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COMMENT

NOTES

UNDERSTANDING NATIONAL TREATMENT: THE PARTICIPATORY VISION OF THE WTO

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I. INTRODUCTION: THE INTERPRETIVE PROBLEMS

Rules against discrimination are easy to state at a general level but are devilishly difficult to apply in particular cases; the gulf between articulating principles of non-discrimination and applying them is wide.[1]

So it is with the national treatment provisions of Article III of GATT.[2] At a general level, the national treatment principle is sensible, self-evident, and seemingly straightforward. Whether stated in the principle's general and formal version—that a member country must not treat foreign products less favorably than domestic products (without justification under Article XX)—or in one of the common variants—that a WTO member may not discriminate on the basis of the national origin of the product (without justification under Article XX)—the principle appears to be self-applying. Yet the general principle, a bedrock of the WTO system, gives little guidance to help us see whether a domestic measure treats imports less favorably than domestic goods or discriminates on the basis of national origin.

Naturally, we look to the purpose of the anti-discrimination provision to help us apply it, but moving from general purpose to a specific test is also problematic. By all accounts, the national treatment principle is designed to interdict "hidden protectionism" and to prohibit measures that are equivalent

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1. For example, the Equal Protection Clause of the U.S. Constitution simply states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Yet, the Supreme Court chooses from at least three different levels of scrutiny to determine the validity of a state or federal statute that discriminates against a group of people. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 526, 526-33 (1997) (giving an overview of Equal Protection analysis). *See generally* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003) (arguing that the current test for identifying unlawful discrimination must be changed in order to provide equity in the workplace); Regina E. Gray, Comment, *The Rise and Fall of the "Sex-Plus" Discrimination Theory: an Analysis of Fisher v. Vassar College*, 42 HOW. L.J. 71 (1998) (discussing gender discrimination in the workplace under Title VII); Rebecca Hanner White, *Modern Discrimination Theory and the National Labor Relations Act*, 39 WM. & MARY L. REV. 99 (1997) (comparing discrimination theories under the National Labor Relations Act and Title VII).

2. The General Agreement on Tariffs and Trade 1994, art. III, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 33 I.L.M. 1154 (1994) [hereinafter GATT 94].

to tariff barriers,[3] with the goal of protecting the commitments that WTO members have made to reduce tariff and other trade barriers and to insure equality of competitive conditions. But identifying hidden protectionism or measures that circumvent the rules against trade barriers is tricky business.[4]

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3. According to the Appellate Body,

> [T]he broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production.' Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products . . . Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.

WTO Appellate Body Report on Japan—Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 15 (Oct. 4, 1996) [hereinafter Japan—Alcohol (AB)] (citations omitted). This anti-protectionist thrust is supported by Article III:1, which provides a statement of general interpretive purpose: "The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal [distribution of products] should not be applied to imported or domestic products so as to afford protection to domestic production." GATT 94, *supra* note 2, art. 3, para. 1. The Appellate Body has recognized that this "general principle" from Article III:1 informs Article III:4, although Article III:4 does not explicitly refer to the general principle. WTO Appellate Body Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, para. 98 (Mar. 12, 2001) [hereinafter EC—Asbestos (AB)]. "[T]here must be consonance between the objective pursued by Article III, as enunciated in the 'general principle' articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:4." *Id.*

There has been some confusion about the relationship between Article III:I and Article III:4. An earlier Appellate Body decision seemed to indicate that this general principle informs the various provisions of Article III in different ways. WTO Appellate Body Report on European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, para. 216 (Sept. 9, 1997) [hereinafter EC—Bananas]. Accordingly, some have seen EC—Asbestos to be a change in the way that Article III:1 informs Article III:4. For example, Professor Regan interprets the Appellate Body in EC—Bananas to be saying that Article III:1 is not to be looked at in interpreting III:4. Donald H. Regan, *Regulatory Purpose and "Like Products" in Article III:4 of the GATT (With Additional Remarks on Article III:2)*, 36 J. WORLD TRADE 443, 446-47 (2002) [hereinafter Regan, *Regulatory Purpose*]. However, in EC—Bananas, the Appellate Body merely pointed out that "a determination of whether there has been a violation of Article III:4 does *not* require a separate consideration of whether a measure 'afford[s] protection to domestic production.'" EC—Bananas, *supra* para. 216. This was a reaction to the panel's decision to apply the "design, architecture and structure" test in its III:4 analysis. *See id.* para. 215-16. The statement in EC—Bananas that Article III:1 does not present a separate test is consistent with the statement in EC—Asbestos that III:1 informs the interpretation of the tests that are set forth in Article III:4. *See also* WTO Panel Report on Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, para. 10.369 (Adopted Apr. 22, 1998) [hereinafter Japan—Film] (using Article III:1 in interpreting III:4 but not separately considering "so as to afford protection").

4. Article III is not the only WTO treaty provision that tries to interdict hidden protectionism or unreasonable barriers to trade. The General Agreement on Trade in Services (GATS) also contains a national treatment provision. *See* General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284, 33 I.L.M. 1167 (1994), art. 17. Moreover, two other treaties, the

The task is not made easier by the way the national treatment principle is articulated in the WTO treaties. The general Article III:4 invocation to give "like" imported goods no less favorable treatment than domestic products is simple enough, but it requires us to squeeze the relevant analysis into a few words, and the words are neither defined in GATT nor self-defining. Moreover, the Article III prohibitions present a series of puzzles in themselves. Why are the rules against discrimination in tax measures (under III:2) different from those applicable to other regulatory measures (under III:4)? Why have two separate tests for tax measures, one for taxes on like products (the first sentence of III:2) and another for taxes on directly competitive or substitutable products (the second sentence and Ad Article of III:2)? What is the significance of the Delphic instruction in Article III:1 that measures *"should* not" (rather than *must* not) be applied "so as to afford protection to domestic production"? Finally, if, as some believe, one cannot assess discrimination without looking at the purpose of the regulation, what is the relationship between Article III, which does not mention regulatory purpose, and Article XX, where regulatory purpose is central to the analysis?

Generally, WTO scholarship and the popular view of the WTO assume that the national treatment standard has substantive content—that is, that it requires the analyst to evaluate, in some way, the appropriateness of a country's regulatory scheme to see whether the regulatory scheme is consistent with the values that make up the WTO's free trade regime.[5] This substantive orientation inevitably leads analysts to advocate some version of an aims and effects test—some inquiry into the purposes of the measure (to see whether, on the one hand, it is protectionist, or, alternately, whether it advances some

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Agreement on Sanitary and PhytoSanitary Standards and the Agreement on Technical Barriers to Trade have roughly the same purpose. *See* Agreement on the Application of Sanitary and PhytoSanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 59, 33 I.L.M. (1994); Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 121, 33 I.L.M. (1994).

5. The common focus of national treatment analysis is on a framework that strikes the appropriate balance between the regulatory autonomy of member states and the suppression of hidden protectionism. *See generally* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 212 (1997) (referring to the "clash of policies" inherent in the national treatment provision); RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW 90-105 (1998) (discussing the national treatment obligation); Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in 2 FAIR TRADE AND HARMONIZATION 1 (Jagdish Bhagwati & Robert E. Hudec, eds., 1996) ("[T]he rules of [GATT] primarily aim at the reduction of barriers between markets, not at the harmonization of competitive conditions in markets. They therefore impose in principle only constraints on trade policies, but leave the contracting parties free to conduct their domestic policies."). GAETAN VERHOOSEL, NATIONAL TREATMENT AND WTO DISPUTE SETTLEMENT: ADJUDICATING THE BOUNDARIES OF REGULATORY AUTONOMY 2 (2002) (portraying the national treatment analysis as turning on the desire to liberalize trade without requiring deeper market integration or harmonization).

legitimate and non-protectionist purpose), some inquiry into the measure's effects on international trade or foreign producers, and some notion of how to balance legitimate purpose and adverse effects.[6] Although analysts use a wide variety of verbiage to articulate these tests,[7] these substantive approaches are grounded in the common notion that the WTO is overseeing a country's domestic measures to consider how they stack up in light of the impact of the measure on the values of the WTO regime.[8]

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6. The most developed of these approaches is the "aims and effects" test, which under the traditional understanding regulatory purpose is analyzed under the "like product" inquiry under Article III, but only when the regulation at issue is origin-neutral. *See* Won Mog Choi, *Overcoming the "Aim and Effect" Theory: Interpretation of the "Like Product" in GATT Article III*, 8 U.C. DAVIS J. INT'L L. & POL'Y 107, 115 (2002). Simply put, "aims and effects" asks "whether they [internal regulatory measures] have a bona fide regulatory purpose and whether their effect on conditions of competition is protective." Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L LAWYER 619, 626 (1998) [hereinafter Hudec, *Requiem*]. According to Hudec, such an analysis brings Article III jurisprudence more in tune with the policy goals of GATT, as stated in Article III:1. *Id.* Hudec also believes that regulatory purpose and trade effects of a measure are the two most important aspects of distinguishing valid regulation from protectionism. *Id.* at 628. Also, by bringing regulatory justification into the "like product" inquiry, valid regulation will not be made invalid by the harsh rigors of Article XX analysis. *Id.* The "aims and effects" test, applied to "like products," received support in two GATT panel decisions. *See* Robert E. Hudec, *"Like Product": The Differences in Meaning in GATT Articles I and III*, *in* REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101 (Thomas Cottier & Petros C. Mavroidis eds., 2000) [hereinafter Hudec, *"Like Product"*], (citing United States—Measures Affecting Alcoholic and Malt Beverages, B.I.S.D., (39th Supp.) at 206 (1993), and United States—Taxes on Automobiles, GATT, GATT Doc. DS.31/R (Oct. 11, 1994) (unadopted)). However, the "aims and effects" test employed by these two decisions are rejected under current WTO case law. See discussion *infra* note 9.

The "aims and effects" approach has also found a home among commentators under the "so as to afford protection" requirement of Article III:2 second sentence, and even the "no less favorable treatment" requirement of Article III:4. *See* Robert Howse & Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 E.J. INT'L L. 249, at 267 (2000) ("[I]n its discussion of 'affording protection,' the Appellate Body in Japanese Alcohol may or may not have rejected 'the aims and effects test,' but it clearly did not reject consideration of aims and effects."); Roessler, *supra* note 5 at 29. *See also* Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most-Favored-Nation Treatment—or Equal Treatment?*, 36 J. WORLD TRADE 921, 945 (2002) (arguing against reading "aims and effects" into the requirement of "no less favorable treatment" in Article III:4).

7. *See* Edward S. Tsai, *"Like" is a Four-Letter Word—GATT Article III's "Like Product" Conundrum*, 17 BERKELEY J. INT'L L. 26 (1999); Kazumochi Kometani, *Trade and Environment: How Should WTO Panels Review Environmental Regulations Under GATT Articles III and XX?*, 16 NW. J. INT'L L. & BUS. 441 (1996); Choi, *supra* note 6, at 111 (designating a "proportional tax differentiation based on transparent criteria" test).

8. More recently Geatan Verhoosel has recommended a necessity test for determining the scope of the national treatment provision. *See* VERHOOSEL, *supra* note 5, at 2. Under this test, a panel or the Appellate Body would determine whether the restriction on trade that was inherent in the measure was necessary to achieve the purpose of the regulatory system. *Id.* If it were not necessary, the regulation would be found to have violated the national treatment

These substantive orientations toward the national treatment principle have led to some difficulties in interpreting the Article III decisions of the WTO panels and the Appellate Body. Although seeming to eschew any aspect of the aims and effects test,[9] the Appellate Body has called for an examination of the "design, the architecture, and the revealing structure of a measure,"[10] when assessing tax measures, a standard that looks to many to be a test that focuses on the purpose of the measure.[11] And the Appellate Body has

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provision. *Id.* Upon analysis this approach also requires a substantive review of the clash between trade values and domestic regulatory values. Although the approach focuses on the connection between the purposes and the effect of the regulation, by assuming that the decision maker can recognize both lawful purposes and adverse effects, it subsumes a form of the aims and effects test. This book is reviewed in *Recent Publications: Globalization of Law and Capital*, 28 YALE J. INT'L L. 275, 295 (2003) (reviewed by John David Lee) and in Simon Lester, *Book Review*, 2003 J. INT'L ECON. L. 291 (2003).

9. According to the Appellate Body,

> [T]he third inquiry under Article III:2, second sentence, must determine whether 'directly competitive or substitutable products' are 'not similarly' taxed in a way that affords protection. This is not an issue of intent. It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure.

Japan—Alcohol (AB), *supra* note 3, at 27–28. Japan—Alcohol (AB) also rejected the "aims and effects" approach to "like products" under III:2 first sentence. Hudec, *Requiem*, *supra* note 6, at 630. The Appellate body has rejected resort to legislative intent and purpose in other contexts as well. *See, e.g.*, WTO Appellate Body Report on United States—Continued Dumping and Subsidy Offset Act of 2000, AB-2002-7, 16 Jan. 2003 (no need to inquire into legislative intent when interpreting measure that allowed complaining domestic industry to recover dumping duties).

10. Japan—Alcohol (AB), *supra* note 3, at 29. The Appellate Body has applied the "design, structure and architecture" test in all III:2 second sentence cases since *Japan—Alcohol*. *See* WTO Appellate Body Report on Canada—Certain Measures Concerning Periodicals, WT/DS31/AB/R (June 30, 1997) [hereinafter Canada—Periodicals]; WTO Appellate Body Report on Korea—Taxes on Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R (Jan. 18 1999) [hereinafter Korea—Alcohol]; WTO Appellate Body Report on Chile—Taxes on Alcoholic Beverages, WT/DS87/AB/R, WT/DS110/AB/R (Dec. 13, 1999) [hereinafter Chile—Alcohol].

11. *See* Hudec, *Requiem*, *supra* note 6, at 631–632 (stating in the context of III:2, second sentence, "neither the Appellate Body's insistence on different words nor its insistence on objective analysis serve to mark a clear distinction between its 'protective application' concept and the 'aims and effects' analysis. . . . The decision in the Japan—Alcoholic Beverages case itself did not make clear just how far the Appellate Body's rejection of the 'aim and effect' approach would be carried."). EC—Bananas, *supra* note 3, by preventing application of design, architecture and structure test to III:4, effectively limited that test to only III:2, second sentence. *See* Hudec, *"Like Product"*, *supra* note 6, at 117-18 (claiming that under *EC—Bananas* "the aims and effects test was rather summarily rejected as an incorrect application of the 'like product' test under Article III:4.").

explicitly seemed to endorse a purposive interpretation in one recent case,[12] raising new questions about the role of purpose and effects in interpreting Article III.[13] Commentators have also suggested that the Appellate Body use an "effects test," suggesting that the Appellate Body examine the proportionate burden of the measure on domestic and foreign products; if the burden on foreign products is disproportionate to the burden on domestic products, the measure can be said to have a protectionist effect.[14] For example, they view "design, architecture, and structure" as an effects test.[15] And some commentators see both purpose and effects in analysis in the cases.[16]

Any version of the aims and effects test is problematic, in part because the text of Article III does not support it.[17] Moreover, this substantive orientation toward identifying and interdicting "hidden protectionism" is a

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12. See Chile—Alcohol, where the Appellate Body stated that it examines

> [T]he design, architecture and structure of a tax measure precisely to permit identification of a measure's objectives or purposes as revealed or objectified in the measure itself. Thus, we consider that a measure's purposes, objectively manifested in the design, architecture and structure of the measure, are intensely pertinent to the task of evaluating whether or not that measure is applied so as to afford protection to domestic production.

Chile—Alcohol, *supra* note 10, para. 71.

13. *See, e.g.*, Regan, *Regulatory Purpose*, *supra* note 3, at 443 (in Chile—Alcohol "the Appellate Body has told us that. . . in deciding whether a measure is applied 'so as to afford protection,' we must consider 'the purposes or objectives of a Member's legislature and government as a whole'—in other words, the regulatory purpose of the measure."). However, Regan misinterprets why the Appellate Body looks to "design, architecture and structure," *See* discussion *infra* accompanying note 147.

14. For example, Lothar Ehring assesses two possible tests for determining the effect of a measure—the "diagonal test" and the "asymmetric impact test." Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most-Favored-Nation Treatment—or Equal Treatment?*, 36 J. WORLD TRADE 921, 924 (2002). Under the "diagonal test," the inquiry is "whether there are any imports receiving less favourable treatment than any like domestic products." *Id.* Under the "asymmetric impact test," the inquiry is whether imports as a whole are treated less favorably than domestic products as a whole. *Id.* at 924-25. While suggesting the asymmetric approach to effects is the better approach, Ehring states that a finding of asymmetric impact would not be necessary for finding less favorable treatment. *Id.* at 925, 928 (stating that other facts could lead to a violation, such as the application of the measure or its objective design).

15. *See id.* at 938 (discussing Chile—Alcohol). *See also* Simon Lester & Kara Leitner, *Dispute Settlement Commentary, European Communities—Asbestos (Appellate Body Report)* 14 (2001), *available at* www.worldtradelaw.net/dscsamples/index.htm (last visited Mar. 9, 2004) ("A discriminatory effect approach appears to have been applied by the Appellate Body in the context of Article III:2, second sentence in Chile—Alcohol.").

16. *See* Hudec, *Requiem*, *supra* note 6, at 631 (discussing the panel decision in *Japan—Alcohol* as calling for an effect test rather that an "aims and effects" test in the context of Article III:2 second sentence). Hudec then states the Appellate Body in *Japan—Alcohol* called for protective effect plus "protective application. . . , which for all the world looked like an objective analysis of regulatory purpose." *Id.*

17. *See id.* at 628-29 (discussing that lack of textual basis for "aims and effects" approach in "like product" analysis is clearest in III:2 first sentence). *See also* Choi, *supra* note 6, at 117 ("[T]he aim-and-effect theory cannot overcome its critical weaknesses—namely, the lack of textual basis and the ample risk of circumvention.").

major source of friction between notions of national sovereignty and the WTO and creates a public relations problem for the WTO. WTO critics with a substantive orientation see the WTO as interfering with the ability of a country to embrace non-economic goals—as a threat, for example, to environmental or safety values—while street protestors see it as symbolic of undue interference from Geneva, perhaps driven by the overwhelming influence of multinational corporations. Even supporters of the WTO, although staunchly defending the need for rules against "hidden protectionism," must—under the substantive view—concede some room for either purpose or effects to be taken into account in order to mesh WTO and national values,[18] albeit without any consistent way of understanding how to define either purposes or effects, or how to balance them.

In this article we suggest that this substantive-based understanding of the national treatment provision should be, and is being, replaced by a procedurally oriented understanding, one that largely avoids a judgment about the substantive values underlying national regulation or the clash between the free trade values of the WTO and national regulatory values. When properly understood, the interpretive standards that the Appellate Body has set up are not an endorsement of an aims and effects review. Instead, the Appellate Body is moving, seemingly deliberately, toward a vision of the national treatment principle that emphasizes process values, specifically the importance of protecting domestic lawmaking processes that allow domestic interests to provide "surrogate representation"[19] for adversely affected foreign interests. This interpretation of the national treatment principle puts the Appellate Body in the position of looking at domestic legislation to see whether domestic forces that have interests identical to the interests of foreigners (and would therefore give surrogate representation to foreign interests within the domestic lawmaking process) have in fact been silenced or had their role impaired. This is the surrogate representation rationale of the national treatment principle.

