite their inherent inequality, if the majority required under section 4 and 46 of the Basic Law is mustered." *Id.*

48. In the Court's words:

> In the Knesset debates on the Financing Law, the merits of a method of finance based on the balance of party power in the outgoing (sixth) Knesset was contrasted with a method based on the new party balance in the incoming (seventh) Knesset. The Knesset preferred the first method and one of its main reasons for so doing was the danger that short-lived lists would be formed because of the temptation to receive an advance on the funding allocation. *This danger can be countered without causing the inequality that we have found to be unlawful, by promising a new list funding without an advance payment and only retrospectively after it stood the test of the elections and gained at least one seat.*

Id. at 20 (emphasis added).

49. H.C. 98/69, Agudat Derekh Eretz v. Broadcasting Authority et al. (1981), 35 P.D. (4) 1.

time for parties participating in the elections-was challenged.[50] The amendment decreased the time allocated to new parties, while simultaneously considerably increasing the time allocated to those parties who participated in the outgoing Knesset. Two associations that intended to introduce a new party argued the amendment infringed the equality principle of the entrenched provision, and, since the required majority did not pass it, it should be struck down.

The petitioners' right to standing in this case was rather obvious, yet the question of the case's justiciability remained challengeable. The then state attorney, following his predecessor in the *Bergman* case, asked for a ruling on the merits, stating explicitly he would not dispute the case's justiciability, nor the Court's competence to review the legislation.[51] All five justices held that the law in question infringed the equality principle and, as it was not enacted in accordance with the entrenched clause's requirements, was invalid.[52]

Within less than a year, the third petition, *Rubinstein, et al. v. Chairman of the Knesset, et al.*, concerning the same entrenched clause was brought before the Court for review.[53] The petitioners in this case were Knesset members of a relatively small party, who claimed to be harmed by a retroactive amendment to the election campaign spending law that was supported by the biggest parties. A third state representative preferred not to raise a plea of non-justiciability and again asked the Court for a ruling on the merits.[54]

These were the three cases in which fundamental constitutional issues could have been but were not directly considered by the Israeli High Court or the legislature (via its legal representatives).[55] One point should be kept

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50. Elections (Modes of Propaganda) Law, 1981, am. 6, S.H. 198.

51. *See* H.C. 98/69, Agudat Derekh Eretz v. Broadcasting Authority et al. (1981), 35 P.D. (4) 1, at 24.

52. *Id.* at 25. The Attorney General chose to argue other preliminary issues such as the need to join additional respondents to the petition. Not arguing the justiciability issue cannot be viewed as mere forgetfulness.

53. H.C. 141/82, Rubinstein et al. v. Chairman of the Knesset et al. (1982), 37 P.D. (3) 141. While preparing for the tenth Knesset elections, several parties exceeded the campaign spending limits set forth in the Elections Financing Law which compensated the parties from the public funding budget. After the elections, the Knesset amended the Elections Financing Law retroactively, raising the spending limits and reducing the sanctions imposed on any party that exceeded its budget. An ordinary majority passed the amendment. The petitioners, leaders of a party which adhered to the original spending limits, argued that the retroactive amendment violated the principle of equality in the elections, and as the majority requirement was not sustained, the amendment was invalid. The five justices were unanimous in accepting the petition. *See id.*

54. *See id.* at 66.

55. The Israeli Attorneys General, as well as state attorneys, have the exclusive power to represent the State in all courts, and they are defending the State, the Government and Government organs when they are being sued in the courts. It is their role to represent and give

in mind: it was not the Court that marked the boundaries of the discourse. The Israeli High Court itself did not define the scope or the content of the in-court dialogue.

Three different state representatives have followed the same path: they have all avoided contesting the justiciability of the constitutional question at issue, while asking the Court to dismiss the petitions on their merits. It should be noted that this approach was also taken with respect to another fundamental issue: the Israeli High Court's jurisdiction to decide petitions submitted by the inhabitants of the Gaza and the West Bank territories administered by Israel since 1967. For more than ten years, Israeli Councils of State abstained from arguing that the Israeli Court did not have the jurisdiction to hear those petitions, limiting themselves to arguing that the petitions should be dismissed on their merits.[56] They have acted in that manner even though there are international legal precedents that support the position that the Israeli Court did not have jurisdiction.[57] This is but another example of State representatives narrowing the scope of the dialogue, which engages themselves and the Court.

The motivations behind these litigation strategies are not well known. It has been speculated that time constraints led the state representatives to follow this strategy.[58] One might further speculate that, by taking that position, state representatives signal their preferences, perhaps even their desire, for a Court's decision. Maybe there was something politically satisfying in submitting to the Court's jurisdiction. Was this submission an attempt to foist a controversial, clashing issue on the Court?

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voice to the government's stance on the issue brought before the Court. *See* Itzhal Zamir, *The Role of the Attorney General in Times of Crisis: The Shin-Bet Affair, in* THE ROLE OF COURTS IN SOCIETY, *supra* note 5 at 271. On the role of the Attorney General in the dialogue see *infra* note 72 and accompanying text.

56. The first petition to the High Court was submitted on June 20, 1967. In that petition, the counsel for the State declared he would not challenge the competence of the Court to review the acts of the military authorities in the territories. *See* Eli Nathan, *The Power of Supervision of the High Court of Justice over Military Government, in* MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTRATED BY ISRAEL, 1967-1980 114 (Meir Shamgar ed. 1982). Consequently, the right of Palestinians to petition the Court for relief, as well as the Court's jurisdiction over these matters, were not thoroughly discussed by the Court. This strategy became the standard. *See, e.g.* H.C. 337/71, Algamaia Almakasda v. Minister of Defense (1972), 26 P.D. (1) 574; H.C. 69/81, Abu Ita v. Military Commendor et al. (1981), 37 P.D. (2) 197. Only years later the Court clearly declared its jurisdiction to hear and decide these petitions, regardless of governmental concession. H.C. 393/82, Gamayat v. The Military Commander (1983), 37 P.D. (4) 785, at 809 (translated in PUBLIC LAW IN ISRAEL, *supra* note 8, at 396). *See also* Robert A. Burt, *Inventing Judicial Review: Israel and America*, 10 CARDOZO L. REV. 2013, 2032 (1988).

57. *See* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. YRBK. HUM. RTS. 262, 273 (1971).

58. Both the *Bergman* and *Agudat Derekh Eretz* petitions were submitted just a few weeks before Election Day, forcing prompt court sessions and decisions. *See* Claude Klein, *Judicial Review of Statute*, 4 ISR. L. REV. 569 (1969).

First, even if time limitations enforced prompt and pointed decisions in both the *Bergman* and the *Agudat Derekh Eretz* cases, they were not relevant in the *Rubinstein* case because it was submitted and decided long after the elections took place; thus, thoroughly delving into the questions of justiciability and jurisdiction was indeed possible. Second, it is highly unlikely that the issue of how to allocate financial aid between parties' electoral campaigns, once it was agreed that it would come from the public purse, was controversial. The issues decided in these three cases do not go to the essence of human rights; they are not the conventional "hot potatoes" like abortion, freedom of expression, or gay rights thrown to the Courts by reluctant and indecisive politicians. They touch on more formal, technical, and structural aspects concerning the structure of government, and only indirectly on the essence of equal opportunity to be elected.[59] Third and most importantly, these were not cases in which a political majority could not have been obtained. Quite the contrary, a special majority reenacted the disputed laws in all three of the cases.

It may have been a mistake for the state representatives to limit the issues to be decided in these petitions by narrowing the scope of their legal arguments. They might have inadequately represented the interests of their clients.[60] However, the legislative body could have mended the situation by taking measures to ameliorate the Courts' decisions. More specifically, it could have taken action to negate the Court's declaration that the law was of no force and to restate parliamentary supremacy.[61] As shall be illustrated presently, that is not quite what the Knesset has chosen to do.

B. In-House Reluctance: The Parliament Response

Recall that after declaring for the very first time that a law was of no effect in *Bergman*, the Court suggested two alternative ways to amend the

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59. *See* Ariel L. Bendor, *Are There Any Limits To Justiciability?*, 7 IND. INT'L & COMP. L. REV. 311, 340 (1997). Bendor states:

> It is noteworthy that in Israel, where it is still contended that judicial review of interference with human rights is unacceptable because it causes the courts to slip into the determination of value-laden political questions, the judicial adjudication of questions related to the structure of government and to the relationships between its various branches arouses less opposition because of the more technical/legal appearance of those issues.

Id.

60. It has been suggested that if the American Solicitor General undermines a sound argument, the government may think she is misusing her office, and that such sound arguments may very well include issues of justiciability or standing. *See* David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165, 167-68 (1998).

61. It is worth emphasizing again that at the time it was not obvious that the Israeli Court had the competence to declare that a law was of no effect. The recent statement by the Knesset Speaker that even now, the Israeli High Court lacks the authority to annul legislation and that the Knesset is sovereign, plainly attests to that point. *See supra* Part I.

defective law, one procedural and one substantive.[62] Yet, the Knesset, in response, "did not choose between the alternatives but adopted them both."[63] Not only did following the Court's suggestion outright change the law, but it was also re-enacted by a special majority.[64] Simultaneously, the Knesset passed an additional law, again by a special majority, retrospectively confirming the validity of all legislation concerning election procedures that had been previously enacted.[65]

After the Court spoke for a second time in the *Agudat Derekh Eretz* decision, the legislature responded in a similar fashion, only slightly modifying the inequality provision before swiftly re-enacting the law with the required majority.[66] Following the decision in the *Rubinstein* case, those parties that exceeded the permitted spending ceiling returned the surplus amounts to the Treasury, and the law was re-enacted by a majority of Knesset members.[67] However, after the elections for the Twelfth Knesset, it was once again retroactively amended to increase the permitted spending limits, and, by a series of acts, the Knesset confirmed the validity of this change by a special majority.[68]

Thus, in each of the cases, the legislature reacted by re-enacting the statutes and by implementing the Court's advice. The legislature did not reverse the judicial decision; it also did not avoid future decisions of the kind by restructuring the Basic Laws, reshaping the entrenched provision, or challenging the Court's authority to strike down laws in the first place. Yet, the Knesset, in its retroactive ratification following the *Bergman* case, did signal its protest and its desire to avoid Court challenges to its legislation in the future. By so doing, I suggest, the Knesset flagged its reluctance to participate in nascent dialogues. It also indicated that it was not totally persuaded that it had erred in other legislation.

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62. *See supra* notes 47-48 and the accompanying text. There could have been no mistake that one of these two alternatives was sufficient. Indeed, the Knesset was well aware of that. *See also* The Knesset Protocols, Jul. 14, 1969. Knesset Member Avraham Vardiger mentions, "(t)he Supreme Court showed us in its decision two ways of which we should choose." *Id.* at 2 (in Hebrew).

63. Hans Klinghoffer, *Legislative Reaction to Judicial Decisions in Public Law*, 18 ISR. L. REV. 30, 31 (1983).

64. *See* Burt, *supra* note 56, at 2045; Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 TEMP. L.Q. 405, 413-14 (1983). The significance of this mode of action will be discussed further in Section V.

65. Election (Ratification of Validity of Laws) Law, 1969, 568 S.H. 269. *See also* Klinghoffer, *supra* note 63. The meaning of this action will also be discussed in Section V.

66. *See* Klinghoffer *supra* note 65, at 34. The new legislation was enacted by the required absolute majority (during three readings) in a single day. *See* Editor's Synopsis, H.C. 246, 260/81, Agudat Derekh Eretz et al. v. Broadcasting Authority et al. (1981), 35 P.D. (4) 1, at 22.

67. *See* AMNON RUBINSTEIN, ISRAELI CONSTITUTIONAL LAW 377 (4th ed. 1991) (in Hebrew).

68. *See id.*

IV. WHAT CONSTITUTES A CONSTITUTIONAL DIALOGUE?

A constitutional dialogue starts with a governmental action being taken, for example, by the legislature. An individual balks, asserting a violation of a structural guarantee. The Court issues its decision. The public notices the decision, and articles are written commenting on the Court's decision. More lawsuits are brought before the courts. Legislatures act.[69]

Constitutional dialogues can take many forms. They can be limited or broad in scope with respect to both time and participants. A dialogue can start with a legislative committee debating a possible challenge to a suggested law, or it can start with the judicial decision striking down that law. It can end with the implementation of the Court's decision, or it may end with a newly enacted law articulated by the competent legislative body.[70] The participants can include some or all of the following: courts, legislatures, Attorneys General or Solicitors General, opinion-makers, individuals, interest groups, and the general public.

The Court's contributions to the dialogue are relatively easy to identify; they are found in the Court's decision to strike down a law. This is the case even if the implications of the decision on future cases are hard to determine, if the reasoning is contestable or vague, if it was decided unanimously or even if it was decided in dissent. Regardless of the context, the Court's input into the dialogue is quite clear: it is found in the decision itself. However, the contributions of the other participants, especially those of the political branches, are a little more elusive and difficult to recognize. Do these contributions include the first legislative initiative that triggered the constitutional challenge (*i.e.* the challenged law) and the debates that may or may not have revolved around that law at different legislative stages?[71] Furthermore, do they include the state Attorney General's position and litigation strategies in such cases?[72] Finally, which kind of legislative acts

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69. This description is Barry Friedman's. *See supra* note 25, at 655-56. Friedman's format deals with laws concerning constitutional rights. Our former discussion deals more with the Israeli laws governing the constitutional structure. Nevertheless, that format can be easily applied to our case studies.

70. *See* Hogg & Bushell, *supra* note 17, at 81.

71. Shapiro and Stone, for example, describe the constitutional dialogue as circular. When Courts declare laws to be unconstitutional, legislatures may be more inclined to take constitutional arguments seriously while pondering future legislation. The executive participates as well, by considering a Court's potential interference prior to the subjected action. *See* Shapiro & Stone, *supra* note 2, at 416-18; *see also* Jai, *supra* note 25, at 12.

72. Jai, *supra* note 25, at 17, gives an example from the Canadian context. Indeed, many litigation strategies are decided solely by the Attorney General. Yet, in a few cases, the constitutional dialogue starts when the Attorney General takes a case to the Cabinet, to discuss the appropriate approach to be taken by her at Court. One litigation issue taken to the Ontario Cabinet between 1990 and 1994 was whether to concede a Section 15 (equality) violation where

are to be counted as constituting or participating in a dialogue—those that reverse a Court's decision, those that leave it intact, those that repeal the violated provision by articulating new legislation, or those that merely acquiesce in the Court's legal "prescription"? [73]

This last quandary is not merely semantic. The legislature's response to a Court's striking down a law can take many different forms. Yet the different modes of action suggest different degrees of commitment and participation in the constitutional dialogue. Indeed, the general usage of the concept of dialogue obscures important differences between types of legislative responses that should be analyzed.[74] These different kinds of responses vary in their meaning and essence. The ensuing discussion delineates a distinction between two different sorts of possible constitutional dialogues: substantive and formal.

A. The Substantive Dialogue

Webster's Dictionary defines "dialogue" as "an open and frank interchange, exchange and discussion of ideas and opinions in the seeking of mutual harmony."[75] Based on this definition, it is my position that a substantive constitutional dialogue should be defined as one in which the parties participating are themselves committed to and engaged in a search for a harmonious solution that will contain both the Court's interpretation of a constitutional question and the legislature's interest. A substantive dialogue is realized only when the *input* of both the dialogists leads to the final state of the law. When a substantive dialogue develops, the Court's decision articulates the flaws of particular legislation which results in its being struck down, whereas the legislature on its own initiative includes in its response solutions for achieving its goal in light of the Court's decision. It may very well be that the Court's decision and the legislature's action will coalesce. For example, sometimes the legislature overreached or undermined democracy or the very rules it formerly set for itself. The Court then declares such encroachments as unconstitutional. The legislature restricts its action to conform to the Court's declaration. After all, legislatures can be

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definitions of 'spouse' in legislation excluded same-sex couples, and to argue only that the exclusion was in accordance with section 1 of the Charter. On the same point see Ian G. Scott, *Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s*, 39 U.T.L.J. 109, 125 (1989).

73. Counting the number of cases in which a constitutional dialogue has developed between the Canadian legislature and the Court, Hogg & Bushell were puzzled as to whether to include in their count the cases in which the legislature acquiesces in the Court's decisions. *See supra* note 17, at 98 and *infra* note 95 and accompanying text.

74. See Morton's critique on the "lax operationalization" of Hogg & Busshell's concept of dialogue. *Supra* note 24, at 23.

75. WEBSTER'S NEW WORLD DICTIONARY (on Power CD, Version 2.5, Zane Publishing Inc., 1994-1996).

persuaded that they have wronged. Yet, if a substantive dialogue has taken place, such a response is the fruit of the legislature's deliberations on the Court's declaration and of its acknowledgment that it has exceeded its powers. In substantive dialoguing, the correspondence of the Court's declaration and the legislature's response is achieved after these two committed public agencies have deliberated the matter in question, each in its own turn, and reached the preferred alternative.

B. The Formal Dialogue

Dialogue is also defined simply as a conversation between two or more participants.[76] This somewhat narrow definition is quite different from the afore-mentioned one. A conversation between two parties can take the form of one participant formulating a solution and the other utterly agreeing. It can also take the form of one party enforcing its own interpretation over the other participant's. Finally, it can also take the form of one party expressing its opinion, and the other participant refusing to listen altogether.

A formal dialogue, I propose, takes place when the legislative action adds nothing to the final articulation of the constitutional solution; it does not add any content to the court's decision, except for "rubber-stamping" it with the relevant legislative process.[77] A formal dialogue occurs when the final formal act is that of the legislature, but the final words are those of the Court. This type of response is characterized by the reluctance of the one or more participants to acknowledge their overreaching or to thoroughly ponder the others' objections in considering alternatives.

A formal dialogue also occurs when a legislature uses its power to hamper future dialogues or limit current ones. Presumably, this type of dialogue is not available in every legal system. Yet it is possible in countries without a constitution, where the principle of parliamentary supremacy reigns, or in those systems where a Court's decision could be overcome by a legislature's explicit reaction, like a legislative override, found in both the Canadian and Israeli constitutional systems.[78]

The determination of whether a dialogue is formal or substantive results from an empirical and contextual examination of every case in question. The differentiation between the two kinds is more a matter of degree than of dichotomous qualifications. A few indications can help determine which of the two possible dialogues came into being in a specific context, although

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76. Search term 'dialogue' at MERRIAM WEBSTER on-line dictionary, *available at http://www.m-w.com/dictionary.htm.*

77. Indeed, WEBSTER'S DICTIONARY defines "formal" as: "of external form or structure, rather than nature or content...." *Supra* note 75. The legislature's "rubber stamping" can be manifested by repealing the annulled law from the books or by fully implementing the changes the reviewing court has suggested. *See infra* note 95.

78. *See infra* Section V(B).

they are by no means decisive. For instance, the length of time that the legislature has taken to reach its response is one such indication: if a thorough debate followed the Court's decision, it is likely that considerable time will elapse before the legislature will provide its solution. Balancing the Court's decision and the legislature's will and reaching an appropriate formula can be a difficult task and involves the interaction of many participants.[79] Hence, a relatively prompt legislative response may suggest a more cursory debate.[80] Furthermore, the *mise-en-scene* surrounding the legislative response is an additional factor to consider: was the response contained in a single piece of legislation or was it a combination of legislative or administrative measures? If so, what were these measures, and why were they taken? Last, the content of the final legislative response should be weighed: if it is identical to the Court's declaration, it should draw our attention. While it is plausible that the legislature will reach the same conclusion as the Court, such an outcome may also indicate a reluctant and uninvolved decision-making process.

The Canadian governmental response to the Court's decision in the famous *Morgentaler v. Borowski*[81] case illustrates how the analysis can be exercised in determining which of the two dialogues applies. In *Morgentaler*, the Canadian Supreme Court struck down those sections of the Criminal Code dealing with abortion. The parliament did not enact a modified abortion provision. The Court's words were final, in that no legislation followed the Court's declaration. Seemingly, such a response implies the occurrence of a formal dialogue. Yet, a closer look into the parliament's workings after the *Morgentaler* decision suggests that a substantive dialogue had taken place.

Many commentators acknowledged that the *Morgentaler* decision left Parliament with a relatively free hand to craft a new abortion law.[82] Naturally, the Mulroney government introduced a compromise measure.[83] The bill incited lengthy and forceful debates in the House of Commons, the

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79. The participants may include: interest groups, the Attorney General's office, and Parliament members.

80. The overall time span in which one examines the dialogue between these institutions could be divided into short-term and long-term interactions. A court's decision to strike down a law can, in the short run, result in the legislature's acquiescence in the Court's definitive answer and yet, in the long run, will result in the legislatures' retaliation, calling to limit the Court's power or to politically control Supreme Court Judges' nominations. *See* ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE 27-43 (1994). For the purpose of this paper, only the short-run interactions and reactions will be examined.

81. R. v. Morgentaler, [1988] 1 S.C.R. 30; 44 DLR (4th) 385.

82. *See* F.L. MORTON, MORGENTALER V. BOROWSKI: ABORTION, THE CHARTER, AND THE COURTS 290 (1992).

83. The Bill C-43 proposal was introduced to the House of Commons on November 3, 1989. *See id.*

cabinet, the Senate, and the media, as well as among various interest groups and academia.[84] Eventually, the bill was defeated, and no further attempts to revive the legislation were made. Since Parliament did not respond to the Supreme Court's decision with new legislation, Canada was left with no abortion law, although the Canadian legislature, polarized over the issue, debated at length the alternative legislation the government did initiate. The public dedicated time and energy to discuss and express their opinions on abortions, women's rights, and fetuses' rights. The constitutional dialogue, engendered by the Court's decision, encouraged various participants to engage themselves in the discourse. The final outcome, notwithstanding *Morgentaler*, resulted in substantial dialogue. While this case represents one sort of substantive dialogue, the next section poses some Israeli and Canadian examples of formal dialogues.

V. FORMAL DIALOGUES IN ACTION

A. The Israeli Example

The aforementioned Israeli case studies exemplify the workings of a formal dialogue, both in the courtroom and in the parliament. This dialogue is most clearly manifested in the events surrounding the *Bergman* case. [85]

In this matter, the Knesset's discussions before the enactment of the impugned law revolved around the system of public financing of election campaigns, examining both its advantages and drawbacks.[86] Neither the constitutionality of the new law nor the possibility of a judicial review were discussed by the legislature.[87]

Furthermore, the litigation strategy of the Attorney General, which included avoiding points that could have prevented the Court's decision to strike down the law,[88] impeded the constitutional dialogue and substantially narrowed it.[89] For example, had the Attorney General disputed the

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84. A "free vote" over the proposal took place in the House of Commons six months afterwards, on May 22, 1990. *See id.* at 292; *see also* Allan C. Hutchinson, *Challenging the Abortion Law*, THE [TORONTO] GLOBE AND MAIL, Nov. 13, 1989, at A7; Sheilah L. Martin, *The New Abortion Legislation*, 1:2 CONST.L.F. 5 (1990).

85. H.C. 98/69, Bergman v. Minister of Finance and Others (1969), 23 P.D (1) 693.

86. *See* Peter Elman, *Judicial Review of Statute*, 4 ISR. L. REV. 559, 565 (1969).

87. This is clear from transcripts of the Knesset debates before the enactment of the relevant law and from the fact that the decision in *Bergman* produced general surprise. *See* Klein, *supra* note 58, at 569. See also Justice Zamir's words, (C.A. 6821/93, Mizrahi Bank et al. v. Migdal Kfar Shitufi et al. (1995), 49 P.D. 4 221, at 468-69), claiming the *Bergman* case was "a legally big surprise." Furthermore, A. Vardinger, Member of the Knesset, talking about the Court's decision in *Bergman*, mentioned the decision brought embarrassment on the House of Parliament. *See* The Knesset Protocols, July 14, 1969, at 2 (in Hebrew).

88. *See supra* Section III(A).

89. Although the Court can raise these issues by itself, "there is nothing in the common

justiciability of the petition or the petitioner's standing, the judicial decision would have been enriched.[90] The Court's decision on these issues could have engendered a principled public debate on the scope of the Court's authority.[91] After all, justiciability and standing are substantive issues, cutting to the heart of the proper role of the Court vis-à-vis the other branches of government.[92] The decision to bypass these issues suggests that the governmental agencies were reluctant to enter a comprehensive dialogue on the scope of judicial review that underlies the Israeli Court.[93]

More importantly, the legislature's response to the Israeli Supreme Court's decision also indicates that this dialogue was formal in nature. Recall that the Knesset responded to the *Bergman* decision in two ways. It first remedied the equality infringement, amending the law by fully adopting the Court's suggestions. In addition, the law was reenacted with a special majority. Together, these actions demonstrate the legislature's lack of interest in participating in a meaningful dialogue.

The legislature should have chosen one out of the two possible alternatives. Either one of the alternatives was legally sufficient.[94] However, by using both of them at the same time, two contradictory positions were implemented. Had the legislature wished to accomplish its original goal of financing only the incumbent parties, it simply could have reenacted the law with the special majority. Once the procedural steps were taken, the law's validity would have been regained. On the other hand, had the legislature wished to remove the inequality, the law could have been amended with a regular majority. Amending the law and at the same time reenacting it with the required majority implies that the legislature was

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law approach that *compels* a court to consider justiciability of an issue and the doubts concerning its own jurisdiction when neither party has raised these points." Benjamin Akzin, *Judicial Review of Statute*, 4 ISR. L. REV. 576, 577 (1969).

90. In an earlier case in 1955, the Court was asked to issue an order of mandamus against the Israeli President, directing him as to the method of carrying out his duties. *See* H.C. 65/51, Jabotinsky v. Weizmann (1951), 5 P.D. 801 *in* SELECTED JUDGMENTS, *supra* note 33, Vol. I. at 75. The then Attorney General claimed that the Court had no jurisdiction to hear the petition. The unanimous decision of the five Justices upheld the Attorney General's arguments finding the case non-justiciable (the issue at stake was not whether the Court has jurisdiction, but rather whether the case was justiciable). The Court's rather lengthy decision revolved entirely around the justiciability of the case. Thus, when the Israeli Court was firmly challenged with the justiciability issue, it addressed the question thoroughly. *See id.*

91. On the Court's decision being the beginning point of a societal dialogue see Friedman, *supra* note 25, at 660-68; Friedman & Smith, *supra* note 27, at 89.

92. On this specific point see Bendor, *supra* note 59, at 319.

93. This view is supported by the fact that this strategy prevailed in subsequent cases, even after the government realized that defense policy could result in the decision to strike down laws. While the Attorney General's position in *Bergman* could be explained by the fact that he positively expected the Court to deny the petition, thereafter such an expectation could not hold; the Attorney General's position remains puzzling.

94. *See supra* note 62.

unsure whether it was ready to infringe the equality right to achieve its goal or wished to refrain from violating the equality right altogether. The linking of these somewhat contradictory actions suggests that the Israeli legislature did not thoroughly and deliberately partake in a substantive dialogue. Its response to the Israeli Supreme Court's decision constituted a formal mode of dialogue in which its own genuine voice was not clearly heard. [95]

However, the government's response contained an additional component. The amended legislation was introduced simultaneously with another short piece of legislation: the Election (Ratification of Validity of Laws) Law,[96] which provided as follows: "(f)or the purpose of removing doubt it is hereby laid down that the provisions contained in the Knesset Election Laws are from the date of their coming into effect valid for every legal proceeding and for every matter and purpose."[97] This law was also enacted within two days, and by a special majority, less than two weeks after the *Bergman* decision was delivered.[98]

This last action has been interpreted as a political-legislative reaction against the Court's intervention[99] as well as a proactive removal and prevention of any future possibility of judicial review of Knesset legislation.[100] While it is a legislative action towards a dialogue that follows a judicial decision to strike down a law,[101] such an action nevertheless entails a very confined dialogue and hampers the very possibility of future dialogues on the same matters. Taken together, the legislature's threefold response, amending the law, reenacting it with the required majority, and enacting the

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95. It should be mentioned that Hogg & Bushell deliberated whether the cases in which the remedial legislation merely implemented the changes the reviewing Court has suggested should be counted as well as examples of dialogues. *See supra* note 17, at 98.

96. *See* Election (Ratification of Validity of Laws) Law, 1969, 568 S.H. 269.

97. *Id. See also* Shapira, *supra* note 64, at 414. In the explanatory notes appended to the draft of the law it was stated that "since the decision of the Supreme Court clears the way for argument against the lawfulness of various election laws, it is proposed to confirm the validity of the laws related to electoral matters and to do this by the majority required." *Id.*

98. The first reading took place on July 14, 1969 and the second and third readings, on July 15, 1969. *See* The Knesset Protocols, July 14-15, 1969 (in Hebrew).

99. *See* Elman, *supra* note 86, at 569.

100. In the Knessets Protocols, the government's representative mentioned:

> This *Ratification Law* is needed not because we believe there is something else [other laws that might infringe the principles provided in section 4 – g.d.], but because we know what the Supreme Court is. Once a petition was successful, we can expect a flood of unsuccessful petitions that will disturb the Elections.

The Knesset Protocols, July 14-15, 1969, at 2 (quoting Knesset Member Yohanan Bader)(in Hebrew, translated by the author).

One Knesset Member, Shmuel Tamir, reacted by stating: "This is a law against the Supreme Court, against the Court's supremacy and out of the fear from the rule of law." The Knesset Protocols, July 14, 1969, at 2 (In Hebrew). *See also* Klinghoffer, *supra* note 63, at 32 and Editor's synopsis to the *Bergman* case, *in* SELECTED JUDGMENTS, *supra* note 33, at 14.

101. For Hogg & Bushell's definition of a dialogue, see *supra* note 17, at 82.

Ratification Law, clearly reveals its reluctance and limited commitment to partaking in a meaningful dialogue.

The circumstances surrounding both the *Agudat Derekh Eretz*[102] and the *Rubinstein*[103] cases are very similar. In both cases, state representatives persisted in bypassing the justiciability question.[104] In both cases, the Court struck down the laws that were found to infringe the election equality prescribed in section 4 of the Basic Law: The Knesset. In both cases, the legislature reenacted the laws with the required majority, in haste, and without delving into the substantive constitutional issues raised by the Israeli Supreme Court's decision.

In all these cases, the potential for a substantive dialogue, in which the legislature engages itself in finding an appropriate resolution that balances both the Court's declaration on rights and its own policy-making interests, never materialized.

B. The Canadian Example

Some scholars suggest that the Canadian constitutional model, entrenched in The Charter, is better adapted to deal with counter-majoritarianism because it contains a few features that facilitate the possibility of legislative action to overcome a judicial decision striking down a law.[105] Most prominently, section 33 has been perceived to accommodate and reconcile the competing ideals of entrenched rights and parliamentary supremacy.[106]

Indeed, section 33 (the "Notwithstanding Clause") has the potential for inducing a substantive dialogue. A legislative response to override a Court's decision would evoke a more focused and informed public political debate, thus leading to the better articulation of majority will and values.[107] The

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102. H.C. 246, 260/81, Agudat Derekh Eretz et al. v. Broadcasting Authority et al. (1981), 35 P.D. (4) 1.

103. H.C. 141/82, Rubinstein et al. v. Chairman of the Knesset et al. (1982), 37 P.D. (3) 141.

104. In a much later case, where the Israeli Supreme Court upheld the constitutionality of a law that was challenged to infringe the property right prescribed in Basic Law: Human Dignity and Liberty, the then Attorney General, Michael Ben-Yair, again did not dispute the justiciability issue. *See* C.A. 6821/93 Mizrahi Bank et al. v. Migdal Kfar Shitufi et al. (1995), 49 P.D. 4 221, at 468-69.

105. These features are contained in sections 1, 7-9, 12, 15(1), and 33. *See* Hogg & Bushell, *supra* note 17, at 82; Weinrib, *supra* note 16, at 85.

106. *See* Tushnet, *supra* note 18, at 279 as well as at pages 282-83: "On this account, section 33 allows judicial review to coexist with majoritarian decision-making in a way that contributes to enhancing the public's understanding of democratic values and constitutional norms." *See also* Roger Tasse, *Application of the Canadian Charter of Rights and Freedoms, in* THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: A COMMENTARY 65, 103 (Gerald A. Beaudoin & Ed Ratushny eds. 1989).

107. *See* Peter H. Russell, *Standing Up For Notwithstanding*, 29 ALTA. L. REV. 293

Notwithstanding Clause could theoretically play a positive role in the Canadian constitutional system by promoting "a complex partnership through institutional dialogue between supercourts and superlegislatures."[108] It might also foster a substantive dialogue, as it "actually invigorate(s) majoritarian politics by providing the people and their representatives with a way *of engaging in direct discussion of constitutional values* in the ordinary course of legislation."[109] However, hitherto the practice of section 33 has drawn it closer to the formal type of constitutional dialogue, the forces drawing it in that direction being both those of the legislature and the Canadian Supreme Court.

The Quebec provincial legislature, the first to make use of the Notwithstanding Clause,[110] used it in a very formal manner. Furious over the enactment of the Charter by the other provinces, Quebec reacted by a blanket override: all existing Quebec legislation was repealed and re-enacted with a standard override clause.[111] This protest-oriented government was surely not interested in engaging itself in any future dialogues with the Canadian Supreme Court. Similar to the Israeli Ratification Law after the *Bergman* decision, the Canadian legislature sought to shield its legislation from judicial review and eradicate future interaction and intercommunication between the judicial and legislative institutions.

After the Canadian Supreme Court's decision in *Ford v. Quebec (A.G.)*,[112] in which Quebec's Bill 101 (requiring that all public signs and commercial advertising in the province be only in French) was struck down, Quebec invoked section 33 once again. This time section 33 was used to protect a revised version of the law, in which exterior signs in the province had to be only in French, while interior signs could be bilingual. Some legal scholars argue that Premier Bourassa believed the revised law was a constitutionally acceptable compromise.[113] If this was indeed the case, why was the usage of the Notwithstanding Clause necessary? Revising the law

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(1991); Tushnet, *supra* note 18, at 280; Paul Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REF. 51, 81-82 (1984).

108. Lorraine Eisenstat Weinrib, *Learning to Live With the Override*, 35 MCGILL L.J. 541, 564-65 (1990). This complex partnership is very close to my notion of the substantive dialogue.

109. Tushnet, *supra* note 18, at 284 (emphasis added).

110. The Quebec provincial legislature was also the only one to use it so far, except for the Saskatchewan government in a back-to-work law. In that latter case, section 33 was used after the Saskatchewan Court of Appeal had declared a back-to-work law to violate section 2(d) of the Charter. However, the Supreme Court of Canada overturned the Saskatchewan Court's decision and upheld the original law, thus negating the effect of using the section. *See* Tushnet, *supra* note 18, at 287.

111. *See* Weinrib, *supra* note 108, at 544-45.

112. [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577.

113. *See* Tushnet, *supra* note 18, at 289. Tushnet based this assumption on Stephane Dion's proposition. *See* Stephane Dion, *Explaining Quebec Nationalism*, *in* THE COLLAPSE OF CANADA? 93-94 (Kent R. Weaver ed. 1992).

while simultaneously invoking the Notwithstanding Clause signals the Quebec government's disinterest in dialoguing. The parallel to the Israeli situation is once again striking.

The aftermath of these affairs was the development of a political climate of resistance and antagonism toward the use of section 33.[114] In light of Quebec's rather prodigal use of section 33, the rest of Canada apparently considers the use of section 33 inconceivable.[115] As a consequence, an important component of the Canadian constitution has been eviscerated. The Federal and Provincial legislatures of Canada have chosen to seal off one possible avenue of legitimate, legal legislative response.

The Canadian Supreme Court has also contributed to turning section 33 into a formal mode of dialoguing. In the *Ford* case,[116] the Court found that an omnibus act containing override clauses could be added to pre-existing legislation, and that there is no need for the legislature to specify which of the Charter provisions it is exempting its legislation from.[117] The Court's interpretation of the purpose of the clause has entailed an unfocused and formal employment of the legislative decision-making power.[118] Hence, Quebec, the federal government, the provincial legislatures, and the Supreme Court — all impaired the potential for substantive dialoguing found in section 33.

VI. SUBSTANTIVE DIALOGUING

Nonetheless, the overall Canadian experience affords us with ample examples for understanding how substantive dialogues work. The above-mentioned *Morgentaler* example is such a one.[119] Moreover, in their study, Hogg & Bushell found that in a significant majority of cases the legislature responded to the Court's decision by changing the law in a *substantive* way.[120] This majority is made up of those cases in which the Court's decision led the political institutions to re-debate the proposed law

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114. *See* Hogg & Bushell, *supra* note 17, at 83.

115. The reluctance of the other Canadian provinces to invoke section 33 was demonstrated during the aftermath of the Supreme Court's decision in the *Vriend* case. Vriend et al. v. Alberta et al., [1998] 156 D.L.R. (4th) 385. For details see Hogg & Thornton, *supra* note 28, at 20-21.

116. *Supra* note 112.

117. Geoffrey Marshall, *Taking Rights for An Override: Free Speech and Commercial Expression*, PUB. L. 4, 6 (1989). The Court in fact suggested that requiring specificity from the legislature would be unreasonable. *See* Tushnet, *supra* note 18, at 288.

118. Tushnet, *supra* note 18, at 289. "The Court's key analytic tool is its characterization of the override as 'formal.'" Weinrib, *supra* note 108, at 555.

119. *Supra* notes 81-84, and accompanying texts.

120. Indeed, Hogg and Bushell themselves used the word 'substantive' to describe this majority. *See supra* note 17, at 98. The majority of cases are reached after excluding the cases in which legislature simply repealed the provision that was found to violate the Charter, or in which the remedial legislation merely implemented the changes the Court has suggested.

and come up with a new initiative in the shape of a modified law - one which honored both the Court's words (the interpreted rights) and the legislature's will.

Canada is not alone in its substantive dialoguing experience. Other legal systems, not possessing the Canadian *Charter* features, have developed their own dialogues' modes and patterns. In the constitutional history of the United States, the striking down of a law by the Court has occasionally spawned proposals for constitutional amendments.[121] At times, it has also brought about deliberation on alternative proposals for new statutes that will restate the legislature's will in a different way.[122] Courts' decisions to strike down laws have also evoked responses that result in the curtailment of their importance or consequences,[123] or they have resulted in futile attempts to override Court's decisions.[124] Whether these responses were formal or substantive is a matter of empirical analysis, yet at least in some of these cases continuous and profound dialogues developed.[125]

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121. After the famous decision of *Roe v. Wade*, 410 U.S. 113 (1973), numerous attempts were made to overturn the decision by constitutional amendment. *See* Albert M. Pearson & Paul M. Kurtz, *The Abortion Controversy: A Study in Law and Politics*, 8 HARV. J. L. & PUB. POL'Y 427, 446-55 (1985).

122. Tushnet gives the example of the anti-flag-burning episode of 1989. *See* Tushnet, *supra* note 18, at 293.

123. Friedman, *supra* note 25, at 663; Pearson & Kurtz, *supra* note 121, at 460-63. Sometimes it is the Court itself that invites the Congress to reverse or override its decisions; Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT. REV. LAW & ECON. 503 (1996). *See also* William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, YALE L. J. 331 (1991).

124. *See, e.g.*, City of Boerne v. Flores, 117 U.S. 2157 (1999). In this case, the Court struck down the Religious Freedom Restoration Act (42 U.S.C. 2000bb to 2000bb-4) (1994), also known as the RFRA. The RFRA was passed in reaction to the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), by using Congress' enforcement authority under section 5 of the fourteenth amendment. The Smith decision distinguished the Court's previous decisions relating to federal laws burdening religious practice. The Congress' RFRA was aimed at reapplying the Court's former balancing text. For a discussion concerning the meaning of the *City of Boerne v. Flores* decision, as well as notes on judicial versus legislative supremacy, see the Symposium: *Reflections on City of Boerne v. Flores*, WM. & MARY L. REV. 39:3 597-1003 (1998).

125. See, for example, Friedman's analysis of the abortion issue and the consequences of the *Roe v. Wade* decision, which concludes with the following:

> Throughout the [abortion] debate, the Court has been a vital, but by no means dispositive, participant. What seems apparent, however, is that the story of abortion rights debate does not support the premises of the counter-majoritarian difficulty. Rather, that story demonstrates a vibrant public dialogue over the issue. Courts have had an important voice in this dialogue, particularly in facilitating it, but theirs is not the final or only voice.

Friedman, *supra* note 25, at 667-68.

VII. THE RESPONSIBILITY TO ENGAGE IN DIALOGUE

The responsibility to enter a substantive dialogue should be equally shared by the Court and society at large, its representatives, and its decision-makers.[126] For it takes two to tango, it takes at least two to dance to the tune of a valuable dialogue for the benefit of all. If one of the participants refuses to take an active part in the evolving exchange, it will inevitably result in the development of a very restricted dialogue, which is less capable of adequately counteracting counter-majoritarianism. It is within the terrain of a substantive dialogue that the majority's will is reshaped and re-expressed in light of a Court's decision. It is when substantive dialogue takes place that the role of the Court as a facilitator and catalyst of the dialogue comes to life.[127] It is therewith that the Court performs its role not at the expense of, but along with, the elected and representative bodies. However, when the legislature and society are not catalyzed and their participation is not facilitated, the dialogue sought dies and with it the prospect of counteracting the difficulty. If "courts can hamper or chill dialogue,"[128] so can legislatures. The lack of a dialogue can be the outgrowth of either legislatures' or Courts' constraints.

Take the Israeli example; the absence of constitutional dialogue until the late 1970s has been attributed mainly to the Court's self-restraint.[129] However, as the preceding discussion suggests, this absence could be explained just as easily as the result of a legislature that avoided materially partaking in a nascent dialogue. Even now the willingness of the Knesset to deliberate constitutional issues in the context of such a dialogue is questionable, as the following account indicates.[130]

As mentioned, in 1992, a change in the constitutional regime took place in Israel, with the introduction of the two new Basic Laws: Basic Law:

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126. At the very end of his discussion, Friedman once again states the problem with the counter-majoritarian difficulty: "it overstates the role of Courts and thus understates society's responsibility." He suggests that it does not "accurately account for the critical role of the rest of society, the people." *See id.* at 682. *See also* Russell, *supra* note 107, at 299: "A legislative override... can subject these questions [of political and social justice raised by the *Charter*] to a process of wide public discussion so that *the politically active citizenry participate in and share responsibility for the* outcome."

127. On the role of courts in the constitutional dialogue see Friedman, *supra* note 25, at 668-71.

128. *Id.* at 671.

129. *See* MARTIN EDELMAN, COURTS, POLITICS AND CULTURE IN ISRAEL 31 (1994); Burt, *supra* note 56, at 2015; Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COM. L. 585, 590 (1996).

130. Gavison, *supra* note 7, at 86. Gavison argues that the political bodies usually conceive constitutional issues to be secondary in importance to the substantive, important security issues. She further claims that the Knesset constitutional discussions frequently reveal extreme apathy, indifference, and ignorance. *See id.*

Human Dignity and Liberty and Basic Law: Freedom of Occupation.[131] The rights conferred by these two Basic Laws were circumscribed in a way that imitated the Canadian Charter's structure.[132]

About a year and a half after its enactment, the Basic Law: Freedom of Occupation was at the center of a petition submitted to the High Court.[133] Accepting the petition, the Court declared that the government's refusal to grant an importation license to a private company which dealt, *inter alia*, with the importation of non-Kosher meat was grounded on illegitimate considerations, and thus infringed the guaranteed right of freedom of occupation. As a remedy, the Court ordered the Ministry of Trade to grant the requested license to the petitioners.[134] Note that the Court reversed a discretionary administrative decision rather than a legislative act; no law was struck down. However, in an obiter dictum, one of the Justices mentioned that should the Knesset enact a law which would condition the granting of licenses to those companies which would import only Kosher meat, such a law would *probably* be found to infringe the freedom of occupation to an unjustified degree.[135]

Both the decision and its obiter evoked the resentment of religious parties in Knesset. Under their pressure, the Legislature repealed the Basic Law: Freedom of Occupation and replaced it with a new law, enacted in March 1994.[136] The new version amended a few original clauses and added a whole new Notwithstanding clause.[137] The enactment of legislation

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131. *See supra* note 10 and accompanying text. On the constitutional change resulting from the introduction of these Basic Laws see Aaron Barak, *A Constitutional Revolution: Israel's Basic Laws*, 4:3 CONSTITUTIONAL FORUM 83 (1993).

132. *See* Weinrib, *supra* note 16, at 85.

133. H.C. 3872/93, Mitral v. Prime Minister et al. (1993) 47 P.D. 5 485.

134. Although the details of this petition are beyond the scope of this paper, a few notes are in order. In 1992 the Israeli Government decided on a new policy which would privatize the importation of meat to the Israeli market. The Government appointed a committee to recommend the necessary steps for the implementation of that policy, yet these recommendations were not executed. In 1993 the Government decided to change its policy once more. Instead of privatization, it sought regulation of the meat market by enacting laws concerning its importation. In the time between these two policy changes, the petitioner's application for a license was refused. The reason behind the second policy change (as well as the license refusal) was the pressure exercised by the religious coalition partners, who feared the total privatization of the market would result in the abundant importation of non-Kosher meat. The private company petitioned the Court against both the policy change and the refusal of its license application. For more on this issue see Hofnung, *supra* note 129, at 596. *See also* Tzvi Kahana, Notwithstanding the Constitution: The Israeli Deviating Law and the Canadian Override, (LL.M. Thesis, Tel Aviv University, 1995) [unpublished] [in Hebrew] at 101-07.

135. These were Justice Or's words in the *Mitral* case. H.C. 3872/93, Mitral v. Prime Minister et al. (1993) 47 P.D. 5 485.

136. For an English translation of the new version see *supra* note 35.

137. Section 8 of the 1994 Basic Law: Freedom of Occupation, states as follows:

> The provisions of any law which are inconsistent exceptionally with the freedom of occupation shall remain in effect, even if it does not conform with section 4,

explicitly using the notwithstanding clause and forbidding the importing of non-Kosher meat immediately followed.[138] By so doing, the Israeli legislature once again engaged in nothing more than a formal dialogue. Just like the Quebec legislature, it signaled lack of interest in future dialogues with the Court on the matter.[139] It used the notwithstanding clause to foreclose any substantive and focused dialogue over the meat issue.

A later petition challenging the constitutionality of the Import of Frozen Meat Law was dismissed. Following the footsteps of the Canadian Supreme Court decision in *Ford* while explicitly referring to it, the Israeli Court ruled that a law which included a notwithstanding clause was immune from judicial review.[140] Once again, the legislature forsook its responsibility to commit itself to a meaningful dialogue.

Fortunately, prospects for a new era of Israeli constitutional dialogue are finally emerging. As mentioned in the introduction, the Supreme Court recently struck down a piece of legislation in the *Investment Managers* case, finding the impugned provision to impair the freedom of occupation rights of investment managers more than necessary.[141] A few months ago, the Knesset responded by amending the law and choosing a less restrictive alternative. That alternative was the product of its own reasoned

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> if it is included in a law adopted by a majority of the Knesset with the explicit comment that it is valid despite the provisions of this Basic Law; such a law shall remain in effect for four years from the date of its commencement, unless an earlier date is fixed.

On that occasion, the Basic Law: Human Dignity and Liberty was also amended. *See* Barak-Erez, *supra* note 10, at 324. After thoroughly examining the happenings that led to the enactment of the 1994 Basic Law: Freedom of Occupation, Kahana concludes:

> the political level desired a law that will forbid the importation of non-Kosher meat. The Supreme Court clarified that in light of *Basic Law: Freedom of Occupation* (1992), the enactment of such a law was not possible. The political level decided to lift the obstacle and amend the Basic Law. The professional level (*i.e.*, the Ministry of Justice) recommended that will be done by including a notwithstanding clause to the Basic Law... The political motive behind the inclusion of a notwithstanding clause was therefore the desire to bypass the *Mitral* ruling.

Kahana, *supra* note 134, at 105 (translated by the author).

138. The Import of Frozen Meat Law, 1994 (S.H. 47-1994 at 104), was enacted on the very same night the Basic Law was amended.

139. While the Quebec government shielded all its legislation and protested against the enactment of the Charter, the Israeli government shielded its Kosher-meat legislation and protested against the Court's administrative decision in Mitral and against possible future constitutional decisions.

140. H.C. 4676/94, Mitral Ltd. et al. v. The Israeli Knesset at all. 50 P.D. (5) 15 at 28.

141. *See supra* note 14. Hogg & Bushell found that the minimal impairment requirement (or the least restrictive means) is the reason behind striking down most of the laws, and that indeed, in most of these cases, alternative legislation using less restrictive means was upheld by the Court. *See supra* note 17, at 85.

deliberations, initiative, and balancing process.[142] Hopefully, this latest development will symbolize the beginning of a new type in the Israeli Court-Legislature dialogue.

VIII. DOES STRUCTURE PROMOTE CONTENT?

The Israeli and Canadian examples raise more profoundly the question of the connection between structure and substance. Does the fact that institutional frameworks are structured in a specific manner have any effect on the substance of the interaction to be developed between courts and legislatures? I extrapolate to the negative.

Substantive dialogues took place in Canada even though a significant institutional framework that was supposed to encourage them - that is, the notwithstanding clause - was almost never used.[143] Yet, one may challenge that substantive dialogues took place in Canada altogether; the same overall institutional framework that was supposed to enhance dialogue achieved quite the opposite. It was suggested that the mere power given to the Canadian legislatures to reasonably limit rights (section 1) or override them to a specific period of time (section 33), discouraged the Court's input to the dialogue.[144] Recent interpretations slant toward this direction: Canadian judges, it was found, defer to rather than challenge the Canadian parliament.[145] Thus, the Canadian model can just as well discourage meaningful dialogue.

The French Constitutional Council's experience produces a puzzling counter-proposition. Taking as a point of departure that the French Constitutional Council was impressively successful in its contribution to the dialogue,[146] Professor Shapiro suggested that its success is the result of the limited powers vested in the Council. Since its judicial review is restricted to only a one-shot abstract review of future legislation, the Council is

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142. On June 29, 1998 the Parliament reenacted the Investment Portfolio Managers' Law, by amending the transitional clauses. In the explanatory notes appended to the bill, it was stated that the amendment follows the Supreme Court's decision. *See* H.H. 2652, at 82 (1998) [in Hebrew]. The Court's decision declared the unconstitutionality of the transitional clauses, yet left it open for the legislature to decide the required changes. *See* H.C. 1715/97, The Investment Portfolios Managers' Association et. al v. Minister of Finance et al. (Sept. 24,1997, not yet reported).

143. *See supra* Section VI.

144. *See* William G. Buss, *A Comparative Study of the Constitutional Protection of Hate Speech in Canada and the United States: A Search for Explanations, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 89, 106 (Sally J. Kenney, et al., eds. 1999).

145. Professor Monahan's proposition, *supra* note 22.

146. Alec Stone, *Constitutional Dialogues: Protecting Rights in France, Germany, Italy and Spain, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE, *supra* note 144 at 8, 25.

determined in taking the fierce and full advantage of that "one time at bat."[147] Putting aside the differences between the Canadian and the French Courts' scope of review, both frameworks were constructed in the midst of a long tradition of parliamentary sovereignty,[148] and in both the marks of this tradition are forever visible.[149] Hence, if frameworks induce dialogues, one might expect both courts to arrive at more of the same end-point. As mentioned hereinabove, that is not quite what some inferences submit; while the French Council was crowned "fierce", the Canadian Court was said to only rarely challenge parliamentary sovereignty.

The Hungarian Constitutional dialogue can also be referred to in rebuffing the "institutional-influencing-outcome" conjecture. Professor Seitzer posits that the Hungarian Parliament was relatively assertive while ". . . not quite as readily raise the white flag in conflicts with the Constitutional Court . . . [but instead] crafts legislation that pushes the envelope of its permissible discretion."[150] Yet, as Professor Seitzer himself points out, the Hungarian Constitutional features, with their far greater potential intervention upon policy-making, should have entailed a more formal dialogue, in which the legislature is more prone to acquiesce to the Court's authoritarian decision.[151] Without structural clauses similar to the Canadian's, the Hungarian Parliament was successful in reshaping its will, twice or even three times, until it was found constitutional by the Court.[152] Deprived from "notwithstanding" or "reasonable limitation" clauses, the Hungarian legislature managed to instate itself as a full participant in substantive dialogues that have produced constitutional statutes, accepted by both the Court and the political branches.

The Israeli case study is more complex. First, Israel has not yet adopted an encompassing, written constitution. This fact alone should exclude it from being put in the constitutional dialogue category altogether. However, as the British example contends, dialogues occur, even if to a lesser extent, in non-constitutional polities in the form of administrative discretion review.[153] Furthermore, dialogues in Israel did occur and were not

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147. Martin Shapiro, *The Success of Judicial Review, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE , *supra* note 144 at 193, 199. In passing, Professor Shapiro has himself admitted that "the French indeed have achieved a flourishing judicial constitutional review, peculiarly limited by its abstract only character but still roughly comparable to constitutional judicial review elsewhere." *Id.*

148. *Id. See also* Buss, *supra* note 144, at 105-06.

149. In the Canadian framework, section 1 and 33 of the Charter and in the French framework, the exclusively abstract review model.

150. Jeffrey Seitzer, *Experimental Constitutionalism: A Comparative Analysis of the Institutional Bases of Rights Enforcement in Post-Communist Hungary, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE, *supra* note 144 at, 42, 48.

151. *Id.* at 45-47.

152. *Id.* at 49.

153. *See* Susan Sterett, *Intercultural Citizenship: Statutory Interpretation and Belonging*

restricted to quasi-constitutional (that is, administrative in nature) issues, but included direct political (electoral) rights. Second, Israel's court-political branches dialogue in other areas of constitutional law of rights was far more impressive, like noted by Professor Shapiro:

> Only in Israel might it be fairly said that constitutional rights have generated judicial review. Indeed, in Israel the Supreme Court has generated a constitutional law of rights and judicial review to enforce those rights in the face of a dramatic failure even to promulgate a constitution. Israel can join Italy in our anomalies bag.[154]

Thus, the absence of a constitution could not account, at least not alone, for the lack of the development of substantive dialogues.

In an attempt to systematically explain the emergence and institutionalization of constitutional dialogues and judicial review, Professor Shapiro raises, and somewhat disqualifies, three possible hypotheses: the Federalism-English hypothesis, the division of powers hypothesis and the rights hypothesis.[155] What is intriguing in his attempt is the number of countries that were put, for a time being or for life, in the "anomalies bag": Italy, France, Spain, Israel, and the ECHR.[156] For a moment or two, it felt as if the United States was the only one to be found in the "anomaly bag", making the possible generalization of the structure and outcome connection almost impossible. If "so many parts of the world entrust so much of their governance to judges,"[157] the importance of different frameworks, adopted by different constitutional structures, is withered.

At the end of the day, what matters is the legal and political culture, held by the country's leaders and people. These are the factors influencing the institutional design of one's constitution and the features that were adopted from the various possibilities. They are the ones to effect the political branches' dialogues and responses, and they are the ones to be embedded in judicial decisions.[158]

Why then, have substantive constitutional dialogues emerged in Canada and formal ones reigned the Israeli landscape? One important element is the elite's attitude and political culture towards the rule of law.[159] Canada, as

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in Britain, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE, *supra* note 144, at 119; Susan Sterett, *Judicial Review in Britain*, 26 COM. POL. STUD. 421 (1994).

154. Shapiro, *supra* note 147, at 200.

155. *Supra* note 147.

156. *Id.* at 196, 197, 199, 200 and 203 respectively.

157. *Id.* at 218.

158. On the importance of cultural traditions and themes on the Court's performance see Buss, *supra* note 144.

159. *See* William M. Reisinger, *Legal Orientations and the Rule of Law in Post-Soviet Russia, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE, *supra* note 144, at 172.

part of the Commonwealth, shares a deep allegiance to the rule of law. The English political tradition, committing itself to respect and follow judicially independent and neutral decisions, resonated well in Canada.[160] In Israel, on the other hand, ambivalence towards the rule of law and the role of the judiciary in the governmental scheme was prevalent at the early days of the state.[161] The government had occasionally defied or ignored the Court's decisions, disapproving the very notion of judicial review.[162] Hence, its readiness to enter a substantive dialogue with the Court was circumscribed. Once it was forced to engage in dialogue, it demonstrated a deep reluctance to generously partake. The Israeli legislature had also introduced an override clause to one of its Basic Laws in an exertion to cut off a constitutional dialogue prematurely.

Furthermore, an additional important element to give attention to is the country's political structure, such as the number of legislative houses, the rules governing the internal works of the legislatures, and the right to veto. While comparing Germany and Hungary, Professor Seitzer claims that the unitary system, the one-house legislature, and the relatively low institutional threshold for expressing reservations to the Court's decisions encouraged the Hungarian legislature to respond to constitutional adjudication and fully partake in the shaping of a final constitutional solution.[163] The more houses to approve legislation or the more veto powers,[164] the harder it is for the legislature to substantially respond and contribute to the constitutional dialogue.

Hence, many factors, other than the Constitution's scheme itself, should be taken in account in calculating the probabilities for the evolution of different kinds of constitutional dialogues. The political and legal cultures and traditions, the overall political system, and the constitutional model - together they all effect these dialogues.

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160. On the English allegiance to the rule of law see Shapiro, *supra* note 147, at 195; Antonio Lamer, *The Rule of Law and Judicial Independence: Protecting Core Values in Time of Change*, 45 U.N.B.L.J. 3 (1996).

161. *See* Ehud Sprinzak, *Elite Illegalism in Israel and the Question of Democracy*, *in* ISRAELI DEMOCRACY UNDER STRESS, *supra* note 30 at 173; Lahav, *supra* note 30 at 125; Pnina Lahav, *The Supreme Court of Israel: Formative Years, 1948-1955*, 11 STUD. IN ZIONISM 45 (1990); Shimon Shetreet, *Judicial Independence and Accountability in Israel*, 33 INT'L & COMP. L. Q. 979, 981 (1984).

162. Klinghoffer, *supra* note 63 at 36-43; Burt, *supra* note 56, at 2075-79; Shapira, *supra* note 64, at 425.

163. Seitzer, *supra* note 150, at 50-51.

164. The President could use the veto to block laws precipitously enacted in the heat of factionalism. The people would be protected against abuse of this power because the President would rarely hazard a test of power with Congress if not backed by the popular will. This was especially so when the veto could be overridden by the Congress.

Carl McGowan, *The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 SAN DIEGO L. REV. 791, 797 (1986).

IX. CONCLUSION

All participants in constitutional dialogues should contribute their share into the development of a meaningful and responsible exchange. Courts, legislatures, cabinets, governments, attorneys general, and the general public are all, and should be, part of an ongoing endeavor to make a constitution a living document.

The chain of a dialogue is endless, and each link is essential. A petition is triggered by legislation. In order for a court to consider a constitutional issue, a petition must be brought before it. It uses the state representatives' legal arguments in order to articulate the constitutional problem and to suggest a solution (either upholding or striking down the law). In turn, the legislature needs a court's decision striking down a law to set its majoritarian wheels in motion again. Using the Court's interpretation and constitutional guidelines, the legislature acts to rephrase its will. A new law is enacted.

The exact features of the links might vary from one constitutional order to another. Canada and Israel's models contain some means that may foster a system of checks-and-balances between the political branches and the judiciary. Both embraced similar override provisions and limitation clauses, yet these features resulted in somewhat different forms of dialogues in the two countries. They are not alone. South Africa's recently adopted constitution also includes the reasonable limitation clause.[165] Its overall constitutional mechanism yields an even far richer dialogue.[166]

However, as this article demonstrates, the mere existence of constitutional features and institutions that may amplify a meaningful and accountable dialogue between Courts and other State institutions does not mean that such a dialogue will inevitably materialize. The dialogues also depend upon the political and legal cultures relating the rule of law, the role of the Court and parliamentary sovereignty, and the political structure.[167]

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165. Section 36(1) of the Constitution of the Republic of South Africa, 1996, prescribes: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...." Section 1 of the Canadian Charter reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

166. This is the result of the existence of State institutions as the South African Human Rights Commission and the Commission for Gender Equality. *See* Craig Scott, *Social Rights: Towards a Principled, Pragmatic Judicial Role*, 1:4 ESR REV. 4 (1999).

167. Another example of a formal dialogue can be found in a recent South African constitutional case. In *The National Coalition for Gay and Lesbian Equality and Another v. The Minister of Justice and Others*, 1998 (12) BCLR 1458 (CC), the petitioners applied to the Court, asking it to declare the unconstitutionality of the inclusion of sodomy as a felony in the South African Criminal Procedure Act. The Attorney General did not lodge any written

Just as there are different types of constitutional dialogues, there are also variants of the counter-majoritarian difficulty. Rather than perceiving it as a homogenous dilemma that undermines all democracies in a similar fashion, one should acknowledge its nuances and, indeed, seek its relevance in different political systems. As counter-majoritarianism rests upon a number of assumptions, the applicability of these very assumptions should be questioned. A full discussion of these variations is beyond the scope of this paper. However, a few concluding remarks on the possible directions in pursuing alternative answers to these questions are in order.

Counter-majoritarianism assumes that laws, enacted by the duly elected legislative body, express the majority's will. Yet it overlooks the workings of politics in coalition governments, especially in parliamentary systems, where various parties, sometimes utterly alien to each other's agenda, constitute a government founded on political compromises and exchanges. It also ignores the well-established practice of party discipline, which might force voting patterns contrary to any free and representative will. In addition, it disregards the effect of the lapse of time between election day, the enactment of the law, and the striking down of that law, thus the very possibility that the majority will has meanwhile changed.

The counter-majoritarian argument also assumes that a judicial decision to strike down a law is final, leaving elected governments speechless and helpless. This supposition fails to acknowledge the possibility of an evolution of substantive constitutional dialogues.

Finally, the theory also suggests that the court's decision runs counter to the majority's will, as represented by its elected delegates. This suggests that the court's actions and the government's reactions inherently stand counter to one another. That, in turn, fails to consider situations in which the legislature chooses not to engage in dialogue of any kind. Where a formal dialogue took place, and it was the legislature that hampered the development of a substantive dialogue, no clash between unaccountable judges and accountable elected officials occurred. Perhaps it was merely the meeting point of two unaccountable institutions. Where, however, a substantive dialogue took place, perhaps it was the meeting point of two equal and

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argument to support the challenged legislation. The Court found the sodomy criminal provision to be unconstitutional. I will argue that this is but another example of a formal dialogue, one in which an administrative body (the Attorney General office) preferred not to contribute from its own part any substance to the Court's interpretation and declaration. Furthermore, in a few South African cases, the Attorney General preferred to concede that the law limited the application of a guaranteed right. However, the concession was not followed by an attempt to justify the limitation as "reasonable and justified in an open and democratic society" (*supra* note 137), or to present evidence that supports the limitation's reasonableness or justification. *See, e.g.*, S v. Williams and Others, 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at paras. 61-92; Mello and Another v. the State, 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC) at paras. 7-10.

responsible partners that together deepen the understanding and reach of democracy.

> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The courts review the work of the legislature and the work of the courts in its decisions can be reacted to by the legislature in the passing of new legislation. . . . This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.[168]

Each branch of government plays a crucial role, and each should strive to work in harmony with the other branches in order to promote the needs of society.

168. Justices Cory and Iacobucci wrote for a unanimous court in *Vriend et al. v. Alberta et al.*, [1998] 156 D.L.R. (4th) 385 at 439.

THE NEED FOR AN ANTIDUMPING MARKET STRUCTURE TEST IN THE CONTEXT OF FREE TRADE AGREEMENTS

Charles M. Gastle and James Leach*

In October, 1999, the Standing Committee on Foreign Affairs and International Trade of the Canadian House of Commons issued a report entitled: *The Free Trade Area of the Americas: Towards a Hemispheric Agreement in the Canadian Interest* ("Standing Committee Report").[1] Surprisingly, the Standing Committee Report contains a recommendation that Canada should resist the merging of antidumping provisions with antitrust predatory pricing provisions.

The Committee's understanding of the issue is that predatory pricing and antidumping were born out of different necessities and intentions. The former provisions were conceived to protect the interests of consumers, with the objective of securing a competitive process for the longer term. The latter provisions were conceived to protect domestic producers from a specific foreign rival with special circumstances enabling it to discriminate between markets. Often these circumstances are protected domestic markets.

In the case of antidumping, the interests of consumers are being subordinated to those of domestic producers. When viewed in this light, the Committee is of the opinion that competition policy and its administrative authority should never be put in the position of subordinating the interests of consumers to those of producers. However, without the permanent disappearance of the ability to discriminate between domestic and foreign markets, there are indeed circumstances in which the interests of domestic producers should prevail over those of consumers, but not in all instances. Provided that proper administrative discretion is exercised in the application of antidumping provisions, the Committee concludes that there is no valid reason, or political appetite for that matter, for folding antidumping into antitrust. Competition and antidumping policies should, for the time being, remain separate.[2]

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* Charles Gastle, B. Comm., LL.B., LL.M., D.Jur. obtained a Doctor of Jurisprudence Degree in international trade from Osgoode Hall Law School, Toronto, and is a member of the Ontario Bar and partner at Shibley Righton, Toronto. James Leach is the former Canadian Ambassador to Peru and Bolivia and is now the Executive Director of the Estey Centre for Law and Economics in International Trade. The authors wish to acknowledge the research assistance provided by Thomas Humbert, a graduate law student from Aix-Marseille University in France.

1. STANDING COMM. ON FOREIGN AFFAIRS AND INT'L TRADE OF THE CANADIAN HOUSE OF COMMONS, THE FREE TRADE AREA OF THE AMERICAS: TOWARDS A HEMISPHERIC AGREEMENT IN THE CANADIAN INTEREST (1999), *at* http://www.parl.gc.ca/infocomdoc/36/2/fait/studies/reports/faitrp01/30-ch15-e.html.

2. *Id.* at Ch.15: Competition Policy and Law.

The Government of Canada's response report ("Government Response")[3] adopted this surprising position:

> The Government supports the recommendation of the Committee to resist merging anti-dumping provisions with predatory pricing provisions in competition policy and law. Rather, the Government will continue its efforts to seek improvements to the application and operation of anti-dumping systems in the hemisphere in the context of a separate Negotiating Group on Subsidies, Antidumping and Countervailing Duties.[4]

Canadian international trade policy now appears to embrace antidumping practices, albeit with some modifications to the underlying antidumping rules. This marks a rejection of at least fifteen years of Canadian trade policy seeking the elimination of antidumping practices. Canada's reversal in trade policy is unprincipled and seems to suggest that its trading interests are better served by maintaining protectionist mechanisms which it can use against its trading partners. This change in trade policy suggests that Canada has begun to view itself differently in terms of world trade and not with the same sense of vulnerability to perceived misuse by the United States of its contingent trade regime. In the context of the Free Trade Agreement of the Americas ("FTAA") initiative - where this change in trade policy occurred - it appears that Canada wants to retain this trade weapon with respect to imports from the emerging nations in Central and South America.

In this article, it is respectfully submitted that Canadian trade policy has become muddled, at a time when American abandonment of a position of leadership in trade liberalization gives an opportunity to eliminate antidumping practices, at least on an interim basis in negotiations to broaden hemispheric free trade. Canadian trade policy had the correct focus when negotiating its free trade agreement with Chile[5] in 1997 that provided for the elimination of antidumping practices no later than 2003.[6] This precedent should be followed in the free trade agreement with Costa Rica that was under consideration at the time of writing.

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3. *See* DEPT. OF FOREIGN AFFAIRS AND INT'L TRADE (CANADA), GOV'T RESPONSE TO THE REPORT OF THE STANDING COMMITTEE ON FOREIGN AFFAIRS AND INT'L TRADE - "THE FREE TRADE AREA OF THE AMERICAS: TOWARDS A HEMISPHERIC AGREEMENT IN THE CANADIAN INTEREST," *at* http://www.dfait-maeci.gc.ca/tna-nac/FTAAreport-full-e.asp (last visited Mar. 15, 2000).

4. *Id.*

5. *See* Canada-Chile Free Trade Agreement, Dec. 5, 1996, Canada-Chile, 36 I.L.M. 1067 (1997), *available at* http://www.dfait-maeci.gc.ca/tna-nac/cda-chile/chap-m26.asp [hereinafter CCFTA].

6. *Id.* art. M-03.

In the alternative to the elimination of antidumping practices, the commitment to open markets represented by free trade agreements, such as the North American Free Trade Agreement (NAFTA),[7] justifies, at minimum, a qualification or limitation upon the traditional antidumping duty practices. It is submitted that, at the very least, a market structure test should be imposed requiring complainants in proceedings involving a free trade agreement party to establish that some specific market impediment exists which gives rise to an ability to differentiate between the exporter's home market and the complainant's import market, resulting from a lack of efficiency.[8] Some artificial impediment (such as a border restriction) or anti-competitive conduct would have to be shown, which keeps the home market price high.

This article starts with a review of antidumping practices and then provides an analysis indicating the nature of the presumption made by antidumping practices that a market impediment exists where there is a difference between the home and target market price. The concept of a market structure test is then discussed, as it was developed during the evolution of American antitrust principles over the past thirty years. The article then makes a proposal regarding the manner in which a market structure test might be used to qualify antidumping practices in the context of free trade agreements such as NAFTA, thus resulting in a somewhat more economically rational international trade law remedy. Of course, this article should not be seen as an endorsement of this alternative as the principle route of reform. The "first-best" reform is to eliminate antidumping practices entirely.

In the context of bilateral trade between the United States and Canada, the complainant-import jurisdiction might utilize its own competition law in determining whether a private practice constitutes an actionable market impediment. If the United States is taken as an example, the American administrative tribunals would be required to use the recoupment test in the context of discriminatory and predatory pricing doctrine, established by the *Brooke Group*[9] precedent. In the context of the FTAA, however, it is not possible to allow each jurisdiction to utilize its own competition law. This is due to the early stage of development of competition law institutions in the Central American and South American jurisdictions or relative lack of experience with competition law concepts. We recommend that the *Brooke*

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7. *See* North American Free Trade Agreement, Dec. 17, 1992, United States, Mexico, Canada, 32 I.L.M 605 (1993), *available at* http://www-tech.mit.edu/Bulletins/nafta.html [hereinafter NAFTA].

8. Throughout this paper we will use the terms "export-home market" and "complainant-import market." In a proceeding in the United States to impose antidumping duties on Canadian products, Canada would be the export-home market and the United States would be the complainant-import market.

9. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S.Ct. 2578 (U.S. 1993).

Group recoupment test be integrated directly into the free trade agreement with respect to antidumping disputes between free trade members. Antidumping practices have been subject to rigorous international trade law rules established by international agreements. Therefore, the addition of a market structure test at the international level follows a well-established precedent. More importantly, inclusion of basic antitrust concepts within an international agreement will provide valuable experience to jurisdictions with newly established competition law institutions.

With respect to public practices, we recommend that a traditional market barrier, such as a tariff, would automatically meet the market structure test, and antidumping duties would be available if the traditional requirements can be established. The difficult question is how more subtle public practices should be treated, and a mere difference in the regulatory environments should not be sufficient. We recommend that the complainant should have the burden of proof to establish that the particular public practice acts as an artificial barrier to entry that permits the respondent to discriminate between the export-home market and the complainant-import market. The complainant should also have the obligation to show that the discrimination in question has allowed the respondent to realize supra-competitive profits in the export-home jurisdiction.

We conclude with a discussion of the appropriate remedy. We recommend that in the case of private practices, bi-national panels be given the authority to enjoin the impugned private practice, if they are given the ability to review the findings of administrative tribunals on a *de novo* basis. With respect to public practices, it is recommended that the bi-national panels have the authority to order the removal of the practice in question. Again, this would require the bi-national panels to have the ability to review the final determinations of administrative tribunals on a *de novo* basis. In the alternative, the bi-national panels should have the authority to vacate the antidumping duty order if the respondent government eliminates the impugned public practice.