This article, by expanding on the surrogate representation rationale, reorients our understanding of the national treatment provisions of Article III from a substantive to a procedural perspective. This reorientation is faithful to the jurisprudence of the Appellate Body interpreting Article III, and shows how the Appellate Body has consistently steered away from a substantive review of national legislation under Article III and away from examining either the substantive aims or their relationship to the external effects of domestic regulatory measures, even as it has given real teeth to the national treatment provision. This reorientation is also faithful to the central interpre-

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18. *See, e.g.*, Hudec, *Requeim, supra* note 6, at 620 ("The policing activity of domestic regulatory measures is a delicate task, one that requires reaching an acceptable balance between the trade objectives of the regime and the legitimate regulatory claims of members states.").

19. The term is taken from Laurence H. Tribe's discussion of the same rationale under U.S. dormant Commerce Clause jurisprudence. LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW, § 6-5, 1055 (2001). The concept has also been called "virtual representation." JOHN HART ELY, DEMOCRACY AND DISTRUST 82 (1980).

tive principle of Article III, the principle of equality of competitive conditions,[20] and it provides answers to the puzzles that we have already noted about the relevant WTO provisions and thus leads to a more coherent WTO jurisprudence. Moreover, this reorientation is consistent with, and supports, the central function of the WTO in the international system, which is to enable countries to participate effectively in the policymaking of other countries.[21] Finally, this reorientation will ease the perceived tension between the values of the trade regime and domestic regulatory values, because it gets the WTO out of the position of overseeing the clash between those values.

This article reflects and transposes in the context of the WTO national treatment jurisprudence an ongoing debate in U.S. constitutional jurisprudence over the appropriate basis for courts to invalidate state regulation that affects interstate commerce. Like the national treatment provision, the idea behind this so-called dormant Commerce Clause jurisprudence has led the Supreme Court to strike down state regulations that discriminate or burden interstate commerce.[22] One view, similar to the dominant interpretation of the WTO's national treatment provision, gives the dormant Commerce Clause substantive content by emphasizing the role of dormant Commerce Clause jurisprudence in protecting against state legislation that would interfere with a common market in the United States, emphasizing the economic goals of the jurisprudence.[23] Another view, and the one highlighted in this article, is grounded in political theory—namely that the purpose of the dormant Commerce Clause jurisprudence is to protect out-of-state citizens from harmful decisions made

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20. Under the reasoning of this article, the "equality of competitive conditions" test is the same as the inquiry into surrogate representation. Because the "equality of competitive conditions" test is better supported by the text of Article III over any purpose-driven test, the surrogate representation inquiry is also better supported by the text of Article III.

21. *See infra* text accompanying notes 33-43.

22. Although the U.S. Constitution does not explicitly limit state power in this respect, the affirmative grant of power to the U.S. Congress is thought to impliedly limit the power of states, even when the exercise of Congressional power is unexercised and thus lies dormant. A substantial body of thought questions whether this implied limitation on state power is an appropriate role for courts to exercise, especially given the fact that Congress can always limit state power through preemptive legislation. *See generally* CHEMERINSKY, *supra* note 1, at 403–06 (summarizing the arguments, but noting that the dormant Commerce Clause is "firmly established"). Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L. J. 569, 573 (1987) (the dormant Commerce Clause "lacks any basis in constitutional democratic theory").

23. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 795 (2001) ("The primary justification is that the dormant Commerce Clause ensures free trade among the states and thereby secures the associated economic benefits."); Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 17 (1987) ("When so interpreted, the commerce clause becomes a charter of free trade."). *But see* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1267 (1986) ("[T]alk of the Nation as an economic unit, talk of free trade, and talk of free access to markets may reflect nothing more than vehemence in the condemnation of protectionism.").

without their representation or representation by a surrogate.[24] The two views, of course, are not mutually inconsistent,[25] and various commentators have attempted to synthesize them in their own analysis.[26] However, the distinction between a substantively-based and a process-based rationale is crucial not only for the freedom that it gives states to regulate their local economies, but also for the legitimacy of the enterprise of interfering with local decisions.[27] It is not surprising then that adherents to one rationale or the other continue to dispute their relative merits.[28]

It may be appropriate to foreshadow some of the doctrinal conclusions of this analysis. First, the aims and effects test is indeed dead. When the Appellate Body refers in its analysis to the purpose of a measure, it is doing so not to distinguish protectionist from non-protectionist purposes on substantive grounds. Instead, it is looking at the measure in a far narrower way—namely, to determine whether the purpose of the particular classification chosen by the regulatory authority was to buy domestic support for the measure by imposing disproportionate costs on foreign producers.[29] Similarly, although national treatment analysis necessarily looks at the degree to which imports are adversely affected by a measure, this is not a substantive effects

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24. TRIBE, *supra* note 19, at 1051 ("[S]tate and local lawmakers are especially susceptible to pressures that may lead them to make decisions harmful to the commercial and other interests of those who are not constituents of their political subdivisions."). *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (describing and analyzing the process based approach but recommending that analysis be moved from Commerce Clause jurisprudence to the Privileges and Immunities Clause); Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A Gatt's Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1405 (1994) ("Local legislatures may be well suited to weigh the importance of gains in terms of the costs they are willing to pay, but there is no reason to think that they have any capacity to make an honest weighing of the balance between their own gains and the costs to outsiders within the larger community."); Mark V. Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 125 (1979) ("[J]udicial displacement of legislative judgment is appropriate when it seems that the legislative process has operated in a distorted way—for example by excluding some affected interest from the legislative process."). The process-based theory is endorsed as the rationale for overseeing state taxation in Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 229, 232 (1957).

25. *See, e.g.*, CHEMERINSKY supra note 1, at 404 ("These justifications, of course, are not mutually exclusive, but quite consistent.").

26. *See, e.g.*, Tushnet, *supra* note 24 (combining the notion that the dormant Commerce Clause contains a kind of substantive due process of free trade with the political process theory); Goldsmith & Sykes, *supra* note 23 (purporting to unify the efficiency and the process justifications for the dormant Commerce Clause).

27. We expand on this point *infra* section IV.

28. *See, e.g.*, TRIBE, *supra* note 19, at 1058 ("[A]lthough the Court's Commerce Clause opinions have freely employed the language of economics, the decisions have not interpreted the Constitution as establishing the inviolability of the free market."). *But see, e.g.*, Redish & Nugent, *supra* note 22, at 613 ("[T]he democratic process model. . . proves too much. Once we agree that the key factor is the lack of representation in the legislative process, any state regulation affecting the residents of other states ('foreign residents')—whether discriminatory or not—is rendered suspect.").

29. *See infra* the discussion of Chile—Alcohol text accompanying note 147.

test; this test does not seek to identify the trade-distorting effects of the measure in order to balance the trade-distorting effect against the non-trade purpose of the measure. Instead, an examination of the impact of the measure on foreign producers is an attempt to measure the extent to which foreign producers and their domestic surrogates have been effectively eliminated from the domestic debate about the substantive wisdom of the measure under consideration.

Section II of this article explains the surrogate representation rationale that underlies rules against discrimination like those embodied in Article III. We argue that the WTO's primary function is to allow countries to represent the interests of their producers and exporters when the laws of foreign countries impede those interests, and that this function is important because otherwise those interests might be underrepresented when foreign countries formulate their policies. This is what Gerhart has elsewhere called the participatory vision of the WTO.[30] We then point out that the surrogate representation rationale, which is identical to the rationale underlying the dormant Commerce Clause in U.S. constitutional jurisprudence,[31] recognizes that interests in the regulating country, including consumers and those domestic producers who will be subject to the regulation, can serve as a proxy for those foreign interests, providing surrogate representation to the foreign interests. When that occurs, the participatory deficit[32] that is inherent in a system of territorially bound government can be overcome. One function of the WTO, and specifically of the national treatment provisions, is to insure that the possibility of surrogate representation is not nullified or disarmed in the regulating country.

Section III then reviews the Appellate Body's jurisprudence under Article III to show that the surrogate representation rationale is indeed guiding the Appellate Body as it shapes the national treatment provisions. In this discussion, we show how other understandings of national treatment, and particularly those that would look to include expansive tests of purpose or effect of a regulatory measure, are misinterpreting what the Appellate Body is doing.

Section IV, the concluding section, summarizes some of the implications of this analysis for our understanding of the role of the WTO and its evolving jurisprudence.

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30. Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 U. PA. J. INT'L ECON. L. 1, 3 (2003).

31. *See* TRIBE, *supra* note 19, at 1057.

32. This deficit is different than the "democratic deficit" that exists between citizens of the world and direct involvement with international organizations. *See* Gerhart, *supra* note 30, at 9-11. The participatory deficit is expounded *infra* text accompanying notes 34-40.

II. THE PARTICIPATORY VISION OF THE WTO AND SURROGATE REPRESENTATION

The national treatment interpretation that is advanced here reflects the role of the WTO as an institution of international federalism.[33] In that role, the WTO gives participatory rights to adversely affected foreign interests that would otherwise be unrepresented when a country makes its policy. The national treatment provision plays a vital part of that role because it allows the WTO to oversee the lawmaking processes in member countries to make sure that those processes do not devalue or ignore forces within the country that could give the interests of foreign producers surrogate representation when policy is made.

Gerhart has written elsewhere in greater length about the participation-enhancing function of the WTO.[34] Briefly, this function responds to a significant problem of democratic representation in a globalized, interconnected world. The problem is that even though national lawmaking often has effects outside the country, lawmakers generally have insufficient incentives to take those effects into account because adversely affected people are outside the lawmaking polity.[35] When lawmaking has external, transnational effects that

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33. *See, e.g.*, Farber & Hudec, *supra* note 24, at 1404-05.

> The conventional explanation of the extraordinary legal protection given to free trade policy is that, unlike most other policy measures, trade restrictions cause direct and immediate harm to 'outsiders' who actually are members of the same wider community. External controls are required, the argument goes, because local units will not properly take into account these harms to other community members. In a community consisting of several smaller units of government (a United States consisting of individual states, or a GATT consisting of individual nations), the ultimate question is whether the gain of the regulation for insiders outweighs the harm it causes to outsiders. Local legislators may be well suited to weigh the importance of gains in terms of the costs they are willing to pay, but there is no reason to think that they have any capacity to make an honest weighing of the balance between their own gains and the costs to outsiders within the larger community. Indeed, human experience tells us that, in a democracy, they have every reason not to do an honest job.

Id.

34. Gerhart, *supra* note 30.

35. As has been said in connection with the dormant Commerce Clause: "The checks on which we rely to curb the abuse of legislative power—election and recall—are simply unavailable to those who have no effective voice or vote in the jurisdiction which harms them." TRIBE, *supra* note 19, at 1052. "The representation-enforcing approach commands judicial intervention where the mechanisms of participatory government have failed to operate, but it also requires deference where no such defect appears." Eule, *supra* note 24, at 442 (discussing the process-based surrogate representation approach to the dormant Commerce Clause). Analysts of the dormant Commerce Clause identified strands of surrogate representation spread throughout Supreme Court decisions. *See generally* Gerhart, *supra* note 30, at 38-48. "[S]tate regulations are rarely struck down for the explicit reason that they are the products of unrepresentative political processes. Rather, this political defect should be seen as *underlying* the forms of economic discrimination which the Supreme Court has treated as invalidating certain state actions with respect to interstate commerce." TRIBE, *supra* note 19, at 1057. Discriminatory trade measures appear in two cases. In case one, either there are no surrogates

are not adequately given weight in the lawmaking process, crucial aspects of democratic representation are threatened, for democratic principles of participation and accountability posit that all those who are adversely affected by the policy will participate in making the policy.[36] The WTO restores to national law-making a balance of participation and accountability, and thus of democratic acceptability, by restraining national lawmaking that would adversely affect foreign interests without having to take those interests into account.

Under this vision of the WTO, the members of the WTO are not imposing substantive values on one another, nor are they giving trade values transcendent weight in public policy. Participation and accountability are not about outcomes or substantive standards, but about processes.[37] Naturally, a regulatory decision-maker must take into account, and balance, the interests of competing groups of producers, as well as the interests of consumers and the broader society. When all those with relevant interests are represented in the forum that sets up the regulatory regime, we accept the legitimacy of the regulatory regime as a reflection of the public interest even if we argue against the wisdom of the regulation. Debate about the regulation either accepts its

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for outside producers inside the regulating polity or there are surrogates inside the regulating polity, but their interests are altered by the enacted measure such that they are no longer viable surrogates. "[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." S. C. State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 185 (1938). In case two, there are surrogates inside the regulating polity, and they are affected the same as those outside the polity; therefore, the court must let the measure stand. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981) ("The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse.").

36. *See* DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER 16 (1995).

> Throughout the nineteenth and twentieth centuries theorists of democracy have tended to assume a 'symmetrical' and 'congruent' relationship between political decision-makers and the recipients of political decisions. In fact, symmetry and congruence have often been taken for grated at two crucial points: first, between citizen voters and the decision-makers whom they are in principle able to hold to account; and secondly, between the 'output' (decisions, policies, and so on) of decision-makers and their constituents—ultimately, the 'people' in a delimited territory.

Id. See also Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. WORLD TRADE 167, 171-72 (2001). ("[A] decision can be called democratic if those affected by the decision were the participants in the decision-making process. . . Accordingly, those who have to comply with the decision—or in other words: who are governed by it—have to be the decision-makers.") (citation omitted).

37. *See, e.g.*, ROBERT A. DAHL, ON DEMOCRACY 37 (1998); Jack L. Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 288 (1966) ("Although the classical theorists accepted the basic framework of Lockean democracy, with its emphasis on limited government, they were not primarily concerned with the policies which might be produced in a democracy; above all else they were concerned with human development, the opportunities which existed in political activity to realize the untapped potential of man.").

legitimacy and focuses on the regulation's substantive wisdom or criticizes the procedural legitimacy of the measure's enactment.[38]

When adversely affected persons—such as foreigners—are not included in the lawmaking forums, however, the procedural concerns are especially acute. The probability that foreign interests will be ignored or displaced is especially great when member nations are crafting their regulatory regimes.[39] This is so because countries have a natural tendency to buy off domestic opposition to regulatory proposals by imposing cost on foreigners; the domestic industry is likely to have less opposition to the costs of a regulatory regime when the regime imposes disproportionately higher costs on foreign rivals. Indeed, Ralph Nader, for one, has argued that imposing costs on foreign rivals is an important aspect of the regulatory state.[40]

The national treatment provision, like its counterpart in the dormant Commerce Clause doctrine of the U.S. Constitution, is designed to oversee the political process in member countries to insure that the interests of foreigners are not denigrated or ignored. This is the basis for the participatory, process-based "representation reinforcement"[41] rationale for the external supervision of state political processes that underlies the dormant Commerce Clause, and, we believe, the WTO's national treatment provision. The rationale has, however, been misinterpreted, for it does not invalidate state legislation merely because foreign interests are not represented in state lawmaking forums, as some have mistakenly thought.[42] It is not the "inherently limited constituency"[43] of national lawmaking by itself that creates the problem. Such a basis for invalidating regulation would, as the critics maintain, be too broad a principle, invalidating regulatory measures merely because foreign interests were adversely affected. The rationale behind the surrogate representation understanding of the national treatment provision is to oversee state law-making processes to determine when the process has in fact co-opted those political forces that would otherwise provide surrogate representation for foreign interests.

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38. *See, e.g.*, Gerhart, *supra* note 30, at 27-33. Under public choice theory, commentators sometimes seek to question the substantive wisdom of a regulation by questioning its procedural legitimacy. Because those efforts frequently rest on precarious assumptions about how voters define the public interest, they are rarely successful in our view.

39. TRIBE, *supra* note 19, at 1051–52. "[T]he Court's rigorous tests . . . underscore the recognition implicit in the Commerce Clause that state and local lawmakers are especially susceptible to pressures that may lead them to make decisions harmful to the commercial and other interests of who are not constituents of their political subdivisions." *Id.*

40. Ralph Nader, Statement at the Uruguay Round Trade Negotiations, Hearings before the Senate Committee of Finance 240, 252 (Mar. 16, 1994) (claiming that domestic laws such as laws on the export of raw logs are necessary to buy the loyalty of domestic industry in exchange for accepting conservation limits on logging).

41. TRIBE, *supra* note 19, at 1054.

42. *See, e.g.*, Goldsmith & Sykes, *supra* note 23, at 795-96; Redish & Nugent, *supra* note 22, at 614-15.

43. TRIBE, *supra* note 19, at 1052.

To see that point, we must recognize that foreign interests are not necessarily under-represented in national lawmaking processes. Surrogates—that is, people within the national polity who share the interest of foreigners and who will represent those interests when the regulatory framework is set up—represent foreign interests. In general, foreign producers have two sets of domestic proxies when domestic regulators consider the scope and form of the regulation. First, domestic consumers represent the interests of foreign producers; when foreign producers offer reasonable substitutes to domestic products, the interests of domestic consumers and foreign producers are symmetrical and identical.[44] Consumers seek to generate consumer surplus by finding better goods at cheaper prices. When they do, the sales generate producer surplus for those producers who are able to supply the goods that generate the most consumer surplus. When no barriers to exchange exist, consumers tell us when certain foreign products compete with domestic products. In their search for better products at lower prices, consumers naturally represent the legitimate interests of producers anywhere in the world.[45] Trade barriers, on the other hand, make it difficult for consumers to recognize, and therefore to represent, the interests of foreign producers.

Admittedly, consumers will not be perfect proxies for the interests of foreign producers. Consumers face well-known collective action problems that make it difficult to represent their own interest, let alone the interest of foreign producers. When consumer interests are small and dispersed, consumers will have trouble organizing.[46] We should not, however, overemphasize the collective action problems of consumers. Often "consumers" are not the ultimate consumers of goods. Instead, "consumers" tend to be large manufacturers or retailers who depend on foreign sources of supply. Additionally, even for less powerful groups of consumers, advances in communications and the rise of consumer advocacy have helped overcome the collective action problems.[47]

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44. See *id.* at 1955 for a discussion on potential consumer surrogacy in the context of the dormant Commerce Clause. *See also* Tushnet, *supra* note 24, at 133, 138–39.

45. John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 572-89 (2000). In suggesting their own version of a process-oriented test for determining the existence of hidden protectionism, Professors John McGinnis and Mark Movsesian develop a test that capitalizes on a flipped notion of surrogate representation, emphasizing the importance of foreign producers representing the interests of domestic consumers in the domestic regulatory process. *Id.* McGinnis and Movsesian suggest that a transparency requirement would allow affected industries to comment on regulations. *Id.* at 573. These industries, then, would represent the diffuse consumer groups who would benefit from a lack of regulation, but are not well represented in the regulatory process. *Id.* at 574-75. Also, if a regulation places burdens on the domestic industry as well, "it gives foreign producers some virtual representation in the domestic political processes that lead to the regulation and provides some assurance that the regulation is not discriminatory." *Id.* at 574.

46. *See generally* MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1965).

47. *See* Robert V. Percival, *Environmental Legislation and the Problem of Collective Action*, 9 DUKE ENVTL. L. & POL'Y F. 9, 19 (1998) (stating the Environmental Defense Fund uses the internet and "latest communications technology to rally public support for their causes."). *See also* Peter H. Schuck, *Against (and for) Madison: an Essay in Praise of Factions*,

But the major point is not that consumers are always good surrogates for foreign producers. The point is that they can be, and when they are, this surrogacy is worth protecting.

A second group that provides surrogate representation for foreign producers consists of domestic producers who seek to resist regulation that they feel is too costly or burdensome. Although domestic producers and foreign producers often have antagonistic competitive interests, when they are similarly situated from a regulatory standpoint, they share a common interest in reducing the adverse effects of regulation. Moreover, even when national regulation affects producers differently, those domestic producers who are in the same position as foreign producers will represent the interests of the foreign producers, even if consumers are neutral concerning the outcome of the regulatory struggle. Consider a hypothetical case used by Professor Regan.[48] Imagine that a country is deciding whether to impose a tax on producers of plastic containers (but not cardboard containers) in the belief that plastic containers (but not cardboard containers) damage the environment. This regulation would benefit the makers of cardboard containers, because it would put them at a competitive advantage and would disadvantage the makers of plastic containers. Even though foreign makers of plastic containers are outside the lawmaking jurisdiction, the domestic makers of plastic containers, if they are numerically strong enough and able to organize, can adequately represent the foreign interests. Because their interests are identical, the domestic group can represent the foreign interest if the circumstances are right.

Such surrogate representation—by either consumers or domestic producers with similar interests—is an important mechanism by which the democratic principles of participation and accountability are advanced in a world where policymaking is territorially confined and decentralized. As a result, the WTO has a vital role to play in making sure that members do not interfere with the mechanism of surrogate representation. When foreign interests are effectively represented through consumer or producer surrogates within the country undertaking the regulation, their representation effectively

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15 YALE L. & POL. REV. 553, 566-67 (1997) (noting success of public advocacy groups despite public choice theory).

48. Regan, *supra* note 3, at 447. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). The facts in Professor Regan's example appear to be drawn from Clover Leaf Creamery, where the regulatory measure was upheld. *Id.* In that case, Minnesota banned "the retail sale of milk in plastic non-returnable, non-refillable containers," while allowing the sale of milk in other such containers, like paperboard cartons. *Id.* at 458. *See also* TRIBE, *supra* note 19, at 1054. The pulp-wood industry within Minnesota received a benefit from this measure because its sales increased. TRIBE, *supra* note 19, at 1054. Also, all producers of plastic resins (who were disadvantaged by the regulation) resided outside the state. *Clover Leaf Creamery Co.*, 449 U.S. at 473. In the course of its decision, the Supreme Court claimed there were adequate surrogates within the state to represent the non-resident interests. *Id.* Although the claim of adequate surrogacy may have been incorrect, *see* TRIBE, *supra* note 19, at 1055, the theory nonetheless buttressed the Court's decision that Minnesota had not violated the dormant Commerce Clause. *Id.* at 1054.

reduces the deficit in participatory lawmaking that would otherwise occur because foreigners are not present in the lawmaking jurisdiction. Although foreigners' voices are not heard, their interests are, and often effectively. Preserving those mechanisms of surrogate representation from domestic legislative interference becomes an important role for the national treatment provision to play, one which helps to knit otherwise parochial lawmaking units together in a federal system.

Often, of course, when domestic proxies for foreigners do not exist, or when their representation is inadequate, no effective surrogate representation can make up for the exclusion of foreigners from the domestic lawmaking process.[49] Consider first the situation in which foreign interests are un(under)represented domestically. Taking the plastic/cardboard container example, if all makers of plastic containers were foreigners, and if no industries inside the country relied on use of plastic containers in their business, then the regulation would not adversely affect any domestic producer and domestic producers could not represent foreign producer interests. A regulation taxing or banning the sale of plastic containers might be in the public interest, but the public interest would be determined without having the views or information of the makers of plastic containers represented in the policy debate. Only consumers would represent the interests of the makers of plastic containers, and their interests would be torn between their interests as consumers in cheaper products and their interests as citizens in a cleaner environment. Under these circumstances, the regulation of plastic containers may threaten the participatory principle that those adversely affected by the regulation should be able to participate in the debate about whether the regulation should be imposed.

Next, consider the case where the domestic proxies represent foreign interests but the representation is inadequate. The concept of "inadequate representation" must be carefully delineated, of course. We cannot assess the quality of surrogate representation in some abstract way by trying to evaluate the quality of the arguments or the effectiveness of the surrogate's communications. Nor can we evaluate the adequacy of surrogate representation by evaluating the results of the regulatory lawmaking, for that would effectively be a review to see who "should" prevail, and that would be akin to reviewing the substantive merits of the regulation. However, the notion of "inadequate representation" can be sensibly understood in a non-substantive way by focusing on the objective ways in which consumers and similarly situated domestic producers may be inadequate proxies for foreign producers.

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49. That is why the disproportionate impact of a regulation is relevant to its validity. As Justice Stone said in South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 (1938): "[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." Conversely, "the fact that [the regulations] affect alike shippers in interstate and intrastate commerce in large numbers within as well as without the state is a safeguard against their abuse." *Id.* at 187. *See also* Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945).

As we have already alluded to, consumers may be ineffective surrogates because of the problem of organizing or because their interests are not purely commercial. Domestic producers may be inadequate proxies for foreign producers because they are too few in number to have a meaningful voice.[50] More to the point, even if they are numerically sufficient, domestic producers may be inadequate proxies for similarly situated foreign interests because, as we have seen, domestic proxies can so easily be "bought off" within the context of the regulatory decision-making by providing the domestic surrogate some competitive advantage over otherwise similarly situated foreign producers.[51]

An example of this occurred in *U.S.—Gasoline*.[52] The U.S. Clean Air Act of 1990 required that pollutants in gasoline meet certain requirements in relation to 1990 gasoline "baselines."[53] Domestic refiners had three possible methods of determining their 1990 baseline, but foreign refiners had only one method to determine their baseline,[54] and if a foreign refiner could not use that method, it had to use a statutory method.[55] Under this system, even when imported gasoline was chemically identical to domestic gasoline, foreign but not domestic producers would be forced to further clean their gasoline in order to remain in compliance with EPA standards under the Act.[56] Foreign refiners would then have to make "cost and price allowances because of their need to import other gasoline with which the batch could be averaged so as to meet the

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50. *See Clover Leaf Creamery Co.*, 449 U.S. at 458. This appears to have been the situation in Clover Leaf Creamery. Although there were no producers of plastic resins in Minnesota, other groups adversely affected by the ban might have represented their interests. *Id.* Looking at the plaintiffs in the case suggest who the surrogates were, and they included "a Minnesota dairy that owns equipment for producing plastic non-returnable milk jugs, a Minnesota dairy that leases such equipment, . . . , a Minnesota company that produces plastic non-returnable milk jugs, . . . , [and] a Minnesota milk retailer, ..." *Id.* Although the court found these to be a safeguard against abuse, the strength of these surrogates may have been overstated. TRIBE, *supra* note 19, at 1055.

51. Similarly, Mark Tushnet has pointed out the danger that logrolling within a state may mean that legislators systematically protect in-state interests from out-of-state competition. Tushnet, *supra* note 24, at 137.

52. WTO Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter U.S.—Gasoline (AB)]. Other cases in which the Appellate Body has struck down regulatory measures because they imposed disproportionate costs on foreigners are: WTO Appellate Body Report on Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter Korean—Beef (AB)]; and WTO Appellate Body Report on Turkey—Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, 39 I.L.M. 159 (Oct. 22, 1999) *available at* http://www.wto.org (last visited Feb. 16, 2004) [hereinafter Turkey—Textiles]. The cost-shifting aspects of these cases are discussed in Gerhart, *supra* note 30, at 56-61.

53. U.S.—Gasoline (AB), *supra* note 52, at 5. Pollutants in reformulated gasoline had to be reduced, while pollutants in conventional gasoline could remain but not go higher than 1990 levels. *Id.* at 4-5.

54. WTO Panel Report on United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/R, para. 6.2-6.3 (Jan. 29, 1996) [hereinafter U.S.—Gasoline (Panel)].

55. *Id.* para. 6.4.

56. *Id.* para. 6.10.

statutory baseline."[57] As the Appellate Body said in striking down this discrimination, "to explore adequately [alternative means of achieving its goal of clean air] means . . . to count the costs for foreign refiners that would result from the imposition of statutory baselines [as the United States had for domestic refiners]."[58]

One can see the surrogate representation model at work in this case. Normally domestic refiners serve as surrogates for the foreign refiners because they have the same interests in the marketplace. However, because domestic refiners gained an advantage in the marketplace over foreign refiners, domestic refiners were less likely to represent the foreigners in the regulatory bodies. They were bought off, and therefore, altered the normal surrogacy foreign refiners would have enjoyed. Because the foreign interests affected by the measure were not represented in the domestic forum, a process failure occurred; and the regulatory scheme could not survive scrutiny under Article XX.

This is the broader lesson of the *U.S.—Gasoline* case. Even if foreign and domestic interests are perfectly aligned initially, the regulatory process can change that alignment by driving a regulatory wedge between domestic and foreign producers.[59] If the regulation imposes disproportionate costs on foreign producers—even similarly situated ones—the domestic producers will no longer act as proxies for the foreign producers. Or if the regulatory scheme gives benefits to domestic producers that are not given to foreign producers, the proxy relationship that should have protected the interests of foreign producers would break down. Domestic producers would no longer be able to adequately represent the foreign interest because they would get a benefit of the regulatory regime not given to the foreigners. When we examine the decisions of the Appellate Body in the next section we will see further examples of ways in which the legislative process can drive a wedge between the interests of foreign and domestic producers.

This shows the essence of the surrogate representation rational. When the legislative process has been shown to interfere with the process by which foreign interests can be represented in national lawmaking forums by national surrogates, the legislation is procedurally objectionable and ought not to stand.[60]

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57. *Id.*

58. U.S.—Gasoline (AB), *supra* note 52, at 27.

59. Professor Tushnet has the most extended discussion of this phenomenon, noting both the possibilities of buying the loyalty of domestic interests, *see* Tushnet, *supra* note 24, at 132, and the limits of this kind of analysis. *Id.* at 140.

60. It may also be helpful to recast the basic surrogate representation argument in somewhat different terms in order to illustrate its breadth. Under the analysis given here, the problem of tariffs is not just that tariffs are economically inefficient. As Gerhart has argued in his earlier work, in terms of participatory democracy, tariffs impose a cost on foreigners under circumstances where foreign producers cannot participate effectively in the decision-making process. *See* Gerhart, *supra* note 30, at 21-25. A related point is relevant to an analysis of national regulation under Article III. Tariffs allow domestic regulatory policy to be made under circumstances in which we can no longer depend on consumer interests to act as a proxy for

Given the importance of the right of participation to promoting harmony among nations and the importance of surrogate representation in affirming participation, the WTO role and the role of the national treatment provision are clear. The WTO review of domestic regulation under Article III must be oriented to uncover those situations in which domestic proxies for foreign interests are either non-existent or have been compromised in some way. When this occurs, national regulation has disrupted the mechanism by which domestic proxies will represent the interests of foreign producers, and the WTO has a legitimate function in either invalidating the regulation on that ground or at least making sure that the regulatory regime is supported by a valid justification under Article XX (which, incidentally, also depends on protecting the interests of foreign producers not to be excluded from a market without some effective participation in the decision).[61]

Several aspects of this approach to the national treatment provision are attractive. First, this approach says that the national treatment provision is not concerned about differential treatment of imported products in the abstract, or in comparing that impact with the regulatory goals of the measure. Instead, it is concerned with differential treatment that is proven to result when the surrogate representation by domestic producers that should protect foreign interests has been compromised. This interpretation avoids the clash between the domestic values that the regulation seeks to achieve and the trade effects of the regulation, and gives foreign interests no greater power to overturn regulatory measures than domestic interests have.[62] If the foreign interests are

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foreign producer interests. Tariffs prohibit consumers from gaining the surplus available from foreign production, thus driving an economic and political wedge between consumers and foreign producers. Theoretically, consumers should still have an interest in foreign production, but because of high search costs, it may be difficult for consumers to recognize this. Because tariffs eliminate a portion of foreign production from consumer's choice set, governments that have imposed tariffs have removed any incentive consumers would otherwise have to argue against regulation that adversely affects foreign producers.

This problem is not necessarily ameliorated when the tariffs come down because the lingering effects of the tariffs would continue to make it difficult for consumers to recognize and understand their options. For some time, information costs would still be high and marketing and delivery channels from foreign producers would still have to be constructed. Lawmaking in this atmosphere might still take place in a situation where consumers could not act as effective surrogates for the interests of foreign producers because they would not be able to understand their own options.

61. *See* Gerhart, *supra* note 30, at 66-70. "[I]n the landmark Shrimp—Turtles decision, the Appellate Body made the procedural rights of foreigners the touchstone for the application of the general exceptions of Article XX of GATT." *Id.* at 66. In that case, the Appellate Body required the United States to negotiate in good faith and non-discriminatorily and required transparent and predictable processes in the administration of regulations. *Id.* at 69.

62. Analysts who believe that the dormant Commerce Clause contains the substantive value of free trade seem to be confusing the power given to the U.S. Congress with the power denied to the states. Without a doubt, the Congress was given power over interstate commerce in order to protect the common market of the United States from state or private interference. But that does not make economic efficiency a Constitutional value; it only operates to confer on Congress the power to take efficiency values into account when Congress exercises its powers. Moreover, this does not imply a limitation on the regulatory authority of the states; as

adequately represented in the policymaking forum but are overridden by other policy considerations, the WTO has no authority to question the decision. It is only when there is evidence that the foreign interests are not represented that WTO intervention is warranted.

Moreover, the surrogate representation understanding of the national treatment principle is also consistent with the role of governments in regulating markets. The attraction of well functioning markets is not merely that they improve economic efficiency but that they allow the consumers of a country to represent foreign interests. In well functioning markets, if foreign interests are not successful it is because consumers have decided that the foreign products do not meet consumers' criteria of selection. But in markets free of restrictions on trade, consumer purchases of foreign products indicate the existence of foreign interests in having access to the market and therefore in how the market is regulated. Markets do not allow discrimination against foreigners unless different treatment is justified by consumer choice.[63]

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was just made clear the Commerce Clause is not a value-laden provision but only an empowering provision. The true relationship between the free market in the United States and Constitutional restrictions on state power is just the opposite of what those who espouse efficiency content for the Commerce Clause believe it to be. Because Congress has allowed interstate commerce to flourish, the instances in which state actors are called on to be surrogates for out-of-state actors has grown, thus making it more important than ever to invoke the dormant Commerce Clause to strike down state legislation. The important role the dormant Commerce Clause follows from increasing economic interdependence, but it does not cause that interdependence.

Even the case that has come to symbolize the efficiency-based view of the dormant Commerce Clause, H.P. Hood and Sons v. DuMond, 336 U.S. 525 (1949), makes this analysis clear. The most quoted part of that opinion is:

> Our system fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation that no embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 539. Even aside from the fact that this quote refers to the system "fostered" by the Commerce Clause rather than the system "commanded" by the Commerce Clause, this quote follows language that more nearly captures the process based rationale of the dormant Commerce Clause. In particular Justice Jackson noted "the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions." *Id.* at 538. In other words, it is economic integration that leads to the need to police local burdens and repressions, not the policing of local burdens and repressions that leads to economic integration. Moreover, it is repressions—and presumably repression of political interests—that is the focus of the prohibition.

63. Consumers may, of course, be prejudiced against foreign goods in a way that leads to less favorable treatment of otherwise "like" goods. As long as we endorse consumer sovereignty and the market mechanism, however, we must be willing to say that consumer decisions are final (in the absence of a market failure) and that the ignorance or prejudice of consumers can be overcome only by education and more knowledge, not by government action at the national or international level. In situations where a potential competitive relationship exists but consumers fail to take advantage of that relationship we can ask governments to take

Consumers in well-functioning markets are the best authority to tell us whether foreign producers have an interest in the market that needs to be protected when the government that regulates the market is determining the scope and nature of its regulatory program.

Sometimes, of course, the government needs to intervene in markets to carry out important government functions—to overcome market failure and to raise revenue, for example. Under the interpretation offered here, the goal of Article III is to make sure that, during these interventions, the interests of foreigners are represented in the same way that the interests of domestic producers are represented. Where the interests of the domestic industry and the foreign industry are identical, the foreign industry is represented by the domestic industry. So if the burden of any regulation is distributed evenly over the producer population, the domestic industry and the foreign industry interests are aligned and domestic producers can represent foreign producers. When surrogate representation is preserved, government intervention in markets is substantively sound and preserves the role of consumers as the moving force behind economic decisions.

Before moving on to see how the Appellate Body has built its interpretation around the surrogate representation rationale, we can profitably address two possible objections to the rationale.

Superficially, one might object that because some members of the WTO are not functioning democracies in the Western model, it would be wrong to presume that some participatory ideal or vision underlies the WTO's work. But a moment's thought will convince us that such an objection is misplaced. In the first place, the WTO is the successor organization to GATT and GATT started as an organization driven primarily by the Western democracies.[64] It is quite plausible to believe that the "founding" countries were influenced by the need to provide a forum by which one country could object to the policies adopted by other countries that adversely affected their export producers,[65]

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no action that facilitates or augments that prejudice, but cannot expect governments to compensate for that prejudice.

64. "Although the GATT was not formed at the 1944 Bretton Woods Conference, nevertheless the Bretton Woods Conference contemplated the necessity of an International Trade Organization." John H. Jackson, THE WORLD TRADING SYSTEM 27-28 (1989) (considering GATT as part of the Bretton Woods System). *See also* BHALA & KENNEDY, *supra* note 5, at 1-3 (1998). The GATT is actually a by-product of a failed effort to create the International Trade Organization (ITO), through the Havana Charter. *Id.* at 2. The Prepatory Committee that worked on the Havana Charter had representatives from: Australia, Belgium, Luxembourg, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, the Netherlands, New Zealand, Norway, South Africa, the USSR, the United Kingdom, and the United States. *Id.* at 1. The USSR was the only member that did not become a contracting party to the GATT 1947. *Id.*

65. *See* Peter M. Gerhart, *WTO History Reexamined: The Participatory Vision* (forthcoming). *See also* THOMAS ZEILER, FREE TRADE, FREE WORLD: THE ADVENT OF GATT (1999) (confirming that GATT was motivated by assumption that cooperation on trade would lead to cooperation on political issues), CATHERINE BARBIERI, THE LIBERAL ILLUSION: DOES FREE TRADE PROMOTE PEACE? (2002) (testing political hypothesis animating GATT, that interconnected economies foster peace).

and, therefore, that the animating motivation for the national treatment provision was shaped by the participatory vision of the WTO. Moreover, we should take note of Ann-Marie Slaughter's reminder that the Bretton Woods institutions, including GATT, were designed to allow transnational regulation.[66] A system set up to enhance international regulatory law (in order to overcome international market failures) is not likely to impose stringent substantive limitations on national regulation designed to overcome market failures.

A second objection to the surrogate representation rationale, one carefully articulated by Professor Regan, is that under any circumstances consumers in the country adopting the regulatory measure will provide positive surrogate representation for foreign producers. Under this view, because the surrogate representation rationale is superfluous, it cannot provide a theoretical basis for understanding federalist legal restraints on regulatory activity. Professor Regan's view is that as long as the regulation is not protectionist, we can be sure that when a regulatory body protects all local interests it will simultaneously protect all foreign interests. Accordingly:

> If the legislature adopts legislation that optimizes with respect to all affected in-state interests, then the overall result will be efficient with respect to all interests, local and foreign. I shall refer to this property of our examples as "local/global equivalence." To say that a sort of regulation exhibits "local/global equivalence" is to say that if a regulation of that sort optimizes "locally" (over all in-state interests) it will necessarily optimize "globally" (it will lead to an outcome that is efficient with respect to all interests, local and foreign.[67]

In a nutshell, local/global equivalence—where it exists—completely undercuts the virtual representation argument.[68]

In this view, the function of federalist review of regulatory measures is to determine whether the local political process has served local interests. If it has, then it has also served foreign (outside) interests; if it has not served local interests, then it should be struck down for that reason (although doing so incidentally protects foreign interests). This view essentially equates the service of local interests with non-protectionism, and protectionism with the non-service of local interests. And because it equates the protection of local

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66. Ann-Marie Burley Slaughter, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State, in* MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 125 (John Ruggle ed., 1993).