I. CANADA'S EPIPHANY AND ABANDONMENT OF ITS TRADITIONAL POLICY OBJECTIVE

The Standing Committee Report is correct in its statement that predatory pricing and antidumping principles pursue different objectives; the former promotes consumer welfare and the latter promote producer welfare. The Committee suggests that there are circumstances in which antidumping principles are justifiable and the one example cited involves protected domestic markets. No explanation is given as to when the ability to discriminate should allow an abandonment of the competition law objective of promoting lower prices, which is what "consumer welfare" actually means. Of course, one might point out that the objective of a "free trade agreement" is to eliminate the ability to discriminate between markets based

on the fortuitous existence of a border interposed between the two markets. The question goes unanswered as to why the antidumping mechanism should be maintained in circumstances where the free trade negotiations have been successful in eliminating tariffs and other barriers between the markets. The Committee also fails to explain what other factors allow discrimination between markets and why they should justify the maintenance of the antidumping mechanism when competition law provisions address discriminatory pricing domestically, while maintaining its objective of promoting consumer welfare.

The passage in the Standing Committee Report (quoted above) is remarkable because it suggests that the merging of predatory pricing and antidumping principles would put the competition tribunal in the position of "subordinating the interests of consumers to producers." This is simply incorrect, as the merging of the two disciplines would result in one set of predatory or discriminatory pricing principles that would promote consumer welfare. The role of the competition tribunal and the courts would not change at all.

At what point in the establishment of free trade does the antidumping mechanism become redundant? In the past, the Canadian government took the position that the establishment of free trade should be sufficient to justify the elimination of the mechanism. At the time of the Canada-United States Free Trade Agreement (CUSFTA)[10] negotiations in 1987, the negotiating objective was to eliminate the antidumping mechanism in favor of competition law principles.

> Dumping was a less intractable problem. At the suspension of negotiations, Canada had rejected a U.S. proposal to set up a working group to examine the feasibility of relying on competition laws after the transition period as a substitute for antidumping law. In Canada's view, such a technical group had concluded its work over the course of the summer. It had considered all aspects of the problem and prepared a number of technical papers. Canadian experts were satisfied that it would be feasible to rely on competition policy at the end of the transition period and to implement a special regime based on competition principles during that transition. The 22 September U.S. proposal was its first formal response. The United States was not prepared to commit itself to the development of a regime based on domestic competition law, it was only ready to explore the issue. The U.S. proposal also did not address the possibility

10. Canada-United States Free Trade Agreement, Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281 (1988)[hereinafter CUSFTA].

> of changes in the existing antidumping regime for the duration of the transition period.[11]

And further,

> We had tried for months to find some basis for meeting legitimate American concerns while protecting our interests. . . . As far as the Americans were concerned, the status quo was just fine. American firms were generally not bankrupted by Canadian anti-dumping duties that covered only a small percentage of their total sales. . . .
>
> For many Canadian exporters, this was literally a matter of economic life or death. Many of our firms shipped half or more of their production to the United States. They had structured their operations around that market as the best way to achieve the volumes needed to increase their revenues and lower their costs. This would be all the more true after a free trade agreement eliminated the tariffs at the border. If, the moment they were successful in exporting to the United States, their American competitors could haul them before a kangaroo court, tie them up in interminable, prohibitively expensive litigation, and very possibly get penalties applied to all imported shipments, these companies would be wiped out. Or they would be forced to move their investment, with the production and jobs, south of the border to escape these penalties.
>
> Obviously, our first choice would be to get rid of the unfair trade laws entirely. Alternatively, we would want Canada to be "exempted" from these laws, to use the prime minister's phrase. Neither of these options was in the cards.[12]

The theory supporting the elimination of the antidumping mechanism was that once tariffs and other barriers were removed there would be no ability to use pricing strategies that could take advantage of protected markets. Thus, firms would be expected to follow pricing strategies falling

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11. MICHAEL HART, DECISION AT MIDNIGHT: INSIDE THE CANADA-US FREE-TRADE NEGOTIATIONS 300 (1994). *See also* Michael Hart, *Dumping and Free Trade Areas, in* ANTIDUMPING LAW AND PRACTICE 326 (Jackson and Vermulst eds. 1989); Debra Steger, *Dispute Settlement, in* TRADE-OFFS ON FREE TRADE: THE CANADA-US FREE TRADE AGREEMENT 182 (Marc Gold and D. Leyton-Brown eds. 1988).

12. GORDON RITCHIE, WRESTLING WITH THE ELEPHANT, THE INSIDE STORY OF THE CANADA-US TRADE WARS 100-01 (1997).

within the "ambit of domestic law regulating restrictive business practices."[13] The importance of this objective was reflected in the Canada-United States Free Trade Agreement (CUSFTA), Article 1906:

> The provisions of this Chapter shall be in effect for five years pending the development of a substitute system of rules in both countries for antidumping and countervailing duties as applied to their bilateral trade. If no such system of rules is agreed and implemented at the end of five years, the provisions of this Chapter shall be extended for a further two years. Failure to agree to implement a new regime at the end of the two-year extension shall allow either party to terminate the Agreement on six-months notice.[14]

While the threat to terminate the agreement was an empty inducement, the provision underscored the importance of the elimination of the antidumping duty mechanism at that time, at least as a political issue within Canada.

The traditional Canadian position that the antidumping mechanism should be eliminated was the basis for the trade negotiations with Chile. The Canada-Chile Free Trade Agreement (CCFTA) included the following provision:

> Article M-01: Reciprocal Exemption from the Application of Antidumping Duty Laws
>
> 1. Subject to Article M-03, as of the date of entry into force of this Agreement each Party agrees not to apply its domestic antidumping law to goods of the other Party. Specifically:
>
> (a) neither Party shall initiate any antidumping investigations or review with respect to goods of the other Party;
>
> (b) each Party shall terminate any ongoing antidumping investigations or inquiries in respect of such goods;
>
> (c) neither Party shall impose new antidumping duties or other measures in respect of such goods; and
>
> (d) each Party shall revoke all existing orders levying antidumping duties in respect of such goods.[15]

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13. Michael Hart, *Dumping and Free Trade Areas, in* ANTIDUMPING LAW AND PRACTICE 326 (Jackson and Vermulst eds. 1989).

14. *See* CUSFTA, *supra* note 10

15. CCFTA, *supra* note 5 art. M-01.

Article M-03 is a phase-in provision requiring the elimination of antidumping provisions on the date when the tariff of both Parties is eliminated for the particular good in question, or by January 1, 2003, whichever comes first.[16] We submit that these provisions are consistent with the traditional Canadian trade position and with one that is principled.

In light of this history, the acceptance of the antidumping mechanism in the Standing Committee Report and the Government Response, must be seen as a significant change in Canadian trade policy. Given the treatment of the issue by the Standing Committee, the question arises whether the elimination of antidumping and countervailing duty practices are justified only in cases where "perfect" economic integration exists in the form of a fully developed customs union. Alternatively, one might question whether these remedies should be qualified at some mid-point between separately evolving economies and a fully integrated customs union.

NAFTA[17] is not a customs union, and there are a number of remaining impediments to full economic integration. One example of such an impediment is the lack of freedom of cross-border labor movement, but American trade negotiators would also point to a number of factors such as restrictions in Canada intended to protect its culture.[18] Both Canada and the United States now appear to agree that these impediments justify the continuing existence of the traditional World Trade Organization (WTO) trade remedies in all international trade disputes. At the same time, the objective of NAFTA was to eliminate trade barriers by January 1, 1998.[19] The degree of economic integration of the United States and Canada is quite remarkable, and the degree of openness of the Canadian economy contrasts sharply to that of a number of other economies, such as Japan.

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16. *See id.* art.M-03.

17. NAFTA, *supra* note 7.

18. *See* United States Trade Representative, *2000 National Trade Estimate Report on Foreign Trade Barriers, available at* www.ustr.gov/reports/nte/2000/contents.html. This report provides a list of alleged barriers to trade. They include: supply management in dairy products; eggs and poultry; restrictions on horticultural imports and non-agricultural goods; barriers to film exports; certain reciprocity rates in its Copyright Act; restrictions pursuant to the Broadcasting Act imposing Canadian content performance standards; Canadian ownership requirements in basic telecommunications services; and certain investment restrictions. *See id.* at 30-36.

19. *See* NAFTA, *supra* note 7.

CANADIAN EXPOSURE TO FOREIGN COMPETITION
(Percentage basis)[20]

	Manufacturing		Food, beverages and tobacco		Textiles, footwear leather		Wood & Wood Products		Paper and Printing		Chemicals		Pharmaceuticals	
	1985	1994	1985	1994	1985	1994	1985	1994	1985	1994	1985	1994	1985	1994
United States	18.8	27.7	8.9	11.1	22.9	36.5	11.1	14.7	6.6	9.1	15.5	21.7	13.3	12.5
Canada	58.5	73.8	19.8	28.4	33.5	51.2	47.8	80.1	47.2	60.2	37.8	60.4	21.7	39.8
Japan	18.5	17.4	7.1	8.6	18.0	22.7	7.8	14.4	4.2	3.3	14.9	14.2	8.6	8.2
Total OECD	32.6	38.0	28.5	21.7	38.7	49.3	20.7	25.2	16.9	19.7	32.8	36.8	25.5	30.0

While "perfect" economic integration in the form of a customs union does not exist, the question arises why Canada is subject to the same trade remedies as Japan, when it has made a much more profound commitment to an open market which can be easily confirmed across a broad range of market segments. Does this commitment only warrant a different form of judicial review (prescribed by the bi-national panel established by Chapter 19 of NAFTA) of final antidumping and countervailing duty determinations?[21]

It is respectfully submitted that NAFTA's commitment to open markets justifies the elimination of or, at a minimum, a limitation upon the traditional antidumping duty mechanism. It appears to be based upon a presumption that if the requisite difference in the home and target prices is demonstrated, some artificial market impediment exists that is not based upon efficiency. Alternatively, using the wording of the Standing Committee Report, there must be some factor based on the existence of an international border permitting the foreign producer to discriminate between the export-home market and the complainant-import market which, once again, is not based on efficiency. Where no such factor can be identified, the fundamental justification for imposing duties is lacking because an open, competitive, and efficient market apparently exists. The higher home market price - if not resulting from the byzantine methods by which costs are constructed according to antidumping principles - must be due to some factor related to efficiency. If not, a competitive opportunity likely exists, which the complainant's manufacturers have not exploited in the exporter's home market. Higher prices in the home market should attract entry and the remedy is a pro-competitive one - the complainant should compete and attempt to penetrate the exporter's home market - instead of wasting

20. OECD, SCIENCE, TECHNOLOGY, AND INDUSTRY, SCOREBOARD OF INDICATORS, 173 (1997). This comparison is based on the export share of production within a sector, combined with a weighted average of the import share of domestic consumption.

21. *See* NAFTA, *supra* note 7, ch. 19.

resources on litigation or seeking the imposition by government of deadweight consumer welfare losses through antidumping duties.

With respect, the reversal of Canadian policy is in error, and the elimination of the mechanism contained in the CCFTA is the proper policy position; this requires the abandonment of the antidumping mechanism. In the absence of an artificial impediment, the Standing Committee's logic, and that of the government, requires that no antidumping duty be imposed. There is no policy justification for imposing higher prices upon consumers and deadweight losses upon the Canadian economy.

II. THE PRESUMPTION BY ANTIDUMPING PRACTICES OF A MARKET IMPEDIMENT

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (Antidumping Agreement)[22] provides that a product is to be considered as dumped (i.e., introduced into the commerce of another country at less than its normal value) if the export price from one country to another is less than the comparable price for the like product when destined for consumption in the exporting (home) country.[23] The Antidumping Agreement provides for a bifurcated tribunal mechanism. Separate administrative agencies decide whether dumping has occurred and whether injury has been sustained. In the United States, the Department of Commerce determines the margin of dumping, and the International Trade Commission determines injury.[24]

The Antidumping Agreement provides that provisional duties (usually in the form of a security by way of cash deposit or bond) may be demanded within sixty days of the commencement of the investigation where a preliminary affirmative determination of dumping and consequent injury has been made.[25] The standard for imposing provisional duties is low and effectively places a reverse onus upon the foreign exporter. The United States' implementing legislation requires the International Trade Commission to determine if "there is a reasonable indication that the requisite injury exists."[26]

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22. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, annex 1A, H.R. Doc. No. 316, 103d Cong. (1994) *reprinted in* LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, *available at* http://www/wto.org/english/docs_e/legal_e/final_e.html [hereinafter Antidumping Agreement].

23. *See id.* art. 2.1.

24. In Canada, the corresponding agencies are the Deputy Minister of National Revenue for Customs and Excise, and the Canadian Import Trade Tribunal (CITT). *See* NAFTA, *supra* note 7, at annex 1911.

25. *See* Antidumping Agreement, *supra* note 22, arts. 7.1, 7.2, 7.3.

26. JOSEPH E. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS 3-13 (1984); *see also* Tariff Act of 1930, § 4, 19 U.S.C.A § 1677 (2000).

The Commission held that the test requires a negative determination only when: (1) the record of a proceeding contains clear and convincing evidence of no material injury or threat thereof; and (2) no likelihood exists that evidence demonstrating material injury for threat thereof will surface in the final investigation.[27]

After provisional duties have been imposed, the investigating authority must verify all information upon reaching a final determination with respect to its finding of dumping.[28] The comparison between the export price and the normal value is to be made at the ex-factory level, and due allowance is to be made for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, and physical characteristics.[29] Using American practice as an example, the Department of Commerce obtains substantial information regarding the foreign and domestic markets through sales questionnaires. Initially, information regarding the corporate structure is obtained, including the description of the units involved in the development, manufacture, sale, and distribution of merchandise under investigation.[30] The Department requests lists of the ten largest shareholders and the percentage of ownership each controls.[31] Commerce also demands a flow chart and description of each method or channel of distribution for the American and export-home markets. For each, the functions performed and services offered[32] in each distribution channel to each customer or class of customer in the United States and export-home markets. With respect to the sales process, the Department of Commerce seeks detailed information on each sale in the United States and export-home markets during the period of investigation, including sales agreements and price lists, along with discount or rebate schedules.[33] The Department of Commerce also obtains information regarding accounting and financial practices, including a chart of accounts, audited consolidated and unconsolidated financial statements, and internal financial statements or profit and loss reports.[34]

In short, the Department of Commerce obtains a complete description of the export-home and United States markets, including the pricing and the profitability thereof. The power given to the investigating agencies is significant, notwithstanding the fact that they lack subpoena power in the foreign jurisdiction. Foreign exporters are encouraged to cooperate and

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27. *See* PATTISON, *supra* note 26, at 3-14.

28. *See id.* at 8-1 (citing 19 U.S.C.A. § 1677m(i) (2000)).

29. *See id.* art. 2.4.

30. *See id.* at appendix M, § A.2.a.

31. *See id.* at appendix M, § A.2.d.

32. *See id.* at appendix M, § A.3.b. These lists include inventory maintenance, technical advice, warranty and other after sales service, freight and delivery arrangements, after-sale warehousing, and advertising or other sales support facilities. *See id.*

33. *See id.* at appendix M, § A.3.4.

34. *See id.* at appendix M, § A.6.

provide the required information. If they refuse access to or otherwise do not provide necessary information within a reasonable period of time or significantly impede the investigation, the determination can be made on the basis of the "best information available."[35] When the investigating authorities resort to best information available, it often means the facts contained in the originating complaint.

Where the export price is non-existent or unreliable, the export price may be constructed on the basis of the price at which the imported products are first sold to an independent buyer, or if the products are not resold to an independent buyer or not resold in the condition as imported, then on such reasonable basis as the authorities may determine.[36] The investigating authorities conduct a constructed cost analysis, in which they build the so-called "normal value" by analyzing all of its constituent components, including an allocation for profit.[37] Allowances are to be made on the basis of a fully-allocated cost standard, with due allowance for costs and profits.[38]

A finding of dumping alone is not sufficient to impose duties; the investigators must also determine that the dumping has caused injury. The injury determination must be based "on positive evidence and involve an objective examination of both: (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."[39] The Department of Commerce must determine whether there has been significant price undercutting by the dumped imports as compared with the price of a like product, "or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree."[40] The Antidumping Agreement provides that the investigating authority is to consider various factors concerning the domestic industry:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on

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35. Antidumping Agreement, *supra* note 22, art. 6(8), annex II.

36. *See id.* art. 2.3

37. Past practice was to estimate an eight percent margin but this was changed in the 1994 WTO Agreements to check pattern in the industry. *See* RICHARD BOLTUCK AND ROBERT E. LITAN, DOWN IN THE DUMPS, ADMINISTRATION OF THE UNFAIR TRADE LAWS 213 (1991).

38. Antidumping Agreement, *supra* note 22, art. 2.4. As indicated below, lawmakers debated the appropriate cost standard in the context of predatory pricing provisions in antitrust law. The debate has been bracketed by a marginal cost standard versus a fully-allocated cost standard. The antidumping price standard is beyond a fully-allocated cost standard because the home market "normal value" includes not only an allocation of all costs but also provide for a reasonable profit in the circumstances. *See infra* pp. 53-68.

39. *Id.* art. 3.1.

40. *Id.* art. 3.2.

> the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investment, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.[41]

Investigators must find a causal relationship between the dumping and the domestic injury. This is based on the examination of all relevant evidence before the authorities, who are required to examine "any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."[42] These factors might include contraction in demand or changes in the patterns of consumption, trade restrictive practices and/or competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry.[43]

In the United States, the International Trade Commission obtains detailed information relevant to the determination of injury or a material threat thereof, through the issuance of detailed questionnaires, including information related to export shipments of the merchandise by the producer.[44] The Tariff Act requires the Commission to consider the following factors when making its injury determination: volume of imports, the effect of imports on the subject merchandise on prices in the United States for the like product, and the impact of imports of the subject merchandise on domestic producers of like products.[45] The Tariff Act defines material injury as "harm

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41. *Id.* art. 3.4.

42. *Id.* art. 3.5.

43. *See id.*

44. *See* PATTISON, *supra* note 26, at 4-4. The questionnaire focuses upon injury to the domestic industry regarding production, sales, pricing, employment, capacity and utilization issues from both the importers and U.S. producers of the subject merchandise. It requests information related to the following issues, among others: (1) total production broken down by producing plant location and product type; (2) quantity and value of imports; (3) export shipments of the merchandise by the producer; (4) hours worked by production and production related employees in producing all products; (5) total wages paid to production and production related employees; (6) comparison of price and quantities; (7) changes in ability to raise capital and investment; (8) increases or decreases in working capital; and (9) average selling prices and production costs; among a wide variety of other information sought. *See id.* at 4-6 - 4-8.

45. *See* Tariff Act, 19 U.S.C. § 1677(7)(B). The commission is directed to evaluate five factors including: (1) actual and potential decline in output, sales, market share, profits, productivity return on investments and utilization of capacity; (2) factors affecting domestic

which is not inconsequential, immaterial or unimportant."[46] Injury determinations in the United States indicate that certain evidence in particular contributes to a positive finding. Pricing trends are important, and the Commission is required to weigh the two basic aspects of pricing referred to above, whether there has been significant price undercutting and/or price depression or suppression.[47] "Import sales at prices substantially below those of domestic producers often substantially sway the Commission in its injury findings."[48] It is irrelevant whether the price underselling or undercutting is of a "predatory" nature.[49] Another key factor is market share, but the Commission is more interested in the dynamics of the market share and an increase therein than by the magnitude of market penetration by imports.[50] Of somewhat lesser importance are issues of profitability and domestic employment factors, along with capacity utilization.[51]

There are a number of presumptions in antidumping practices that highlight the difference between competition and international trade law. For instance, antidumping practices appear to prohibit cross-subsidization between markets if the requisite degree of injury can be found. From the standpoint of international trade law, a foreign exporter should not be allowed to earn profits in the export-home market to subsidize sales in the complainant-import market. It does not matter whether pricing in the complainant-import market exceeds its marginal costs, thus indicating that the foreign exporter is acting in an economically rational manner.

Another identifiable presumption is that there is price inelasticity in the relevant pricing range in the export-home market. Prices are maintained at artificially high levels in the exporter's home market, and this is possible because the market segment in question is not unduly price sensitive. In other words, the demand for the product remains relatively constant notwithstanding the higher prices in the export-home market, or at least the increase in price exceeds the decrease in sales caused by the higher prices. If the home market exhibited price elasticity (i.e., if any price increase would cause a correspondingly greater decrease in sales volume due, for instance,

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prices; (3) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to rise capital, and investment; (4) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product; and (5) the magnitude of the dumping margin. *See* 19 U.S.C. § 1677(7)(C). No one factor is determinative and the Commission is not restricted to these factors. *See* PATTISON, *supra* note 26, at 4-9 (citing 19 U.S.C. § 1677(7)(F)(ii)).

46. PATTISON, *supra* note 26, at 4-7.

47. *See id.* at 4-8.

48. *Id.* at 4-15; *see also* BIC Corp. v. United States, 19 I.T.R.D. 1560 (Ct.Int'l Trade 1997); Companhia Paulista de Ferro Ligas v. United States, 18 I.T.R.D. 1542 (Ct.Int'l.Trade 1996).

49. *See* PATTISON, *supra* note 26, at 4-14.

50. *See id.* at 4-12.

51. *See id.* at 4-15 - 4-19.

to readily available substitutes) the maintenance of higher prices would not be economically rational. Profits would decrease in the home market.

This leads into the most important presumption for the standpoint of this article - the presumption that antidumping practices of a market impediment allow the foreign exporter to exploit the export-home market in a manner not available to the domestic industry in the complainant-import market. In the Canadian context, this means that the Canadian exporter can exploit the Canadian market in a manner not available to its American competitors. Such a presumption must exist because, if no such impediment is present, why has the American manufacturer simply not supplied the Canadian market? The higher prices in the Canadian market should attract market entry if they are not a result of manipulation sanctioned by constructed price analyses and other nuances of antidumping practices.

The presumption of a market impediment is evident in certain aspects of the antidumping practices that were reviewed above. It is seen in the insular focus of the investigation of injury in the domestic market on such factors as domestic market share, profitability, production capacity, and utilization of technology, among others. There is no explicit requirement to give consideration to the export performance of the domestic industry, particularly from the standpoint as to what efforts, if any, have been made in attempting to penetrate the export-home market to take advantage of the higher prices. There is no inquiry into the reasons for the difference in price evident in the export-home and the complainant-import market. The existence of the price difference itself becomes the market structure analysis. Nothing more is needed as the injury requirement appears to provide the element of causation.

III. COMPETITION LAW AND ITS EVOLUTION TO A MARKET STRUCTURE TEST

The importance of the presumption of a market impediment when a difference in pricing exists between the export-home and the complainant-import market becomes apparent when one considers the manner in which similar issues are treated in the context of antitrust law. The possibility of subsidization between markets is considered irrelevant, absent anti-competitive conduct. The issue of a market structure that is conducive to the exploitation of the impugned pricing practice, becomes the focal point of the analysis.

Traditionally, competition law regulated competition within a market, and trade policy regulated trade between markets. Ostensibly, both are concerned with the conditions of trade within a particular jurisdiction, but they start from fundamentally different premises. Antitrust has shifted to a predominantly efficiency and consumer welfare orientation, but countervailing duty and antidumping laws embrace a producer-welfare orientation. This difference in orientation begins to break down once

markets integrate. The question becomes what degree of integration is necessary such that the difference in orientation is no longer justified?

Antidumping principles find their counterpart in the predatory pricing and price discrimination provisions of the American antitrust statutes. Section 2 of the Sherman Act[52] deals with predatory pricing in the context of attempts at monopolization and provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .[53]

In the context of predatory behavior, the complainant must prove that the alleged monopolist has the market power or the prospect of acquiring market power sufficient to drive competitors out of the market, with the ability to then raise prices through a restriction of output allowing recoupment of the losses. The circumstances in which these factors can be established are considered to be relatively rare.

Section 2(a) of the Clayton Act,[54] as amended by the Robinson-Patman Act,[55] is concerned with discriminatory pricing and provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .[56]

The Supreme Court has held that a price difference is sufficient to qualify as price discrimination within the terms of this section.[57] The statute does not ban all price differences and is qualified in a number of important ways. For example, the price difference must threaten

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52. 15 U.S.C.A § 2 (1997).

53. *Id.*

54. *See* 15 U.S.C. § 12 (2000).

55. *See* 15 U.S.C. § 13(a) (2000).

56. *Id.*

57. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S.Ct. 2578, 2586 (U.S. 1993).

to injure competition.[58] This has been a problematic statutory provision from the standpoint of asserting consumer welfare as the central goal of antitrust. It has been described as a small business statute and as one that protects competitors and not competition.[59] One important problem in American antitrust jurisprudence is whether Section 2 of the Sherman Act and Section 2(a) of the Clayton Act, as amended, involve similar standards of proof, or whether the latter involves a lesser standard such that findings of antitrust violation will become more readily available.

The American antitrust law applies internationally in certain circumstances pursuant to the terms of the Wilson Tariff Act,[60] which provides:

> Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter.[61]

Apparently, few cases have interpreted the scope of this section.[62] The leading case is *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*[63] in which the lower court held that this statute was co-extensive with Section 1 of the Sherman Act.[64] The court rejected the argument that the statute was

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58. There are a number of relevant statutory defenses. One such defense is that the price discrimination is based on differences in costs "changing conditions affecting the market for or the marketability of the goods concerned," or conduct undertaken "in good faith to meet an equally low price of a competitor." *Id.* (citing 15 U.S.C. § 13(b)).

59. *See* J.F. Feeser Inc. v. Serv-A-Portion Inc., 909 F.2d 1524-48 (1990). *See also* SPENCER WALLER, ANTITRUST LAW LIBRARY: INTERNATIONAL TRADE AND U.S. ANTITRUST LAW 2:28 (1996).

60. 15 U.S.C. § 8. (2000).

61. *Id.*

62. *See* WALLER, *supra* note 59, at 1:24-25.

63. Matsushita Electric Indus. Co. v. Zenith Radio Corp., 513 F. Supp. 1100, 1162-64 (E.D. Pa. 1981), *aff'd in part and rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

64. Matsushita, 475 U.S. at 583. Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ." 15 U.S.C. § 1 (2000).

protectionist in nature and provided relief from foreign competition beyond the requirements of the other antitrust laws. The court also rejected the defendants' argument that the statute was more limited than the Sherman Act.[65]

Predatory and discriminatory pricing principles within American antitrust law have evolved during the past thirty years. Initially they shared the same producer-welfare orientation as current antidumping principles. *Utah Pie Co. v. Continental Baking Co.*[66] reflects this orientation. It has since been described as one of the most anti-competitive antitrust decisions ever made within the United States. It was the first time the Supreme Court actually imposed and required a restraint of trade.[67] The next section reviews the evolution of predatory and discriminatory pricing principles from *Utah Pie* through the *Brooke Group* case. The adoption of a consumer welfare orientation and market structure test is highlighted, as it identifies the kind of condition precedent that should be incorporated into NAFTA antidumping practices.

A. Utah Pie and its Illusion of Price Discrimination

Utah Pie Co. v. Continental Baking Co. involved allegations of discriminatory pricing between 1958 and 1961 by a local pie company in the Utah market against three national pie companies. The Court found that the major competitive weapon in the Utah market was price.[68] The location of the Utah Pie plant gave it a natural advantage. It entered the market at a price below the national companies, sparking the price competition it later complained about. The remarkable feature of this case is that the complaint was brought even though Utah Pie was expanding its volume and maintaining its profitability during the period of the complaint.[69] Notwithstanding Utah Pie's performance during the period, the jury awarded treble damages on the allegation of price discrimination, although allegations of conspiracy under the Sherman Act were dismissed. The court of appeals reversed, finding the evidence against the respondents insufficient to support a finding of probable injury to competition.[70]

The Supreme Court reversed and remanded, disagreeing with the court of appeal's view that there is no reasonable injury to competition possible as long as the volume of sales in a particular market is expanding and at least

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65. *See* Matsushita, 513 F. Supp. at 1162-64. This finding was upheld by the court of appeals, but not referred to in the Supreme Court decision.

66. Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

67. *See* Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70, at 84-85 (1967-68).

68. Utah Pie, 386 U.S. at 690.

69. *See id.* at 691-92.

70. *See id.* at 686-87.

some of the competitors in the market continue to operate at a profit.[71] The Supreme Court held that:

> there was ample evidence to show that each of the respondents contributed to what proved to be a deteriorating price structure over the period covered by this suit and each of the respondents in the course of the ongoing price competition sold frozen pies in the Salt Lake market at prices lower than it sold pies of like grade and quality in other markets considerably closer to its plants.[72]

The Supreme Court also held that the Clayton Act,[73] as amended by the Robinson-Patman Act,[74] is not limited to those instances when price discriminators consistently undercut other competitors. The Court acknowledged that many "primary line cases" involve "blatant predatory price discriminations employed with the hope of immediate destruction of a particular competitor."[75] The Court found that there was some evidence of predatory intent, although acknowledging that "[i]t might be argued that the respondents' conduct displayed only fierce competitive instincts."[76] The Court further stated that:

> There was also other evidence upon which the jury could rationally find the requisite injury to competition. The frozen pie market in Salt Lake City was highly competitive. At times Utah Pie was a leader in moving the general level of prices down, and at other times each of the respondents also bore responsibility for the downward pressure on the price structure. We believe that the Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact. In this case, the evidence shows a drastically declining price structure which the jury could rationally attribute to continued or sporadic price discrimination.[77]

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71. *Id.* at 702. Of course, the other competitors of the national brands were not complainants. The only complainant, and the company to which damages would be paid, was the very company who had remained profitable through the period in question. *See id.*

72. *Id.* Utah Pie entered the market at a price of $4.15 per dozen and was selling at a price at $2.75 forty-four months later when the complaint was filed. *Id.*

73. 15 U.S.C. § 12 (2000).

74. *Id.* § 13(a).

75. Utah Pie, 386 U.S. at 702.

76. *Id.* at 702, n.14.

77. *Id.* at 702-03.

It has been argued that in *Utah Pie* the Supreme Court was showing a determination to change antitrust laws "designed to promote competition into laws that regulate or hamper the competitive process," and it used the Robinson-Patman Act "to strike directly at price competition itself."[78] The court of appeals finding of no probable effect on competition was overcome by the decline in the share of the market held by Utah Pie.

> Thus, an adverse effect on a *competitor*, even on one in a quasi-monopoly position, whose sales and profits continue to expand, and whose only injury is the loss of market dominance as a result of price competition which he himself engenders, is enough for the Supreme Court.[79]

Bowman states "but that is not all," as Justice White "used the very evidence of competition which convinced the court of appeals that no violation existed to decide that there was an antitrust violation."[80]

> Outlawing price discrimination because it might transfer funds to kill or harass competitors deserves about as much support as outlawing income itself because it might be spent on burglars' tools. The pro-competitive aspects of price discrimination, in contrast, are manifest.[81]

The *Utah Pie* decision can be seen as supporting principles found within antidumping practice. A decreasing price structure alone can be found to be inimical to the competition within a particular market, without regard to a consideration of an appropriate pricing standard, whether based upon marginal costs, a fully-allocated cost standard or the antidumping standard covering all costs and allowing for a reasonable profit. One might infer that the antidumping standard was indeed used, due to the fact that liability was imposed, even though the Utah Pie company was enjoying an increase in profits. The erosion in price structure alone provides liability, and there is no apparent analysis of market structure included in the decision. Similar to antidumping practices, this case reflects a concern for producer welfare at the expense of consumer welfare.

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78. Bowman, *supra* note 67, at 70. This article is the seminal economic analysis of the Utah Pie decision.

79. *Id.* at 73.

80. *Id.*

81. *Id.* at 83-84.

B. *Areeda and Turner: an Average Variable Cost-based Test of Predation*

The *Utah Pie* decision, along with at least two other decisions in the 1960s,[82] reflect a high water mark in establishing a producer welfare orientation for antitrust law. The first major step in the evolution of predatory pricing theory to a consumer welfare orientation was the publication of Areeda and Turner's article, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, published in 1975.[83] This article became a focal point for academic scrutiny and had a significant influence on the courts thereafter.

Areeda and Turner start their analysis by indicating that the then existing treatment of predatory pricing in the courts and legal analysis suffered from two defects: (1) "failure to delineate clearly and correctly what practices should constitute the offense," and (2) "exaggerated fears that large firms will be inclined to engage in it."[84] Vague formulations of the offense overlook the fact that predation "cannot exist unless there is a temporary sacrifice of net revenues in the expectation of greater future gains"[85] after rivals have been driven out of the market. Predatory pricing makes little economic sense unless the predator has: "(1) greater financial staying power than his rivals, and (2) a very substantial prospect that the losses incurred will be exceeded by the profits made after the predation has succeeded."[86] If monopoly power is achieved, the firm has, by definition, captured enough of the market to determine market price by varying its output and thus raising its price to supra-competitive levels.[87] The second prerequisite is less likely to occur, unless "very high barriers to entry" exist.[88] In many markets, entry barriers may be nonexistent or too low to prevent entry. Even though

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82. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

83. Phillip Areeda and Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

84. *Id.* at 698.

85. *Id.*

86. *Id.*

87. *See id.* at 702-03. Under circumstances of perfect competition, price will equal marginal cost, as the competitive firm has no power over market price. Any additional unit of output is equal to the price itself. This produces an efficient allocation of resources: the social optimum. However, when monopoly power exists, the selling of additional product will reduce price and so the monopolist faces a downward sloping demand curve. The incremental revenue to a monopolist is the lower price received for that unit as well as the lower revenue received from the sale of all its other production as a result of the lower price. Marginal revenue, therefore, is always below the price that generates it. The monopolist will only produce to the point where marginal cost equals marginal revenue and so marginal cost will be below the associated price. The monopolist's price is thus higher, and its output lower, than the social optimum; any higher output and lower price would be an improvement in resource use up to the point where, as in a competitive market, price equals marginal cost. *See id.*

88. *Id.* at 699.

predatory pricing "seems highly unlikely does not necessarily mean that there should be no antitrust rules against it."[89]

> But it does suggest that extreme care be taken in formulating such rules, lest the threat of litigation, particularly by private parties, materially deter legitimate, competitive pricing. Courts in predatory pricing cases have generally turned to such empty formulae as "below cost" pricing, ruinous competition, or predatory intent in adjudicating liability. These standards provide little, if any, basis for analyzing the predatory pricing offense.[90]

Areeda and Turner submit that prices below marginal cost should be the point at which an inference of predatory intent can be made. By definition, a firm selling goods within this range is selling at least part of its output at an out-of-pocket loss. It could restrict either its output or cease production in the extreme case if the highest price the firm could obtain is below average variable cost at all levels of production. When above marginal cost, pricing should be tolerated because it leads to a proper resource allocation[91] and is consistent with competition on the merits. When price is below marginal cost, the monopolist is incurring private losses and wasting social resources because marginal cost exceeds the value of what is produced. "[P]ricing below marginal cost greatly increases the possibility that rivalry will be extinguished or prevented for reasons unrelated to the efficiency of the monopolist . . . [a]ccordingly, a monopolist pricing below marginal cost should be presumed to have engaged in a predatory or exclusionary practice."[92]

The final step in the Areeda and Turner predatory pricing analysis is the selection of average variable cost as a surrogate for marginal cost, due to the difficulty in measuring marginal cost. Few, if any, corporations actually track and engage in financial reporting based upon marginal cost. Areeda and Turner focus upon average variable costs to provide an inference that, when pricing falls below this level, predatory pricing intent exists. The

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89. *Id.*

90. *Id.*

91. Areeda and Turner use the economic concept of perfect competition to establish this point. When this condition exists, marginal cost equals the market price. This solution in the perfectly competitive world also produces an efficient allocation of resources: market price reflects what consumers are willing to pay for the last unit of output; marginal cost reflects the full current cost of resources needed to produce it; a higher price would result in a reduction in output and thus deprive some buyers of a commodity for which they were willing to pay the cost of production.
See id. at 702.

92. *Id.* at 712. The only exception to this rule is in circumstances where price is below marginal cost but above average cost. It only occurs when demand exceeds what the firm can produce at minimum average cost. Equally efficient rivals will be making above-normal profits at this level because the firm in question is acting near capacity.

importance of the test is that it abandons a fully allocated price standard on the basis that an economically rational agent can engage in pricing above marginal cost. It has proven to be a highly influential test, but note that the inference is based upon pricing practices alone without regard to the market structure that exists. For our purposes, antidumping and antitrust practices begin to diverge, but in a sense the difference between antidumping practices and the Areeda-Turner test is simply the price point at which the appropriate inference is drawn. There are other differences. The Areeda & Turner test focuses exclusively upon the accused's pricing patterns and does not consider the financial circumstances of, or injury to, the complainant.

C. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation*[93]

The issues that the Supreme Court dealt with were: (1) the correct cost standard for determining predatory intent; (2) the role of a structural market analysis in respect of recoupment; and (3) the nature of the relationship

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93. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S.Ct. 2578 (U.S. 1993). The case involved cigarette manufacturing, a concentrated industry dominated by six firms. The plaintiff and applicant, Brooke Group, held a 2% market share while Brown & Williamson held an 11.4% market share. *Id.* at 2582-83. In 1980, the plaintiff and applicant, the Brooke Group, developed a line of generic cigarettes offered at a list price roughly 30% lower than that of branded cigarettes. *Id.* By 1984, the generics had captured 4% of the market. Brown & Williamson was hardest hit by the introduction of generics as its brands were cost-sensitive; 20% of the converts to Brooke Group generics came from Brown & Williamson. *Id.* at 2583. Brown & Williamson entered the generic segment at a lower net price. The Brooke Group responded precipitating a price war that they alleged ended with Brown & Williamson selling its generics at a loss. *See id.* at 2584. The Brooke Group commenced the action alleging, *inter alia*, that volume rebates by Brown & Williamson to wholesalers amounted to price discrimination that had a reasonable possibility of injuring competition contravening Section 2 of the Clayton Act as amended by the Robinson-Patman Act. The Brooke Group alleged further that the rebates were designed to force it to raise its prices thus restraining the growth of the generic segment and preserving Brown & Williamson's supra-competitive profits on branded cigarettes. The jury found for the Brooke Group, but the verdict was overturned by the district court as a matter of law on three grounds: lack of injury to competition, lack of antitrust injury to Liggett, and lack of a causal link between the discriminatory rebates and Liggett's alleged injury. *Id.* at 2585. The trial court's "lack of injury to competition" finding was based on a conclusion that there was no tacit coordination of prices in the generic segment among the various manufacturers, and so Brown & Williamson had no reasonable possibility of limiting the growth of the segment. *Id.* The court of appeals affirmed, holding that the dynamic of conscious parallelism among oligopolists could not produce competitive injury in a predatory pricing setting, which necessarily involves a price cut by one of the oligopolists. *Id.* "In the Court of Appeals' view, [t]o rely on the characteristics of an oligopoly to assure recoupment of losses from a predatory pricing scheme after one oligopolist has made a competitive move is . . . economically irrational." *Id.* at 2586. The syllabus was also used in describing the facts. *See id.* at 2580.

between the Sherman Act[94] and the Robinson-Patman Act[95] regarding predatory and discriminatory pricing.[96]

The Supreme Court held that price discrimination under the Clayton Act, as amended, "is merely a price difference," but "the statute as a practical matter could not, and does not, ban all price differences. . . ."[97] Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws."[98] The Supreme Court then distinguished *Utah Pie* on the ground that "[a]s the law has been explored since *Utah Pie*, it has become evident that primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act."[99] The Court confirmed that there are differences between the two statutes, but that they share the same general characteristics:

> For example, we interpret § 2 of the Sherman Act to condemn predatory pricing when it poses 'a dangerous probability of actual monopolization,' . . . whereas the Robinson-Patman Act requires only that there be 'a reasonable possibility' of substantial injury to competition before its protections are triggered . . . . But whatever additional flexibility the Robinson-Patman Act standard may imply, the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market.
>
> Accordingly, whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, the two prerequisites to recovery remain the same.[100]

When predatory pricing or price discrimination is at issue, the first requirement is that "a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of

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94. 15 U.S.C.A § 2.

95. 15 U.S.C.A.§ 13(a).

96. The argument in respect of these issues was given added piquancy because Phillip Areeda and Robert Bork (the "titans of antitrust") argued the case for the plaintiff-appellant and defendant-respondent respectively, before the Supreme Court.

97. Brooke Group Ltd., 113 S.Ct. at 2586.

98. *Id.* (citing Great Atlantic & Pacific Tea Co., Inc. v. FTC, 440 U.S. 69, 80, n. 13 (1979); Automatic Canteen Co. Of America v. FTC, 346 U.S. 61, 63, 74 (1953)).

99. *Id.* at 2587.

100. *Id.*

are below an appropriate measure of its rival's costs."[101] The Supreme Court declined to determine what constitutes an "appropriate measure" of costs because the parties agreed that the relevant measure of cost is average variable cost.[102]

The Supreme Court rejected the notion that "above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws."[103] The protection of price competition was an important aspect of the decision.

> Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition . . . . We have adhered to this principle regardless of the type of antitrust claim involved. As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.[104]

With respect to Brown & Williamson's pricing of generics evident in the case, the Supreme Court found that there was sufficient evidence "from which a reasonable jury could conclude that for a period of approximately 18 months, Brown & Williamson's prices of its generic cigarettes were below its costs . . . and that this below-cost pricing imposed losses on [Brooke Group] that it was unwilling to sustain, given its corporate parent's effort to locate a buyer for the company."[105] With the agreement between counsel in place accepting the average cost rule, Brown & Williamson's prices were below average variable costs for a significant period of time, yet the court still did not impose liability, reflecting the importance the court attributed to the protection of price competition. The court also did not impose liability even though there was sufficient evidence that a reasonable jury "could conclude that Brown & Williamson envisioned or intended this anti-

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101. *Id.* (citing Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986); and Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)).

102. *Id.* at n.1. It is not surprising that Areeda and Bork would agree to this standard. Areeda co-authored the average variable cost standard, while Bork, by inclination and as counsel for the defendant, would want the most permissive cost-based test possible.

103. *Id.* at 2588 (citing Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990)).

104. *Id.* (quoting Cargill, 479 U.S. at 116)(citations ommitted).

105. *Id.* at 2592.

competitive course of events", and thus subjective predatory intent could be established.[106]

The reason why the below-cost pricing in this case was not actionable is due to Brown & Williamson's failure to meet the second requirement, which is "a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices."[107] After having relied upon below-cost pricing, Areeda appears to have attempted to minimize the role of the recoupment approach by stating that "recoupment is simply the payoff for below-cost pricing."[108] His position in this regard is consistent with the absence of such a requirement in his formulation of the average variable cost test. The Supreme Court held:

> Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.[109]

Here, the Court has indicated that inefficient substitution toward the product being sold at less than cost is not actionable. As a result of the pricing practices evident in the case, the result holds even if the pricing involved is below average variable cost for a period of twelve to eighteen months.

The Supreme Court gave pre-eminent importance to price competition, holding that the painful losses below-cost pricing may impose on target

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106. Elzinga and Mills, *Trumping the Areeda-Turner Test: The Recoupment Standard in Brooke Group*, 62 ANTITRUST L.J. 559, 579-91 (1994):

> The third is that the Court now places so much confidence in a recoupment approach to predation that it will ignore the kind of evidence that, in Utah Pie, figured prominently: documents about the defendant's intentions . . . .
>
> There were so many such documents that the district court distinguished Brooke Group from other predation cases by claiming that the number of Brown & Williamson documents indicating anticompetitive intent are more voluminous and detailed than any other reported case.

Id.

107. Brooke Group, 113 S.Ct., at 2588 (citing Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) and Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)).

108. Elzinga and Mills, *supra* note 107, at 583 (quoting from Brief of Appellant at 4, Brooke Group v. Brown & Williamson Tobacco Corp., 113 S.Ct. 2578 (U.S. 1992)(written by Phillip Areeda)).

109. Brooke Group, 113 S.Ct. at 2588.

companies are irrelevant to the antitrust laws if competition is not injured, quoting the principle expressed in an earlier case that the antitrust laws were passed for "the protection of competition, not competitors."[110] The importance of price competition is reflected in the statement that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce'."[111] The required evidence regarding market structure also reflects that recoupment is possible. As a threshold matter, below cost pricing must be capable of driving competitors from the market or, as alleged in *Brooke Group*, causing them to raise their prices to supra-competitive levels within a disciplined oligopoly. This requires a market analysis of the relative financial strength of the predator and its intended victim and a consideration as to whether the target will likely succumb given the aggregate losses caused by the below-cost pricing.[112] If the below-cost pricing might produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must demonstrate the likelihood that the alleged predatory scheme would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. The Supreme Court held that, "[i]n order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices."[113] The finding of recoupment requires a structural analysis:

> Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market . . . . If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supra-competitive pricing, the plaintiff's case has failed. In certain

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110. *Id.* at 2588-89 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). It is interesting to note that the court relies upon the first branch of the Brown Shoe quote without rationalizing the second branch "[b]ut we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally-owned businesses." *Id.*

111. *Id.* at 2589 (quoting Hunt v. Crumboch, 325 U.S. 821, 826 (1945)).

112. *Id.* at 2589 (citing Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)).

113. *Id.*

> situations — for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity — summary disposition of the case is appropriate.[114]

The Court notes that the two prerequisites, below cost pricing and recoupment, "are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components for real market injury."[115] The Court refers to its dictum in *Matsushita* that "predatory pricing schemes are rarely tried, and even more rarely successful" and notes that "the costs of an erroneous finding of liabilities are high."[116] Price competition is the same mechanism by which a firm engages in predatory pricing or stimulates competition. As "cutting prices in order to increase business often is the very essence of competition . . . mistaken inferences . . . are especially costly, because they chill the very conduct that the antitrust laws are designed to protect."[117] The Court further notes, "[i]t would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high."[118]

The Supreme Court affirmed the decision of the Court of Appeals, upholding the dismissal of the case.[119] The Brooke Group failed to demonstrate competitive injury because it could not show that "Brown & Williamson had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics."[120] No evidence indicated that Brown & Williamson "was likely to obtain the power to raise the prices for generic cigarettes above a competitive level."[121]

The implications of this case are many. Elzinga and Mills argue that the cost-based tests have now receded in importance, and that the structural test is the dominant or threshold requirement.[122] This analysis appears to be correct. The importance of the structural test is evident in the fact that no finding of predatory or discriminatory pricing existed even though Brown & Williamson had priced its goods below average variable costs and that evidence of subjective predatory intent was replete in Brown & Williamson's records. The cost-based rules generally allowed drawing an inference of predatory intent when pricing was evident in this range. After *Brooke*

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114. *Id.* (citing Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)).
115. *Id.*
116. *Id.* (quoting Matsushita, 475 U.S. at 589).
117. *Id.* at 2589-90 (quoting Cargill, 479 U.S. at 122).
118. *Id.* at 2590.
119. *Id.* at 2578.
120. *Id.* at 2592.
121. *Id.*
122. *See* Elzinga and Mills, *supra* note 106, at 578-80, 582-84.

Group, such inferences are not permissible without the appropriate finding of a market structure allowing recoupment. The interests of consumers are now of such pre-eminent importance that they are entitled to the benefit of low pricing introduced with the subjective intent of driving competitors from the market, as long as the market structure indicates that the attempt to monopolize has little chance to succeed.

The case is also notable due to Posner's analysis that predatory pricing includes two different forms of inefficient substitution; toward the product during the period of low pricing, and away from the product during the period of subsequent monopolization.[123] Cost-based rules permitting a finding of liability without a structural market analysis would target either form of inefficient substitution. The Supreme Court has expressly held that the first kind of inefficient substitution cannot sustain an antitrust cause of action.

The *Brooke Group* determination marks the evolution of antitrust predatory pricing principles from the shared perspective of producer welfare to a consumer welfare orientation. In addition, an analysis of pricing practices alone cannot provide the inference of anti-competitive conduct. A detailed structural analysis must be undertaken, and a market structure found, that allows an inference that recoupment is possible. If not, consumers benefit from lower prices notwithstanding the possibility of anti-competitive intent providing the motivation for price competition.

IV. A MARKET STRUCTURE TEST FOR NAFTA/FTAA ANTIDUMPING PRACTICES

There are a number of profound differences between antidumping and antitrust principles with respect to what constitutes actionable pricing. A geographical difference in pricing is sufficient for antidumping practices, even if the prices charged are above marginal price and at levels marking an unacceptably low *de minimus* threshold for the imposition of duties. No analysis of price in relation to cost is necessary, unless a constructed cost analysis is undertaken which is based upon a fully allocated cost standard versus the marginal cost standard proposed by the Areeda-Turner test. No consideration is given to the fact that if the prices in the export-home market truly are higher, an opportunity should exist for market entry. If antidumping duties are imposed when such an opportunity exists, they achieve a suppression of price competition in the complainant-import market and dampen the incentive placed upon domestic producers to aggressively seek an expansion of sales in at least the export-home market.

Actionable pricing pursuant to antitrust standards has evolved from a simple pricing trigger point provided by the Areeda-Turner test (below average variable cost, a standard intended as a surrogate for marginal cost)

123. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 310 (4th ed. 1992).

to an assessment of market structure. Although not yet endorsed by the U.S. Supreme Court, the marginal cost standard highlights the unfairness of the antidumping standard requiring prices above a fully-allocated cost standard, as antidumping duties can be imposed even when the respondent company has acted rationally in its pricing policy. In the antitrust context, the addition of a market structure analysis in the form of a recoupment test results in pricing below marginal cost being actionable only in rare circumstances where a market structure exists which allows recoupment of profits lost during the predatory campaign. Antitrust protects consumer welfare by promoting price competition even if it is below cost, in certain circumstances.

Antidumping law has no concept of a recoupment test and, indeed, no market structure analysis is undertaken, except in the context of the determination of injury. The problem is that the threshold of injury, or the threat thereof, is relatively low and concentrates solely upon the economic condition of the complainants in the import market. It tends to ignore the conditions of entry in the exporter's home market, which would allow a determination whether there is some structural impediment or whether a competitive opportunity exists which the complainants have failed to exploit. Similarly, there is no analysis as to whether there is any danger of recoupment through an escalation of prices in the complainant-import market, assuming for the moment that the low pricing did signify a predatory campaign intended to drive the complainant-import market producers out of business.

The contrast between antidumping practices making actionable pricing above a fully-allocated cost standard and antitrust principles, in which pricing below marginal cost is often protected, highlights the important difference in orientation between the two systems of law. As indicated above, antidumping law protects producer welfare while antitrust law protects consumer welfare. The question arises whether this difference in orientation is justified in the circumstances of a regional free trade agreement intended to remove most, if not all, barriers to trade across a large variety of market segments. Under the terms of a free trade agreement where barriers have been dismantled in a particular sector, there appears to be no justification for maintaining antidumping practices.

Canada has already established the precedent for the elimination of antidumping practices in the Canada-Chile Free Trade Agreement and should follow it in future negotiations. In the alternative to complete elimination of the mechanism, a market structure test should be established requiring the complainant to identify particular market impediments that insulate the home market, thereby allowing a higher price to be maintained. Antidumping duties should be imposed only if the complainant can establish that a particular public or private impediment exists which allows the exporter to discriminate between its home market and the complainant-import market.

The impediment cannot be one based upon efficiency, and causation must be established.

A. Actionable Private Practices in the Context of Canadian-American Trade

Apart from a government regulatory restriction, the question arises as to what private practices might be cited by a complainant as a market impediment. In the context of bilateral trade between the United States and Canada, a complainant might utilize its own competition law in determining whether anti-competitive conduct has resulted in the erection of an actionable market impediment. Both Canada and the United States have mature competition law regimes and regulatory infrastructures at an advanced stage of development, when compared to the significant number of new competition codes that have been adopted by developing and emerging economies throughout the world.

To illustrate the manner in which the mechanism could work between fully-developed economies, if the United States was seeking to impose antidumping duties on Canadian products, the American administrative tribunal would apply domestic competition law to the market structure of the industry in question in the export-home market to see if American or other foreign goods are being excluded by anti-competitive conduct. If such conduct is occurring, the United States would be permitted to impose antidumping duties determined according to existing practices. In the absence of such conduct, no antidumping duties could be imposed.

The competition law of the complainant's jurisdiction has been chosen because the duties are only being imposed in that market. The test is intended to be a filter making antidumping duties hard to obtain, and the administrative tribunals asked to make such a finding will be most familiar with domestic legal standards. If the administrative tribunal asked to make the determination is the competition law authority, the interpretation of the law should be consistent with other determinations made in the domestic context. This would prevent selective interpretation of competition law in a manner freed from concern for the orderly development of competition law within the domestic context.

The *Brooke Group*[124] case established that the same principles underlie predatory pricing or discriminatory pricing allegations under either the Sherman Act[125] or the Robinson Patman Act.[126] If the market structure test was to be adopted in the circumstances of NAFTA,[127] complainants within the United States would be required to meet the *Brooke Group* thresholds,

124. Brooke Group v. Brown & Williamson Tobacco Corp., 113 S.Ct. 257 (U.S. 1993).
125. 15 U.S.C.A § 2 (1997).
126. 15 U.S.C.A § 13 (1997).
127. *See* NAFTA, *supra* note 7.

involving: (1) pricing below a reasonable standard and (2) a market structure exists that permits recoupment. The pricing standard appears to be the average variable cost standard surrogate for marginal costs established by the Areeda-Turner test, although the Supreme Court has not determined that this is indeed the correct standard. The acceptance of an average variable cost standard would have the benefit of substituting a rational pricing standard for the fully-allocated cost standard accepted in antidumping practices.[128]

We readily admit that the imposition of such a market structure test would result in a severe curtailment of antidumping complaints or, even more happily, the effective elimination of antidumping practices. In fact, this is the objective of the imposition of such a requirement. The difficulty of succeeding in circumstances of international price discrimination allegations should such a market structure test be imposed is underscored by the Supreme Court decision in *Zenith v. Matsushita*.[129] This case involved allegations that twenty-one Japanese corporations dumped televisions into the American market as part of a conspiracy to drive American firms from the market, while maintaining artificially high prices for television sets sold in Japan.[130] The Supreme Court dismissed predatory pricing allegations made pursuant to the Sherman Act[131] and the Robinson Patman Act[132] on the basis that predatory pricing conspiracies by their very nature are speculative, and there must exist the possibility of recoupment of lost profits after the American competitors were driven from the market.[133] The Court found that the proffered objective of the alleged twenty-year-old conspiracy was yet far distant.[134] The Court also found that the casual connection between higher pricing decisions in one market and lower pricing decisions in a different more competitive market is questionable.[135]

> Nor does the possibility that petitioners have obtained supra-competitive profits in the Japanese market change this calculation. Whether or not petitioners have the means to sustain substantial losses in this country over a long period of time, they have no motive to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. The courts below found no evidence of any such success, and—as indicated above—the facts actually are to the contrary: RCA and

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128. Of course, trade negotiators might be forgiven for maintaining the fully-allocated cost standard as a *quid pro quo* for imposing the second or market structure threshold of the Brooke Group test.

129. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

130. *See id.* at 577-8.

131. 15 U.S.C. art. 2.

132. 15 U.S.C. art. 13(a).

133. Matsushita, 475 U.S. at 588-93.

134. *Id.* at 591.

135. *Id.* at 593.

> Zenith . . . continue to hold the largest share of the American retail market in color televisions sets. More important, there is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market. In the absence of any such evidence, the possible existence of supra-competitive profits in Japan simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy.[136]

The point is that there must be a market structure permitting recoupment of profits lost during the period of predatory conduct in the U.S. market. If no such market structure exists, the fact of profits in a foreign jurisdiction is irrelevant, and allegations of cross-subsidization are not actionable. Price competition should be protected.

The *Zenith v. Matsushita*[137] case provides another bridge between competition law and antidumping practices. The American complainants included antidumping allegations in the complaint pursuant to the 1916 Antidumping Act.[138] This statute creates a private cause of action and prohibits an importer from selling substantially below the actual market value or wholesale price prevailing in either the country of production or another foreign market when the dumping is undertaken with the intent of injuring a U.S. industry.[139] The statute penalizes dumping undertaken with the specific intent of "destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."[140] The district court granted summary judgment and dismissed both the competition law and antidumping allegations. The Third Circuit Court of Appeals heard an appeal concerning the antidumping allegations and held that there was sufficient direct and circumstantial evidence of, among other things: (1) high barriers of entry to the Japanese market; (2) the Japanese manufacturers "created higher plant capacities than could reasonably be absorbed by the Japanese home market, thereby creating an incentive to dispose of the excess capacity in markets outside Japan"; and (3) "an agreement to stabilize Japanese home market prices to realize the profits needed to support sales at low prices in the United States" which

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136. *Id.* at 593.

137. *Id.*

138. 15 U.S.C. § 72 (1994). In WTO complaints commenced by the European Community and Japan, the 1916 Antidumping Act was found inconsistent with United States' obligations under the WTO Agreements. *See* Appellate Body Report, United States–Antidumping Act of 1916, WT/DS136/AB/R;WT/DS162/AB/R, AB-2000-5, AB-2000-6, *available at* http:/www.wto.org/english/tratop_e/dispu_e/distab_e.html.

139. *Rethinking the 1916 Antidumping Act,* 110 HARV. L. REV. 1555 (1997).

140. 15 U.S.C. § 72; *see also Rethinking the 1916 Antidumping Act, supra* note 140, at 1557 (quoting 15 U.S.C. § 72).

produced losses often as high as twenty-five percent on sales.[141] The Supreme Court found that there was no motive to continue the predatory campaign in the United States and refused to deal with the antidumping issues.[142] On remand regarding the antitrust issues, the court of appeals dismissed the entire case, holding that it was bound to do so by the Supreme Court's finding that the Japanese defendants had no motive to sustain substantial losses over a sustained period of time.[143]

It might be suggested that if a market structure test is imposed with respect to antidumping practices, any complainant should proceed under the competition laws and ignore the antidumping practices entirely. One of the most important aspects of American antitrust law is the entitlement to treble damages available through the private right of action by those injured by the improper conduct.[144] If a market structure can be proven such that the court accepts that recoupment is possible, there is an incentive to proceed under the antitrust statutes, at least in the United States, to take advantage of the treble damages provision. Diverting antidumping disputes to determination under antitrust law is an acceptable result because it achieves the effective elimination of antidumping practices in favor of a competition law mechanism.

B. Actionable Private Practices in the Context of Developing Economies with New Competition Codes/authorities

The problem with using the provisions of domestic competition law to establish whether an actionable private practice exists is that those trade agreements, such as the FTAA[145] initiative, include developing economies in Central and South America as well as the Caribbean. Some of these potential free trade partners have newly enacted competition codes and institutions that do not enjoy the traditions, policy infrastructures, and resources that are evident in Canada and the United States. Professor William Kovacic reports that more than forty emerging economies have enacted new antitrust laws since 1975, and as many as twenty more are likely to do so within the next

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141. In Re Japanese Electronic Products Antitrust Litigation, Zenith Radio Corp. and National Union Electric Corp., 807 F.2d 44, 47 (3d Cir. 1986).

142. Matsushita, 475 U.S. 574 n.3.

143. In re Japanese Electronic Products, 807 F.2d at 47.

144. Section 4 of the Clayton Act provides:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . . .

15 U.S.C. § 15(a) (2000).

145. FTAA, *supra* note 3.

decade.[146] He points to a number of concerns with the development of these new institutions, including that they are often given a number of functions,[147] they often have political and social objectives imposed upon them with economic efficiency playing a role of lesser importance,[148] and they are often poorly funded and staffed.[149] He also indicates that the new competition law institutions exist on fragile political foundations and often "begin operating without the political ties and power base that [their] adversaries inside and outside the government will enjoy."[150] In addition, there is a relative absence of competition policy expertise and experience which can result in a relatively difficult environment for the requisite traditions to take root.[151] The situation is further complicated by what Kovacic terms "dysfunctional courts" and because "[f]ew judges have even a rudimentary understanding of market processes, let alone comprehension of the basic rationale for and elements of an antitrust system."[152] Why then are there so many new competition laws being introduced? Kovacic indicates that one of the primary motivating factors is Western donors and institutions, such as the World Bank and the International Monetary Fund, tying the provision of aid in part to the development of competition law institutions. He indicates that these well-meaning donors may not have the long-term commitment to funding these institutions.[153]

Kovacic recommends a gradualist approach to the implementation of competition laws and institutions instead of a "big bang" introduction of the entire panoply of antitrust rules and remedies.[154] We suggest that the objective of introducing competition law traditions might be facilitated by including a competition law-based market structure test directly into the free trade agreement itself. As reviewed above, antidumping practices are based upon detailed rules contained in a fully developed code within the WTO Agreements. It should be possible to modify the code in the context of the free trade agreement. The inclusion of the rules in the supra-national agreement would provide guidance to the newly established competition law and trade authorities in the developing nations. It might provide them with valuable experience in dealing with the competition law concepts that are

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146. William E. Kovacic, Competition Policy for Transition Economies 1 (May 14, 1999)(unpublished manuscript on file with authors).

147. On occasion, they include antitrust, consumer protection, and trade law responsibilities. In Peru, the administrative tribunal, Indecopi, has responsibility for antitrust, bankruptcy, consumer protection, intellectual property, and trade policy functions. *See id.* at 16.

148. *See id.* at 13-15.

149. *See id.* at 16-17.

150. *Id.* at 19.

151. *Id.* at 19-20.

152. *Id.* at 20.

153. William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403, at 407, 422, and 428 (1997).

154. Kovacic, *supra* note 146, at 28.

established thereby, such as the importance of consumer welfare as a competition law objective. The mechanism would also benefit from the analysis of the mechanism available through competition law authorities in Canada and the United States, as well as the scrutiny of the mechanism by the well-established academic and professional association commentators who will subject it to extensive critical analysis. Each decision would be subject to criticism, especially in the early stages. Contacts will also be fostered between such competition law institutions and those in the developing nations and transitional economies. As Kovacic indicated, this is an important element in establishing competition law traditions.

The development of competition law traditions in the developing nations that have only recently adopted them or otherwise do not have much experience with them will also be fostered by the institutions that would be established in support of the free trade agreement. At the very least, the secretariats that have been established in the jurisdiction of each free trade partner, although relatively meager, would help coordinate the resources provided in support of the mechanism. The decisions emanating from the various jurisdictions, especially from Canada and the United States, would also provide an impetus for uniform interpretation of the market structure test principles included in the free trade agreement. This uniformity of interpretation would be promoted even if the decisions from the various jurisdictions did not have the binding authority of legal precedents.[155] A more important authority for developing uniform interpretation would be the oversight of domestic decisions through the establishment of a bi-national or multi-national panel mechanism and an Extraordinary Challenge Committee, each having become commonplace in the CUSFTA and the NAFTA. The bi-national panel process, although exhibiting some weaknesses, receives credit for forcing domestic administrative tribunals to document and clarify their reasoning in a more rigorous fashion than had been evident before such international oversight was established. One of the weaknesses of the NAFTA bi-national panel mechanism is the shackling of the panels to a judicial standard of review. The bi-national panel process, in the context of a market structure impediment, would be improved if the panels were permitted to undertake *de novo* review of the final decisions of domestic administrative tribunals.

The question arises as to what principles should be included in the free trade agreement regarding a market structure mechanism. Antidumping involves allegations of predatory pricing or regional price discrimination. It is submitted that the appropriate principles would be those established by the *Brooke Group* precedent because they were developed in the context of such allegations. The principles include, that the complainant must demonstrate:

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155. Chapter 19 of NAFTA specifically provides that the decisions of the bi-national panels do not have binding authority as precedents. Notwithstanding this, the decisions do appear to have persuasive power. *See* NAFTA, *supra* note 7, ch. 19.

(1) pricing below a reasonable standard and (2) a market structure exists that permits recoupment.[156] The appropriate pricing standard should be the average variable cost standard surrogate for marginal costs, established by the Areeda-Turner test. This would have the benefit of substituting a more rational pricing standard for the fully-allocated cost standard accepted in antidumping practices. However, the objective is to implement a market structure test that will make the imposition of antidumping duties difficult if not impossible to achieve. It would be an acceptable compromise if the price is the continuance of a fully-allocated cost standard.

The benefit of including the *Brooke Group* standard is that it firmly establishes consumer welfare as the appropriate objective for the mechanism, and it sets a high threshold. Basing the mechanism on American law should make it more palatable to American trade negotiators and Congress. The chance to establish a competition law precedent in the free trade agreement and promote the development of competition law traditions within developing nations without such traditions should also be of interest to the United States. This is not to underestimate the difficulty, if not impossibility, of substantially reforming antidumping practices through the imposition of a market structure test. If protectionism is on the rise in the United States, and since Canada has begun negotiations with Costa Rica and eventually other Central and South American nations in a quasi-FTAA, why not experiment with such a reform? Of course, it is unknown at this point whether President-elect George W. Bush will have greater success obtaining fast-track authority from Congress to recommence the full FTAA negotiations.

C. *Actionable Public Provisions Subject to Review*

The logic of the argument set forth in the Standing Committee Report would suggest that the complainant should be required to show that a particular public practice acts as a barrier to entry and allows the respondent to undertake international price discrimination. If the particular public practice in question does not impede market access, then the case to impose duties appears to be lacking because higher prices in the export-home market should attract market entry. A market impediment could be the continuing existence of a tariff or some other regulatory restriction which insulates the domestic market. If the only restriction between the markets is a tariff, the antidumping duty that could be imposed should be limited to the amount of the tariff. For instance, if a tariff of 2.5% *ad valorem* exists, an antidumping duty might be limited to the same figure. It would seem somewhat absurd if a market impediment could only impose a 2.5% difference in price, as this could result in antidumping duties in double digit figures. In our view, if antidumping practices are to be maintained with the addition of a market structure test, blatant impediments such as the continuing existence of a

156. *See supra* pp. 60-68.

tariff, should be sufficient to trigger the application of antidumping duties, assuming that the other requirements can be met.

The more difficult issue is what public practices or non-tariff barriers should be sufficient to justify the imposition of antidumping duties, which may have a much more subtle effect than a blatant tariff barrier. A mere difference in regulatory environments should not be sufficient. Labor laws, environmental laws, or the income tax structure might be different, but mere differences in the regulatory environment should not be actionable when they are general in nature, such that all firms are subject to compliance on a national treatment basis. These differences may not give rise to an ability to discriminate between markets in a manner that permits supra-competitive profits to be realized. In the case of more subtle market impediments, the complainant should have the obligation to prove that the particular public practice complained of permits the respondent to discriminate between the home or export market and the complainant-import market and realize supra-competitive profits in the export-home market. This requires that the complainant show that the public practice has acted as an "artificial" barrier to entry, preventing the respondent from selling into the export-home market.

The concept of a "barrier to entry" introduces a potentially difficult analytical issue to the market structure test.[157] Professor Bork rejects a large number of conditions which some argue constitute barriers to entry and which he views as advantages obtained as a result of greater efficiency.[158] Professors Bork and Posner appear to agree as to what might constitute an artificial barrier, with Bork suggesting that they are barriers not based upon efficiency which prevent market entry or "the growth of smaller firms already within the industry from operating to erode market positions not based on efficiency."[159] Posner extends this concept by stating that an artificial barrier "must be something that makes the small firm's marginal costs as high as the monopoly price charged by the leading firms so that the small firm cannot make money by shading that price."[160] Both appear to

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157. There are at least two definitions of a barrier to entry. The "Bainian" definition states that entry barriers measure the extent to which, in the long run, established firms can elevate their selling prices above the minimal average costs of production and distribution without inducing potential entrants to enter the industry. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, THE LAW OF COMPETITION AND ITS PRACTICE 39 (1994). The "Stiglerian" definition provides that "entry barriers are costs that a prospective entrant must incur at or after entry, that those already in the market did not have to incur when they entered." *Id.* at 39-40.

158. These include economies of scale, physical product differentiation, advertising and promotion, capital requirements, dealerships, leases and deferred rebates. *See* ROBERT H. BORK, THE ANTITRUST PARADOX, A POLICY AT WAR WITH ITSELF 310-29 (1978).

159. *Id.* at 311. Posner accepts this definition: "a barrier to entry is a condition that imposes higher long-run costs of production on a new entrant than are borne by the firms already in the market." RICHARD A. POSNER, ANTITRUST LAW, AN ECONOMIC PERSPECTIVE 59 (1976)(citing George J. Stigler, *Barriers to Entry, Economies of Scale, and Firm Size*, in ORGANIZATION OF INDUSTRY 67 (1968)).

160. RICHARD A. POSNER, AN ECONOMIC PERSPECTIVE 92 (1992).

suggest that an artificial barrier to entry is in reality an exclusionary practice that would otherwise be actionable and so the concept of an artificial barrier adds little if anything to antitrust analysis. By concentrating upon exclusionary and collusive practices, artificial barriers are sorted out from efficient barriers,[161] and this is why we based the antidumping market structure test on the *Brooke Group* standard.

While the concept of a barrier to entry is somewhat difficult in the context of a private practice, it is generally recognized that public practices can represent an important source of barriers to entry. Hovenkamp states that "[v]irtually all sides agree that government regulation, licensing and entry restrictions collectively create among the greatest and most effective entry barriers."[162] Bork argues that "[p]redation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition."[163]

> In the early years of antitrust policy there were fewer opportunities for monopolization through misuse of government because governmental regulation was not so pervasive as it is today. The last several decades have witnessed an enormous proliferation of regulatory and licensing authorities at every level of government, federal, state, and local. In order to enter the market and vie for consumers' favor, businesses of all types must gain various types of approval from governmental agencies, departments, and officials. Licensing authorities, planning boards, zoning commissions, health departments, building inspectors, public utilities commissions, and many other bodies and officials control and qualify the would-be competitor's access to the marketplace. . . . The modern profusion of such governmental authorities offers almost limitless possibilities for abuse.[164]

While artificial barriers to entry arising from private practices are considered rare, restrictions upon market access imposed by government action can be effective barriers, particularly if government restrictions are

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161. *See id.* "In short, it takes a good deal of strained and ad hoc argumentation to explain persistent monopoly or concentration without assuming unlawful exclusionary practices, lawful patent protection, economies of scale, superior management, competitive pricing, or other factors that would not normally justify dissolution proceedings." *Id.* at 93. *See also* BORK, *supra* note 158. "An artificial barrier to entry is, of course, an exclusionary practice .... Every barrier will be either a form of efficiency deliberately created or an instance of deliberate predation. There is no 'intermediate case' of non-efficient and unintended exclusion. Failure to bear that in mind leads to serious policy mistakes."

162. HOVENKAMP, *supra* note 157, at 473.

163. BORK, *supra* note 158, at 347.

164. *Id.*

coordinated with private practices through administrative guidance. Such barriers to trade represent a difficult challenge for competition law which generally does not extend to public practices as a result of "state action" doctrines which are reportedly found in most if not all competition law regimes.[165]

Before antidumping duties can be imposed, the complainant should be required to show that a public practice is a barrier to entry and a proximate cause of price discrimination between the export-home market and the complainant-import market. The price discrimination in question must produce greater profit margins in the export-home market such that the price discrimination is not simply a reflection of a difference in cost structure between the two jurisdictions.[166] The evidence that a public practice represents a barrier to entry could best be provided by an attempt to actually sell into the export-home market by the complainant itself, but the complainant should have the opportunity to establish that other international competitors in the particular market segment have similarly been unable to sell into the export-home market.

D. The Appropriate Remedy

Thus far, the market structure test has been discussed in the context of a remedy involving the imposition of antidumping duties if an actionable private or public practice is identified and the traditional antidumping requirements have been met.[167] A more principled remedy would be to enjoin the conduct complained of with respect to the private actions, but we recognize that such a remedy is unlikely to be instituted, particularly when the investigation is undertaken by a domestic administrative tribunal in the complainant-import market. Of course, the provision of such a remedy at the bi-national panel level might be somewhat more attractive, if the bi-national panels were allowed to undertake a *de novo* review of any final determination undertaken by the administrative tribunal.

If a public practice is identified which is found actionable such that antidumping duties could be imposed, the remedy should promote the elimination of the public barrier to entry in the export-home market within a reasonably short period of time. Once again, a remedy allowing the bi-national panels to order the removal of the public barrier would be justified

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165. "Every nation has some form of a state action doctrine and an act of state doctrine, exempting certain government acts from antitrust." Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 21 (1995).

166. Once price discrimination is shown, the burden of proof could shift so that the respondent would have a chance to resist the finding of price discrimination on the basis that it represents a difference in cost structure.