67. Donald H. Regan, *Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-Federal System: Protectionism and Balancing Da Capo*, 93 MICH. L. REV. 1853, 1859-60 (2001) (footnote omitted) [hereinafter Regan, *Judicial Review*].

68. *Id.* This view then provides a crucial argument in his analysis of the application of the national treatment standard by the WTO. *See* Regan, *Regulatory Purpose, supra* note 3, at 452.

interests with an appropriate local process—that is, with one that is not captured by special interests—it is focused exclusively on whether special interests have captured the local legislative process. As Regan argues:

> Protectionist legislation normally does not optimize over all local interests. It normally does result from a failure of the political process with respect to local interests. Protectionist legislation standardly results from local producer interests wielding excessive power in the political process, which allows them to distort disorganized consumer interests. So, in any case where there is a significant suggestion of protectionism, it is appropriate for the court to consider whether the political process has gone awry in its treatment of local interests. But if the answer is no (if the law is not protectionist), there is no justification for balancing to protect foreign interests.[69]

There is much in Regan's analysis that turns out to be congruent with the surrogate representation analysis that we present here. Because Regan recognizes that local interests can represent outside interests, Regan is in effect endorsing the premise that surrogate representation is an important feature of local regulatory measures. We agree that where the local/global equivalence holds, there is no reason to intervene to overturn regulatory measures.

Where we part company with Regan however, is in how we define whether the local/global equivalence holds. Regan equates protectionism with the absence of the local/global (or surrogate representation) identity and then defines the presence or absence of the local/global identity in terms of local capture by special interests. His motivation for doing this is to counter the notion that review of state (or national) regulatory measures should involve a balancing of in-state and out-of-state interests, and thus a weighing of competing interests. In his view, the only issue should be whether there is a legitimate purpose behind the statute, and that can be determined by assessing whether the process has been captured by special interests. This attempt to equate special interests with parochial interests and determine the presence of special interests by looking at regulatory purpose is ingenious, but ultimately inappropriate for the WTO.

By equating protectionism with "capture by special interests," Regan is unduly narrowing the scope of federalist review of domestic measures. Here, Regan is falling into a trap that is endemic to much of the dormant Commerce Clause literature—the assumption that the anti-protectionist thrust of the dormant Commerce Clause can by equated with review to avoid "capture by special interests." In fact, the protectionism that is invalidated under the dor-

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69. Regan, *Judicial Review*, *supra* note 68, at 1861.

mant Commerce Clause is far broader than simple "special interest capture legislation." Domestic regulatory measures may be protectionist not just because special interests capture the regulatory apparatus but, in a wider sense, because they are parochial. That is, domestic regulation may systematically ignore the impact of regulation on foreign producers and therefore result in regulation that is procedurally invalid.

To see this, assume that consumers want to regulate plastic containers for environmental reasons and pulpwood producers want to regulate plastic containers to suppress competitive alternatives. Legislation that results from the confluence of these interests can hardly be called special interest legislation because consumers are seeking to represent their own interests, not those of pulpwood producers. Yet consumers in that situation can hardly be thought to represent the interests of out-of-state producers of plastic containers. This is precisely the situation where some oversight of the legislative process to protect the interests of out-of-state producers would be called for; a situation where both consumers and producers are acting parochially because they do not represent the interests of out-of-state producers. The aim of the dormant Commerce Clause analysis, and, correspondingly, national treatment analysis, is not special interests but parochial interests.

Regan's statement that any regulatory body that takes into account all local interests will also take into account out-of-state interests is flawed because it is based on the view that consumers care only about efficient laws and, as a result, consumers will lobby against regulation that is inefficient. This view is apparently based on the assumption that when it comes to policymaking, consumers will acts as consumers and vote for policy that is in their economic self-interest. Under this view, if there is no efficiency-motivated reason for regulation, then consumers adequately represent the interests of foreign producers and can act as good surrogate representatives for the foreign producers. On the other hand, if the regulation in question is itself efficiency enhancing—because it addresses an important market failure—then the regulation has a non-protectionist purpose and is not protectionist. In the latter case—where regulation is needed to overcome a market failure—the consumer may not be a good surrogate for foreign manufacturers (because the regulation will adversely affect foreign manufacturers), but the consumer is a good surrogate for a non-protectionist interest (because the regulation is needed not for protectionism but to increase market efficiency). In this way, the surrogate representation rationale is superfluous. If there is a good purpose for the regulation (that is, an efficiency-enhancing purpose) it is not protectionist, and if it is protectionist, we can tell from that conclusion that foreign producers (like domestic consumers) have been undercut by special interests.

One problem with this analysis is that it assumes we can identify purpose and use that analysis as the fulcrum on which to base our finding or illegality. Although Professor Regan's discussion of this difficulty is quite sophisticated,

many have not been persuaded that distinguishing protectionist from non-protectionist purpose is easily done.[70]

A more fundamental objection to this analysis, however, is that it assumes consumers as voters are interested only in efficiency; will represent the interests of foreign producers when that is the most efficient interest; and the interest underlying the regulatory measure when that is the most efficient interest. The equation of the consumer-as-voter interest with the efficient interest is, of course, erroneous. When determining their positions on public policy, it is just as likely as not that voters will ignore their personal interest in efficient outcomes and advocate instead for non-efficient outcomes.[71] Voters often advocate policy not on the basis of their narrow economic interest, but on the basis of non-economic values that might underlie the regulatory measure. Consumers, to be sure, are self-interested in their commercial dealings, but can act as citizens when it comes to public policy matters.

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70. *See* Regan, *Regulatory Purpose*, *supra* note 3, at 458-64 (discussing objections to a tribunal's ability to identify regulatory purpose). Regan stipulates that tribunals are not to look into the collective mind of a legislature, but rather look for "what political forces are responsible for the measure under review." *Id.* at 459. Regan suggests the Appellate Body could create a rebuttable presumption that a regulation is non-protectionist if there is a plausible non-protectionist purpose for the regulation. *Id.* at 459-60. While objective evidence is important to rebutting the presumption, Regan also points to ministerial statements (of the kind discussed in Canada—Periodicals, *supra* note 10) as an example of the type of evidence that could refute the presumption of non-protectionist purposes. *Id.* at 459.

> Objective evidence, offered by the complaining country, will often be enough to shift to the defendant country the burden of going forward with the evidence, usually by asserting a non-protectionist regulatory justification. On the other hand, if there is relevant "subjective" evidence in the form of ministerial statements, or legislative committee reports, or whatever, the tribunal should consider that too, . . . remembering always that even such "subjective" evidence is still just evidence.

Id. at 460. *See also* Regan, *Judicial Review*, *supra* note 68, at 1890-94 (discussing inquiring into legislative purpose in the dormant Commerce Clause context). Choi lists several problems with determining legislative purpose. First, there are often many reasons for a certain piece of legislation, and determining which one(s) should be used for Article III is a difficult task. Choi, *supra* note 6, at 119 (citing WTO Panel Report on Japan—Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.16 (July 11, 1996) [hereinafter Japan—Alcohol (Panel)]). Second, the complete legislative history of a regulation may be impossible to access, and "could be manipulated by both proponents and opponents of the legislation." *Id.* at 119 (citing Japan—Alcohol (Panel), para. 6.16). Third, Choi suggests difficulties relating to determining how to value "prepatory work" and circumstances surrounding the regulation. *Id.* at 119 (citing the Vienna Convention on the Law of Treaties as an example of how "supplementary means" might be handled by a tribunal). Although not willing to concede that determinations of regulatory purpose cannot be successfully accomplished by panels and the Appellate Body, Tsai states, "The need for research and study into this area of establishing the proper standards for evaluating regulatory aim is indeed extensive." Tsai, *supra* note 7, at 58.

71. *See* Gerhart, *supra* note 30, at 27-33.

III. THE APPELLATE BODY DECISIONS

The Appellate Body has crafted an analytical understanding of the Article III-XX combination that fully reflects the participation-enhancing role of the WTO.[72] This jurisprudence provides a coherent set of tests under Article III that can be explained only by the surrogate representation rationale.[73]

For analytical purposes, Article III contemplates two parallel, though slightly distinct, inquiries for two subjects it regulates: tax regulation and non-tax regulations. The first inquiry seeks to identify the universe of relevant products—the "like" product inquiry, in Article III:4 (applicable to non-tax regulations) and the "like" or "directly competitive or substitutable" product test in Article III:2 (applicable to taxes).

The second general inquiry in both Article III:2 and Article III:4 is a "less favorable treatment" inquiry. For Article III:4 the measure must treat imports no less favorably than domestic goods. In Article III:2 the taxes on imports must not exceed taxes on domestic products (if the products are like) or "not similarly taxed" and "applied so as to afford protection" (if the products are directly competitive or substitutable). By examining the like product and less favorable treatment standards sequentially, we can see how they together demonstrate the surrogate representation rationale underlying the Appellate Body's interpretation of the national treatment standards.

III. A. THE LIKE PRODUCT ANALYSIS

The test for determining whether imported products are either "like" or "directly competitive or substitutable" fully reflects the surrogate representation rationale. The basic inquiry concerns the competitive relationship between foreign and domestic products, which is tantamount to an inquiry to determine whether the imported goods are sufficiently competitive with domestic products that consumers can serve as surrogates for the interests of foreign producers.

The competitive relationship test stems from the *Border Tax Adjustments*[74] case as incorporated into WTO jurisprudence and interpreted in

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72. Under other points of view that seek an inquiry into regulatory purpose, the case law appears inconsistent. *See* VERHOOSEL, *supra* note 5, at 52 ("[A] number of egregious inconsistencies can be observed in the current case law defining the interface between WTO law and domestic regulation.").

73. This analysis, therefore, responds to the criticisms of those who argue that the Appellate Body case law appears to be inconsistent. *See* VERHOOSEL, *supra* note 5, at 52. In our view, that criticism is flawed because it seeks to understand the national treatment provision in terms of substantive law.

74. Report of the Working Party, Dec. 2, 1970, GATT B.I.S.D. (18th Supp.) at §18S/97-109 (1972).

Japan—Alcohol.[75] Several criteria determine whether imported products are "like" domestic products: the product's end-uses in a given market, consumers' tastes and habits, the physical properties of the products, and common tariff classifications.[76] As the panel in *Japan—Alcohol* declared: "[T]he wording [of Article III and of the Interpretative Note ad Article III] makes it clear that the appropriate test to define whether two products are 'like' . . . is the marketplace."[77] It is understood that the word "like" need not be applied in the same way in Article III:2 as it is in Article III:4,[78] although, as the following analysis shows, the underlying inquiries are similar.

By concentrating on competitive relationships, the national treatment provision focuses on the relationship between the interests of consumers in the domestic market and foreign producers to determine how closely aligned they are. If consumers treat the imported and domestic products as close substitutes, the products are "like" for the purposes of Article III, which also tells us that consumers have the potential to provide surrogate representation for the interests of foreign producers.[79] Under these circumstances, when countries interfere with the process by which consumers might represent the interests of foreign producers, they decrease the surrogate representation that

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75. WTO Report on Japan—Taxes on Alcoholic Beverages, WT/DS8/AB/R,WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter Japan—Alcohol (AB)]. *See* Hudec, *supra* note 6, at 112–13 (commenting on the originally unofficial nature of the Working Party criteria). *See also* Regan, *Regulatory Purpose, supra* note 3, at 465 (claiming that the criteria's "canonical status should be reconsidered").

76. Japan—Alcohol (AB), *supra* note 3, at 20-21. Tariff classifications were added in 1987. Robert Howse & Elisabeth Tuerk, *The WTO Impact on Internal Regulations—A Case Study of the Canada-EC Asbestos Dispute, in* THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 293 (Grainne De Burca & Joanne Scott eds., 2001) (citing Report on Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, (Nov. 10, 1987) L/6216 B.I.S.D. 34S/83.

77. Japan—Alcohol (Panel), *supra* note 71, para. 6.22. This conclusion was affirmed by the Appellate Body. *See* Japan—Alcohol (AB), *supra* note 3, at 20.

78. According to the Appellate Body,

> The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.

Japan—Alcohol (AB), *supra* note 3, at 21. "It follows that, while the meaning attributed to the term 'like products' in other provisions of the GATT 1994, or in other covered agreements, may be relevant context in interpreting Article III:4 of the GATT 1994, the interpretation of 'like products' in Article III:4 need not be identical, in all respects, to those other meanings." EC—Asbestos (AB), *supra* note 3, para. 89. It is widely understood that the term "like" product in Article III:4 can be determined by drawing a wider circle than is true for the term "like" in III:2, but that the circle is not as wide as the combination of like and directly competitive and substitutable in Article III:2. *Id.* para. 99. *See,* Sydney M. Cone, III, *The Asbestos Case and Dispute Settlement in the World Trade Organization: The Uneasy Relationship Between Panels and the Appellate Body,* 23 MICH J. INT'L L. 103, 124 (2000) (pointing out that para. 99 is dicta).

79. *See* discussion *supra,* notes 44–46.

is an important part of participatory lawmaking and is therefore suspect. By contrast, if foreign goods do not sufficiently compete with domestic goods, then domestic consumers cannot act as surrogates for foreign producers. The interests of domestic consumers are not aligned with those of foreign producers, and there is no need to inquire about less favorable treatment to see whether the measure was passed in a way that disrupted the process of surrogate representation.

The competitive relationship test is also used in applying the second sentence of III:2 to determine whether imported products are "directly competitive or substitutable" with domestic goods, which again reflects the importance of recognizing consumers as surrogates for the interests of foreign producers. The test is similar to the "like" products test, but casts a wider net by expanding the range of products where the consumer can represent foreign producers.[80] The factors that are relevant to this inquiry are similar to those used in the "like product" inquiry: physical characteristics, common end-uses, tariff classifications, and the marketplace.[81] But here the Appellate Body summed them up by seeking an inquiry into common end-uses or "elasticity of substitution."[82] In other words, similar to the interpretation of the word "like" in the first sentence, the first inquiry concerns consumer behavior and identifies instances in which consumers might serve as effective political proxies for foreign interests.

The Appellate Body's elaboration on this competitive relationship test further demonstrates the surrogate representation view of the national treatment provision. Pre-existing barriers to foreign producers may be relevant to the analysis of competitive relationships because consumer perceptions about the marketplace may be influenced by prior restrictions on foreign producers that made it difficult for consumers to recognize their joint interest with foreign producers. In *Korea—Alcohol*[83] the Appellate Body stated that a potential competitive relationship could buttress a finding of a direct competitive relationship[84] and agreed that the inquiry must include not only

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80. "How much broader that category of 'directly competitive or substitutable products' may be in any given case is a matter for the panel to determine based on all the relevant facts in that case." Japan—Alcohol (AB), *supra* note 3, at 25.

81. *Id.* "Marketplace" referring to competition in the relevant market.

82. *Id.*

> [The decisive criterion] seems to be whether two products have common end-uses as shown by the demand cross-price elasticity of the two products. That is, if for every sale of the import there is one lost sale of the domestic product, then the two products are perfect substitutes and in direct competition. In a case of perfect substitutability, the imported and domestic products are like products and are covered under Article III:2, first sentence. Instances of less-than-perfect substitutability are addressed under Article III:2, second sentence."

BHALA & KENNEDY, *supra* note 5, at 97.

83. WTO Report on Korea—Taxes on Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R (Jan. 18, 1999) [hereinafter Korea—Alcohol (AB)].

84. *Id.* para. 113, 120.

existing substitutability, but also the capacity for substitutability—a concept it termed "latent demand."[85] By clarifying the term "directly" in "directly competitive or substitutable,"[86] this analysis takes into account that prior regulation might have hindered or prevented consumers from recognizing the interest they have in foreign goods. In order to identify when consumers have the potential to provide surrogate representation to foreign producers, a panel must determine what the competitive relationship would have been without prior restraints on that relationship.[87]

Further, because this counterfactual is so difficult to determine, *Korea—Alcohol* allowed the use of evidence from a third market to establish that consumers have an economic and, by implication, surrogate interest in the foreign goods. "[E]vidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or to competition."[88] Where consumers have been prevented from speaking for foreign interests, the inquiry turns to whether consumers in other countries identify their interests with foreign as well as domestic producers.

The conclusion that the competitive relationship test reflects the role of consumers as potential surrogates for foreign interests is also supported by what the Appellate Body has said about the role of purpose in applying the competitive relationship test and in the Appellate Body's treatment of regulatory measures that facially discriminate against foreign goods.

A. 1. The Role of Purpose—The Asbestos Case

In *EC—Asbestos*,[89] the Appellate Body made it look as if the purpose of the regulatory measure was relevant to applying the "like product" tests, thus giving support to those who would read purpose into the analysis of Article III. However, a proper understanding of that opinion shows that the purpose of a measure has no role other than to help apply the competitive relationship test. In 1997, France prohibited the manufacture, processing, sale, and importation of asbestos fibers and products containing asbestos fibers, although it allowed

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85. *Id.* para. 114.

86. *Id.* para. 109.

87. [S]tudies of cross-price elasticity . . . involve an assessment of latent demand. Such studies attempt to predict the change in demand that would result from a change in the price of a product following, *inter alia*, from a change in the relative tax burdens on domestic and imported products.
Id. para. 121.

88. Korea—Alcohol (AB), *supra* note 83, para. 137.

89. EC—Asbestos (AB), *supra* note 3. *See generally* Jochem Wiers & James Mathis, *The Report of the Appellate Body in the Asbestos Dispute: WTO Appellate Body Report 12 March 2001, WT/DS135/AB/R, European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, 28 LEGAL ISSUES OF ECON. INTEGRATION 211 (2001) (discussing the EC—Asbestos report).

the production and sale of asbestos substitutes.[90] Therefore, the ban clearly benefited domestic producers of asbestos substitutes over their foreign asbestos-producing competitors. In the context of the discussion of "like" product, the Appellate Body said that health risks are to be considered in the Article III:4 "like product" inquiry.[91] Purpose-theorists seized upon this indication and suggested that the Appellate Body was acknowledging that if the legislature can advance a non-protectionist purpose for the legislation then the products would be found to be not "like."[92] However, a close reading of the Appellate Body's opinion shows that, in fact, regulatory purpose is not an independent reason for finding that products are not "like." Instead, it is simply a fact that helps us understand the competitive relationship between imported and domestic goods.

The Appellate Body integrated a consideration of health factors into two of the *Border Tax Adjustments* criteria: physical properties and consumers' tastes and habits.[93] Thus, when determining which physical properties are relevant to the "like product" inquiry, "panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace."[94] The health risks are relevant to the physical property inquiry not because they might show a non-protectionist desire to protect human health, but rather because health-risks are likely to influence consumers' decisions and thus are relevant in determining whether

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90. EC—Asbestos (AB), *supra* note 3, para. 1-2 (there were a few exceptions).

91. *Id.* para. 113.

92. *See* Regan, *supra* note 3, at 467 ("[T]he Appellate Body's attempts to rely solely on competitive relationship, without bringing in regulatory purpose, either have an otherworldly air, or else require reference to regulatory purpose to complete them. Perhaps the Appellate Body thought WTO insiders were not yet ready for explicit appeal to regulatory purpose."). EC—Asbestos is the only Appellate Body decision with a concurring opinion. In it, the concurring member argues that scientific evidence of the health risks is so abundant that the Appellate Body should have declared definitively that asbestos fibers are not like the substitute fibers. EC—Asbestos (AB), *supra* note 3, para. 152. That is, the concurring member could not "imagine what evidence relating to economic competitive relationships as reflected in end-uses and consumers' tastes and habits could outweigh and set at naught the undisputed deadly nature of . . . [the asbestos fibers]." *Id.* Although the concurring member would limit his suggestion to this case alone, "the other Members of the Division feel unable to take [this step] because of their conception of the 'fundamental,' perhaps decisive, role of economic competitive relationships in the determination of the 'likeness' of products under Article III:4. *Id.* para. 153. Second, the concurring member questions how fundamental an economic interpretation of likeness under III:4 ought to be and warns that "fundamentally" might become one and the same with "exclusively." *Id.* para. 154 (concluding such a decision should be left for a different time). Although Regan suggests these statements by the concurring member leave room for possible consideration of regulatory purpose in a different case, the concurring member did not refer to regulatory purpose in his opinion.