167. We did suggest above that an "average variable cost" test would be more principled than the current "fully allocated cost" standard.

if the bi-national panels were permitted to undertake a *de novo* review of the administrative panel determination. In any event, the respondent jurisdiction should have the option of eliminating the public barrier to entry within a reasonably short period of time. The bi-national panels might be given the authority to an order rescinding the antidumping duty award, if the respondent government can establish that the impugned public practice has been eliminated.

V. CONCLUSION

The reversal of Canada's traditional trade policy position is unfortunate, and the objective of the elimination of antidumping practices should once again be pursued. The Canada-Chile Free Trade Agreement achieved this objective, and the negotiations underway between Canada and Costa Rica represent an opportunity to extend the precedent. In the alternative, the introduction of a market structure test would go a long way to reduce, if not eliminate, antidumping duties. This is due to the fact that findings of anti-competitive conduct are not easy to obtain. The inclusion of a market structure test based on the principles of the *Brooke Group* precedent has the collateral value of helping to establish competition law traditions and institutions in developing nations in Central and South America, and in the Caribbean, that likely could benefit from them.

In the leadership vacuum created by the growth of protectionist sentiment which appears to have existed in the United States over the past few years, the question arises whether Canada should be pursuing a much broader trade initiative. It appears that the FTAA initiative has fractured into a number of different trade initiatives in Central and South America. Using Costa Rica as an example of the kind of initiatives now underway, Costa Rica reached a free trade agreement with Mexico in 1994, the Dominican Republic in 1998, and Chile in December 1999. It is also involved in trade negotiations with El Salvador, Guatemala, Honduras, Nicaragua, and Panama, among other trade initiatives.[168]

There appears to be an opportunity to coordinate these trade initiatives into a "framework agreement" that could then form the basis of the negotiation with the United States for a Free Trade Agreement of the Americas, once the trade policy climate has improved. There clearly is a need to coordinate the various bilateral free trade agreements now existing between Canada, Chile, Costa Rica, and Mexico. The framework agreement could then be extended to include the various negotiating initiatives with other Central and South American trading partners.

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168. *See* James D. Leach and Charles M. Gastle, Canada-Costa Rica Free Trade Initiative, Apr. 14, 2000 (submission to Canadian Dept. of Foreign Affairs and International Trade), *available at* http://www.esteycentre.ca/library.html.

A significant precedent would be established if the framework agreement adopted the Canada-Chile Free Trade Agreement's approach to the elimination of antidumping practices. It is extremely unlikely that the United States would subsequently agree to an FTAA eliminating antidumping practices, but, at the same time, a principled approach to the elimination of antidumping practices should be taken when the opportunity presents itself. Alternatively, there may exist an opportunity to introduce a market structure test into a framework free trade agreement. This would be virtually impossible to achieve if the United States was a participant in the negotiations.

DOLLARIZATION OF ECUADOR: SOUND POLICY DICTATES U.S. ASSISTANCE TO THIS ECONOMIC GUINEA PIG OF LATIN AMERICA

Hale E. Sheppard*

I. INTRODUCTION

It was not supposed to turn out this way . . . .[T]he abandonment of the interventionist and populist state in

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* Hale E. Sheppard (B.S. Journalism with distinction; M.A. Latin American Studies with honors; J.D. - University of Kansas; Magister (LL.M. equivalent) in International Law with highest distinction - University of Chile) works in the Americas Practice Group of Haynes and Boone, LLP, a full-service law firm with offices in Texas, Washington D.C., and Mexico.

> Latin America more than a decade ago [was] supposed to usher in a period of unparalleled prosperity. The invisible and efficient hand of the market, now made more powerful through globalization, would succeed where the incompetent and often bloody hand of government had failed. But more than a decade after the annunciation of this 'end of history,' country after country among the new emerging-market economies has fallen into financial crisis . . . .[1]

As evidenced by this quotation, despite high expectations, the majority of the economies in Latin America, including Ecuador's, have incurred significant problems in recent years. Solutions to overcoming this volatility have been diverse, each implemented with varying degrees of success. Ecuador, a country characterized by extreme political and economic instability, recently became the first Latin American country in nearly a century to introduce "dollarization." In addition to replacing the Ecuadorian national currency (the *sucre*) with the U.S. dollar, dollarization entails significant alterations to the political, social and economic structures existing in Ecuador. Due to this country's links with the United States, Ecuador's adoption of the dollar may generate serious repercussions in the United States, both positive and negative. As a result, the United States, perhaps more than any other country, is strictly scrutinizing this economic transformation process. According to high-ranking government officials, "[i]t is possible that there are more people in Washington concerned about dollarization of the economy than there are in Ecuador . . . ."[2] As with any polemic issue, opinions regarding the appropriate strategy to be utilized by the United States under the circumstances are diametrically opposed. Based on the information available on this topic, it appears that the only thing on which the experts agree is that they will continue to disagree: "[T]he debate has quickly become polarized: Both sides seem to accept that there can be no middle ground, no half-way arrangement . . . ."[3]

This article advocates limited U.S. participation in the dollarization of Ecuador and begins by briefly explaining the concept of dollarization in its many forms. Section two analyzes the dollarization process in Ecuador and provides a concise history of the general economic difficulties experienced in the country, as well as details of the tumultuous situation in recent years that served as an impetus to dollarization amid considerable controversy. Section three focuses on the *Ley Fundamental para la Transformación*

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1. Ricardo Hausmann, *Should There Be Five Currencies or One Hundred and Five?* FOREIGN POL'Y, Fall 1999, at 65.

2. *Ecuador Hopes to Sign Two Billion IMF Standby Credit Next Week*, AFX NEWS LIMITED, Mar. 21, 2000, LEXIS, Nexis Library. This comment was made by Ecuador's Foreign Minister, Heinz Moeller. *See id.*

3. Hausmann, *supra* note 1, at 66.

Económica del Ecuador ("Economic Transformation Law"), the legislation recently promulgated by the Ecuadorian congress designed to facilitate the dollarization process in its entirety, including all relevant banking, financial, tax, commercial, contractual and labor regulations. Section four presents the policy arguments in support of dollarization from the perspective of both Ecuador and the United States. The fifth section suggests that assistance from the United States in the dollarization process is logical and, in effect, inevitable due to policy justifications and key instruments used to implement dollarization (the Economic Transformation Law and the Ecuadorian legal system). In other words, far from being merely another imperialistic intervention or hegemonic maneuver under the guise of international altruism, this article concludes that participation by the United States in the dollarization of Ecuador constitutes sound policy favorable to both nations.[4]

II. DOLLARIZATION

Until recently, the concept of dollarization has received minimal attention because, according to the traditional view, it was a "political impossibility."[5] In recent years several factors have created an interest in dollarization, including: (1) in Europe, the introduction of the common currency (the *euro*) and the possibility of the entrance into the monetary union by the Eastern European countries; (2) in Latin America, Argentina's relatively successful experience with the use of the dollar and the currency-board type system implemented in 1991; and (3) worldwide, the repercussions generated by the financial crises in Mexico (1994-1995), East Asia (1997-1998), Russia (1998) and Brazil (1998-1999).[6]

In broad terms, dollarization can be divided into three main categories. First, unofficial dollarization occurs when residents of a country, in the

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4. *See* FONTANA DICTIONARY OF MODERN THOUGHT (1999). The concept of "hegemony" is defined as "political and economic control by a dominant class, and its success in projecting its own way of seeing the world, human and social relationships as 'common sense' and part of the natural order by those who are, in fact, subordinated to it." *See also* AMERICAN HERITAGE COLLEGE DICTIONARY 629 (3rd ed. 1997). (defining the term "hegemony" as "[t]he predominant influence of one state over others.") Restricted U.S. assistance to Ecuador in implementing dollarization would not constitute a hegemonic maneuver for the following reasons: (1) While U.S. participation would benefit Ecuador, the principal motive for such action would be to safeguard U.S. domestic interests; (2) Ecuador unilaterally decided to dollarize, without any discussions or pressure from the United States; (3) Ecuador has explicitly solicited assistance both from the United States and international financial organizations; and (4) any renunciation of economic control by Ecuador was done voluntarily. Information on the topic of U.S. hegemony in Latin America abounds. *See e.g.* G. Pope Atkins, LATIN AMERICA IN THE INTERNATIONAL POLITICAL SYSTEM 40-41 (3d ed. 1995).

5. *See generally* STAFF OF JOINT ECON. COMM., REPORT ON BASICS OF DOLLARIZATION (prepared by Kurt Schuler) (Jan. 2000), *available at* http://www.senate.gov~jec.basicshtml.

6. *See* Zeljko Bogetic, *Official or "Full" Dollarization: Current Experiences and Issues* (June 9, 1999), *available at* http://users.erols.com/kurrency/bogdlr.html.

absence of formal government approval of the practice, retain a large share of financial wealth in assets denominated in foreign currency. This currency retention comes in a variety of forms such as: (1) foreign currency bonds or other noncash assets; (2) foreign currency cash; (3) foreign currency deposits in domestic banks; and (4) foreign currency deposits in foreign banks. Despite attempts by some governments to conceal such information, unofficial dollarization is significant in many developing countries. According to a study conducted by the International Monetary Fund (IMF), in 1995 over thirty percent of these countries registered "high" levels of dollarization.[7] Such incidence of unofficial dollarization does not occur instantly; rather, it is the result of a three-step process.[8] Unofficial dollarization is ordinarily a gradual progression that may be accelerated by an increase in economic instability of a nation as "the probability of devaluation rises . . . more citizens shun the national currency in favor of the historically more stable U.S. dollar."[9]

The second category is known as semi-official dollarization, which is another name for a bi-monetary system where two distinct currencies are legally recognized and circulate simultaneously. Presently, more than a dozen countries have adopted this financial structure.[10] In these nations, the dollar is considered legal tender and may dominate bank deposits, yet remains subordinate to the domestic currency in terms of paying wages, taxes and everyday expenses. Like countries with unofficial dollarization, these nations retain their central banks and, therefore, are able conduct their own monetary policy.

The third category, official dollarization, contemplates an absolute monetary union between at least two nations. In such cases, the imported foreign currency (*i.e.*, the dollar) is converted into full legal tender and the

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7. STAFF OF JOINT ECON. COMM., REPORT ON BASICS OF DOLLARIZATION (prepared by Kurt Schuler) (Jan. 2000), *available at* http://www.senate.gov~jec.basicshtm. The Federal Reserve System estimates that foreigners hold between 55% and 70% (approximately 300 billion) of all dollars currently in circulation. *Id.*

8. *See id.* During the first stage, "asset substitution," residents hold foreign bonds and deposits abroad as stores of value to protect against losing wealth through inflation in domestic currency or outright confiscations. *See id.* "Currency substitution," the second stage, entails residents holding large amounts of foreign currency in domestic banks, if legally permitted. *Id.* During this period, while everyday expenses (wages, taxes, groceries, bills, etc.) are still paid in domestic currency, major items are handled in foreign currency. In the final stage, residents actually begin to think in terms of the foreign currency and local prices become indexed to the exchange rate. *See id.*

9. Atlanta Fed's Latin America Research Group, *Responding to Global Crises: Dollarization in Latin America*, 1 ECONSOUTH 2 (2nd Quarter 1999), *available at* http://www.frbatlanta.org/publica/econ_south/1999/q2/es_vln2_4.html.

10. *See* Bogetic, *supra* note 6. Among those nations with bi-monetary systems are the Bahamas, Bhutan, Bosnia, Cambodia, Haiti, Isle of Man, Lao, Lesotho, Liberia, Luxembourg, Namibia, and Tajikistan. *See id.*

former domestic currency, if any, is relegated to a subordinate role.[11] To date, approximately 30 nations comprised of nearly 10.5 million persons have adopted this economic structure.[12] The most famous of these is Panama, a country that formally sanctioned the use of the dollar in 1903 and has served as a prototype for many emerging nations.[13] If a country is truly dollarized, in addition to replacing its domestic currency, its central bank is essentially abolished. Consequently, the nation's independent monetary policy is also eliminated.[14] Notwithstanding this apparent loss of economic autonomy, according to experts, countries that adopt official dollarization and allow full participation by foreign financial institutions become tightly integrated into large financial markets.[15] Moreover, those nations that are officially dollarized become part of a unified currency zone where prices of

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11. *See* Economic Transformation Law, ch. 1, art. (2000), *Ley para la Transformación Económica del Ecuador*, published in the Official Registry Supplement No.24, Mar. 13, 2000. Due to the need to "specify the parameters and content of various provisions," shortly after its promulgation, this law was augmented by the *Ley Reformatoria a la Ley para la Transformación Económica*, published in the Official Registry Supplement No.48, March 31, 2000. In this article, they are referred to collectively as the Economic Transformation Law.. In Ecuador, although the dollar will be used as the principal currency, the *sucres* in coin form will continue to be acceptable for use in small purchases.

12. STAFF OF JOINT ECON. COMM., REPORT ON BASICS OF DOLLARIZATION (prepared by Kurt Schuler) (Jan. 2000), *available at* http://www.senate.gov~jec.basics.html. The nations which have Officially Dollarized include Andorra, Caicos Island, Cocos Islands, Cook Islands, Cyprus, Greenland, Guam, Kiribati, Liechtenstein, Marshall Islands, Micronesia, Monaco, Nauru, Niue, Norfolk Islands, Northern Mariana Islands, Palau, Panama, Pitcairn Island, Puerto Rico, Saint Helena, Samoa, San Marino, Tokelau, Turks Island, Tuvalu, Vatican City, and the Virgin Islands. *See id.*

13. STAFF OF JOINT ECON. COMM., ENCOURAGING OFFICIAL DOLLARIZATION IN EMERGING MARKETS (prepared by Kurt Schuler) (Apr. 2000), *available at* http://www.senate.gov~jec.basics.html. Since 1903, Panama has been officially dollarized, and no central bank or centralized foreign reserves exist. The national currency (the *balboa*) continues to circulate as coins. According to the author, as a result of dollarization, "[d]espite large inflows and outflows of capital, Panama has avoided the booms and busts that have resulted from such flows in other Latin American countries." *Id.* In addition, the inflation rate between 1971 and 1997 averaged just 3.5%, which is lower than the rate in the United States or in any other Latin American nation. *Id.*

14. *See id.* The concept of an "independent monetary policy" means that a country has a domestic central bank which, among other things, issues domestic currency. Some economic theories suggest that an independent monetary policy allows a country to control interest rates, money supply and exchange rates with the goal of avoiding drastic fluctuations. *See also* Jeff Frieden, *Currency Politics: Dollarization and Other Dilemmas*, DRCLAS NEWS (Fall 1999), *at* http://fas-www.harvard.edu/~drclas/publications/newsletter/fall99/frieden.html.

15. *See* STAFF OF JOINT ECON. COMM., REPORT ON BASICS OF DOLLARIZATION (prepared by Kurt Schuler) (Jan. 2000), *available at* http://www.senate.gov~jec.basics.html. In the opinion of Senator Connie Mack, former Chairman of the Senate Joint Economic Committee, "[th]e ability to switch dollar funds without currency risk between the domestic economy and the rest of the world tends to minimize the booms and busts that often arise in countries having independent monetary policies and financial systems not well-integrated into the world system." *Id.*

similar goods originating in either country are kept within a narrow range. Despite this relative price stability, the officially dollarized country loses the ability to respond to economic shocks by altering the exchange rate of its currency and is obligated to adopt alternative methods to mitigate unexpected financial changes, including: (1) fostering flows of capital into or out of the country to offset the shock; (2) reducing the government budget; and (3) increasing prices and lowering wages.[16]

Ecuador has been unofficially dollarized to a large extent for several decades, due to the historic economic instability of this nation and the resulting distrust of its citizens of the *sucre*. Recently, as a consequence of the extreme precariousness of this nation's economy, Ecuador has opted to become the first Latin American country in nearly a century to formally adopt the dollar. While the official dollarization of Ecuador may prove beneficial in the long term, introducing such a drastic change during this stage of political instability, legal inadequacy, and economic uncertainty necessitates assistance from outside sources, including the United States.

III. THE DOLLARIZATION PROCESS IN ECUADOR

Ecuador, a country located between Colombia and Peru with a population of approximately thirteen million, has experienced economic hardships in the last decade. From 1992 to 1996, the Sixto Duran Ballen administration managed to introduce a sound macroeconomic program that generated a balanced budget and low levels of inflation. This stability, however, was later sabotaged by several events, including a territorial dispute with Peru entailing military intervention, a corruption scandal involving the vice president, and extended periods of electricity rationing. As a result of such events, Ecuador experienced soaring interest rates and the failure of various financial institutions. Under the subsequent president, Abdala Bucaram (who served from August 1996 - February 1997), interest rates rose yet higher and foreign investment significantly decreased. Amid a major corruption scandal, Bucaram was removed from office on the basis of "mental incompetency" after serving less than one year. Like his predecessors, the interim president, Fabian Alarcon (who served from February 1997 - August 1998), was unable to overcome diminishing oil prices, destruction to crops and infrastructure caused by the El Niño tropical storms, and complications associated with privatizing several state-owned enterprises. His successor, Jamil Mahuad (who served from August 1998 - March 2000), proposed to, among other things, reduce the fiscal deficit, increase foreign investment, privatize government entities, and reconstruct

16. *See id.* Senator Connie Mack acknowledges that absorbing economic shocks without the traditional instrument of choice in Latin America (exchange-rate modifications) is difficult. *See id.* According to Mack, "[a] country experiencing 'real' economic shock ultimately has to adjust by experiencing 'real' pain or gain." *Id.*

the country's infrastructure.[17] Despite these lofty campaign goals, Mahuad was neither able to stabilize the Ecuadorian economy nor to overcome the poverty that has plagued the country, and the region, for decades.[18]

In the last few years, Ecuador has experienced one of the worst social and economic crises in its history, a situation characterized by a heavily indebted economy, a rapidly devaluating currency, and an inflation level that has recently risen to nearly 90%-the highest in the region.[19] In October, 1999, Ecuador gained the "dubious distinction" of becoming the first nation to default on its Brady Bonds.[20] Soon thereafter, despite negotiations with the IMF to obtain a $250 million loan designed to stabilize the economy, the general public became increasingly anxious about the precarious state of Ecuador's economy and began ridding themselves of local currency as quickly as possible.[21]

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17. *See* U.S. DEP'T OF ST., 1998 COUNTRY REP. ON ECON. POL'Y AND TRADE PRACTICES: ECAUDOR (submitted on Jan. 31, 1999), *available at* http://state.gov/www/issues/economic /trade_reports/wha98.html.

18. *See* Hausmann, *supra* note 1, at 66. According to experts, notwithstanding the abundance of natural resources that many Latin American nations (including Ecuador) have, there are two primary explanations for the pervasive poverty throughout the region. The first theory, moral hazard, is defined as "the increase in recklessness that takes place when people are somehow protected against the consequences of risky behavior." *Id.* For example, statistics show that persons with car insurance tend to take mores risks (*e.g.*, drive faster, park in questionable areas, etc.) than those without insurance. Likewise, the readiness of governments and international institutions to provide bailouts in times of financial crises make investors less vigilant about weighing all the risks involved. The second theory, original sin, is premised on the idea that Ecuador, like the majority of Latin American markets that are volatile and prone to crisis, have three characteristics: (1) good economic prospects; (2) a certain degree of oneness to international capital flows; and (3) a national currency that cannot be used by local firms or the government to borrow abroad and cannot be used, even at home, for long-term borrowing. *See id.* at 67. This is, in the words of experts, a "sin." *Id.* In these conditions, the problem is as follows: "If the nation is economically promising and reasonably open, then people want to invest." *Id.* "If, however, its currency cannot be used as described above, then investors must opt for borrowing foreign currency or borrowing short-term." *Id.* "This scenario, it is argued, 'is a recipe for financial fragility.'" *Id.*

19. *Ecuador Inflation on the Rise*, WASH. POST, Apr. 28, 2000, *available at* http://www.washingtonpost.com/wp-srv/aponline/20000428/aponline184445_000.html. In April of 2000, consumer prices rose 10.2%, thereby increasing Ecuador's annual inflation rate to 88.9%. *Id.*

20. Heather Bourbeau, *Ecuador Opts for the Dollar*, THESTREET.COM, Jan. 11, 2000, LEXIS, Nexis Library, TheStreet.com File.

21. *Mahuad Defaults on Brady Bonds*, NOTISUR, Oct. 1, 1999, *at* http://www.americas.org/news/nir/19991003_mahuad_defaults_on_brady_bonds.asp. When it failed to pay $96 million of interest due on September 28, 1999, Ecuador became the first country to default on Brady bonds. *Id.* Nicholas Brady, who served in President George Bush's administration from 1989-1993, created these bonds backed by the U.S. Treasury to restructure the defaulted commercial bank debt of developing nations. *See id.*

Consequently, bank officials and President Mahuad met to address the "near panic that . . . hit Ecuador's currency market."[22] Based on previous investigations and the conclusions reached at this political meeting, the President decided that dollarization, or a variation thereof, was the only feasible solution to stabilize the plummeting Ecuadorian economy.[23] In his words, "dollarizing [was] the only way out that we have and it is the road that we must travel."[24] Accordingly, on January 9, 2000, Mahuad formally announced his intention of dollarizing the economy. During a speech aimed at justifying his actions to the public, Mahuad recognized his previous indecision as an error, but assured the public that he "had his foot on the accelerator."[25]

Despite this and similar presidential rhetoric, critics predicted the imminent removal of Mahuad from the presidency-an event they considered a condition precedent to economic recovery in the country. One expert expressed:

> [w]ith no political consensus . . . a weak banking system and little popular support for the president, Mahuad's belief in his ability to overcome this downward spiral appears little more than a temporary delusion on his part. The sooner he exits the political stage, the sooner Ecuador can begin its soul-searching and recover.[26]

In addition to negative comments, the dollarization decision generated strong reactions from diverse groups. For instance, indigenous protestors, trade unions and other social sectors threatened to protest until Mahuad

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22. *Ecuador Currency Plunges, Trade Halted*, AGENCE FRANCE PRESSE, Mar. 3, 1999, LEXIS, Nexis Library, Agence France Presse File.

23. *See* Jane Bussey, *Latin American Finance Community Debates Adopting Dollar*, THE MIAMI HERALD, Mar. 19, 1999. At the annual meeting of the Inter-American Development Bank, representatives from Latin America discussed the newest idea for reviving the region's economies, i.e., "doing away with the weak local currencies and replacing them with the mighty greenback." According to a former World Bank official, policymakers from Latin America are attracted to the idea of dollarization because it would eliminate the "Achilles's heel" of the region's economies: "weak currencies that no one, including their own citizens, trust." *Id. See also* Gustavo Oviedo, *Ecuador Defends Switch to U.S. Dollar*, NAT'L POST, Jan. 11, 2000, at C15. To justify the president's decision, Ecuador's Finance Minister said "[t]his is an economic model which is much more autonomous than before. The other depended on help by the [International Monetary] Fund. But it is in the interest of the country to maintain good relations with international organizations." *Id.*

24. Monte Hayes, *Ecuador President Pegs Currency to U.S. Dollars*, AP WORLDSTREAM, Jan. 10, 2000, LEXIS, Nexis Library.

25. Bourbeau, *supra* note 20. According to critics, "Mahuad is speeding along . . . toward economic ruin, not recovery. While the adoption of the dollars could stem raging inflation, it is not a cure for the deep economic troubles." *Id.*

26. *Id.*

resigned; congress dissolved, and members of the supreme court were removed. These protestors felt that their actions were warranted, explaining that "[n]one of the powers of the state — the executive branch, congress and the judiciary — are trusted at this time by the people."[27] As a protective measure, the President declared a state-of-emergency and deployed troops to control the street demonstrations.[28] As an additional step, Mahuad gave a public discourse designed to placate the masses focusing on the difficulty of governing a nation lacking uniformity and of making decisions based on the interests of the entire country.[29]

In order to legally implement dollarization, the key legislative instrument, the proposed Economic Transformation Law, was presented to the Banco Central del Ecuador ("Central Bank") for its review in February 2000. Under fierce pressure from the President, the text was approved at this level and submitted to Congress.[30] The promulgation of such legislation did not come without casualties, in fact, the Central Bank's three highest ranked officials resigned in protest of what they considered an irrational change of policy.[31] While proponents labeled Mahuad's determination to

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27. Kintto Lucas, *Ecuador: Mass Protests Over Dollarization Plan*, INTER PRESS SERVICE, Jan. 11, 2000, LEXIS, Nexis Library.

28. *See* Gustavo Oviedo, *Ecuador bajo protestas contra dolarización*, REUTERS, Jan. 12, 2000, LEXIS, Nexis Library. According to the government, more than 10,000 police officers were assigned to control the public demonstrations during the "state of emergency." *Id.*

29. *See President Mahuad Announces Dollarization, Cabinet Resignation*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 11, 2000, LEXIS, Nexis Library. In a speech delivered shortly after the decision to dollarize, Mahuad emphasized the need for all Ecuadorians to unite and his duty to act on behalf of the nation as a whole. *See id.* In the words of former president Mahuad,

> [i]t is terribly difficult to govern a country like this with so many divisions, with some many group interest involved. It is difficult to govern a country in which there is no unity, no national objectives. It is difficult to speak in Ecuador about Ecuador when so many people speak about their province, their region, their economic sector, the labor movement, yet they do not stop to see Ecuador's overall interests. I must ensure everyone's interest. I represent the national interests. I must end up deciding projects on such as theses which are the ones that benefit the economy as a whole. Of course, with every decision, there are sectors that gain and sectors that are adversely affected, but the idea is to benefit the majority and the future of Ecuador. These are historic, far-reaching decisions that are necessary.

Id.

30. *See* Larry Rohter, *Three Top Central Bankers Quit Over Dollarization*, N.Y. TIMES, Jan. 12, 2000, at C4. The Economic Transformation Law was passed only after Mahuad threatened to convoke a special session of congress to remove any Central Bank official who opposed the measure. *See id.*

31. *See id. See also Ecuador's Central Bank Officials Resign Over Dollarization*, AGENCE FRANCE PRESSE, Jan. 11, 2000, LEXIS, Nexis Library. In addition to the resignation of Central Bank officers, amid tremendous pressure on the president to stabilize the "nation's plummeting currency," all fifteen members of the presidential cabinet renounced their positions. Hayes, *supra* note 24.

dollarize "a bold move"[32] and a "good gamble,"[33] those opposed to dollarization have called it "a desperate move to save his presidency," a "Hail Mary pass,"[34] a "last-ditch effort to stabilize South America's shakiest economy,"[35] and an "inadequate remedy of economic deterioration."[36]

According to experts, time was of the essence after the announcement of the proposed Economic Transformation Law due to the drastic nature of dollarization. In the opinion of one analyst, "[t]his country has lived in permanent uncertainty . . . The dollar announcement had a very strong impact, but it is not going to last longer than two weeks. If the president does not make some dramatic announcement [soon] the confidence and expectations that were created will disappear."[37] True to this and other similar predictions, based in large part on his decision to dollarize and the ensuing uncertainty, Mahuad was removed from presidency vis-a-vis a military coup.[38] For a brief period of time, power was assumed by a three-man military junta. Due to pressures from the international community, however, the military leaders renounced their leadership and dissolved the military junta almost immediately.[39] As a replacement, Gustavo Noboa, the

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32. *Ecuadorian President Faces Strong Protest*, XINHUA NEWS SERVICE, Jan. 15, 2000, LEXIS, Nexis Library.

33. Nathaniel Harrison, *Ousted Ecuadorian President Gambled and Lost on Dollarization*, AGENCE FRANCE PRESSE, Jan. 22, 2000, LEXIS, Nexis Library. According to Guillermo Calvo, director of the Center for International Economics at the University of Maryland, Mahuad's decision was nearly correct. *See id.* "It was a good gamble, but he made a mistake by over devaluing. The *sucre* was set at 25,000 to the dollar and that was excessive." *Id.*

34. Anthony DePalma, *The Yankee Dollar: Latin America Decides, If You Can't Beat 'Em, Join 'Em*, N.Y. TIMES, Jan. 23, 2000, at 4. From the perspective of Steve Hanke, economics professor at Johns Hopkins University, Mahuad's decision was made as a last resort. *See id.* The key to dollarizing, claims Hanke, is not simply adopting the dollar. *See id.* Rather, the elimination of the central banks is pivotal. *See id.* "The only way to extinguish the frequency and reduce the magnitude of recurring currency crises is to put these little half-baked central banks out of business," explained the professor. *Id.*

35. *State Sales Seen Sparking Ecuador Economy*, REUTERS, Apr. 13, 2000, LEXIS, Nexis Library. In the opinion of one opponent, "[t]he medicine is worse than the disease." *Id.*

36. Rohter, *supra* note 30.

37. Jane Bussey, *Ecuador Waiting For President's Plans on Switching to Dollars*, THE MIAMI HERALD, Jan. 15, 2000. This comment was made by Simon Pachano, a political analyst and professor at FLASCO, the Latin American School of Social Sciences. *See id.*

38. *See* Carlos Hamann, *Ecuadorian Congress Accepts Noboa as New President*, AGENCE FRANCE PRESSE, Jan. 22, 2000, LEXIS, Nexis Library. The congress ruled that Mahuad "abandoned" his office when, aware of the imminent danger, he sought asylum in the Chilean embassy. *Id.* Mahuad, on the other hand, argued that he was ousted by a military coup. *See id.*

39. *See* Tod Robberson, *VP at Helm In Ecuador After Coup - US Presses Military to Dissolve Junta*, DALLAS MORNING NEWS, Jan. 23, 2000, at A1, LEXIS, Nexis Library. Washington threatened to isolate Ecuador if the military leaders did not step down and dissolve the military junta. *See id.* "[T]he coup added an apparently unacceptable new element of instability to a region already teetering on the brink of a military crisis," maintains the author.

former vice president, assumed control of the country on January 22, 2000. In spite of his pledges to significantly alter the economic and political policy reigning in Ecuador, once he became president, Noboa continued to utilize the same economic policies (*i.e.*, dollarization) that instigated the military coup that placed him in power.[40] The new president and other authorities believed that the precariousness of the situation merited drastic actions such as adopting the foreign currency.[41]

Just as Mahuad had done, Noboa warned the public of the future hardships that dollarization would entail. According to the new leader, "[n]o sacrifice so far can be compared to the sacrifice that awaits us in the future."[42] Not surprisingly, the dollarization initiative soon gave rise to the same public reaction. In the beginning of February, 2000, public demonstrations dominated the streets as the people demanded economic stability[43] and revenge for Noboa's alleged lack of forthrightness during his rise to power.[44] The situation was so extreme that some experts began to consider Ecuador a veritable anarchy.[45] In light of these major obstacles, the Ecuadorian leaders realized that outside help was desirable, if not outright necessary. According to Miguel Davila, president of Ecuador's Central Bank, the country desired assistance from the United States in terms of

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Id. See also President of Ecuadorian Congress Supports His Government's Economic Policy, ORGANIZATION OF AMERICAN STATES (Apr. 12, 2000), *at* http://www/oas.org/americaviva/press200/083.html. The president of the national congress of Ecuador, Juan José Pons, suggested that the real cause of the failure of the coup was a lack of popular support, not external pressures. *See id.* The coup was unfruitful, according to Pons, "due to the institutional fortuity and the widespread rejection of its citizens." *Id.*

40. *See* William Neuman, *Ecuador Fears New Prez May Be Coup-Coup*, N.Y. POST, Jan. 24, 2000, at 16, LEXIS, Nexis Library.

41. *See* John Otis, *Fragile Ecuador Debates Swap of Sucre for U.S. Greenback*, THE HOUSTON CHRONICLE, Jan. 30, 2000, at A31, LEXIS, Nexis Library. As one expert explains, "[t]o understand how authorities here view the *sucre*, Ecuador's ailing currency, it helps to remember a local proverb: To cure rabies, kill the dog. Ecuadorian leaders want to put the *sucre* out of its misery." *Id.*

42. Santiago Piedra, *Gustavo Noboa Sworn In As Ecuadorian President*, AGENCE FRANCE PRESSE, Jan. 26, 2000, LEXIS, Nexis Library.

43. *See New Demonstrations Called in Ecuador*, XINHUA GENERAL NEWS SERVICE, Jan.30., 2000, LEXIS, Nexis Library. "[W]hat is happening in Ecuador is the same mange on a different dog. The policy has not changed after Mahuad's downfall," said Luis Villacis, president of Patriotic Front, an opposition group. *Id.*

44. *See* Steven Dudley, *Secrets and Lies: After a Failed Uprising, Ecuador's Indigenous Groups Warn a Civil War Could Ensue*, IN THESE TIMES, Mar. 6, 2000, at 6, LEXIS, Nexis Library. Indigenous protestors explained their resentment toward Noboa in the following manner: "They betrayed us . . . [a]nd in our culture, when someone betrays you, you cut off his head." *Id.*

45. *See* Tim McGirk, *Still on a Precipice: Ecuador's New President Has to Solve Some Nasty Problems, and Do It Fast*, TIME, Feb.7, 2000, at 13, LEXIS, Nexis Library. Based on all the recent problems, experts begin to ask the question: "Is Ecuador ungovernable?" *Id.*

implementing dollarization, but it was prepared to proceed alone if necessary.[46]

Amid allegations that it was, at least in part, one of the causes of the economic chaos in Ecuador, the IMF sent a group of experts to provide technical assistance in designing a plan to dollarize.[47] Later, on March 9, 2000, four international financial institutions - the IMF, World Bank, Inter-American Development Bank (IDB) and Corporación Andina de Fomento (CAF) --- announced that they planned to provide approximately $2 billion in loans to Ecuador over the next three years to support the new dollarization plan.[48] These institutions warned Ecuadorian leaders though that such economic assistance alone is not enough to successfully implement dollarization. According to representatives, continued success presents "major challenges," including: (1) structural reforms to allow the economy to withstand external shocks; (2) strengthening of public finances to reduce pressures that will accompany new budgetary needs; and (3) improvements in bank supervision and regulation.[49] Cognizant of these challenges, Ecuadorian officials have announced their plans of austerity and economic

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46. *See Ecuador Dollarization Advances*, CORPORATE FINANCE, Mar. 2000, at 49-50, LEXIS, Nexis Library. The bank official summarized Ecuador's determination in the following manner: "[I]f we are not granted permission, obviously dollarization must go forward." *Id.*

47. *See IMF Says Ready to Help Ecuador on Dollarization*, XINHUA NEWS SERVICE, Jan. 10, 2000, LEXIS, Nexis Library. By way of press release, the IMF announced that "[i]n light of the announcement yesterday by the government of Ecuador of its intention to move the economy to full dollarization, the IMF is prepared to send a fact-finding mission to Quito to provide technical assistance . . . ." *Id. See also* Samantha Newport, *Did the IMF Drop the Ball in Ecuador?*, BUSINESS WEEK, Jan. 24, 2000, at 20. In October 1999, the IMF did not intervene when Ecuador defaulted on $5.9 billion in Brady bonds. *Id.* By its inaction, experts say that the IMF intended to send a clear message: "No more bailouts for private creditors who take risky bets on economic basket cases. By holding back, the IMF hoped to compel bondholders and the Ecuadorian government to hammer out a restructuring deal." *Id.* The irony is that due in part to this attitude, the author argues, the IMF was forced to intervene later. *See id. See also* Peter Hakim, *Ecuador's Desperation*, THE CHRISTIAN SCIENCE MONITOR, Jan. 27, 2000, at 11. The idea that the IMF was a partial catalyst for the economic catastrophe enjoyed support by others. *See id.* One expert stated, for instance,

> [i]t was clear for some time that democratic politics in Ecuador were jeopardized by economic adversity. Yet, the [IMF], in exchange for financial support, set economic conditions that the weakened Mahuad government, facing an unruly legislature, could not meet. In a vicious circle, these continuing demands, coupled with lengthy and humiliating negotiations, further debilitated the government, making it less able to make critical economic decisions.

Id.

48. *Multilateral Lenders Prepared to Support Ecuador*, XINHUA GENERAL NEWS SERVICE, March 9, 2000, LEXIS, Nexis Library. *See also* Inter-American Development Bank, *IMF, World Bank, IDB and CAF Prepared to Support Ecuador*, Press Release NR-34/00, (Mar. 9, 2000), *at* http://ww.iadb.org/exr/PRENSA/2000/cp3400e.html.

49. *See* Press Release No. 00/32, International Monetary Fund, IMF Approves Stand-By Credit for Ecuador (April 19, 2000), *at* http://www.imf.org/external/np/sec/pr/2000/PR0032.htm.

responsibility, which can be achieved only by eliminating the Central Bank's ability to create currency. In the words of Foreign Minister Heinz Moeller, Ecuador is prepared to be absolutely disciplined: "We are going to sink those damned money printing machines in the Pacific."[50]

Despite continued opposition to the initiative, the government claims that dollarization is the only way to control inflation, reverse the economy's rapid decline, and restore confidence to the nation. This plan, opines one Ecuadorian expert, is tantamount to zealous dieting, since "[d]ollarization is like trying to lose weight by wiring your jaw shut."[51] Notwithstanding implicit promises of rapid improvement made by various government officials, Ecuadorians now realize that dollarization is no quick fix, and their enthusiasm for the measure in waning. In fact, recent public opinion polls indicate that support for the measure has dropped to thirty-eight percent. In the words of one unidentified economist for international monetary institution, "people are realizing that this is not going to be a quick cure as some advocates of dollarization have promised."[52]

IV. ECONOMIC TRANSFORMATION LAW

Promulgated March 13, 2000, the Economic Transformation Law constitutes the principal mechanism to be used in implementing

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50. WORLD BANK, ECUADOR ANXIOUS FOR IMF CASH TO BACK DOLLARIZATION, *in* DEVELOPMENT NEWS (Mar. 22, 2000), *at* http://www.wblm0018.worldbank.org/news/devnews.nsf/la3be.../9fo98e0a30le7908852568aa004ff61.

51. Jane Bussey, *Ecuador Embraces U.S. Dollar As Its National Currency*, MIAMI HERALD, Mar.10, 2000, LEXIS, Nexis Library.

52. Anthony Faiola, *Putting Faith in the Dollar; Ecuador Hopes Greenback Will Rescue Economy*, WASH. POST, Apr. 9, 2000, at A1. Experts claim that "[t]he idea was definitely oversold, and people in Ecuador are now realizing that." *Id.* The transition period is hard for Ecuadorians, the majority of whom have limited experience with international currencies. *See* Samantha Newport, *Dollar Spoken Here–Sort Of*, BUSINESS WEEK, Apr. 24, 2000, at 32. According to a recent poll, only 19% of the population had previously handled dollars and only 4% believed that they could recognize a counterfeit bill. *Id.* Although the Ecuadorian government expects dollarization to save the economy, experts warn that "it could end up triggering more waves of unrest." *Id.* As a condition to receiving aid from the international financial institutions, the government is phasing out government subsidies, which has led to a substantial increase in the costs of public transportation, home cooking fuel, gasoline, and other items. *See Ecuadorians Protest Dollar Economy*, WASH. POST, Apr. 26, 2000, *available at* http://www.washingtonpost.com/wp-srv/aponline/20000426/aponline200634_000.html. Angered by such increases, hundreds of demonstrators threw rocks at police and sequestered public buses. *See id.* Implementation of dollarization has proven to be "a formidable task in an economy where most people get their milk, bread, vegetable[s] and meat in street markets from poorly educated vendors." Carlos Cisternas, *Ecuador's Switch to Dollar Rolling*, WASH. POST, Apr. 26, 2000, *available at* http://www.washingtonpost.com/wp-srv/aponline/20000426l/aponline124317_000.html. To mitigate the public anxiety, the government introduced a six-month public education campaign. *See id.* The success of such plan, though, is yet to manifest itself.

dollarization.[53] According to the Constitution of Ecuador, the government is obligated to establish an economic system that assures all citizens a dignified existence, as well as equal rights of access to employment, goods, and property.[54] To fulfill this constitutional mandate, the Economic Transformation Law recognizes the need for immediate change, stating that "it is indispensable to adopt radical measures that will permit us to overcome the economic crisis affecting the country."[55] One such radical step is the dollarization of the national economy, which has been labeled "the only scheme that [lends] itself to the necessities of the national economy."[56]

With respect to financial reforms, Article 1 stipulates that the monetary regime, which is to be executed by the Central Bank, is premised on the theory of full circulation and transferability of foreign currency. This Article establishes, in addition, that the Central Bank will exchange the *sucres* presently in circulation at a fixed rate of 25,000 *sucres* for each U.S. dollar, thereby gradually removing virtually all *sucres* from circulation. Due to the fact that the complete elimination of the *sucre* would require a constitutional amendment, the Economic Transformation Law explicitly provides for the continual use of *sucres* for minor transactions, if desired. Specifically, Article 4 provides that while all financial operations conducted by or through the Ecuadorian financial system shall be expressed in dollars, such operations "may be executed in national currency or dollars in accordance with the exchange rate set forth in Article 1."[57] Notwithstanding the option to use *sucres* for minor purchases, the Economic Transformation Law aims to fully implement dollarization within six months. According to Article 18, the transition period during which the Central Bank will exchange *sucres* in circulation for dollars extends 180 days. This period, though, may be extended an additional 180 days, if necessary.

In addition to adopting the dollar within this time frame, the Economic Transformation Law mandates the privatization of several state-owned entities in various sectors, including: (1) oil - private companies are permitted to build and operate pipelines and the construction of a new oil

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53. *Ley para la Transformación Económica del Ecuador*, published in the Official Registry Supplement No.24, Mar. 13, 2000. Due to the need to "specify the parameters and content of various provisions," shortly after its promulgation, this law was augmented by the *Ley Reformatoria a la Ley para la Transformación Económica*, published in the Official Registry Supplement No.48, March 31, 2000. In this article, they are referred to collectively as the Economic Transformation Law.

54. CONSTITUCIÓN POLÍTICA DEL REPÚBLICA DEL ECUADOR [Constitution] art. 242 (Ecuador).

55. Economic Transformation Law, Recitals (2000).

56. *Id.*

57. *Id.* art. 15. This provision stipulates that "[e]ach obligation in *sucres* that arises from the application of contracts, treaties or pacts —be these financial, commercial, labor or of any type– that are executed from January 1, 2000 shall be paid in dollars or in *sucres*, in the amount necessary to acquire the same quantity of dollars at a rate of 25,000 *sucres* per dollar." *Id.*

pipeline in the year 2000 is facilitated; (2) electricity - the privatization of six state electricity companies and eighteen electricity distribution companies is arranged; and (3) telecommunications - the privatization of two state-owned companies is established. As a result of such privatizations, the government expects to generate nearly $300 million in net revenue.[58]

As explained subsequently, the Economic Transformation Law facilitates dollarization but has been criticized for its deficiencies. Such legal shortcomings, in conjunction with other factors, lend support to the argument in favor of foreign participation in the dollarization process.

V. POLICY ARGUMENTS IN SUPPORT OF DOLLARIZATION IN ECUADOR

A. Potential Disadvantages of Dollarization for Ecuador

While this article advocates dollarization in Ecuador based on, *inter alia*, the benefits to be provided to this nation, effects to the contrary do exist. In the words of one expert, although dollarization "seems almost too good to be true . . . there are several hitches,"[59] which are addressed below. In the case of Ecuador, however, these "hitches" appear negligible.

1. Seigniorage

The concept of seigniorage may be defined as the revenue that a country derives from issuing its currency, i.e., the difference between the cost of putting money into circulation and the value of the goods such money will buy. For instance, in the United States, a one dollar bill costs approximately three cents to print, yet the government can only use it to buy one dollar's worth of goods. Thus, if the bill circulates indefinitely, the seigniorage is ninety-seven cents. In addition to this initial economic gain, when persons hold dollars, they create seigniorage for the U.S. government in the sense that the U.S. government is not obligated to pay interest to the holder as it would with a government bond or other interest-bearing instrument. Possessing dollar bills, therefore, is functionally equivalent to granting the U.S. government an interest-free loan.[60]

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58. Letter from Jorge Guzman, Minister of Finance and Public Credit, and Modesto Correa, President of the Board Central Bank of Ecuador to Stanley Fischer, Acting Managing Director International Monetary Fund (descibing the intent of Ecuador's government) (Apr. 4, 2000), *at* http://www.bce.fin.ec/avisos/intent_fmi.html. [*hereinafter Government of Ecuador*].

59. Ricardo Hausmann, *Should There Be Five Currencies or One Hundred and Five?*, FOREIGN POL'Y, Fall 1999, at 76, LEXIS, Nexis Library.

60. *See* STAFF OF JOINT ECON. COMM., ENCOURAGING OFFICIAL DOLLARIZATION IN EMERGING MARKETS (prepared by Kurt Schuler) (Jan. 2000), *available at* http://www.senate.gov~jec./dollarization.html. The Federal Reserve Board estimates that foreigners now hold between fifty-five and seventy percent of the total dollars, thereby providing the U.S. government approximately $15 billion per year in seigniorage. *Id.*

In the case of Ecuador, the cost of introducing dollars can be viewed in one of two ways. On one hand, the expense of initially obtaining the dollar notes and coins necessary to replace the *sucre* in circulation may be considered a one-time "stock cost." On the other hand, this expense could be characterized as a "flow cost," or a continual loss of seigniorage each year. Irrespective of its categorization, according to some experts, the seigniorage issue should not constitute a significant obstacle to dollarization in Ecuador for two main reasons. First, with a population of merely thirteen million people and a currency that is not accepted in most international transactions, the revenue that the Ecuadorian government may lose by not printing currency is minimal. As one economist puts it, "this is not a huge amount, and the benefits of adopting a supranational currency may well exceed the costs."[61] Second, any loss of seigniorage incurred by Ecuador could be mitigated by a bilateral treaty with the United States, whereby Ecuador would receive rebates of up to eighty-five percent of the seigniorage. Though not currently in effect, treaties of this nature would be feasible under the International Monetary Stability Act of 1999.[62]

2. *Central Bank as Lender of Last Resort*

Historically, in times of extreme financial pressures, the Central Bank in Ecuador and banks throughout Latin America have attempted to meet the liquidity demands of local banks and other institutions by providing loans predicated on the printing of additional currency. As explained previously, true dollarization entails the eradication of the Central Bank, which, in turn, eliminates the option to create new currency in times of need. It is arguable that abolishing the Central Bank as the lender-of-last-resort should not prove troublesome for Ecuador because the country may simply convert certain assets in order to accumulate the reserves necessary to accommodate dollarization. Also, Ecuador could arrange appropriate lines of credit with foreign banks. According to some experts, these lines of credit would be readily accessible by Ecuador. It is claimed that even if the United States attempted to restrict Ecuador's access to the Federal Reserve system, foreign banks would "line up" to furnish the needed funding, provided that they

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61. Hausmann, *supra* note 59, at 76. Statistics indicate that seigniorage in most countries accounts for only five percent of the Gross Domestic Product. *Id.*

62. *See* STAFF OF JOINT ECON. COMM., REPORT ON BASICS OF DOLLARIZATION (prepared by Kurt Schuler) (January 2000), *available at* http://www.senate.gov~jec.basicshtml. The International Monetary Stability Act was introduced in November 1999 due to the fact that the seigniorage constituted both a political and economic impediment to dollarization. *See id.* Under this Act, the U.S. Secretary of the Treasury is allowed to certify officially dollarized countries as eligible to obtain rebates of up to eighty-five percent of the seigniorage. *Id.* To foster equity, the remaining fifteen percent would be distributed to countries that have already dollarized. *Id.*

could secure adequate collateral.[63] However, in its letter of intent recently submitted to the IMF, the government acknowledged that dollarization imposes a strict limitation on the Central Bank's ability to provide liquidity assistance to the banking system during this period of substantial vulnerability. To resolve this issue, the government has identified several potential sources of liquidity, namely: (1) the Central Bank's free disposable international reserves in excess of those needed to cover the monetary base and existing stabilization bonds; (2) the reallocation of public entities' financial assets held abroad to the central bank; (3) external borrowing; and (4) foreign exchange that could be raised in the local market by offering dollar-denominated bonds.[64]

3. *Exchange Rate Flexibility and Economic Sovereignty*

In theory, countries benefit from having their own monetary policy because they can address local economic conditions, thereby preparing the economy for shocks (internal and external) and leveling long-term trends in economic growth and unemployment.[65] In the majority of Latin American countries, the key weapon in the monetary arsenal has been a flexible exchange rate between the national currency and the dollar, which functions to counteract fluctuations in the economies of distinct countries.[66] In spite of the untamed economic volatility in the region, some experts argue that "[d]ollarization is an extreme solution to market instability, applicable in only the most extreme cases. The opposite approach -a flexible exchange rate between the national currency and the dollar- is much more prudent for most developing countries, including those hardest hit by recent crises."[67]

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63. Ricardo Hausmann, et al., *Financial Turmoil and the Choice of Exchange Rate Regime*, INTER-AMERICAN DEVELOPMENT BANK, No. 400, 1999. The author maintains that dollarization, among other things, is likely to increase the assets that could be utilized as collateral. *See id.* For instance, in a dollarized system, Ecuadorian real estate could be used as collateral, although presently it is not used as such in international business transactions due to the exchange rate and convertibility risks. *See id.*

64. *See* Government of Ecuador, *supra* note 58.

65. *See* STAFF OF JOINT ECON. COMM., ISSUES REGARDING DOLLARIZATION (prepared by Robert Stein) (July 1999), *available at* http://www.senate.gov~jec/bankingdollar.html.

66. *See* Jeffrey Sachs & Felipe Larrain, *Why Dollarization is More Straitjacket Than Salvation*, FOREIGN POLICY, Fall 1999, at 80. The use of a flexible exchange rate as a tool to protect the local economy from intense fluctuations is demonstrated in the following example. *See id.* An oil exporter faces declining prices that will lead to less demand for various domestic goods and services, an overall slowing of economy, and a rise in unemployment. *See id.* Under a flexible exchange rate system, the Ecuadorian government would allow the *sucre* to depreciate, thereby making exports less expensive for foreign buyers. *See id.* Accordingly, the resulting increase in demand for non-oil goods would compensate the loss of oil earnings and the shock would be absorbed. *See id.*

67. *Id.* at 80.

Notwithstanding such endorsements, many authorities adopt the opposite stance, pointing out that the flexible regimes have repeatedly failed throughout Latin America.[68] In particular, it is argued that recent experiences in the region indicate that the popularity of floating rates may constitute merely "another form of charming naivete" because such rates: (1) have failed to provide autonomy in the determination of interest rates; (2) have not facilitated more stabilizing monetary policies; and (3) have not increased the countries' ability to absorb shocks.[69] In the case of Ecuador, in an attempt to conserve its foreign reserves, the government in February, 1999, allowed the *sucre* to float, a maneuver that encountered significant difficulties. During the following year, the Ecuadorian currency lost more than seventy percent of its value against the dollar. Based on this performance, criticisms of the floating exchange policy were commonplace. One economist expressed it as "the *sucre* hasn't floated on a sea of tranquility."[70]

Apart from the unsatisfactory results of the flexible policy, dollarization in Ecuador is advocated for two additional reasons. First, elimination of the flexibility in monetary policy may actually benefit Ecuador. While some economists argue that central banks are necessary to control inflation, lower interest rates in times of recession, finance government deficit spending, and temporarily support financially troubled institutions; others vehemently reject this argument. Case in point, one expert maintains that the central banks are actually the "Achilles' heel of these countries," historically obstructing true economic advancement.[71] Such

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68. *See* STAFF OF JOINT ECON. COMM., ISSUES REGARDING DOLLARIZATION (prepared by Robert Stein) (July 1999), *available at* http://www.senate.gov~jec/bankingdollar.html. In the opinion of one expert, "Many emerging market countries may still be better off without the supposed safety valve of an independent monetary policy . . . Rather than counteracting economic shocks, independent monetary policies have actually been pro-cyclical, exacerbating the ups and downs of the business cycle." *Id. See also* George Grayson, *Ecuador, the Dollar, and the Coup d' Etat*, JOURNAL OF COMMERCE, Jan. 26, 2000, at 9. Opponents of dollarization make three principal arguments. They are against: (1) "the symbolism of forsaking a traditional currency for Uncle Sam's legal tender"; (2) losing control of the monetary policy; and (3) forsaking seigniorage. *Id.* Nevertheless, the author says that dollarization may be necessary in Ecuador because "the erratic monetary policies pursued by local officials also give heartburn to astute observers." *Id.*

69. *See* Hausmann, *supra* note 59, at 72. The author claims that past experiences in Chile, Mexico, Peru and Venezuela demonstrate that in reality the exchange rate was not allowed to move adequately during pivotal economic moments. *Id.* Instead, he argues, they "react by raising interest rates, thereby dramatically worsening the domestic downturn." *Id.*

70. Steve H. Hanke, *The Beauty of a Parallel Currency*, WALL ST.J., Jan.11, 2000, at A27. *See also* "Dolarización oficial en Ecuador,"REVISTA JUDICIAL, Mar. 1-7, 2000. Local legal experts claim that dollarization is necessary because, *inter alia*, the performance of the Central Bank in terms of controlling monetary policy and adjusting exchange rates has historically been "poor." *Id.*

71. Dale Keiger, *The Way According to Hanke*, JOHN HOPKINS MAGAZINE 2, Sept. 1999,

ineptitude, it is argued, is so apparent that virtually all persons, irrespective of their particular knowledge of economics, realize that the central banks are detrimental.[72] Other advocates of dollarization discredit the argument that such process is unfeasible in the larger economies of Latin America because of the need for swift adjustments. They argue that all of the states in the United States are dollarized, notwithstanding the distinct resources and disparate economic cycles of each.[73]

Second, in spite of contrary arguments espoused by Latin American political leaders, adopting the dollar is not equivalent to a surrender of national sovereignty. Historically, a national currency has been a symbol of a country, thus eradicating it would be tantamount to renouncing a portion of national autonomy. This perspective, though, is suspect in the opinion of dollarization advocates. For example, one Ecuadorian proponent flatly denies the existence of a relationship between the two factors stating that "[t]he currency of a country has nothing to do with its sovereignty."[74] In support of this assertion, the expert lists a number of countries that already use a foreign currency, emphasizing that they are, in fact, still countries.[75] According to this expert, the essence of sovereignty is free-will of a country's citizens, not that of the government.[76] Likewise, another

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available at http://www.jhu.edu/~jhumag/0999web/hanke.html. In the opinion of Steve Hanke, "the banks' record makes clear that they cannot be trusted to make prudent decisions, that they are susceptible to political pressures and poor judgment and tend to do more harm than good. Put them in a straitjacket... or abolish them altogether." *Id.* at 2.

72. *See id.* at 10. Hanke argues that people already know that the central banks are deficient and, thus, choose to dollarize unofficially. *See id.* at 10. Hanke points out, for instance, "[y]ou go to Mexico or Russia and you find that everybody is [sic]using greenbacks. They don't need some damned economist or pedagogue explaining the problem with central banks." *Id.*

73. *See* Steve Hanke, *Dollarize Now*, FORBES, May 3, 1999, at 208, *available at* LEXIS, Forbes File. Rejecting the argument that a nation's size is an impediment to dollarization, the author makes the following comparison: "There is less to this argument than meets the eye. All 50 states within the US are officially dollarized, and some have very large economies. Indeed, California's economy is larger than Brazil's, which accounts for almost 45% of Latin America's total economic activity. I have yet to hear calls to establish a Central Bank of California." *Id.*

74. José Luis Cordeiro, *La Segunda Muerte de Sucre . . .y el Renacer del Ecuador*, INSTITUTO ECUATORIANO DE ECONOMÍA POLÍTICA [IEEP] (1999).

75. *See* INSTITUTO ECUATORIANO DE ECONOMÍA POLÍTICA, DOLARIZACIÓN OFICIAL EN ECUADOR, (Jan. 12, 2000). The author explains that a Central Bank is not necessary for national sovereignty since, for instance, Ecuador was already a nation prior to the establishment of this institution. He contends, furthermore, that the importance of a national currency to project a national identity is overrated since Panama, a country that implemented dollarization nearly a century ago, still enjoys a strong national identity. *See id.*

76. *See* Cordeiro, *supra* note 74. The author claims that "[s]overeignty does not reside in the currency, rather in the well-being of the citizens. Accordingly, the only ones at risk of losing their 'sovereignty' with dollarization are "the corrupt politicians that print inorganic money in order to pay their own salaries." *Id.* The remainder of the population, maintains this

Ecuadorian expert postulates that sovereignty, as properly defined, focuses on the autonomy of consumers in selecting the most advantageous currency instead of on the freedom of the government to set monetary policy. In this sense, dollarization actually increases monetary sovereignty for Ecuador. For others, the issue lacks major importance due to the global trend toward overall economic stability.[77] Therefore, despite the nationalistic ideals so profoundly inculcated in the region, some argue that now many countries are "coming to the conclusion that the cost of maintaining a national currency - no matter how satisfying to their emotions - has simply become too high to bear."[78]

4. *Social Costs*

It has been argued that dollarization would have tremendous social costs because, when a government is deprived of its ability to use protective measures such as devaluating the local currency, the public in general, and the working class in particular, will be the repository of nearly all negative ramifications. According to one expert, "[a]dopting a common currency such as the US dollar or a newly minted one with the face of Columbus -or for that matter Ricky Martin- without ensuring the necessary changes in its institutional and economic structure, including the free movement of labor into the United States, may easily end up hindering . . . economic development."[79] On this same note, it is argued that, irrespective of

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author, would be more sovereign upon having a better quality of life linked to the strongest currency in the world. *See id.*

77. *See* Hausmann, *supra* note 59. The author suggests that this issue is probably less important than it appears. *See id.* The last 20 years have been characterized by the increasing independence of monetary authorities and a narrowing of the objectives to focus almost entirely on the achievement of price stability. *See id.*at 77-78. In the end, the author reasons, "the monetary authorities' autonomy and accountability are much more important than their national origins." *Id.*at 78.

78. Jonathan Peterson, *Latin America Ponders Dollars As Currency of the Realm*, DETROIT NEWS, Apr. 3, 1999, *available at* http://detnews.com/1999/biz/9904/03/04030073.htm. The author suggests that throughout the region attitudes toward dollarization and the idea of sovereignty are rapidly changing. *See id.* Now, claims the author, Latin American opinion leaders are openly discussing that which earlier was considered unspeakable, i.e., "linking their economies, indeed their financial destinies, to the very symbol of Yankee capitalism, the dollar." *Id.* This author argues that, in essence, the global marketplace is already dollarized and the tension begins only when countries see national identity as being linked to sovereignty. *See* David J. Rothkopf, *In Ecuador and Elsewhere, It's Change For a Dollar*, WASH.POST, Jan. 30, 2000, at B2. Whether the countries allow their currencies to float freely in the market or peg them to an existing currency such as the dollar, the author claims that "they have to face a new reality of the global marketplace. Their local currencies are a kind of figment of their national imaginations that dissolves once you cross their borders. Any transaction outside the country must be made in another currency." *Id.*

79. Juan Carlos Moreno Brid, *Dollarization in Latin America: Is it Desirable?*, DRCLAS NEWS, Fall 1999, *available at* http://fas-www.harvard.edu/~drclas/publications/

implementation of the dollar, developing economies like Ecuador will inevitably experience external shocks that require macroeconomic adjustment programs. Due to the fact that the option to modify the exchange rate is abolished under dollarization, the shocks will most likely be absorbed by reducing domestic wages and raising prices. As a result of the "monopolistic competition and rigidity of labor laws in the region," such changes would generate political and social instability.[80] Under dollarization, then, it is argued that the burden of macroeconomic adjustments will disproportionally impact the working class and the underemployed.[81]

This concern notwithstanding, Ecuadorian dollarization will more likely lead to a more equitable distribution of benefits. In a country such as Ecuador with a weak national currency, the financially sophisticated are able to preserve and even expand their wealth during periods of high inflation. The poor and those less economically astute, in contrast, tend to suffer during these phases. Therefore, the long-term stabilizing effects of dollarization would facilitate a more equitable distribution of wealth in Ecuador, particularly during periods of high inflation. The Ecuadorian government, in conjunction with dollarization, has already taken measures to institute a more balanced distribution of the assets. In an official document to the IMF, the government announced that public expenditure would be focused on "the poorest segments of the population, protecting them from the worst effects of the adjustment process and improving their human capital and earning capacity over the medium term."[82] The key elements to this plan include: (1) improving the distribution of the *bono solidario* (the government cash subsidy granted to the poorest 1.5 million Ecuadorians); (2) providing nutritional and medical support for young children and pregnant women; and (3) developing a fund to accelerate the social and economic development of the indigenous communities.

5. *Ancillary Costs*

Finally, apart from the potential disadvantages listed previously, dollarization involves two additional costs. First, Ecuador must bear the expense of making all prices, computer programs, cash registers, and vending machines compatible with the dollar. Second, both individuals and the government will bear legal and transaction costs associated with revising contracts or refinancing. Such conversion costs, though, are

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newsletter/fall99/moreno.htm.

80. *Id.*

81. *See id.*

82. Government of Ecuador, *supra* note 58.

somewhat mitigated since the amount may be amortized over a long period due to the virtual irreversibility of dollarization.[83]

B. *Advantages of Dollarization for Ecuador*

Notwithstanding the potentially detrimental aspects of dollarization, this economic transformation will undoubtedly benefit Ecuador in numerous ways. First, adopting the dollar reduces the risk of a sporadic currency devaluation which makes the country more appealing to foreign investors. Experts argue that the credibility of Latin American currencies, especially the minor ones, is limited. This is evidenced by the fact that none of these countries has created long-term debt markets denominated in local currency. The result is that firms find themselves at a pivotal juncture with two options that are equally unappealing: (1) borrow in dollars and be exposed to exchange rate mismatches or (2) borrow in local currencies and risk maturity mismatches and liquidity crises.[84] A second benefit of dollarization is that it also allows Ecuador to decrease its reserves. The existence of a national currency, in effect, segregates payments in national currency from those made in other currencies. Coupled with financial integration, dollarization will diminish this segregation, thereby transforming the Ecuadorian financial system into part of the worldwide pool of dollar liquidity. Third, a reduction in inflation is a byproduct of dollarization. In comparison to advanced economies, inflation in Latin America has been one hundred times more volatile–this phenomena is largely attributable to unstable economic policies.[85] Upon dollarizing, this rampant inflation so notorious throughout the region and in Ecuador will be stabilized. Similarly, as a fourth benefit, dollarization will lead to a reduction in interest rates

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83. *See* Catherine Mann, *Dollarization as Diet*, INST. FOR INT'L ECON., Apr. 22, 1999, *available at* http://207.238.152.36/TESTIMONY/dolariz2.htm. The author argues that dollarization should not be transformed into a fad diet, but a change of long-term lifestyle. *See id.* She explains, in particular, that "[p]olicy-initiated dollarization is like wiring your mouth shut to lose weight. It is effective in the short-run, but unless you undertake life-style changes (eating habits, exercise) you are not a healthier individual, just a thinner one. Moreover, once you have achieved your desired new weight, you'll want to take off the braces and eat something besides a liquid diet. Unwiring your mouth, de-dollarizing is very difficult since you can't be sure . . .that you won't go back to the old habits. Similarly, once dollarized by policy, changing the regime to regain monetary autonomy *simply may not be possible–in order to get the benefits, even if over-rated, you have to forswear ever changing.*" *Id.* (emphasis added).

84. *See* Peter Bate, *Dollars for Everyone?*, IDBAMÉRICA, INTER-AMERICAN DEVELOPMENT BANK, Jan.-Feb. 2000, *available at* http://www.iadb.org/exr/IDB/stories/2000/eng/cont.htm. This records the comments of IDB chief economist, Ricardo Hausmann, during a seminar titled "New Initiatives to Tackle International Financial Turmoil." *Id*

85. *See* Stein, *supra* note 65, at 2. From 1970 to 1998, consumer price inflation averaged as follows: Argentina (158%); Brazil (143%); Chile (51%); Mexico (34%); Peru (108%); and Venezuela (25%). *Id.*

since these usually contain a premium for anticipated inflation or devaluation. With these economic fluctuations eliminated or significantly decreased, the interest rate will also enjoy increased stability.[86] Fifth, as discussed in the previous section, dollarization will encourage a more equitable distribution of benefits in Ecuador. Sixth, as a member of a unified currency zone in which the sometimes onerous step of currency conversion is absent, Ecuador and American businesses alike will enjoy lower transaction costs. The seventh beneficial aspect is the increased transparency with which the Ecuadorian government and its financial institutions will function. As the first Latin American country to introduce dollarization in nearly a century, Ecuador is being closely scrutinized by experts on a global level. This degree of vigilance will undoubtedly improve the efficacy of the government, which has historically been criticized for its inefficiency and susceptibility to corruption.[87] Aware of this debility, in conjunction with the loans from the IMF, the government has announced a plan to improve the supervision of the banking industry.[88] Eighth, the stability generated by dollarization will continue to facilitate Ecuador's exports to the United States and other destinations. A significant percentage of Ecuador's revenue is derived from exports. For instance, petroleum sales constitute nearly ten percent of the country's entire Gross Domestic Product, and this nation is also one of the leading banana exporters in the world, selling $1.3 billion worth of this fruit per year. With an economy so reliant

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86. *See* C. Fred Bergsten, *Dollarization in Emerging-Market Economies and Its Policy Implications for the United States*, INST. FOR INT'L ECONOMICS, Apr. 22, 1999, *available at* http://www.iie.com/TESTIMONY/dollariz.htm. Dollarization offers three main benefits to Ecuador: (1) it provides greater credibility to a nations's commitment to eternally forgo the option to devaluate; (2) it assures that the nation will import stable prices and lower interest rates from the United States; and (3) it lowers transaction costs, which, in turn, promotes further long-term integration with the United States economy. *See id.*

87. *See* INSTITUTO ECUATORIANO DE ECONOMÍA POLÍTICA, *supra* note 75. Ecuadorian academicians describe the situation in the following manner:

> Ecuador is rich in resources but poor in financial institutions that function well. Dollarization will end the economic problems and create a permanent structure to focus and resolve other problems in a rational manner. The current monetary policy wastes Ecuador's potential, scaring off production and financial supervision. Ecuador has no reason to continue facing its current problems. Dollarization is a first step of crucial importance to resolve them.

Id.

88. *See* Government of Ecuador, *supra* note 58, at 1. The government also claims that the Superintendency of Banks will improve its supervision and enforcement of banking regulations, with penalties being imposed on a "systematic and nondiscretionary basis." *Id.* at 9. Strengthening bank supervision will include: (1) identifying 'at risk' banks for intensive monitoring; (2) reorganizing the structure to improve regional and departmental coordination; (3) instituting a training program for supervisory staff; (4) executing bilateral agreements with relevant foreign supervisors to share information; and (5) testing and adapting the provisions of the Economic Transformation Law to the existing manuals used during inspections. *See id.* at 9-10.

on sales to external markets, the stability associated with dollarization seems fundamental to continued success, particularly in terms of trade with the United States.[89] Finally, dollarization is advantageous for Ecuador because it recognizes the free-will of the public, allowing it to utilize its currency of choice.[90]

C. *Effects of Ecuador's Dollarization for the United States*

Due to the expanded use of the dollar abroad, dollarization in Ecuador will undoubtedly have repercussions for the United States, positive and negative alike. In terms of potential adverse consequences, some experts have described dollarization as a "mixed blessing" for the United States for two main reasons.[91] First, some argue that officially condoning Ecuador's use of the dollar will make it more difficult for the Federal Reserve to conduct monetary policy favorable to U.S. national interests. These analysts argue, in particular, that with dollarization "the Federal Reserve Board, in effect, becomes responsible not only for the U.S. economy but the economies and monetary policies of dollarized nations, with all the political risks that entails."[92] This assertion has been rejected by other experts who, in contrast, maintain that the mandate of the Federal Reserve always has been and will continue to be domestic, irrespective of dollarization in Ecuador.[93]

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89. *See* U.S. DEP'T OF STATE, COUNTRY COMMERCIAL GUIDES: ECUADOR (1999), *available at* http://www.state.gov/www/about_state/business/com_guides/1999/wha/ecuador99_01.html. The United States is Ecuador's largest trading partner, purchasing approximately thirty-nine percent of its total exports. *Id.*

90. *See* Stein, *supra* note 65 (citing Mario I. Blejer and Marko Skreb, BALANCE OF PAYMENTS, EXCHANGE RATES AND COMPETITIVENESS IN TRANSITION ECONOMICS (1999); and Kurt Schuler, SHOULD DEVELOPING COUNTRIES HAVE CENTRAL BANKS? MONETARY SYSTEMS AND CURRENCY QUALITY IN 155 COUNTRIES (1996)). An "optimum currency area" may be defined as "a region in which it is economically preferable to have a single official currency rather than multiple official currencies." *Id.* The criteria to form an optimum currency area with the United States include: (1) the extent to which country may be similarly affected by the economic shocks that hit the United States; (2) the general closeness with which the business cycle is synchronized with the United States; (3) the reduction in inflation the country would enjoy by getting monetary policy set by the Federal Reserve; (4) its oneness to trade and the amount of trade with the United States; (5) the diversification of its economy; and (6) the efficiency gains from eliminating exchange-rate risks. *See id.* Just because a country does not meet enough of these factors, though, does not mean it cannot be part of optimum currency area. *See id.* In fact, one theory dictates that the determination should not be made on abstract economic theory; rather, the behavior of the people should govern. *See id.* "[I]f people in a country show a preference for holding dollars rather than another currency, then that country is part of an optimum currency area with the United States." *Id.*

91. Dale McFeatters, *The Almighty U.S.-Ecuadorian Dollar*, SCRIPPS HOWARD NEWS SERVICE, Jan. 19, 2000.

92. *Id.*

93. *See Responding to Global Crises: Dollarization in Latin America*, 1 ECONSOUTH 2

In order to clarify the intentions of the United States in spite of dollarization, some suggest that an explicit disclaimer could prevent subsequent recriminations from Ecuador. Accordingly, Alan Greenspan, chairman of the Federal Reserve, recently warned candidates for dollarization that they should do so at their own risk: "We would never put ourselves in a position where we envisioned actions that we would take would be of assistance to the rest of the world but to the detriment of the United States."[94] This statement was accurately interpreted by the Latin American countries to mean that (1) the U.S. government is unwilling to extend the safety net of the Federal Reserve system to dollarized countries that incur economic trouble and (2) the Fed will not determine monetary policy to account for the cyclical differences between the United States and Latin America.[95]

The second main reason for labeling dollarization a "mixed blessing" for the United States is, despite the express disclaimers of liability issued by Greenspan, the process may still tarnish the U.S. image abroad. Specifically, experts speculate that, while dollarization would undoubtedly strengthen economic and other ties, there exists the risk that in difficult times the loss of monetary sovereignty will fuel resentment and encourage policymakers to attribute problems to the United States.[96] In view of the

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(1999), *available at* http://www.frbatlanta.org/publica/econ_south/1999/q2/index.html. Jack Guynn, president and CEO of the Federal Reserve Bank of Atlanta, discussing the role of the Federal Open Market Committee (FOMC), the policy-making section of the Federal Reserve explained that "[t]he mandate of the FOMC is chiefly domestic. We're charged with delivering the best economic conditions we can as defined by, among other things, the inflation rate, the GDP growth, the unemployment rate and the safety and soundness of the banking system in the United States." *Id.* Mr. Guynn did acknowledge, though, that even such domestic-based decisions inevitably produce ramifications on a global level. *See id.*

> But the policy environment in which we attempt to achieve this mandate is global. No economic condition in any part of the world can be considered exogenous. And any action intended to produce a strictly domestic result is almost instantly transmitted around the globe and may or may not be countervailed by a concomitant charge in international economic conditions.

Id. See also Steven Beckner, *Greenspan: Dollarization Unlikely to Create Problems for Fed*, MARKET NEWS INT'L, Apr. 22, 2000, *available at* http://www.economeister.com/news/1999_04/22/141800mo.htm. Greenspan clarified that the Fed would not alter its policy to benefit dollarized countries. *See id.* Although U.S. monetary policy has historically taken into account the situation in the rest of the world, explained Greenspan, the Fed would "not focus on the wellbeing of the world as a whole versus the wellbeing of the United States." *Id.* Greenspan announced, moreover, that external pressures subsequent to dollarization would have minimal impact on U.S. policy, thereby making the issue essentially moot: "As a practical matter, I really don't think that's a big issue." *Id.*

94. Larry Rohter, *Using the Dollar to Hold the Line: U.S. Currency Becomes Ecuador's*, N.Y. TIMES, Jan. 18, 2000, at C1, *available at* LEXIS, New York Times File.

95. *See id.*

96. See U.S. DEP'T OF TREASURY, COMMENTS BEFORE SENATE BANKING COMM.–SUBCOMM. ON ECON. POL'Y AND SUBCOMM. ON INT'L TRADE & FIN. (Apr. 22, 1999).

region's history of political and economic instability, the Clinton administration has acknowledged its concern that the relationship would become too close. According to U.S. Treasury Secretary, Lawrence H. Summers, "given the political dynamics that play out in those societies at times of economic frustration [resentment] could be vented at us."[97] Notwithstanding these arguments, high-ranking U.S. officials contend that the dollarization of Ecuador will not have a significant effect on the U.S. economy.[98] Moreover, other experts argue that, even if dollarization forces the United States to adjust its political and monetary policy based on conditions reigning in other countries, such a practice would not constitute a novelty.[99]

In terms of positive aspects of Ecuador's dollarization for the United States, attention focuses on two areas. First, dollarization would fortify the U.S.-Ecuador trade relationship, thereby increasing the amount of U.S. products sold in this Latin American nation. Currently, consumer demand in Ecuador for U.S. products is quite high. Official government studies reveal that "Ecuador's 12 million inhabitants . . . like American products and often prefer them to national and European brands, making the United States Ecuador's leading supplier."[100] Based on this popularity, in 1997 the United States exported approximately $1.5 billion worth of goods and services to Ecuador, which constituted 30.6% of Ecuador's total imports.[101] Statistics aside, official sources indicate that exporting to Ecuador is lucrative for those U.S. companies involved. In fact, according to a recent assessment by the U.S. Department of State, "[m]any U.S. firms find that

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97. Rohter, *supra* note 94.

98. *See generally* Steven K. Beckner, *Greenspan: Dollarization Unlikely to Create Problems for Fed*, MARKET NEWS INT'L, *available at* http://www.economeister.com/news/1999_04/22/141800mo.htm. According to Greenspan,

> [t]here is already a very large amount of U.S. currency in circulation outside the borders of the United States. We've been able to adjust our monetary policy to recognize that, and there have been no particular problems that have occurred as a consequence of that. So in a technical sense, there should be no particular problems if additional countries were to dollarize as far as our mechanical abilities to implement the appropriate monetary policy in the United States is concerned.

Id.

99. *See generally* Ricardo Hausmann, et al., *Financial Turmoil and the Choice of Exchange Rate Regime*, INTER-AMERICAN DEVELOPMENT BANK 1, 20 (1999). According to the author, the Fed will want to maintain total independence due to its fear that markets will presume that it will consider the economic conditions of Latin America when setting policy. *See id.* This fear, suggests the author, is a reality in today's world. *See id.* "Was it not the economic conditions of emerging markets and their impact on the U.S. financial system that prompted the interest rate cuts of October and November 1998?" *Id.*

100. U.S. DEP'T STATE, COUNTRY COMMERCIAL GUIDES: ECUADOR (1999), *available at* http://www.state.gov.www.about_state/business/com_guides/1999/wha/ecuador99_01.html.

101. *Id.*

selling into the Ecuadorian market is profitable, with fewer competitors, a general preference for U.S. brands, and many niche markets."[102] This profitability, argues the report, is likely to increase in the near future.[103] This positive historical performance notwithstanding, analysts predict that dollarization would allow U.S. exports to surpass former achievements, both in terms of quantity and profitability, for several reasons. The Ecuadorian markets for U.S. goods would become less volatile because, upon dollarization, Ecuador would be unable to make "competitive devaluations" designed to impede U.S. exports. This inability to devalue would, in addition, foster a more harmonious U.S.-Ecuador trade relationship by reducing incidents of alleged "dumping," which tends to arise when there are large unexpected devaluations that suddenly make the goods considerably less expensive. In short, dumping allegations are not derived from technological advantage; rather, they are a byproduct of "capricious exchange rate policies."[104] Moreover, by encouraging dollarization, experts argue that "the U.S. has an opportunity to share with other countries a key factor responsible for our own economic success . . . price stability."[105] Finally, the lack of inflation afforded by dollarization would generate greater levels of consumption.[106]

In addition to improving exports to Ecuador, dollarization would also benefit U.S. investments already present in the country. Currently, U.S. companies have significant investments in selected industries, including $730 million in petroleum, $193 million in manufacturing, $67 million in wholesale trade, $1 million in banking, $23 million in insurance and real estate, and $3 million in services.[107] The stabilizing effect of dollarization and its ability to stimulate economic growth would, therefore, serve to protect U.S. investments in Ecuador, current and future alike.

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102. *Id.*

103. *See id.* "As a major importer with a limited, but growing, manufacturing base, Ecuador will continue to seek suppliers of consumer, agricultural and industrial products and services." *Id.*

104. STAFF OF JOINT ECON. COMM., 106TH CONG., REPORT ON BASICS OF DOLLARIZATION (prepared by Kurt Schuler), *available at* http://www.senate.gov~jec.basicshtm .

105. Connie Mack, *A Fist Full of Dollarization*, INVESTOR'S BUSINESS DAILY, May 12, 1999, at 4, *available at* LEXIS, Investor's Business Daily File.

106. *See generally Responding to Global Crises: Dollarization in Latin America*, 1 FED. RESERVE ECONOSOUTH BANK OF ATLANTA, at 4. (1999), *available at* http://www.frbatlanta.org/publica/exon_south/1999/q2/indiv.html. The author explains that dollarization should "lead to faster rates of economic growth . . .;[t]he stronger consumption and increased sales this growth would spark could improve the performance of U.S. businesses that export to the dollarized markets." *Id.*

107. *See generally* U.S. DEP'T OF STATE, 1998 COUNTRY REPORT ON ECON. POL'Y & TRADE PRACTICES: ECUADOR (Jan. 31, 1999), *available at* http://www,state,gov/www/issues/economic/trade_reports/wha98/ecuador98.html. Overall, U.S. investments in Ecuador are approximately $1175 billion. *Id.*

VI. JUSTIFICATIONS FOR US PARTICIPATION IN THE DOLLARIZATION OF ECUADOR

Due to the fact that Ecuador, even within Latin America, has never been regarded as an economic leader, politicians and analysts worldwide are closely scrutinizing this nation's dollarization effort. In terms of U.S. interests, sources claim that "both the Clinton administration and its trading partners from Canada to Chile will be watching the experiment here intently–and with a healthy dose of skepticism."[108] Notwithstanding this overt curiosity, U.S. participation to date has been labeled "agnostic," an ambivalence caused in part by the Clinton administration's concern about the mechanics of the process and the potential added burden.[109] In light of the circumstances, this lethargy is an erroneous strategy that should be replaced by active involvement by the United States, to the extent solicited and necessary, in the dollarization of Ecuador. As suggested previously, though, this participation should not be categorized as simply another example of hegemonic tendencies.[110] Rather, U.S. involvement seems inherently logically based on the following arguments.

A. Dollarization Presents Advantages For Ecuador and the United States and Concords with the Concept of Free Trade

First, as amply demonstrated above, notwithstanding the arguments to the contrary, dollarization produces numerous benefits for both Ecuador and the United States. Second, the concept of dollarization concords with the U.S. policy of hemispheric integration so adamantly promoted by this nation during the last decade. Pursuant to the original timetable, by 2005 the Free Trade Area of the Americas (FTAA) should stretch from Alaska to the Tierra del Fuego, thereby facilitating free trade between thirty-four countries located in the Western Hemisphere, comprised of over 755 million people. In addition to the FTAA, the United States has spearheaded or openly

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108. Rohter, *supra* note 94. *See also* David J. Rothkopf, *In Ecuador and Elsewhere, It's Change For a Dollar*, WASH. POST, Jan. 30, 2000, at B2, *available at* LEXIS, Washington Post File. The author contends that Ecuador's decision to dollarize was premature. *See id.* "Under the circumstances, dollarization is something of an act of desperation. It is like buying smaller clothes before you've begun to diet. At best, it's constraining [and] at worst, it's an invitation for disaster." *Id.*

109. Rohter, *supra* note 94. *See also EEUU apoya la dolarización en Ecuador*, EL DÍA, Jan. 12, 2000. In her capacity as the U.S. Ambassador to Ecuador, Gwen Clare expressed U.S. approval of dollarization in general, but she emphasized the need to pass the laws and regulations necessary to properly carry out the process. *See id.*

110. *See generally* Rothkopf, *supra* note 108. Some authors, explicitly or implicitly, have provided hegemonic rationales for dollarizing Ecuador. The writer of this article, for instance, states that upon dollarization the United States "can withhold cooperation from countries that adopt political or social policies with which we don't agree." *Id.*

condoned numerous multilateral trade initiatives, such as the North American Free Trade Agreement (NAFTA).[111] On the basis of this integration theory, there are compelling reasons to consider dollarization. In fact, according to one economist, in addition to facilitating the dollarization of Ecuador, the United States should begin to encourage dollarization throughout the entire region, using Mexico as a natural point of entry.[112]

It is argued, furthermore, that in light of the current conditions, the United States is effectively obligated to take a stance in order to preserve its position as a global forerunner. One expert suggests, in particular, that a "neutral position has strong negative implications for the U.S. with regard to global economic leadership."[113] This expert maintains that, parting from the premise that a stable monetary order is the foundation for a hemispheric free trade agreement, the United States finds itself in a quandary: how to propagate dollarization without creating the erroneous impression of imperialism.[114] To demonstrate that U.S. interest in dollarization should be increased for reasons other than self-interest, the author argues that chaos in the international monetary system is the nemesis of a "global marketplace dedicated to free trade."[115] As drastic exchange rate changes provoke accusations of dumping and unfair competition, governments tend to utilize protectionist measures that prejudice international trade and investment relations. Thus, as stated earlier, although the United States did not

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111. North American Free Trade Agreement (NAFTA), Dec. 17, 1992, United States, Mexico, Canada, 32 I.L.M. 605 (1993), *available at* http://www.tech.mit.edu/Bulletins/nafta.html. The amount of information on U.S. trade policy is overwhelming. *See, e.g.* Karen Roberts & Mark Wilson, POLICY CHOICES: FREE TRADE AMONG NAFTA NATIONS (1995); *See also* Richard Fisher, *The FTAA: A Commitment to Fair and Open Trade*, USIA ECONOMIC PERSPECTIVES, Mar. 1998, *available at* http://www.usia.gov/usis.html. (explaining the impact of various trade agreements on open markets).

112. *See generally* Judy Shelton, *Dollarization as Destiny?*, Feb.18, 1999, *available at* http://www.intellectualcapital.com/issues/issue170/item891.asp. The author explains that Mexico is the gateway to Latin America and will play a key role in establishing a common monetary foundation to support expanded trade. *See id.* Accordingly, the author suggests that the United States send "both an urgent message and a gracious invitation to Mexico: We need to talk." *Id.*

113. *Hearing on Official Dollarization in Emerging-Market Countries Before the Subcomm. on Int'l Trade and Finance, Senate Banking, Housing and Urban Affairs Committee*, 106th Cong. (1999) (statement of Judy Shelton, member of the board, Empower America). According to Shelton, "[i]t would be a mistake for the United States to be so cowed by the potential for diplomatic clashes that it avoids encouraging movements toward dollarization in Mexico and Canada." *Id.* At this juncture, contends Shelton, it is necessary to emphasize "the positive implications of stable monetary relations among vital trade partners." *Id.*

114. *See id.* The author presents the following issue: "[H]ow do we send a message of encouragement that neither seeks to entice nations toward dollarization with superficial rewards nor obligates the United States to compromise its own perceived economic interests?" *Id.*

115. *Id.*

participate in Ecuador's initial decision to dollarize, under the present circumstances, it is essentially obligated to react: "Dollarization has arisen as a spontaneous movement within our hemisphere; this puts the ball in our court. If the United States neglects to play it, we lose the chance to win a decisive victory for free trade and free markets."[116]

B. The Existing Legal Mechanisms In Ecuador Are Insufficient

Next, outside participation is necessary due to the fact that the key instruments in the implementation of dollarization, the Economic Transformation Law and the judiciary system assigned to enforce it, are suspect.[117] In order to obtain the full benefit of dollarization, instead of merely replacing the *sucres*, Ecuador must also: (1) remove the power of the Central Bank to act in the monetary sphere and eviscerate its power to act as a pseudo-lender of last resort; (2) accomplish international financial integration by establishing elements to facilitate interaction with global markets; and (3) provide for a rule of law.[118] The situation in Ecuador, it is claimed, is only partially corrected by the Economic Transformation Law because it provides for privatizing only fifty-one percent of many government entities.[119] Although affirmative steps are being taken to

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116. *Id.*

117. *See generally* Ricardo Hausman & Andrew Powell, *Dollarization: Issues of Implementation*, INTER-AMERICAN DEVELOPMENT BANK (1999). The authors suggest that "[s]upport from Congress, the business community, the financial sector, labor organizations and civil society is bound to be needed *in order to put in place the necessary laws, regulations and reforms* and in order to reap the full potential benefits of the new monetary regime." *Id.* at 2. (emphasis added). In the case of Ecuador, these pre-conditions for a successful dollarization are absent or deficient. *See id.*

118. *See* Steve H. Hanke, *Ecuador Needs More Than a Dollars-for-Sucres Exchange*, WALL ST. J., Mar. 31, 2000, at A19. A 1999 study by Political Risk Services that analyzed factors such as amount of bureaucracy, corruption, likelihood of governmental repudiation of contracts, and risks of expropriation, ranked Ecuador as one of the worst countries in terms of "rule of law." *Id.*

119. *Id.* The author contends that the Economic Transformation Law is simply incomplete and that "[t]he government's retention of a minority interest in privatized enterprises is an invitation for political mischief and corruption. The law should be amended to require full privatization." *See also* Mary Anastasia O'Grady, *Ecuador Staggers Toward a Dollar Economy*, WALL ST. J., Mar. 3, 2000, at A19. Likewise, this author opines that the Economic Transformation Law is an improvement, albeit an underdeveloped one. She states, in particular, that "[i]t's hard to see how growth-hungry capital, with its many suitors, will come screaming into Ecuador under these conditions. Nor is it clear how Ecuador plans to attract international banks for the financial integration that dollarization requires." *Id. See also FMI Dice Ecuador Debe Profundizar Reformas*, REUTERS, Mar. 27, 2000, *available at* LEXIS, Reuters File. Jeffrey Franks, FMI representative in Quito, acknowledged that approving the Economic Transformation Law was a significant step toward dollarization but emphasized that there are still a series of reforms that must be implemented. From Franks' perspective, a solid legal foundation will eliminate volatility, a prerequisite to advancement. Franks explains: "It is

facilitate this privatization process, its effectiveness is undermined by the limitations set forth in the Economic Transformation Law.[120] While the promulgation of this law is unquestionably a positive effort, to truly implement dollarization and thereby stabilize the economy some claim that serious additional measures need to be taken: "Ecuador is clearly on the right track. To reach the station, it must sweep out all vestiges of central banking, ensure financial integration and establish the rule of law without waiting for an overhaul of its own courts."[121] Other experts concur, arguing that governmental monetary institutions must be eradicated because Ecuadorians endure "profound economic suffering at the hands of the perniciously politicized Ecuadorian central bank."[122] In sum, while the promulgation of the new Economic Transformation Law is a positive first step, it may constitute mere hope because the key problem, the discretionary powers of the Central Bank, remains.[123]

In addition to amending the Economic Transformation Law, Ecuador must implement judicial reform, thereby creating a system capable of enforcing such legislation. Recently, the World Bank loaned Ecuador approximately $10 million to implement reform in the judicial sector. Prior to doing so, though, this financial institution analyzed the current state of the judicial system in Ecuador and concluded that such a loan "would provide the basis for creating an effective and efficient judicial system which is required for economic development, public reliance and confidence in laws and their enforcement."[124] This study also indicated that the objective of this

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difficult to imagine foreign investors coming to Ecuador if an environment of economic stability does not exist." *Id.*

120. *See generally* Press Release No. 99/140, Brigid Janssen, International Finance Corporation, No. 99/140 (May 6, 1999), *available at* http://www.worldbank.org/ifc/pressroom/Archive/1999/99140/99140.html. Ecuador signed an agreement with the International Finance Corporation in May 1999 to advise the government on restructuring and privatizing state-owned entities, including electricity, telecommunications, hydrocarbons, airports, postal services and the sanitation sector. *See id.*

121. Hanke, *supra* note 118.

122. O'Grady, *supra* note 119.

123. *See id.* This author suggests that this legislation "grossly perverts" the term dollarization when it grants discretionary powers to the central bank such as setting reserve requirements and interest rates. Abolition of the central bank in its entirety, she argues, is a prerequisite to true advancement:

> The central bankers, it would seem, harbor a deep-seated desire to manipulate monetary outcomes even in the absence of a domestic currency system. This is absurd, but it is also illustrative in that it dramatically defines the core problems of the country: The central bankers, along with this country's other privileged elite, are dug in so hard that nonsense becomes law at their behest. Prying their hands off the economy and moving toward liberalization will mean a long, hard fight, well beyond the simple dollar-for-*sucres* exchange.

Id.

124. WORLD BANK, STAFF APPRAISAL REPORT - ECUADOR: JUDICIAL REFORM PROJECT (Sept. 1994), *available at* http://www.worldbank.org/pics/sar/15385.

reform is to improve judicial administration by: (1) reducing case backlog; (2) increasing access to justice by ensuring that the poor have adequate representation; (3) improving legal training for judges, lawyers and students; and (4) modernizing judicial infrastructure.[125]

According to the World Bank, a judicial system should provide efficient and rational outcomes and remedies, yet this "is not the case in the Ecuadorian judicial system, and so the public lacks confidence in the system."[126] Irrespective of the changes to the constitution implemented in 1992 to improve this situation, government officials, the judiciary, and the private sector recognize that additional reforms are necessary to modernize the legal system.[127] Furthermore, the Ecuadorian government has realized that economic and social progress requires improved governance, a key element of which is the development of an effective judicial system. In a recent document submitted to the IMF, the government acknowledged that the widespread distrust and inefficiency of the judicial system is detrimental to foreign and domestic investment. The government, therefore, has committed itself to working with the supreme court to reform the judicial system "to ensure rapid and impartial decisions based on accepted international standards and principles and Ecuadorian law."[128]

C. *Dollarization Would Help With the Euro-Dollar Rivalry*

Third, theorists claim that a decrease in the amount of usable currencies is a foregone conclusion, arguing that, like Ecuador, eventually all nations will be driven to adopt one of only a few supranational currencies.[129] Due to this current global trend of currency reduction, experts argue that dollarization is necessary to confront the potency of the euro, the

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125. *See id.* The judicial system in Ecuador has been plagued by insufficient financial resources, administrative inefficacies, and a sizable case backlog. *See id.*

126. WORLD BANK, SECTOR REPORT NO. 12777 - ECUADOR: JUDICIAL SECTOR ASSESSMENT (Aug. 19, 1994), *available at* http://www.worldbank.org/pics/pid/ec36056.txt.

127. *See id. See also* John Otis, *Law & Order*, LATIN TRADE, June 1, 1997, *available at* http://www.latintrade.com/content/archives/index.cfm?StoryID=838. This article argues that judicial reform is necessary in Ecuador and throughout the region because, among other things, the courts and judges move at "snail's speed," the rulings are "neither fair nor just," corruption is prevalent, and the separation-of-powers concept is ignored. *Id.* These factors, suggests the author, produce one principal effect: "widespread mistrust of Latin America's judiciary." *Id.* This generalized lack of confidence in the legal system significantly undermines the efforts toward economic modernization and foreign investment. *See id.* In the words of one local expert, allowing the legal system to deteriorate to such extremes is tantamount to "retooling a factory with state-of-the-art machinery, then forgetting to hire the security guards." *Id.*

128. Government of Ecuador, *supra* note 58.

129. *See generally* Rothkopf, *supra* note 108. This author states that "Ecuador may have turned to dollarization out of desperation. But when it did, it became part of an irreversible trend that is a century in the making." *Id.*

first "true rival" of the dollar in decades.[130] This widespread phenomena of eliminating weaker currencies has, according to analysts, created a sense of urgency in Latin American countries to attempt to create their own regional arrangements or, alternatively, to join the existing dollar or euro blocks.[131] Similarly, it is argued that, in light of the inevitability of a global currency competition, the United States is effectively obligated to take swift measures to facilitate dollarization in Ecuador and throughout the region.[132] To the contrary, after fierce competition, these nations may adopt the euro.[133] In the words of one expert, "the region, particularly in the southernmost portions, might become a battleground between the euro and the dollar."[134] In this perhaps unavoidable battle, Ecuador plays a pivotal role because increasing the circulation of the dollar, even in a country comprised of some thirteen million people, may lead to the adoption of the dollar by other Latin American countries with larger economies that have manifested a sincere interest in the possibility.[135] From one expert's perspective, the propagation

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130. STAFF OF JOINT ECON. COMM., REPORT ON BASICS OF DOLLARIZATION (written by Senator Connie Mack), *available at* http://www.senate.gov~jec.basicshtm . The author explains that since the First World War, the number of currencies with independent monetary policies has risen in proportion to the number of independent countries. *See id.* However, the author states, a period of currency consolidation has commenced that will again divide the world into two or three large currency blocks.
See id.

131. *See id.*

132. *See generally* Mark Falcoff, Latin American Outlook - American Enterprise Institute for Public Policy Research, *Dollarization for Argentina? For Latin America?*, Apr. 1999, *available at* http://www.aei.org/lao/lao10297.htm. The author explains that many economists believe that the world is moving toward the use of two currencies: the euro and the dollar. Thus, "[i]f the United States refuses to assume the leadership to create a dollar area, some Latin American countries may feel obliged to adopt the euro." *Id.*

133. *See* Alonso R. Trujillo, *MERCOSUR: Trade Negotiations with EU*, 7 INTER-AMERICAN TRADE REPORT (May 22, 2000). In April, 2000, preliminary negotiations were held in Argentina between representatives of the European Union (EU) and MERCOSUR in order to identify the structure and delegates for the forthcoming bilateral negotiations, which are designed to facilitate the creation of a free trade area between these two blocks. Such heightened relations in terms of trade, investment and capital movements could lead to the eventual adoption of the euro. *See id.*

134. Falcoff, *supra* note 132.

135. *See generally* Zeljko Bogetic, *Official or Full Dollarization: Current Experiences and Issues*, INT'L MONETARY FUND, June 9, 1999, *available at* http://users.erols.com/kurrency/bogdllr.htm. The author suggests that numerous Latin American nations are serious prospects for official dollarization, yet the progress in each country is distinct: (1) Argentina - Prompted by doubts about the credibility of the Convertibility Plan of 1991 that established a currency-board type system, in January 1999 President Carlos Menem announced that the government was studying the possibility of full official dollarization; (2) El Salvador - In 1995, the government divulged its intention to fully dollarize the country, a proposal that was discarded based on studies by international financial institutions that indicated that Ecuador's economy and financial situation were "not healthy enough" for dollarization. In 1999, however, this initiative was reintroduced by the president,

of the dollar in Latin America "would help the dollar remain the premier international currency, a status that the euro is now challenging."[136]

D. *Ecuador is the "Economic Guinea Pig of Latin America"*[137]

Finally, U.S. participation in the dollarization of Ecuador is justified due to the symbolic importance of this country. In other words, under the circumstances, the risk is created that "if the experiment here fails, it will damage the concept's credibility elsewhere in the region."[138] Due to the advanced stage of unofficial dollarization in the country anyway, experts contend that it is logical that the United States take an active role in facilitating dollarization in Ecuador, provided that the bureaucracy does not impede nimble decision-making.[139] Ecuador's abrupt decision to dollarize, according to some sources, is tantamount to the decision made by the Spanish conquistador Hernan Cortés upon reaching America to burn his ships entirely. From both incidents the same message is derived: "There is no turning back."[140] Ecuador now constitutes a test case which, if successful

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Armando Calderón Sol; (3) Mexico--Since the economic crisis in 1994 and ensuing "tequila effect," dollarization of this nation has been debated. Despite government opposition to the measure, many Mexican business leaders and trade associations have manifested support for dollarization; and (4) Peru - with considerable unofficial dollarization already (approximately 65% percent of the money supply is held in dollars) and recurring hyperinflation, Peru has shown interest in dollarizing. *See also Dollarization: Fad or Future of Latin America*, INT'L MONETARY FUND (June 24, 1999), *available at* http://www.imf.org/external/np/tr/1999/TR990624.htm. (explaining the potential for dollarization) *See also* Ian Katz, *Greenback Magic?*, BUSINESS WEEK, Mar. 13, 2000, at 36. The author claims that Ecuador's plan to dollarize has renewed this debate in other Latin American countries. Unlike other nations in the region that are seriously considering this possibility, Chile and Brazil "have not warmed to the idea of trading in their currencies for the greenback." *Id.* In these countries, argues the author, an economic cataclysm would necessarily occur to create an interest in dollarization. *See id.*

136. STAFF OF JOINT ECON. COMM., ENCOURAGING OFFICIAL DOLLARIZATION IN EMERGING MARKETS (prepared by Kurt Schuler) (Apr. 2000), *available at* http://www.senate.gov~jec.basics.html.

137. Jane Bussey, *Ecuador's Dollarization Seen As the Test Case for Controversial Measure*, MIAMI HERALD, Jan. 20, 2000, *available at* LEXIS, Miami Herald File.

138. *See* Rohter, *supra* note 94. According to U.S. Treasury Department officials, describing Ecuador's decision to dollarize as untimely would be a gross understatement: "Not only is the country's economy in terrible shape, but the decision to dollarize was taken hastily and unilaterally, for reasons more political than economic, catching Washington and international lending agencies completely by surprise." *Id.* Accordingly, implementing dollarization in Ecuador, if successful, will serve as a paradigm for other nations in the region.

139. *See* Hanke, *supra* note 73. This article claims that "[t]he unofficial dollarization train left the station long ago. If the wags in Washington don't get in the way, it all could be made official and serve as the linchpin of a new global financial architecture, one that would eliminate currency crises, lower interest rates and stimulate growth." *Id.*

140. Nathaniel Harrison, *Ousted Ecuadorian President Gambled and Lost on Dollarization*, AGENCE FRANCE PRESSE, Jan. 22, 2000, *available at* LEXIS, Agence France

in these conditions, will serve as an invaluable instrument for the propagation of dollarization throughout the region. Evidence of this potential is found in the recent announcements by other Latin American countries expressly interested in adopting the dollar.[141] According to economists at the Inter-American Development Bank, the importance of dollarization in Ecuador cannot be underestimated: "If this fails, there aren't too many lessons because it is such a difficult case. But if it succeeds, even in Ecuador, it can make it anywhere."[142]

VII. CONCLUSION

As demonstrated above, the economic and legal situation prevalent in Ecuador in recent history has been turbulent. The extent of this financial precariousness was recently evidenced when, faced with pervasive social unrest and intense political pressures, dollarization was abruptly introduced as a desperate measure. To implement this initiative, the government promulgated the Economic Transformation Law, a piece of legislation heavily criticized for its inadequacy in terms of facilitating full dollarization. While dollarization may generate some negative side effects, as clearly illustrated throughout this article, this process could undoubtedly prove beneficial to both the United States and Ecuador. To obtain the benefits, however, dollarization must be implemented swiftly and without obstacles which, if not eliminated, could become insurmountable.

Ecuador's decision to dollarize was made unilaterally, yet the need for external assistance has become exceedingly apparent since the inception of the program. In terms of financial support, several international institutions (e.g. the IMF, the World Bank, and the IDB) have committed billions of dollars to the effort and have designated representatives to assist with the actual planning and implementation of the plan. The United States, on the other hand, has been hesitant to intervene, notwithstanding the effects that dollarization will inevitably have on the country. This reticence ignores the benefits to be derived from dollarization for both the United States and Ecuador, is incongruent with the U.S. policy of free trade so widely disseminated by the current presidential administration, fails to support

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Presse File.

141. *See Dollarization Looks Good to Guatemala*, EMERGING MARKETS WEEK, Apr. 3, 2000, at 6, *available at* LEXIS, Emerging Markets Week File. Some Central American countries have recently been increasingly interested in dollarization: Guatemala and Nicaragua According to the general director of the Nicaraguan Exportation Bank, Adolfo Arguello, "I wish [dollarization] would happen tomorrow." *Id. See also* Katz, *supra* note 135. According to the author, "[i]n the short term, only small and weak economies, such as Ecuador's, will switch to the dollar. But calls for adopting the greenback could grow stronger in coming years as trade links between Latin countries and with the U.S. multiply." *Id.*

142. Bussey, *supra* note 137. This opinion was expressed by Ricardo Hausmann, chief economist of the Inter-American Development Bank. *See id.*

judicial reform initiatives in emerging-market countries such as Ecuador, disfavors the dollar in its unavoidable rivalry with supranational currencies, and underestimates the importance of Ecuador as the "economic guinea pig of Latin America."

Unlike prior interventions in Latin America, participation by the United States in the dollarization of Ecuador should not be considered an imperialistic imposition or hegemonic strategy. Rather, based on the treacherous situation currently confronting Ecuador and the arguments supporting the need for external assistance in the dollarization process, limited U.S. involvement represents sensible policy.

MISSION ACCOMPLISHED? FIFTY-FOUR YEARS OF SUFFERING FOR THE PEOPLE OF THE MARSHALL ISLANDS AND THE LATEST ROUND OF ENDLESS RECONCILIATION

I. INTRODUCTION

When viewed from a modern perspective of political correctness, U.S. history contains at least two well-known and unfortunate chapters: the reprehensible treatment of the Native Americans[1] and the barbaric industry of slavery.[2] Although one may dismiss the disturbing events of those eras as the distant past, a less known and more recent period of unpleasant history involved the United States mistreating the indigenous people of the Marshall Islands.[3] From 1946 to 1958, the Marshallese people[4] endured sixty-seven experimental nuclear tests,[5] conducted by the United States, that

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1. For insight into the U.S. government's treatment of the North American Indians see WENDELL H. OSWALT, THIS LAND WAS THEIRS (2d ed. 1973).

2. For an overview of slavery in the United States see CHARLES JOHNSON & PATRICIA SMITH, AFRICANS IN AMERICA: AMERICA'S JOURNEY THROUGH SLAVERY (1998).

3. *See generally* JANE DIBBLIN, DAY OF TWO SUNS: U.S. NUCLEAR TESTING AND THE PACIFIC ISLANDERS (1988). The Marshall Islands are located in the Pacific Ocean in the region known as Micronesia. *See id.* at 3. Micronesia also includes the Mariana Islands (now a U.S. Commonwealth), the Republic of Belau and the Federated States of Micronesia, made up of the Kosrae, Yap and Pohnpei islands. *See id.* Guam is also geographically part of Micronesia, but it is politically separate as a U.S. territory. *See id.* at 3. The estimated population of the Marshall Islands in 1995 was 55,575. *See RMI Online: Internet Guide to the Republic of the Marshall Islands, at* http://www.rmiembassyus.org/popstat.html (last visited Sept. 10, 1999).

4. For an account of earlier history of the Marshallese people see FRANCIS X. HEZEL, S.J., THE FIRST TAINT OF CIVILIZATION: A HISTORY OF THE CAROLINE AND MARSHALL ISLANDS IN PRE-COLONIAL DAYS, 1521- 1885 (1983). For subsequent history see JONATHAN M. WEISGALL, OPERATION CROSSROADS (1994).

5. *See Welcome to the Nuclear Claims Tribunal, at* http://www.tribunal-mh.org/text.html (last visited Sept. 7, 1999) [hereinafter *Claims Tribunal*]. *See also* 143 CONG. REC. H4334-01, H4335 (daily ed. June 24, 1997) (statement of Mr. Faleomavaega), *available at* 1997 WL 345477 (stating that between 1946 and 1958 the United States tested sixty-six atomic and hydrogen nuclear bombs at Bikini and Enewetak atolls in the Marshall Islands.) An "atoll" is "a ringlike coral island that encloses a lagoon." AMERICAN HERITAGE DICTIONARY 43 (1983).

Disagreement exists concerning whether sixty-six or sixty-seven tests were conducted in the Marshall Islands over this period. The U.S. government's position appears to be that sixty-six tests occurred. *See The Status of Nuclear Claims and Relations and Resettlement in the Marshall Islands, 1999: Hearings Before the House Comm. On Resources,* 106th Cong. (1999) (statement of Ralph Boyce, Deputy Assistant Secretary, Bureau of East Asian and Pacific Island Affairs for Department of State), *available at* 1999 WL 16947528 [hereinafter Boyce testimony]. *See also The Status of Nuclear Claims and Relations and Resettlement in the Marshall Islands, 1999: Hearings Before the House Comm. On Resources,* 106th Cong. (1999)

damaged the health of many Marshallese citizens and forced a significant number of them from their homes.[6] The most infamous device, code-named "Bravo," produced a crater 6240 feet in diameter and 164 feet deep, illustrating the devastating force of these tests.[7]

Although it is tempting to simply categorize the events surrounding the U.S. nuclear testing imposed on the Marshall Islands as yet another shameful chapter in U.S. history, that categorization may be too hasty. Even supporters of the Marshallese people acknowledge that the arsenal developed during the testing program provided the powerful nuclear deterrent responsible for victory in the Cold War.[8] Justifications for the tests, however, are beyond the scope of this note.

What remains is over half-a-century of suffering by the Marshallese people due to intentional acts by the U.S. government. Although the United States accepted responsibility for its actions in the Compact of Free Association between the United States and the Republic of the Marshall Islands (Compact),[9] the provisions of that agreement have proven inadequate to fully repay the Marshallese citizens for the damage done to their homeland or to provide for their medical care.[10] Accordingly, the Republic of the Marshall Islands (RMI) announced its intention to submit to the U.S. Congress a request for additional funding, a process provided in the Changed Circumstances provision[11] of the Section 177 Agreement, a

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(statement of Allen P. Stayman, Director of the Office of Insular Affairs of the Department of the Interior), *available at* 1999 WL 16947529(reiterating that sixty-six tests were conducted) [hereinafter Stayman testimony]. The Republic of the Marshall Islands, however, cites sixty-seven tests in its official tally. *See Claims Tribunal*, *supra* note 5.

6. *See* DIBBLIN, *supra* note 3, at 255-58. For a chronological summary of the tragic events see id.

7. *See U.S. Nuclear Testing Program in the Marshall Islands*, *at* http://www.tribunal-mh.org/testing.html (last visited Sept. 7, 1999) [hereinafter *Nuclear Testing Program*].

8. *See* 143 CONG. REC. H4334-01, H4335 (daily ed. June 24, 1997) (statement of Mr. Faleomavaega), *available at* 1997 WL 345477. *See generally* WEISGALL, *supra* note 4 (describing the Cold War fears and intra-military rivalries that fueled the testing program).

9. Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

10. *See* 143 CONG. REC. H4334-01, H4335 (daily ed. June 24, 1997) (statement of Mr. Faleomavaega), *available at* 1997 WL 345477. *See also* 145 CONG. REC. H3063-02, H3064 (daily ed. May 12, 1999) (statement of Mr. Faleomavaega), *available at* 1999 WL 296150 (stating that the people of the Marshall Islands have endured great harm that continues today); 145 CONG. REC. H8115-03, H8116 (daily ed. Sept. 13, 1999) (statement of Mr. Underwood), *available at* 1999 WL 708989 (explaining how some Marshallese lost their homes to the testing and have not been able to return).

11. Section 177 Agreement, Article IX, Changed Circumstances provides:

> If loss or damage to property and person of the citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, and such injuries were not and could not reasonably have been identified as of the effective date of this agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Government of the Marshall Islands may request that the Government of the

subsidiary agreement which implemented Section 177[12] of the Compact.[13] The RMI claims that the funding provided by the Section 177 Agreement is "manifestly inadequate," an allegation based in part on the assertion that needs were underestimated because the U.S. Department of Energy withheld

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United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds.

Id.

12. The Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986), art. VII, § 177 provides:

(a) The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.

(b) The Government of the United States and the Government of the Marshall Islands shall set forth in a separate agreement provisions for the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise, for the continued administration by the Government of the United States of direct radiation related medical surveillance and treatment programs and radiological monitoring activities and for such additional programs and activities as may be mutually agreed, and for the assumption by the Government of the Marshall Islands of responsibility for enforcement of limitations on the utilization of affected areas developed in cooperation with the Government of the United States and for the assistance by the Government of the United States in the exercise of such responsibility as may be mutually agreed. This separate agreement shall come into effect simultaneously with this Compact and shall remain in effect in accordance with its own terms.

(c) The Government of the United States shall provide to the Government of the Marshall Islands, on a grant basis, the amount of $150 million to be paid and distributed in accordance with the separate agreement referred to in this Section, and shall provide the services and programs set forth in this separate agreement, the language of which is incorporate[d] into this Compact.

Id.

13. *See, e.g., The Status of Nuclear Claims and Relations and Resettlement in the Marshall Islands: Hearings Before the House Comm. On Resources,* 106th Cong. (1999) (statement of Tony A. Debrum, Minister of Finance, House Resources Marshall Islands) [hereinafter Tony A. Debrum testimony](stating that the RMI is preparing to submit a request for additional funding under the Changed Circumstances provision). *See infra* Part IV.B discussion of the relationship between the Compact and the Section 177 subsidiary agreement.

substantial information from the RMI at the time of the Compact's formation.[14]

This note seeks to analyze the RMI's allegation that the provisions of the Compact and Section 177 Agreement are manifestly inadequate, and subsequently to examine whether Congress should grant additional funding to address the alleged harm that has arisen from the nuclear testing. Part II of this note explains how the United States arrived at its present position of culpability by abusing a former trust relationship with the Marshall Islands. Part III provides background information on the Marshallese injuries and suffering caused by the nuclear testing. Part IV examines the United States-Republic of the Marshall Islands Compact of Free Association and subsidiary Section 177 Agreement. Part V analyzes current allegations of inadequacy of the Compact and Section 177 Agreement. Part V also addresses the implications, to that analysis, of the U.S. Department of Energy's withholding of information. Finally, Part VI recommends that the U.S. Congress conduct a prompt evaluation of whether or not to grant additional funding to the Marshall Islands. That evaluation should result in granting needed funds due to the United States' fiduciary and moral obligations.

II. THE UNITED STATES AS TRUSTEE

At the conclusion of World War II, the United Nations wanted to aid the development of the newly liberated peoples in Africa and Micronesia.[15] To accomplish that goal, the United Nations established the International Trusteeship System,[16] under which members of the United Nations administered the trusteeship states.[17] The Trusteeship System required the trustees to help the trust territories develop autonomous systems of

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14. *See* 145 CONG. REC. H3063-02, H3064 (daily ed. May 12, 1999)(statement of Mr. Faleomavaega), *available at* 1999 WL 296150 (stating that recent declassified DOE documents show that the U.S. government has not always been candid with the RMI); 145 CONG. REC. H8115-03, H8117 (daily ed. Sept. 13, 1999) (statement of Mr. Miller), *available at* 1999 WL 708989 (explaining that it was the Bush administration that released previously confidential information to the RMI).

15. *See* Hyun S. Lee, *Post Trusteeship Environmental Accountability: Case Of PCB Contamination On The Marshall Islands*, 26 DENV.J. INT'L.L. & POL'Y 399, 399 (1998). The Marshall Islands had previously been held as a trust territory by the Japanese under the League of Nations Mandate System. *See id.* at 403. At the end of World War II, the United Nations replaced the League of Nations and replaced the Mandate System with the International Trusteeship System. *See id. at* 403-04. As in the League of Nations Covenant, the nation-states that accepted a United Nations Trusteeship accepted "a sacred trust to promote the well being of the inhabitants of the Trust." *Id.* at 404.

16. *See* U.N. CHARTER art. 75.

17. *See* Lee, *supra* note 15, at 404. *See also* Juda v. United States, 13 Cl. Ct. 667, 670-74 (1987) (detailing background information on the Marshall Island as a trust territory in the United Nations system).

government and to aid in the trust territories' economic development.[18] United Nations members who accepted the trusteeship responsibility also acknowledged a "sacred trust obligation" whose beneficiaries were the trust territory's inhabitants.[19] In general, the United Nations granted trustees expansive authority in administering the trust territories.[20]

The United States controlled the Marshall Islands at the end of World War II[21] and arranged for their designation as a strategic trust.[22] The Trusteeship Agreement[23] that the United States entered into with the United

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18. *See* Lee *supra* note 15, at 399. For a current overview of the RMI economy see *Marshall Islands: Country Profile*, ASIA & PAC. REV. WORLD OF INFO., Nov. 1, 1998, *available at* 1998 WL 26760534. *See also Interview with Chief Secretary Oscar Debrum*, MICRONESIAN INVESTMENT Q., June 1, 1992, *available at* 1992 WL 3170273 (explaining the RMI's current strategies for economic growth).

19. Lee, *supra* note 15, at 404.

20. *See id.*

21. *See* DIBBLIN, *supra* note 3, at 17. The United States captured Micronesia from the Japanese in the autumn of 1944 after more than two years of what are widely described as some of the "bloodiest battles witnessed in the Pacific during the Second World War." *Id.* at 17. Approximately five thousand Micronesians, 10% of the estimated population, died during those battles. *Id.*

22. *See* Lee, *supra* note 15, at 403. The administering authority of a strategic trust had greater control over the territory than a non-strategic trust. *See id.* Article 82 of the United Nations Charter provides for strategic trusts. U.N. CHARTER art. 82. Article 83(2) provides that "[t]he basic objectives set forth in Article 76 shall be applicable to the people of each strategic area." U.N. CHARTER art. 83(2). Article 76 provides in full:

> The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:
>
> a. to further international peace and security;
>
> b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
>
> c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
>
> d. to ensure equal treatment in social, economic and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

U.N. CHARTER art. 76.

23. Trusteeship Agreement For the Former Japanese Mandated Islands, July 18, 1947, 8 U.N.T.S. 189 (1947). "The Trusteeship Agreement is a treaty in the nature of a bilateral contract between the Security Council and the United States." Juda v. United States, 13 Cl.Ct. 667, 671 (1987). Article 6 of the Trusteeship Agreement required the United States, in the discharge of its duties under Article 76(b) of the United Nations Charter, "to promote the

Nations Security Council permitted the United States to deploy military forces in the Marshall Islands, construct military bases, and close off areas for security purposes.[24] The United States took full advantage of this authority by using the Marshall Islands as a nuclear testing ground, while doing little in the first twelve years as trustee to accomplish the goals of the Trusteeship System as outlined by the United Nations.[25]

From June 30, 1946 to August 18, 1958, the United States conducted nuclear tests[26] in the Marshall Islands.[27] The most powerful of the tests, "Bravo,"[28] released the explosive power of one thousand Hiroshima bombs.[29] Bravo was part of the United States coordinated program of atomic and nuclear weapons testing conducted under the control of the Atomic Energy Commission (AEC).[30] Because of the expansive control granted to the United States as trustee, U.S. military leaders and AEC officials took the actions they deemed necessary and then, on several occasions, withheld information that was damaging to their interests.[31] This abusive relationship[32] officially lasted until 1986 when the United States and the Marshall Islands terminated the trust relationship by signing the Compact of Free Association.[33] Although a positive step toward correcting the harm

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development of the inhabitants towards self-government or independence as may be appropriate to the particular circumstances of the territory and its peoples." *Id.* at 672.

24. *See* Lee, *supra* note 15, at 404.

25. *See* U.N. CHARTER art. 76, *supra* note 22.

26. For a complete listing of the tests in chronological order, detailing whether it was an atmospheric or underwater test see *Nuclear Testing Program, supra* note 7.

27. *See id.* For background on the selection process for the atomic testing location see WEISGALL, *supra* note 4, at 32-33. Prior to commencing Operation Crossroads in 1946, military officials studied more than a dozen locations throughout the Pacific, Atlantic, and the Caribbean. *See id.* at 32. The majority of these locations were eliminated because their waters were too shallow, the population too large, or the weather too unpredictable. *See id.*

28. Bravo was detonated on March 1, 1954, at Bikini atoll. *See Nuclear Testing Program, supra* note 7.

29. *See id.*

30. *See The Status of Nuclear Claims and Relations and Resettlement in the Marshall Islands, 1999: Hearings Before the House Comm. On Resources,* 106th Cong. (1999). During this same time period, the Atomic Energy Commission conducted nuclear weapons tests in the Nevada desert. *See generally* Elizabeth Louise Loeb, *Constitutional Fallout From the Warner Amendment: Annihilating the Rights of Atomic Weapons Testing Victims,* 62 N.Y.U. L. REV. 1331(1987) (explaining how the U.S. government faced allegations of using U.S. military personnel as guinea pigs and then hiding behind the Warner Amendment).

31. *See infra* Part V. for discussion on several incidents where U.S. officials deceived the RMI government.

32. In 1954, the Marshallese people submitted a petition to the United Nations pleading for it to stop the next round of hydrogen bomb experiments. *See* Lee, *supra* note 15, at 406. The testing, however, continued for four additional years. *See Nuclear Testing Program, supra* note 7.

33. See Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986). PCB contamination of the Marshall Islands, caused by the United States bringing electrical equipment to the islands, presents another issue of post trusteeship accountability. *See*

done, the Compact did not erase the consequences of the radiation exposure, which continue to this day.

III. THE MARSHALLESE SUFFERING

The Marshallese people suffered and continue to suffer physical and non-physical injuries as a result of the testing program.[34] Tony A. Debrum, Minister of Finance for the Republic of the Marshall Islands, stated before the U.S. House of Representatives Resources Committee that "[t]here is not a single soul in the Marshall Islands whose life remains untouched by the U.S. Nuclear Weapons Testing Program."[35] "Every Marshallese citizen has lost a family member or friend who died from a radiogenic illness."[36]

A. Physical Suffering

The majority of the physical injuries traceable to the nuclear testing did not result from a one-time exposure to radiation. However, the extreme amounts of radiation released from Bravo[37] caused acute injuries to particular victims in addition to contributing to the long-term physical injuries of the Marshallese people.[38] In preparing for that test, scientists recommended that the Rongelap and Ailinginae atolls, several hundred miles east of the Bikini test site, be placed in the "danger zone"[39] for Bravo.[40] The U.S. Interior Department, however, was reluctant to displace islanders, as was done

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generally Lee, *supra* note 15. In light of the former trust relationship, Lee questions whether the United States has a continuing fiduciary duty to remedy the environmental consequences of the trusteeship era that still linger. *See id.* at 400. See infra Part VI. for discussion of the fiduciary duty the United States arguably owes to the Marshall Islands for the nuclear damage.

34. *See* 143 CONG. REC. H4334-01, H4335 (daily ed. June 24, 1997) (statement of Mr. Faleomavaega), *available at* 1997 WL 345477. *See also* 145 CONG. REC. H3063-02, H3064 (daily ed. May 12, 1999) (statement of Mr. Faleomavaega), *available at* 1999 WL 296150 (stating that the people of the Marshall Islands endured great harm that continues today); 145 CONG. REC. H8115-03, H8116 (daily ed. Sept. 13, 1999) (statement of Mr. Underwood), *available at* 1999 WL 708989 (explaining that some Marshallese lost their homes because of the testing and have not been able to return).

35. Tony A. Debrum testimony, *supra* note 13.

36. Tony A. Debrum testimony, *supra* note 13. Radiogenic, as used in this note, generally refers to diseases associated with radiation exposure.

37. Bravo was the first deliverable hydrogen bomb detonated by the United States. *See* WEISGALL, *supra* note 4, at 302.

38. *See* WEISGALL, *supra* note 4, at 302. *See also Endangered Islands*, NEW STRAITS TIMES (MALAYSIA), Aug. 7, 1995, at 1 (explaining that only in recent years are the diseases and birth defects caused by the nuclear testing in Micronesia being fully realized).

39. "Danger zone" refers to the area of possible danger from the explosion or radiation. *See* WEISGALL, *supra* note 4, at 302.

40. *See id.*

during the earlier Operation Crossroads.[41] Accordingly, the Interior Department and the AEC drew the danger zone boundaries precisely to exclude those atolls.[42]

Bravo exploded with a force three times greater than its creators expected.[43] U.S. officials claimed that it was an "unpredicted" shift in wind direction[44] that sent the massive cloud of radioactive fallout eastward covering approximately seven thousand square miles.[45] Fallout from the test showered 28 American servicemen on Rongerik, the 236 inhabitants of Rongelap and Utrik atolls, and other Marshallese camping at Ailinginae Atoll.[46] The U.S. military evacuated the servicemen to Kwajalein Atoll the day after Bravo but did not rescue the people of Rongelap and Utrik for two to three days.[47]

The fallout exposed the Marshallese victims to radioactivity that equaled the dose received by Japanese citizens located less than two miles from ground zero at Hiroshima and Nagasaki.[48] Almost all of the Rongelapese displayed the usual symptoms of radiation poisoning: hair loss, skin lesions, and lowered white blood cell counts.[49] Seventeen of nineteen

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41. *See id.* "Operation Crossroads" refers to the tests code-named "Able", detonated on June 30, 1946, and "Baker", detonated on July 24, 1946. *See Nuclear Testing Program, supra* note 7. Both of these tests were conducted at Bikini Atoll. *See id.* The inhabitants of Bikini Atoll had been evacuated for those tests. *See* WEISGALL, *supra* note 4, at 106-07.

42. *See* WEISGALL, *supra* note 4, at 302. The Atomic Energy Commission took extensive precautions with regard to an explosive device prior to Bravo. *See id.* That weapon, code-named "Mike," caused very little fallout, hence encouraging lax safety and emergency evacuation plans by the AEC for Bravo. *See id.*

43. *See id.* "Bravo was the most powerful nuclear weapon ever detonated by the United States and was, at the time, the largest man made explosion in the history of the world, equal to the force of about 750 Hiroshima bombs." *Id.* "Bravo had an explosive force of about fifteen megatons, or fifteen million tons of TNT." *Id.*

44. *See id.* at 303. *See also* Merril Eisenbud, *Monitoring Distant Fallout: The Role of the Atomic Energy Commission Health and Safety Laboratory During the Pacific Tests, with Special Attention to the Events Following Bravo*, HEALTH PHYSICS vol. 73, at 21, 26 (questioning whether the winds shifted or whether the "meteorological window" that existed was simply too narrow for safety) [hereinafter Eisenbud].

45. WEISGALL, *supra* note 4, at 303.

46. *Id.* at 303. A controversy ensued because the Bravo fallout also injured twenty-three crewmen of the Japanese fishing vessel the Lucky Dragon. *Id.* One of the men died, causing public outrage in Japan. *Id. See also* Eisenbud, *supra* note 44, at 25 (discussing the ramifications of the unexpected group of Japanese victims).

47. *See* WEISGALL, *supra* note 4, at 303.

48. *See id.* at 304.

49. *See id. See also* E.P. CRONKITE, M.D., DEPT. OF ENERGY, Epilogue to FIVE YEAR REPORT ON THE MEDICAL FOLLOW UP OF MARSHALLESE RECEIVING SPECIAL MEDICAL CARE RELATED TO THE 1954 BRAVO FALLOUT RADIATION (JANUARY 1992-1996) DOE/EH-0593, *at* http://tis.eh.doe.gov/ihp/marsh/congress.html (last visited Oct. 10, 1999)(stating "[t]here had been nausea, vomiting and diarrhea in some of the Marshallese . . . [t]here is no question that the radiation was responsible for skin burns, epilation, temporary suppression of hemopoiesis, thyroid hypofunction, thyroid tumors, and probably responsible for the fatal case of acute

Rongelapese who were under ten years old at the time of Bravo developed abnormal thyroid nodules.[50] One member of that group died of leukemia.[51] The Atomic Energy Commission tried to keep the disaster a secret[52] and did not admit the gravity of the incident for decades.[53]

The injuries and pain caused by acute exposure represents only one portion of the physical injuries caused by the radiation exposure. Scientists and doctors continue to compile data on the non-acute exposure related illnesses, which are only now being identified and tallied due to the long latency periods,[54] poor health care for the first generation of victims,[55] and the emergence of a new generation of victims from subsequent exposure.[56] RMI officials emphasize that sixty-six explosions other than Bravo[57] contributed to radiation and trace chemicals on each of the Marshall Islands, raising the probability of diseases caused by non-acute exposure.[58]

The RMI continues to assess the total magnitude of the long-term injuries. Partially in response to devastating errors by U.S. officials, including prematurely resettling people to islands which were not safe,[59] the

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leukemia.")

50. *See* WEISGALL, *supra* note 4, at 304.

51. *See id.* at 303.

52. *See id.* When the information was uncovered and ended up in a Cincinnati newspaper, the AEC issued a statement claiming that "during the course of a routine atomic test," some Marshallese "were unexpectedly exposed to some radioactivity," but "there were no burns" and "all are reported well." *Id.* at 303-04.

53. *See id.* at 304. Not until 1982 did the U.S. government admit the truth about Bravo. *See id.* What the AEC characterized a "routine atomic test" became in the words of the Defense Nuclear Agency, "the worst single incident of fallout exposures in all the U.S. atmospheric testing program." *Id.* "[N]o burns" became "acute radiation effects." *Id.* It would later be uncovered that with full knowledge that winds were not headed northward to the open sea but due east over Bikini's islands, the AEC proceeded to detonate the Bravo bomb. *See id.*

54. *See Endangered Islands*, NEW STRAITS TIMES, Aug. 7, 1995, at 1. Only in recent years have the diseases and birth defects caused by the nuclear testing in Micronesia been fully realized. *See id.*

55. See infra Part V. B & C for discussion of the quality of health care provided.

56. There has been a wealth of data collected on exposure since the nuclear testing ended. For a partial list of DOE studies that are available for public viewing see *Health Physics – The Radiation Journal, at* http://tis.eh.doe.gov/ihp/marsh/journal (last visited Oct. 8, 1999). The titles of these reports illustrate that it is not realistic for a layman to challenge the validity of the data based on complex science.

57. Bravo represented approximately one-seventh of the radiation released from the testing program. *See Claims Tribunal, supra* note 5.

58. *See* Tony A. Debrum testimony, *supra* note 13.

59. Some Bikinians returned to their atoll in 1969, a year after President Johnson announced that Bikini was safe for resettlement. *See Hearings on S.1804 Before the Senate Energy and Natural Resources Comm.*, 103d Cong. (1996) (statement of Jonathan M. Weisgall, Legal Counsel to the people of Bikini), *available at* 1996 WL 10829191 [hereinafter Weisgall testimony]. They lived there until 1978, when medical tests by U.S. doctors revealed that the people possibly ingested the largest amount of radioactive material of any known population, and that the people needed to leave immediately. *See id.* An Atomic Energy Commission panel

RMI initiated the Marshall Islands Nationwide Radiological Study.[60] Several obstacles exist, however, to amassing the final tally of injuries. First, U.S. officials have primarily focused upon only those victims who were acutely exposed.[61] Secondly, many of the radiation monitoring and medical reports were produced by the same agencies that have both withheld information and at certain points lied, thereby making it difficult for Marshallese citizens to trust the data.[62] Third, an unknown quantity of information remains classified.[63] Finally, funding deficiencies limit the RMI's ability to collect additional data.[64] As the RMI continues its efforts to collect the needed data, Marshallese citizens with injuries they believe to be related to the nuclear testing present their claims to the Nuclear Claims Tribunal, a court created by the Section 177 Agreement.[65]

B. Non-Physical Injuries

Aside from causing physical injuries and disease, the nuclear testing forced many Marshallese from their homes.[66] The events surrounding the people of Bikini Atoll illustrate the plight of those Marshallese uprooted. The U.S. Navy removed the Bikinians from their atoll in 1946 to facilitate

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relied on an erroneous 1957 AEC report when it told the President that Bikini was safe. *See id.*

60. *See Bikini Atoll, What About Radiation on Bikini Atoll, at* http://www.bikiniatoll.com/whatrad.html (last visited Nov. 18, 1999). *See also Radiation Health Effects Research Resource, at* http://radefx.bcm.tmc.edu/marshall_islands/ (last visited Nov. 18, 1999) (explaining that the study was the first comprehensive radiological monitoring program of the Republic of the Marshall Islands (RMI)). The entire report is available for viewing at the Radiation Health Effects Research Resource web site. *See id*

In addition, the July 1997 issue of Health Physics was devoted entirely to the Consequences of Nuclear Testing in the Marshall Islands. *See* 73 HEALTH PHYSICS, No. 1 (1997), *available at* http://tis.eh.doe.gov/ihp/marsh/journal.

61. *See infra* Part V.B for discussion of exposure.

62. *See* HEALTH PHYSICS – THE RADIATION JOURNAL, *available at* http://tis.eh.doe.gov/ihp/marsh/journal (last visited Oct. 8, 1999). "Because of what some would consider callous disregard and perhaps duplicity for the well-being of the residents of the Marshall Islands, they no longer trust our government to do the right thing." 145 CONG. REC. H3063-02, H3064 (daily ed. May 12, 1999) (statement of Mr. Faleomavaega), *available at* 1999 WL 296150.

63. *See Nuclear Claims Tribunal: Approach to Compensation, at* http://www.tribunal-mh.org/appro.html(visited Nov. 5, 1999) [hereinafter *Claims Approach*].

64. *See The Status of Nuclear Claims and Relations and Resettlement in the Marshall Islands, 1999: Hearings Before the House Comm. On Resources,* 106th Cong. (1999) (statement of Oscar Debrum, Chairman of the Nuclear Claims Tribunal), *available at* 1999 WL 16947535 [hereinafter Oscar Debrum testimony].

65. *See infra* part V.D for discussion of the Nuclear Claims Tribunal.

66. *See* Boyce testimony, *supra* note 5. *See also* 145 CONG. REC. H8115-03, H8116 (daily ed. Sept. 13, 1999) (statement of Rep. Underwood), *available at* 1999 WL 708989 (speaking specifically of the Bikinians' forced exile from their atoll).

the U.S. nuclear testing program.[67] U.S. officials placed the Bikinians on Rongerik, an uninhabited atoll approximately one-hundred miles from Bikini.[68] Naval officials falsely stated that Rongerik was larger and "richer" than Bikini.[69] Contrary to the Navy's assertions, Rongerik's land area was one-quarter of the size of Bikini, and its pandanus and coconut trees produced considerably less fruit than those of Bikini.[70]

After a two-year stay on Rongerik Atoll that resulted in near starvation,[71] U.S. officials moved the Bikinians to Kwajalein Atoll. For their six month stay on Kwajalein, they lived in tents beside a runway used by the U.S. military.[72] As early as 1948, the official Naval history of the Trust Territory, in reference to the Bikini Islanders, reported that "[d]efinite physiological scars were left on the people."[73] In November 1948, U.S. officials relocated the Bikinians to Kili Island, which is approximately four-hundred miles south of Bikini.[74] Clearly contrary to the Trusteeship System's goals, "[i]n less than three years, the once self-sufficient people had been transformed into dependent wards of the United States."[75] Since their arrival in Kili in 1948, the Bikinians have compared it to a jail.[76] Most Bikinians

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67. *See* WEISGALL, *supra* note 4, at 109. There is no precise record of what the Navy told the Bikinians when they first "asked" them if they would move. *See id.* The evidence, however, strongly suggests that the Bikinians believed their departure was to be temporary. *See id.*

68. *See* 145 CONG. REC. H8115-03, H8116 (daily ed. Sept. 13, 1999) (statement of Rep. Underwood), *available at* 1999 WL 708989.

69. *Id.*

70. *Id.*

71. *See id.*

72. *See id.* For details on the Bikinians' journey see Jack Niedenthal, *A History of the People of Bikini Following Nuclear Weapons Testing in the Marshall Islands: With Recollections and Views of Elders of Bikini Atoll*, 73 HEATH PHYSICS 28-36 (1997).

73. 145 CONG. REC. H8115-03, H8116 (daily ed. Sept. 13, 1999) (statement of Rep. Underwood), *available at* 1999 WL 708989.

74. *See id.*

75. *Id.*

76. *See id.* The RMI and the DOE currently are resolving the safety status of Bikini Atoll, as well as Eniwetak, Rongelap, and Utrik atolls. *See The Status of Nuclear Claims and Relations and Resettlement in the Marshall Islands: Hearings Before the House Comm. On Resources*, 106th Cong. (1999) (statement of Paul J. Seligman, Deputy Assistant Secretary for Health Studies of Department of Energy), *available at* 1999 WL 16947531 [hereinafter Seligman testimony]. Seligman summarized the DOE's position:

> The Utrik people can choose to live on their atoll without concern that their health will be affected by radiological exposure. The Rongelap people could choose to resettle without concern that their health will be affected by radiological exposure if they 1) conducted a limited scrape of surface soils in the village areas and 2) apply potassium fertilizer to areas where food is growing. This mitigation technique, referred to as the combined option, is the basis for the resettlement program being implemented at Rongelap today. We have recently entered into a Memorandum of Understanding with the Rongelap leadership to provide radiological monitoring of the ongoing resettlement activities. The

remain there today, unable to return home.[77]

The weapons testing inflicted additional non-physical injuries on the Marshallese people by reducing their homeland to a nuclear wasteland.[78] Prior to the testing, the Marshallese people enjoyed a close relationship to their islands and atolls, each of which sustained some level of environmental degradation as a result of the nuclear testing.[79] The environmental damage sustained by some atolls continues to render food that is grown there lethal.[80] Fifty-four years after the nuclear testing began, radiation prevents many islanders from safely returning home because they would be subjected to continuos exposure from the soil, water, and air.[81] In a fate worse than contamination, the nuclear tests destroyed some islands completely.[82] As stipulated under the Section 177 Agreement, Marshallese citizens may submit claims for these property damages to the Nuclear Claims Tribunal.[83]

> Bikini people could choose to resettle without concern that their health will be affecte by radiological exposure if they, like the Rongelap, 1) scrape the village areas and 2) apply potassium fertilizer to food growing areas. The Enewetak people have been resettled on Enewetak atoll. Bioassay and whole body counting results have confirmed that radiation doses on Eniwetak Island, where resettlement has occurred, are at or near world background levels and present no health consequences to the population. If the Enewetak people decide to, resettle Enjebi Island, DOE recommends using the combined option as at Rongelap and Bikini atolls for mitigation.

Id.

77. *See* 145 CONG. REC. H8115-03, H8116 (daily ed. Sept. 13, 1999) (statement of Rep. Underwood), *available at* 1999 WL 708989.

78. *See id.* The Bikini culture, society, and personal identity are rooted in their ancestral home: the islands, reefs, and lagoon of Bikini Atoll. *See id.* "Short of loss of life itself, the loss of their ancestral homeland represented the worst calamity imaginable for the Bikini people." *Id.*

79. *See* Tony A. Debrum testimony, *supra* note 13.

80. *See Assessing Exposure to Radiation, at* http://www.llnl.gov/str/Robison.html (last visited October 10, 1999). For a list of fifty-seven DOE documents and studies relating environmental data collected on the Marshall Islands see *International Health Programs -Marshall Islands Environmental Documents, available at* http://tis-nt.eh.doe.gov/ihp/marsh/env_docs.html (last visited Oct. 8, 1999).

81. *See* LAWRENCE LIVERMORE NATIONAL LABORATORY, HEALTH AND ECOLOGICAL ASSESSMENT DIVISION, AN UPDATED DOSE ASSESSMENT FOR RONGELAP ISLAND UCRL-LR-107036 (July 1994) (written by William L. Robison, et al.).

82. *See* WEISGALL, *supra* note 4, at 307. Some islands were totally obliterated. *See id.* In 1952, the AEC did not send the Bikinians home because "[i]t is possible that the tests planned for Eniwetak may result in the destruction of a part or all of the atoll . . . ." *Id.* at 301. That year "Mike" confirmed the AEC's fears by completely destroying Elugelab Island. *See id.* Subsequently, the 1956 "Zuni" device "vaporized most of the western end of Bikini's Eneman Island." *See id.* at 307. Accordingly, it is physically impossible for some Marshallese to ever "return home."

83. *See infra* Part V.D for discussion of the Nuclear Claims Tribunal.

IV. THE COMPACT OF FREE ASSOCIATION

A. The Compact

In the decades following the end of the nuclear testing program, the U.S. and Marshallese governments slowly progressed toward Marshallese independence[84] and made initial efforts to provide health care to the many victims of the testing.[85] The most significant step toward compensation to radiation victims, however, occurred simultaneously with attainment of RMI sovereignty when the Marshall Islands and the United States completed the Compact of Free Association.[86] The Compact established the Republic of the Marshall Islands as a sovereign nation in free association with the United States.[87] The nations finalized the Compact on June 25, 1983, dissolving the

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84. In 1965, the Congress of Micronesia was formed. *See* Lee, *supra* note 15, at 407. In 1967, the Marshall Islands established the Political Status Commission to negotiate with the United States about the administration of the Trust Territory. *See id.* at 407-08. The RMI approved its constitution in a referendum on March 1, 1979 and inaugurated a parliamentary constitutional government on May 1, 1979. *See id.* at 408.

85. *See* Act of October 15, 1977, Pub. L. No. 95-134, 91 Stat. 1159. Title I, §104 provides in pertinent part:

> (a) the Secretary [of the Interior] shall provide by appropriate means adequate medical care and treatment for any person [residents or their heir of Rongelap or Utirik Atoll] who has a continuing need for the care and treatment of any radiation injury or illness directly related to the thermonuclear detonation referred to in paragraph (a) of this section [Bravo].

Id.

> Also, see the Act of March 12, 1980, Pub. L. No. 96-205, 94 Stat. 84 (amending Pub. L. No. 95-134) (a). In addition to any other payments or benefits provided by law to compensate inhabitants of the atolls of Bikini, Enewetak, Rongelap, and Utirik, in the Marshall Islands, for radiation exposure or other losses sustained by them as a result of the United States nuclear weapons testing program at or near their atolls during the period 1946 to 1958, the Secretary of the Interior (hereinafter in this section referred to as the *'Secretary') shall provide for the people of the atolls of Bikini, Enewetak, Rongelap, and Utirik and for the people of such other atolls as may be found to be or to have been exposed* [emphasis added] to radiation from the nuclear weapons testing program, a program of medical care and treatment and environmental research and monitoring for any injury, illness, or condition which may be the result directly or indirectly of such nuclear weapons testing program. The plan shall set forth, as appropriate to the situation, condition, and needs of the individual atoll peoples: (1) an *integrated, comprehensive health care program* [emphasis added]including primary, secondary, and tertiary care with special emphasis upon the biological effects of ionizing radiation; . . . (3) All costs associated with the development and implementation of the plan shall be assumed by the Secretary of Energy . . .

Id.

86. Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

87. *See id.* The compact sets up a special relationship between the two nations where the

existing trusteeship agreement between the Marshall Islands and the United States and granting the RMI self-government.[88]

B. *The Section 177 Agreement*

In Section 177 of the Compact, the United States accepted responsibility for the damage the U.S. nuclear weapons testing caused in the Marshall Islands.[89] As detailed in Section 177 of the Compact, a separate agreement for "the just and adequate settlement of claims," commonly known as the "Section 177 Agreement," was created to implement Section 177 of the Compact.[90] The United States intended the Section 177 Agreement to provide a full settlement of all claims arising from the nuclear testing program conducted in the Marshall Islands during the trusteeship period.[91] Article X, Section 1 of the Section 177 Agreement provides:

> This Agreement constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims . . . which may be pending

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RMI is a sovereign power, but the United States has granted the RMI access to the services of over forty U.S. domestic programs and a large per capita funding. *See* Boyce testimony, *supra* note 5. The United States takes responsibility for the RMI's security in return for foreclosure of third country access to the Marshall Islands for military purposes, known as "strategic denial." *Id.*

According to the DOE, the United States entered into the Compact for several reasons. *See id.* "[F]irst, . . . the U.S. was obligated as administrator of the UN mandated Trust Territories, ..." *Id.* "[S]econd, in the Cold War environment of the mid-1980s, the United States was keen to bolster its security posture in the Pacific." *Id.* "Third, our agreement with the RMI ensured continued access to U.S. Army Kwajalein Atoll (USAKA)/ Kwajalein Missile Range . . ." *Id.* The "Compact with the RMI provides for automatic renewal rights for an additional 15 years if the U.S. chooses to do so." *Id.*

88. *See* Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986). *See also* Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989) (detailing the history of the Compact). The Compact officially went into effect October 21, 1986. *See* Proclamation 5564 Placing Into Full Force And Effect the Covenant With the Commonwealth of the Northern Mariana Islands and the Compacts of Free Association With the Federated States of Micronesia and the Republic of the Marshal Islands, Nov. 3, 1986, 51 FR 40399, *available at* 1986 WL 141919 (Pres.). *See also* Exec. Order No. 12569, 51 FR 37171, Oct. 16, 1986, *available at* 1986 WL 141903 (detailing the responsibilities of the various federal agencies involved with the Compact's implementation).

89. *See* Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 § 177.

90. *See id.*

91. *See* Section 177 Agreement, Art. X, § 1.

> or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions.[92]

In addition, Article XII of the Section 177 Agreement states: "All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed."[93]

Because the Section 177 Agreement states that it represents the means for the full settlement of all claims against the United States, U.S. courts held that Marshallese citizens could not bring claims against the United States arising from the nuclear testing.[94] The victims, therefore, have no recourse other than the Compact and Section 177 Agreement.[95] Accordingly, the interpretation and implementation of these agreements is vital to the welfare of the Marshallese people.

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92. *Id.*

93. Section 177 Agreement, Art. XII.

94. *See* Juda v. United States, 13 Cl. Ct. 667, 689 (1987). Beginning in 1981, fourteen petitions were filed on behalf of approximately five-thousand inhabitants of the Marshall Islands in the United States Court of Claims for damages allegedly caused by the United States nuclear testing. *See id.* at 668. The fourteen cases involved three groups of people: inhabitants of Bikini Atoll, inhabitants of Enewetak Atoll, and inhabitants of atolls and islands that were not used as atomic test sites. *See id.* at 669. Originally, the Bikini claims of (1) takings in violation of the Fifth Amendment and (2) breaches of an implied-in-fact contract that arose in 1946 and which created fiduciary obligations owed to the people of Bikini, were held to be valid claims within the jurisdiction of the court under the Tucker Act (28 U.S.C. §1491(a)(1) (1982)). *See id* at 669. Likewise, the Enewetak people and the third group stated valid claims of implied in fact warranty and unlawful takings respectively. *See id.* The court subsequently held, however, that Article XII of the Section 177 Agreement by necessary implication amended the Tucker Act. *See id.* The consent of the United States to be sued in the Claims Court on plaintiff's taking claims and breach of contract claims that arise from the United States' nuclear testing program in the Marshall Islands had been withdrawn. *See id.* at 689. *See also* Nitol v. United States, 13 Cl. Ct. 690 (1987), (holding same effect of Article XII); Peter v. United States, 6 Cl.Ct. 768 (1984) (holding Congress has the power to deprive the federal courts of subject matter jurisdiction over claims which do not involve constitutional violation). *See generally* Thomas Stewart Blackburn, *Case Comment, International Law – Treaty Interpretation – Congressional Power to Withdraw Jurisdiction*, Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989), 14 SUFFOLK TRANSNAT'L L.J. 325 (1990) (discussing federal court jurisdiction over diversity actions, "[Congress] may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.")