93. EC—Asbestos (AB), *supra* note 3, para. 113.

94. *Id.* para. 114.

consumers can be effective surrogates for foreign producers.[95] Stressing the point further, "evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly 'like' products."[96]

Similarly, health risks play an important role in consumers' tastes and habits because these tastes and habits "are very likely to be shaped by the health risks associated with a product which is known to be highly carcinogenic."[97] Here too, the analysis focuses on competitive relationships[98] and whether or not consumer surrogates tell us that foreign producers have a viable interest in the market.

In short, attention to the health related properties of a product—and how those health related properties affect competitive relationships—is relevant to analyzing the role of consumers as surrogates for the interests of foreign producers. If consumers do not consider the products to be competitive substitutes because the products have different health related properties, then a consumer cannot act as a surrogate for the interests of foreign producers. When this is true, finding the goods to be "not like" simply reflects the fact that treating those goods differently cannot take away any representation of foreign interests that consumers would otherwise provide. As a result, from the standpoint of the participatory-enhancing function of the WTO, the regulation is less suspect as a process for driving a wedge between consumer interests and adversely affected foreign interests. If the interests were not that close in the first place (because of the health related properties of the products) the function of the WTO in policing surrogate representation by consumers is not impaired.

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95. *See* Howse & Tuerk, *supra* note 76, at 288-89 (acknowledging "the approach of the Appellate Body was to introduce the fundamental human interests at stake not through an examination of regulatory purpose, but rather by making those interests relevant to an analysis of the competitive relationship between products in the market place."). One argument Regan presents for considering regulatory purpose under likeness can be summarized as follows: (1) If a plastic container harms the environment and cardboard containers do not, they "are not 'like' in any ordinary sense"; (2) existence of "harm" is determined by the regulating government; (3) therefore harm depends on regulatory purpose; (4) therefore likeness depends on regulatory purpose. Regan, *supra* note 3, at 448-49. In other words, Regan distinguishes the physical effects of a product from the harm that product may cause. In the context of the Asbestos case, a physical effect of asbestos is that it causes cancer. However, asbestos does not harm unless the regulating state determines that cancer is not worth the benefits of asbestos products. However, Regan's argument relies on the presumption that "harm" determines likeness, which is clearly contrary to the Appellate Body's focus on health risks, without any discussion of the benefits of asbestos. That is, the Appellate Body report focuses on the effects of asbestos on health in determining likeness.

96. EC—Asbestos (AB), *supra* note 3, para. 115.

97. *Id.* para. 122.

98. *Id.* para. 117.

III. A. 2. SPECIAL TREATMENT OF FACIALLY DISCRIMINATORY MEASURES

Domestic regulation sometimes discriminates against foreign products on its face by putting foreign and domestic products into different regulatory categories by explicitly identifying one regulation for foreign products and a different regulation for domestic products. When that occurs, the analysis can dispense with any examination of the competitive relationship between imported and domestic products; the foreign and domestic products are automatically considered to be "like" products. For example, in *Argentina—Bovine Hides*,[99] Argentina established a tax system based on factors wholly unrelated to the nature of the products or their competitiveness, but dependent only on the national origin of the producer and whether the product was being sold inside Argentina. Applying the hypothetical product test,[100] the panel stated that it was therefore "inevitable . . . that like products will be subject to [the taxes at issue],"[101] and that it was not necessary to prove separately either the "like product" requirement of Article III:2, first sentence[102] or even that "trade involving like imported products actually exist[ed]."[103]

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99. WTO Panel Report, *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (adopted Feb. 16, 2001) [hereinafter *Argentina—Bovine Hides*].

100. The hypothetical product test draws its support from the Section 337 case. There the United States applied different procedures when foreign goods were alleged to have violated a U.S. patent than it did when domestic goods were alleged to have violated a patent. The imported infringing goods were not necessarily the same as the domestic infringing goods and in many cases would have no competitive relationship. Although the panel in the section 337 case was not interpreting the word "like," it had no problem holding that the United States could not escape from its obligations under national treatment for that reason. The panel noted that if competitive products were infringing domestically and as imports they would have been treated differently and that a hypothetical circumstance was enough to bring the measure within the purview of section 337. Panel Report on United States—Section 337 of the Tariff Act of 1930, GATT B.I.S.D. 36S/345 (Nov. 7 1989) [hereinafter Section 337].

101. Argentina—Bovine Hides, *supra* note 99, para. 11.169.

102. *Id. See also* WTO Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS64/R para. 14.113 (adopted July 23, 1998) ("[A]n origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually traded like products."). WTO Panel Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, (July 31, 2000) WT/DS161/R, WT/DS169/R, para. 627 [hereinafter Korean—Beef (panel)].

> Any regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III and this conclusion can be reached even in the absence of any imports (as hypothetical imports can be used to reach this conclusion) confirming that there is no need to demonstrate the actual and specific trade effects of a measure for it to be found in violation of Article III.

Id. Although the panel was overruled by the Appellate Body on the issue of whether facial discrimination necessarily results in a violation of Article III, the finding that there did not need to be actual like products was not disputed on appeal. Korean—Beef (AB), *supra* note 52, para. 133.

103. Argentina—Bovine Hides, *supra* note 99, at 11.169.

This approach also conforms to the surrogate representation rationale. When a measure is facially discriminatory, we can automatically say that the regulatory authority did not account for the role of domestic consumers as surrogates for the interest of foreign producers. If the regulatory authority had represented the role of consumers as surrogates for foreign producers, they would not have singled out foreign products for special treatment on account of their foreignness. The products can be presumed to be "like" because foreign products identical in every relevant respect with domestic goods would have been treated differently, a sure sign that consumers have not served as effective surrogates for foreign interests.

In sum, the Appellate Body's approach to the determination of like products fully implements the surrogate representation rationale by seeking to identify those classes of cases in which domestic consumers will function as good surrogates for the interests of foreign producers. Of course, preserving this surrogacy is a necessary but not a sufficient condition for the application of Article III; the analysis must go on to inquire into whether the foreign producers receive less favorable treatment.

III. B THE LESS FAVORABLE TREATMENT STANDARD

The approach developed by the Appellate Body to determine whether imports are treated less favorably than domestic goods (under Article III.4) or (equivalently) taxed differently so as to afford protection (under Article III.2), also reflect the surrogate representation rationale.

III. B. 1. Facial Discrimination

When the measure distinguishes on its face between domestic and foreign products, the Appellate Body has had to determine whether the mere fact that foreign goods are treated differently from domestic goods is enough to infer less favorable treatment and, if not, what additional facts must be proven. The answer to each question is revealing from the standpoint of the surrogate representation rationale.

The Appellate Body addressed both issues authoritatively in *Korean—Beef*,[104] in which the Appellate Body reviewed a dual retail system for beef products. Imported beef had to be sold in different outlets from domestic beef or (for larger stores) from different locations within the store. Although the measure facially distinguished between like products on the basis of national origin, the Appellate Body determined that such differential treatment was not

104. Small retailers that were a "Specialized Imported Beef Store" could sell any meat except domestic beef. Korean—Beef (AB), *supra* note 52, para. 143. Any other small retailer could sell any meat other than imported beef. *Id.* A large retailer could sell both, so long as the imported and domestic beef were sold in different sales areas. *Id.*

unlawful in itself; the complaining country still had to prove that the differential treatment was also less favorable treatment.[105]

This conclusion is, of course, not only logical and suggested by the structure of Article III.4 (which, after all, makes "less favorable treatment" a required part of the analysis), but it is also consistent with the surrogate representation model. First, the refusal to automatically invalidate facially discriminatory measures shows that the Appellate Body is not engaging in substantive review of national regulatory measures to determine whether their purpose or effect is to discriminate, effectively rejecting the notion that facial discrimination shows an impermissible purpose.[106] This is true because the fact of differential treatment of foreign and domestic goods does not necessarily mean that foreign producers are not adequately represented in the domestic decision-making process. Domestic producers could provide adequate surrogate representation even if different regulations apply to foreign goods if the foreign producers are more favorably advantaged or if the different treatment reflects more than the different circumstances of the foreign producers that are relevant to the regulatory scheme.[107] That might be the case, for example, where the regulatory measure specified the safety features for products but allowed foreign products to be admitted if they met the different

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105. *Id.* para. 135. The Appellate Body explicitly stated that the different treatment under the measure need not be a formal difference (i.e., facial discrimination). *Id.* para. 137.

106. Some commentators, for example, would make facially discriminatory measures an automatic violation of the national treatment provision on the ground that the fact of discrimination shows an unlawful purpose. *See, e.g.,* Regan, *Regulatory Purpose, supra* note 3, at 455. The Appellate Bodies rejection of that position is further evidence that they are rejecting purpose as a substantive test for national treatment. Although "[c]ases of explicit discrimination stand out because the explicitly different treatment is viewed as evidence that discrimination against foreign goods is a deliberate policy. . . GATT/WTO legal texts have not created separate rules for explicitly discriminatory regulatory measures." Hudec, *Requiem, supra* note 6, at 621-22.

107. The national treatment principle may also forbid formally identical treatment in certain circumstances. Section 337, *supra* note 100, para. 511. For example, a procedural requirement that applies to both domestic and foreign producers may be found to be unreasonably burdensome on the foreign producers, and thus a violation of Article III. Since domestic producers would not suffer as harsh a burden, they would be poor surrogates for foreign interests. *See* BHALA & KENNEDY, *supra* note 5, at 100.

> Exposure of imported products to the risk of discrimination is itself a form of discrimination prohibited under Article III. In the panel report, *Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, the panel concluded that Canadian minimum price regulations for beer undermined one of the fundamental purposes of Article III:4, which is to ensure that internal regulations do not dilute or eliminate the benefit of Article II tariff concessions. Moreover, the panel report establishes that equality of treatment of imported products vis-à-vis the domestic like product still may be a national treatment violation. Even though the two products are treated identically (e.g., as in the case of minimum price regulations), a national treatment violation nevertheless exists if the imported product could undersell the domestic like product but for the minimum price control.

Id.

safety regulations of the home government. Such a regulation based on the principle of mutual recognition would be differential treatment but not an instance in which the incentive of the domestic firms to resist the regulation on behalf of the foreign producers had been compromised.

How then are we to know when facially discriminatory measures treat foreign goods less favorably? The cornerstone of the analysis of less favorable treatment is the concept of equality of competitive conditions—the single consistent value that runs throughout the Appellate Body jurisprudence.[108] As the Appellate Body said in *Korean—Beef*, "whether or not imported products are treated 'less favorably' than like domestic products" depends on "whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products." [109]

The test centering on equality of competitive conditions invokes the image of a level playing field and summarizes the basic commitment of the WTO to remove barriers to competition and allow markets to work across borders. WTO jurisprudence makes it clear that this test does not focus on the impact of the measure on trade flows,[110] and that it is not an effects test in that sense. Instead, it is a test that looks at the costs imposed by a measure to determine whether the regulatory costs are evenly distributed between domestic and foreign producers.[111] The equality of a competitive conditions test expresses the central and foundational wisdom of the surrogate representation rationale: domestic producers can never be effective representatives of the interests of foreign producers if they stand to gain a competitive advantage to offset the cost of regulation.

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108. The purpose of this first sentence of III:2 is to protect "expectations on the competitive relationship between imported and domestic products." Panel Report. *United States—Taxes on Petroleum and Certain Imported Substances*, GATT B.I.S.D. 34S/136, para. 5.1.9 (June 17, 1987) [hereinafter U.S.—Petroleum]. "Article III:4, which is the parallel provision of Article III dealing with the 'non charge' elements of internal legislation, has to be construed as serving the same purpose." Section 337, *supra* note 107, para. 5.13 (Nov. 7, 1989). "The words 'treatment no less favourable' in . . . [III:4] call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products." *Id.* para. 5.11. "[T]his standard of effective equality of competitive conditions on the internal market is the standard of national treatment that is required, not only with regard to Article III generally, but also more particularly with regard to the 'no less favourable treatment' standard in Article III:4." Japan—Film, *supra* note 3, para. 10.379.

109. Korean—Beef (AB), *supra* note 52, para. 142.

110. Korean—Beef (AB), *supra* note 52, para. 137. "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products." Japan—Alcohol, *supra* note 3, at 16. *See also*, U.S.—Petroleum, *supra* note 108, para. 5.1.9. *See also supra* text accompanying note 108 (discussing development of the standard of equality of competitive conditions).

111. Although the Appellate Body referred to the "fundamental thrust and effect of the measure," Korean—Beef, *supra* note 52, para. 142, it evidently did not mean the effect of the measure on trade flows but the effect of the measure on costs, a central condition of competition. *Id.* para. 145.

When it applied this cost-based test to the Korean regulatory structure, the Appellate Body found that the vast majority of small Korean retailers chose to sell domestic beef rather than foreign.[112] Therefore, imported beef required new channels to reach consumers if imported beef was to compete with domestic beef.[113] "The central consequence of the dual retail system can only be reasonably construed . . . as the imposition of a drastic reduction of commercial opportunity to reach, and hence generate sales to, the same consumers served by the traditional retail channels for domestic beef."[114] Further, "what is addressed by Article III:4 is merely the *governmental* intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory."[115] Because the measure clearly imposed costs on foreign producers that were not imposed on the domestic beef industry, the domestic industry could not be relied upon to represent foreign interests in the domestic regulatory process. The flaw with the dual retail system was that by imposing greater costs on imported than on domestic goods, the scheme itself showed that the regulatory process failed to preserve the role of domestic producers as surrogates for foreign interests.

By turning the test focused on "equality of competitive conditions" into a test focusing on the differential impact of the costs of the measure, the Appellate Body has avoided reintroducing the effects part of the "aims and effects" test. In its place it has invoked a test that determines whether the regulatory process has imposed differential costs on the foreign and domestic producers, because that would itself be a sure sign that domestic producers have not been successful surrogates for foreign producers.

Admittedly, although meat producers might not have been good surrogates for foreign beef producers, meat retailers in Korea might have been good surrogates and foreign interests might have been fully represented in the regulatory process. As a general matter, retailers represent consumer interests because retailers enhance their own welfare by generating benefits for their customers; their goal as distributors is to enhance consumer surplus—the net benefits that consumers get from the low prices and high quality that competitive markets provide. Assuming that Korean consumers consider imported and domestic beef to be close substitutes, one might have expected the retailers to argue against measures that would make comparison shopping more difficult. This would have provided foreign beef producers with the surrogate representation they needed to provide the pro-consumer, pro-foreign producer point of view when the measures were being adopted.

But in the context of the *Korean—Beef* case, the possibility that retailers in Korea would provide effective representation for the interests of foreign producers was weak. Retailers, being numerous and diverse, would have

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* para. 149.

obvious difficulties in organizing to protect their (and consumer) interests. The fact that the measure would raise retailer costs uniformly, and thus put none at a competitive disadvantage versus other retailers, decreased the incentive to organize in opposition to the measure. Moreover, the incentive for Korean retailers to organize was blunted by the preexisting structure of the beef market. Prior import quotas on foreign beef, and its high cost, meant that the market share of foreign beef was low. As a result, retailers in Korea did not have an established and defined interest in promoting foreign beef, and therefore did not have an accurate assessment of the consumer surplus that could be generated from selling domestic and foreign beef side by side. Had the Korean measure been changing a well-established pattern of equal access, rather than disrupting an emerging distribution pattern, the retailers would have been injured to a far greater extent. We can speculate that they would have provided greater regulatory resistance, and therefore a heightened level of surrogate representation. Moreover, retailers who sold only domestic beef may have supported the segregation of foreign beef, feeling that they could gain over their rivals by not having to respond to competitive pressures to carry both domestic and foreign beef. Retailers that would have to absorb additional expense if the market were allowed to work would not be averse to seeing the market mechanism disrupted, and would therefore "defect" from any retailer coalition to oppose the measures.[116] Retailers were thus inadequate surrogates for foreign beef producers.

III. B. 2. Facially Neutral Measures

Often the domestic regulatory measure in question will not single out imported products for special treatment; it will be neutral concerning the origin of the goods.[117] Under these circumstances it is especially difficult to design a test for the less favorable treatment standard that is not either over-inclusive or under-inclusive. A test that relies only upon disproportionate effects would be over-inclusive by unduly impinging on the freedom of a country to regulate in the public interest when the regulation has international effects. A test that ignored effects—that is, one that exempted origin neutral measures from

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116. It is also instructive to examine the restaurant market as an outlet for foreign beef. Forty-five percent of the foreign beef sold in Korea was sold through restaurants. Korean—Beef (panel), *supra* note 102, para. 618. As far as we can tell from the record in the case, the Korean government imposed neither labeling requirements nor a requirement that the menus separately list the foreign and domestic beef. *Id.* In that segment of the beef market, where preexisting arrangements did not segregate the domestic and foreign beef, the power of the restaurants was apparently great enough to represent effectively the foreign beef producers and overcome any attempt to segregate the market for foreign and domestic beef. *Id.*

117. Interestingly, the problem of facially neutral measures has arisen in only one Appellate Body case under Article III:4, EC—Asbestos, *supra* note 3. Most of the analysis of facially neutral measures has been with respect to tax measures, where the Appellate Body has developed a sophisticated and nuanced approach that fully reflects the surrogate rationale.

III:4—would be under inclusive and in fact, would make it easy for a country to engage in protectionist measures by making its regulation look facially neutral. [118] The Appellate Body has made clear that taxing imports and domestic products the same within a certain fiscal category does not absolve the regulating country of its obligations under Article III,[119] but what test determines when a facially neutral measure should be struck down? Any extended look at the external effects of a measure would require the analyst to consider the trade effects in light of the purpose of the measure, and would therefore require a substantive balancing of trade and non-trade values under some form of an aims and effects test.

The Appellate Body has largely avoided such a substantive review by constructing tests for less favored treatment (and the equivalent standard in Article III:2) that focus on whether the measure appears to have been designed in a way that effectively co-opted domestic producers from acting as surrogates for the interests of foreign producers. Again, the equality of competitive conditions concept looks at the quality of the surrogacy. [120]

Under the first sentence of III:2, the inquiry into the treatment of imports is relatively straightforward, for the provision says that any differential in the tax on like goods is impermissible; no de minimis test or complex inquiry is necessary to determine whether the differential treatment upsets the competitive balance or otherwise impairs competitive conditions. Any difference is conclusively presumed to impair competitive conditions.

The analysis of this standard under the surrogate representative rationale is straightforward. If imports are taxed in excess of domestic "like products" then we can assume that the domestic producers with interests most similar to the foreign producers were a poor group of representatives of the foreign interests. We can assume this because the tax favors domestic producers and that would occur only if the regulating government has bought off the domestic producers by offsetting higher taxes by relieving them from foreign competition. Alteration of competitive conditions in favor of domestic pro-

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118. *See* Howse & Tuerk, *supra* note 76, at 285 (discussing how hidden discrimination in facially neutral measures requires an interpretation that allows Article III to reach instances of de facto, as well as de jure, discrimination).