95. The Compact's fifteen-year term will expire in October 2001. *See* Boyce testimony, *supra* note 5. The State Department has stated that it will establish an Office of the Special Negotiator to be located in the Department of State which will house the interagency team that will conduct the Compact negotiations. *See id.*

V. THE INADEQUACY OF THE SECTION 177 AGREEMENT

Although the Section 177 Agreement states that it encompasses the final settlement agreement of all claims arising out of the nuclear testing, Article IX of that agreement, entitled Changed Circumstances, permits the RMI to submit a request for additional compensation to the U.S. Congress for its consideration.[96] Article IX of the Section 177 Agreement reads in its entirety:

> If loss or damage to property and person of the citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, and such injuries were not and could not reasonably have been identified as of the effective date of this Agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Government of the Marshall Islands may request that the Government of the United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds.[97]

In recent years, Marshallese officials have alleged that the funding provided by the Section 177 Agreement is manifestly inadequate.[98] Accordingly, the RMI announced that it will submit a request for additional funding to the U.S. Congress for its consideration.[99] On May 11, 1999, Tony A. Debrum, Minister of Finance for the Republic of the Marshall Islands, spoke before the U.S. House of Representatives Resources Committee concerning the problems facing his nation. He proclaimed, "[i]f this Committee and the RMI Government had known at the time of the Compact negotiations what we have learned now as a result of the DOE document declassification process, I am certain that Congress and the RMI would have negotiated a radically different agreement than we have today."[100]

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96. *See* Section 177 Agreement, art. IX.

97. *Id.*

98. *See* Oscar Debrum testimony, *supra* note 64. *See also* Weisgall testimony, *supra* note 59 (referring to the health care funds as "wholly inadequate").

99. *See* Oscar Debrum testimony, *supra* note 64. *See also* Tony A. Debrum testimony, *supra* note 13 (explaining that the RMI desperately needs more financial assistance from the United States).

100. Tony A. Debrum testimony, *supra* note 13.

A. *Loss or Damage to Property and Person of the Citizens of the Marshall Islands, Resulting from the Nuclear Testing Program, Which Arose or was Discovered after the Effective Date of the Section 177 Agreement*

It is difficult to separate damages resulting from the nuclear testing which arose or were discovered *after* execution of the Section 177 Agreement from those that the RMI should have reasonably known about at the time of the agreement's formation. RMI officials have not attempted to draw this fine line. Rather, RMI officials have emphasized two crises that they feel prove that the provisions of the Section 177 Agreement are manifestly inadequate: the inadequate health care available to the Marshallese people and the inadequate funds available to the Nuclear Claims Tribunal.[101]

B. *Injuries Inadequately Addressed by the Department of Energy's Health Care Program*

As mandated under Title I of the Compact,[102] one specific segment of the Marshallese population, the 174 direct victims of Bravo, receive medical care from the Department of Energy's medical program.[103] The RMI government asserts that the limited availability of the DOE's program placed a burden on the RMI's public health sector.[104] Marshallese officials believe that the DOE medical program[105] should consider harm to all Marshallese

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101. *See id.* See infra Part VI.D for discussion of the Nuclear Claims Tribunal.

102. Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770, Title I, art. I, § 103 (h)(1) DOE Radiological Health Care Program.

103. *See id.*

> [T]he President (either through an appropriate department or agency of the United States or by contract with a United States firm) shall continue to provide special medical care and logistical support thereto for the remaining 174 members of the population of Rongelap and Utrik who were exposed to radiation resulting from the 1954 United States thermo-nuclear "Bravo" test, pursuant to Public Laws 95-134 "91 Stat. 1159" and 96-205 "94 Stat. 84." Such medical care and its accompanying logistical support shall total $22,500,000 over the first 11 years of the Compact.

Id.

104. *See* Tony A. Debrum testimony, *supra* note 13. The DOE medical program, which receives almost $2,000,000 annually, is limited to 174 people - those from Rongelap and Utirik who are "acutely exposed," as defined by DOE. *Id.* RMI officials object to the fact that although Congress has taken responsibility for the damage resulting from the entire testing program, it has limited DOE medical care to only two affected atolls and eligibility to participate is limited to exposure solely from the Bravo test. *See id.*

105. While arguing for expansion of the DOE's program, Minister Debrum hinted at the underlying anger of the Marshallese people by stating, "I won't discuss the outrage and humiliation of the people for being forced into medical experiments designed to benefit

citizens based on cumulative exposure from the testing program because radioactive fallout from the tests contaminated all of the Marshall Islands.[106] The RMI named numerous groups "exposed"[107] to medium or low levels of radiation that need the DOE's care but are not included in the DOE's definition of "exposed."[108] The RMI claims that the expense of caring for all of the exposed groups is beyond its financial capability.[109]

In the Compact, the U.S. Congress reaffirmed the United States' commitment, through the DOE's program, to the 174 Bravo victims mandated by previous law.[110] It is unlikely that the RMI did not realize the scope of the DOE's programs at the time of the Compact's formation because the specific provisions were part of the Compact. The RMI emphasizes the importance of monitoring the environment of all atolls, concentrating on the food chain and the health of all the affected peoples.[111] The RMI asserts that it cannot adequately provide for the exposed

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scientists not the patients because after years of this practice, DOE finally agreed to terminate the medical program run by a U.S. weapons laboratory." Tony A. Debrum testimony, *supra* note 13.

106. *See id.*

107. Among those groups exposed:

> (1) Marshallese test site workers who supported the testing and clean-up activities on Enewetak and Bikini, including the most dangerous type of activities, such as ground-moving activities that re-suspended plutonium in the air; (2) The people of Bikini, Enewetak and Ronglep who were prematurely resettled; (3) the Rongelapese "control" group; (4) The people of Ailuk, Likiep, Meiit, Wotie, Wotho, Ujae and Uielang who received levels of radiation in the vicinity of the people from Utirik; (5) The children of the prematurely resettled communities whose parents were exposed to radiation and who were born into highly radioactive environments; (6) Any second illness in the 174 exposed Marshallese.

Id.

108. The differences concerning the DOE's definition of exposed is part of an ongoing debate over radiation measurement and definitions. *See id.* The RMI claims that Marshallese citizens have been harmed by inaccurate radiation measurement and definition by the U.S. government. *See id.* Atolls such as Mejit, Ailuk, Likiep, Wotho, and Ujelang fall into the Department of Energy's category of the "least amount of radioactive atoms." *Id.* As a result, they are disregarded in all medical care or environmental monitoring programs under the Compact. *See id.* The DOE's category, however, of "the least amount of radioactive atoms" in the Marshall Islands exceeds acceptable radiation exposure levels in the United States hundreds of times. *See id.* The RMI is forced to care for the radiation-related needs of all atoll communities beyond those recognized as acutely exposed due to the testing program. *See id.*

109. *See id.*

110. *See* Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770, Title I, art. I, § 103 (h)(1).

111. *See* Tony A. Debrum testimony, *supra* note 13. *See also* Oscar Debrum testimony, *supra* note 64 (reiterating the "pressing need" for more medical surveillance and radiological monitoring activities despite the exhaustion of the funding provided under Section 177 Agreement).

communities if the extent of their exposure is unknown.[112] However, because the RMI knew or should have known the scope of the DOE's services, these items should not be considered under the Changed Circumstances provision. If the radiological monitoring services[113] or medical care have been poorly delivered,[114] that would be a matter for normal diplomatic negotiations[115] between the two nations, perhaps to be worked out during the Compact renegotiations.[116]

C. *Injuries Not Adequately Addressed by the Four Atoll Health Care Program*

The U.S. Congress created a medical program to care for the people of Bikini, Enewetak, Rongelap, and Utrik atolls in 1980.[117] The program was never implemented as intended,[118] but the U.S. Congress reaffirmed the

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112. *See* Tony A. Debrum testimony, *supra* note 13.

113. The Lawrence Livermore National Laboratory operates the DOE's environmental monitoring program. *See* Boyce testimony, *supra* note 5. The program is led by Dr. William Robison, and the DOE asserts that the program "has become the standard by which dose assessment and radioecology programs are measured today." *Id.*

114. Much to the Department of Energy's credit, it has admitted that there were deficiencies in its medical program. *See* Seligman testimony, *supra* note 76. Starting in 1944, a team of U.S. doctors, organized under the Brookhaven National Laboratory (BNL), provided limited medical care to certain Rongelap and Utrik beneficiaries. *See id.* "The BNL team visited the Marshall Islands semi annually for medical missions lasting four to six weeks." *Id.* The program provided only "intermittent medical care" to the mandated patients and "had limited prospects of making sustained contributions to either their health or public health in general." *Id.* However, beginning in 1998, the DOE implemented a new program with the local governments of Rongelap and Utrik atolls to provide medical care that would be more responsive to their needs. *See id.* The program's goals include: (1) Providing preventative and innovative healthcare for the mandated population; (2) enhanced continuity in the delivery of healthcare; (3) establishment of a community advisory process for the program; (4) delivery of healthcare in a culturally appropriate manner; and improve overall service. *See id.*

115. The Marshallese and U.S. governments will soon be involved in negotiations; which will be held prior to the expiration of the Compact in 2001. *See* Boyce testimony, *supra* note 5. *See generally* Agreement Relating to Diplomatic Relations, With Related Notes, Sept. 6, 1989, U.S.-Marshall Islands, *available at* 1989 WL 428700.

116. *See* Boyce testimony, *supra* note 5. In regard to which issues should be handled under Compact renegotiation, and those that could be addressed under the *Changed Circumstances* provision of the Section 177 Agreement, Boyce stated cryptically:

> The Compact negotiations should be limited to what Congress and the Compact called for. Issues involving nuclear claims should remain separate and be dealt with in accordance with the terms of the Compact, including the subsidiary agreement and, if appropriate, through a request to Congress for consideration based on changed circumstances.

Id.

117. *See* Pub. L. No. 96-205 (94 Stat. 84 amending 95-134).

118. *See* Weisgall testimony, *supra* note 59. President Carter signed Pub. L. No. 96-205 into law in 1980. *See id.* The Interior Department, however, never implemented the program

United States' commitment to the idea in the Compact.[119] The Four Atoll Health Care Program (Four Atoll Program), after implementation by the RMI, faced several severe obstacles. First, because most Marshallese citizens are not covered by the DOE's health care program, a large portion of the Marshallese population looks to the Four Atoll Program for healthcare.[120] Population growth in the Marshall Islands has exacerbated the problem.[121] When the RMI signed the Compact the four atolls contained an estimated population of 2300 people.[122] As of 1997, approximately five times as many people had enrolled in the program.[123] This figure includes approximately 10,919 people from the four atolls as well as an additional 555 people from other atolls qualified for coverage.[124]

Certain U.S. officials have criticized the Marshall Islands for failing to establish eligibility criteria for the Four Atoll Program.[125] The RMI contends that because the DOE's care is restricted and the Marshallese public health infrastructure is stretched beyond its capacity, virtually all of the people from the eligible atolls sought to enroll in the Four Atoll Program.[126] The RMI further asserts that it is hard to imagine anyone from the four atolls who is "not affected by the consequences" of the testing program.[127] Additionally, the RMI asserts that it did not foresee at the Compact's signing the extent to which health care costs would increase annually.[128] Since the Compact's inception, the purchasing power of the $2 million annual appropriation under the Section 177 Agreement has declined

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despite repeated requests from Congress and the Marshall Islands. *See id.* The U.S. government placed the responsibility to implement the program upon the RMI in the Section 177 Agreement. *See id.*

119. *See* Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986), Title I, § 103(j), which provides:

> (1) Services provided by the United States Public Health Service or any other United States agency pursuant to section 1(a) of Article II of the Agreement for the Implementation of Section 177 of the Compact (hereinafter in this subsection referred to as the "Section 177 Agreement") shall be only for services to the people of the Atolls of Bikini, Enewetak, Rongelap, and Utrik who were affected by the consequences of the United States nuclear testing program, pursuant to the program described in Public Law 95-134 "91 Stat. 1159" and Public Law 96-205 "94 Stat. 84" and their decedents (*and any other person identified as having been so affected if such identification occurs in the manner described in such laws*)

(emphasis added).

120. *See* Weisgall testimony, *supra* note 59.

121. *See id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* Tony A. Debrum testimony, *supra* note 13.

126. *See id.*

127. *Id.*

128. *See id.*

dramatically.[129] Unfortunately, the program receives no inflation adjustment.[130] Currently, the Four Atoll Program has a budget that equates to approximately fifteen dollars per patient per month.[131] Although the Compact entitles the RMI government to use the U.S. Public Health Service to bolster its health care sector, the RMI claims that due to U.S. budget cutbacks the Public Health Service informed the RMI that it does not have the resources to place doctors in the Marshall Islands.[132]

Section 177 of the Compact, to which the Changed Circumstances provision is applicable, does not specifically refer to the Four Atoll Program, but does state that "[t]he Government of the United States and the Government of the Marshall Islands shall set forth in a separate agreement [the 177 Agreement] provisions for . . . the continued administration by the Government of the United States of direct radiation related medical surveillance and treatment programs . . . ."[133] In addition, the Preamble to the Section 177 Agreement refers to the language of Public Laws 95-134 and 96-205, purporting to establish an "integrated, comprehensive" health care system.[134] From the language of those laws, the RMI government should have reasonably expected that the funding and programs provided by the Compact and the Section 177 Agreement would provide the "comprehensive" health care system promised. The RMI government stated that it does not have the expertise or the financial resources to provide health care for all its people suffering from nuclear testing related injuries.[135] Minister Debrum stated, "we are almost no closer today than we were at the beginning of our relationship to providing for the health care needs of our radiation victims."[136] "Despite the fact that we have some of the highest incidences of radiogenic illnesses and cancers in the world, we don't have adequate hospitals, diagnostic equipment or even a cancer registry program in the Marshall Islands."[137]

D. Claims Inadequately Compensated by the Nuclear Claims Tribunal

The Nuclear Claims Tribunal (Tribunal) is the mechanism created by the Section 177 Agreement to remedy property and personal injury claims resulting from the nuclear testing.[138] The Tribunal's approach to personal

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129. *Id.*

130. *See id.*

131. *Id.*

132. *See id.*

133. Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986), Title II, art.VII § 177 (b).

134. Preamble, Section177 Agreement.

135. *See* Tony A. Debrum testimony, *supra* note 13.

136. *Id.*

137. *Id.*

138. Section 177 Agreement, Article IV, Section 1 – Establishment and Operation of the

injury claims is intentionally patterned after a similar U.S. statutory program that provided compensation for American civilian and military personnel harmed by the U.S. nuclear testing in Nevada.[139] In the Radiation Exposure Compensation Act of 1990 (often referred to as the "Downwinders' Act"),[140] the U.S. Congress found that fallout emitted from the nuclear tests conducted in Nevada exposed American civilians "to radiation that is presumed to have generated an excess of cancers among those individuals."[141] "In view of that finding, the Congress established a presumptive program of compensation for specified diseases contracted by the people who were physically present in the 'affected area' during the periods of atmospheric testing in Nevada."[142]

The Tribunal determined that it would only be equitable if the Marshallese victims received the same type of statutory remedy.[143] Accordingly, the Tribunal adopted compensable medical condition regulations providing for awards to people physically present in the Marshall Islands during the testing period and for those who were also medically diagnosed as having one of the thirty-four conditions.[144]

Claims Tribunal:

> (a) The Government of the Marshall Islands, prior to the first anniversary of the effective date of this Agreement, shall establish a Claims Tribunal, in accordance with its constitutional processes and this Agreement. The Claims Tribunal shall have jurisdiction to render final determination upon all claims . . . based on, arise out of, or are in any way related to the Nuclear Testing Program, and disputes arising from distributions under Article II and III of this Agreement. This section confers in the Claims Tribunal no jurisdiction over the United States, its agents, employees, contractors, citizens or nationals with respect to claims of the Government, citizens or nationals of the Marshall Islands arising out of the Nuclear Testing Program.

Id.

139. *See Claims Approach, supra* note 63. *See also* Oscar Debrum testimony, *supra* note 64 (reiterating the "Downwinders' Act" as the Tribunal's model, and further asserting that the Tribunal's funding is inadequate).

140. 42 U.S.C. § 2210. For discussion of the Nevada testing victims, as well as other groups of people exposed to radiation by the U.S. government, see William A. Fletcher, *Atomic Bomb Testing and the Warner Amendment: A Violation of the Separation of Powers*, 65 WASH. L. REV. 285 (1990); Leonard W. Schroeter, *Human Experimentation, The Hanford Nuclear Site, and Judgment at Nuremberg*, 31 GONZ. L. REV. 147 (1996); Trisha T. Pritikin, *Hanford: Where Traditional Common Law Fails*, 30 GONZ. L. REV. 523 (1995).

141. *Claims Approach, supra* note 63.

142. *Id.*

143. *See id.*

144. See *Nuclear Claims Tribunal: Claims, at* http://www.tribunal-mh.org/claim.html (last visited Nov. 5, 1999) [hereinafter *Tribunal Claims*], detailing the Marshall Islands Nuclear Claims Tribunal Act of 1987. As originally adopted in 1991, the Act established a list of twenty-five medical conditions that were irrefutably presumed to be the result of the Nuclear Testing Program. *Id.* Based on subsequent scientific reports made available, the regulation was expanded to its present thirty-four conditions. *Id.*

These medical conditions are: Leukemia, cancer of the thyroid, cancer of the

The Tribunal's presumptive program is warranted, according to the RMI government, because of the need for an efficient and cost-effective system of resolving personal injury claims where proof of causation would often be impossible because large amounts of the exposure data is not available.[145] The presumptive standard applies to the entire Marshall Islands, not simply the atolls which have suffered the most severe contamination.[146] The Tribunal concluded that given the vastly greater radioactive fallout of the tests in the Marshall Islands compared with those in Nevada, it was clearly justified in extending the presumption of exposure to everyone living in the Marshall Islands during the testing period.[147]

Oscar Debrum, Chairman of the Tribunal, asserts that the funding allocated to the Nuclear Claims Tribunal under the Section 177 Agreement is manifestly inadequate,[148] thereby preventing the Tribunal from fulfilling its mandate of compensating the Marshallese victims.[149] He claims there have been far more cases of radiogenic illnesses presented to the Tribunal than either nation was prepared for when they originally negotiated the Compact.[150] The situation is complicated by the realization that many radiation-related illnesses, latent for decades, are now beginning to appear

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breast, cancer of the pharynx, cancer of the esophagus, cancer of the stomach, cancer of the small intestine, cancer of the pancreas, multiple melanoma, lymphomas, cancer of the bile ducts, cancer of the gall bladder, cancer of the liver, cancer of the colon, cancer of the urinary bladder, tumors of the salivary gland, non-malignant thyroid nodular disease, cancer of the ovary, unexplained hypothyroidism, severe growth retardation due to thyroid damage, unexplained bone marrow failure, meningioma, radiation sickness, beta burns, severe mental retardation, unexplained hyperarathyroidism, tumors of the parathyroid gland, bronchial cancer, cancer of the brain, cancer of the central nervous system, cancer of the kidney, cancer of the rectum, cancer of the cecum, non-melanoma skin cancer.

Id.

145. *See Claims Approach, supra* note 63. Despite requests by the RMI government, fallout measurements from the last two series of tests in the Marshall Islands (Operation Redwing in 1956 and Operation Hardtack I in 1958, comprising fifty tests averaging nearly one megaton each) still remain classified. *See id.*

146. *See id.*

147. *See id.* The total yield of the sixty-seven tests conducted by the United States in the Marshall Islands is approximately 99 times greater than the total yield of the 87 atmospheric tests conducted in Nevada (approximately 108.5 megatons in the Marshall Islands compared to 1.1 megatons total in Nevada). *Id.* In addition, because of the environmental differences between an ocean lagoon and the Nevada dessert, the tests in the Marshall Islands created much larger amounts of fallout. *See id.* The amount of I-131 released at the Marshall Islands was 42 times greater than the Nevada test site. *Id.* I-131 is a radionuclide which concentrates in and may cause damage, including cancer, to the thyroid. *See id.*

148. *See* Oscar Debrum testimony, *supra* note 64.

149. *See id.*

150. *See id.*

in the Marshallese population.[151]

As of April 30, 1999, compensation totaling $67,700,000 had been awarded to 1613 individuals.[152] This amount represents approximately $22 million more that the $45,750,000 provided under the Section 177 Agreement for payment of compensation by the Tribunal during the fifteen year period of the Compact of Free Association.[153] In addition, the Tribunal has yet to award any compensation for property damage,[154] although three major class action suits are currently pending in the Tribunal's procedural system.[155]

Due to funding deficiencies, distribution of actual payments has necessarily been reduced. Funding shortages forced the Tribunal to reduce the pro rata annual payments in the years 1996 through1998 to 2%, which brought the cumulative payment to 61% for all awards that had been approved prior to October 1, 1996.[156] For awards made on or after October 1, 1996, the Tribunal established a new initial payment rate of 25% of the net total of each award.[157] In summary, the actual payment status for the majority (1274 people) of the Tribunal recipients is 61% of their award.[158] Individuals awarded compensation between October 1, 1996 and September 30, 1998 have received only 40% of their awards.[159]

Chairman Debrum voiced the RMI's view by stating, "[i]t is . . . clear that the determinations already reached by the Tribunal render the provisions of the Section 177 Agreement manifestly inadequate."[160] Many Marshallese people are dying from radiation-related illnesses without the compensation owed to them.[161] Elderly Marshallese subjected to the testing program are dying without compensation whereas the radiation victims in the United States receive one-time payments when they are compensated for radiogenic illnesses.[162]

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151. *See id.*

152. *Id.*

153. *Id.*

154. *See id.*

155. *See id.* The three class actions are the Enewetak Class Action, Bikini Class Action, and the Rongelap, Ailinginae, Rongerik, and Utrik Class Action. *See id.* The Tribunal will focus on: (1) just compensation for the loss of use; (2) restoration costs; and (3) consequential damages. *See id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.*

162. *See id.*

E. *Such Injuries Were Not and Could Not Reasonably Have Been Identified as of the Effective Date of This Agreement*

In 1983, at the time of the Compact's finalization, the RMI did not have all available information regarding the nuclear tests.[163] Some information remains classified today, such as data pertaining to Operation Redwing and Operation Hardtack I.[164] Furthermore, the DOE did not release many of its documents concerning the testing program until after 1983.[165] Perhaps in an effort to renew the Marshallese faith in U.S. truthfulness,[166] the DOE recently implemented a program to make available one-million pages of nuclear testing documents through the DOE's Web site.[167] These documents allow direct access by the RMI and the public to this important information.[168] However, a million pages of scientifically complex information, made available long after the Compact was signed, is not much help to the health of the Marshallese people. RMI citizens will quite reasonably question whether they can trust any data offered by the DOE.[169] Other non-DOE sanctioned data also became available after the Compact's formation.[170] Damage disclosed to the RMI regarding Bikini Atoll serves as one example.[171] But expertise, such as that possessed by the DOE, is needed to interpret the findings.

It is not clear, however, how significant this information is to RMI's present assertion of injuries that "were not and could not reasonably have been identified as of the effective date" of the Compact. Only a careful review of the scientific data could determine if the new information reveals greater injury to the Marshallese people than the governments expected when

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163. *See* Tony A. Debrum testimony, *supra* note 13.

164. *See Claims Approach, supra* note 63.

165. *See* 145 CONG. REC. H3063-02, H3064 (daily ed. May 12, 1999)(statement of Rep. Faleomavaega), *available at* 1999 WL 296150; 145 CONG. REC. H8115-03, H8117 (daily ed. Sept. 13, 1999) (statement of Rep.Underwood), *available at* 1999 WL 708989.

166. Some Marshallese citizens distrust the DOE in part because of the events surrounding Bravo. The AEC received a report about a change in the wind direction six hours before Bravo was detonated. *See* Eisenbud, *supra* note 44. With full knowledge that winds were not headed northward to the open sea, but due east over Bikini's islands, the AEC proceeded to detonate Bravo. *See id.* Before Congress in 1999, Ralph Boyce of the DOE nevertheless referred to "sudden wind changes [that] sent radiation unexpectedly eastward . . . " Boyce testimony, *supra* note 5.

167. *See* Seligman testimony, *supra* note 76.

168. *See id.*

169. *See* Weisgall testimony, *supra* note 59.

170. *See id.*

171. *See* 145 CONG. REC. H4334-01, H4335 (daily ed. June 24, 1997), *available at* 1997 WL 345477. Recently disclosed information previously withheld by the U.S. government revealed that the physical and radiological damage to Bikini Atoll caused by the U.S. nuclear testing program was more extensive than previously disclosed. *See id.*

the Compact was signed. The DOE's actions, however, will likely arouse extra sympathy in the U.S. Congress for the Marshallese plight.

VI. CONCLUSION

The Changed Circumstances provision of the Section 177 Agreement does not legally obligate the U.S. Congress to address a RMI request for additional funding.[172] However, Congress has been sympathetic to the Marshallese plight.[173] Accordingly, Congress will most likely examine the Marshallese grievances. In so doing, Congress will logically look to the requirements, or elements, of the Changed Circumstances provision to evaluate whether the RMI presents a prima facie case showing that the terms of the Section 177 Agreement are manifestly inadequate. An affirmative answer to that question would necessitate the requisite full scale investigation for a Congressional remedy.[174]

In the RMI's plea to Congress, it could credibly argue that injuries have been discovered which were caused by the nuclear testing but were not discovered until after the Compact and Section 177 Agreement were finalized.[175] Furthermore, the RMI could reasonably argue that at least a portion of these injuries were not reasonably foreseeable due to the wealth of data that has become available due to new scientific studies,[176] declassification of DOE documents,[177] and the unknown extent of radiodonic diseases.[178]

Whether or not the RMI can produce sufficient evidence to convince Congress that the Section 177 Agreement is "manifestly inadequate" is unclear. That phrase is not defined in the Section 177 Agreement or in the Compact. In ordinary usage, manifest means "obvious," and adequate may be defined as "suitable or sufficient."[179] Thus, a common sense meaning of that phrase would be "obviously not sufficient."[180] What is clear, however, is that Congress should be lenient in applying that standard to the RMI's petition for funding.

The disaster inflicted upon the Marshallese for the last fifty-four years has created a moral obligation. The United States owes an immense debt to

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172. *See* Section 177 Agreement, Article IX, Changed Circumstances.

173. *See* Act of October 15, 1977, Pub. L. No. 95-134, 91 Stat. 1159; Act of March 12, 1980, Pub. L. No. 96-205, 94 Stat. 84 (amending Pub. L. No. 95-134).

174. *See* Stayman testimony, *supra* note 5.

175. *See* Tony A. Debrum testimony, *supra* note 13.

176. *See* 145 CONG. REC. H4334-01, H4335 (daily ed. June 24, 1997), *available at* 1997 WL 345477.

177. *See id.*

178. *See id.*

179. WEBSTERS 21ST CENTURY DICTIONARY (1992).

180. The United States Supreme Court has generally held that words in a treaty are to be given their ordinary meaning. Chan v. Korean Air Lines, Ltd., 109 S.Ct. 1676, 1678 (1989).

the Marshallese people for their tremendous sacrifices that directly contributed to and continue to contribute to the United States' nuclear deterrent and ballistic missile defense capability.[181] The Marshallese people made those sacrifices with their lives and homeland.

Notwithstanding Section 127 of the Compact, which purports to end any United States responsibility not outlined in the Compact,[182] the U.S. government should also recognize a fiduciary duty to continue to help the Marshallese people for as long as they need it.[183] During the trusteeship period, the Marshall Islands and the United States were not on an equal state to state relationship.[184] Rather, the United States, because of its powerful status, "enjoyed special privileges in its administration of the Trust Territory . . . ."[185] In this relationship, the Marshallese people were "dependent on the United States as the administrator of the trust to act in good faith."[186] The United Nations Charter, Articles 82 and 76, which created the International Trusteeship System, imposed this same fiduciary duty upon the United States to administer the trust for the ultimate benefit of these inhabitants.[187] Because of the unequal nature of this relationship, there existed a fiduciary obligation that "imposed a higher standard and longer enduring duty of care upon the United States in its administration of its Trust Territories."[188] The United States failed to act as trustee in a manner consistent with that higher standard.

The United States abused the trust relationship by bombing the Marshall Islands.[189] Additionally, the United States has allowed the Republic of the Marshall Islands to remain dependent upon the United States since the trusteeship began. The United States has moved the Marshall Islands toward independence in terms of sovereignty. But realistically, the RMI's nuclear injuries have created a different type of dependence that has greatly limited

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181. *See* 145 CONG. REC. H3063-02, H3063 (daily ed. May 12, 1999), *available at* 1999 WL 296250.

182. Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986), Title II § 127, which provides:

> Except as otherwise provided in this Compact or its related agreements, all obligations, responsibilities, rights and benefits of the Government of the United States as Administering Authority which have resulted from the application pursuant to the Trusteeship Agreement of any treaty or other international agreement to the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact are no longer assumed and enjoyed by the Government of the United States.

Id.

183. *See* Lee, *supra* note 15, at 415.

184. *See id.*

185. *Id.*

186. *Id.*

187. *See* U.N. CHARTER arts. 82 and 76.

188. Lee, *supra* note 15, at 415.

189. *See id.*

the RMI's self-sufficiency, and thereby its bargaining power to affect change for itself by diplomatic force. The RMI has been, and will continue to be, relegated to pleading to the U.S. Congress for more funding while politely pointing to the harm the RMI has suffered. This unfortunate situation would not be present if the United States had not placed the RMI in its present turmoil.

Because of these moral and fiduciary duties, whether or not legally enforceable, Congress should make every effort to deliver the needed assistance to the RMI. Minister Tony Debrum of the RMI, while announcing that Congress should consider the Changed Circumstances petition of the RMI Government,[190] specifically put forward tentative requests to remedy the deficiencies of the U.S.-Marshallese agreements:

1. A supplemental ex gratia payment to the Nuclear Claims Tribunal, consistent with Section 105(c)(2) of the Compact, in order to make the full awards that the Compact envisions for personal and property damage;[191]
2. Infrastructure and institutional support for the RMI public health sector, including additional facilities, equipment, and trained personnel;
3. Expansion of eligibility for the DOE medical program;
4. An inflation adjustment for the four atoll health care program;[192]
5. A directive to the U.S. Public Health Service to provide doctors to the Marshall Islands; and

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190. *See* Tony A. Debrum testimony, *supra* note 13. In addition to the above key requests, Debrum referred to some additional requests, although unlikely to fall under the Changed Circumstances provision:

> (1) A directive to the Department of Energy to conclude a bilateral agreement on clean-up standards for resettlement and worker safety standards for Marshallese workers involved in clean-up activities. The clean-up standards should be equal to those used in the United States and monitored by an independent party; (2) A directive to the Department of Energy to put its environmental monitoring contractor in the RMI, Lawrence Livermore National Laboratory, out to bid; (3) Continued Committee representation at the annual meetings between the DOE and the RMI; (4) Training and education-programs in the fields of environmental science and radiation health.

Id.

191. Oscar Debrum calculated the immediate need to be approximately $22,900,000, as of April 30, 1999, as the Tribunal had already awarded $67,700,000, but the Section 177 Agreement provides only $45,750,000 for the entire fifteen-year compact period. Oscar Debrum Testimony, *supra* note 64.

192. For the argument that the United States should run the health care program, as originally intended, see Weisgall testimony, *supra* note 59.

6. A nationwide cancer registry program in the Marshall Islands.[193]

Each of these requests carries a significant financial price[194] for the United States and consequently, the RMI's record of financial responsibility should be examined. Although there have been limited accusations of poor management by the RMI,[195] Congress should have the burden to overcome the presumption that the RMI has prudently handled the $150 million[196] originally granted under the Section 177 Agreement.[197] Again, leniency should guide Congress in light of the overwhelmingly complex problems facing the young nation.[198]

The United States has given a substantial amount of assistance to the Marshallese people, and those efforts have been recognized. The RMI has repeatedly voiced its appreciation for Congress' aid. However, in light of the current deficiencies under the Section 177 Agreement, more funding is desperately needed. When Congress is asked for help by the Marshallese people, it should deliver the funds expeditiously. Priority should be given to those Marshallese currently suffering from radiodonic diseases, especially the elderly Marshallese citizens.[199] Congress should remember why the Marshall Islands are again desperately in need of the United States' helping hand.

*John C. Babione**

193. Tony A. Debrum testimony, *supra* note 13.

194. The United States has spent large amounts of money on the Marshall Islands in areas other than health care. For example, in the restoration of Bikini Atoll, the $90,000,000 the United States has provided for cleanup may be only half of what is necessary. *See Oversight Hearings on Status of Nuclear Claims and Relations and Resettlement in the Marshall Islands, 1999: Hearings Before the House Comm. On Resources,* 106th Cong. (1999) (statement of Henchi Balos, Bikini Senate), *available at* 1999 WL 16947529 [hereinafter Balos testimony].

195. *See* Boyce testimony, *supra* note 5.

196. Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986), Title II § 177 (c).

197. The people of Bikini have received part of the $150 million. Their money management has been described as prudent. *See* 145 CONG. REC. H8115-03, H8117 (daily ed. Sept. 13, 1999), *available at* 1999 WL 708989.

198. While the RMI faces the normal problems of a developing nation, as well as the nuclear aftermath, it also has to combat PCB contamination. *See generally* Lee, *supra* note 15.

199. As of 1999, 632 (or 39%) of the Marshallese citizens granted personal injury awards from the Tribunal were deceased. Oscar Debrum testimony, *supra* note 64.

* J.D. Candidate, 2001, Indiana University School of Law - Indianapolis; B.S., Environmental Science, Indiana University - Bloomington. I give all credit and thanks to my mother. My success is due to her enduring example of strength, kindness, and determination.

ISRAEL'S HIGH COURT OF JUSTICE RULING ON THE GENERAL SECURITY SERVICE USE OF "MODERATE PHYSICAL PRESSURE": AN END TO THE SANCTIONED USE OF TORTURE?

I. INTRODUCTION

Omar Ghaneimat, a forty-five year old father of seven, was taken from his home in April of 1997 and detained until July of that same year.[1] During his detention, Ghaneimat was subjected to various forms of what the Israeli General Security Service ("GSS") describes as "moderate physical pressure" and what international human rights organizations consider as "torture."[2] Ghaneimat was put into *shabeh*,[3] where his hands and legs were shackled behind the back of a small chair with one leg shorter than the others. He was left in this position for hours with a hood over his head and music blaring, which effectively prevented him from sleeping.[4] During Ghaneimat's interrogation by GSS officers, he was forced into *qambaz*,[5] where he knelt on his toes while being questioned. When he fell over, the GSS officers would kick him until he returned to the *qambaz* position.[6] The officers beat Ghaneimat often, causing multiple contusions and a broken rib.[7] Although Ghaneimat was given three meals a day during his imprisonment, he was permitted to bathe only once every five days and prevented from sleeping more than two to three hours at a time within a two day period.[8]

One would expect that a prisoner treated in such a manner was a notorious criminal and an extreme threat to Israel. However, when Ghaneimat was finally charged with a crime, after being detained for two months, it was not murder or terrorism but concealing a rifle for which he

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1. *See* YUVAL GINBAR, ROUTINE TORTURE: INTERROGATION METHODS OF THE GENERAL SECURITY SERVICE 39-40 (B'tselem 1998). The data collected in this text is based on the testimonies and affidavits of eleven interogees and on official documents.

2. *See id.* at 39.

3. *See id.* at 42. *Shabeh* is a combination of several interrogation methods used by the GSS. It typically involves shackling the interogee to a small chair, placing a hood over his head, and playing loud music for an extended period of time. *See id.*

4. *See id.*

5. *See id.* at 45. *Qambaz*, also known as the frog position, is where the interrogators force the interogee to squat on his toes with his hands shackled behind his back for long periods of time. *See id.*

6. *See id. Qambaz* may also refer to forcing an interogee to stand alongside a wall with his legs and hands tied behind his back. The interrogators force the interogee to bend his knees while keeping his body straight for up to thirty minutes. If the interogee falls during this time he is beaten until he resumes the *qambaz* position. *See id.*

7. *See id.* at 48.

8. *See id.* at 44.

received ninety days imprisonment, commencing on the day of his detention.[9] Ghaneimat served three more weeks in prison before his release on probation.[10] This is not an unique case. Data collected in 1996 and 1997 by HaMoked, the center for the defense of the individual, indicates that an astounding eighty-five percent of Palestinians interrogated by GSS officials were tortured.[11] The Israeli government was not only aware of the GSS interrogation methods but condoned them,[12] that is until the recent High Court of Justice's decision in *Public Committee Against Torture in Israel v. Israel*.[13]

This note will examine the High Court of Justice's decision to determine what effect it will have on the GSS's battle against terrorism. Part II of this note will focus on the historical and legal establishment of "moderate physical pressure" as a legitimate method of interrogation. The note will then address, in part III, whether these methods constitute "torture". Part IV will review the Court's ruling and its rationale in *Public Committee Against Torture in Israel v. Israel*. Finally, in parts V through VII, this note will discuss the structure of Israel's government, the potential effect the Court's decision will have on Israel's national security, and lastly the question of whether the Knesset (Israel's legislature) may circumvent the ruling.

II. THE GENERAL SECURITY SERVICE'S USE OF "MODERATE PHYSICAL PRESSURE"

A. The Israeli and Palestinian Conflict

The Zionist movement[14] began at the end of the nineteenth century with a philosophy that "preaches that the Jews are one people and one nation

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9. *See id.* at 40.

10. *See id.*

11. *See id.* at 36. The data indicated that the methods used against the Palestinians during GSS interrogations included painful binding, sensory isolation, and sleep deprivation. This combination of methods is commonly referred to as *shabeh*. *See id.*

12. *See Commission of Inquiry Into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISR.L.R. 146, 184 (1989) [hereinafter *Landau Report*] (translating the 1987 Landau Commission Report that upheld the use of "moderate physical pressure" in investigations by the GSS of suspected terrorists).

13. H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 26, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. (translating the High Court of Justice's ruling stating that the GSS could no longer use physical force in the interrogations of suspected terrorists absent a legal statutory provision granting the GSS the power to use such methods).

14. *See* SAMI HADAWI, BITTER HARVEST 33 (4th ed., Olive Branch Press 1991). The Zionist movement, headed by the World Zionist Organization, "is an international political movement which aspires to link all Jews, by means of ethnic, nationalistic bonds into a world-wide nation, a peoplehood, having as its political and cultural center the state of Israel." *Id.*

requiring their own land, to which all Jews must eventually return."[15] In 1948, the Zionist movement watched its goal reach fruition with the establishment of the State of Israel.[16] By the late 1970s, the Israeli government began confiscating land under Section 103 of the Ottoman Land Law[17] to facilitate the settlement of Jewish persons and businesses in the West Bank.[18]

The Arab community opposed the Zionist movement from the beginning because it sought to take their homeland.[19] The consequence of the

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15. *Id.* at 34.

16. *See id.* at 35. The State of Israel legislated "the Jewish people" concept into legal form through the Law of Return and the Nationality Act which permitted any Jew to become a citizen of Israel. *See id.*

17. *See* ALTERNATIVE INFORMATION CENTER, ISRAELI SETTLEMENT IN THE WEST BANK: PAST, PRESENT, AND FUTURE 8-9 (Alternative Information Center 1995). Section 103 of the Ottoman Land Law states that:

> Empty land, such as mountains, rock-strewn or stony land, and grazing areas that are no one's property - for which no one has a deed of ownership - and that have never been intended for the use of any town or village, and that are located at such a distance from towns or villages that a person's voice cannot be heard in the nearest place of habitation, are called dead land ... Any person by whom such land is needed may, with the agreement of the custodian work it, but absolute proprietorship shall remain with the sultan.

Id. at 8. *See also* MERON BENVINISTI, THE WEST BANK DATA PROJECT 15 (1984).

18. *See* ALTERNATIVE INFORMATION CENTER, *supra* note 17, at 8-10. By 1982, approximately 55% of the lands in the West Bank had been declared to be state land and confiscated. "While only 5,000 Jewish settlers lived in the occupied territories in 1977, by the end of the period of Likud rule (1977-1992), an estimated 105,000-115,000 settlers were living in 133 settlements in the West Bank." *Id.* at 8. This period also saw the emergence of a dual system of law in which Jewish settlers were subject to the more generous laws of the State of Israel, while the local Palestinians were subject to the "authority of the Civil Administration, regulations of the military governor, and to the system of laws in place on the eve of the occupation." *Id.* at 10.

19. *See* HADAWI, *supra* note 14, at 192-93. "In the period 1935 to 1938, with Jewish immigration becoming a flood, the Palestinians became alarmed and rose in open rebellion against the mandate which necessitated the bringing into the country of additional military reinforcements." *Id.* at 192. Because the rebellion lasted longer than the British anticipated, they solicited help from neighboring Arab states. Thus, "[a]fter the establishment of the state of Israel in 1948, the Palestine problem . . . was overnight transformed into an Arab States-Israeli conflict in which the Palestinians no longer figured as a party and were from then on referred to, and dealt with, as mere refugees in need of shelter and maintenance." *Id.* at 193; *See also* Steve Fireman, *The Impossible Balance: The Goals of Human Rights and Security in the Israeli Administered Territories*, 20 CAP. U. L. REV. 421, 422 (1991) (referring to the text of E.R. COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982, 35 (1985)). In June of 1967, the state of Israel went to war against the combined forces of Egypt, Jordan, and Syria. As a consequence of Israel's conquest in the "Six-Day War", Israel found itself in control of territories that were previously not included within the boundaries of the State of Israel. These territories encompassed 70,000 square kilometers of land known as the West Bank, the Sinai Peninsula, Gaza Strip, and the Golan Heights. According to the census taken immediately following the Six-Day War, there were one million Arabs within these territories.

settlement of Jews in Palestine was the formation of the Palestinian Liberation Organization ("PLO") whose primary aim was to free Palestine from Israeli control.[20] The Israeli government immediately saw the PLO as a significant threat and labeled it as a terrorist organization. In order to prevent terrorist acts against Israel or its citizens, the government of Israel adopted a number of legal measures, including both the Prevention of Terrorism Ordinance,[21] which criminalized membership in a terrorist organization, and the Defense (Emergency) Regulations,[22] which afforded

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Id. (footnotes omitted).

20. *See* HADAWI, *supra* note 14, at 195-98. The Palestinian Liberation Organization serves as an umbrella organization for the following guerrilla groups: El-fateh, The Democratic Front for the Liberation of Palestine, The Popular Front for the Liberation of Palestine, the Arab Liberation Front, The Palestinian Liberation Front, The Palestinian Popular Front, and As-Saiqa. *See id.* at 196-97. In November of 1974, the General Assembly of the United Nations granted the PLO observer status with the right "to participate in the sessions and the work of the General Assembly." *Id.* at 198. *See also Landau Report*, *supra* note 12, at 154. The Commission makes reference to the Terrorist Organizations and "The Armed Struggle." Specifically the Commission cites the "Palestinian Convenant" (1968) Article 8, which states:

> The Palestinian people is at the stage of national struggle for the liberation of its homeland. For that reason, differences between Palestinian national forces must give way to the fundamental difference that exists between Zionism and imperialism on the one hand and the Palestinian Arab people on the other. On that basis, the Palestinian masses, both as organizations and as individuals, whether in the homeland or in such places as they now live as refugees, constitute a single national front working for the recovery and liberation of Palestine through armed struggle.

Id. (alteration in original). The Commission also made reference to Article 9 of the Palestinian Convenant which states:

> Armed struggle is the only way to liberate Palestine. Thus it is the overall strategy, not merely a tactical phase. The Palestinian Arab people assert their absolute determination and firm resolution to continue their armed struggle and to work for an armed popular revolution for the liberation of their country and their return to it. They also assert their right to normal life in Palestine and to exercise their right to self-determination and sovereignty over it.

Id. (alteration in original). *See also* Fireman, *supra* note 19, at 443. "The PLO's avowed goal has been the liquidation of the state [sic] of Israel." *Id.*

21. *See* Justus R. Weiner, *Terrorism: Israel's Legal Responses*, 14 SYRACUSE J. INT'L L. & COM. 183, 189 (1987). "This Ordinance criminalizes membership in and activities supporting a terrorist organization. It has been amended to also outlaw acts manifesting identification or sympathy with a terrorist organization in a public place and knowingly maintaining contacts with officials or representatives of a terrorist organization." *Id.* (footnotes omitted). This is the "primary weapon" for the state in bringing to trial members of a terrorist organization so that they may be punished accordingly. *See also* ISRAEL FOREIGN MINISTRY, PREVENTION OF TERRORISM ORDINANCE NO. 33 OF 5708-1948, *at* gopher://israel-info.gov.il/00/constit/laws/bas.22%09%09%2B (translating the ordinance into English).

22. *See* Weiner, *supra* note 21, at 191-94.

> The broad powers derived from the Regulations include the power to temporarily detain an individual administratively or to temporarily restrict his travel to within his town of residence. Other Regulations, which apply only in the Administered

broad powers to the government, including the right of the government to temporarily detain an individual suspected of terrorism.[23]

The Israeli government also utilized the General Security Service to combat terrorism. "The GSS is responsible for security matters and counter-intelligence within Israel and the occupied territories . . . . [It] apprehends and interrogates people who are believed to be involved in activities endangering the security of the state."[24] Although the Jewish citizens of Israel view the GSS as an effective tool in combating Palestinian violence towards Israeli citizens and their property, the agency's reputation among the millions of Palestinians living in the Occupied Territories[25] is "that of a secret police agency that exercises wide-ranging and non-accountable control over their

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> Areas, authorize the deportation of individuals from the Administered Areas who threaten security and the demolition or sealing-up of residences which are used as the base for a terrorist attack. . . .
>
> The administrative measures embodied in the Regulations are not utilized to punish individuals for the offenses they have committed, but rather to prevent the perpetration of illegal acts by the individual in question.

Id. (footnotes omitted). *See also* HAROLD RUDOPH, SECURITY, TERRORISM AND TORTURE, 94-97 (Juta & Co., Ltd. 1984). "On March 5, 1979 . . . the Emergency Powers (Detention) Law 5739-1979, was passed by the Knesset, and so, for the first time, administrative detention in Israel was to be governed by truly indigenous law." *Id.* at 94.

23. *See generally* Weiner, *supra* note 21 (discussing the various legal responses Israel has taken in order to combat terrorism).

24. STANLEY COHEN & DAPHNA GOLAN, THE INTERROGATION OF THE PALESTINIANS DURING THE INTIFADA: ILL-TREATMENT, "MODERATE PHYSICAL PRESSURE" OR TORTURE? 19 (B'tselem 1991). This text draws its information from a selection of 41 cases in which the use of ill-treatment was alleged. *See also Landau Report*, *supra* note 12, at 157. In a description of the role of the GSS in the State of Israel, the Landau Commission distinguished between a police investigation and a GSS investigation when it stated:

> Basic differences exist between the essence of a police interrogation of an ordinary criminal, on the one hand, and an interrogation carried out by the GSS of persons suspected of HTA or subversive political activity, on the other. The police investigation is aimed at collecting evidence against individuals within the society, suspected of criminal offences, and its purposes are to have the accused convicted so that he will change his ways, to deter him and others from committing future crimes, and to give him the punishment he deserves. Whereas the direct goal of the GSS interrogation is to protect the very existence of society and the State against terrorist acts directed against citizens, to collect information about terrorists and their modes of organization and to thwart and prevent the perpetration of terrorist acts whilst they are still at a state of incubation, by apprehending those who carried out such acts in the past - and they will surely continue to do so in the future - and those who are plotting such acts, as well as seeking out those who guide them.

Id.

25. *See* ALTERNATIVE INFORMATION CENTER, *supra* note 17, at 6. The Occupied Territories refer to those lands, including the West Bank, that Israel gained as a result of winning the Six-Day War in 1967. *See id.*

daily lives, often by violent and/or coercive means."[26] By 1987, many Palestinians living in the occupied territories became disillusioned with their situation and started what became known as the Intifada,[27]or uprising. What began as stone-throwing at the occupying soldiers resulted in 892 Palestinian deaths and an estimated 106,000 wounded.[28]

B. The Israeli Government Endorses the "Use of Moderate Physical Pressure" in GSS Interrogations

Between 1967 and 1987, the Israeli government took the position that the GSS interrogators did not use "coercive" methods during interrogations.[29] Israeli officials flatly denied allegations by the media and human rights organizations that ill-treatment or torture was common.[30] The government reversed its position in 1987 after the outbreak of two scandals[31] that

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26. HUMAN RIGHTS WATCH, TORTURE AND ILL-TREATMENT: ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 14 (Human Rights Watch 1994) (documenting reports of torture based on interviews of 36 security suspects who were interrogated by GSS officials between 1992 and 1994).

27. *See* HADAWI, *supra* note 14, at 294.

> The uprising began in the Gaza Strip in response to an incident in which four Palestinian workers were run over by an Israeli truck. While the intention of the Israeli driver remains in dispute, for Palestinians the incident recalled the killing of seven members of an Arab family in Lebanon when their car was crushed by an Israeli tank on September 18, 1972. This time, the protests began in the Jabaliya refugee camp where the men had lived, and at the funeral a young Gazan teenager was shot and killed by Israeli soldiers. The demonstrations spread to other refugee camps and towns in Gaza, and very quickly to the West Bank as well, beginning in the Balata camp near Nablus. As the resistance spread, stone-throwing against the occupying soldiers became more organized, and soon emerged as a leitmotif among young Palestinians. . . .
>
> The message of the Intifada is a clear and simple one: Palestinians assert their presence in the West Bank and the Gaza Strip and their determination not only to stay, but to claim their right to self determination and to the establishment of an independent Palestinian state. . . .

Id. at 295-98.

28. *See id.* at 296. *See also* Fireman, *supra* note 19, at 434. "From the beginning of the uprising in December of 1987 to December of 1989, over 50,000 Palestinians were arrested. As of December of 1989, over 13,000 Palestinians have been detained." *Id.* "According to Israeli figures, 95 percent of all Palestinians brought to trial in the military courts in the territories are convicted. Defense attorneys say the conviction rate is 97 to 99 percent." *Id.* at 439 (footnotes omitted).

29. *See* HUMAN RIGHTS WATCH, *supra* note 26, at 46.

30. *See id.*

31. *See id.* at 48.

> In the first case, GSS officials fabricated evidence to cover up a 1984 incident in which agents beat to death two Palestinians who had been taken into custody after hijacking a civilian bus (an incident known as the "Buss 300 Affair"). In the second incident, Lieutenant Izzat Nafsu, a member of Israel's Circassian

tarnished the reputation of the GSS among Israeli citizens. These two scandals resulted in the formation of the Landau Commission which proceeded to investigate the methods of interrogation used by the GSS.

The Landau Commission published its findings in November of 1987. The Commission concluded that:

> We are convinced that effective activity by the GSS to thwart terrorist acts is impossible without use of the tool of interrogation of suspects, in order to extract from them vital information known only to them and unobtainable by other methods.
>
> The effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to [sic] disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does reveal information. . . .
>
> The means of pressure should principally take the form of nonviolent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, *the exertion of a moderate measure of physical pressure cannot be avoided.*[32]

The Commission based its rationale on a combination of the defense of necessity[33] and the threat of terrorism posed by the Palestinian Liberation Organization. As a result, the Commission ultimately extended the defense

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(Turkic Muslim) minority, was released from prison after the Supreme Court ruled that he had been convicted of espionage on the basis of a false confession extracted under duress by GSS agents, who later lied in court when Nafsu challenged his confession.

Id.

32. *See Landau Report*, *supra* note 12, at 184. (emphasis added) (footnote omitted). *See also* HUMAN RIGHTS WATCH, *supra* note 26, at 50-51; COHEN & GOLAN, *supra* note 24, at 24-25; AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: TORTURE AND ILL-TREATMENT OF POLITICAL DETAINEES 11 (Amnesty International USA 1994).

33. *See Landau Report*, *supra* note 12, at 169. The defense of necessity is found in Sec. 22 of the Penal Law which states:

> A person may be exempted from criminal responsibility for an act or omission if he can show that it was done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person, honour or property or on the person or honour of others whom he was bound to protect or on property placed in his charge: Provided that he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided.

Id.

of necessity to the GSS in its role as the guardian against terrorism for the State of Israel.[34] The Landau Commission Report, thus, legitimized the use of "moderate physical pressure" in the interrogation of suspected Palestinian terrorists. This endorsement remained in effect for more than a decade.[35]

III. "MODERATE PHYSICAL PRESSURE" OR "TORTURE"?

The Landau Commission Report legalized the use of "moderate physical pressure" in interrogations by GSS officers, but the Report did not specify the meaning of that phrase. Instead, the Report prescribed GSS methods in the second chapter, which remained classified for security reasons.[36] Nonetheless, the various methods used by the GSS surfaced over

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34. *See id.* at 172-73. The Commission uses the "ticking time bomb" example to illustrate how the GSS falls under the protection of the defense of necessity.

> [I]t is a salient security interest of the State to protect the lives of its citizens, and the duty to defend them, imposed on the State, certainly falls within the category of the need to prevent bodily harm or grievous injury, as stated in Sec. 22.
>
> . . .
>
> The second condition embodied in Sec. 22 is that it was impossible to prevent the anticipated harm in any other way. . . . [I]n regard to GSS interrogations . . . the information possessed by a member of a terrorist organization . . . cannot be uncovered except through the interrogation of persons concerning whom the GSS has previous information about their affiliation with such an organization or group . . . .

Id. See also AMNESTY INTERNATIONAL, *supra* note 32, at 10-11.

35. *See* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 10, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. The Court referred to the Commission of Inquiry Report, which was published in 1995, and legalized the GSS interrogation tactics:

> [T]he Commission concluded that in cases where the saving of human lives necessarily requires obtaining certain information, the investigator is entitled to apply both psychological pressure and "a moderate degree of physical pressure." Thus, an investigator who, in the face of such danger, applies that specific degree of physical pressure, which does not constitute abuse or torture of the suspect, but is instead proportional to the danger to human life, can avail himself of the "necessity" defense, in the face of potential criminal liability.
>
> The Commission approved the use of "a moderate degree of physical pressure" with various stringent conditions including directives that were set out in the second (and secret) part of the Report, and for the supervision of various elements both internal and external to the GSS. The Commission's recommendations were duly approved by the government.

Id. at 10-11 (citation omitted).

36. *See* Tamar Gaulan, *Israel's Interrogation Policies and Practices, at* gopher://israel-info.gov.il/00/constit/leg/961200.leg (stating Israel's official position on the use of torture).

> [T]he Landau Commission went on, in a second section of its report, to precisely detail the exact forms of pressure permissible to the GSS interrogators. This section has been kept secret out of concern that, should the narrow restrictions binding the interrogators be known to the suspects undergoing questioning, the

the last decade, due mostly to the stories told by persons previously subjected to its interrogations.

The GSS employs a variety of interrogation methods under the heading of "moderate physical pressure" in order to combat the nature of the terrorist being investigated. Terrorist groups are trained not to reveal information, and those that succeed in thwarting investigators are viewed as heroic by their comrades.[37] "Under these circumstances, the interrogation of an HTA suspect by the GSS turns into a difficult confrontation between the vital need to discover what he knows . . . and the will of the person interrogated to keep silent . . . or to mislead the interrogators by providing false information."[38] The interrogation methods typically used involve shackling or binding of the suspect's limbs,[39] which is seen in the *shabeh (shabach)*;[40]

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interrogation would be less effective. Palestinian terrorist organizations commonly instruct their members, and have even printed a manual, on techniques of withstanding GSS questioning without disclosing any information. It stands to reason that publishing GSS guidelines would not only enable the organizations to prepare their members better for questioning, but would reassure the suspect as to his ability to undergo interrogation methods without exposing vital information, thus depriving the GSS of the psychological tool of uncertainty.

Id. at 2-3.

37. *See Landau Report*, *supra* note 12, at 157.

38. *Id.* at 157-58. *See also* Gaulan, *supra* note 36, at 1 (stating that "The Commission determined that in dealing with dangerous terrorists who represent a grave threat to the State of Israel and its citizens, the use of a moderate degree of pressure, including physical pressure, in order to obtain crucial information, is unavoidable under certain circumstances.")

39. *See* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 8, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. The Court referred to the GSS use of "excessive tightening" of hand or leg cuffs, which the applicants to the Court claimed "resulted in serious injuries to the suspect's hands, arms and feet, due to the length of the interrogations." *Id.*

40. *See* GINBAR, *supra* note 1, at 15.

> Regular *shabeh* entails shackling the interogee's hands and legs to a small chair, angled to slant forward so that the interogee cannot sit in a stable position. The interogee's head is covered with an often filthy sack and loud music is played non-stop through loudspeakers. Detainees in *shabeh* are not allowed to sleep.
>
> The GSS generally uses "regular *shabeh*" for several days at a time, with extremely short breaks.

Id. See generally HUMAN RIGHTS WATCH, *supra* note 26, at 114-18 (describing *Shabeh* torture methods used by GSS); COHEN & GOLAN, *supra* note 24, at 62-65. *See also* Sahar Francis, *Torture and Widespread Arrest Campaigns: Legislating Torture: Testimony of Addameer's Lawyers*, *at* http://www.addameer.org/torture/ (describing various interrogation methods used by the GSS); *Mahmoud*, *at* http://www.lawsociety.org/prisoner/tstory/st2.html (accounting of a person forced into *shabeh* by GSS interrogators); H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 7, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. The Court described *shabach* position as one in which, the suspect's hands are tied behind his back and he is seated on a small, low chair with the seat tilted forward. One hand is tied behind him and placed inside the gap between the chair's seat

qambaz;[41] *qas'at a-tawleh*;[42] and the banana tie[43] position. Other methods used may also include beatings and/or shaking,[44] physical threats,[45] the use

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and back support and his head is covered by an opaque sack. During all of this loud music is played in the room. These suspects are detained in this position for an extended period of time resulting in headaches and severe muscle pain in the arms and neck. *See id.*

41. *See* GINBAR, *supra* note 1, at 28-31. *Qambaz* is also know as the "frog position" because it requires the suspect to kneel on his toes with his hands tied behind his back. The interogee is forced to remain in this position for hours and is beaten if he falls over. *See also* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 7, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. The Court referred to this position as the "Frog Crouch" and described it as "periodical crouches on the tips of one's toes, each lasting for five minute intervals." *Id.*

42. *See* GINBAR, *supra* note 1, at 26-28.

> The [*qas' at a-tawleh*] method combines a painful position with the application of direct violence by the interrogator, and is used during the interrogation itself. The interrogator compels the interogee to kneel or sit down (on the floor or on the *shabeh* chair) in front of a table, with the detainee's back to the table. The interrogator places the interogee's arms, bound and stretched behind him, on the table. The result is intense pain. Sometimes the interrogator sits on the table, his feet on the interogee's shoulders, and pushes the interogee's body forward, stretching his arms even more, or pulls his legs, creating the same painful effect.

Id. at 26.

43. *See* COHEN & GOLAN, *supra* note 24, at 65-67.

> There are two methods which are called the banana tie. One consists of binding the suspect's legs to the legs of a chair without a backrest, and then tying his hands to the back legs of the chair. The second is binding the detainee's hands to his legs so that his body is bent backward. Thus, the tied up body looks like a banana and is exposed and vulnerable to the blows of the interrogators.

Id. at 65.

44. *See id.* at 71. *See generally* HUMAN RIGHTS WATCH, *supra* note 26, at 187-89 (describing various prisoners' experiences with GSS interview techniques). *See also* PHYSICIANS FOR HUMAN RIGHTS, ISRAEL AND THE OCCUPIED TERRITORIES: SHAKING AS A FORM OF TORTURE - DEATH IN CUSTODY OF 'ABD AL-SAMAD HARIZAT 4-6 (Physicians for Human Rights 1995) (Shaking of a suspect results in injuries similar to shaken baby syndrome); GINBAR, *supra* note 1, at 31-34. Shaking is when "[t]he interrogator grabs the interogee, who is sitting or standing, by the lapels of his shirt, and shakes him violently, so that the interrogator's fists beat the chest of the interogee, and his head is thrown backward and forward." *Id.* at 31. *See also* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 6, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html B'tselem, *Shaken to Death: Torture in Interrogation, at* http://btselem.netgate.net/news/96spring/torture.html (reporting that detainee, Harizat, died "as a result of brain damage caused by violent shaking during interrogation"); B'Tselem, *Forcefully Shaken After the Death of Harizat, at* http://btselem.netgate.net/news/96spring/musa.htm (reporting testimony of a terrorist suspect regarding the interrogation methods used against him by the GSS); *Nawaf Al Kaissi, at* http://www.lawsociety.org/prisoner/tstory/st1.html (reporting testimony of interrogation methods used against a former GSS prisoner); *Abed, at* http://www.lawsociety.org/prisoner/tstory/st4.html (accounting of interrogation methods used against a detainee by the GSS); *PICCR: Another Palestinian Victim Dies in Israeli Prison, at* http://msanews.mynet.net/gateway/piccr/19980202.9.html (reporting the death of a Palestinian and condemning such practices); B'Tselem, *Torture During Interrogations: Testimony of*

of confined spaces,[46] and general humiliation.[47] The use of these methods was approved by not only the Landau Commission, but indirectly by the Israeli High Court of Justice.[48] Though the High Court of Justice never specifically ruled on the issue of whether the GSS interrogation methods were lawful prior to September of 1999, the Court faced numerous cases alleging abuse by the GSS and, in those cases, the Court ruled in favor of the GSS.[49]

Palestinian Detainees and Israeli Interrogators, at http://btselem.netgate.net/REPORTS/1994/nov_1.htm (listing GSS interrogation methods). The Court described this method as "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly." H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 6, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html B'tselem. An expert who testified before the Court stated that "the shaking method is likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably, and suffer serious headaches." *Id.*

45. *See* GINBAR, *supra* note 1, at 25. *See also* COHEN & GOLAN, *supra* note 24, at 56-57 (indicating that these threats often involve both sexual threats and death threats to the prisoner and/or his family).

46. *See* HUMAN RIGHTS WATCH, *supra* note 26, at 129 (describing different prisoners' experiences with confined spaces). *See also* COHEN & GOLAN, *supra* note 24, at 59-60. Confined spaces are often times referred to as closets by interogees. These "closets" are extremely small, sometimes only one meter by one meter, and the interogee is usually detained while bound and hooded. *See id.* Some of these closets are referred to as "refrigerators" because of the extremely low temperatures. *Id.*

47. *See* HUMAN RIGHTS WATCH, *supra* note 26, at 177-80. Detainees are frequently denied the use of a toilet, and when permitted, they are only given a few minutes in which to relieve themselves while also eating their meal. Detainees are also prevented from keeping clean because they are only permitted to bathe once a week, if at all. *See id.*

48. *See generally* YUVAL GINBAR & JESSICA MONTELL, LEGITIMIZING TORTURE: THE ISRAELI HIGH COURT OF JUSTICE RULINGS IN THE BILBEISI, HAMDAN, AND MUBARAK CASES: AN ANNOTATED SOURCEBOOK 7-21 (B'tselem 1997) (providing an English translation for three HCJ cases).

49. *See id. See also* H.C. 7964/95, *'Abd al-Halim Bilbeisi v. The General Security Service* (1995). Bilbeisi was a detainee who complained of abuse by the GSS interrogators. The Court ordered an interim injunction in which the GSS was prohibited from using physical force on Bilbeisi while the Court was investigating his allegations. While the interim injunction was still in effect Bilbeisi confessed to taking part in a prior terrorist attack and that he was currently hiding other explosives to be used in future terrorist attacks. Because of this confession, the Court found that "in this case there exists a clear and present danger of harm to human lives" and repealed the interim injunction. *Id.* at 8-10. *See also* H.C. 8049/96, *Muhammad 'Abd al-'Aziz Hamdan v. The General Security Service* (1996). Hamdan was a detainee of the GSS who complained about the use of physical force in his interrogation. The Court issued an interim injunction and an *order nisi* in which the GSS must come forth and defend the methods used against Hamdan. The GSS informed the Court that Hamdan possessed vital information, the procurement of which would save human lives. After reviewing the classified material, the Court agreed with the GSS and repealed the interim injunction. *Id.* at 14-16. *See also* H.C. 3124/96, *Khader Mubarak et al v. The General Security Service* (1996). Mubarak complained of the following interrogation methods used by the GSS: shackling his

Although the interrogation methods employed by the GSS taken alone may not appear odious, oftentimes these methods are used in combination and result in both psychological and physical trauma.[50] Because of the psychological and physical trauma frequently seen in GSS suspects, both human rights organizations and the United Nations have characterized the GSS's interrogation methods as "torture."

Although what one person's perception as torture may differ from another's, international law provides a ready definition. "Torture" is:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in

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hands in a painful position, forcing him to wear a sack over his head and to listen to loud music between interrogations, and depriving him of sleep. The GSS argued that these were necessary for security reasons. The GSS claimed that the shackling was used to protect the interrogators from the suspects, and the sack was to prevent the prisoners from seeing other interogees which may harm the interogee. Moreover, the music was used to prevent interogees from conversing with one another, and the sleep deprivation was not really deprivation but forcing the interogee to wait for the next interrogation without rest. The Court found that "[t]he necessities of security, the reasons for which the Appellant was detained, and the pressing need to prevent loss of life, as brought to our attention *in camera*, justified an intensive interrogation of the Appellant in the way that it was conducted . . . ." *Id.* at 20-21.

50. *See* GINBAR, *supra* note 1, at 38 (quoting from the UN's Special Rapporteur on Torture). In his report for 1997, Professor Nigel Rodley, U.N. Special Rapporteur, wrote:

> The following forms of pressure during interrogation appear so consistently (and have not been denied in judicial proceedings) that the Special Rapporteur assumes them to be sanctioned under the approved but secret interrogation practices: sitting in a very low chair or standing arched against a wall (possibly in alternation with each other); hands and/or legs tightly manacled; subjection to loud noise; sleep deprivation; hooding; being kept in cold air; violent shaking (an "exceptional" measure, used against 8,000 persons according to the late Prime Minister Rabin in 1995). Each of these measures on its own may not provoke severe pain or suffering. Together - and they are frequently used in combination - they may be expected to induce precisely such pain or suffering, especially if applied on a protracted basis of, say, several hours. In fact, they are sometimes apparently applied for days or even weeks on end. Under those circumstances, they can only be described as torture . . . .

Id. (quoting E/CN.4/1997, 10 January 1997, par. 121, p. 29).

or incidental to lawful sanctions.[51]

Although the Israeli government condoned the use of "moderate physical pressure" in GSS interrogations, it repeatedly denied that these methods constituted torture.[52] In support of its position, Israeli officials would point to their laws which prohibit torture and provide up to three years imprisonment for a public official who violates those laws.[53] Thus, by these

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51. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. High Commissioner for Human Rights, G.A. Res. 39 (1984), *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.html.

52. *See* Gaulan, *supra* note 36, at 1-4.

> To prevent terrorism effectively while ensuring that the basic human rights of even the most dangerous of criminals are protected, the Israeli authorities have adopted strict rules for the handling of interrogations. These guidelines are designed to enable investigators to obtain crucial information on terrorist activities or organizations from suspects who, for obvious reasons, would not volunteer information on their activities, while ensuring that the suspects are not maltreated. . . .
>
> [A]ny allegations of maltreatment are taken seriously and are investigated on a case by case basis. However, it should be noted that individuals arrested, tried or convicted have both personal and political motives for fabricating claims of maltreatment during interrogation. . . .
>
> It is the unfortunate reality that, during times of political unrest and violence, restrictions must be placed on individuals who threaten the welfare of the State and its citizens. This paper has been aimed at demonstrating that, despite the harsh reality of continuing terrorism faced by the State of Israel, we are doing everything in our power to uphold the rights of all persons under our jurisdiction while ensuring the safety of innocent individuals.

Id. See also Second Periodic Report of Israel Concerning the Implementation of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Submitted to the Committee Against Torture March 1998, at gopher://israel-info.gov.il/00/constit/leg/980300.leg%09%09%2B (presenting Israel's position concerning methods used to prevent torture in interrogations of Palestinians).

53. *See* AMNESTY INTERNATIONAL, *supra* note 32, at 8-9, quoting Article 277 of 1977 Penal Law as follows:

> Article 277 of the 1977 Penal Law provides for up to three years' imprisonment for a public servant who does any one of the following:
>
> 1. uses or directs the use of force or violence against a person for the purpose of extorting from him or from anyone whom he is interested a confession of an offence or information relating to an offence;
> 2. threatens any person, or directs any person to be threatened, with injury to his person or property or to the person or property of anyone in whom he is interested for the purpose of extorting from him a confession of an offence or any information relating to an offence.

Id. But see HUMAN RIGHTS WATCH, *supra* note 26, at 7.

> While laws exist to punish interrogators who use force or ill-treat detainees, there are few known instances in which interrogators have been convicted or significantly punished for abuse. The problem is two-fold. There is first of all a lack of political will to punish abusive interrogators. There is only one known

officials' reasoning, the GSS's methods could not constitute torture because that would be illegal. Numerous human rights groups, however, disagree with both the conclusions of the Landau Commission Report[54] and Israel's position on GSS interrogation methods. Among these groups, Amnesty International declared that "[it] considers the interrogation methods employed by the Israeli authorities constitute torture or ill treatment: most of them,

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> case in which GSS agents received criminal sentences for mistreating a detainee in their charge; authorities have claimed that in an unspecified number of other cases, GSS and prison medical personnel have been disciplined.
>
> The other facet of the problem is that some forms of abuse are evidently permitted by the GSS's interrogation guidelines.

Id. (citation omitted).

54. *See* COHEN & GOLAN, *supra* note 24, at 26-29. There are four main criticisms of the Report. The first is its use of the "necessity defense" as a means to provide advanced authorization for the use of force by government officials. "In the realm of individual action, criminal liability is mitigated by 'necessity' only in situations where danger is imminent and unpreventable by any means other than force. In the realm of national security, the only equivalent might indeed be the extreme hypothetical case: [a ticking time bomb]." *Id.* at 26. Critics however, argue that the ticking time bomb case is far from typical and in fact there has been no known case like that in Israel's history. *See id.* at 27. The second critique is that the Report has a very elastic definition of the nature of the enemy. Individuals who may be subject to the interrogation methods sanctioned by the Report include not only those terrorists with ticking time bombs but also people who are members of the PLO and who may have written leaflets in its favor or thrown stones. According to this definition, "[t]here is no reason why the entire public who sympathize with the Palestinian cause should not be the enemy against whom 'special means' are permitted and who have no moral cause to demand ordinary civil rights." *Id.* at 28. A third criticism is that since the methods are laid out in the secret part of the report there is no way of knowing what methods are condoned. In addition, critics fear that the mere condoning of these methods will carry with it other risks. Namely that the use of force will become routine and that there will be a risk of the force escalating when an interrogator does not hear what he wants. *See id.* at 28-29. The fourth critique is that "[b]y placing all its exact description of interrogation methods in the secret Part B of its report, the Commission has reinforced the very context of secrecy in which torture can possibly take place. The already privileged legal status of the GSS is now condoned." *Id.* at 29. *See also* AMNESTY INTERNATIONAL, *supra* note 32, at 13-16.

> [T]he Landau Commission Report has been criticized for recommending that a governmental body, which is likely to receive significant advice from the GSS, is to review the secret guidelines on the use of "pressure" with the power to amend them. Some have also argued that such secrecy is unnecessary, as former detainees are bound to inform others on the methods of interrogation used, as in fact happens. By contrast, such secrecy may place medical and other personnel who visit GSS interrogation wings in a position of unwanted complicity.
>
> Critics have called for the interrogation guidelines to be published so as to allow their examination in light of international standards on the treatment of detainees and allow proper monitoring of their application.

Id. at 15.

especially when used in combination, certainly amount to torture."[55] Similarly, B'tselem[56] stated that "[b]y formal criteria, at least, these methods, particularly when used together . . . fall under most accepted definitions of 'torture.' Even if we object to using this word, these methods are self evidently forms of ill-treatment, abuse, or 'cruel and inhuman treatment.'"[57]

Human rights groups are not the only organizations that have expressed concern over the interrogation methods employed by the GSS. The United Nations Committee Against Torture has also expressed its disapproval. In its 1998 concluding observations, the Committee Against Torture acknowledged that Israel made some progress[58] but that the progress proved

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55. AMNESTY INTERNATIONAL, *supra* note 32, at 15. *See also* HUMAN RIGHTS WATCH, *supra* note 26, at 71. (stating that "[it] believes that the substantial evidence available indicates the existence of a clear pattern of systematic psychological and physical ill-treatment, constituting torture or other forms of cruel, inhuman or degrading treatment, which is being inflicted on detainees during the course of interrogation.")

56. *See* HUMAN RIGHTS WATCH, *supra* note 26, at 68. B'tselem is the Israeli Information Center for Human Rights in the Occupied Territories.

57. *Id.* The Human Rights Watch also concludes in this text that:

> [T]he methods used by Israeli interrogators in the occupied territories amount to a pattern of torture, as the term is defined in international law. This conclusion is based on an evaluation of the extent to which the methods are used in combination with one another, and of the lengths of time during which detainees are subjected to them. While not every Palestinian security detainee under interrogation experiences mistreatment amounting to torture, it is clear that thousands of Palestinians have been tortured since the Intifada began in late 1987.

Id. at 73. *See also* PHYSICIANS FOR HUMAN RIGHTS, *supra* note 44, at 6 (stating that "PHR believes that the use of shaking under any circumstances constitutes torture and should be strictly prohibited.")

58. *See Concluding Observations of the Committee Against Torture: Israel*, U.N. High Commissioner for Human Rights, G.A. 20th Sess., U.N. Doc. A/53/44 (1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/9c66.../daf82ddcda36946e80256609004b7df9?OpenDocument. The committee acknowledged the following:

> Israel has embarked upon a number of reforms, such as the creation of the Office of Public Defender, the creation of the Kremnitzer Committee to recommend oversight of police violence, amendments to the Criminal Code, ministerial review of several security service interrogation practices and the creation of the Goldberg Committee relating to the rules of evidence.

Id. at 1. *See also Second Periodic Report of Israel Concerning the Implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted to the Committee Against Torture*, *supra* note 52, at 1-19.

> Israel submitted, to the Committee, several measures it had adopted to prevent torture, which included the following:
> Basic Law: Human Liberty and Dignity . . . [has] constitutional status in Israel's legislative framework. The Supreme Court arguably has the power to void any legislation enacted after the entry into force of the Basic Law which violates [its] provisions . . . . These provisions in the Basic Law, then, may be deemed to constitute a general prohibition of cruel, inhuman or degrading treatment or punishment, including torture, and are binding both vis a vis public and private

insufficient.[59] The Committee concluded that hooding, shackling in painful

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entities.

. . . The Kremnizter Committee . . . issued its report in June 1994, which included specific recommendations for the prevention and deterrence of violence by police officers.

. . . Following publication of the Kremnitzer Committee's Report, the Israel Police adopted its recommendations . . . .

In 1995, a national public defender's office was created by legislation . . . . [I]t is anticipated that the augmented protection of the rights of criminal defendants and detainees by a highly-trained corps of criminal [defence] attorneys will result, among other things, in a decrease in violent treatment on the part of law enforcement officials.

. . . The Goldberg Committee's report, published in 1994, included recommendations aimed at ensuring that false confessions were not extracted by illegal means. Among other things, the Committee recommended employment of investigation techniques and technologies which have been developed elsewhere, and which have proven effective in fulfilling the purposes of the criminal investigation without resort to violence; increasing supervision of investigation by senior investigators; videotaping of any interview at which the interviewee's lawyer is not present; and giving the judge who presides over detention hearings more of a role in actively investigating the conditions of detention and the investigation.

An amendment to the Evidence Ordinance [New Version], 1971 is currently being prepared at the Ministry of Justice to implement the above recommendations of the Goldberg Committee.

Id.

59. *See Concluding Observations of the Committee Against Torture: Israel*, U.N. High Commissioner for Human Rights, *supra* note 58, at 2. The Committee was concerned about the following:

1. The continued use of the "Landau rules" of interrogation permitting physical pressure by the General Security Services, based as they are upon domestic judicial adoption of the justification of necessity, a justification which is contrary to article 2, paragraph 2, of the Convention;
2. Resort to administrative detention in the occupied territories for inordinately lengthy periods and for reasons that do not bear on the risk posed by releasing some detainees;
3. The fact that, since military law and laws going back to the Mandate pertain in the occupied territories, the liberalizing effect of the reforms referred to in paragraph 235 above will not apply there; [and]
4. Israel's apparent failure to implement any of the recommendations of the Committee that were expressed with regard to both the initial and the special report.

Id. See also Associated Press, *UN Committee: Israel's Interrogation Methods Constitute Torture*, JERUSALEM POST, May 11, 1997, at 14, LEXIS, Nexis Library, UPI File (quoting Peter Thomas Burns, The Committee Against Torture member specializing in Israeli affairs).

The committee said that prolonged sleep deprivation, playing of loud music, death threats, violent shaking and other interrogation methods Israel used 'constitute torture.

This conclusion is particularly evident where such methods of

positions, sleep deprivation, and shaking violate articles 1, 2, and 16 of the Convention and should cease.[60]

Israel has signed numerous international human rights treaties, including the Convention Against Torture in 1986.[61] Although Israel ratified this treaty, its provisions are not considered to be the law of the State.[62] Therefore, the provisions set forth by agencies such as the Committee Against Torture constitute mere recommendations which Israel retains the discretion to adopt or ignore. As a result, Israel effectively ignored those

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interrogation are used in combination, which appears to be the standard case.

> [Because] Israel had signed the Convention Against torture [it] is precluded from raising before this committee exceptional circumstances as justification for acts prohibited by article 1 of the convention.

Id.

60. *See Concluding Observations of the Committee Against Torture: Israel*, U.N. High Commissioner for Human Rights, *supra* note 58, at 2-3.

> Since the State party admits to hooding, shackling in painful positions, sleep deprivation and shaking of detainees (through its delegates and courts, and supported by the findings of the United Nations Special Rapporteur on Torture) the bare assertion that it is "not severe" is not in and of itself sufficient to satisfy the State's burden and justify such conduct. This is particularly so when reliable evidence from detainees and independent medical evidence made available to Israel reinforce the contrary conclusion . . . .
>
> [Accordingly] . . . [i]nterrogations applying the methods referred to above are in conflict with articles 1, 2 and 16 of the Convention and should cease immediately . . . .

Id.

61. *See generally* Natan Lerner, *International Law and the State of Israel, in* INTRODUCTION TO THE LAW OF ISRAEL 391 (Amos Shapira & Keren DeWitt-Arar eds., 1995)(listing human rights treaties ratified by Israel). *See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. High Commissioner for Human Rights, *supra* note 51, at 1.

62. *See* Eyal Benvenisti, *The Influence of International Human Rights Law on the Israeli Legal System: Present and Future*, 28 ISR.L.R. 136, 138-41 (1994).

> Following the common law tradition, Israeli law distinguishes between customary international law and treaty-based law. Customary law is considered part of the domestic law. It is binding without the need of transformation by a statute, unless it conflicts with an existing statute. On the other hand, treaties have no legal effect as such. To take effect, a treaty must be incorporated by a statute, unless it is considered a declaratory rather than a constitutive treaty, the former being a treaty which merely restates customary norms . . . .
>
> To date, the Supreme Court has applied to international human rights law the general rules concerning the domestic applicability of international law. Therefore, under current case law, only customary human rights are applicable in the Israeli legal system.

Id. (footnotes omitted). *See also* LERNER, *supra* note 61, at 386; *Landau Report*, *supra* note 12, at 179 (noting the fact that Israel is not bound to International Conventions).

recommendations because it declared itself to be in a "state of emergency,"[63] which outweighs the need and/or desire to adhere to international law.

Israel has been the target of a large number of terrorist attacks. "Between 1969 and 1985, the PLO had perpetrated some 8,000 acts of terror causing the deaths of over 650 Israelis and the wounding of thousands more."[64] Due to the prevalence of acts of terrorism, Israel declared itself to be in a "state of emergency" soon after its formation, and this declaration still operates today.[65] The Landau Commission had that state of affairs in mind when it stated,

> To put it bluntly, the alternative is: are we to accept the offence of assault entailed in slapping a suspect's face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The

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63. LAWYERS COMMITTEE FOR HUMAN RIGHTS, COMMENTS RELATING TO THE COMBINED INITIAL AND FIRST PERIODIC REPORT OF THE STATE OF ISRAEL BEFORE THE U.N. HUMAN RIGHTS COMMITTEE 1 (Lawyers Committee for Human Rights 1998). The Lawyers Committee referred to the *Lawless v. Ireland* case for a definition of state of emergency. "[A] state of emergency has been defined as those exceptional circumstances resulting from temporary factors which, to varying degrees, involve extreme and imminent danger which threaten the organized existence of the State and the population contained therein." *Id.* at 2.

64. Weiner, *supra* note 21, at 187. The author refers to a 1985 publication of the Israeli Ministry of Foreign Affairs, THE THREAT OF PLO TERRORISM, 3 (1985). *See id.*; *see also* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 3, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. "The facts presented before this Court reveal that one hundred twenty-one [sic] people died in terrorist attacks between 1.1.96 to 14.5.98. Seven hundred and seven people were injured." *Id. See also* Fireman, *supra* note 19, at 442. "In proportion to its population, Israel has been the target of the largest number of terrorist attacks by organized terrorist networks. These attacks are usually not directed toward the military bases scattered throughout the administered territories but toward civilian populations." *Id.*

65. Asher Maoz, *The Institutional Organization of the Israeli Legal System, in* INTRODUCTION TO THE LAW OF ISRAEL 23 (Amos Shapira & Keren DeWitt-Arar eds., 1995).

> [T]he most serious deviation from the doctrine of separation of powers concerns the authority that is vested in the ministers to promulgate emergency regulations, which may alter, suspend, or modify any law of the Knesset. While it is true that this authority exists only as long as the Knesset declares that a state of emergency exists, such a declaration was made soon after the establishment of the State of Israel and is still in force. The only limitation upon the ministerial powers concerning the promulgation of emergency regulations is that said regulations expire after three months, unless they are either extended or revoked earlier by the Knesset.

Id.

answer is self-evident.[66]

In addition to declaring itself in a state of emergency, Israel made use of its Defense (Emergency) Regulations which give the State broad powers including the power to temporarily detain an individual and/or to restrict his travel within his town of residence.[67] In this manner, Israel justified the use of "moderate physical pressure." This justification operated until the recent High Court of Justice ruling on the GSS interrogation methods.

IV. HIGH COURT OF JUSTICE RULING ON THE USE OF "MODERATE PHYSICAL PRESSURE"

Although Israel's High Court of Justice heard numerous cases involving alleged abuse by GSS investigators,[68] the Court never decided the question of whether the methods employed by the GSS during its interrogations were legitimate. The Court confronted that question in *Public Committee Against Torture in Israel v. Israel*[69] on September 6, 1999.

In *Public Committee Against Torture in Israel*, the Court consolidated the complaints of seven applicants.[70] Each applicant waged specific

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66. *Landau Report*, *supra* note 12, at 174 (footnotes omitted). *See also* AMNESTY INTERNATIONAL, *supra* note 32, at 11 (referring to the same Landau Commission statement).

67. *See* Weiner, *supra* note 21, at 192-93.

> [T]he power to temporarily detain an individual administratively or to temporarily restrict his travel to within his town of residence. Other Regulations, which apply only in the Administered Areas, authorize the deportation of individuals from the Administered Areas who threaten security and the demolition or sealing-up of residences which are used as the base for a terrorist attack.

Id.

68. *See* GINBAR & MONTELL, *supra* note 48, at 7-21.

69. H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999), *available at* http://www.derechos.org/human-rights/mena/doc/torture.html.

70. *See id.* at 4-5. The first application was brought by the Public Committee Against Torture in Israel. It claimed that the GSS was not authorized to investigate suspected terrorists nor was it entitled to employ "moderate physical pressure." *Id.* The second application was brought by the Association for Citizen's Rights in Israel and argued that the GSS should be ordered to "refrain from shaking suspects during interrogations." *Id.* The remaining five applicants involved specific individuals. Kaaqua and Ganimat (H.C. 5188/96) were granted an order *nisi* preventing the GSS from using physical force against them during the interrogations. Zayda (H.C. 6536/96) complained of the following interrogation methods used against him: deprivation of sleep, shaking, beatings, and the use of *Shabach*. Zayda has been convicted of carrying out terrorist attacks and sentenced to seventy-four months in prison. Abd al Rahman Ismail Ganimat (H.C. 7563/97) claimed he was tortured by GSS interrogators through the use of the *Shabach* position, excessive tightening of his handcuffs, and sleep deprivation. These interrogations resulted in his being convicted of a murder of an IDF soldier and of a bombing in Tel Aviv for which he was sentenced to five consecutive life sentences. Quran (H.C. 7628/97) complained of both the *Shabach* position and of forced sleep deprivation. Batat (H.C.

allegations, but all generally asserted a two-fold argument. First, the parties argued that the "GSS [is] not authorized to investigate those suspected of hostile terrorist activities."[71] Second, they argued that "the GSS is not entitled to employ those pressure methods approved by the Commission of Inquiry's Report . . . [and] the methods used against [the applicants] by the GSS are illegal."[72]

The State of Israel responded with a three-part argument. First, the State argued that the GSS has the right to interrogate those suspected of committing crimes against the nation's security.[73] Second, the State asserted that the physical methods of interrogation used by the GSS did not constitute torture under international law. It stated, "[T]hese methods cannot be qualified as 'torture,' 'cruel and inhuman treatment' or 'degrading treatment,' that are strictly prohibited under international law. Instead the practices of the GSS do not cause pain and suffering . . . ."[74] Lastly, the State maintained that the use of "moderate physical pressure" was legal under Israel's domestic law due to the necessity defense.[75]

In determining whether the GSS had the authority to conduct interrogations of suspected terrorists, the Court focused on the inherent nature of interrogations and concluded that "[a]n interrogation inevitably infringes upon the suspect's freedom, even if physical means are not used . . . [it] infringes on both the suspect's dignity and his individual privacy. In a state adhering to the Rule of Law, interrogations are therefore not permitted in absence of clear statutory authorization . . . ."[76] The Court went on to state that the statutory authorization must comply with the requirements of the Basic Law: Human Dignity and Liberty.[77] When faced with the question of whether a specific statute provided authorization for GSS interrogations, the Court could not identify one. Instead, the Court determined that the GSS's authorization stemmed from the Minister of Justice's commission of the power to interrogate suspected terrorists, based

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1043/99) complained that physical force was used against him during the course of the interrogation. *See id.*

71. *Id.* at 4.

72. *Id.*

73. To support this contention the State cited the government's general and residual powers in Article 40 of the Basic Law: The Government and Article 2(1) of the Criminal Procedure Statue. *See id.* at 9.

74. *Id.*

75. *Id.* at 21-22. For a discussion of the necessity defense see supra note 33. The State contended that "GSS investigators are entitled to use 'moderate physical pressure' as a last resort in order to prevent real injury to human life and well being .... Resorting to such means is legal, and does not constitute a criminal offence." H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 9, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html.

76. *Id.* at 12.

77. *See id.*

on Article 2(1) of the Criminal Procedure Statute. That statute provides that a police officer may interrogate any person familiar with the facts and/or circumstances of any offense and the officer may reduce any statements made into writing.[78] The Court, therefore, concluded that the GSS investigators are "tantamount to police officers in the eyes of the law."[79]

Once the Court determined that the GSS had authority to interrogate suspected terrorists, the Court turned its attention to whether this authorization included the right to use "moderate physical pressure." The Court recognized that in order to accurately resolve this issue, an acknowledgment of the collision of values was involved.[80] The Court used this collision in postulating two general notions about a reasonable interrogation. First, there is an absolute prohibition on the use of torture in an investigation.[81] Second, the very nature of an investigation is likely to cause discomfort.[82] Thus, the Court concluded that "it is possible to conduct

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78. *See id.* at 14.

> A police officer, of or above the rank of inspector, or any other officer or class of officers generally or specially authorized in writing by the Chief Secretary to the Government, to hold [inquiries] into the commission of offences, may examine orally any person supposed to be acquainted with the facts and circumstances of any offence in respect whereof such officer or police or other authorized officer as aforesaid is [inquiring], and may reduce into writing any statement by a person so examined.

Id.

79. *Id.* at 15.

80. *See id.* at 16. The Court looked to a quote by Justice H. Cohen to illustrate that collision:

> On the one hand, it is our duty to ensure that human dignity be protected; that it not be harmed at the hands of those who abuse it, and to do all that we can to restrain police investigators from fulfilling the object of their interrogation through prohibited and criminal means; On [sic] the other hand, it is (also) our duty to fight the increasingly growing crime rate which destroys the positive aspects of our country, and to prevent the disruption of public peace to the caprices of violent criminals that were beaten by police investigators.

Id. (quoting Cr. A. 183/78, Abu Midjim v. The State of Israel, 34(4) P.D. 533 at 546).

> The Court recognized the threat of terrorism that Israel is forced to face on a daily basis and the fact that many attacks were prevented due to measures taken by the GSS.
>
> Terrorist organizations have established as their goal Israel's annihilation. . . . [T]hese groups do not distinguish between civilian and military targets. . . . They do not distinguish between men, women, and children. . . .
>
> . . . Many attacks . . . were prevented due to the measures taken by the authorities responsible for fighting . . . hostile terrorist activities on a daily basis, [and] [t]he main body responsible for fighting terrorism is the GSS.

Id. at 3.

81. *See id.* at 17.

82. *See id.*

an effective investigation without resorting to violence."[83] The Court then returned to the specific allegations of abuse in this case. The Court concluded that the shaking of a suspect,[84] the use of the *shabach* position,[85] the use of the frog position,[86] and the intentional deprivation of sleep[87] were

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83. *Id.*

> First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever .... These prohibitions are "absolute." There are no exceptions to them and there is no room for balancing.... The use of violence during investigations can potentially lead to the investigator being held criminally liable.... Second, a reasonable investigation is likely to cause discomfort; It [sic] may result in insufficient sleep; The [sic] conditions under which it is conducted risk being unpleasant. Indeed, it is possible to conduct an effective investigation without resorting to violence.

Id.

84. *See id.* at 17-18. "Plainly put, shaking is a prohibited investigation method. It harms the suspect's body. It violates his dignity.... It surpasses that which is necessary." *Id.* at 17.

85. *See id.* at 18-20. The Court focused on the several components of the *Shabach* method. As for handcuffing of the suspect, the Court stated the following:

> [W]e accept that the suspect's cuffing, for the purpose of preserving the investigators' safety, is an action included in the general power to investigate.... Provided the suspect is cuffed for this purpose, it is within the investigator's authority to cuff him.... Notwithstanding, the cuffing associated with the "Shabach" position is unlike routine cuffing.... This is a distorted and unnatural position. The investigators' safety does not require it. Therefore, there is no relevant justification for handcuffing the suspect's hands with particularly small handcuffs .... "Cuffing causing pain is prohibited ...."

Id. at 18. With respect to placing the suspect in a low chair, the Court said that:

> [It accepts] that seating a man is inherent to the investigation .... [The] sort of seating [in *Shabach*] is not encompassed by the general power to interrogate ... [because] there is no inherent investigative need for seating the suspect on a chair so low and tilted forward towards the ground, in a manner that causes him real pain and suffering.

Id. at 18-19. As for placing an opaque sack over a suspect's head, the Court found that the power to interrogate did allow one to prevent suspects from seeing one another or from seeing their interrogators. *Id.* The Court concluded, however, that the use of an opaque sack was not part of fair interrogation because "[it] harms the suspect and his (human) image. It degrades him. It causes him to lose sight of time and place. It suffocates him. All of these things are not included in the general authority to investigate." *Id.* at 19. The Court concluded the authority to investigate an individual "encompasses precluding him from hearing other suspects under investigation or voices and sounds that, if heard by the suspect, risk impeding the interrogation's success." *Id.* at 20. The Court found, however, that "[b]eing exposed to powerfully loud music for a long period of time causes the suspect suffering ... and is [therefore] a prohibited means [of interrogation]." *Id.*

86. *See id.* at 18. The Court concluded that the frog position "is degrading and infringes upon an individual's human dignity ... [and is therefore] a prohibited investigation method." *Id.*

87. *See id.* at 20-21.

> The suspect, subject to the investigators' questions for a prolonged period of time, is at times exhausted. This is often the inevitable result of an interrogation,

all prohibited interrogation methods.[88]

Subsequent to the Court's condemnation of "moderate physical pressure" as a mode of interrogation, the Court considered whether such methods were nevertheless permissible under the defense of necessity. The Court upheld the notion that the use of physical means in interrogations is permissible under the defense of necessity in "ticking time bomb" situations,[89] but the Court further distinguished that situation from the circumstances before the Court in that case. The Court concluded that,

> [the necessity defense] does not authorize the use of physical means for the purposes of allowing investigators to execute their duties in circumstances of necessity . . . . The Rule of Law (both as a formal and substantive principle) requires that an infringement on a human right be prescribed by statute, authorizing the administration to this effect.[90]

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or one of its side effects. This is part of the "discomfort" inherent to an interrogation. This being the case, depriving the suspect of sleep is, in our opinion, included in the general authority of the investigator . . . .
The above described situation is different from those in which sleep deprivation shifts from being a "side effect" inherent to the interrogation, to an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or "breaking" him - it shall not fall within the scope of a fair and reasonable investigation. Such means harm the rights and dignity of the suspect in a manner surpassing that which is required.

Id.

88. *See id.* at 19. The Court concluded that, "All these methods do not fall within the sphere of a 'fair' interrogation. They are not reasonable. They impinge upon the suspect's dignity, his bodily integrity and his basic rights in an excessive manner . . . . They are not to be deemed as included within the general power to conduct interrogations." *Id.*

89. *Id.* at 22-23.

> [The] "necessity" exception is likely to arise in instances of "ticking time bombs", and that the immediate need . . . refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion's occurrence . . . .
> Consequently we are prepared to presume . . . that if a GSS investigator - who applied physical interrogation methods for the purpose of saving human life - is criminally indicted, the "necessity" [defence] is likely to be open to him in the appropriate circumstances . . . .
> This however, is not the issue before this Court.

Id.

90. *Id.* at 24-25. The Court summarized its findings as follows:

> According to the existing state of the law, neither the government nor the heads of security services possess the authority to establish directives and bestow authorization regarding the use of liberty infringing physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the

V. THE DEBATE AMONG ISRAELIS BETWEEN NATIONAL SECURITY AND HUMAN RIGHTS

The High Court of Justice ruling has since been met with both reservation and praise amongst Israeli citizens. Those with reservations worry that it will hamper the GSS investigations and ultimately effect the national security of Israel. Those who approve of the ruling, however, counter that no justification exists for a State to permit acts constituting torture.

Among those Israelis fearing this ruling will adversely effect national security are top governmental officials including State Attorney General Elyakim Rubinstein[91] and Likud[92] Knesset faction whip, Reuven Rivlin.[93]

> general directives which can be inferred from the very concept of an interrogation. Similarly the individual GSS investigator - like any police officer - does not possess the authority to employ physical means which infringe upon a suspect's liberty during the interrogation, unless these means are inherently accessory to the very essence of an interrogation and are both fair and reasonable.

Id. at 26.

91. *See AG Rubinstein Supports Legislation to Bypass High Court's GSS Ruling*, ISRAEL WIRE, Sept. 9, 1999, *at* http://www.israelwire.com/New/990909/99090928.html. Rubinstein stated:

> [T]he judiciary must find a way to assist the GSS in fulfilling its responsibility to stop terrorists from blowing up buses . . . . [T]he decision limits their ability to do so and in a case dealing with what security agents call a "ticking bomb," the appropriate legislation must be available to permit investigators to use measures not permitted under the 'regular' law. . . .
>
> [U]ntil such time that the necessary legislation can be invoked into law, temporary measures must be taken to protect GSS agents from criminal charges in the event an interrogator crosses the line during an interrogation in extenuating circumstances.

Id. See also Dan Izenberg & Liat Collins, *Barak to Begin Debate on GSS Court Ruling Today. PM, Beilin Differ on Legislation*, JERUSALEM POST, Sept. 15, 1999, at 1, LEXIS, Nexis Library, UPI File (reporting differences of opinion among Israeli officials on the Court's ruling).

92. *See* DR. YAACOV S ZEMACH, THE JUDICIARY OF ISRAEL 33 (Institute of Judicial Training for Judges in Israel 2d ed. 1998). The Likud is a faction in the Knesset. "The list of candidates that wins a number of valid votes which is not less than the blocking percentage, as determined by law (which is to-day one and a half percent), becomes a faction in the Knesset. The number of factions represented in the Knesset has never been less than ten." *Id.*

93. *See* Liat Collins, *Likud to Discuss Formulating GSS Bill*, JERUSALEM POST, Sept. 8, 1999, at 3, LEXIS, Nexis Library, UPI File. Rivlin stated,

> The Basic Law: Human Dignity and Freedom must protect the dignity and freedom of citizens who are the potential victims of terror and not protect the dignity and freedom of the murderers . . . . This sums it all up, and any democracy which gives up on the need and duty to protect itself will not remain a democracy.

Id.

Prime Minister Ehud Barak also expressed his concern publicly when he stated, "there must be an authority that can, in time of need, take rapid action to approve necessary interrogations in 'ticking bomb' situations which present an immediate danger."[94] In addition, those closely associated to the anti-terrorism campaign in Israel believe that this ruling will prove extremely detrimental to intelligence gathering and national security.[95]

Although many Israelis express concern over the ruling, others, in addition to those belonging to human rights groups,[96] feel that the High Court of Justice came to the correct conclusion in this case. Among them is Justice Minister Yossi Beilin who has stated, "I am very proud of the court's decision and believe in the GSS and its ability to cope with the difficult tasks that Israeli society has invested it with."[97] Similarly, Emmanuel Gross, a

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94. *PM Barak Comments on Terrorist Attacks and GSS ruling*, ISRAEL WIRE, Sept. 9, 1999, *at* http://www.israelwire.com/New/990909/99090916.html. *See also* Danna Harman & Liat Collins, *Barak Hints of Ways to Bypass Anti-torture Ruling*, JERUSALEM POST, Sept. 9, 1999, at 3, LEXIS, Nexis Library, UPI File; Aluf Benn, *Barak Proposes New Limits on Shin Bet Interrogations*, HA'ARETZ MAGAZINE, Sept. 9, 1999, http://www.haaretzdaily.com/htmls/kat17_5.asp (reporting Barak's desire to find a legal arrangement that would permit Shinbet to use special interrogation methods in cases of immediate security risks).

95. *See* Herb Keinon, *Civil Rights vs. Security*, JERUSALEM POST, Sept. 10, 1999, at 1B, LEXIS, Nexis Library, UPI File. Brig-Gen. Yigal Pressler, who worked as a counter-terrorism expert under four prime ministers, stated that "those sending the terrorists will have an easier time training them to stand tough during interrogations, knowing that the most the interrogator can do is 'give them juice without sugar.'" *Id.* Pressler went on to say that "The Court's decision is great as a candidate for the Israel Prize in democracy. But you can't fight terror waving prizes in democracy." *Id.* The former head of the GSS, Ya'acov Perry was in agreement with Pressler and stated, "First of all, those being interrogated will know that no one can frighten or do anything to them, they are ordinary criminals - like catching a thief. As a result they will be much more stubborn and determined, and it will take a long time to get results." *Id.* Perry also forecast that the interrogators will continuously ask themselves all kinds of questions such as who will defend them if they step beyond the line, and "why should I work so hard, since if I make a false step, charges will be brought against me." *Id.*

96. *See* Dan Izenberg & Ben Lynfield, *Human-Rights Groups Applaud GSS Ruling*, JERUSALEM POST, Sept. 7, 1999, at 2, LEXIS, Nexis Library, UPI File. Dan Yakir, legal advisor for the Association for Civil Rights in Israel, said, "We welcome the decision and consider it historic, courageous and moral." *Id.* at 1. Hanna Friedman, head of the Public Committee Against Torture, said that the decision was "very progressive, [and] very serious. I am very proud of our country and of our High Court, which is capable of passing such progressive rulings. We will have to find other, more sophisticated ways to fight against terrorism." *Id.* Eitan Felner, executive director of B'tselem welcomes the decision and has stated that "the justices performed their duty as primary defenders of human rights." *Id.*

97. *Id. See also Deputy Attorney General Opposes Interrogation Law*, ISRAEL WIRE, Sept. 15, 1999, *at* http://www.israelwire.com/New/990915/99091530.html. Deputy Attorney General Yehudit Karp agrees with Beilin. In her report to Prime Minister Barak, Karp recommended that, "no law be legislated that would permit coercive methods to be used by the General Security Service . . . in its interrogations." *Id.* She went on to state that, "her recommendation is grounded in ethical, moral and legal considerations; international opinion of Israel, which

professor of criminal law at Haifa University, believes that although the ruling may make it more difficult for the GSS in some of their investigations, the ruling will not necessarily harm national security because it still allows for the use of force in "ticking time bomb situations" under the defense of necessity.[98]

The court anticipated the potential concerns voiced by many Israelis, and in response it seems to have left a means for the Knesset (Israeli legislature) to circumvent this ruling and reinstate the GSS practice of the use of "moderate physical pressure" in its interrogations. In its ruling, the Court stated that if it is determined that because of Israel's security situation it is appropriate to permit the GSS to use "moderate physical pressure," it is for the legislature to make lawful and not the Court.[99] A determination of whether the Knesset could effectively reinstate the use of "moderate physical pressure" in GSS interrogations first requires an examination of the general organization of the Israeli government and the power of judicial review.

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would be diminished by such a law; and fear that sanctioned use of force could be exploited or abused." *Id.*

98. Emmanuel Gross, *High Court Ruling Won't Harm the GSS*, JERUSALEM POST, Sept. 8, 1999, at 3, LEXIS, Nexis Library, UPI File.

> Does this mean that GSS investigators will now be unable to extract information from suspects in a situation of a "ticking time bomb?" The answer is no.
>
> Firstly, there are other interrogation methods that are legal. But even if a GSS investigator decides that he has no choice but to use exceptional methods, he is still protected by the "necessity defense." In this a GSS investigator is no different from any other person who finds himself in an emergency situation in which he is called upon to set aside one legitimate interest to defend another, more important interest.
>
> There is no doubt that the High Court's ruling will make it more difficult for the security services. But in the long run, if they learn to live with it, it will only strengthen the state's moral position and its democratic basis.

Id.

99. H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 27, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html.

> If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by the legislative branch which represents the people. . . . It is there that the required legislation may be passed, provided, of course, that a law infringing upon a suspect's liberty "befitting the values of the State of Israel," is enacted for a proper purpose, and to an extent no greater than is required. (Article 8 to the Basic Law: Human Dignity and Liberty).

Id.

VI. ISRAEL'S GOVERNMENT, LAWS AND JUDICIAL REVIEW

A. Constitutional Law

Although both the United Nations Resolution calling for an established Jewish State and Israel's own Declaration of Independence[100] mandated that Israel adopt a constitution, the first Knesset chose not to.[101] Instead, it adopted what became known as the Harrari Resolution, which postponed the adoption of a constitution as a single document and instead recommended its preparation in piecemeal - chapter by chapter -in a series of basic laws eventually integrated to form Israel's constitution.[102]

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100. ISRAEL, ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND OF THE BASIC LAWS 6-9 (Aryeh Greenfield-AG Publications 3d ed. 1999).

101. *See* ITZHAK ZAMIR & ALLEN ZYSBLAT, PUBLIC LAW IN ISRAEL 3 (Clarendon Press 1996).

> Indeed, the 1947 United Nations Resolution calling for the establishment of a Jewish State and an Arab State in former Palestine mandated that each would enact a democratic constitution, including entrenched guarantees for the civil rights of all citizens. Israel's own Declaration of Independence specified that the provisional bodies of state would govern until an election would be held 'pursuant to the provision of a constitution to be prepared . . . no later than 1 October, 1948'.
>
> For a whole host of reasons, Israel's tumultuous first year of existence did not include the preparation of a constitution.

Id. See also Maoz, *supra* note 65, at 11; DAPHNA SHARFMAN, LIVING WITHOUT A CONSTITUTION 44 (M.E. Sharpe 1993). A quote by Ben Gurion stated, in essence, the position of the ruling party in regards to not adopting a constitution.

> In a free country like Israel, there is no need for a declaration of freedoms. In this state a person is free to do anything not prohibited by law. In the eighteenth century, which was an era characterized by the rule of tyrants - there was need for a Bill of Rights. In countries in which freedom and the people's right to decide, of its own free will, what kind of government and law it desires are still denied - there is need to fight for human rights.
>
> But in free countries, democratic lands in which the people rule, what is needed is a Bill of Obligations, which for us means - duties to the homeland, the nation, immigration, the ingathering of the exiles, the building of the country, and safety for the other, for the weak.

Id. (quoting *Knesset Protocols*, vol. 4, p. 819 (Hebrew)) (footnote omitted).

102. *See* ZAMIR & ZYSBLAT, *supra* note 101, at 4. "One argument advanced at the time to justify postponing the entrenching of basic civil liberties in a written constitution was that British experience had proven that a formal constitution was not essential for democracy." *Id. See also* Maoz, *supra* note 65, at 11-12. The Harrari Resolution states the following:

> The first Knesset charges the Constitutional, Legislative and Judicial Committee with the duty of preparing a draft constitution for the State. The constitution shall be composed of individual chapters, in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the Knesset as the Committee completes its work and all the chapters

Over the next forty years, the Knesset adopted twelve different Basic Laws.[103] These laws cover much of what one would expect to see in a constitution. The Basic Laws, for example, outline the roles of the three branches of government, the location of the State capitol, and civil rights.[104]

Prior to 1992, when Israel enacted Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty, Israel did not have a bill of rights.[105] At that time, the basic rights were considered "soft principles" because they did not limit the power of the Knesset.[106] "In the absence of a formal constitution or Bill of Rights, the Supreme Court was not prepared to subject primary legislation to judicial review in order to examine whether it places unacceptable restrictions on those basic rights that are recognized as legal principles."[107] The exceptions to this rule, however, were those entrenched basic laws. In those instances, the Court "exercised judicial

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together will form the state constitution.

Id. "The rather cryptic decision served as a compromise between two political blocs in the Knesset - one demanded the immediate adoption of a constitution, the other opposed the adoption of a constitution." *Id.* at 12.

103. ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND THE BASIC LAWS, *supra* note 100, at 5.

104. *See* Maoz, *supra* note 65, at 12. *See also* ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND THE BASIC LAWS, *supra* note 100, at 10-77. Israel's Basic Laws include: Human Dignity and Freedom, Freedom of Occupation, Jerusalem - Capital of Israel, The State President, The Knesset, The Government, State Economy, The Army, Israel Lands, Administration of Justice, and The State Comptroller. *See id.*

105. *See* David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR.L.R. 238 (1992).

> A bill of rights fulfills at least one of three normative functions in a legal system. It's first and most obvious function is to define those basic rights that are recognized and protected by the system. The second function is to set standards for resolving clashes between the protected rights themselves and for balancing those rights and other values or policies recognized by the system. The final function is to establish the status of the recognized rights within the legal system itself. This means determining whether the bill of rights binds the legislative body itself and whether legislation that is inconsistent with basic rights may be struck down by a court or by some other constitutional body.

Id. at 239.

106. ZAMIR & ZYSBLAT, *supra* note 101, at 143. *See also* Kretzmer, *supra* note 105, at 239.

107. ZAMIR & ZYSBLAT, *supra* note 101, at 143.

> Although basic laws are supposed to be chapters in Israel's emerging constitution the Supreme Court held in the past that in the absence of express provisions granting them preferred status, basic laws are not inherently superior to ordinary legislation. Thus, in the case of a clash between a special provision in ordinary Knesset legislation and a general provision in a basic law, the former prevails. Furthermore, the Court held that the Knesset may amend a provision in a basic law by ordinary legislation passed with a simple majority.

Id. at 144 (footnote omitted).

review in order to ensure that legislation inconsistent with entrenched provisions was indeed enacted with the special majority [expressly] required by those provisions."[108]

The two basic laws, Basic Law: Freedom of Occupation ("Occupation Law") and Basic Law: Human Dignity and Liberty ("Human Dignity Law"), comprise the civil rights in Israel. The Occupation Law protects "the right of every citizen or resident of the State to engage in any occupation, profession, or trade."[109] The Human Dignity Law includes a number of fundamental rights such as "the right to life, body, and dignity and to protection of [those] interests; the right to property; the right to liberty of the individual; the right to leave and enter the country, and the right to privacy and personal confidentiality."[110] Although these laws make up the civil rights in Israel, they differ in one major respect. Basic Law: Freedom of Occupation has an expressed entrenchment by which it may not be changed

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108. *Id. See also* Kretzmer, *supra* note 105, at 241.

109. ZAMIR & ZYSBLAT, *supra* 101, at 148; *see also* ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND OF THE BASIC LAWS, *supra* note 100, at 13-15; *Basic Law: Freedom of Occupation, available at* http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00hj0 (translating Basic Law: Freedom of Occupation into English).

110. ZAMIR & ZYSBLAT, *supra* note 101, at 148 (citations omitted).

> Many of the rights expressly mentioned in human rights covenants or charters are part and parcel of the rights listed in the Basic Law: Human Dignity and Liberty, even if not explicitly mentioned. Thus, for example, the prohibitions against slavery and against torture and cruel, inhuman, and degrading treatment or punishment are covered by the right to human dignity.
>
> . . . Barak J, now president of the Court, has dismissed the idea that original intent should be the guiding principle in interpreting basic laws that are part of Israel's developing formal constitution. Following Barak J's general theory of interpretation, the concept of human dignity must be interpreted in the light of its 'objective purpose', which can be gleaned from its meaning in international human rights documents and other democratic constitutions, and which in the end must include 'all those human rights that have a close substantive connection to human dignity and liberty according to prevailing concepts among the enlightened public in Israel'.

Id. at 149 (footnote omitted). *See also* ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND OF THE BASIC LAWS, *supra* note 100, at 10-12. Section One provides:

> The basic rights of human beings in Israel are founded on the recognition of the worth of the human being, of the sanctity of his life and of the fact that he is free, and they shall be respected in the spirit of the principles in the Declaration of the Establishment of the State of Israel.

Id. at 10. *See also Basic Law: Human Dignity and Liberty, available at* http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00hi0 (translating Basic Law: Human Dignity and Liberty into English).

"except by a Basic Law enacted by a majority of Knesset members."[111] Basic Law: Human Dignity and Liberty does not contain such an entrenchment.[112] The Supreme Court later did away with the significance of this difference by declaring that these Basic Laws have formal constitutional status and that they may be changed only by "expressly amending those basic laws or by enacting other basic laws."[113]

Although the basic laws of Israel are considered to be the law of the land, most are subject to the emergency regulations that Israel adopted to cope with it existing in a state of emergency.[114] These emergency regulations

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111. ZAMIR & ZYSBLAT, *supra* note 101, at 144.

> [I]n the case of a clash between a special provision in ordinary Knesset legislation and a general provision in a basic law, the former prevails. Furthermore, the Court held that the Knesset may amend a provision in a basic law by ordinary legislation passed with a simple majority. The only exception to this rule recognized before the new basic laws on civil rights were enacted related to those provisions in basic laws that are entrenched . . . .

Id. (footnotes omitted).

112. *See id.*

> Section 11 of the Basic Law: Human Dignity and Liberty states expressly that all government authorities are bound to respect the rights protected under that law. Furthermore, section 8 of that basic law states that no restrictions may be placed on protected rights except by a statute that meets defined substantive standards. These provisions would seem to leave little room for doubt that the basic law is meant to place restrictions on the legislative power of the Knesset. Nevertheless, given the existing case law of the Supreme Court regarding the status of basic laws, and the absence from that basic law of an express entrenchment clause, some doubts were raised whether legislation that did not meet the demands of the Basic Law: Human Dignity and Liberty would be regarded as invalid.

These doubts were dispelled in a decision handed down by an expanded bench of nine justices of the Supreme Court in November, 1995. . . .

> The majority of judges on the Court held that the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation have formal constitutional status and therefore enjoy a status superior to that of ordinary legislation. Thus all legislation passed after these basic laws came into force must meet their demands. Furthermore, the courts have the power to review legislation in order to determine whether it does indeed meet those demands and to invalidate legislation that does not.

Id. at 145-46 (footnotes omitted).

113. *Id.* at 145-46.

114. *See* Joseph M. Wolf, *National Security v. The Rights of the Accused: The Israeli Experience*, 20 CAL. W. INT'L L.J. 115, 129-30 (1989). The Knesset has adopted three different emergency regulations which include:

(1) The Defense (Emergency) Regulations of 1945 are security laws which were enacted by the British Mandatory Authority and were later adopted by Israel. These regulations empower the military to obstruct freedom of movement, disband unlawful associations and set curfews when security requires such actions.

(2) Section 9 of the Law and Administration Ordinances of 1948 grants

may "alter, suspend, or modify any law of the Knesset."[115] Though both the Occupation Law and the Human Dignity Law are equally important to the establishment of civil rights in Israel, this note will focus on the Basic Law: Human Dignity and Liberty as it relates to whether the Knesset may bypass the High Court of Justice ruling regarding GSS interrogation methods. Additionally, this analysis will take into account the aforementioned emergency regulations and whether they will aid the Knesset in bypassing the ruling, if it chooses to do so.

B. The Government of Israel (Executive and Legislative Branches)

Israel is considered a representative parliamentary republic centered around its legislature.[116] Israel's legislature, the Knesset, is unicameral[117] and composed of 120 members.[118] In addition to serving as the legislative branch of Israel, the Knesset is a constituent assembly.[119] It can, therefore,

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emergency powers to the legislature, allowing it to proclaim a state of emergency and to enact emergency regulations in order to protect state security. In so doing, the legislature can derogate from any existing laws. Such powers have been exercised mostly during times of war.

(3) Emergency Powers (Detention) Law of 1979 grants Defense Minister the power to issue administrative detention for up to six months when he has reason to believe that a person poses a threat to national security. Such a procedure may only be exercised during a state of emergency.

Id. (footnotes omitted). "The Supreme Court held that detention orders shall be granted only if 'it is proven that the risk of security . . . is so serious that it is necessary to infringe upon the rights of the detained.'" *Id.* at 131.

115. Maoz, *supra* note 65, at 23.

> [T]he most serious deviation from the doctrine of separation of powers concerns the authority that is vested in the ministers to promulgate emergency regulations, which may alter, suspend, or modify any law of the Knesset. While it is true that this authority exists only as long as the Knesset declares that a state of emergency exists, such a declaration was made soon after the establishment of the State of Israel and is still in force. The only limitation upon the ministerial powers concerning the promulgation of emergency regulations is that said regulations expire after three months, unless they are either extended or revoked earlier by the Knesset. Only a handful of basic laws are shielded from the possible effects of the emergency regulations: the Basic Law: The Knesset; the Basic Law: The Government; the Basic Law: Freedom of Occupation; and the Basic Law: Human Freedom and Dignity.

Id.

116. *See* ZEMACH, *supra* note 92, at 31.

117. *See id.* at 33 (Unicameral refers to the Knesset being composed of only one branch).

118. *See id.*

119. *See* Maoz, *supra* note 65, at 11. Israel's Declaration of Independence called for the election of a constituent assembly to create a constitution for the State of Israel. This constituent assembly was elected shortly after Israel's formation, but that assembly did not create a constitution. Instead, it declared itself to be the legislative body of the State, and, consequently, the Knesset acts as both the legislature of Israel and as the body capable of making a

"bind future Knessets by virtue of its authority."[120] The Knesset reigns supreme over the other branches of government because in the absence of a formal constitution there are no restrictions on its legislative activities, except for a handful of entrenched clauses found in certain basic laws.[121] In addition to its role as the legislative branch of government, the Knesset acts as the supervisor of the other branches. This is particularly so with the executive branch. The State Comptroller, who reports directly to the Knesset, supervises the executive branch by examining the legality of measures taken, reviewing their proper and efficient functioning, and providing cost analysis of the measures involved.[122] The State Comptroller also serves as the Public Ombudsman to address complaints made by the public concerning government bodies and persons.[123]

The executive branch of the government is composed of the Prime Minister and the President of the State. The Prime Minister serves as the head of the executive while the President serves as a figurehead with few authoritative powers.[124] The Government, or executive branch, is subject to the approval and/or confidence of the Knesset — "A Knesset's vote of no-confidence in the Prime Minister . . . brings with it the dissolution of the Knesset and the holding of Knesset and Prime Minister elections."[125] Although understanding the role of the executive branch of the Israeli government is essential to comprehending the functions of the Israeli government as a whole, it is not particularly relevant to the topic in this note. This note will instead focus on the Knesset and its relationship to the judicial branch, particularly with regards to whether the Knesset can bypass the court's ruling on GSS interrogation methods.

C. *The Judicial Branch*

The judicial system is divided into two categories. The first is comprised of general courts of law which enjoy general jurisdiction.[126] The

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constitution. *See id.*

120. *Id.* at 15.

121. *See id.*

122. *See* ZEMACH, *supra* note 92, at 42.

123. *See id.*

124. *See* Maoz, *supra* note 65, at 28.

> The Supreme Court described the position of the President as follows: 'The President is supreme over the various branches of the Government in that he symbolizes the whole of the State and of its institutions.' However, the President holds merely a figurehead position. Indeed, the President lacks any governing authority, not only in comparison with presidential regimes, but also in comparison with most parliamentary regimes.

Id. (footnote omitted).

125. ZEMACH, *supra* note 92, at 41.

126. *See* Maoz, *supra* note 65, at 31.

second constitutes the tribunals which enjoy only limited jurisdiction.[127] Israel's judicial system differs from that of the United States because it does not rely on a jury system. Instead, the judges decide both questions of law and questions of fact.[128] The High Court of Justice heads the judicial system, and its success may be attributed to the independent nature of that system.[129] The Court distinguishes itself from most other Supreme Courts in that every citizen enjoys direct access to it.[130] Because every citizen has the opportunity to be heard by the Court, it has taken on the role as the guardian of civil rights.[131]

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127. *See id.* The tribunals recognized by the Israeli legal system are the military, labour, and religious courts. "The administration of each of these systems is independent, and there is an appellate framework within each system." *Id.* All of the judges that sit for these courts hold law degrees, except for the religious judge who is instead trained in the religious laws of their religious community. *See id.*

> The system of regular courts may be distinguished on three levels: (1) the Supreme Court; (2) the district courts; and (3) the magistrates' courts. The district courts and the magistrates' courts function as trial courts, and the distinction between them depends on the gravity of the matter. The jurisdiction of the district courts is residual to that of the magistrates' courts, in both criminal and civil matters.

Id. at 34.

128. *See* Wolf, *supra* note 114, at 123. "Israel has never adopted the jury trial. It was believed that the heterogeneous population - in particular, the political and social differences between Jews and Arabs - would not foster the concept of a jury trial." *Id.* (footnote omitted). *See also The Judicial System in Israel,* 34 TULSA L.J. 527 (1999) (The text is from a speech by the Honorable Amnon Straschnov and describes the general differences between the judicial systems of Israel and the United States.)

129. *See* Maoz, *supra* note 65, at 35. "All persons with judiciary powers enjoy complete independence with respect to the exercise of such powers. Such persons are, per section 2 of the Basic Law: Judicature, 'in judicial matters, subject to no authority but that of the law.'" *Id. See also* SHARFMAN, *supra* note 101, at 94 (stating that "The independence of the High Court of Justice was not a foregone conclusion; rather, it was established by the justices themselves in the course of their deliberations.")

130. *See* ZAMIR & ZYSBLAT, *supra* note 101, at 48.

131. *See* Wolf, *supra* note 114, at 121. The Court has stated its function as follows:

> In our state, lacking a constitution which protects the individual's fundamental freedoms explicitly, this court, sitting as a High Court of Justice is obliged to guarantee these freedoms and to bestow the remedy applied for by the citizen when one of his basic rights was injured by an act of government.

Id. at 121 (quoting the Court in H.C. 152/71, *Kremer, et. al. v. Municipality of Jerusalem, et. al.*, 2591 P.D. 767, 782 (1971)). *See also* Maoz, *supra* note 65, at 34.

> [It] functions as both an appellate court and a High Court of Justice. In its capacity as an appellate court, the Supreme Court entertains appeals from decisions rendered by the district courts . . . . In its capacity as a High Court of Justice, however, the Supreme Court sits as a trial court from which there is no appeal, and in that capacity is also authorized to issue prerogative writs against State authorities and against other authorities and individuals that operate by virtue of law.
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> . . . [O]f all the courts in Israel, the High Court of Justice is the only one that is

The scope of judicial review of the Supreme Court is expansive — "no public authority is immune from judicial review."[132] The doctrine of standing[133] supports the broad scope of judicial review because the Court typically grants standing even if the petitioner lacks a personal interest in the claim, so long as the matter involves a constitutional dimension.[134] The justiciability doctrine of the Israeli Supreme Court is also not as limiting as that of other nations. "The Court has jurisdiction to deal with any public matter that comes before it, but can nevertheless decide that a certain matter is unsuitable for judicial determination."[135] In the beginning, the Court failed to recognize this broad scope of review and justiciability, particularly in areas of national security. For example, Justice Haim Cohen, who served as attorney general during the 1950s, described the prevailing attitude:

> competent to issue a mandamus order against the State and its organs. Thus, the High Court of Justice serves in principle as an administrative court. The Supreme Court's judicial review of administrative action serves as a method to both supervise governmental activities and protect civil liberties.

Id.

132. Zeev Segal, *Administrative Law, in* INTRODUCTION TO THE LAW OF ISRAEL 69 (Amos Shapira & Keren DeWitt-Arar eds., 1995).

133. *See id.* at 67. There are two approaches to the doctrine of standing in administrative law. The first is the subjective approach, "which places the emphasis on the role of judicial review in protecting individuals whose particular and personal interests have been affected." *Id.* The second approach is the objective approach, which "regards judicial review as a method for enforcing the rule of law and the legality of administrative acts." *Id.*

134. *See id.*

> In recent years, the Supreme Court has adopted a flexible attitude towards standing and abandoned the conservative and traditional approach. The Court has shown its readiness to grant standing when the matter at hand is of constitutional importance. The Supreme Court has, for example, recognized the standing of lawyers and law professors to challenge the President's decision to grant clemency to several members of the General Security Services who had been charged with alleged crimes in the course of their interrogating terrorists. The Court stated that 'the absence of a real personal interest does not justify dismissal of the petition.' The Justices noted that a liberal view of standing should be adopted where the question is 'of public interest related directly to the advancement of the rule of law.'

Id. (quoting H.C.J. 428/86, Barzilai v. Government of Israel, 40(3) P.D. 505, *translated in* 6 SELECTED JUDGMENTS SUP. CT. ISR. 1, 43 (1986)) (footnote omitted).

135. Segal, *supra* note 132, at 68.

> In recent years, the Supreme Court has clearly indicated that the range of cases that it considers to be unjusticiable has been substantially narrowed down. Apparently, the Court will only avoid matters that are of a predominantly political nature, as opposed to those of a legal nature. . . . However, it is also clear that the Court will examine a whole range of state acts that might be held to be unjusticiable in other legal systems.

Id.

> If the chief of the Security Services told me that something was a vital necessity, I didn't give it a second thought. The security situation during the first years of statehood was such that if I was told that the security of the state required a particular action, I accepted it even at the expense of human rights.[136]

The judicial review of classified materials became permissible after the 1968 Amendment to the Law of Evidence.[137] The prevailing view of the Court today in regard to matters of national security can be summarized in a statement by Justice Olshan, who stated, "While it is true that state security, which requires detaining an individual, is no less important than the need to preserve civil rights, whenever it is possible to achieve both aims, one should not ignore one or the other."[138] Today, when the Court is faced with a claim involving national security and human rights it employs a balancing of interests test. This requires the Court to weigh the restricted freedom of an individual against the need for public order and/or national security.[139]

Although the Court derives its jurisdiction and power directly from the legislature, the High Court of Justice ruled that "it has the authority to review any administrative action, including that of the Knesset."[140] Since the

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136. SHARFMAN, *supra* note 101, at 98 (quoting T. Segev, *Interview with Justice Haim Cohen*, HA'ARETZ, Mar. 12, 1981 (footnote omitted)).

137. *See id.* Although this law permitted the Court to hear sensitive material, this was not the case for the petitioner. The Court would hear the classified information behind closed doors. Neither the petitioner, nor his counsel, was permitted to sit in on these meetings. *See id.* at 99.

138. *Id.* at 96 (quoting Y. OLSHAN, LAW AND JUDGMENTS 106 (Jerusalem and Tel Aviv: Shocken, 1979) (Hebrew)) (footnote omitted).

139. *See* ZAMIR & ZYSBLAT, *supra* note 101, at 331.

> [I]n cases involving the restriction of [some] freedom . . . on the ground of public order or national security, the Supreme Court has repeatedly held that the freedom concerned . . . is a relevant consideration for the authority. The authority must weigh this consideration against other relevant considerations. . . . Once [the Court has] established [a standard], the standard serves as a guideline in the future exercise of administrative discretion . . . .

Id.

140. Maoz, *supra* note 65, at 35.

> In determining its scope of intervention *vis-à-vis* the Knesset, the Court distinguishes between various functions of the Knesset. For example, although the scope of the Court's judicial review over legislation is 'narrow,' its scope of judicial review over both administrative action and quasi-judicial decisions is quite broad. . . . Moreover, the Court does not hesitate to invalidate laws that contradict any of the entrenched provisions of the basic laws, unless the particular law in question is adopted by the mandatory special majority.
>
> In the recent *La'or* case, Justice Barak stated that the Court, in principle, has the power to declare a law void if it contradicts a fundamental principle of the system, even in the absence of either a written constitution or an entrenched

adoption of the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty, Supreme Court decisions have adhered to these laws and protected human rights. In support of this notion, Justice Aharon Barak stated, "Human rights are no longer subject to the laws of the Knesset. From today forward, the laws are subject to human rights."[141]

VII. THE KNESSET OPTION TO BYPASS THE HIGH COURT OF JUSTICE RULING ON TORTURE

The Supreme Court ruling on the use of torture prompted strong and divergent responses among many Israeli citizens, including those occupying high level government positions. The Court anticipated such a controversy and, thus, provided for a potential method of bypassing its conclusion.[142] In addition to the Court's invitation to the legislature to resolve the issue, the Knesset, by virtue of its superiority over the three branches of the Israeli government, always retains the ability to circumvent the Court's rulings through ex-post facto legislation.[143]

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basic law according such power.

Id. (citing H.C. 142/89, La'or Movement v. Chairman of the Knesset, 44(3) P.D. 529 (1990)). *See also* Wolf, *supra* note 114, at 120.

> Although the judiciary does not have equal standing with the Knesset, civil rights have not been seriously curtailed. Viewing itself as the sole guardian against governmental impropriety, the Supreme Court of Israel has prevented the erosion of civil liberties and kept government in check. It has accomplished this by internalizing the legal norms of a democratic society through judge-made law.

Id. (footnote omitted).

141. Segal, *supra* note 132, at 71 (quoting Aharon Barak, 3 *Interpretation in Law-Constitutional Interpretation* 29 (1994)).

142. *See* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel, (Sept. 9, 1999) 25-26, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html.

> Endowing GSS investigators with the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the latters' dignity and liberty, raise basic questions of law and society, of ethics and policy, and of the Rule of Law and security. These questions and the corresponding answers must be determined by the Legislative branch. This is required by the principle of the Separation of Powers and the Rule of Law, under our very understanding of democracy . . . .
>
> If the state wishes to enable GSS investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability.

Id.

143. *See* Wolf, *supra* note 114, at 120.

> In the absence of a written constitution, the Supreme Court of Israel cannot strike down a law: "[e]very law or part of a law which is passed by the Knesset must be enforced." In addition, the decisions of the Supreme Court are susceptible to circumvention through ex post facto legislation and administrative emergency

The Occupation Law and the Human Dignity Law have paved "the way for judicial review of Knesset legislation on the grounds that it violates human rights."[144] If the Knesset decided to pass legislation to circumvent the Court's ruling, the Court would examine that legislation as it relates to the Human Dignity Law because any proposed legislation would involve the use of physical means in interrogations. Thus, the legislation could potentially violate someone's human dignity, which the Court is required to protect.[145] The Court would likely use the balancing test proscribed in the Human Dignity Law to determine the legality of any legislation passed by the Knesset. This test provides that the rights proscribed in the Human Dignity Law shall only be infringed by a statute that is directed towards a worthy purpose and does not exceed what is necessary.[146]

Although Israeli emergency regulations may dispose of any law passed by the Knesset, it is doubtful that they would affect the Court's ruling. This is so for two reasons. First, the Court indicated that even with respect to emergency laws judicial control exists to monitor the civil and military administration.[147] Second, the Basic Law: Human Dignity and Freedom is

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legislation. Therefore, the judiciary is the subordinate branch of government. *Id.* (footnotes omitted).

144. David Kretzmer, *Constitutional Law, in* INTRODUCTION TO THE LAW OF ISRAEL 52 (Amos Shapira & Keren DeWitt-Arar eds., 1995).

145. *See id.* "The term 'human dignity' is not defined in the basic law and may be employed to include many fundamental rights not expressly mentioned, such as . . . the right not to be subjected to cruel, unusual or degrading punishment or treatment." *Id.*

146. *See* Kretzmer, *supra* note 105, at 246.

> This test appears in section 8 that states: "The rights according to this Basic Law shall not be infringed except by a statute that befits the values of the State of Israel and is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary."
>
> This section must be read together with section 1 of the Law that . . . refers to the "values of the State of Israel as a Jewish and democratic state". . . . [The Supreme Court] will have to decide not only whether legislation that restricts basic rights is directed towards a worthy purpose and that the restrictions on those rights do not what is necessary, but that such legislation "befits the values of the State of Israel as a Jewish and democratic state."

Id. See also ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND OF THE BASIC LAWS, *supra* note 100, at 10-12.

147. *See* Wolf, *supra* note 114, at 131.

> Since 1948, the Supreme Court has demonstrated increased willingness to scrutinize security action. The subsequent change in attitude of the Court to the continuous state of emergency and defense regulations is typified by Supreme Court Justice Haim Cohn, who has stated, "even in respect of all emergency laws and regulations, judicial control has at all times been, and will continue to be very zealous, and readily available to watch over the civil and military administration to insure that nobody exceed or misuse the authority vested to him by law."

Id. (quoting Cohn, *The Spirit of Israeli Law*, 9 ISR.L.R. 456, 457 (1974)) (footnote omitted).

shielded from the possible effects of emergency regulations.[148] Therefore, any legislation passed by the Knesset must also pass the balancing test found in Basic Law: Human Dignity and Freedom in order to sustain constitutional scrutiny.

VIII. CONCLUSION

Due to the inherent controversial nature of the High Court of Justice's ruling on torture, the Knesset will likely attempt to draft legislation bypassing the ruling and, in effect, reinstating the use of "moderate physical pressure" as a legitimate means of interrogation. In order for this legislation to withstand constitutional scrutiny however, it must pass the Court's balancing test. This test requires the Court to consider both the security issues at stake as well as the potential violation of the rights of the accused. For the legislation to be declared lawful by the Court, it must not exceed what is necessary.

It is unlikely that the Court would declare the large scale use of "moderate physical pressure" in GSS interrogations as not exceeding what is necessary. This is so for a number of reasons. First, the Court champions itself as the guardian of civil rights. To allow the government to use physical means in its interrogations would be a clear violation of the rights the Court has sworn to protect. Second, the Court is sensitive to the international condemnation of such methods. Although the Court is not bound to follow international laws, it is likely that it would consider those laws when it examined any legislation that legitimized the use of physical means in GSS interrogations. Lastly, because the Court did not forbid the use of physical means in "ticking time bomb" scenarios, it left the door open for the use of "moderate physical pressure" in extreme situations. It, therefore, would not see a reason to justify the broad scale use of "moderate physical pressure" in GSS interrogations. Thus, legislation legitimizing the large scale use of physical means in interrogation will fail the Court's balancing test and be declared as a violation of constitutional law. The High Court of Justice's ruling, therefore, will likely withstand any Knesset attempt to reinstate the broad scale use of "moderate physical pressure" as a legitimate form of interrogation.

*Melissa L. Clark**

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148. *See* Maoz, *supra* note 65, at 23.

* J.D. Candidate, 2001, Indiana University School of Law-Indianapolis; B.S. in Biology, 1996, Indiana University. The author wishes to thank Don and Mary Hermann for making law school possible, as well as Kevin D. Clark for his invaluable support and patience during the drafting of this comment.

THE DEVELOPMENT OF A GLOBAL HOSPITAL IS CLOSER THAN WE THINK: AN EXAMINATION OF THE INTERNATIONAL IMPLICATIONS OF TELEMEDICINE AND THE DEVELOPMENTS, USES AND PROBLEMS FACING INTERNATIONAL TELEMEDICINE PROGRAMS

I. INTRODUCTION

The patient sits perfectly still as the robotic arm grabs her arm and rotates it back and forth.[1] Her primary care physician, suspecting a fractured ulna, looks on from nearby. Finally, the robotic arm stops, and the consulting physician, from a hospital 100 miles away, speaks up on the computer monitor, "I have reviewed the X-rays and have manipulated the patient's arm, and I believe that you are correct, the ulna is fractured."[2]

In another part of the world, paramedics on the scene of an emergency suspect that the patient has had a stroke. They hook up a laptop computer equipped with a video camera and establish a satellite link with the hospital.[3] The on-call physician asks the patient a series of questions and that she perform a series of manual tasks.[4] The physician, from the hospital, observes the patient's verbal and physical responses and confirms the paramedics' suspicion that the patient has suffered a stroke.[5] As a result, treatment begins within the hour, and the patient regains the use of her arm, suffering only negligible speech impediments.[6]

A man feels a bit of a stomachache while hiking in a remote location and asks his watch what the problem might be. His watch, which continuously monitors his health by noting changes in blood pressure, heart rate, and skin temperature, responds that his stomach acid levels are elevated and are causing mere indigestion. This watch is equipped with a "personal medical assistant" (PMA), an artificially intelligent computer with software that can determine if the patient requires any changes in lifestyle or medical

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1. *See* Stacey Swatek Huie, Note, *Facilitating Telemedicine: Reconciling National Access With State Licensing Laws*, 18 HASTINGS COMM. & ENT. L.J. 377, 380-81 (Winter 1996).

2. This is a fictional account of a real technology that has been developed. *See* discussion *infra* Part II.B.

3. *See Hi-Tech Hope for Stroke Victims*, THE SCOTSMAN, Oct. 11, 1999, *available at* 1999 WL 28856973.

4. *See id.* The treatment protocol used in this example was developed at the National Institutes of Health in Washington, D.C. *See id.*

5. *See id.* The diagnosis rates of strokes using telemedicine are comparable to the same rates when physicians are in physical contact with the patient. *See id.*

6. *See* Medical Encyclopedia, *at* http://keye.drkoop.com (visited Oct. 22, 1999). Strokes cause the brain to be deprived of oxygen. *See id.* The longer the brain is without oxygen, the more permanent and severe the damage is to the brain. *See id.* The earlier that treatment is initiated, the more complete the recovery is for stroke victims. *See id.*

assistance.[7] The watch responds to a wearer's health questions using voice recognition and a speech synthesizer.[8]

These scenarios present just three examples of how telemedicine is currently being used throughout the world. The World Health Organization defines *telemedicine* as:

> The delivery of health care services, where distance is a critical factor, by all health care professionals using information and communications technologies for the exchange of valid information for diagnosis, treatment and prevention of disease and injuries, research and evaluation, and for the continuing education of health care providers, all in the interests of advancing the health of individuals and their communities.[9]

Telemedicine is being used in the United States to solve problems related to the lack of access to health care and the lack of sufficient health care. However, various problems related to telemedicine remain unresolved in the United States. These problems include the licensing and regulation of physicians using telemedicine, jurisdiction and choice of law issues related to malpractice litigation, and the point of formation regarding the physician-patient relationship.

With the increasing use of telemedicine throughout the world, legal problems also arise in the context of the global community. Many of the problems facing domestic telemedicine programs also apply in an international setting. Part II of this note explores the various telemedicine programs and technological innovations currently in use in the United States and in several foreign countries. Part III of this note examines the existing legal and technical problems facing telemedicine in the United States and abroad. Finally, Part IV of this note proposes possible solutions to these problems that may increase society's access to and improve the quality of health care in the United States and throughout the world.

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7. *See Veterans Health Care, Witness Statement before the Subcomm. on Hospitals and Health Care of the House Veterans' Affairs Comm.*, 103rd Cong. (1996) (statement of William R. Rowley, Rear Admiral, Medical Corps, U.S. Navy).

8. *See id.* In addition, the wearer of the watch can access the Internet and confer with medical professionals who would have access to the information accumulated and stored by the watch. *See id.*

9. World Health Organization (WHO), *at* http://www.who.org/ism-htp/Telematics/s-rpt1.html (visited Sept. 16, 1999).

II. BACKGROUND AND CURRENT DEVELOPMENTS OF TELEMEDICINE

A. Historical Perspective of Telemedicine

Telemedicine first occurred in the 1950s when a multi-state audio link-up was established to connect seven state hospitals in four states.[10] As technology improved, many other applications, including education, teleconferencing, and teleradiology emerged for use worldwide.[11] In addition to electronic information exchange, x-rays, ultrasounds, electrocardiograms (EKG's), lab reports, magnetic resonance imaging (MRI's), cranial tomography (CT) scans, stethoscope results, and other information can now be transmitted via the Internet.[12] As technology continues to improve, telemedicine will become an essential tool for practicing physicians in the 21st century.

American citizens make approximately 734 million visits to physicians annually.[13] In the United States, the percentage of the Gross Domestic

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10. Douglas D. Bradham et al., *The Information Superhighway and Telemedicine: Applications, Status, and Issues*, 30 WAKE FOREST L. REV. 145, 149 (1995). The National Institute of Mental Health (NIMH) established this 1278-mile closed-circuit telephone system between hospitals in Nebraska, Iowa, North Dakota, and South Dakota to provide weekly teleconferencing lectures. *See id.* In 1959, the NIMH assisted the Nebraska Psychiatric Institute at the University of Nebraska by implementing audiovisual linkage. *See id.* Having found no adverse effects of treating patients via a "telepsychiatric consultation", the NIMH funded an interactive audiovisual linkage with Norfolk State Hospital, which was 112 miles away, by microwave. *See id.*

Eventually, in 1970, the Veterans Affairs hospitals in Omaha, Lincoln, and Grand Island joined the network. *See id.* Of the 1,267 on-line hours registered, 68% of the time was devoted to educational use, 25% for patient care, and 7% for other purposes. *Id.* At the same time that this network was established, a group of Canadian radiologists were developing the first teleradiology applications. *See id.* at 150.

11. *See id.* at 152-58. While electronic information transfer remains an important use of telemedicine, other technologies such as ultrasound imaging, clinician-to-patient consultation, clinician-to-clinician consultation, and televideo conferencing have enlarged the role of telemedicine. *See id.*

12. *See* Barry B. Cepelewicz, *Can Foreign States Exercise Jurisdiction in Med-Mal Cases Based on Internet Use?*, 4 INTERNET NEWSL.: LEGAL AND BUS. ASPECTS 7 (Sept. 1999).

13. *Statistical Rolodex, Office Visits to Physicians, at* http://www.cdc.gov/nchswww/fastats/docvisit.html (visited Sept. 27, 1999). This site also offers other pertinent statistics (all figures are for the United States and for the year 1996):

1. Average Number of Visits Per Person: 3.4 *Id.*
2. Most Frequent Principal Reason for Visit: General Medical Examination (54.7 million visits) *Id.*
3. Most Frequent Physician Specialty Visited: General and Family Practice (186,190,000 visits) *Id.*
4. Most Frequent Diagnostic Procedure Performed: Pap Smears (over 22,000 annually) *Id.*
5. Most Frequent Principal Diagnosis: Essential Hypertension (27,690,000 diagnoses) *Id.*

Product (GDP) spent on health care has increased from 5.1% in 1960 to 13.6% in 1996.[14] An estimated 14% of the GDP will be spent on health care in the year 2000 and that amount will climb to 15% by the year 2005.[15] The U.S. military currently devotes 6% of its Department of Defense budget to health care where fifteen years ago health care accounted for only 3%.[16] In response to this increase in spending on health care, new methods of delivery must be developed so that a greater number of Americans can receive health care in a more cost-effective manner. Dr. Eric Tangalos of the Mayo Clinic has suggested that "the export of U.S. medical expertise," partially with telemedicine, could provide enough money to "fund our domestic health care system."[17] Furthermore, an estimated forty to sixty billion dollars a year could be saved with the implementation of an interactive telemedicine system.[18]

The health care system in the United States is in a state of turmoil. Despite the pervasiveness of private health insurance coverage and the existence of some public health insurance programs, an estimated 16% of the U.S. population lacks health insurance.[19] In addition, many people who live in rural communities must rely exclusively upon the care provided by Sole Community Hospitals.[20] For these hospitals and communities there are many

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6. Type of Drug Most Frequently Mentioned: Amoxicillin (15.9 million) *Id.*

7. Most Frequent Source of Payment: Private/Commercial Insurance (21% of visits) *Id.*

14. PHOEBE LINDSEY BARTON, UNDERSTANDING THE U.S. HEALTH SERVICES SYSTEM 163 (Health Administration Press 1999). Next to social security, the United States spends more money on health care than any other government service. *See id.* at 7. These expenditures on health care "significantly exceed expenditures for defense, education, transportation, agriculture, and other government services." *Id.* Moreover, "the United States allocates a greater proportion of its GDP to health care than do other countries, more than twice that of the United Kingdom, and nearly double that of Japan." *Id.* at 23.

15. INSTITUTE FOR THE FUTURE, HEALTH & HEALTHCARE 2010: THE FORECAST, THE CHALLENGE 25 (2000).

16. *National Security Subcomm. of the House Appropriations Comm. Holds Hearing on DOD Medical Programs* (1997), 104th Cong. (statement of Stephen Joseph, Assis. Sec. of Def., Health Affairs).

17. Huie, *supra* note 1, at 392.

18. *VA Health Care and Technology, The Veterans Health Administration Health Information Infrastructure Before the Subcomm. on Oversight and Investigations of the Comm. on Veterans' Affairs, U.S. House of Representatives* (1994), 101st Cong. (statement of Michael D. McDonald, Senior Advisor, Health and Telecommunications, The C. Everett Koop Institute). These savings would result from allowing patients to "self-triage", which would reduce unnecessary professional care. *See id.* In addition, the information provided would result in health promotion and a reduction of disease. *See id.*

19. *See* BARTON, *supra* note 14, at 46-47.

20. *See id.* at 215. Sole Community Hospitals (SCHs) were created under the 1982 Tax Equity and Fiscal Responsibility Act (TEFRA). *See id.* These hospitals are designed to be "the primary source of inpatient services for the residents of a market area." *Id.* at 216. They are "often the only source of inpatient services for rural areas." *Id.* "SCHs are designated based

advantages to a telemedicine program. First, eliminating the need for patient trips to metropolitan areas in order to visit specialists can reduce costs.[21] Also, more physicians may choose to practice in rural areas because the concern of professional isolation would be reduced.[22] Finally, since many rural hospitals had to adapt to rising costs of national health care, they scaled down the services offered.[23] Utilizing telemedicine can help these hospitals stay open.

B. Current Uses and Developments of Telemedicine in the United States

The effect that telemedicine can have on the U.S. health care system is potentially unlimited, especially as technology continues to improve. Specifically, five of the top ten leading causes of death in the United States could be diagnosed and treated with the use of telemedicine.[24] The Center for Disease Control (CDC) cites heart disease as the leading cause of death in the United States.[25] Telemedicine is well equipped to combat heart disease by allowing for early diagnosis and treatment. Cancer, the second leading cause of death in the United States,[26] can be addressed by allowing specialists to interpret x-rays, magnetic resonance imaging (MRI's), and test results of patients not otherwise able to visit an oncologist. Early diagnosis and

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on the distance of the hospital from neighboring facilities . . . and a requirement that the hospital be located in a rural, nonmetropolitan statistical area." *Id.*

21. *See* Bradham, *supra* note 10, at 147. A 1992 study indicated that health care costs could be reduced by thirty-six billion dollars annually with the use of telemedicine. *Id.*

22. *See* Derek F. Meek, *Telemedicine: How an Apple (or Another Computer) May Bring Your Doctor Closer*, 29 CUMB. L. REV. 173, 176 (1999).

23. *See Health Care Revision Access to Care: Written Testimony Presented to the Senate Finance Comm.*, 101st Cong. (1994) (statement of Walter S. Busch, Administrator, Roosevelt Memorial Medical Center).