119. Chile—Alcohol (AB), *supra* note 10, para. 52.

120. Although the central thrust of Article III is sometimes portrayed as having multiple purposes, equality of competitive conditions remains the foundational concept. For example, in Korea—Alcohol, the Appellate Body identified three objectives of Article III: "avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships . . . ." Korea — Alcohol (AB), *supra* note 10, para. 120. It appears, however, that those measures that are protectionist are a strict subset of those that violate the requirement of equality of economic conditions. That is, if WTO jurisprudence prohibits the latter, the former will always be eliminated. Such a view may be supported by the Appellate Body's later statement in the same opinion reducing the three objectives to one: "the object and purpose of Article III is the maintenance of equality of competitive conditions for imported and domestic products." *Id.* para. 127. This single requirement of providing "equality of economic conditions" applies to Article III:4 as well. Japan — Film, *supra* note 3, para. 10.369.

ducers through tax measures tells us that domestic producers reduced their resistance to the tax because the disadvantage of the tax was offset by the advantage of the freedom from foreign competition. By invalidating the tax, the first sentence of Article III:2 corrects the participatory deficit that reduces the surrogate voice of foreign interests in domestic policymaking.

One might ask whether it is appropriate to assume that mere differential impact of a tax measure is enough to justify a finding that the measure was in fact favoring domestic producers so that they would reduce their opposition to the tax. We have already seen that differential treatment is not necessarily less favorable treatment.[121] Tax categories, however, are generally constructed on the basis of revenue needs rather than regulatory needs. The process of determining the categories into which the taxed products falls is generally determined by the revenue requirements of the government rather than by any aspect of the product itself. That makes it relatively easy to conclude that the revenue to be derived from like products ought to not be a basis for distinguishing between the products. When a revenue distinction is nonetheless made, it is appropriate to draw the conclusion that creating differential revenue streams probably does not reflect differences in the product and therefore must reflect the fact that in the decision-making process domestic producers were able to relieve some of the burden of taxation on themselves by inducing the decision-maker to impose a relatively greater burden on foreign producers (the very entities for whom the domestic producers should have been acting as surrogate).

Of course, not all tax legislation is designed only with revenue in mind. Sometimes tax authorities create differential tax categories in order to discourage consumption of one type of product. They may distinguish between high and low nicotine cigarettes, for example, or between the high and low alcohol content of liquors in order to promote products that are perceived to be safer. That possibility should not change the analysis of tax measures. First, the precise rule invalidating any differential taxation of like products is fully justified because tax classification based on product content is rare. Moreover, when tax classifications have a non-tax purpose, the differential (and the differential effect) created to achieve that purpose can be justified, and thus allowed under Article XX. The Appellate Body need not complicate Article III analysis by taking safety objectives of revenue measures into account at that point of the analysis.

For the second sentence of Article III:2, the less favorable treatment inquiry revolves around two standards: whether the imports are "not similarly taxed" and whether they are taxed "so as to afford protection."[122] The "not similarly taxed" inquiry requires a showing that the differential is more than *de minimis*. "Dissimilar taxation of even some imported products as compared

121. *See* discussion *supra* Part III.B.1, notes 105–107.

122. Japan—Alcohol (AB), *supra* note 3, at 27-29.

to directly competitive or substitutable domestic products is inconsistent with" this standard.[123] The second inquiry, whether the tax is "applied so as to afford protection," requires the analyst to examine "the design, the architecture, and the revealing structure of the measure."[124] Just as is true under Article III, this too relates to the effect of the measure on the equality of competitive conditions. In some instances, "[t]he very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application."[125] But in other instances, additional unspecified factors might be relevant.[126] Significantly, the Appellate Body has cited, with apparent approval, a 1987 Panel statement that the "so as to afford protection" test was a matter of looking at factors that could show sufficient evidence of fiscal distortions of the competitive relationship between ". . .imported and domestic products 'affording protection to the domestic production . . . .'"[127] In other words, "so as to afford protection" means nothing more than affecting the equality of competitive conditions in favor of domestic products.

Commentators have interpreted the "design, architecture and structure test" as the equivalent of the test for determining the purpose of the tax classification and therefore as introducing a substantive inquiry into the evaluation of the tax classification.[128] Analysis shows, however, that the Appellate Body had a more sophisticated and less confrontational view in mind. They look at the design, architecture, and structure of the measure to determine whether the tax categories have been constructed to disrupt the natural alliance between domestic and foreign producers in opposition to the tax measure.[129]

In *Korea—Alcohol*, the very large difference in taxation was enough to justify a finding that the tax classification was "so as to afford protection."[130] Even beyond that simple conclusion, however, the Appellate Body elaborated on the design, structure, and architecture test. The tax operated:

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123. Canada—Periodicals, *supra* note 10, at 31.

124. Japan—Alcohol (AB), *supra* note 3, at 29-31.

125. *Id.* at 30.

126. *Id.* at 30.

127. *Id.* at 28.

128. *See* discussion, *supra* note 6.

129. Admittedly, in Canada—Periodicals, *supra* note 10, at 30-32, the Appellate Body looked at a government report and two statements by government officials to support its conclusions about the design, architecture and structure of the classification, which has been construed by purpose theorists to be a basis for determining purpose. *See, e.g.*, Regan, *Regulatory Purpose, supra* note 3, at 459. Their resort to this legislative evidence was in the context of different treatment that was said to be "beyond excessive, indeed it is prohibitive." Canada—Periodicals, *supra* note 10, at 30. Excessive disparity has been held to invalidate measure on its own, making this legislative purpose something of dicta. *See* Japan—Alcohol (AB), *supra,* note 3, at 30-31.

130. Korea—Alcohol (AB), *supra* note 10, para. 150.

> . . .in such a way that the lower brackets cover almost exclusively domestic production, whereas the higher tax brackets embrace almost exclusively imported products. In such circumstances, the reasons . . . as to *why* the tax is structured in a particular way do not call into question the conclusion that the measures are applied "so as to afford protection to domestic production."[131]

Because the favored and disfavored categories were virtually conterminous with the distinction between domestic and foreign produced products, and because the differential between the classifications was large, the classifications were easily interdicted. The tax authorities drew the lines between favored and disfavored categories in such a way that segregated the interests of the domestic and foreign producers of liquor and made it impossible for domestic producers to act as surrogates for the foreign producers. The design, structure, and architecture inquiry was in fact an inquiry into the quality of the surrogacy.

The relevant analysis was a great deal harder in *Chile—Alcohol*—the most recent Appellate Body decision applying the design, architecture and structure test—because there the favored and disfavored categories contained both domestic and imported products.[132] Again, the way the Appellate Body interprets the Article III:2 standards shows that it is analyzing the factual background of the measure to determine whether domestic producers provided effective surrogate representation for the interests of domestic producers when the measure was adopted.

The arguments of the parties turned on the fact that the favored tax brackets contained some imported goods (i.e., not all imports were disadvantaged) while the disfavored tax brackets included domestic goods (i.e., the adversely affected group was not only imported products). Although almost all of the relevant imports were taxed in the highest bracket,[133] and even though the vast majority of the comparable domestic products were taxed in the lowest bracket[134] a large proportion of the disfavored group of products included domestic goods. Moreover, in the higher, disfavored brackets, imports were relatively small, and domestic goods made up a major portion of the sales. Accordingly, Chile could easily argue that the tax brackets were not

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131. *Id.* The only domestic product that fell into the disfavored tax classification was distilled soju, and that accounted for less than one percent of Korean production of the relevant product. *Id.* para. 147. Moreover, in the favored tax category "[t]here is virtually no imported soju so the beneficiaries of this structure are almost exclusively domestic producers." *Id.* para. 150 (quoting the panel decision).

132. Chile—Alcohol (AB), *supra* note 10, para. 1.

133. *Id.* para. 67 (stating almost ninety-five percent of directly competitive or substitutable imports were in the highest bracket).

134. *Id.* para. 67 (stating seventy-five percent of all domestic production was taxed at the lowest rate).

designed "so as to afford protection;" otherwise the disfavored category would not have included such a large proportion of domestic producers, so that within that category imported and domestic goods were similarly taxed, rather than "not similarly" taxed.[135] In the context of the surrogate representation analysis, Chile's argument was tantamount to the claim that foreign interests were adequately protected because the adversely affected domestic interests could represent them.

The Appellate Body's two-prong test must be understood as responding to these claims by weighing the adequacy of the surrogate representation. The Appellate Body applied the "not similarly taxed" and "so as to afford protection" tests to explore whether the regulatory process had kept adversely affected domestic producers from effectively representing the interests of foreign producers.[136]

The first test, "not similarly taxed," looks at the distribution of the burdens and benefits of the regulatory scheme between domestic and imported goods. Noting that 95% of the imported goods were taxed at the higher rate and 75% of the domestic products at the lower rate,[137] the Appellate Body concluded that: "the tax burden on imported products, most of which will be subject to a tax rate of 47 percent, will be heavier than the tax burden on domestic products, most of which will be subject to a tax rate of 27 percent."[138] In other words, at least on an aggregate level, the distribution of burdens and benefits is such that the adversely affected domestic producers seem to have a disproportionately smaller interest than foreign producers in avoiding the higher tax.

This differential impact, however, was not enough to show that the measure was designed to afford protection. It demonstrated that the class of domestic producers who could represent the interests of the foreign producers (those in the higher tax category) was small in relation to the entire class of domestic producers. However, that fact by itself would not necessarily indicate that domestic producers could not effectively represent the interests of foreign producers. They may have been effective, but unsuccessful, representatives. Accordingly, the Appellate Body looked to the "so as to afford protection" prong of the analysis to assess the effectiveness of the domestic representation of foreign producers.

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135. *See id.* para. 12.

136. The European Communities did present evidence that the Chilean government bought off domestic producers. WTO Panel Report, Chile—Taxes on Alcoholic Beverages, WT/DS87/R, WT/DS110/R, para. 7.121 (June 15, 1999). The EC alleged that the Chilean government's preservation of preferential treatment of lower alcohol content products (the majority of domestic production being in the lower alcohol content bracket) allowed a higher tax on domestic products with higher alcohol content. *Id.* However, the panel did not engage in an inquiry of this alleged deal between the government and the domestic industry. *Id.* para. 7.122.

137. Chile—Alcohol (AB), *supra* note 10, para. 50.

138. *Id.* para. 53.

First, the Appellate Body addressed the fact that Chilean products constituted the "major part of the volume of sales in [the disfavored] bracket,"[139] which would seem to indicate that as spokespersons against the higher taxes the domestic producers had more at stake than foreign producers. The Appellate Body acknowledged the direction but not the weight of that point, noting that "This fact, does not by itself, outweigh the other relevant factors, which tend to reveal the protective application of the New Chilean system."[140] The fact that the larger proportion of producers in the disfavored class were domestic—not foreign—tells us a great deal about the small number of imports but very little about the effectiveness of the domestic producers in representing the interest of producers of liquor with that alcohol content. The "other factors" alluded to by the Appellate Body show how the Appellate Body has embraced and applied the surrogate representation rationale.

Two factors indicated that the classification adopted by Chile was designed to undermine surrogate representation. First, the tax rate rose steeply for liquor with an alcohol content above 35 proof and liquor with an alcohol content of 39 proof,[141] and, second, "approximately *half* of all domestic production has an alcohol production of 35 [proof] and is, therefore located on the line of the progression of the tax at the point immediately before the steep increase in tax rates. . . ."[142] The conclusion from this tax structure is clear. Chile drew its tax classification to minimize the number of domestic producers who would be in the disfavored categories and therefore minimized the group of producers who would have an identity of interest with the foreign producers. Had Chile set the tipping point for the large jump in tax rates at products with an alcohol content of 34 proof, it would have had a large number of domestic producers aligned with the foreign interests. Instead, Chile effectively neutralized the opposition of that large group of domestic producers by including them in the lower rate and their foreign competitor in the higher rate. Chile also effectively neutralized the mechanism by which foreign producers might have had their interests represented by domestic producers, which is the very problem that the WTO is working to solve. If Chile wants to segregate natural allies in the political process, it must do so for some overwhelming regulatory purpose encompassed within Article XX.

Consistent with the surrogate representation rationale, the Appellate Body rejected the broad claim that past de jure discrimination would be used as the basis for supporting a finding of bad faith. To equate past de jure discrimination with an appraisal of the present measure "would come close to a presumption of bad faith."[143] In terms of surrogate representation, one cannot support a finding of present protectionism with a finding of past

139. *Id.* para. 67.
140. *Id.*
141. *Id.* para. 63.
142. *Id.* para. 64.
143. Chile—Alcohol (AB), *supra* note 10, para. 74.

protectionism unless one can link the past discrimination to a present impairment of the mechanism by which domestic producers and consumers represent foreign interests.

However, in analyzing the quality of the proxy representation of foreign interests by domestic interests, the Appellate Body noted that the "comparatively small volume of imports consumed on the Chilean market may, in part, be due to past protection."[144] Here too, the Appellate Body is applying the surrogate representation rationale. Past discrimination of imports—which Chile accomplished by taxing different types of liquor at different rates—means that the country had already disrupted the market mechanism by which consumers protect the interests of foreign producers. Because prior discriminatory taxes had denied consumers the opportunity to express their preferences for foreign products in the marketplace, the taxes also diminished consumers' opportunity to evaluate and express their preferences for foreign products in the policymaking arena. The regulatory process needs to be especially protected when prior discrimination has impaired its ability to function.[145]

In this connection, we can see the relationship between the test that looks at design, architecture, and structure and the legislative purpose behind the measure. The Appellate Body affirmed its prior ruling that justification for the unlawful discrimination was not to be relevant to determining whether Article III was violated. They would not examine "the many reasons legislators and regulators often have for what they do."[146] But they would look at whether there were explanations for the design, architecture, and structure of the measure that were unrelated to protectionism. If the country could explain how the design, architecture, and structure came about for reasons that were unrelated to the need to buy the loyalty of domestic producers, it could refute an inference of unlawful discrimination, even though at this stage it would not be appropriate to ask whether the discrimination met the goals and tests of Article XX. In other words, the inquiry is not into whether the purpose of the regulation is permissible or substantively valid in some way, but only to determine whether there was a reason to negate the inference that the surrogate representation had been impaired. This is a limited use of purpose, geared only to determine whether the design, architecture, and structure show that there was no attempt to disrupt surrogate representation.

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144. *Id.* para. 68.

145. By contrast the Appellate Body rejected the panel's conclusion that a finding of unlawful discrimination could be based on the "interaction of the New Chilean System with the Chilean regulation which requires most of the imports to remain at the highest tax level without losing their generic name and changing their physical characteristics." *Id.* para. 73. Those regulations were not of the type that could impair the ability of domestic manufacturers and consumers to represent the interests of foreign producers. *Id.*

146. *Id.* para. 71 (citing *Japan-Alcohol (AB), supra* note 3, at 27).

III. IMPLICATIONS AND CONCLUSION

As the foregoing has demonstrated, the Appellate Body has developed an interpretive framework for the national treatment provision of Article III that is consistent with the process-oriented role of the WTO, and re-emphasizes it as an institution whose central mission is to insure that when a member country takes regulatory action affecting foreigners, the interests of the foreigners are not ignored in the decision-making process. The implications of this interpretation for our understanding of the WTO and its role as an international organization are significant.

The process-based interpretation presented in this article sees the national treatment provision as a mechanism by which the WTO's dispute resolution process can determine whether the interests of foreigners that would normally be represented by surrogates within a lawmaking jurisdiction have in fact been undercut and stymied. When foreign goods are in close enough competition with domestic goods to satisfy the "like" or "directly competitive" test, we know that under ordinary conditions the interests of foreign producers will be represented by domestic producers or consumers (or both), and this identifies a situation in which it is important to preserve that surrogate representation. When, however, analysis of the regulatory measure—its design, architecture and structure or its comparative treatment of foreign producers—reveals that those surrogates have been undercut in the regulatory process (for example, because the regulation imposes disproportionate costs on foreign producers), then the regulatory measures impermissibly impairs the participatory function that the WTO is designed to uphold.

The process-based account of national treatment gives Article III a coherent content, and furnishes answers to the kinds of issues that were raised at the beginning of this article. The key phrases of Article III take on a consistent meaning, focusing either on the role of consumers as surrogates for foreign producers (the "like" or "directly competitive" tests) or on the imposition of disproportionate costs on foreigners in order to ameliorate domestic opposition (the "less favorable" treatment test). The injunction that no member should apply measures so as to afford protection is a general statement of the surrogate representation rationale. Taxes are treated differently from other regulatory measures because most often they are used for revenue and not regulatory purposes and therefore can tolerate a broader notion that different classifications can be attributed to "buying off" the surrogate representation of domestic producers. Finally, this reading maintains a healthy relationship between Article III and Article XX. Under this reading, Article III deals only with whether the surrogate representation mechanism has been impaired; Article XX tells us whether the purpose for doing so outweighs the loss of political participation by surrogates for the foreign producers.

This process-based account of the national treatment provision suggests that most WTO analysts have been looking in the wrong direction when seeking a meaning for Article III. Previous analysis of the national treatment

provision has assumed that it had some substantive content, and that it therefore required the analyst to balance the values of a free trade system against the values inherent in a regulatory system. That approach set up a natural clash between the WTO and the trade regime, on the one hand, and national regulatory sovereignty on the other. The surrogate representation rationale, by contrast, does not assume that the national treatment provision elevates any substantive value (such as free trade) above other substantive values. It assumes only that the WTO enforces a process value—the process value of allowing those who represent the interests of foreign producers to do so without being co-opted in the course of the legislative process.

The implications of the shift from a substantive account of the national treatment provision to a procedural account are significant. The two accounts have vastly different implications for our understanding of international federalism, for the role of the WTO, and for the division of lawmaking authority between the members of the WTO and the panels and Appellate Body.

The substantive view of the national treatment provision inevitably posits a conflict between free trade values and national regulatory agendas. It assumes that the WTO and its members are engaged in a prolonged debate about how to interject free trade values into national regulatory agendas, and therefore results in a search for tests that will achieve the correct "balance" between regulatory autonomy and the international trading system. Accordingly, the various tests that have been devised to chart the border between trade values and regulatory values reflect the political proclivities of the analyst and the personal trade-offs made by the analyst when considering the appropriate goals of regulation. This has led to a wide and indeterminate range of opinions about how the balance should be struck.

The substantive view of the WTO therefore naturally raises questions about the scope of global federalism, the process by which trade values were made ascendant over other values within that federal system, and the appropriateness of moving decision-making authority away from democratic governments. Inevitably, therefore, the substantively based view leads to distrust of the WTO by those who support sovereignty and national regulatory autonomy, and puts the friends of the WTO in a defensive position. It leads to attacks on the WTO for displacing national regulatory choices with trade values enforced by an unelected and distant group of decision-makers.

By contrast, the process-based view appeals to values that are widely shared and that do not threaten the goals of regulatory regimes. The process-based view suggests that the only value at stake in national treatment cases is one that is widely shared, rather than contested—and that is the value of having the interests of those affected by a regulation be represented within the lawmaking forum that enacts the regulation. This value not only appeals to widely shared values of participatory lawmaking, but it is one that regulatory bodies can meet easily without sacrificing their regulatory goals. They need simply respond to affected interests directly rather that by reducing the

objection to the regulation by domestic producers. (And even if they do not, they can still justify the interdiction of surrogate representation if they meet the standards of Article XX).

The substantive view of the national treatment provision also raises troubling issues about the division of power between the member states and the Appellate Body that are less significant under the process-based view. Naturally, some interpretive function is inevitable. There is simply no way for the WTO members to adopt a code against protectionist measures. A significant issue under the substantive view is the legitimacy of delegating lawmaking power to the unrepresentative and unaccountable members of the Appellate Body. By what right do they seek to overturn national legislation and how do they develop the expertise to evaluate and balance purpose and effects?