> [R]ural hospitals play a unique role within the spectrum of hospital services in the United States. Rural Hospitals, although they are much smaller than their urban counterparts, are not merely scaled down versions of their city cousins. The common denominator of small rural hospitals is that they make available a menu of basic services to their local communities . . . the evidence shows that rural hospitals continue to concentrate on the basic "plain vanilla" services which are within the competence of local health care providers . . . these hospitals are basic public service organizations, for the most part community owned and community run, more akin to public wishes than entrepreneurial ventures.

Id. (quoting Drs. Hart, Ammundson and Rosenblatt, 1990 Report in THE JOURNAL OF RURAL HEALTH).

24. *Statistical Rolodex-Deaths, Deaths/Mortality, at* http://www.cdc.gov/nchswww/fastats/deaths.htm (visited Sept. 27, 1999).

25. *See id.*

26. *See id.* Cancer is the second leading cause of death in the United States, killing 539,577 people in 1997. *Id.*

treatment positively affects the survival rate of many types of cancer.[27] In Scotland, telemedicine is already used to diagnose and treat strokes.[28] The early diagnosis of Chronic Pulmonary Disorder,[29] which is beneficial to the patient because early treatment increases the chances of survival, can also be diagnosed via telemedicine.[30] Telemedicine programs to combat diabetes[31] have also been implemented in the United States.[32] As technology continues to improve, telemedicine will be able to combat many more diseases that adversely affect people in the United States and throughout the world.

More people turn to the Internet for answers to health care questions.[33] Internet use on the whole has increased dramatically in recent years.[34] However, physicians are not keeping up with the demand for medical information on the Internet.[35] Fortunately for rural communities, telemedicine has developed into a successful and widely used tool for patients to receive medical assistance from previously inaccessible physicians. However, access to telemedicine in the United States is still limited due to certain obstacles.

The United States does not have a national telemedicine program. Instead, the development of a health care system on the Internet is left to the

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27. *See* Interview with Dr. Peter Gulick, D.O., Board Certified Oncologist, Michigan State University, in East Lansing, Mich. (Nov. 12, 1999).

28. *See* THE SCOTSMAN, *supra* note 3. Strokes are the third leading cause of death in the United States, killing 159,791 people in 1997. *Statistical Rolodex-Deaths*, *supra* note 24.

29. *See Statistical Rolodex-Deaths*, *supra* note 24. Chronic obstructive pulmonary disease is the fourth leading cause of death in the United States, with 109,029 deaths in 1997. *Id.*

30. *See Medical Encyclopedia*, *supra* note 6.

31. *See id.* Diabetes is the seventh leading cause of death in the United States, with 62,636 deaths in 1997. *Id.*

32. *See* discussion cited *infra* at note 51.

33. *See* Patrick Cross, Presentation before the Indiana Hospital & Health Association (Oct. 8, 1999), *Internet Users*. Seventy percent say that the Internet has become 'indispensable' in their lives. *Id.* In addition, 65% have sought health information at least once, and over 1/3 look up information regularly. *Id.*

34. *See* IntelliQuest April 1998 poll, Nielsen October 1998 update, USA TODAY 1999 survey. One hundred two million people in the United States have access to the Internet compared to 21.5 million in October 1996. *Id.* Approximately 150 million people worldwide have access to the Internet. *Id.* Twenty-five percent of Internet users are new in the past 12 months. *Id.* On average, Internet users use the Internet 5.5 hours weekly. *Id.* The average age of Internet users worldwide is 37 while the average age in the United States is 36.2. *Id.* The average income of Internet users worldwide is $55,000. *Id.* By way of comparison, the average income of Internet users in the United States is $25,000. *Id.*

35. *See id.* Seventy-seven percent of patients prefer to get online health information directly from their physician, but less than 10% of physicians have web pages and most refuse to give out their e-mail addresses. *Id.* The number of physicians who are accessing the Internet for medical information has increased from 3% in 1995 to 90% in 2000. George Lundberg, Netscape, Presentation before the American Bar Association/American Medical Association's Conference on Physician-Legal Issues: Critical Regulatory and Compliance Developments (June 9-10, 2000).

initiative of each individual state.[36] The Medical College of Georgia has established one of the largest telemedicine programs in the country, "spending ten million dollars to link sixty remote locations with its medical center."[37] In addition, it is currently coordinating with the Georgia Institute of Technology in the development of an electronic hand.[38] This electronic hand can perform an initial diagnosis, complete with manual manipulations, on a patient in another part of the state or anywhere in the world.[39] Similarly, Massachusetts General Hospital in Boston developed a telemedicine program to promptly diagnose patients so that they can receive the treatment necessary within hours, greatly increasing a patient's chances of full recovery.[40]

Several states have developed telemedicine programs, the most recent being West Virginia. Mountaineer Doctor Television (MDTV) is a two-way interactive audio-video system that allows a physician specialist at West Virginia University Health Science Center in Morgantown to consult with a patient at a distant site with full audio and video capabilities.[41] This has

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36. *See* Huie, *supra* note 1, at 402. Four states that have implemented telemedicine systems are Oregon, Georgia, Kansas, and Iowa. *See id.*

37. *Id.* at 381.

38. *See id.* at 380-81.

39. *See id.* at 381.

40. *See* THE SCOTSMAN, *supra* note 3. Drugs that mitigate the damage that a stroke causes "must be given within three hours" to be effective. *Id.* Stroke specialists at Massachusetts General Hospital reported that tests using a telemedicine link "worked almost as well as seeing a patient in person." *Id.* The physicians at one end of the tele link-up viewed patients through video cameras and made a diagnosis based upon a scale developed by the National Institute of Health. *See id.* This scale assesses speech, comprehension, clumsiness, vision, and eye movement, all indicators of a stroke. *See id.* Physicians using the computer link-up made almost identical diagnoses as their colleagues who treated the patient in-person. *See id.* In addition, "CAT scans of the brain can be sent using the same link," greatly enhancing the physician's ability to make a diagnosis. *Id.* This is a very important program because, in terms of stroke victims, every minute counts in diagnosing and treating a stroke. *See id.*

41. *See Telemedicine: Written Testimony Regarding the Results and Effectiveness of the Mountaineer Doctor Television (MDTV) Program Before the Senate Subcomm. on Science, Technology, and Space of the Senate Comm. on Commerce, Science, and Transportation,* 106th Cong. (1999) (testimony of Dr. James Brick, Chairman, Department of Medicine, Robert C. Byrd Health Science Center, Morgantown, West Virginia). Nineteen Mountaineer Doctor Television sites have been implemented in the state of West Virginia "including service centers with specialty care." *Id.* Five more MDTV sites are planned by the end of 1999 for a grand total of 24 MDTV sites throughout the state of West Virginia. *Id.*

The system in West Virginia is used primarily for education. *See id.* "In 1998, over 1036 hours of medical education and 209 hours of administrative teleconferencing" dominated the network. *Id.* In addition, 146 hours were logged seeing patients "which translates to over 680 patients seen." *Id.* The greatest benefit of telemedicine in West Virginia has been to rural physicians because it gives them access to the same levels of professional support that doctors in academic or urban settings experience on a daily basis. *See id.* In addition, rural hospitals have benefitted from telemedicine because they can keep patients in the community hospital who might otherwise have transferred to larger metropolitan hospitals. *See id.*

immediate and easily cognizable benefits to patients and doctors in rural areas. However, individual states are not the only users of telemedicine.

One of the most extensive users of telemedicine is the United States military.[42] The United States military uses telemedicine to treat personnel in the battlefield, on ships, and in airplanes.[43] At Walter Reed Army Medical Center, the military provides "well over 3,000 medical consults per year to armed forces personnel and their families worldwide."[44] The Army Medical Department's telemedicine program uses "store and forward" technology[45] to send images and information over the Internet. Images are sent to tertiary care[46] physicians for review. The consulting physicians then render a diagnosis and return the diagnosis to the referring physician.[47]

The military is also pioneering several new applications of telemedicine. For example, the military has developed the Personal Information Carrier, or "digital dog-tag", which carries a soldier's personal information as well as their entire medical record.[48] This dog tag contains all of the soldier's medical information to be read by physicians at all levels of care.[49] In addition, the Center for Total Access[50] is pioneering home health telemedicine for the care and monitoring of diabetic patients.[51] The military also developed and implemented technology to care for patients suffering from heart problems,[52] neuropsychological problems,[53] dental

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42. *See Telemedicine; Remarks Before the Senate Comm. On Commerce, Science, and Transportation, Subcomm. on Science, Technology, and Space*, 106th Cong. (1999) (statement of Ronald K. Poropatich, M.D., Member, Board of Directors, American Telemedicine Association).

43. *See generally DOD Medical Programs, National Security Subcomm. of the House Appropriations Comm.*, 106th Cong. (1999)(statement of Lieutenant General Ronald R. Blanck, Surgeon General, U.S. Army).

44. Poropatich, *supra* note 42.

45. Cepelewicz, *supra* note 12. "Store and Forward" technology uses e-mail on an Internet platform to send high-resolution still and motion images, digital audio and other types of clinical data. *See id.* This information is stored and then forwarded to the receiving physician for review at his or her leisure. *See id.*

46. *See* BARTON, *supra* note 14, at 266. Tertiary medical care is defined as "highly specialized care, usually extremely complex." *Id.*

47. *See Defense Health Programs; Statement on Health Care in the United States Army before the Senate Armed Services Personnel Comm.*, 106th Cong. (1999) (statement by Lieutenant General Ronald R. Blanck, Surgeon General, U.S. Army). The majority of the Army's telemedicine projects are in the areas of radiology, dermatology, and psychiatry. *See id.*

48. *Id.*

49. *See id.*

50. The Center for Total Access is a military program that concentrates on home health care for disabled and elderly patients. *See id.*

51. *See id.* The intent is to improve compliance and reduce hospitalizations of patients with diabetes. *See id.*

52. *See id.* Telecardiology, which is digital radiographic examination of the heart, is used to transfer echocardiogram information between Fort Belvoir Community Hospital and Walter

problems,[54] cancer,[55] hearing problems,[56] dermatological problems,[57] and kidney problems.[58] The Army also established a World Wide Web site containing useful information beneficial to not only military personnel but the general public as well.[59]

The Navy has a more comprehensive web site that provides information to the public and military personnel on virtually any medical topic ranging from what to do with an amputated arm to the dangers of smokeless tobacco.[60] In addition, the Navy has uploaded all field manuals concerning chemical and medical defense so that reserve or other organizations, such as local police and fire departments, can download treatment protocols from the Internet in the event of a biological or chemical emergency.[61]

Commercial uses of the Internet are aiding hospitals in the treatment of high-risk elderly patients and are assisting in the home-delivery of health care. The LifeMasters web site allows patients to personalize their own health care page by uploading data such as weight, heart rate, and blood pressure.[62] Nurses review the pages looking for significant changes so that the patient and the treating physician can respond accordingly.[63] LifeMasters contracts with Health Maintenance Organizations (HMOs) and has recently

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Reed Army Medical Center. *See id.*

53. Active neuropsychological telemedical sessions take place between patients and doctors at Army medical centers in Texas. *See id.*

54. In Europe, there are teledentistry programs at 37 sites. *Id.*

55. Subspecialists in pathology, radiology, surgery, radiation oncology, and hematology examine patients from remote Hawaiian islands with tumors to render opinions on the treatment of these patients. *See id.*

56. Tripler Army Medical Center has developed video-otoscopy (video inspection of the middle ear) for diagnosis of middle ear diseases in patients from remote sites. *See id.* This program will be important for early treatment and possible prevention of significant hearing loss. *See id.*

57. *See DOD Medical Programs, National Security Subcommittee of the House Appropriations Committee Holds Hearing on DOD Medical Programs*, 106th Cong. (1999)(Rear Admiral Stephen T. Fisher, Deputy Chief, on Behalf of Vice Admiral Harold M. Koenig, Surgeon General, United States Navy). A dermatologist in Bethesda, Maryland diagnosed a basal cell carcinoma next to a sailor's eye. *See id.* This is unremarkable except for the fact that the sailor was located on a ship that was half way across the world. *See id.*

58. A specialist in San Diego diagnosed a kidney stone in a sailor who was stationed on a ship located in the Antarctic. *See id.* The doctor ascertained the size of the kidney stone via an ultrasound and prescribed an appropriate treatment. *See id.* The treatment involved allowing the kidney stone to pass through the system naturally. *See id.* This avoided a costly evacuation because the ship's runway had been closed for the winter. *See id.*

59. *See Army Medicine, at* http://www.armymedicine.army.mil (visited Oct. 24, 1999). Information regarding biological weapons involving anthrax and vaccines to prevent the effects of anthrax are posted for the general public. *See id.*

60. *See Virtual Naval Hospital, at* http://www.vnh.org/ (visited Oct. 24, 1999).

61. *See* Vice Admiral Harold M. Koenig, *supra* note 57.

62. *See* Josh Fischman, *A Logon a Day Keeps the Doctor Away*, U.S. NEWS & WORLD REP., Oct. 25, 1999, at 65.

63. *See id.*

initiated a commercial site that is accessible by the general public.[64] This program saves patients considerable money by allowing them to leave hospitals earlier than normal.[65]

However, the most beneficial use of telemedicine, from the perspective of the United States as a whole, is its positive impact on rural health care. Rural areas in the United States are plagued by a shortage of doctors,[66] and patients oftentimes live hundreds of miles from the nearest hospital.[67] Douglas Henley, the President of the American Academy of Family Physicians, testified that "there are currently 2682 counties or parts of counties [that] remain designated as primary care health professions shortage areas (HPSA's). This means [that] there is less than one primary care physician for every 3500 persons in those areas."[68] Because of persistent shortages, rural hospitals have been closing at a disproportionate rate for the past twenty years.[69]

The Federal Government recognizes telemedicine as a possible solution to the problems faced by rural communities.[70] As a result, various bills and fund allocations have been devoted to develop telemedicine programs in rural communities.[71] However, the United States does not stand alone in its

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64. *See id.*

65. *See id.* Web monitoring saves an average of $2,100 over a typical hospital stay, $450 over a typical nursing home stay, and $90 over a typical home-health visit. *Id.*

66. *See Rural Health Care: Testimony before the Comm. on Ways and Means, U.S. House of Representatives*, 104th Cong. (1996) (statement of Jeffrey Human, Director, Office of Rural Human Policy, Health Resources and Services Admin., Dept. of Health and Human Services). When considered "on a per capita basis, there are almost twice as many primary care physicians practicing in urban areas as there are in rural areas." *Id.* When all physicians are considered, "there are well over twice as many physicians practicing in urban areas (on a per capita basis)." *Id.*

67. *See id.*

68. Christopher J. Caryl, Note, *Malpractice and Other Legal Issues Preventing the Development of Telemedicine*, 12 J.L. & HEALTH 173, 177-78 (1998). Health Professional Shortage Areas (HPSA) are "areas with a primary care provider-to-client ratio of 1:3500 or worse." *Id.* at 175. Furthermore, "twenty-nine percent of rural residents reside in HPSA's. In contrast, only nine percent of urban residents live in HPSA." *Id.*

69. *See* BARTON, *supra* note 14, at 231-32. Between 1980 and 1988, 200 rural hospitals closed. *Id.*

70. *See generally* Caryl, *supra* note 68, at 177-80. Hospitals will be reduced from 850,000 beds in 1997 to 720,000 beds in 2005. INSTITUTE FOR THE FUTURE, HEALTH & HEALTH CARE 2010: THE FORECAST, THE CHALLENGE 6 (2000).

71. *See Rural Healthcare: Testimony before the Senate Agriculture, Nutrition, and Forestry Comm.*, 104th Congress (June 9, 1994) (testimony of Douglas E. Henley, M.D., Board Chair of the American Academy of Family Physicians).

> The Rural Electrification Administration (REA) makes low-interest loans to telephone and telecommunications companies to set-up communication links for telemedicine. The 1990 Farm Bill authorized $60 million to assist rural hospitals and schools set-up fiber-optic link-ups. The National Telecommunications and Information Administration (NTIA) within the Department of Commerce has $26 million to distribute in the form of matching grants to states for

recognition of the potential benefits of telemedicine.

C. *Current International Uses and Developments of Telemedicine*

Many countries have implemented, or are in the process of implementing, a telemedicine system.[72] However, these efforts to utilize technologies associated with telemedicine remain hindered by a lack of technology.[73] Approximately eighty percent of the world's population does not have a telephone.[74] Those countries with telemedicine programs have various programs that widely differ. Some programs are controlled and regulated by the central government.[75] Other countries call upon the private sector to aid in the advance of telemedicine.[76] In addition, program initiatives vary across the borders. Some countries are interested in establishing a large telemedicine program that will encompass a large region (including other countries),[77] while other countries focus more on serving the domestic needs of their own populations.[78]

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telecommunications development, including telemedicine. Finally, the Agency for Health Care Policy and Research (AHCPR) and the Health Care Financing Administration (HCFA) will both fund demonstration studies of the clinical issues in telemedicine, while the National Library of Medicine's High Performance Computing Applications in Health Care initiative will study standards for data transmission.

Id.

72. *See* Gustavo Capdevila, *Health: New Focus for WHO in Setting Policies*, INTER PRESS SERVICE, Jan. 16, 1997, *available at* 1997 WL 7073219.

73. *See* Edward R. Leahy & Michael O'Brien, *Telecommunications Law and Technology in the Developing World*, 22 B.C. INT'L & COMP. L. REV. 1, 8 (Winter 1999).

74. *See id.*

75. *See German Federal, State Governments Reach Accord on Multimedia Control*, COMPUTERGRAM INTERNATIONAL, July 31, 1996, *available at* 1996 WL 10473518. Germany has designated that the Federal Government have control over telemedicine programs. *See id.* In addition, countries like Kuwait and Australia are also looking to the government to establish, implement, and control telemedicine. *See Kuwait: New Telecommunications Services to be Launched*, INT'L MARKET INSIGHT TRADE OPPORTUNITIES INQUIRIES, Dec. 2, 1997, *available at* 1997 WL 15020970. *See also Australia: Telemedicine Industry: An Overview*, INT'L MARKET INSIGHT REP., Aug. 4, 1998, *available at* 1998 WL 13711492.

76. *See South Africa: First Telemedicine Site Launched*, INT'L MARKET INSIGHT REP., Mar. 10, 1999, *available at* 1999 WL 8686522. Telehealth SA, a consortium of private companies, is sponsoring South Africa's national telemedicine network. *See id.*

77. *See* Anil Noel Netto, *Malaysia-Information: Spare a Thought for the Poor Along the Highway*, INTER PRESS SERVICE, Jan. 21, 1997, *available at* 1997 WL 7073265. Malaysia has implemented a program that is intended "to develop into a regional center for telemedicine, linking rural clinics to medical experts and renowned clinics in Malaysia and abroad." *Id.*

78. *See Rural Communities in Southern Ontario Receive $11.5 Million in New Telecommunications Services*, CANADA NEWSWIRE, Oct. 22, 1999. Canada has implemented a nationwide telemedicine program to further the healthcare needs of rural communities. *See id.*

It helps to examine the extent of the telemedicine programs in other countries before examining the problems facing telemedicine on an international level. The World Health Organization (WHO) actively promotes telemedicine as a tool for improving world health.[79] Dr. Nakajima, Director-General of the WHO, stated, "The World Health Organization fully realizes that the rapid development of modern telecommunication technologies presents countries with a unique opportunity to improve the health of their populations."[80] The World Health Organization demonstrated the remarkable potential of telemedicine to the International Telecommunication Union (ITU) during an international TELECOM 97 Forum by presenting two live interactive transmissions between Moscow, Washington, and Geneva.[81] In addition, the World Health Organization began a worldwide surveillance program on the spread of drug resistance, pollution levels, reactions to toxic chemicals, and the adverse side effects of various pharmaceuticals.[82] However, the WHO is not the only organization to realize the benefits of telemedicine.

1. The European Union

Like many industrialized areas throughout the world, the European Union (EU) is experiencing an increase in its elderly population. The population of elderly people in the EU is expected to reach fifty-six million people by the year 2000, and the disabled population will total thirty-six to forty-eight million people.[83] The increases in these populations prompted the EU to commission the European Foundation Research Project to study the various uses of telemedicine throughout the EU. The European Foundation Research Project consisted of five case studies: the Domiciliary Fetal Monitoring Study,[84] the Information System for the Disabled Study,[85] the

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79. *See* Press Release, World Health Organization, Telehealth and Telemedicine Will Henceforth be Part of the Strategy for Health for All (Sept. 16, 1997), *available at* http://www.who.int/archives/inf-pr-1997/en/pr97-98.html.

80. *Id.*

81. *See WHO Director-General Highlights Potential of Telemedicine, at* http://www.who.int/archives/inf-pr-1997/en/pr97-65.html (visited Sept. 16, 1999). The TELECOM 97 Forum was held in Geneva, Switzerland and was sponsored by the International Telecommunication Union (ITU). *See id.*

82. *See* WHO, *supra* note 79.

83. DR. MARJORIE GOTT, TELEHEALTH AND TELEMEDICINE: EXECUTIVE SUMMARY OF A EUROPEAN FOUNDATION RESEARCH PROJECT, EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS (1994).

84. *See id.* at 8. The Domiciliary Fetal Monitoring Study was conducted in Wales and was intended to study the efficacy of training pregnant women to use telemedicine to record fetal traces (heart rates) and transmit them to the Obstetricians Unit of their hospital from their homes. *See id.* The women's self-monitoring reports were found to be as good or better than those recordings made at the Obstetric Unit of the hospital. *See id.* The results of this study were found to be effective in reducing clinical visits for pregnant women and reducing the costs

Computer Youth Network Study,[86] the Personal Alarms Study,[87] and the Videotelephony Study.[88]

The European Foundation has seven recommendations that they suggest would benefit Europe. These recommendations include a reorientation of health services towards primary health care.[89] In addition, it recommends that the study of telehealth and telemedicine and the use of telematic services be included in the basic and post-basic training of health care professionals.[90]

2. *Malaysia*

While the WHO is concentrating on promoting world health with the use of telemedicine, individual countries are initiating and developing their own telemedicine programs. Malaysia has announced plans to become a worldwide leader in Internet telecommunications technologies.[91] Among its plans is to be the world's first country to set-up a "cyber court."[92] In

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associated with having a baby. *See id.*

85. *See id.* at 9. The Information System for the Disabled Study was conducted in Italy and the Netherlands and was intended to evaluate the HANDYNET Project that established a European-wide information system on all aspects of living with a disability. *See id.*

86. *See id.* at 10. The Computer Youth Network Study was conducted in Alberta, Canada and was intended to utilize Internet bulletin boards to educate teens and young adults on the dangers of drug and alcohol use. *See id.* The sites associated with the bulletin boards were found to be successful based on the increased frequency of visits to the site. *See id.*

87. *See id.* at 11. The Personal Alarms Study was conducted in the Netherlands and in Canada and studied a system in which elderly and disabled people living alone could call for help by means of an alarm system that sounds an alarm directly to an emergency center. *See id.* The alarm system allows the elderly and disabled to feel secure while living independent lives and also helps to organize an adequate response to an emergency situation. *See id.*

88. *See id.* at 12. The Videotelephony Study was conducted in Germany and Portugal and was intended to evaluate a program that allows for two-way visual and sound interaction between people in their homes and remote care centers. *See id.* This program proved to be an effective, easy to use program that lowered costs and provided care to rural populations. *See id.*

89. *See id.* at 16. Primary health care is defined as "the appropriate treatment of common diseases and injuries, the provision of essential drugs, simple prophylactic and therapeutic dental care, and the identification of potentially serious physical or mental health conditions that require prompt referral for secondary or tertiary care." BARTON, *supra* note 14, at 266.

90. *See id.* The other recommendations made by the European Foundation for the Improvement of Living and Working Conditions include the commissioning of an international study of telemedicine and allowing for policy makers to accept that technology is only a part of the whole health care package. *See id.*

91. *See* Anil Noel Netto, *Malaysia: Cyber Laws Passed to Support High-Tech Dreams*, INTER PRESS SERVICE, Apr. 1, 1997, *available at* 1997 WL 7074521.

92. *Id.* The "cyber court" would be "the first on-line reference center for criminal cases world-wide" an unidentified ministry official stated. *Id.* Since March 24, 1997, the parliament has passed several new "cyber-bills." *Id.* These bills cover "computer crimes, digital signature, intellectual property protection, and telemedicine development." *Id.*

addition, Malaysia plans on using its Multimedia Super Corridor (MSC)[93] to lure businesses to Malaysia and enhance government services.[94]

The Malaysian Health Ministry has established a project to link all state and district hospitals and clinics nationwide on a common Virtual Private Network (VPN) platform.[95] This project will be implemented in four phases. The first phase is called the Lifetime Health Plan and will link-up modules such as clinical support systems and personalized lifetime health plans that cater to individuals with group data services to track patients in an outpatient setting.[96] The group data services digitalize medical data for analysis purposes.[97] The second phase is known as the Mass Customized and Personalized Health Information and Education phase.[98] This phase focuses on using the Internet to educate the public on maintaining healthy lifestyles.[99] This phase is to be dedicated to serving specialized groups of people with similar health problems, such as cancer.[100] The third phase is called the Continued Medical Education (CME) phase.[101] This phase enables the Health Ministry to offer medical education to health care providers.[102] The final phase of the Malaysian Health Ministry's telemedicine program is called Teleconsultation.[103] This phase involves linking forty physicians practicing in remote areas with specialists in larger, metropolitan areas.[104]

The preliminary results from the pilot program in Malaysia seem promising. Between 1992 and 1997, the National Heart Institute of Malaysia provided services to more than 35,000 patients from low income groups.[105]

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93. *See Health Ministry in Final Stage to Carry Out Telemedicine Project*, BERNAMA, THE MALAYSIAN NAT'L NEWS AGENCY, Oct. 28, 1998, *available at* 1998 WL 20443138. "The MSC is a 750 square-kilometer area stretching from the Kuala Lampur City Center to the Kuala Lampur International Airport in Sepang, and is a dedicated hub for the development of multimedia products and services." *Id.* The MSC is expected to provide millions of dollars of revenue for Malaysia but will face competition from "Cyberclones" in Singapore, Hong Kong, Taiwan, Thailand, and India. Thomas Omestad, *Building a High-Tech Magnet*, U.S. NEWS & WORLD REPORT, Sept. 25, 2000, at 36.

94. *See* Netto, *supra* note 91.

95. *See Malaysia: Virtual Private Network Platform Project in Full Swing*, INT'L MARKET INSIGHT REP., Aug. 10, 1999, *available at* 1999 WL 17739411. The Virtual Private Network (VPN) is built on a corporate information superhighway (COINS) infrastructure. *See id.* The main objectives of the VPN are to provide a communication infrastructure to support the various applications that run on a secure environment - such as telemedicine - and also to utilize Internet technology. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *Pilot Project on Telemedicine Next Year*, BERNAMA, THE MALAYSIAN NAT'L NEWS

Malaysia also successfully tested a teleradiology program that allows a paramedic at a remote district hospital to obtain radiographic films interpreted by a radiologist overnight.[106] Malaysia furthered its goal of being a world wide leader in telecommunications by signing a Memorandum of Understanding with the United Arab Emirates (UAE) that facilitates the formation of a telemedicine program between the two countries.[107]

In addition to creating an infrastructure that supports telemedicine programs, Malaysia is the first country in the world to create legislature that regulates telemedicine. The Telemedicine Act of 1997[108] requires physicians to apply to the Malaysian Medical Council for a certificate to practice telemedicine.[109] Physicians not licensed in Malaysia can also apply for this certificate.[110] However, a physician must obtain the consent of the patient before commencing treatment via telemedicine.[111] Finally, the Minister of Health has the power to create additional regulations as the challenges facing telemedicine become more apparent.[112]

3. *Australia*

Australia is also positioning itself as an international leader in the provision of telemedicine.[113] Video conferencing telemedicine sites have increased from 30 in 1994 to more than 250 in 1999.[114] In addition, telemedicine sites for teleradiology have grown to 150.[115]

Australia conducted a trial run of its first international ophthalmic telemedicine link-up with Indonesia using technology developed in Australia.[116] This trial run involved over 100 highly detailed color pictures

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AGENCY, Nov. 26, 1998, *available at* 1998 WL 20444738.

106. *See Project Using Internet for Teleradiology Successful in Sarawak*, BERNAMA, THE MALAYSIAN NAT'L NEWS AGENCY, Nov. 5, 1998, *available at* 1998 WL 20443437. Obtaining these radiographic films would have taken a month if done the "old-fashioned" way - by courier service. *Id.*

107. *Malaysia and UAE to Collaborate in Education and Technology*, BERNAMA, THE MALAYSIAN NAT'L NEWS AGENCY, Aug. 7, 1999, *available at* 1999 WL 21721281.

108. Telemedicine Act, Act 564 (1997) (Malaysia).

109. *See id.* cl. 3.

110. *See id.* cl. 4(1).

111. *See id.* cl. 5(1).

112. *See id.* cl. 6.

113. *See Australia: Telemedicine Industry: An Overview*, INT'L MARKET INSIGHT REP., Aug. 4, 1998, *available at* 1998 WL 13711492. The Honorable John Moore, the Minister of Industry, Science and Tourism, announced in 1998 that "Australia is positioning itself internationally as a leading supplier of telemedicine technology and applications." *Id.*

114. *Id.*

115. *Id.*

116. *See Aussie Eye Institute Conducts Telemedicine Trial Link Up with Indonesia*, BERNAMA, THE MALAYSIAN NAT'L NEWS AGENCY, Mar. 5, 1999, *available at* 1999 WL 5596523.

of the eye being sent from Indonesia to Perth, Australia.[117] The Director of the Lions Eye Institute, Professor Ian Constable, explained that "[s]uch a technological breakthrough provides hope for the millions of people in the Third World who, without early detection of disease, face the prospect of going blind."[118] This technology enables ophthalmologists in Australia to examine a patient in another part of the world while simultaneously talking with the patient and the attending doctor.[119]

4. Canada

Canada also implemented a telemedicine plan that allows rural communities to gain access to the same quality health care that they would receive from a larger, urban community.[120] Similar to Australia's Lions Eye Institute plan, the Canadian plan permits nurses and physician assistants equipped with laptop computers and cellular phones to travel to rural communities to meet with patients in need of a wide array of treatment.[121] After the nurses and physician assistants meet with the patients, they contact the physicians, via satellite communications, to receive instructions and help with the various treatments.[122] These treatments vary in scope from physical therapy to diagnosis and treatment of diabetes.[123] As the technology in Canada continues improving, so will the quality of care provided to its citizens.[124]

5. Developments in Other Countries

Several other countries also recognize the potential of telemedicine and have implemented their own programs. Ireland developed a high-tech

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117. *Id.*

118. *Id.*

119. *See id.* The equipment, which is lightweight for easy portability, includes a portable fundus camera, laptop computer and a satellite phone. *See id.* This portable equipment "can be taken to remote villages where local people can be trained to use the camera and successfully screen the whole population." *Id.*

120. *See Rural Communities in Southern Ontario Receive $11.5 Million in New Telecommunications Services*, *supra* note 78. The Data Services Improvement Program will allow businesses in smaller communities and rural areas to effectively compete with their competitors in urban centers. *See id.* Higher speed data services will improve access to the Internet and will provide more opportunities for local businesses, residents and communities located in rural areas. *See id.*

121. *See* Cross, *supra* note 33.

122. *See id.*

123. *See id.*

124. *See* CANADA NEWSWIRE, *supra* note 78. The Ontario government, in conjunction with Bell Canada and two public sector partners, are investing $11.5 million (Canadian) to extend high-speed data services to rural and small communities in Southern Ontario. *Id.*

computer system to improve cancer research.[125] Ireland also developed a telemedicine-teleconsultation system that enables doctors in Ireland to consult on-line with their colleagues in the United States and Europe.[126]

Most countries collaborate their telemedicine practices by sharing advanced computers that make telemedical link-ups feasible. However, the United States limits the sharing of certain technologies[127] to countries because of the potential threats to national security.[128] Despite this limitation on development, India has developed an advanced computer system that they will use to implement a telemedicine program.[129]

Several other countries are in the process of developing a telemedicine program. Kuwait plans to develop a telemedicine program.[130] In Saudi Arabia, the Saudi Council of Ministers approved the use of the Internet in Saudi Arabia.[131] The Prince Sultan Charitable Foundation has "established a joint-venture partnership with IMED Link, an American Telemedicine firm based in Bethesda, Maryland."[132] However, Saudi Arabia is not the only country to adopt the services of physicians in the United States.[133] South

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125. *See* Maureen Coleman, *Belfast On-Line with Top US Cancer Research*, BELFAST TELEGRAPH, Oct. 5, 1999, *available at* 1999 WL 28236093. This computer system "will enable doctors, nurses, and scientists in Belfast, [Ireland] to link their research" with researchers at the National Cancer Institute (NCI) in Washington. *Id.* This information system is the first of its kind in the world. *See id.*

126. *See id.*

127. *See* R. Dev Raj, *Science-India: India Beats U.S. Ban on Supercomputer Exports*, INTER PRESS SERVICE, Mar. 30, 1998, *available at* 1998 WL 5986421. A "teraflop" machine is a supercomputer whose computing power exceeds two-thousand mega theoretical operations per second (MTOPS). *Id.* These "supercomputers" are considered a threat to national security because of their ability to launch nuclear weapons. *Id.* Despite restrictions by the United States, India has developed their own "teraflop" machine, called the "PARAM 10,000", and has committed it to developing a National Information Infrastructure (NII) which will allow for "collaboratories for scientific research, digital libraries, electronic governance and telemedicine with the common man in mind," stated Shyamal Ghosh, Secretary in the Department of Electronics. *Id.*

128. *See id.*

129. *See id.*

130. *See Kuwait: New Telecommunications Services to Be Launched*, INT'L MARKET INSIGHT TRADE OPPORTUNITIES INQUIRIES, Dec. 2, 1997, *available at* 1997 WL 15020970.

131. *See Saudi Arabia: Gov't Approves Local Use of Internet Service*, INT'L MARKET INSIGHT REP., Jan. 5, 1998, *available at* 1998 WL 8067121. Internet usage for Saudi citizens is very limited. *See id.* Because access is limited, citizens can only access the Internet at certain authorized sites, such as Internet cafes. *See id.* In addition, content is heavily restricted by the Council of Ministers. *See id.* However, by allowing access to the Internet, Saudi Arabia has paved the way for telemedicine programs to be developed. *See id.* King Faisal Specialist Hospital and Research Center, based in Riyadh, has been connected with King Abdul Aziz City for Science and Technology as part of a telemedicine project. *See id.*

132. *Id.*

133. *See Malaysia and UAE Collaborate in Education and* Technology, *supra* note 107. The UAE formed a telemedical consultative relationship with physicians in the United States and Britain. *See id.*

Africa has also enlisted the assistance of U.S. technology companies to develop and implement a telemedicine program.[134]

III. THE PROBLEMS FACING TELEMEDICINE IN THE UNITED STATES

INTRODUCTION

The increasing use and reliance of foreign countries upon physicians and equipment from the United States presents multiple legal implications. Although international telemedicine creates many challenges, four major problems arise from this international relationship. First, can a licensing scheme be created to utilize the national and international aspects of telemedicine? Second, when problems arise in the context of national and international telemedicine, where can a lawsuit be initiated? Third, when two states or two countries interact via telemedicine, what law should be applied in the event of a conflict? Finally, how do traditional tort principles apply to telemedicine?

A. Regulation and Licensure of Telemedicine

In the United States, the regulation of health care has traditionally been left to the individual states.[135] Historically, the authority to regulate health care is founded on the States' "police power."[136] This power to provide and regulate health services is considered a part of the states' plenary powers, "the power to provide for and protect the public health is a basic, inherent power of the government."[137] The Supreme Court established the premise that a state can exercise "[i]ts unquestioned power to protect the health and safety of its people."[138] Currently, all fifty states regulate the practice of medicine.[139] In order to practice medicine in the United States, physicians must meet certain national and state standards. Even before physicians attend medical school, they must take the Medical College Admissions Test (MCAT), which is administered nationwide and is a factor[140] in being

134. *See South Africa: First Telemedicine Site Launched*, INT'L MARKET INSIGHT REP., Mar. 10, 1999, *available at* 1999 WL 8686522. Some U.S. firms, like Vidar Systems of Virginia, which supplies x-ray film digitizers, already supply products to the South African telemedicine market. *See id.*

135. *See* FRANK P. GRAD, THE PUBLIC HEALTH LAW MANUAL 10 (2d ed. 1990). *See also* U.S. CONST. amend. X. This amendment states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

136. GRAD, *supra* note 135.

137. Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905).

138. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

139. *See* Huie, *supra* note 1.

140. *See* STEFAN BOSWORTH ET AL., MCAT SUPERCOURSE (Prentice Hall 2d ed. 1994).

admitted to medical school.[141] Although these standards vary among medical schools, the testing that medical students undergo is nationally regulated.[142] The National Board of Medical Examiners regulates the tests that medical schools administer.[143] These tests are standard at medical schools nationwide.[144] Upon graduating from medical school and completing all of the requirements, physicians may begin residency training in a specialty.[145] In order to specialize in a certain area of medicine, physicians must undergo a residency program in that area and pass a national test before they are considered Board Certified.[146] A physician who is Board Certified as a specialist in Oncology graduated from a nationally accredited medical school, passed several national standardized tests both in general and within that specialty, and the state has granted the physician a license to practice medicine within that state.[147] To practice medicine in a certain state, a physician must be licensed in that state.[148] The practice of telemedicine does not require a special license, but most states have statutes that regulate telemedicine.[149] Some states stringently regulate telemedicine,[150] but other

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The weight given to this test varies from school to school. *See id.*

141. *See* Telephone Interview with Denise Hawk, Office for Medical Student Academic Affairs, Indiana University School of Medicine (Nov. 2, 1999).

142. *See id.* Indiana University School of Medicine requires that students take and pass an examination after their second year of medical school. *See id.* This is known as STEP I. *See id.* STEP II involves taking and passing an examination after the third year of medical school. *See id.* STEP III involves taking and passing an examination after the residency program. *See id.* This testing schedule is not a national schedule; nevertheless it has been adopted by the Indiana University School of Medicine to ensure that graduating students have met certain national criteria for the practice of medicine. *See id.*

143. *See id.*

144. *See id.* In fact, if a student attending Indiana University School of Medicine was in Michigan and wanted to take the examination at Michigan State College of Medicine, he or she could do so because the test is standard, and it is administered on a computer. *See id.*

145. *See* Interview with Dr. John Greene, D.O., Member of the Admissions Committee at Michigan State College of Osteopathic Medicine (Nov. 12, 1999).

146. *See id.*

147. *See id.*

148. *See* Interview with Denise Hawk, *supra* note 141. The test that physicians are required to take to be licensed in Indiana is called the Indiana State Medical Exam. *See id.*

149. *See e.g.* IND. CODE ANN. § 25-22.5-1-1.1(a)(4) (West 1998). The practice of medicine in Indiana includes "[p]roviding diagnostic or treatment services to a person in Indiana when the diagnostic or treatment services:

(A.) are transmitted through electronic communications; and

(B.) are on a regular, routine, and non-episodic basis or under an oral or written agreement to regularly provide medical services." *Id.*

150. *See e.g.* TEX. HEALTH & SAFETY CODE ANN. § 151.056(a) (West 1996). Texas has mandated that any examination of a patient within the state of Texas, electronic or otherwise, must be performed by a physician licensed in the state of Texas. *See id.* Nevada's licensure laws includes "equipment that transfers information concerning the medical condition of the patient electronically" within the definition of "the practice of medicine". NEV. REV. STAT. ANN. §6804(A). *See also* OKLA. STAT. ANN. tit. 59 § 492(c)(3)(b) (West 1998); GA. CODE ANN.

states permit limited exceptions for licensed, out-of-state physicians.[151] Unfortunately, these exceptions do not permit telemedicine to reach those patients who could benefit the most from this system.[152] States require full licensure in order to practice medicine in another state.[153] Full licensure requires physicians to become fully licensed in every state in which they wish to practice telemedicine. This presents the most serious impediment to a nationwide telemedicine program. Despite the various exceptions to state licensing requirements,[154] the licensing of physicians is a problem that must be resolved before telemedicine programs are implemented nationwide. Several solutions to the problem faced by telemedicine programs regarding state licensure requirements, however, have been proposed.

B. "Telemedicine Only" License

A plan proposed by the Federation of State Medical Boards (FSMB) allows each state to create its own standards for a "telemedicine only" license.[155] While this proposal may help individual states regulate their telemedicine programs, it makes it more difficult to establish a feasible, national program of this type.[156] Fifty different approaches to telemedicine licensing standards will inevitably prevent physicians from consulting via telemedicine with out-of-state physicians. To alleviate this difficulty, states can legislate exceptions for physicians who are licensed in another state. Endorsements allow practitioners currently licensed for telemedicine in one state to practice telemedicine in other states, provided the physician's other credentials are adequate.[157]

If a state adopted the FSMB proposal, physicians wishing to practice

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§ 43-34-31.1 (1999).

151. In addition to the exceptions described in section two [IC 25-22.5-1-2] of this chapter, a nonresident physician who is located outside Indiana does not practice medicine or osteopathy in Indiana by providing a second opinion to a licensee or diagnostic or treatment services to a patient in Indiana following medical care originally provided to the patient while outside of Indiana. IND. CODE ANN. § 25-22.5-1-2.

152. *See supra* Part II. Telemedicine is especially useful in providing access to health care for rural communities. *See id.*

153. *See* Huie, *supra* note 1, at 395.

154. *See* Caryl, *supra* note 68, at 185. The three traditional exceptions to state licensing requirements are as follows: a border state exception where physicians from neighboring states are given implicit permission to see patients in that state; a limited duration or consistency exception for physicians to see patients in a state on a limited basis; and emergency exceptions where physicians may be excused from the state licensing requirement in the event of a medical emergency. *See id.*

155. Meek, *supra* note 22, at 181.

156. *See id.*

157. *See* Alison M. Sulentic, *Crossing Borders: The Licensure of Interstate Telemedicine Practitioners*, 25 J. LEGIS. 1, 22-26 (1999). The other credentials necessary would be the state licensure requirements. *See id.*

telemedicine within that state would have to obtain a special license specifically for telemedicine.[158] This allows the states to regulate the health and safety of its citizens while still allowing for the use of telemedicine. Under the FSMB proposal, the state medical licensing board in the state in which the patient is examined would maintain disciplinary authority over the physician.[159] This approach, however, does not simplify the problems that are posed by the interstate practice of telemedicine. In addition, this approach does not address problems that would be faced by an international telemedicine system.

The American Telemedicine Association (ATA) endorses a position on state licensure that is similar to that proposed by the FSMB. The ATA proposed that states should continue to regulate medical professionals.[160] However, to best utilize telemedicine, states should allow patients and primary care physicians to access the services of physicians (specialists) in other locations, including other states.[161] By allowing each state to determine its own standards for telemedicine, patients in rural communities who need telemedicine the most are not helped.

C. *Registration for the Practice of Telemedicine*

In 1996, California enacted the Telemedicine Development Act.[162] This Act provides an innovative method for promoting telemedicine through interstate cooperation.[163] Ultimately, this statute establishes guidelines for a telemedicine program by enabling a registered telemedicine practitioner to offer services in California without obtaining a California medical license. In order to qualify for this exception, out-of-state practitioners must meet certain criteria. To consult with patients in California via telemedicine, an out-of-state physician must consult with a licensed California physician who is considered the "primary caregiver."[164] Furthermore, out-of-state physicians are prohibited from opening an office in California, appointing a place to meet patients, or even receiving calls from patients they have consulted with in California.[165] This statute provides protection for California citizens and promotes the use of telemedicine. Limiting which physician a California patient can consult arguably gives patients the best care possible. This statute is also beneficial because California physicians are not inundated with patients who in the past did not have access to them,

158. *See* Caryl, *supra* note 68, at 190.
159. *See id.*
160. *See* Poropatich, *supra* note 42.
161. *See id.*
162. 1996 Cal. Legis. Serv. 864, §1 (a)-(c), (i) (West).
163. *See id.*
164. *See* Sulentic, *supra* note 157, at 27.
165. *See id.*

and now have access to them via telemedicine. However, even if every state adopted statutes similar in kind and scope to California's, many problems would still exist. Specifically, telemedicine programs in foreign countries pose additional problems.

D. National Licensure

A national licensure proposal would greatly simplify national and international telemedicine use. By taking a standardized test, a national license would be available to physicians.[166] The examination would cover medical knowledge that would be used by physicians and technological knowledge necessary to effectively use telemedicine.[167] A national licensure system eliminates the guesswork that accompanies the other two proposals and also simplifies the practice of telemedicine.[168] In addition, by allowing the federal government to regulate the practice of telemedicine, populations that need telemedicine the most could receive it. Finally, a national telemedicine system would facilitate the international practice of telemedicine.

A national telemedicine system is already being used by the military.[169] Under military law, a health care professional that is a member of the armed forces and holds a valid license issued by a state may practice his profession anywhere in the United States and its territories.[170] Although a national telemedicine program is certainly feasible, certain problems remain. Each state has the power to regulate the health and safety of its citizens, and telemedicine is considered their exclusive domain. However, the regulation of health care is becoming increasingly federalized. For example, the federal government regulates the provision of medical services to veterans and the military. In this situation, the government serves as a third-party payor[171] through the Medicare and Medicaid programs.[172] In addition, Congress regulates health care financing and, more particularly, the financing of telemedical developments throughout the nation. Since the federal

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166. *See* Meek, *supra* note 22, at 185. *See also supra* Part III.A. A national standardized test given to medical students and physicians seeking to become Board Certified in a specialty. *See NBME® Information, National Board of Medical Examiners®, at* http://www.nbme.org/new.version/home.html (visited Aug. 18, 1999).

167. *See id.*

168. *See* Meek, *supra* note 22.

169. *See* Sulentic, *supra* note 157, at 27. The Veterans Administration, the Bureau of Indian Affairs, and the United States military have all implemented programs that enable licensed physicians to offer services in all jurisdictions without the inconvenience of obtaining local licenses. *See id.*

170. *See id.*

171. A third-party payor is another term for an insurer.

172. *See* Sulentic, *supra* note 157, at 27.

government increasingly regulates the practice of medicine,[173] the implementation of a national telemedicine program would not be very difficult.

A national regulation standard is already implemented to a certain extent in the United States. Prospective medical students take a national examination[174] as part of the admissions process. While in medical school, students must take at least two tests administered by the National Board of Medical Examiners. These tests are nationally standardized. Thus, medical schools must tailor their curriculum to the national standard to allow students to pass these exams. Once a physician decides to specialize, there is another national test to become Board Certified in that specialty. Therefore, establishing a federal license for telemedicine may be the easy to implement because the practice of medicine is already nationally regulated and standardized.

The use of telemedicine on an international scope has increased dramatically within the last five years. Discussions about licensure must begin to take into account this fact. An international telemedicine licensure program would ensure that physicians who consult with other physicians across international borders are trained in both the area of medicine in which they consult and practice in telemedicine. Therefore, an international telemedicine licensure program should be examined to determine its necessity and feasibility.

1. Jurisdiction

One of the major problems inherent in development of telemedicine regulation is the ambiguity surrounding where a "consultation" takes place. A consultation, which establishes a physician-patient relationship, is crucial for medical malpractice concerns. If a physician in Ohio consults with a physician in Switzerland, is the physician in Switzerland subject to service of process in the United States in the event of a misdiagnosis? The Due Process Clause of the U.S. Constitution[175] prohibits unwarranted assertions of personal jurisdiction.[176] For jurisdiction to be asserted upon a foreign party, the foreign party must have minimum contacts with the forum.[177] The minimum contacts test consists of two parts. First, the defendant must have purposefully created contacts with the forum, and those contacts must rise to

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173. *See supra* Part II.B.

174. The Medical College Admissions Test (MCAT) is required by all medical schools in the United States and is used as a factor (which varies school by school) in admitting students to medical school.

175. U.S. CONST. amend. XIV, § 1.

176. *See* Christopher W. Meyer, *World Wide Web Advertising: Personal Jurisdiction Around the Whole Wide World?*, 54 WASH. & LEE L. REV. 1269, 1285 (1997).

177. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

a level such that the defendant could reasonably expect to face lawsuits in the forum based on those contacts.[178] Secondly, the exercise of jurisdiction must be fair and reasonable.[179] At this point in the development, courts are ill equipped to address a question of minimal contacts.

In the context of telemedicine across international borders, the question of whether minimal contacts would be established is unclear. In most cases, a single consultation is too attenuated a contact to establish minimal contacts.[180] However, as physicians enter into consultation contracts with other countries, this relationship becomes less attenuated.[181]

The opposite situation occurs when a physician in a foreign country consults a physician in the United States and malpractice occurs. Will the physician in the United States be compelled to stand trial in that country? If the physician has established a relationship with the patient, it is likely that the consulted physician will be forced to stand trial in the foreign country.

Various proposals have also been suggested for determining jurisdiction in a telemedicine case. The first proposal involves a patient being "electronically transported" to the state or country in which the consulting physician is located.[182] Physicians are deemed to be practicing within their own state or country, and additional licensure is not needed.[183] This legal fiction is impractical because states will not relinquish their interest in protecting their citizens.[184] In addition, if this is adopted in an international setting, a U.S. patient would be deemed to be transported to a foreign country, making the commencement of a lawsuit extremely difficult. In the alternative, a physician can be considered "electronically transported" to the state in which the patient is located. Notwithstanding this, the proposed determination of jurisdiction over a patient is completely arbitrary and would create confusion.

By adopting a national telemedicine system, jurisdictional issues are simplified. A proposed solution to the problem of where a consultation is deemed to take place is the adoption of a national licensure system.[185] Congress is granted the power by the U.S. Constitution to regulate interstate commerce.[186] Assuming that telemedicine develops and substantially affects

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178. *See id.*

179. *See id.*

180. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

181. *See* Huie, *supra* note 1.

182. *See* Caryl, *supra* note 68, at 187.

183. *See id.*

184. *See* Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963). This case expresses the view that the states have an interest in protecting the rights of their citizens from the laws of other states unless the others state has an overriding interest. *See id; see also* Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972) (utilizing the same reasoning as *Babcock*, but involves a foreign province (Ontario) and a U.S. state (New York)).

185. *See* Caryl, *supra* note 68, at 188.

186. *See* U.S. CONST. art. I, § 8, cl. 3. *See also* U.S. v. Lopez, 514 U.S. 549, 559 (1995).

interstate commerce, Congress can regulate this activity.[187] The Center for Telemedicine Law asserts that a federal impetus is "necessary to create a uniform interstate licensure system."[188] A national licensure system allows for federal court jurisdiction in the event of a dispute between citizens of different states. It also allows for the same law and the same procedure to be applied in all fifty states. In the context of an international telemedicine system, federal court jurisdiction simplifies matters for foreign defendants or plaintiffs.

Jurisdictional uncertainty inhibits the development of telemedicine because physicians are fearful of being sued. This question becomes more difficult when physicians must determine if they established a legal duty towards the patient in the form of a physician-patient relationship.

2. *The Physician-Patient Relationship and Medical Malpractice*

For the minimal contacts test to be used to determine if a physician-patient relationship exists, it must first be determined whether a consultation has occurred. Five factors are crucial to determining whether a consultation has formed between a physician and patient.[189] The first factor is whether the consulting physician and patient see each other.[190] In the context of modern developments in telemedicine technologies, a face-to-face consultation is standard.[191]

The second factor is whether the physician examines the patient.[192] This factor is ambiguous because it is unclear exactly what constitutes an examination. Telemedicine allows for face-to-face interaction between the physician and the patient.[193] In addition, robotic manipulations, while not standard in telemedical examinations, are fast becoming an integral part of examinations. Telemedicine technology allows the physician to see and interact with the patient verbally. In addition, a physician's routine examination tasks includes listening to a heart-beat,[194] examining a patient's ear, nose, or mouth,[195] and observing certain tests, such as sonograms.[196]

The third factor is whether a consulting physician ever examines the patient's records.[197] One of the primary uses of telemedicine is electronic

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187. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978).

188. Caryl, *supra* note 68, at 189.

189. *See* Phyllis F. Granade & Jay H. Sander, *Implementing Telemedicine Nationwide: Analyzing the Legal Issues*, 63 DEF. COUNS. J. 67, 68 (1996).

190. *See id.*

191. *See supra* Part II.B.

192. *See* Granade & Sander, *supra* note 189.

193. *See* Huie, *supra* note 1, at 380. *See also* discussion, *supra* Part II.B.

194. *See* Cepelwicz, *supra* note 12, at 8.

195. *See* Poropatich, *supra* note 42.

196. *See id.*

197. *See* Granade & Sander, *supra* note 189.

information transfer.[198] This involves the exchange of information, such as the patient's medical record, which includes vital statistics[199] and test results. This type of information transfer is standard in telemedical consultations.[200] Thus, telemedicine meets the third factor.

The fourth factor that determines whether a physician-patient relationship exists is whether the consulting physician knows the patient's name.[201] With a face-to-face consultation via telemedicine, there is a good chance that the consulting physician knows the patient's name. Because telemedicine is rarely restricted to electronic information transfer, the fourth factor is met by telemedicine.

The fifth and final factor is whether the consultation is either gratuitous or fee-based.[202] Contracts between physicians in the United States and hospitals in foreign countries are becoming common.[203] In addition, Medicare and Medicaid have begun to reimburse telemedicine consultations.[204] This involves a fee for services provided, and therefore the physician is subjected to jurisdiction in a foreign country.

In *Lopez v. Aziz*,[205] the Texas Court of Appeals determined that a physician who was consulted by a treating physician by telephone was not responsible for the patient's demise because a physician-patient relationship had not been formed. This relationship was not formed because "there [was] no evidence that Dr. Aziz contracted with Dr. Martinez [the treating physician], or anyone else, to perform any services for Mrs. Lopez."[206] The court concluded that, because the consulted physician only provided a recommendation and not an informed diagnosis, he had not established a patient-physician relationship and could not be held responsible for the results caused by the decision of the treating physician.[207] Thus, a telephone conversation between physicians is not always enough to establish a relationship.

However, some telephone consultations have been found to create a physician-patient relationship. In *Wheeler v. Yettie Kersting Memorial Hospital*,[208] a telephone consultation in which a physician received

198. *See supra* Part II.A.

199. *See* Dr. Gulick Interview, *supra* note 27. Vital statistics are those taken in an initial examination. These include, but are not limited to, blood pressure, heart rate, pupil dilation, reflexes, and visual acuity. *See id.*

200. *See* Huie, *supra* note 1, at 380.

201. *See* Granade & Sander, *supra* note 189.

202. *See id.*

203. *See* Huie, *supra* note 1, at 384. Dr. Kenet of New York signed a contract to provide services to a dermatology group located in Austria. *See id.*

204. *See* Poropatich, *supra* note 42.

205. Lopez v. Aziz, 852 S.W.2d 303 (Tex. App. 1993).

206. *Id.* at 306.

207. *Id.*

208. Wheeler v. Yettie Kersting Memorial Hospital, 866 S.W.2d 32 (Tex. App. 1994).

information regarding a patient from a nurse at the emergency room established a physician-patient relationship.[209] A physician-patient relationship was determined to exist because the physician used information obtained from the nurse in making the decision to transfer the patient to a hospital over ninety miles away.[210] The patient died en route to the hospital, and the physician was deemed responsible.[211] The fact that the physician who made the decision was the on-call physician also entered into the court's decision.[212]

Because a relationship is most likely formed during a telemedicine consultation, to what standard of care should the physician be held? With the current developments in medicine and communications, including telemedicine, a national standard of care is the most appropriate standard. A national standard of care requires a physician to exercise the degree of care and skill a reasonably competent practitioner in his specialty would use in similar circumstances.[213] As the practice of medicine becomes more and more nationalized, courts are using the national standard of care.[214]

3. *Choice of Law and Conflict of Law Issues*

Even if jurisdiction is determined to exist, it is unclear which law should be applied. This is especially true where the laws are in conflict. The choice of law is especially significant in the context of international telemedicine. Modern conflict of law rules for torts in the United States have used the "center of gravity" or "grouping of contacts" doctrine.[215] In *Babcock v. Jackson*,[216] the court stated that this doctrine gives "controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."[217] Moreover, the following four key contacts are considered in determining the law with the most significant relationship: the domicile, the residence, the nationality, and the place where the relationship between the parties is centered.[218] However, the choice of law rule for torts in the United States is diversified throughout the states.

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209. *See id.* at 39, 40.

210. *See id.*

211. *See id.*

212. *See id.*

213. *See* Robbins v. Footer, 553 F.2d 123 (D.C. Cir. 1977).

214. *See* Caryl, *supra* note 68, at 198 for a discussion of the cases involving the national standard of care.

215. Babcock v. Jackson, 191 N.E.2d 279, 282 (N.Y. 1963).

216. *Id.*

217. *Id.* at 283.

218. *See* J.P. McEvoy, *Choice of Law in Torts: The New Rule*, 44 U.N.B. L.J. 211, 215 (1995).

There is not one definite rule in the United States.[219] The U.S. approach is confusing when the medical malpractice occurs in the United States. This confusion is compounded when the patient or consulting physician is located in another country. It is useful to examine the choice of law rules of various countries to get a better understanding of how international telemedicine malpractice cases might be handled.

4. *Lex Loci Delicti*

The lex loci delicti approach applies the law of the place in which the tort occurred.[220] Internationally the trend is toward adopting the lex loci delicti approach.[221] Australia, for example, has adopted the lex loci delicti as the general choice of law rule for torts.[222] In the context of telemedicine, the place of consultation would have to be determined in order to apply Australia's choice of law rule. If a physician in the United States was treating a patient in Australia via telemedicine, conflict would ensue regarding what law should be applied. Switzerland has also adopted the lex loci delicti as the choice of law rule for torts.[223] Furthermore, Great Britain is in the process of adopting the lex loci delecti rule.[224] In Great Britain the lex loci delicti rule would be subject to displacement if the law of another country was substantially more appropriate "in light of the significance of the factors connecting the tort with that country."[225]

5. *Lex Fori Approach*

Canada, on the other hand, uses a lex fori approach to the choice of law for torts.[226] The lex fori approach adopts the law of the jurisdiction where an action is brought.[227] However, scholars and lawmakers in Canada criticize this approach.[228] A lex loci delicti approach has been approved for

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219. *See id.* at 216. Thirteen states follow the rule of lex delicti, twenty-two states follow the Restatement of Law-Conflict of Law (2d) approach, one state uses the "center of gravity" or "significant contacts" approach, two states use an interest analysis approach, five states use a policy considerations approach, two states use the lex fori approach, and five states use a combination of various approaches. *See id.*

220. *See id.* at 211.

221. *See id.* at 226.

222. *See id.* at 225.

223. *See id.* at 226. The Swiss Statute on Private International Law, enacted in 1989, provides for the lex loci delicti to be used in a tort case. *See id.*

224. *See id.*

225. *Id.*

226. *See id.* at 221. In Phillips v. Eyre, LR 6OB 1, the court adopted a lex fori approach. *See id. See generally* Daniel P. Schafer, *Canada's Approach to Jurisdiction Over Cybertorts: Braintech v. Kostiuk*, 23 FORDHAM INT'L L.J. 1186 (2000).

227. *See* GILBERT LAW SUMMARIES DICTIONARY 186 (1st ed. 1997).

228. *See* McEvoy, *supra* note 218, at 221-22.

inter-province torts with an exception for international torts.[229] International torts would be viewed in light of the comparative interests of the countries involved.[230]

IV. CONCLUSION & PROPOSAL

The United States should implement a national telemedicine system. With a national telemedicine system organized by the National Institute of Health (NIH), physicians trained and certified in telemedicine would be registered with the federal government.[231] This federal license would be made available to physicians much as their traditional licensure requirements are made available. Classes could be offered at medical school and residency programs in specialties that support telemedical applications and could offer further training in telemedicine as it applies to a particular specialty. Furthermore, Continuing Medical Education (CME) classes, which are a requirement for physicians,[232] can be used to educate physicians on the current technologies available. Eventually telemedicine could become as much a part of the medical school curriculum as gross anatomy and physiology.

A national licensure program of this type would be easy to implement because the licensure of medicine is becoming increasingly federalized. Furthermore, individual states would not necessarily have to stop regulating and licensing health care providers who practice in the state. By allowing only the federal government to regulate telemedicine, a greater number of people could be helped, and patients within the state would still have their health care closely monitored. States could continue regulating the practice of medicine by practitioners physically within state boundaries.[233]

The implementation of a national telemedicine system is also cost effective. Medicare currently offers reimbursement "for several different types of remote services including teleradiology" and various other types of telemedicine.[234] This allows Health Maintenance Organizations (HMOs) to invest in technologies that promote telemedicine because they know that they will be reimbursed. Since HMO enrollment has nearly doubled between

229. *See id.* at 224.

230. *See id.*

231. By a national testing procedure similar to the one already in place for medical students and specialists.

232. *See* Interview with Dr. Gulick, *supra* note 27.

233. No opinion is offered as to whether a physician consulting via telemedicine is "physically transmitted" to the state in which he is consulting with the patient.

234. Poropatich, *supra* note 42.

1986 and 1994,[235] telemedicine would allow access to quality health care for millions of HMO subscribers.

An international telemedicine program is essential for the improvement of world health. A national telemedicine system in the United States would be beneficial to an international telemedicine program. By simplifying the telemedicine program in the United States, an international telemedicine program can be more easily implemented. The World Health Organization (WHO) is in the position to regulate and monitor all international telemedicine programs. By uniting all international telemedicine programs, the best health care in the world would be made available by computer to areas of the world that desperately need better access to quality health care.

There are several reasons why the United States should initiate the development of a global telemedicine program. The United States, especially the United States military, is the world leader in developing telemedicine technology. By implementing technologies developed in the United States on an international scale, the United States can be a world-leader in the provision of health care. In addition, exporting U.S. medical expertise can potentially fund the U.S. domestic health care system.[236]

In terms of telemedicine across international borders, precautions need to be taken so that conflicts can be resolved. When engaging in an international telemedical consultation, the physicians or hospitals should determine ahead of time what law will be applied in the event of malpractice or incident. Another alternative is for the WHO to act as the ultimate arbiter of international telemedical conflicts. The WHO can also control licensure and regulation of international telemedicine programs. By licensing and regulating international telemedicine, the WHO can ensure that telemedicine is being practiced safely and effectively. An international telemedicine license would be available to physicians who wished to engage in the practice of telemedicine across international borders. Furthermore, conflict of law issues and jurisdictional problems could be resolved by having countries interested in joining the global telemedicine program agree to resolve problems in accord with standards developed by the WHO. Medical malpractice issues can also be resolved in this manner. By establishing an international telemedicine program, millions of people who are lacking sufficient health care can be helped by experts all over the world. The time

235. Alan Hillman & Kimberly Ripley, *Physician Financial Incentives in Managed Care: Their Impact on Healthcare for the Elderly*, THE AMERICAN JOURNAL OF MANAGED CARE, Vol. 1, No. 2 (1996).

236. *See* Huie, *supra* note 1.

for the development of a global hospital is truly at hand, and the United States should be the one to develop and implement it.

*P. Greg Gulick**

* J.D./M.H.A. with Concentration in Health Law, Candidate, 2001, Indiana University School of Law - Indianapolis; B.S., 1998, Michigan State University. I would like to thank my wife, Carola, and my family for their support. I would also like to thank the editorial staff of the Indiana International & Comparative Law Review and my editors for their tireless efforts.

SEX DISCRIMINATION IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION: THE SEX DISCRIMINATION ORDINANCE, THE EQUAL OPPORTUNITIES COMMISSION, AND A PROPOSAL FOR CHANGE

I. INTRODUCTION

In China, women have historically been considered property and could be sold or divorced for various reasons, including poverty, failure to bear male children, or failure to obey elder members of the family.[1] Therefore, the citizens of Hong Kong, especially the women, took seriously Hong Kong's reversion to Chinese control. In an attempt to eliminate the potential for Chinese abuse, women's groups joined together and lobbied the pre-reversion Hong Kong government for reform.

For the most part, the women's groups were successful in initiating reform. As a result of their determination, the Hong Kong legislature passed the Bill of Rights Ordinance and the Sex Discrimination Ordinance. Despite setbacks, the Ordinances have proved useful in the battle against sex discrimination. The Hong Kong courts have favorably interpreted the Ordinances and Hong Kong women currently enjoy an improving lifestyle. Nevertheless, the Sex Discrimination Ordinance needs improvement and the establishment of a women's commission is necessary in order to protect the interests of Hong Kong women.

II. PRE-REVERSION BACKGROUND OF HONG KONG

The Hong Kong Special Administrative Region (HKSAR) consists of Hong Kong Island, the Kowloon Peninsula, and the New Territories. Hong Kong is located on the southeastern coast of China. It consists of 236 islands and part of the Chinese mainland (the "New Territories").[2]

Great Britain obtained Hong Kong in three stages.[3] The first stage, the acquisition of Hong Kong Island,[4] occurred as a result of a trade dispute over opium.[5] The hostilities were aptly labeled the First Opium War. As a result of the hostilities, British merchants and their families were expelled from

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1. *See* Veronica Pearson, *The Past in Another Country: Hong Kong Women in Transition*, 547 ANNALS AM. ACAD. POL. & SOC. SCI. 91, 92 (1996). Some of the reasons women could be divorced or sold include contracting a disease and "being too garrulous." *Id.* Female children could also be sold as indentured servants. *See id.*

2. Peter Lesser, *The Legal System of Hong Kong*, *in* MODERN LEGAL SYSTEMS CYCLOPEDIA: PACIFIC BASIN § 2.40.3 (Redden ed. 1989).

3. *See id.* § 2.40.8.

4. *See id.*

5. *See id.*

several important Chinese trading ports.[6] Therefore, the merchants and their families fled to the virtually deserted offshore island of Hong Kong.[7] The Chinese, in an effort to push military activity away from the mainland, offered possession of Hong Kong Island to the British.[8] Hong Kong Island was ceded "in perpetuity"[9] to Great Britain in 1841.[10] The 1842 Treaty of Nanking confirmed the agreement.[11] The British envisioned Hong Kong Island as a trading post and diplomatic headquarters for negotiations with China because there was not an extensive indigenous population, and the island was not expected to attract enough people to form a significant European community.[12]

During the second stage, due to increasing hostilities between China and Great Britain, the British obtained the Kowloon Peninsula in 1860 pursuant to the Convention of Peking.[13] British troops occupied the Peninsula in 1856 in an effort to strengthen and safeguard the British military presence on Hong Kong Island.[14]

The third and final acquisition, in 1898, was due to Sino-British negotiations. As a result of the negotiations, the New Territories were leased to Great Britain for a period of ninety-nine years.[15] The British viewed the New Territories as a buffer zone around their existing possessions in South China.[16] However, unlike Hong Kong Island and the Kowloon Peninsula, the New Territories contained a significant indigenous population.[17]

Nevertheless, the Chinese considered the various agreements ceding Hong Kong to the United Kingdom invalid.[18] The Chinese view these agreements as unfair because they were a result of unequal bargaining power and were essentially forced upon them by a superior power.[19] Regardless, the British control of Hong Kong continued without any major incidents throughout the early 20th Century.[20] While under British control, many Mainland Chinese citizens fled to Hong Kong because of the political instability in China.[21] However, during World War II Japanese troops

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6. *See id.*
7. *See id.*
8. *See id.*
9. Webster's Dictionary defines perpetuity as an "endless duration; something of which there will be no end." WEBSTER'S DICTIONARY 166 (1992).
10. Lesser, *supra* note 2, § 2.40.8.
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.* § 2.40.9.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*

occupied Hong Kong.[22] As a result, many Hong Kong citizens (formerly Chinese citizens) fled back to the mainland during World War II to escape the Japanese occupation of Hong Kong Island.[23] Despite the Japanese occupation, Hong Kong made an impressive economic recovery after World War II with the aid of British grants.[24]

In the past thirty-five years, Hong Kong has experienced tremendous social and economic growth. Hong Kong has established itself as an international trading post and has incorporated expansive banking, finance, and commercial ventures.[25] Hong Kong functions as a laissez-faire[26] economic system and is export-oriented.[27] The United States is Hong Kong's chief economic importer, with the United Kingdom, Germany, and Japan slightly behind.[28] Moreover, because of its proximity and large population, China represents the most expansive market for Hong Kong exports.[29]

The anticipation of the reversion to Chinese control in 1997 created tension and apprehension in Hong Kong. However, as discussed below, Hong Kong currently flourishes economically under the Chinese model of "one country, two systems"[30]; nevertheless, there is room for improvement in the area of human rights - especially women's rights.[31]

A. Traditional Treatment of Hong Kong Women

Chinese culture and custom have heavily influenced the traditional treatment of Hong Kong women. The Chinese viewed women as "goods on which one loses" since women were destined at birth to be married into another family that would benefit from their labor and reproductive capacities.[32] As a result, Hong Kong women faced deeply rooted societal discrimination - discrimination that would prove hard to overcome.

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22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. Laissez-faire means "[a] letting alone, non-interference." WEBSTER'S DICTIONARY 129 (1992). In other words, the government lets the economy run itself with little or no government intervention.

27. The Hong Kong economic system is export-oriented because Hong Kong has a small population, and production greatly outweighs the demand by the Hong Kong population. Therefore, Hong Kong exports its goods to larger countries whose population has an increased demand for their products. *See* Lesser, *supra* note 2, § 2.40.9.

28. *See id.* § 2.40.11.

29. *See id.*

30. China's approach to the reversion was of creating "one country" with "two systems." Hong Kong would no longer be a separate country; however, it would maintain its capitalist economic system. *See generally* MICHAEL C. DAVIS, CONSTITUTIONAL CONFRONTATION IN HONG KONG (1990).

31. *See generally* Pearson, *supra* note 1.

32. *Id.* at 92.

B. Prohibition of Female Inheritance of Land in the New Territories

The prohibition of female inheritance of New Territories land was deeply rooted - the prohibition began years before Great Britain obtained the territory. Britain leased the New Territories from China for ninety-nine years beginning in 1898.[33] Since the New Territories would eventually revert to Chinese control, unlike Hong Kong Island and Kowloon Peninsula which were ceded to Britain in perpetuity, the British felt obligated to preserve the native customs of the people in the New Territories. Hence, Section 13 of the New Territories Ordinance states that "the court shall have the power to recognize and enforce any Chinese custom or customary right . . . ."[34]

Chinese customary law required land to be passed down the male line, effectively denying females the right to inherit land.[35] Section 13 of the New Territories Ordinance specifically requires the application of Chinese customary law in any proceeding dealing with New Territories land.[36] Therefore, women in the New Territories have been denied the right to inherit land for almost a century.[37]

The "Small House Policy"

The small house policy, a social welfare policy, was created in 1972 to encourage rural New Territories residents to remedy the housing shortage by moving into the urban developments - the "New Towns."[38] The policy allows an indigenous villager to apply for a free building license to erect a house on his own land or to be granted a building site on government owned land for a premium.[39] However, the policy defines an indigenous villager as a male, at least eighteen years old, who is a descendent of an 1898 male resident from a recognized village.[40]

The Hong Kong Government continues to support this policy despite its invidious discrimination against women and non-villagers. Justifying its policy, the government reasons that the small house policy "reflects the

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33. *See* Lesser, *supra* note 2, § 2.40.8.

34. Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335 (1996).

35. A female could not inherit land from her parents or spouse even if it was specifically left to her in a last will and testament. The land would go to her surviving brother(s) or son(s). *See id.* at 342.

36. *See id.* at 341.

37. After many years of lobbying by women's groups in Hong Kong, the ban on female inheritance of land in the New Territories was repealed in June 1994 (discussed in Part III below). *See id.* at 339. *See also* Pearson, *supra* note 1.

38. Petersen, *supra* note 34, at 343.

39. *See id.*

40. *See id.*

traditions and customs of the New Territories indigenous communities, where heads of households have traditionally been almost exclusively male and female villagers have moved away from their villages upon marriage."[41]

C. *Discrimination in Rural Elections and Consultative Bodies*

In the New Territories, women have traditionally been discriminated against in the electoral process. In 1993, one-third of approximately 690 villages in the New Territories precluded women from running for election as a Village Representative.[42] Many of the villages also excluded women from voting either expressly or by permitting only the head of the household to vote - always defined as a male.[43] This invidious discrimination has resulted in only one woman serving in the capacity of a Village Representative and created the precipitous effect of discrimination since the next level of officers are selected from the ranks of the Village Representatives.[44]

The male-dominated advisory body on New Territories matters, the Heung Yee Kuk, wields enormous power and has steadfastly opposed reforms to address sex discrimination.[45] This might explain why, in 1993, only 4 of the 143 Heung Yee Kuk counselors were females.[46]

D. *Miscellaneous Laws that Encourage Sex Discrimination*

According to the Marriage Ordinance, only a father may consent to the marriage of a child between the ages of sixteen and twenty-one.[47] Several "protective" laws restricting women's employment encourage employers to discriminate against women. For example, a sixteen-year-old man may work in an establishment that serves liquor, but a woman may not do so until she is eighteen.[48] Another example of a "protective" law is the prohibition against

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41. *Id.* at 343-44 (citing Hong Kong Government, The New Territories Small House Policy, Legco Paper No. 729/93-94, app. I, para. 11). The government is heavily influenced by the Hueng Yee Kuk the male dominated advisory body on New Territories affairs. The power of this male dominated body might explain why preserving the traditions and customs of the indigenous villagers is so important to the government. The Hueng Yee Kuk is notorious for its opposition to gender equality in the New Territories. *See id.* at 344.

42. *Id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *Id.* This trend continues although Section 35 of the Sex Discrimination Ordinance effectively outlaws sex discrimination in voter eligibility and election or appointment to government advisory bodies (discussed in Part III below). Sex Discrimination Ordinance, Cap. 480 § 35 (1997).

47. If the father is dead or insane, the mother may consent. *See id.* at 345. (citing Marriage Ordinance, Cap. 181 Laws of Hong Kong § 14).

48. *See* Petersen, *supra* note 34, at 345 (citing Commodities Regulations, Cap. 59 Laws

"women . . . work[ing] underground, in any tunneling operation, or in any dangerous trade."[49] Although the laws appear to protect women, in reality they pigeonhole women into job classifications.

E. Discrimination in Employment

Only nineteen percent of the administrative and managerial workers in Hong Kong are women[50] compared to the more than two-thirds of clerical jobs performed by women.[51] In the past, newspapers published job advertisements for "male engineers," "male accounts supervisors," and "female clerks" in an effort to make clear the hierarchy that exists at a company.[52] For example, managerial positions are often reserved for men.[53] Additionally, teaching, a profession that traditionally employs a majority of women, lacks a significant female presence in post-secondary education.[54] Moreover, women are frequently paid less than men for performing the same or similar work.[55]

III. TRANSITIONAL PERIOD

A. Joint Declaration Between China and the United Kingdom

Against the background of rampant sex discrimination and after two years of negotiations, China and the United Kingdom signed the Joint

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of Hong Kong §§ 4,5).

49. *Id.*

50. *The World's Women 1995: Trends and Statistics*, United Nations Fourth Conference on Women (1995).

51. Harriet Samuels, *Women and the Law in Hong Kong: A Feminist Analysis*, *in* HONG KONG, CHINA AND 1997 ESSAYS IN LEGAL THEORY 80 (1993).

52. Petersen, *supra* note 34, at 347.

53. "In almost any work environment, women are less preferred as workers because it is assumed that they will take maternity leave, will stay away from work when their child is sick, and will be able to devote less energy to their labors because of their household responsibilities." *Id.*

54. In 1987, 99% of kindergarten teachers, 75% of primary-school teachers, and 28% of teachers at the post-secondary level were female. Samuels, *supra* note 51, at 80 (quoting Grace C. L. Mak, *The Schooling of Girls in Hong Kong Progress and Contradictions*, *in* EDUCATION AND SOCIETY IN HONG KONG: TOWARD ONE COUNTRY AND TWO SYSTEMS 167-80 (Gerard A. Postiglione ed. 1992)).

55. *See* Samuels, *supra* note 51, at 81 (citing Carole J. Petersen, Failure of the Hong Kong Government to Enact Legislation Prohibiting Discrimination in Employment, in *Report by the Hong Kong Council of Women on the Third Periodic Report by Hong Kong Under Article 40 of the International Covenant on Civil and Political Rights* March 1991 (unpublished)). *See also* Anne Cheung, *Pay Equity for Hong Kong: A Preliminary Exploration*, 25 HONG KONG L.J. 383, 384 (1995) (stating that "Wage disparity is one quantifiable measure of sexual inequality. It is also one of the more blatant forms of sexual discrimination in Hong Kong. . . [I]n March 1994, the nominal overall monthly salary [was] $7,596 for women compared with $9,172 for men.").

Declaration regarding the future status of Hong Kong on September 24, 1984.[56] The Joint Declaration insured that the reversion to Chinese control on July 1, 1997 would not undermine Hong Kong's success as a major trading, manufacturing, and industrial partner.[57] The Joint Declaration sought to have Hong Kong continue functioning as it did under British law with a liberal, capitalist, common law framework – only under Chinese control. Thus, the phrase "one country, two systems" accurately depicted the new regime. China and Hong Kong would become one country; however, Hong Kong would continue its traditions of free trade, a high degree of autonomy and self-government, and use of the common law legal system.[58]

B. The Basic Law

The Basic Law ensured the implementation of the basic policies contained in the Joint Declaration. A Basic Law Drafting Committee was established and consisted of members from Mainland China and Hong Kong.[59] The United Kingdom was not involved. The most contentious issues facing the committee were those not clearly spelled out in the Joint Declaration.[60] The National People's Congress adopted the Basic Law on April 4, 1990, but the law did not come into effect until July 1, 1997.[61] Ultimately, the Basic Law incorporated some of the positive features of the Joint Declaration but failed to strengthen the democratic nature of Hong Kong institutions and limited the autonomy Hong Kong had hoped to express.[62] Several areas of the Basic Law arguably conflict with the Joint Declaration.[63]

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56. *See Generally* YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER (1999) (discussing the series of negotiations between China and the United Kingdom).

57. *See generally* Davis, *supra* note 30.

58. *See id.* at 5-6.

59. *See id.* at 6.

60. These issues include: the scope of the application of the Chinese Constitution, residual powers, provisions for the interpretation of the Basic Law, and the political system. *See* Ghai, *supra* note 56, at 61-63.

61. *Id.*

62. "The Basic Law, like the curate's egg, was good in parts. China showed some sympathy to Hong Kong's tradition of law and social organization. It made several concessions to the Hong Kong position." *Id.* at 64.

63. Areas of incompatibility include: definitions of the words "elections" and "accountability" (both have differing meanings in Hong Kong, China, and the rest of the world); scheme for the interpretation of the Basic Law; restriction on the powers of the HKSAR courts; division of powers; additional qualifications for certain officers that did not appear in the Joint Declaration; reduction of the rights and freedoms of HKSAR residents; and Chinese mainland intervention in Hong Kong affairs. *See id.* at 67-69. *See also* Davis, *supra* note 30.

C. *Passage of the Hong Kong Bill of Rights*

The Basic Law protects individual rights in two limited ways. First, it lists a specific number of rights enjoyed by Hong Kong citizens.[64] Second, it expressly incorporates the provisions of the United Nations International Covenant on Economic, Social, and Cultural Rights[65] and the International Covenant on Civil and Political Rights.[66] However, in light of China's record on human rights, especially women's[67] rights,[68] and the 1989 Tiananmen

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64. Rights available under the Basic Law include: equality before the law; freedom of speech, press, and publication; freedom of association; freedom of assembly; freedom to join trade unions and strike; freedom and liberty of the person; prohibition of torture; prohibition of unlawful or arbitrary deprivation of life; privacy of person and home; freedom of movement; freedom of conscience and religious belief and practice; freedom of occupation; right to engage in academic research, literacy and artistic creation and other cultural activities; freedom of marriage and the right to raise a family; protection of the law and legal process; presumption of innocence; right to a speedy and fair trial; common law procedural safeguards in civil and criminal trials; right to own and enjoy property and protection against its confiscation without compensation; and the right to social welfare. *See* The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, arts. 27-38. *See also* GEORGE EDWARDS, HONG KONG'S BILL OF RIGHTS: TWO YEARS BEFORE 1997 (1995).

65. International Covenant on Economic, Social, and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.

66. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 (declaring that "[a]ll peoples have the right of self-determination" and, consequently, peoples have the right to "freely pursue their economic, social, and cultural development.").

67. "A [Chinese] woman who attempts to buck tradition and challenge the role assigned her by society usually finds herself at best misunderstood and, at worst, ostracized by her community." Vivien Ng, *Sexuality, Gender and Social Scripting in Japan and China*, 4 YALE J.L. & FEMINISM 65, 71 (1991).

68. In China, women were traditionally treated as inferior to men. This tradition is exemplified in the following ways:

> Possessing no political rights, women were completely excluded from social and political life. Economically dependent [on men] women were robbed of property and inheritance rights and possessed no independent form of income. Having no social status, women were forced to obey their fathers before marriage, their husbands after marriage and their sons if they became widowed. Women had no personal dignity or independent status, and were deprived of the right to receive education and take part in social activities. They enjoyed no freedom of marriage but had to obey the dictates of their parents and heed the words of matchmakers, and were not allowed to remarry if their spouse died. [Women] were subjected to physical and mental torture, being harassed by systems of polygamy and prostitution, the overwhelming majority of women were forced to bind their feet at childhood.

The Situation of Chinese Women, *available at* http://www.chinese-embassy.org.uk/Hot-Issues/Situation-of-Chinese/wpwomen.htm (last visited Nov. 8, 2000). In modern China, Chinese scholars have acknowledged that "development has led to violence against women," that "reform has made females second-class citizens in jobs, education and career promotions," and that "sixty percent of the population before the poverty line is composed of women and children." Ann D. Jordan, *Human Rights, Violence Against Women, and Economic Development (The People's Republic of China Experience)*, 5 COLUM. J. GENDER & L. 216

Square incident,[69] Hong Kong citizens remained unconvinced that the Basic Law adequately protected their individual rights. In response, the Hong Kong Government enacted the Bill of Rights Ordinance in June 1991. The Ordinance specifies many additional rights that Hong Kong residents enjoy in order to compensate for the inadequacies of the Basic Law's enumeration of individual rights.[70]

Nevertheless, the Bill of Rights Ordinance proved inadequate in eliminating gender discrimination in both the private and public sectors. First, the Ordinance binds only the government and public authorities.[71] Therefore, the Ordinance cannot be applied to a dispute between private parties even if one party alleges that a violation of the Bill of Rights Ordinance has occurred as a result of another party's actions.[72] Second, the

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(1996); *Cf. The Situation of Chinese Women, available at* http://www.chinese-embassy.org.uk/Hot-Issues/Situation-of-Chinese/wpwomen.htm (last visited Nov. 8, 2000)(finding that "China has made active endeavors in promoting equality between men and women and safeguarding the legitimate rights and interests of women."). For more information on China's human rights record see Ann D. Jordan, *Human Rights, Violence Against Women, and Economic Development (The People's Republic of China Experience)*, 5 COLUM. J. GENDER & L. 216 (1996).

69. "Public concern reached its height in the summer of 1989, immediately after the massacre in Beijing's Tiananmen Square. In Hong Kong, more than one million people (almost 20% of the population) marched in the streets in condemnation of the massacre. Not surprisingly, public confidence in the future of Hong Kong after 1997 'sank to an all-time low.'" Petersen, *supra* note 34, at 349-50.

70. These rights are: entitlement to the rights of the Ordinance without discrimination such as those based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; right to life; prohibition of torture, inhumane treatment, slavery or imprisonment for inability to fulfill a contractual obligation; right to liberty and security of the person; right of persons deprived of their liberty to be treated with humanity and respect; right to liberty of movement; right to a fair hearing before expulsion from Hong Kong; equality before the courts and the right to a fair and public hearing; prohibition of retrospective criminal offenses or penalties; right to recognition as a person before the law; protection of privacy, family, home, correspondence, honor, and reputation; freedom of thought, conscience, religion, association, opinion, and expression; right of peaceful assembly; right to marry and found a family, prohibition of forced marriages, and equal rights of spouses in marriage; right of every child to the protection of law as justified by his or her status, to registration after birth, and to a name; right of every permanent resident to take part in the conduct of public affairs, directly or through chosen representatives; right to vote and contest elections; right to have equal access to public service; right of minority communities to enjoy their own culture, profess their religion, and use their own language; and equality before and equal protection of the law, so that there may be no discrimination on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *See* Bill of Rights Ordinance, Cap. 383 (1991). *See also* EDWARDS, *supra* note 64.

71. *See* Bill of Rights Ordinance, Cap. 383 § 7 (1991).

72. *See* Petersen, *supra* note 34, at 357-58; *see also Submission by Hong Kong Human Rights Monitor in Respect of the Hong Kong Special Administrative Region's Initial Report on the Hong Kong Special Administrative Region under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, available at* http://www.hkhrm.org.hk/english/reports/cedaw.html (last visited Nov. 8, 2000).

cost of litigation, the difficulty in finding legal aid, the ethical limitations placed on lawyers in Hong Kong, and the nature of litigation as a whole make it virtually impossible for women to challenge sexually discriminatory laws.[73] Finally, the Hong Kong Government refused to comply with the Bill of Rights Ordinance by failing to repel or change discriminatory policies such as the rule against female inheritance, the small house policy, and the "protective" regulations.[74]

D. Women's Movement

Frustrated with the Hong Kong Government's inaction regarding sex discrimination, many Hong Kong women united and began lobbying the Legislative Council for reform. Disappointed in the Bill of Rights Ordinance's lack of protection for women, women's groups criticized the Government and accused it of "reneging on its promise."[75] In response, the Government formed an "Inter-departmental Working Group on Sex Discrimination."[76] The group was to determine whether sex discrimination was a problem in Hong Kong and, if so, to recommend governmental measures to remedy the problem.[77] The Working Group concluded, "the problem [of sex discrimination] is not serious in Hong Kong."[78] Noting that sex discrimination legislation would likely have an adverse impact on the Hong Kong economy, the Working Group concluded that sex discrimination legislation did not need to be introduced.[79] Although the findings of the Working Group greatly disappointed women's organizations, the debate and attention increased the public's awareness of women's rights and the lack thereof in Hong Kong.[80]

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73. Legal fees in Hong Kong are among the highest in the world, lawyers are prohibited from working on a contingency fee basis, and if a Plaintiff brings a legal action and loses she is likely to be held liable for the defendant's legal fees as well as her own. *See* Petersen, *supra* note 34, at 358.

74. *Id.* at 359.

75. *Id.* The Government had made promises that the Ordinance would take action against discrimination. However, according to women's groups, the government did not fulfill the promise. *See id.*

76. *Id.*

77. *See id.*

78. *Id.* "The [Working Group's] Findings consisted of six double-spaced pages, with no footnotes or specific sources cited other than the 1981 and 1991 Population Censuses. The Working Group referred only to unnamed 'surveys,' which it claimed showed that only a small proportion of Hong Kong women perceive themselves to be victims of discrimination." *Id.* at 360.

79. *See id.* at 360-61.

80. *See id.* at 361.

E. *Repeal of the Ban on Female Inheritance of Land in the New Territories*

Under political pressure, the Hong Kong Legislative Council repealed the prohibition of female inheritance of New Territories land in 1994. Less than three months after the government issued the Green Paper,[81] the government attempted to apply a "quick fix" to remedy the discrimination problems in the New Territories by proposing the New Territories Land (Exemption) Bill.[82] The Bill continued to prohibit female inheritance of rural New Territories land, and declared, retroactively, that the prohibition on female inheritance of urban land was abolished.[83] However, women's organizations "condemned the proposal as a deliberate effort to isolate rural women and fossilize forever the discrimination against them."[84]

In response to the criticism of the government's bill, Christine Loh, an appointed member of the Legislative Council, proposed an amendment to the bill that would allow any landowner to leave land to either male or female heirs by executing a will.[85] Not surprisingly, Loh's amendment faced sharp criticism from the Heung Yee Kuk and conservatives in the New Territories who favored maintaining the status quo.[86] Nevertheless, public opinion polls indicated that the majority of Hong Kong citizens supported the Loh amendment.[87] Ultimately, the New Territories Land (Exemption) Ordinance

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81. A Green Paper is a formal consultative document used to inform the public about areas of special concern or proposed legislation. *See id.* Again, the women's movement was unhappy with the Government's findings in the Green Paper. The Green Paper devoted little time to the most blatant problems of discrimination in the New Territories – the ban of female inheritance of land and the "small house" policy. In addition, the Green Paper refused to acknowledge that sex discrimination was a major factor in the disparity between salaries of women and men. "Fortunately, the public read the Green Paper with a skeptical eye. Despite the government's effort to understate the extent of discrimination, the submissions made in response to the Green Paper indicated significant public support for action against sex discrimination . . . ." *Id.* at 366.

82. *Id.*

83. *See id.*

84. *Id.* at 370.

85. *See id.*

86. Petersen states,

> The United Democrats pledged to endorse Loh's amendment and one member of the party was assaulted by protesters on his way to a Legislative Council session. Women who demonstrated in favor of the amendment also claimed that they were assaulted, and some women demonstrators reported that they were afraid to return to their villages in the New Territories.

Id. at 370-71.

87. *See id.* at 371. (citing *Loh's Popularity Soars Over Stance on Inheritance Laws*, SOUTH CHINA MORNING POST (H.K.), Apr. 2, 1994 (reporting that "[a] poll taken by Hong Kong polling and business research showed that 64% of respondents supported the amendment; 24% were unsure and 12% opposed it.")).

passed in June 1994, with Loh's amendment.[88]

F. *Adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*

Women's organizations had been advocating the extension of the CEDAW[89] to Hong Kong for years.[90] Finally, in November, 1991, Emily Lau, a member of the Legislative Council and a strong advocate for women's rights, helped form a legislative group to study women's issues. In December 1992, Lau introduced a proposal[91] encouraging the government to extend the CEDAW to Hong Kong. The Administration "cautioned that Hong Kong should not make a hasty decision on [the] CEDAW and that 'the administration doubts the wisdom of extending [the] CEDAW to Hong Kong forthwith.'"[92] However, the Legislative Council strongly favored the

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88. *See id.*

89. *See id.* The Convention on the Elimination of All Forms of Discrimination stated,

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation . . . ; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure . . . the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; and (g) To repeal all national penal provisions which constitute discrimination against women.

The Convention on the Elimination of All Forms Of Discrimination Against Women, 1979, pt.1, art. 2.

90. The United Kingdom ratified the CEDAW in 1986, but it was not extended to Hong Kong pursuant to the Hong Kong Government's request. *See* Petersen, *supra* note 34, at 364. "[T]he Hong Kong government stated that it needed to study the implications of CEDAW before deciding whether, and on what terms, CEDAW should be extended to Hong Kong. In the late 1980's, women's organizations pressed the government to make a decision on CEDAW, but the government staunchly refused to do so." *Id.*

91. The proposal stated: "this Council calls upon the Administration to support the extension to Hong Kong of the United Nations Convention of the Elimination of all Forms of Discrimination Against Women and to request the British Government to take the necessary action to so extend the Convention forthwith." *Id.* at 363. (citing *Hong Kong Legislative Council Official Record of Proceedings*, Dec.16, 1992, at 1451).

92. *Id.* at 365. The administration opposed the adoption of CEDAW because the Convention expressly required the government to repeal existing discriminatory policies and statutes. The adoption would require a complete overhaul of the "small house" policy and many

proposal and passed it unanimously with suggestions for the actual implementation of the CEDAW.[93] After a four-year delay, the CEDAW was formally extended to Hong Kong in 1996.

G. *Passage of the Sex Discrimination Ordinance*

The Government introduced the Sex Discrimination Bill in October, 1994, in response to and in fear of a much more comprehensive bill supported by Legislative Council member Anna Wu.[94] The original submission by the Government was extremely conservative and lacked several important provisions.[95] Recognizing that her bills might not be heard in the Legislative Council,[96] and (if they were heard) would only have a marginal chance of passing, Wu decided to propose amendments to the Government's submission in order to remedy the shortcomings.[97] Because of Wu's persistence, a few additional amendments to the Government's Sex Discrimination Bill were passed.[98]

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other laws that treated women unequally. In addition, the government was fearful that new laws prohibiting unequal pay for equal work would adversely impact Hong Kong's free market economy. *See id.*

93. The Legislative Council called for "the actual implementation of CEDAW through substantive reforms, including anti-discrimination legislation, a women's commission, and reform of discriminatory laws." *Id.*

94. Anna Wu introduced the Equal Opportunities Bill, which sought to prohibit discrimination on the basis of sex, marital status, pregnancy, family responsibility, disability, sexuality, race, age, political and religious conviction, and spent conviction. *See id.* at 372. The bill provided for an independent public body responsible for the promotion and enforcement of the rights contained in the bill. *See id.*

95. The government's submission addressed discrimination on the grounds of pregnancy and marital status in employment situations but ignored those forms of discrimination in education and housing. In addition, the bill lacked a specific provision prohibiting discrimination in the enforcement of law and administration of government programs and lacked a provision prohibiting age discrimination. Nothing in the government's bill outlawed discrimination in elections or appointments to public office. Most significantly, the government's bill created a special exemption to the bill for the "small house" policy. *Id.*

96. *See id.* Petersen also states,

> Under Hong Kong's colonial constitution, a member of the Legislative Council must obtain express permission from the Governor before she may propose any bill 'the object or effect of which may be to dispose of or charge any part of [o]ur revenue arising within the colony. . . .' Thus, in addition to the Governor's power to refuse assent to any bill passed by the Legislative Council . . . the Governor also has the power to prevent the Legislative Council from even considering bills that require the expenditure of public funds.

Id. at 373-74.

97. *See id.* at 380.

98. *See id.* The following amendments were added to the Government's Sex Discrimination bill: (1) A provision prohibiting discrimination in all elections and appointments to public office; (2) The exemption for "protective regulations" was limited to one year; (3) The provisions relating to marital status and pregnancy were expanded to cover areas other than

Unfortunately, the Legislative Council voted down both an amendment to compel the Government to bring the Sex Discrimination Ordinance into effect by January 1, 1996 and an amendment limiting the exemption for the "small house" policy to one year.[99] In addition, the Council voted down an amendment adding the remedy of reinstatement[100] and approved a last minute amendment limiting damages for sex discrimination to $150,000 regardless of the amount of actual damages.[101] With these changes, the Sex Discrimination Ordinance was enacted with substantive enforcement provisions including a commission to enforce the Ordinance - The Equal Opportunities Commission.

H. Establishment of the Equal Opportunities Commission

The long overdue Equal Opportunities Commission (EOC)[102] was established on May 20, 1996.[103] The EOC seeks to "create, with the support of the community, an environment where there is no barrier to equal opportunities and no discrimination."[104] The EOC seeks to achieve its mission by promoting equality of opportunity between men and women; eliminating gender discrimination through legislative provisions, administrative measures, and public education; and eliminating sexual harassment.[105] The EOC drafted strategies[106] and a list of commitments[107] to

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just employment; (4) A provision expressly prohibiting "hostile environment" harassment in employment and "student to student" harassment in education; and (5) The exemption for small businesses was shortened to three years. *See id.* at 381-82.

99. *See id.* at 383.

100. Reinstatement would have allowed a victim of discrimination to get his/her job back.

101. *Id.* However, the amendment limiting damages to $150,000 originally contained in Section 76(7) of the Ordinance was repealed in 1997. Sex Discrimination Ordinance, Cap. 48 § 76 (1997).

102. The EOC is a statutory body set up to work towards the elimination of discrimination and promote equality of opportunity with specific reference to gender, disability and family status. It consists of a full-time Chairperson, Anna Wu, and 16 members of the public from different sectors including employment and labor, law, women's concerns, and rehabilitation. The EOC is charged with implementing the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, and the Family Status Discrimination Ordinance. The primary focus of this note is on the Sex Discrimination Ordinance. Equal Opportunities Commission, *Introduction, available at* http.// www.eoc.org.hk/about/about.html (last visited Nov. 8, 2000); *see also* Sex Discrimination Ordinance, Cap. 480 § 63 (1997).

103. *See id.*

104. Equal Opportunities Commission, *available at* http:// www.eoc.org.hk/about/about.html (last visited Nov. 8, 2000). *See also* Sex Discrimination Ordinance, Cap. 480 § 64 (1997).

105. *See id.*

106. The EOC's strategies are: "securing compliance and reform through legislative means[,] [p]romoting education to raise awareness and achieve change[,] [s]trengthening communication with community organizations to promote participation[,] [b]uilding corporate partnerships to encourage practices and prevention[,] [and] conducting research to guide our

the Hong Kong people to exemplify its duty to fulfill its mission.[108]

The Sex Discrimination Ordinance[109] empowers the EOC to investigate complaints related to any allegedly unlawful act and to effect settlement by conciliation.[110] The EOC may also conduct formal investigations on any act made unlawful by the Ordinance and may issue enforcement notices.[111]

Section 65 of the Sex Discrimination Ordinance states "[t]he Commission may undertake or assist (financially or otherwise) the undertaking by other persons of any research, and any educational activities, which appear to the Commission necessary or expedient for the performance of its functions."[112] In September, 1996, prior to the implementation of the Sex Discrimination Ordinance, the EOC commissioned a survey[113] to determine the focus of the Commission.[114] In general, the survey determined that print and television media tend to discriminate against women more than

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future direction." *Id.*

107. EOC's commitments to the People of Hong Kong are to:

> handle enquiries, complaints, and conciliation fairly, effectively, and efficiently[;] assist aggrieved persons in obtaining information and advice, and provide conciliation or assistance in proceedings[;] initiate formal investigations in the public interest[;] coordinate and communicate with government and non-government organizations on issues of equal opportunities[;] build up corporate partnership to promote equal opportunity policies and codes of practice[;] create better understanding of discrimination and inequality through research and public education[;] issue codes of practice and guidelines on elimination of discrimination and promotion of equal opportunities[;] [and] review the Sex Discrimination Ordinance . . . and propose appropriate amendments.

Id.

108. *See id.*

109. Section 63 of the Sex Discrimination Ordinance establishes the Equal Opportunities Commission. Sex Discrimination Ordinance, Cap. 480 § 63 (1997).

110. Conciliation is a type of mediation between the parties. The EOC acts as the mediator and attempts to get the parties to agree to a settlement. *See id.* § 64(1)(d).

111. *Id.* § 77.

112. *Id.* § 65.

113. The survey was taken from a random sample of 2,020 Hong Kong Chinese people. *Id.* Among the 2,020 respondents, 48.3% were male and 51.5% were female. *Id.* "The socio-demographic characteristics of the respondents largely coincide with the general population as reported by the 1996 Hong Kong by-census." Equal Opportunities Commission, *A Baseline Survey of Equal Opportunities on the Basis of Gender: Executive Summary*, *available at* http://www.eoc.org.hk/ep/ep.html (last visited Nov. 8, 2000).

114. The objectives of the survey were to:

> collect information about the public's perception of gender role and stereotyping . . . collect information on the public's perception and experience of equality or discrimination between men and women in the media, family, education, work, and community participation . . . establish baseline subjective indicators reflecting equal opportunities or discrimination on the basis of gender . . . [and] collect information about the public's knowledge of the establishment of the Equal Opportunities Commission.

Id.

men,[115] that the traditional gender-based division of household chores survives,[116] and that sex discrimination in employment is more commonly perceived by women than men.[117] In sum, about 52.5% of the respondents perceived gender discrimination as a common occurrence, and most respondents perceived discrimination as most commonly occurring in work-related situations.[118]

In response to the Baseline Survey and pursuant to Section 69 of the Sex Discrimination Ordinance,[119] the EOC released the code of practice for employer compliance with the Sex Discrimination Ordinance in December 1996. The code "aims to eliminate discrimination on the grounds of sex, marital status and pregnancy, sexual harassment and victimisation[120] in

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115. Respondents considered the print media as discriminating more against women than the television media. *See id.* "About 66% of the respondents agree[d] that the government should legislate to curb discrimination against women in the media, with more men than women supporting such government control." *Id.*

116. Most household chores and responsibilities are still primarily the wives' responsibilities. *See id.* The husbands' main responsibility is maintaining and repairing household appliances. It is uncommon for husbands to share housework or responsibilities with their wives. *See id.*

117. "Dismissal due to pregnancy, sexual harassment, and gender-based differential benefits are considered the most severe forms of gender discrimination." *Id.* "Employed women are more sensitive than employed men in perceiving gender discrimination in employment situations." *Id.* "[M]ore women than men regarded the employment situations given in the Survey as gender-based discrimination especially when women have a greater chance of being laid off and senior positions are occupied by men." *Id.*

118. *See id.* However, "[o]lder respondents are generally less sensitive to gender inequality, tend to have gender-based family role expectation, perceive less gender discrimination at work, and think gender discrimination is infrequent in Hong Kong." *Id.*

119. Section 69 provides that "[t]he Commission may issue codes of practice containing such practical guidance as it thinks fit for the purposes of (a) the elimination of discrimination; (b) the promotion of equality of opportunity between men and women generally; and (c) the elimination of sexual harassment." Sex Discrimination Ordinance, Cap. 480 § 69 (1997).

120. Victimization is defined by Section 9 of the Sex Discrimination Ordinance as follows:

> A person ('the discriminator') discriminates against another person ('the person victimised[sic]') in any circumstances relevant for the purposes of any provision of the Ordinance if he treats the person victimised less favourably [sic] than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised [sic] or any other person ('the third person') has (a) brought proceedings against the discriminator or any other person under this Ordinance; (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Ordinance; (c) otherwise done anything under or by reference to this Ordinance in relation to the discriminator or any other person; or (d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Ordinance, or by reason that the discriminator knows the person victimised or the third person, as the case may be, intends to do any of those things, or suspects the person victimised or the third person, as the case may be, has done, or intends to do, any of them.

employment and to promote equal employment opportunities between men and women."[121] The code was designed to "help employees, their colleagues, employers and other concerned parties to understand their responsibilities under the [Sex Discrimination Ordinance]. The code also provides guidance on the procedures and systems that can help to prevent discrimination and to deal with unlawful acts in employment."[122] The code recommends that employers use consistent selection criteria for recruitment, promotion, transfer, training, and dismissal as well as in the terms and conditions of employment.[123] Employers are encouraged not to take the code lightly. For example, Section 69 of the Sex Discrimination Ordinance states, in part, that:

> A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Ordinance before any court any code of practice issued under this section shall be admissible in evidence, and if any provision of such a code appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.[124]

A particular area of interest in the code is the elimination of gender-based job advertisements.[125] The code suggests that employers "avoid requests for photographs and copies of identification at the application stage," place a statement such as "equally open to men and women" when advertising for an open position, advertise in publications with distribution to both sexes,[126] and review all advertising materials and accompanying literature to ensure that women are not pigeonholed into their traditionally limited professional roles.[127]

Another area of interest in the code is the concept of equal pay for equal work. The code defines "like work" as work that is "of a broadly similar nature and where the differences between the tasks performed by either the man or the woman are not of practical importance to the terms and conditions of employment."[128] The code cautions that different job titles, job

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Sex Discrimination Ordinance, Cap. 480 § 9 (1997).

121. Equal Opportunities Commission, Code of Practice, *available at* http://www.eoc.org.hk/ep/ep.html (last visited Nov. 8, 2000).

122. *Id.* § 1.2.

123. *See id.* § 10.2.

124. Sex Discrimination Ordinance, Cap. 480 § 69 (1997).

125. *See* Equal Opportunities Commission, Code of Practice § 11.5, *available at* http://www.eoc.org.hk/ep/ep.html.

126. The publications should include only those that are sent to both sexes – not those that are predominantly read by either sex. *See id.* § 11.5.8.

127. *See id.* § 11.5.2.

128. *Id.* § 12.2.

descriptions, or contractual obligations, do not necessarily imply the work is different.[129] With regard to sexual harassment, the code provides a list of behaviors that could constitute sexual harassment.[130] The code also specifies that one incident of harassment may constitute sexual harassment.[131] In an effort to legitimize the Sex Discrimination Ordinance, the EOC brought or assisted in several lawsuits alleging violations of the Ordinance.

IV. THE STATUS OF HONG KONG WOMEN SINCE JULY 1997

A. Application of the Sex Discrimination Ordinance by the Courts

1. Equal Opportunities Commission v. Apple Daily LTD

In *Equal Opportunities Commission v. Apple Daily LTD,*[132] Apple Daily LTD ("Apple Daily") published an advertisement in Chinese on May 9, 1997. According to the English version of the advertisement, the ad read "Celebrities - Fashion page requires a number of beautiful female reporters to report on balls and parties . . . ."[133] In response, the EOC alleged that Apple Daily violated Section 43(1) [134] of the Sex Discrimination Ordinance and filed a Complaint with the Hong Kong court. The trial court determined that the advertisement was capable of two different interpretations and thus dismissed the application.[135] The court of appeals disagreed and reversed the trial court.[136]

The court of appeals found that the words in Section 43(1) had a plain meaning and were simple to apply.[137] The court held that "[o]nce it is established that an advertisement indicates, or might reasonably be understood as indicating that intention, it seems to [this Judge] that it matters not that the advertisement indicates, or might reasonably be understood as indicating also some other intention to do an act which is not unlawful."[138] The court

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129. *See id.* § 12.3.

130. Behavior such as unwelcome sexual advances; unwelcome requests for sexual favors; unwelcome verbal, non-verbal, or physical conduct of a sexual nature; and conduct of a sexual nature that creates a hostile work environment are examples of sexual harassment according to the code. However, the code explicitly states that the list is not exhaustive. *See id.* § 6.1.

131. *See id.* § 6.3

132. EOC v. Apple Daily LTD, 1998 HKC LEXIS 1782 (1998).

133. *Id.* at 4.

134. Section 43(1) states: "It is unlawful to publish or cause to be published an advertisement which indicates, or might reasonably be understood as indicating, an intention by a person to do any act which is or might be unlawful by virtue of Part III or IV." Sex Discrimination Ordinance, Cap. 480 § 43(1) (1997).

135. Apple Daily LTD, 1998 HKC LEXIS at 2.

136. *Id.*

137. *See id.* at 14.

138. *Id.* at 15.

reasoned that if an alternative meaning is to be taken as an indication of a contrary meaning then it would "certainly severely limit" the effect of Section 43(1) of the Ordinance.[139] In holding that the trial court's application of Section 43(1) would "militate against the purpose of the Ordinance,"[140] the court doubted that the Legislative Council intended to construe Section 43(1) using the trial court's reasoning.[141] Most importantly, the court of appeals cited a compelling public policy argument to support its finding, in that, "Apple Daily's construction [of Section 43(1)] would enable employers who intended to recruit employees of only one gender where that was not permitted by the Ordinance, to advertise freely for employees of that gender by simply including an ambiguity in that respect."[142]

Finally, the court of appeals held that the trial court erred by assuming that a reasonable understanding as required by Section 43(1) must be the sole meaning.[143] The court remanded the issue of a financial penalty to the trial court.[144]

2. *Yuen Sha Sha v. Tse Chi Pan*

In *Yuen Sha Sha v. Tse Chi Pan*,[145] the plaintiff and defendant were students of the Chinese University in Hong Kong. On several occasions from October 1996 to March 1997, the defendant covertly placed a camcorder on the plaintiff's roommate's dresser in an effort to film the plaintiff undressing. The plaintiff neither consented to nor had knowledge of the existence of the camcorder in her bedroom. The camcorder recorded images of the plaintiff getting ready for bed, sleeping, and undressing. On occasion, the plaintiff

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139. *Id.*

140. *Id.*

141. The trial judge found an ambiguity in the advertisement. *See id.* at 7-8. Respondents contended that the English translation certified by the court was not the only translation. *See id.* at 14. They claimed the other interpretation was "reporters are required for interviews of pretty females at balls." *Id.* at 7. Therefore, the trial judge, applying the ordinary reasonable man or woman test held that "readers of the Celebrities Fashion page of the Apple Daily are capable of reading both meanings from the wording of the advertisement." *Id.* at 11. Thus, the court concluded that "the advertisement as read by the ordinary reasonable man or woman [did not bear] only the meaning interpreted by the applicant" and therefore the case was dismissed. *Id.* at 7.

142. *Id.* at 16.

143. *Id.* at 19.

144. *See id.* The EOC sought a $1,000 penalty against Apple Daily. *Id.* at 20. The EOC urged the court to impose a financial penalty or "the Commission might not be disposed to pursue the matter before the District Court, being concerned primarily to clarify the meaning of Section 43(1)." *Id.* The court held that no submissions had been made as to the quantum of financial penalty and thus declined to impose a penalty. *Id.*

145. Yuen Sha Sha v. Tse Chi Pan, 1999 HKC LEXIS 6 (1999). This case was the first of its kind regarding sexual harassment in Hong Kong and the application of the Sex Discrimination Ordinance in that context.

was completely naked in her room. When the plaintiff accidentally discovered the camcorder, she began trembling and crying. She also felt scared, embarrassed, and violated. After she confronted the defendant, he admitted to filming her since October 1996. He also admitted showing the recording to a friend. The plaintiff then reported the matter to the hostel[146] warden, and the Hong Kong police were summoned.

After discovering the camcorder, the plaintiff was afraid to stay in her hostel room, unable to fall asleep alone, and unable to attend class for several weeks. As a result of the incident, the plaintiff became depressed and lost sixty-one pounds.

The plaintiff brought this action pursuant to Section 39(4) of the Sex Discrimination Ordinance,[147] alleging sexual harassment in an educational establishment and under Section 76(3A) of the Ordinance,[148] which lists the remedies available when the court finds a violation of the Ordinance. The court quickly found that "[c]learly, the defendant's video taping of the plaintiff without her consent dressing and undressing is sexual in nature and is undeniably unwelcome."[149] Therefore, the court held that the defendant committed an act of sexual harassment which violated Section 39(4) of the Sex Discrimination Ordinance.[150] The court then proceeded to examine the issue of damages.

First, the court discussed the issue of "injury to feelings."[151] The defendant contended that his unreserved apology in open court and admission

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146. A hostel is a dormitory.

147. Section 39(4) states: "It is unlawful for a person who is seeking to be, or who is, a student of an educational establishment to sexually harass a woman– (a) who is, or is a member of, the responsible body for; or (b) who is a member of the staff of the establishment." Sex Discrimination Ordinance, Cap. 480 § 39(4) (1997).

148. Section 76(3A) states:

> Without limiting the generality of the power conferred by subsection (3), the District Court may (a) make a declaration that the respondent has engaged in conduct, or committed an act, that is unlawful under this Ordinance, and order that the respondent shall not repeat or continue such unlawful conduct or act; (b) order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant; . . .(e) order that the respondent pay to the claimant damages by way of compensation for any loss or damage suffered by reason of the respondent's conduct or act; (f) order that the respondent shall pay to the claimant punitive or exemplary damages . . . .

Sex Discrimination Ordinance, Cap. 480 Section 76(3A) (1997). Section 76(6) states: "For the avoidance of doubt, it is hereby declared that damages in respect of an unlawful act of discrimination or sexual harassment may include compensation for injury to feelings whether or not they include compensation under any other head." Sex Discrimination Ordinance, Cap. 480 Section 76(6) (1997).

149. Yuen Sha Sha, 1999 HKC LEXIS at 20.

150. *Id.*

151. Damages for injury to feelings are expressly allowed by Section 76(6) of the Sex Discrimination Ordinance. Sex Discrimination Ordinance, Cap. 480 § 76(6).

of liability "substantially mitigated" any damages for injury to feelings.[152] However, the court rejected the defendant's argument by taking into account five principles regarding damages,[153] the plaintiff's shock and dismay, and the humiliation and betrayal she felt upon discovery of the camcorder. The court awarded her $50,000 for injury to feelings.[154]

Next, the court analyzed exemplary damages, otherwise known as punitive damages.[155] Section 76(3A)(f) of the Sex Discrimination Ordinance authorizes the court to award punitive or exemplary damages. The court found that the defendant's actions[156] justified an award of punitive damages in the amount of $20,000.[157] The court held that "the conduct of the defendant in this action and the [late] apology [were] offered not out of remorse but to avoid the award of huge damages."[158] After examining case law and legal treatises,[159] the court also held that the relative "means of the plaintiff [was] 'not of real' relevance to an award of exemplary damages."[160] Therefore, it was irrelevant that the defendant was expelled from school and working part-time and that the plaintiff was working as a full-time teacher.

In addition, the court awarded the plaintiff $10,000 in aggravated damages.[161] The court found that the defendant "deliberately added insult to injury" and was "defiant, unrepentant and vindictive."[162] Additionally, the court observed that the defendant's behavior was "tantamount to flouting the legislation . . . reprehensible, and should not be condoned."[163] Under Section 76(3A)(b), the court ordered the defendant to render a written apology to the

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152. Yuen Sha Sha, 1999 HKC LEXIS at 20.

153. The court gleaned the five principles by summarizing the cases of Prison Services & Ors v. Johnson, ICR 275 (Employment Appeal Tribunal, 1997) and Alexander v. Home Office, ICR 685 (1988) from the English Court of Appeals. The five principles are: (1) "Awards for injury to feelings are compensatory;" (2) "Awards should not be too low, as that would diminish respect or the policy of anti-discrimination legislation;" (3) "Awards should bear some broad general similarity to the range of awards in personal injury cases;" (4) When assessing a sum, tribunals should keep in mind the value the sum has in everyday life; and (5) Tribunals should bear in mind the need for public respect for the level of awards made. *Id.* at 21-22.

154. The court also considered it "necessary and appropriate" to look at damages awarded in other jurisdictions. *Id.* at 23.

155. The reasoning behind the award of punitive damages is to punish the defendant for his conduct in inflicting harm. *See id.* at 25.

156. The defendant carefully measured the angle and distance of the lens in directing it toward the plaintiff's wardrobe; he showed the tape to his friend; he failed to apologize; falsely declared his love in an attempt to get himself "off the hook"; and he attempted to put pressure on the plaintiff by having a former schoolmate contact plaintiff and threaten a civil action for nuisance. *See id.* at 29-30.

157. *Id.* at 36.

158. *Id.* at 30.

159. *See id.* at 30-35.

160. *Id.* at 34.

161. *Id.* at 36.

162. *Id.*

163. *Id.*

plaintiff.[164] Moreover, the court awarded the plaintiff costs under the local rules of civil procedure that provide for special circumstances that warrant such an award.[165]

3. *Chan Wah v. Hang Hau Rural Committee & Anor*

In *Chan Wah v. Hang Hau Rural Committee & Anor*,[166] the plaintiff applied to the Sai Kung District Office to register as a voter in the election of the Po Toi O village representative. The plaintiff applicant was not an indigenous villager, but he was married to one. However, his name was excluded from the final list of eligible voters. Among other alleged violations, the applicant claimed that he was subjected to unlawful discrimination prohibited by the Sex Discrimination Ordinance because a non-indigenous villager woman married to an indigenous villager man might vote in an election of a village representative, while a non-indigenous villager man married to an indigenous villager woman may not.[167]

The court held that disenfranchising the applicant was "clear discrimination on the grounds of the man's sex, and [was] unlawful."[168] For lack of a better argument, the defendant asserted that the Sex Discrimination Ordinance was incompatible with the guarantees contained in Article 40 of the Basic Law.[169] The court stated that "[t]here is nothing before [this court] to show that one of the 'lawful traditional rights and interests of the indigenous inhabitants' is the right to discriminate against a man on the ground of his sex."[170] Therefore, the court concluded that "the applicant [had] established an invasion of his civil rights, and he [was] entitled to a remedy."[171]

4. *Cheng Yin Fong v. Incorporated Owners of Siu on Court & ORS*

The appellant in *Cheng Yin Fong v. Incorporated Owners of Siu on Court & ORS*[172] brought claims under the Sex Discrimination Ordinance against three respondents. She alleged that the first respondent failed in its management duties by allowing or failing to forbid bare-chested men from

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164. *See id.* at 37.

165. *See id.*

166. Chan Wah v. Hang Hau Rural Committee & Anor, 1999-2 HKC LEXIS 160 (1999).

167. *See id.* at 6.

168. *Id.*

169. Article 40 of the Basic Law states: "The lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region." The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Article 40 (July 1, 1997).

170. Chan Wah, 1999-2 HKC LEXIS at 7.

171. *Id.*

172. Cheng Yin Fong v. Incorporated Owners of Siu on Court & ORS, 1992-2 HKC LEXIS 747 (1999).

appearing on the sports field. The second respondent, a newspaper vendor, allegedly violated the statute when two bare-chested men appeared at the pedestrian path near the newspaper stand and insulted the appellant with foul language and words describing sexual acts. The appellant alleged that the third respondent, a vegetable stall owner, had allowed a bare-chested man to sell vegetables at the stall. On respondent's motion, the Registrar dismissed the appellant's actions. The appellant appealed the dismissal.

The appellate court held that the appellant had no "locus standi to commence proceedings for sexual harassment."[173] The court reasoned that the cited acts had occurred during the course of playing sports or engaging in manual labor.[174] Moreover, the acts were not sexual advances or conduct of a sexual nature and, further, they were not directed at the appellant.[175] In addition, the court found that the appellant failed to establish both the relationship between the respondents and the men[176] and the reasons why the respondents should be held responsible for the behavior of those men.[177] Therefore, the court held that no violation of the Sex Discrimination Ordinance had occurred.[178]

B. Analysis

The aforementioned court cases specifically analyze the amendments to the Sex Discrimination Ordinance made four days before Hong Kong's reversion to Chinese control.[179] The most important of these amendments repealed the $150,000 cap on damages originally contained in Section 76(7).[180] In addition, an amendment allowed the District Court to order reinstatement or promotion of a woman who was subjected to wrongful sex discrimination.[181] Moreover, an amendment to Section 76 allowed the

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173. *Id.* at 1. The court applied the following reasoning:

> It was not shown that the alleged act of sexual harassment occurred in the course of offering to provide or providing goods, facilities or services to the appellant. Further it was not shown that the appellant and the respondents had an employer-employee or other working relationship. They were not members or potential members of the same organisation or body. The respondents were not educational establishments, landlords, persons who managed or disposed of premises, barristers, barrister's clerks or persons giving instructions to a barrister. . . .

Id.

174. *See id.*

175. *See id.* at 2.

176. *See id.*

177. *See id.*

178. *Id.*

179. The amendments to the Sex Discrimination Ordinance became operative on June 26, 1997. Sex and Disability Discrimination Ordinance, Miscellaneous Provisions (1997).

180. Amendment 6(b) repealed Section 76(7-8). *Id.*

181. *See* Sex Discrimination Ordinance, Cap. 480 Section 76(3A)(c)-(d) (1997).

District Court to award punitive damages.[182]

In light of these changes, the court in *Yuen Sha Sha v. Tse Chi Pan* discussed at length the remedies available under the Ordinance. The *Yuen Sha Sha* case was the first of its kind in Hong Kong. Judge HC Wong quickly recognized a violation of the Sex Discrimination Ordinance and took the opportunity to discuss the damages available to the plaintiff. The court interpreted the Ordinance literally and ordered the defendant to pay a total of $80,000 in damages and tender the plaintiff a written apology. To provide adequate support for its damage award, the court utilized case law from Hong Kong, case law from other jurisdictions, and influential legal treatises on damage awards. Most importantly, the court used specific facts in the case to support its reasoning and damage award. Judge Wong's logical reasoning provides an excellent springboard for subsequent cases involving damages under the Sex Discrimination Ordinance.

The second sexual harassment case brought under the Sex Discrimination Ordinance, *Cheng Yin Fong v. Incorporated Owners of Siu on Court & ORS*, was dismissed. The court indicated that the facts of the case failed to establish sexual harassment under the Ordinance. Clearly, the court was sending a message that in order for business owners to be liable for sexual harassment there must be some connection between the business and the alleged offenders.

Additionally, the court found that "insulting a woman with foul language was impolite, ungentlemanly and rude, and might have caused the appellant to feel offended, insulted, or intimidated, [but] such behavior did not constitute a sexual advance or conduct of a sexual nature and thus was not sexual harassment."[183] This statement by the court is troubling, especially if it is applied in future cases. The EOC's Code of Practice specifically mentions that "one incident may be sufficient to constitute sexual harassment."[184] The Code also states that "unwelcome verbal, non-verbal or physical conduct of a sexual nature - e.g., sexually derogatory or stereotypical remarks . . ." can be regarded as sexual harassment.[185]

However, the context in which the statements were made to the appellant in *Fong* probably had a large influence on the court. Since the sexual comments were allegedly made by passers-by and not by employees of the newspaper stall, the court had difficulty finding sexual harassment. However unfortunate, women must regularly withstand sexually lewd remarks made by strangers. In those situations, women can walk away. Consequently, a hostile environment is arguably not created. Caution must be taken, however, when comments and statements of a sexual nature are

182. *See* Sex Discrimination Ordinance, Cap. 480 Section 76(3A)(f) (1997).

183. Cheng Yin Fong, 1999-2 HKC LEXIS 747 at 2.

184. Equal Opportunities Commission, Code of Practice § 6.3, *available at* http://www.eoc.org.hk/ep/ep.html.

185. *Id.* § 6.1.3.

made to a woman at work. Comments of the nature described in *Fong* could create a hostile work environment. It is important that the Hong Kong courts realize the distinction and do not take the *Fong* court's holding out of its factual context.

The first case heard by a Hong Kong court alleging a violation of the Sex Discrimination Ordinance was *Equal Opportunities Commission v. Apple Daily LTD.* The Hong Kong Court of Appeal overruled the District Court's dismissal of the case. The holding by the Court of Appeal was significant. Since the case was one of first impression, the EOC and leaders of the women's movement watched closely. The court discounted the trial judge's findings and interpreted the Sex Discrimination Ordinance by relying on legislative intent. The court was careful not to "militate against the purpose of the Ordinance."[186] Finally, the court in *Chan Wah v. Hang Hau Rural Committee & Anor* reaffirmed the notion that the Sex Discrimination Ordinance applies to both men and women. But, most importantly, the court held that sex discrimination is prohibited in rural elections.

In conclusion, Hong Kong courts held true to the language of the Sex Discrimination Ordinance. The courts attempted to apply the Ordinance according to the drafters' intent. The courts neither expanded nor limited the Ordinance's scope. However, the courts have not yet addressed the issue of sex discrimination or sexual harassment in an employment situation. Nevertheless, if past decisions accurately predict the future, women should expect the court to deliver a fair, unbiased, and well-supported opinion based on legislative intent. Hong Kong women should be encouraged by the court system's performance in interpreting the Sex Discrimination Ordinance.

C. *Effectiveness of the EOC*

Public awareness of the EOC has risen from 34.9% in late 1996 to 87% in 1999.[187] In addition, 74% of the public reported that they would seek the help of the EOC if they experienced discrimination.[188] Since June, 1999, the EOC has received twelve hundred complaints.[189] Additionally, settlement prior to court intervention has been successful – the conciliation success rate is 66%.[190] The EOC has successfully eliminated virtually all discriminatory advertisements from newspapers.[191] Moreover, the EOC's publication of the

186. Apple Daily LTD, 1998 HKC LEXIS at 15.

187. Equal Opportunities Commission News – Message from the Chairperson, *The First Three Years of the EOC, available at* http://www.eoc.org.hk/message/english/em9903.html (last visited Nov. 8, 2000)[hereinafter Message].

188. *Id.*

189. *Id.* Note that the number of complaints received includes complaints from individuals claiming a violation of the Disability Discrimination Ordinance as well as the Sex Discrimination Ordinance. *See id.*

190. *Id.*

191. *See id.* Thirty-seven percent of newspapers contained discriminatory advertisements

Code of Practice has lessened big business' resistance to the anti-discrimination laws.

Nevertheless, the EOC struggled to overcome misconceptions.[192] Many people ridiculed the concept of equality and doubted the effectiveness of the EOC.[193] Furthermore, there were high expectations that the EOC would "administer justice by prosecuting, punishing, and publicly condemning alleged offenders."[194] Critics questioned the role of conciliation and the potential threat of increased litigation it presented.[195] Most significantly, the EOC was perceived as a women's commission devoted to serving solely women's needs and concerns.[196]

Due to the misconceptions, the EOC has not escaped criticism. The EOC has been accused of "setting up hurdles and discouraging victims from lodging complaints and seeking justice. Investigators from the Commission were said to always encourage victims to list their terms of conciliation."[197] The EOC's emphasis on conciliation, although a laudable goal, at times can hurt the victim of discrimination. If EOC investigators encourage settlement before court intervention, the victim may be persuaded to take less than she deserves; consequently, the discriminator will evade full responsibility for his actions. Thus, conciliation practices may not provide a large enough deterrent to cease future discriminatory activity.

D. Barriers to Equality

1. Education

Although the EOC has been effective in combating some forms of discrimination, a clear pattern of "[g]ender segregation is found in the choice of subjects in both secondary schools and tertiary institutions."[198] Female students dominate in faculties of art, humanities and social sciences, and business; whereas, male students dominate in faculties of engineering and science.[199] "Studies in Hong Kong show that through formal and informal

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before the establishment of the EOC. *Id.*

192. *See id.*

193. *See id.*

194. *Id.*

195. *See id.*

196. *See id.*

197. *Hong Kong Human Rights Monitor, supra* note 72.

198. *Barriers to Equal Opportunities for Women in Hong Kong*, Background Paper for the 1997 Women Leaders' Network Meeting, *available at* http://www.eoc.org.hk/message/english/extram3e.html (last visited Nov. 8, 2000)[hereinafter Barriers].

199. *See id. See also The Need for Objective and Subjective Indicators in Gender Statistics*, Paper presented at the APEC Experts' Meeting on Gender, *available at* http://www.eoc.org.hk/message/english/extram2e.html (last visited Nov. 8, 2000)(finding the

channels, children learn explicit gender roles in schools and are streamed in school subjects along gender lines."[200] For example, traditional school practice excludes girls from design and technology classes and boys from domestic classes.[201] Girls often perceive technology as difficult; however, with exposure to technology at a young age, girls should lose this perception and compete equally with boys.[202]

2. *Pay Disparity*

Government statistics from 1994 suggest that the pay disparity between women and men is 69%.[203] There is a clear earnings differential between men and women in almost all sectors of employment.[204] The earnings gap is larger for those in higher income categories, for those over thirty-five, and for married women,[205] suggesting that family "responsibility arising from marriage and [child bearing] contributes to the unequal earnings between men and women."[206] This phenomenon is likely a result of the continued existence of traditional gender stereotyping of women in Hong Kong.[207] Under this stereotype, women are expected to stay home and raise the children, clean the house, and perform the other duties necessary to keep a household functioning.[208]

3. *Government Service*

Although there are a number of outstanding Hong Kong women in the public limelight, statistics demonstrate that women do not fare as well as people may think. For example, among the twenty-four principal officers/directors of the bureau of the HKSAR, only six are women.[209]

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male/female ratio in construction, civil, and structural engineering was 732 men to 100 women; the ratio in electrical and electronic engineering was 714 men to 100 women; the ratio in mechanical, marine, production and industrial engineering was 615 men to 100 women) [hereinafter *Need for Statistics*].

200. *Id.* at 3.

201. *See id.*

202. *See id.*

203. Cheung, *supra* note 55, at 384 (finding that the real wage for men per month is $6,810 compared to the real wage for women at $4,685).

204. *See* Message, *supra* note 187.

205. *See Need for Statistics*, *supra* note 199.

206. *Id.* at 2.

207. *See Barriers*, *supra* note 198. "Different surveys have continued to show that women take up the majority of household chores and the role [of] the caretaker in the family. Women's groups have pointed out that the inadequacies of childcare support have limited women's opportunity to participate in the labor force." *Id.*

208. *See id.*

209. *How do Women Fare in Hong Kong?*, *available at* http://www.eoc.org.hk/message/english/extram1e.html (last visited Nov. 8, 2000).

Among all levels of government, no more than 12% of counselors are women.[210] Women in the Executive Council constitute 26.7% of the total council.[211] The government should strive for equality in representation to set an example for private individuals and companies.

4. *Discrimination in the Workplace*

While the Sex Discrimination Ordinance outlawed discrimination based on a woman's sex, discrimination prevails in the workplace. Stereotypical assumptions and attitudes towards women remain common in the workplace and continue to affect employment decisions.[212] Women comprise only 23% of the senior managers and administrators.[213] Studies indicate that women managers refer to themselves as "competent, responsible, intelligent, and analytical" while men view women as "sensitive and intuitive" and as having good people skills.[214] In addition, sexual harassment in the workplace is an increasing problem.[215] Over half of the complaints received by the EOC alleging sex discrimination are reports of sexual harassment and pregnancy-related discrimination in the workplace.[216]

V. THE NEED FOR A HIGH-LEVEL CENTRAL GOVERNMENT MECHANISM FOR FORMULATION OF POLICIES REGARDING WOMEN

The EOC and women's groups continue to urge the government to establish a commission on women's affairs. Similar to Australia's Commonwealth Office on the Status of Women and Great Britain's Women's Unit, a women's commission is needed in Hong Kong to "implement and monitor Hong Kong's international obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)."[217]

A. *Australia's Commonwealth Office of the Status of Women*

An exceptional model supporting the request of Hong Kong's EOC chairwoman for a women's commission is Australia's Commonwealth Office

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210. *Id.*

211. *Id.*

212. *See Barriers, supra* note 198.

213. *How do Women Fare in Hong Kong?, supra* note 209.

214. *Barriers, supra* note 198.

215. *See How do Women Fare in Hong Kong?, supra* note 209.

216. *See id.*

217. In addition, the central mechanism should: deal with issues in relation to [CEDAW]; formulate policies on women; advise on the impact on women of all government policies; direct funding into areas based on these policies; address women's problems; compile gender statistics and analyses; and act as clearing house on training programs for women. *See EOC Calls for an Accountable Women's Commission, available at* http://www.eoc.org.hk/news/300500e.html (last visited Nov. 8, 2000).

of the Status of Women ("OSW"). OSW works behind the scenes in developing governmental policy by conducting research and creating discussion and debate on women in the public sphere.[218] The OSW is not involved with resolving complaints of discrimination or handling legal cases alleging discrimination.[219] In order to insure that women have diverse choices and aspirations, a strong policy framework that supports women is imperative. Thus, the role of the OSW is to guarantee that the strong policy framework exists.

In order to fulfill it's role, the OSW will "monitor and advise on the impact of government policies and programmes on women; and be forward-looking and investigate emerging issues and develop new approaches in areas where existing policies are not achieving the government's aims."[220] The OSW made a commitment to consult with national women's groups and women "to ensure the views and concerns of women underpin effective policy development and advice."[221] The OSW plans to focus on six key areas of women's policy.[222] The primary focus in 1999 was Australia's country report on CEDAW for submission to the United Nations in 2000.[223] Australia's report was completed and submitted in 2000.[224] The OSW worked hard to ensure that the report fully reflected achievements for women and was consistent with government policy.[225]

The OSW also plans to address several other women's concerns in the upcoming year.[226] Statistics from Australia indicate that the OSW has had some impact on improving the status of Australian women. The participation rate for working age women (ages 15-64) reached a record high of 66.1% in December 1999.[227] The women's unemployment rate as of December 1999

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218. *See* Commonwealth Office of the Status of Women, *Our Role, available at* http://www.dpmc.gov.au/osw/content/our_role.html (last modified Aug. 2000).

219. *See id.* Australia has a separate agency, the Affirmative Action Agency, which administers the Affirmative Action (Equal Employment Opportunity for Women) Act. *See id.*

220. Commonwealth Office of the Status of Women, *Workplan for 1999-2000, available at* http://www.dpmc.gov.au/osw/content/workplan.html (last modified Aug. 2000).

221. *Id.*

222. Those areas include: "income security. . .; workforce participation, including childcare and workplace relations; women in leadership; prevention of violence against women; the law as it effects women; and international, including the lead up to the UN special session on Beijing plus 5 and Australia's next country report." *Id.*

223. *Id.*

224. *See* Commonwealth Office of the Status of Women, *Implementation of the Beijing Platform for Action – Australian Government Response, available at* http://www.osw.dpmc.gov.au/content/beijing.htm (last modified Oct. 2000).

225. *See Workplan, supra* note 220.

226. *See id.* The site lists other examples of areas where the OSW plans to direct its focus. *See id.*

227. Commonwealth Office of the Status of Women, *Australian Women – March 1999, available at* http://www.dpmc.gov.au/content/resources/women_aus.html (last modified Oct. 2000).

was at its lowest rate in nine years.[228] For the twelve months ending in August 1999, women's average weekly earnings rose by 3.5% to $677, compared with an increase of 1.5% (approximately $796) for men.[229] All females' total earnings rose by 1.2% compared with a 0.7% increase for men.[230] In addition, the number of Australian women participating in higher education has increased and surpassed the number of males.[231] In 1998, 54.7% of university students were female.[232]

Not only are there more women in higher education, but there are also more women in leadership in both the public and private sectors. In June, 1999, the 48.3% of the Australian Government employees were women.[233] Most significantly, 36.4% of appointments to the Senior Executive Service between June 1998 and June 1999, were women - an increase from the previous year in which women represented only 36.4% of the Senior Executive appointments.[234] The rate of women's participation in the Commonwealth Parliament is 24.5% (55 of the 224 Parliament members are women), up from 21.4% in 1996 and 14% in 1995 - more than double the international average of 13%.[235] Moreover, over the first 6 months of the year 2000, more than 150 women have been appointed to senior positions on Commonwealth boards and bodies.[236] In the private sector, 10% of board members are women, representing an increase from 8.3% in 1999.[237]

B. United Kingdom's Women's Unit

The United Kingdom's Women's Unit mirrors the success of the OSW. The Women's Unit was established to "ensure that Government policies knit together properly to take account of the interests of women."[238] The Unit does not handle discrimination complaints[239] but works to ensure that the

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228. *Id.*

229. Commonwealth Office of the Status of Women, *Facts About Women, available at* http://www.osw.dpmc.gov.au/content/resources/facts.html (last modified Oct. 2000).

230. *Id.*

231. *See id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Commonwealth Office of the Status of Women, *Women's Voice Strengthened with 152 new appointments to Commonwealth Boards, available at* http://osw.dpmc.gov.au/content/resources/media/000914_01.htm (last modified Oct. 2000). As of June 30, 2000, women held 32.2% of positions on Commonwealth boards and bodies. *Id.* Of the 474 appointments made from January to June 2000, 32% were women. *Id.*

237. *Id.*

238. *Delivering for Women: Progress so far, available at* http://www.womens-unit.gov.uk/1998/delivering/fore.htm (last visited Nov. 8, 2000).

239. The United Kingdom's Equal Opportunity Commission handles discrimination complaints. *See id.*

"Government considers the impact of all policy proposals on women and monitors the effects of [those policies]."[240] The Unit is currently working on women's issues such as poverty, education, health, violence, and women in power and decision-making.[241]

In November, 1998, the Unit released the Policy Appraisal for Equal Treatment.[242] The Appraisal requires government departments to work to ensure that policy and its results are "fair, lawful and practical, and promote equal opportunities in [the] widest sense."[243] Thus, the departments must "consider the impact on those who have found the actions and attitudes of others placing obstacles in the way of equality of opportunity."[244] The Appraisal lists three necessary steps in the policy appraisal process.[245] In addition, the Appraisal suggests avenues for determining the potential impact of a proposal.[246] The Appraisal also lists the relevant laws and international treaties that a department is required or would be required to consult in order to determine the legality of a proposal.[247]

The Women's Unit was responsible for and drafted the Fourth Report of the United Kingdom of Great Britain and Northern Ireland on the United Nations Convention on the Elimination of all forms of Discrimination against Women.[248] The Unit cites statistics exemplifying the continuing improvement of the condition of women in the United Kingdom. For example, in 1996, women made up 44% of the labor force as opposed to only 38% in 1971.[249]

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240. Women's Unit, *Factsheet: Ministers of Women, available at* http://www.womens-unit.gov.uk/1998/factsheet/3mfw.htm (on file with the author). The 2000 factsheet is currently being added to the Women's Unit website. *See* Women's Unit, *available at* http://www.womens-unit.gov.uk/2000/factsheets.htm (last visited Nov. 4, 1999).

241. *See* Women's Unit, *Delivering for Women: Progress so far (Platform for action: strategic objectives), available at* http://www.womens-unit.gov.uk/1998/delivering/app1.htm (last visited Nov. 8, 2000).

242. *See* Women's Unit, *Policy Appraisal for Equal Treatment, available at* http://www.womens-unit.gov.uk/1999/equal.htm (last visited Nov. 8, 2000).

243. *Id.*

244. *Id.*

245. The three steps include: 1. "Check how your policy or programme will affect, either directly or indirectly, different groups of people. . .[;] 2. Identify whether there is any adverse differential impact on a particular group or groups and then decide whether it can be justified in policy terms even if it is legally permissible[; and] 3. Take action, if necessary." *Id.*

246. The Appraisal suggests making full use of research and statistics and, if necessary, commission new data, consult established interest groups and those who are likely to use your service, and carry out a differential impact assessment, based on this and any other relevant information. *See id.*

247. *See id.*

248. Fourth Report of the United Kingdom of Great Britain and Northern Ireland on the United Nations Convention on the Elimination of all forms of Discrimination against Women (January 1999), *available at* http://www.womens-unit.gov.uk (last visited Nov. 8, 2000).

249. Women's Unit, *Delivering for Women: Progress so far (Women – the facts), available at* http://www.womens-unit.gov.uk/1998/delivering/fact.htm. The updated 2000 factsheet is currently being added to the Women's Unit website. *See also* Women's Unit, *available at*

Additionally, in 1997, the average hourly earnings of full-time working women were 80% of men's earnings.[250] Women represent 32% of managers and administrators and 35% of health professionals.[251]

The Women's Unit also conducted a study researching women's attitudes in 1999. The study found that women are not a homogeneous group.[252] There are striking differences between generations of women in terms of employment, income, educational aspirations, and the perceptions of family responsibility.[253] In general, older women were concerned with issues relating to health, crime, and justice. In contrast, younger women felt that employment and education were most important.[254] Fortunately, and perhaps due to the work of the Women's Unit, the majority of teenage girls saw few barriers to opportunity based on gender.[255]

VI. CONCLUSION AND PROPOSAL

Women in Hong Kong need a commission, sponsored by the government, to promote the interests of women, to represent working women, and to advocate women's concerns in employment and non-employment situations. In order for Hong Kong to hold true to its commitment to the United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW), a women's commission is essential. Both the Australian and British commissions were responsible for drafting the country report required under CEDAW. Moreover, as the statistics indicate, both of the commissions' efforts had a dramatic effect on the overall condition of women in their respective countries. Only a governmental commission focusing exclusively on women and their needs can adequately identify the needs of women in Hong Kong.

The EOC has neither the time nor the resources required to perform the functions needed to ensure gender equality in all aspects of life – from work to politics to home. The purpose of the EOC is to enforce the discrimination ordinances. With a maximum statutory limit of 16 commission members and a total of 1200 complaints filed last year alone, the EOC is ill equipped to assume additional responsibilities. The EOC has provided a Code of Practice for employers to ensure compliance with the Sex Discrimination Ordinance;

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http://www.womens-unit.gov.uk/2000/factsheets.htm (last visited Nov. 8, 2000).

250. *Id.*

251. *Id.*

252. *See* Women's Unit, *Listening to Women: Qualitive Research Summary* (1999), *available at* http://www.cabinet-office.gov.uk/womens-unit/1999/listening/index.htm (last visited Nov. 8, 2000).

253. *See id.*

254. *See id.*

255. *See id.*

however, their efforts are ineffective because there is a lack of government personnel to enforce the Ordinance.

Gaps remain in the quality of services and the policies required to promote women's status and development in Hong Kong. A women's commission could address some of these concerns, such as education, employment, violence against women, health, welfare, and security. Coordinating government policies and services for women is not part of the EOC's jurisdiction.

Former EOC chairwoman, Dr. Fanny Cheung, articulated the need for a women's commission in Hong Kong by stating:

> [I]n countries where there are organisations similar to the EOC in Hong Kong, like the United Kingdom and Australia, women's affairs are being handled by separate government commissions or ministries. Over 30 national government[s'] offices are addressing the needs of women, indicating the urgent need for a central mechanism in Hong Kong.[256]

In addition to the establishment of a women's commission, the Hong Kong government must also revise the Sex Discrimination Ordinance. First, the government needs to reevaluate the need for the small house policy exemption. The small house policy clearly infringes upon the rights of women in violation of the Hong Kong Bill of Rights.[257] However, it does not violate the Sex Discrimination Ordinance because the Ordinance contains an exception that reads: "Any discrimination between men and women arising from that policy of government - (a) known as the small house policy; and (b) pursuant to which benefits relating to the land in the New Territories are granted to indigenous villagers who are men" is exempt from the Ordinance.[258]

The Hong Kong government insists that it needs more time to study the small house policy and to determine what reforms, if any, should be made.[259] However, the government had enough time to study the policy. It is time for the government to admit that the policy inherently discriminates against women and to remove the exception from the Sex Discrimination Ordinance. If the government expects private individuals to comply with gender equality mandates, then the government should abide by its own rules.

Next, the government needs to eliminate the exceptions regarding qualifications for employment in governmental departments in the Ordinance.

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256. Press Release, Equal Opportunities Commission, Dr. Fanny Cheung met with CEDAW Committee Members (Jan. 29, 1999)(on file with author).

257. The small house policy is clearly government action and falls within the scope of the Bill of Rights.

258. Sex Discrimination Ordinance, Cap. 480 Sched. 5 (1997).

259. *See generally* Petersen, *supra* note 34.

Exception 1 to the Sex Discrimination Ordinance allows:

> Any discrimination between men and women seeking to hold, or holding, any relevant office as to requirements relating to height, uniform, weight or equipment . . . (c) so far as any such office or class of such office which falls within that part of the police force known as the Police Tactical Unit is reserved for men.[260]

The government should eliminate the exemption on height, uniform weight or equipment and replace it with an exemption stating that "only discrimination that is reasonably necessary under the circumstances of employment" is allowed.[261]

Then, due to high legal fees in Hong Kong and in order to encourage victims of discrimination to bring legitimate lawsuits, the government should advocate the addition of a provision awarding attorney's fees for a prevailing plaintiff. After all, but for the defendant's alleged discriminatory activity, the plaintiff would not have incurred attorney's fees. The Ordinance will have little or no effect if women cannot afford to take violators to court and hold them responsible for their actions. A provision requiring the defendant to pay attorney's fees may also encourage early settlement. For example, a defendant faced with paying his attorney's fees, a judgment to the plaintiff, and the plaintiff's attorney's fees might agree to a quicker settlement to avoid paying the cost to litigate the matter in court where fees will dramatically increase. In addition, awarding attorney's fees under the Ordinance would make it easier for victims to obtain counsel since counsel will be assured of payment if their client prevails in court.

Finally, the Ordinance needs an additional provision outlawing unequal pay for equal work. The pay disparity between men and women in Hong Kong is a serious problem that continues to grow.[262] The Sex Discrimination Ordinance does not provide adequate protection against wage discrimination. "[T]he concept of unequal pay for similar or comparable work would likely fall outside the ambit of definitions of direct discrimination used in the Ordinance."[263] Because wage discrimination is incompatible with the notion

260. *Id.* at 258. "Relevant office" is defined by the ordinance as the police force, the royal Hong Kong Auxiliary police force, the immigration service, the fire services department, the correctional services department, and the customs and excise service. *See supra* note 258.

261. Petersen, *supra* note 34, at 379.

262. *See* Cheung, *supra* note 55, at 391.

263. *Id.*

of gender equality, the government should amend the Sex Discrimination Ordinance or enact new legislation that outlaws unequal pay for equal work.[264]

Allyson Singer[*]

264. *See id.* for a more thorough discussion on the disparity of wages between men and women in Hong Kong and the proposed solution.

* J.D. Candidate, 2001, Indiana University School of Law—Indianapolis; 1998 graduate of the University of Southern Indiana. I would like to thank Gregory Duff for his assistance and support during the editing process.