The process-based view avoids this difficulty by positing that the role of the Appellate Body is not to balance trade values against local regulatory values, but simply to police the process by which national regulatory decisions are made, a role which is more highly suited to unelected and unrepresentative decision-makers. The Appellate Body has wisely limited its review under Article III to issues of process, for these are the kinds of decisions that bodies like the Appellate Body have a comparative advantage in addressing.

The question of who should make which decisions in a federal system is a significant one. In the context of the national treatment provision—just as in the context of the dormant Commerce Clause—an underlying issue is who should have the burden of seeking federal legislative review of the judicial interpretation. Under the Commerce Clause, Congress can always overturn the decision of a court because Congress is the ultimate arbitror of interstate commerce. Therefore, as many accounts of the dormant Commerce Clause emphasize, judicial review is really determining which party should have the burden of going to Congress to have the legislation overturned.

The same is true under the national treatment provision, of course, but the stakes are even higher, for, as many have noted, the possibility of overturning the decision is weaker. Decisions of the panels and Appellate Body cannot be overturned unless all the members agree to a new standard. The process-based view, more than the substantive view of national treatment, respects this aspect of WTO lawmaking by limiting the scope of review to process based matters and therefore preserves the authority of the members to set the substantive standards under which they will be governed.

Finally, the substantive view of the national treatment provision restricts national autonomy in ways that the process-based view does not. Presumably, if national values conflict with the trade values of the WTO because the effect of regulation on trade outweighs the national values, then no change in the legislation can preserve the national values unless the measure can be justified under Article XX. By contrast, under the process-based view, national regulation is not permanently forestalled or subjected to the tests of Article XX. A national regulatory body that runs afoul of the national treatment

provision can continue to address the regulatory need, reformulating its regulatory process to restore the potency of the surrogate representatives. Korea can still tax liquor and the United States can still regulate to clean the air.

In other words, along several important dimensions, the process-based view of the national treatment provision is superior to the substantive view. It is a more conservative function for an international institution to perform; it fits more closely to the institutional competency of judges of the panels and Appellate Body; and it appeals to values of participatory democracy that are more widely accepted and value neutral than the substantive values that underlie free trade.

At the same time that the process-based review fits more comfortably within the lawmaking structure of the WTO, it is not an impotent or pro-forma exercise. The review remains searching; it is just not substantively intrusive. By serving to preserve surrogate representation in the lawmaking process, this review performs the same important role that process performs in any law-making setting. It gives those who are adversely affected a stake in the debate and in the outcome. It reduces tensions and bad feelings generated when opportunities to participate are limited. It helps knit together the policy-making machinery that in our system of nation-states is otherwise territorially confined. Most of all, it insures that economic interdependence is managed in a way that encourages participatory interdependence so that the tensions from economic interdependence do become political tensions as well. By avoiding the parochial, it protects the ideal of participatory democracy in a global economy.

THE PERILS OF "CONSENSUS": HANS KELSEN AND THE LEGAL PHILOSOPHY OF THE UNITED NATIONS

J. Peter Pham*

During the debates preceding Operation Iraqi Freedom,[1] most Americans, even those who usually consider themselves seasoned political observers, were surprised at the vehemence with which many at the United Nations and other international assizes not only opposed the specific policies of President George W. Bush and his administration, but also contested the very notion that the United States government could be permitted to stake a unilateral position that is different from the consensus of the world body. Even prescinding from the specific case of the military intervention in Iraq by the armed forces of the United States and its allies, many at the United Nations and the various non-governmental organizations (NGOs) that, together with the U.N. and its bureaucracy, pass nowadays as the institutional incarnation of the international community, have excoriated the United States in recent years for its unilateralism, refusing to defer to the multilateral international consensus on such matters as the Kyoto Protocol on environmental change,[2] the Ottawa Treaty banning anti-personnel land mines,[3] and the Rome Statute creating the International Criminal Court.[4]

There are a number of different explanations proposed for these tensions. According to one school of thought, tensions and even heated exchanges have been and are part and parcel of international diplomacy. Hence, the exponents of this explanation counsel to do nothing: allow time to pass and tempers to cool, recognize that, as former U.S. Ambassador to Saudi Arabia, Charles W. Freeman, Jr. observed, estrangement from former friends invites charges of perfidy, but a state's bargaining power is usually enhanced, rather than

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1. *See* U.S. Army: Operation Iraqi Freedom Homepage, *at* http://www.army.mil/operations/oif (last visited Mar. 23, 2004).

2. Kyoto Protocol to the United Nations Framework Convention on Climate Change, *adopted* Dec. 11, 1997, 37 I.L.M. 32, *available at* http://unfccc.int/resource/convkp.html (last visited Mar. 31, 2004).

3. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *adopted* Sept. 18, 1997, 36 I.L.M. 1509, *available at* http://www.unog.ch/frames/disarm/distreat/ottawa.htm. (last visited Apr. 1, 2004).

4. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF/189/9, *reprinted in* 37 I.L.M. 999, *available at* http://www.un.orgllaw/icc/ (last visited Mar. 31, 2004).

impaired, by demonstrating its freedom of diplomatic maneuver in pursuit of national interests.[5]

A variant of this approach is the temptation to write off this criticism, especially in light of the French government's *volte-face* from promising to veto any U.N. Security Council resolution authorizing the use of force in Iraq to demanding French firms share in the lucrative post-war reconstruction contracts being awarded by the Coalition Provisional Authority (CPA),[6] as a momentary tempest in a teapot, fueled by the puerile feelings of impotence in the face of the world's lone *hyperpuissance* (to recall former French foreign minister Hubert Védrine's less-than-affectionate designation for an America he viewed as too worryingly-powerful to be designated a mere "superpower").[7]

Other observers have sought to attribute these tensions to what they perceive as a lack of leadership and effectiveness in American participation at the United Nations and other multilateral organizations. Such was the conclusion of a blue-ribbon, bi-partisan task force co-sponsored by the Council on Foreign Relations and Freedom House and co-chaired by Congressman David Dreier and former Congressman Lee H. Hamilton.[8] Congressman Dreier and Congressman Tom Lantos introduced to the House of Representative the recommendations of the task force for tactical and institutional reforms of the U.S. missions to the United Nations and other international organizations.[9]

Such approaches to the current tensions, while completely justified *in se*, suffer nonetheless from their failure to take into account the long-term significance not only to the policy interests of the United States, but for the international system itself of raising consensus to the status of a *norm* in international organizations like the United Nations. What is at stake is not

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5. CHARLES W. FREEMAN, JR., ARTS OF POWER: STATECRAFT AND DIPLOMACY 82 (1997).

6. For information and news regarding the CPA, see Coalition Provisional Authority, *at* http://www.cpa-iraq.org (last visited Mar. 24, 2004).

7. For an incisive and convincing analysis of the instinctive opposition to the United States on the part of the European, especially French, governing elites, see JEAN-FRANÇOIS REVEL, L'OBSESSION ANTI-AMÉRICAINE: SON FONCTIONNEMENT, SES CAUSES, SES INCONSÉQUENCES (2002). Ravel, a member of the *Académie française*, is unsparing in his criticism of his peers, arguing that:

> It is lies coming from an anti-American bias that have invented American unilateralism. Tendentious blindness and systematic hostility on the part of many of the governments towards America have weakened them and keep them from an understanding of realities. It is these governments themselves that . . . by substituting action with animosity and analysis with passion, have condemned themselves to impotence and, as a result, nourished the American superpower.

Id. at 300.

8. Enhancing U.S. Leadership at the United Nations: Report of an Independent Task Force (2002), *available at* http://www.cfr.org/publication.php?id=5047 (last visited Mar. 31, 2004).

9. United States International Leadership Act of 2003, H.R. 1590, 108th Cong. (2003).

simply a question of tactics and more effective public diplomacy. What is ultimately behind the current tensions is a debate concerning legal philosophy, specifically about an ideology that underlies the entire juridical vision of the United Nations, to the detriment not only of the national interests of the United States of America, but also the sovereignty of the nation-state and the democratic self-determination of smaller communities in an increasingly global world. The purpose of the present study is the examination of this philosophical vision, its intellectual origins, its current application, and the consequences thereof.

Two terms are essential to understanding the actual terms of the present debate: *consent* and *consensus*. Both words derive from the Latin verb *consentire* (literally *cum* plus *sentire)*, "to feel together," and, thus, "to agree, to give permission." The notion behind the Latin verb was itself explored in even earlier antiquity, within the context of the Hellenic philosophical inquiry into the nature of freedom. To the Stoics, who knew the concept in Greek as *synkatathesis*, it denoted a spiritual assent or accord to a proposition. The modern use of the verb "to consent" (*consentir* in its Old French origins) dates at least back to the writings of Richard of St. Victor (ca. 1110-1173).[10] In English, the use of the noun "consent" signifies "agreement" or "permission" and dates back to at least 1225.[11] In its millennial usage, as both verb and noun, the word has implied an individual act wherein a truth proposed is affirmed. Thus, the authors of the American Declaration of Independence held that "governments are instituted among men, deriving their just powers from the *consent* of the governed," that is, from the willful and explicit act of agreement of the governed to being ruled, an *active* act.[12]

In contrast, apart from its technical use in the Latin of the medieval Church's canon law, the now much-used noun "consensus" was relatively rare. Its use in modern languages is relatively recent, being a product of the philosophical enlightenment and entering the English language only in the 19th century, specifically in 1843, according to the second edition of the Oxford English Dictionary. And while the word "consensus" derives from the same linguistic roots as its cousin "consent," *consensus* took on a slightly, but significantly, different meaning. Rather than an affirmation of truth, consensus occurs when, in the words of French philosopher Paul Foulquié,

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10. *See* GERVAIS DUMEIGE, RICHARD DE SAINT-VICTOR ET L'IDÉE CHRÉTIENNE DE L'AMOUR (1952) (illustrating Richard of St. Victor's use of "consent."). While Richard, the Scottish-born abbot of the Parisian Cistercian Abbey of Saint Victor, is best known for his writings on Christian spirituality, it was within the context of his development of a theology of the Trinity that he articulated an early psychology of consent. *Id. See also* RICHARD DE SAINT-VICTOR, DE TRINITATE: TEXTE CRITIQUE AVEC INTRODUCTION, NOTES ET TABLES (JEAN RIBAILLIER ed.) (Librairie Philosophique J. Vrin, 1958). No less a figure than Dante characterized Richard's thought on the matter as "in contemplation more than human" ("*che a considerar fu più che viro*," *Paradiso* X, 130).

11. *See* DUMEIGE, *supra* note 10.

12. *Id.*

"one gives to the decision that another initiated the personal adhesion necessary for it to pass into fulfillment."[13] That is, it is a *passive* acquiescence to an act that has no necessary correlation to objective truth.

This philosophical subtlety is crucial to understanding the indignation sparked by America's repudiation of what is presented as the "consensus" of the world. With enlightenment thinkers, such as Immanuel Kant, excluding considerations of the metaphysical from the public square, there emerged a paradox. Democracy is based on the equality of all, and freedom of thought, speech, and association, which gives rise to the "consent of the governed." However, when other principles are excluded, the democratic process becomes an absolute and majority rule risks causing a democratic society's values to be determined by a preponderance of voices that, for the sake of appearing legitimate, masquerade as an impersonal general will, or "consensus." Having no point of reference other than a vote count of nation-states and, increasingly, self-appointed NGOs, the United Nations, and other international groups increasingly rely on "consensus" to legitimize their deliberations. A classic illustration of this is the opprobrium heaped upon the United States for being in the "extreme minority" and defying "consensus" in rejecting the Ottawa and Rome accords, when the majorities adopting both agreements consisted of states representing less than half of the world's population.[14] Thus, the hypothetical "tyranny of the majority" that Alexis de Toqueville cautioned against[15] has become real in the contemporary international community's *de facto* "tyranny of consensus" and, often enough, it is the "consensus" of a vocal minority at that.

All of this comes by way of preface to the present situation in which the United States finds itself regularly confronted by an "international community," as represented by the United Nations and those NGOs whose globalist agenda matches the ambitions of the U.N. bureaucracy to world governance, demanding that it give up its "unilateral" policies and submit to an alleged "multilateral consensus."[16] This attitude, rather than being merely a reaction to the unique set of historical circumstances that left the United States, in the words of former President George H. W. Bush, the world's "sole and preeminent power"[17] with all the attendant resentment such a status inevitably

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13. PAUL FOULQUIÉ, DICTIONNAIRE DE LA LANGUE PHILOSOPHIQUE 126-27 (1st ed. 1962) (defining "consentment").

14. *See generally* David Davenport, *The New Diplomacy,* POL'Y REV., Dec. 2002, at 17-30, *available at* http://www.policyreview.org/DEC02/davenport.html (last visited Mar. 25, 2004) (reviewing the role of a small group of states allied with globalist NGOs in formulating the international "consensus").

15. *See generally* ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer ed. & George Lawrence trans., Anchor 1969).

16. *See generally* John Van Oudenaren, *What is "Multilateral?",* POL'Y REV., Feb. 2003, at 33-47, *available at* http://www.policyreview.org (last visited Mar. 23, 2004).

17. George H. W. Bush, State of the Union Address (1992), *available at* http://www.janda.org (last visited Mar. 6, 2004).

brings and, therefore, destined to dissolve once some future rival rises to balance America's political, economic, and military might represents a long-term ideological commitment inherent to the United Nations bureaucracy and the supranational legal system that is its goal to bring about, as U.N. Secretary-General Kofi A. Annan has candidly admitted:

> Simply put, our post-war institutions were built for an inter*national* world, but we now live in a *global* world. Responding effectively to this shift is the core institutional challenge . . . More than ever, a robust international legal order, together with the principles and practices of multilateralism, is needed to define the ground rules for an emerging global civilization. . . . .[18]

This drive to subsume national sovereignty within single "multilateral consensus" derives its theoretical foundations from the legal philosophy of Hans Kelsen, one of the most important jurists of the twentieth century, if not the most preeminent.[19] Although Kelsen's theory has long been the focus of legal scholars around the world, and despite the fact that he spent the last three decades of his life teaching in the United States, only recently have American scholars begun to examine his thought,[20] a state of affairs that goes a long way to explaining the lack of appreciation in U.S. policy circles of the deeply-rooted nature of the hostile attitudes that confront the country's independent international policy.

Kelsen is relatively unknown in American circles. The only complete biography of him to date, by his former student and assistant Rudolf Aladár Métall, was published in German[21] and remains untranslated. Therefore, it would be useful to recount the major events in the fascinating life of the legal

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18. KOFI A. ANNAN, "WE THE PEOPLES": THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 11, 13 (2000).

19. *See* Michael Steven Green, *Hans Kelsen and the Logic of Legal Systems*, 54 ALA. L. REV. 365, 365-414 (2003) (citing a number of legal scholars, qualifying Kelsen as "the most important legal theorist of the twentieth century").

20. *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 250-91 (2003). The book has a very recent and interesting exception to this rule, the presence of an entire chapter, entitled *"Kelsen versus Hayek: Pragmatism, Economics, and Democracy."* Even then, Judge Posner admits that he had never read Kelsen and knew nothing about him except his reputation as a Kantian and the title of his most famous book, *Pure Theory of Law*, until he was "casting about for a suitable topic for a lecture that [he] had agreed to give at an annual meeting of the European Association of Law and Economics, which was to be held in Vienna" and being "told that economic analysis of law hadn't made much headway in Austria because the academic legal profession there remained under the sway of Austria's (and Continental Europe's) most distinguished twentieth-century legal philosopher, Hans Kelsen." *Id.* at 250.

21. RUDOLF ALADÁR MÉTALL, HANS KELSEN, LEBEN UND WERKE, EINE AUTORISERTE BIOGRAPHIE MIT VOLLSTÄNDIGEN LITERATUR UND SCHRIFTUMVERZEICHNIS (1969). For a complete bibliography of Kelsen's writings listed chronologically and thematically, see ROBERT WALTER, HANS KELSEN: EINE LEBEN IM DIENSTE DER WISSENSCHAFT (1985).

scholar.[22] Born in Prague on October 11, 1881, to a German-speaking Jewish family that moved shortly thereafter to Vienna, Kelsen pursued juridical studies even though his lifelong interests were in the humanistic disciplines of philosophy and literature, as some of his legal writings would show. He also had a passion for logic and mathematics as well as the natural sciences. Although a convinced agnostic, he converted to Roman Catholicism in 1905, evidently to escape any problems of discrimination that his religious background might present to his ambitious designs for an academic career in the resolutely Catholic Austro-Hungarian empire.

In 1905, Kelsen published his first book, a study of the theory of the state in Dante.[23] The following year, he received his doctorate in law from the University of Vienna. In 1911, he qualified as a teacher of public law and of legal philosophy with the publication of his first major work, a 700-page study in which he first articulated his nascent legal theory.[24] During World War I, Kelsen served as legal advisor to the Austrian Minister of War. In 1918, he was appointed associate professor of law at the University of Vienna, and, after the conflict in 1919, became full professor of public and administrative law. During this period, he was a part of the "Vienna School," coming into contact with Otto Bauer, Max Adler, Joseph Schumpeter, and Ludwig von Mises. Numbered among his students were several figures who would achieve prominence in later years, including Eric Voegelin and Charles Eisenmann. After helping draft the new Austrian Constitution, Kelsen was appointed a member of the Constitutional Court in 1921.

Kelsen's role in leading the Constitutional Court to overturn lower court bans on remarriage, a legal prohibition sought by Catholic Church authorities, caused the Christian Social Party-led government to oust him from the tribunal in 1930. The political climate became so hostile that Kelsen moved to Germany, taking up a chair in international law at the University of Cologne, where he began to focus on positive international law. In 1932, he delivered his second series of lectures in The Hague on this topic.[25]

With the coming to power of the Nazis in early 1933, Kelsen lost his teaching position at the University of Cologne. In the fall of that same year, he immigrated to Geneva with his wife and two daughters to take up a position

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22. As yet, there exists no survey of Kelsen's work as a whole in any language. Even the core of Kelsen's work, his "pure theory" of law, has been surveyed in book length only once. *See generally* WILLIAM EBENSTEIN, THE PURE THEORY OF LAW (1945). Although this book was valid in its time, it became dated with Kelsen's 1960 publication of the second, definitive edition of Reine Rechtslehre [*Pure Theory of Law*].

23. *See generally* HANS KELSEN, DIE STAATSLEHRE DES DANTE ALIGHIERI (1905).

24. *See generally* HANS KELSEN, HAUPTPROBLEME DER STAATSRECHTLEHRE. ENTWICKELT AUS DER LEHRE VOM RECHTSSATRE (1911). For an English translation, see HANS KELSEN, MAIN PROBLEMS IN THE THEORY OF PUBLIC LAW (Stanley L. Paulson & Bonnie Litschewski trans., 1998).

25. His first, in 1926, had reflected on the relationship between national law and international law.

at the *Institut Universitaire des Hautes Études*, where he reflected on the integration of international law into national legislation. In 1934, he published the first edition of what would become acclaimed as his masterpiece, *Pure Theory of Law*.[26] In addition to his courses in Geneva, he briefly taught international law at the University of Prague, although increasing anti-Semitic agitation made it impossible for him to continue there.

At the beginning of World War II, Kelsen, at the age of sixty, moved to the United States. From 1940 to 1942, he was a research associate at Harvard University, delivering the 1940-1941 Oliver Wendell Holmes Lectures at Harvard Law School that were eventually published as *Law and Peace in International Relations*.[27] In 1942, with the assistance of Roscoe Pound who declared him "the leading jurist of the time,"[28] Kelsen was appointed visiting professor in the Department of Political Science at the University of California at Berkeley.[29] In 1945, he became a full professor as well as an American citizen. Remaining at Berkeley until his retirement in 1952, Kelsen devoted himself to international law and published during the period, among other works, *Society and Nature*,[30] *Peace Through Law*, [31] and *General Theory of Law and the State*.[32] He also served as a legal advisor to the United Nations War Crimes Commission, with the task of preparing the legal and technical aspects for the eventual Nuremberg Tribunals. In addition, during this period, Kelsen devoted considerable attention to the nascent United Nations organization and published the monumental 900-page monograph on *The Law of the United Nations*.[33] This work, although now outdated, went through several editions and numerous re-printings between 1950 and 1966.

After retiring from teaching in 1952, Kelsen remained highly active, publishing in that same year his seminal work, *Principles of International Law*.[34] The following year, in 1953, he gave a third series of lectures in The Hague. In subsequent years, he served as a visiting professor at a number of institutions, including the Universities of Vienna, Copenhagen, Stockholm,

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26. HANS KELSEN, REINE RECHTSLEHRE. EINLEITUNG IN DIE RECHTSWISSENSCHAFTLICHE PROBLEMATIK, (Franz Deuticke, Leipzig und Wien 1934). For a translation of this book, see HANS KELSEN, INTRODUCTION TO PROBLEMS OF LEGAL THEORY (Bonnie Litschewski & Stanley L. Paulson trans., Claredon Press 1996) [hereinafter PROBLEMS OF LEGAL THEORY].

27. HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS: THE OLIVER WENDELL HOLMES LECTURES 1920-41 (Harvard Univ. Press 1948) (1942).

28. Roscoe Pound, *Law and the Science of Law in Recent Theories*, 43 YALE L. J. 525, 532 (1934).

29. PROBLEMS OF LEGAL THEORY, *supra* note 26, at xvi.

30. HANS KELSEN, SOCIETY AND NATURE: A SOCIOLOGICAL INQUIRY (1943), *available at* http://www-bunken.tamacc.chuo-u.ac.jp/scholar/morisue/datei.htm (last visited Apr. 12, 2004).

31. HANS KELSEN, PEACE THROUGH LAW (1944).

32. HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE (Anders Wedberg trans., 1949).

33. HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS (George W. Keeton & Georg Schwarzenberger eds., 1950).

34. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW (1952).

Edinburgh, and Chicago. By 1960, he published the second, definitive edition of *Reine Rechtslehre*,[35] a complete revision of the previous edition. Hans Kelsen died in Berkeley on April 19, 1973, leaving behind a legacy of some four hundred published works, some of which have been translated into some two dozen languages.[36]

Kelsen's influence on the jurisprudence of the United Nations, if "jurisprudence" is the correct term for the Orwellian corpus produced by the legal hodgepodge of overlapping conventions, commissions, committees, and other "deliberative" bodies, cannot be underestimated. In their meticulous article-by-article commentary on the sources and redaction of the U.N. Charter, Jean-Pierre Cot and Alain Pellet cite Kelsen's influence dozens of times.[37] Apart from the Charter, it is the role that Kelsen's theoretical vision plays in laying the intellectual foundations for the world body's overall ideology as to the binding nature of its "consensus" that is of capital importance.[38] Before considering this later subject, however, it is necessary to examine some of the basic tenets of Kelsen's legal philosophy.

In his *Pure Theory of Law*, Kelsen adopted the view that law is a strictly formal construct,[39] without regard for questions of content.[40] Kelsen was only interested in the mechanism for the production of these legal norms, their validity, and the obligations that they entailed.[41] He affirmed that "a definition of law, which does not determine law as a coercive act, must be rejected."[42]

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35. HANS KELSEN, REINE RECHTSLEHRE (1960). For an English translation, see HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., 1967) [hereinafter PTL]. All subsequent citations from PURE THEORY OF LAW are from this edition, the work of a former student of its author, who personally checked the translation.

36. *See generally* Nicoletta Bersier Ladavac, *Bibliographical Note and Biography*, 9 EUR. J. INT'L L. 391 (1998), *available at* http://www.ejil.org/journal/Vol9/No2/index.html (last visited Mar. 25, 2004) (listing the bibliography of Kelsen's works and their translations, arranged chronologically by date of the publication of the original work).

37. JEAN-PIERRE COT & ALAIN PELLET, LA CHARTE DES NATIONS UNIS. COMMENTAIRE ARTICLE PAR ARTICLE (2d ed. 1985). The absence of an index of names renders the use of this remarkable reference book a bit exacting.

38. *See generally* Ladavac, *supra* note 35. In all fairness to the remarkable figure of Hans Kelsen, it should be noted that the jurist would probably never have imagined the influence that his theories would take on as the legal ideology of a movement toward global governance, much less might approved of the consequences of that development. That being said, however, the influence is nonetheless real.

39. *See generally* Iain Stewart, *The Critical Legal Science of Hans Kelsen*, 17 J.L. & SOC'Y 273 (1990), *available at* http://www.law.mq.edu.au/HTML/staff/istewart/JLSKelsen.doc (last visited Apr. 12, 2004). Although Kelsen and some of his disciples resented the characterization of his "pure theory" as "formal," a more dispassionate analysis of his thought permits no other conclusion. *Id.*

40. PTL, *supra* note 34, at 53. "Since the law regulates the procedure by which it is itself created, one might distinguish this legally regulated procedure as *legal form* from the *legal content* established by the procedure, and speak of a legally irrelevant legal content." *Id.*

41. *Id.*

42. *Id.* at 54.

This reductionism, Kelsen reckoned, was the necessary price to pay in order to achieve a legal theory of scientifically irreproachable purity:[43]

> The obvious statement that the object of the science of law is the law includes the less obvious statement that the object of the science of law is *legal norms*, but human behavior only to the extent that it is determined by legal norms as condition or consequence, in other words, to the extent that human behavior is the content of legal norms. Interhuman relations are objects of the science of law as legal relations only, that is, as relations constituted by legal norms. The science of law endeavors to comprehend its object "legally," namely from the viewpoint of the law. To comprehend something legally means to comprehend something as law, that is, as legal norm or as the content of a legal norm—as determined by a legal norm.[44]

In this reductionist vision, the question of the norm becomes central, because "[t]hose norms, then, which have the character of legal norms and which make certain acts legal or illegal are the objects of the science of law."[45]

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43. PROBLEMS OF LEGAL THEORY, *supra* note 27, at 1. This preoccupation with vindicating the law as a "science" (*Wissenschaft*) and overcoming the tension between science and historicity, between "is" and "ought," introduced by Kant, and proposing a "unified science" characterized Kelsen's endeavors from the beginning. *Id.* at 15. *See also* Stewart, *supra* note 38. As Kelsen acknowledged in the preface to the first edition of *Reine Rechtslehre* in 1934:

> It is more than two decades since I undertook the development of a pure theory of law, that is, a theory of law purified of all political ideology and all natural-scientific elements and conscious of its particular character because conscious of the particular laws governing its object. Right from the start, therefore, my aim was to raise jurisprudence, which openly or covertly was almost completely wrapped up in legal-political argumentation [*Raisonnement*], to the level of a genuine science, a science of the mind [*Geistes-Wissenschaft*].

Id. at iii. Editor's note: This is the author's translation.

44. PTL, *supra* note 34, at 70.

45. *Id.* at 4. Kelsen provides that "[b]y 'norm' we mean that something *ought* to be or *ought* to happen." *Id.* He further explains:

> To say that the behavior of an individual is commanded by an objectively valid norm amounts to the same as saying the individual is obliged to behave in this way. If the individual behaves as the norm commands he fulfills his obligation—he obeys the norm; if he behaves in the opposite way, he "violates" the norm—he violates his obligation.

Id. at 15. "The norm that is regarded as objectively valid, functions as a standard of value applied to actual behavior." *Id.* at 17.

None of the classical questions of "first principles" are permitted in this schema. Kelsen states that "[t]he object of a scientific theory of value can only be norms enacted by human will and values constituted by these norms."[46]

What distinguishes the legal order from other social orders (economic, religious, cultural, etc.) is its monopoly on coercion.[47] This requires strong judicial and executive organs.[48] It should be recalled, however, that in contrast with older philosophies of law such as the classical formulation of St. Thomas Aquinas of law ("*id quod iustum est*") as an ideal justice based on the divine will or Montesquieu's more modern definition of law as the necessary relations flowing from the nature of things as revealed by reason[49] in Kelsen's system, the actions that government agents may compel do not derive their objective validity "from the factual act, that is to say, from an *is*, but again from a norm authorizing this act, that is to say, from an *ought*."[50]

It is this context, Kelsen added that the "[n]orms according to which men ought to behave in a certain way can also be created by custom."[51] He explained that "[i]f men who socially live together behave for some time and under the same circumstances in the same way, then a tendency—that is, psychologically, a will—comes into existence within the men to behave as the members of the group habitually do."[52] This, then, becomes the basis for the importance that, in the ambiance of the United Nations and its hangers-on in the NGOs, is attributed to the "international *consensus*" as the expression of the "general will" of the world; with neither content nor any objective outside point of reference, judges will have to fill the void with something. As Posner has observed, Kelsen advised the judge to use "ideology" to "create the specific legal norms needed for deciding cases not ruled by preexisting law."[53]

The rapid expansion of claims of jurisdiction for alleged crimes against humanity is an example of how the two distinct juridical notions, custom and consensus, have been intertwined to achieve an ideologically-desired outcome, irrespective of the actual law on the books. A case on point is the arrest of the

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46. PTL, *supra* note 34, at 18. He also states, "[a] norm, however, cannot be either true or untrue, but only valid or not valid." *Id.* at 19.

47. *Id.* at 34. Kelsen provides, "The decisive criterion is the element of force—that means that the act prescribed by the order as a consequence of socially detrimental facts ought to be executed even against the will of the individual and, if he resists, by physical force." *Id.*

48. *Id.* at 37. Kelsen states, "Collective security reaches its highest degree when the legal order installs law courts with compulsory jurisdiction and central executive organs whose coercive means are so effective that resistance ordinarily is hopeless." *Id.*

49. John Guegen, *Beyond Legal Positivism and Legal Naturalism: A Lesson from St. Thomas Aquinas*, *in* 1 LAW AND PHILOSOPHY: THE PRACTICE OF THEORY. ESSAYS IN HONOR OF GEORGE ANASTAPLO, 258-71 (John A. Murley et al. eds., 1992).

50. PTL, *supra* note 34, at 9.

51. *Id.*

52. *Id.*

53. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 268 (2003) (interpreting the complex argument of PTL contained in pp.104-06).

former Chilean President, General Augusto Pinochet, in Great Britain.[54] Regardless of one's views on the former military ruler and the actions of his regime, particularly during the period immediately after it took power in 1973, the *facts* of the case are not disputed. On September 21, 1998, the former head of state, then a senator-for-life under the provisions of the Chilean Constitution, entered Great Britain using a diplomatic passport. On October 9, he underwent surgery in a London hospital for back pain. A week later, while recovering in a hospital on October 16, he was awakened by Scotland Yard agents serving him with an arrest warrant issued by a Spanish magistrate who was investigating the deaths of Spanish nationals in the wake of the General's seizure of power in 1973.[55] The case subsequently dragged on until March 2, 2000, when the British Foreign Office decided to free the eighty-four year old Pinochet on humanitarian grounds, citing his failing health.

Also clear in the case are the international statutory and customary laws on the matter. International law confers sovereign immunity on General Pinochet for his official actions while head of state - an immunity correctly recognized by Lord Chief Justice Thomas Bingham in his original ruling of October 28, 1998,[56] before the politicization of the case; the Vienna Convention on Diplomatic Relations,[57] to which both Great Britain and Chile adhere, is clear on the immunities enjoyed by holders of diplomatic passports, including the former Chilean President who was traveling on one.[58] This immunity can only be waived by the State issuing the passport,[59] in this case Chile, which formally protested the former Chilean President's detention on

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54. *See generally* Justice Frank Sullivan, Jr., *A Separation of Powers Perspective on Pinochet*, 14 IND. INT'L & COMP. L. REV. 409.

55. It should be noted that the magistrate in question, Baltazar Garzón, has carved himself a reputation for harassing high-profile "defendants." Since his failure to get custody of General Augosto Pinochet, he has attempted, using a variety of international legal instruments and *ad hoc* juridical justifications, to have detained Italian Prime Minister Silvio Berlusconi, former U.S. Secretary of State Henry Kissinger, and amnestied ex-members of the former military government in Argentine. John Carlin, *Spain's Man of Law With Cojones of Steel: General Pinochet, Henry Kissinger and the Bali Bombers are the Big Guys Judge Baltazar Garzon Goes After. But He is Not Without Enemies of His Own*, NEWS STATEMENT (London), Oct. 28, 2002, *available at* http://www.findarticles.com/cf_dls/m0FQP/4611_131/94509907/p1/article.jhtml (last visited Mar. 25, 2004). He has also investigated former Peruvian President Alberto Fujimori, now living in exile in Japan. One cannot help but note a certain political bias in the subjects he has selected for his "judicial" inquiries.

56. In re an Application for a Writ of Habeas Corpus ad Subjiciendum re: Auguto Pinochet Ugate, 38 I.L.M. 68 (Q.B. Div'l Ct. 1998).

57. Vienna Convention on Diplomatic Relations, *adopted* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 96, *available at* http://www.un.org/law/ilc/texts/diplomat.htm (last visited Feb. 27, 2004). Originally signed by sixty States plus the Holy See, presently 178 States have ratified it. *Id.*

58. *Id.* art. 29. It states, "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." *Id.*

59. *Id.* art. 32.

October 17, the day after his arrest. Furthermore, the immunity also applies if the holder of the passport travels through another country.[60]

In the case of Great Britain, its treaty obligations required it respect the immunities that the Chilean government had seen fit to accord General Pinochet when the latter issued him a diplomatic passport. If the British authorities found the comings and goings of the former military ruler objectionable, they had the right to refuse him passage, but once they had admitted him under diplomatic cover, the traditional understanding at the time was that they were obliged to respect that cover.[61]

However, the British government and courts, under relentless scrutiny from the media and pressure groups, discovered a new "consensus" - albeit one never codified by the same solemnities as the Vienna Convention - that permitted it to justify a total innovation: the arrest of the holder of a diplomatic passport with a view at deporting him to a third country.[62] Thus, in one fell swoop, a new *lex gentium* was inaugurated based on a "consensus" of "world opinion." Kelsen's theory anticipated such a move:

> Traditional science of law assumes that *opinio necessitatis* is an essential component of the facts of custom. That is to say that the acts which constitute the custom must take place in the belief that they ought to take place. But this opinion presupposes an individual or collective act of will whose subjective meaning is that one ought to behave according to custom. If customary law, like statutory law, is positive law, then there must be an individual or collective act of will

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60. *Id.* art. 40. It provides, "If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary . . . , the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return." *Id.*

61. *Cf.* EILEEN DENZA, DIPLOMATIC LAW, A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS (2d ed. 1998).

62. Even if one accepts the somewhat far-fetched claim by the Spanish judge Baltazar Garzón that the actions carried out by the regime of then-President Augusto Pinochet amounted to the crime of "genocide" as defined by the 1948 United Nations Convention for the Prevention and Punishment of Genocide, there remains the fact that the British Parliament, when it ratified that international agreement with the passage of the United Kingdom Genocide Act of 1969, deliberately omitted article IV, which lifts sovereign immunity. *See* Sullivan, *supra* note 53 at 425-26. Hence, even if General Pinochet were *guilty*, there was no British statutory authority duly passed according to the Britain's unwritten constitution on which to actually hold and extradite him. *See id.* And even if one accepted the legal reasoning adopted by the Judiciary Committee of the British House of Lords in its November 25, 1998, appellate opinion overturning the Lord Chief Justice's ruling that "international law has made it plain that certain types of conduct . . . are not acceptable conduct on the part of anyone," it is a still a leap from that conclusion to endowing a magistrate with domestic jurisdiction in another country with the enforcing that principle on the national of still another country. *See* Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., 86-96 (July–Aug. 2001).

> whose subjective meaning is the "ought"—that is interpreted as objectively valid norm, as customary law.[63]

What is at stake here is not the hallowed custom that is a secondary source of law in civil law societies, much less the common law of societies that follow Anglo-Saxon jurisprudence. Rather, what Kelsen proposes is a sociological circle wherein the norm ought to reflect the conduct of the members of the group. This "consensus" is interpreted to be the expression of a "general will," that is then obligatory on all as a norm:

> At first the subjective meaning of the acts that constitute the custom is not an *ought*. But later, when these acts have existed for some time, the idea arises in the individual member that he ought to behave in the manner in which the other members customarily behave, and at the same time the will arises that the other members ought to behave in that same way. If one member of the group does not behave in the manner in which the other members customarily behave, then his behavior will be disapproved by the others, as contrary to their will. In this way the custom becomes the expression of a collective will whose subjective meaning is an *ought*.[64]

Even as he referred to the sociological nature of the process for the formation of norms, Kelsen rejected any recourse to the use of "sociology" *in se*—or what might today be referred to as the "social sciences"—in adjudicating the contents of the norms, in order to preserve his "pure theory" from contamination by the use of tools other than logic.[65]

Over the long run, this approach tends to generalize customary practices never formally subject to the usual give-and-take of legislative debate whereby a constitutional *consent* is normally given, and arrives at canonizing a "*consensus*" that obliges all to submit to it. It is, in short, precisely the incremental "consensus"-driven legal approach of the U.N. organs, which adhere to a corollary construct of legal order seen as a pyramid-like structure:

> Because of the dynamic character of law, a norm is valid because, and to the extent that, it had created in a certain way, that is in a way determined by another norm, therefore that other norm is the immediate reason for the validity of the new norm. The relationship between the norm that regulates the

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63. PTL, *supra* note 34, at 225.

64. *Id.* at 9.

65. *See* Renato Treves, *Hans Kelsen et la sociologie du droit*, DROIT ET SOCIÉTÉ 1, 15-25 (1985) (discussing Kelsen's ideas regarding the sociology of justice).

> creation of another norm and that norm created in conformity with the former can be metaphorically presented as a relationship of super- and subordination. The norm which regulates the creation of another norm is the higher, the norm created in conformity with the former is the lower one. The legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms. Its unity is brought about by the connection that results from the fact that a validity of a norm, created according to another norm, rests on that other norm, whose creation, in turn, is determined by a third one. This is a regression that ultimately ends up in the presupposed basic norm [*Grundnorm*]. This basic norm, therefore, is the highest reason for the validity of the norms, one created in conformity with another, thus forming a legal order in its hierarchical structure.[66]

This passage, needless to say, eerily presages the actual *modus operandi* of the various specialized U.N. organs and the NGOs associated with the fields of competence of those official agencies. The evolution of the situation leading up to the present furor over America's alleged "unilateralism" on environmental issues neatly illustrates the point.[67] In the late 1960s, the United Nations Economic and Social Council decided to convene an international conference on the environment. After several years of preparatory meetings and the establishment of various panels of experts, the United Nations Conference on the Human Environment met in Stockholm on June 5, 1972 for eleven days. The chief accomplishments of the Stockholm Conference, as it came to be known, were the publication of a "Stockholm Declaration" containing some twenty-six "principles of common conviction" and a call for the follow-up conference. As it turns out, this conference took two decades to organize, although during the interim, a U.N. Commission on Environment and Development was constituted. In 1987, this body, subsequently known as the Brundtland Commission after its president, former Norwegian prime minister Go Harlem Brundtland, issued a report calling for the establishment of an "international charter for sustainable development." This task was taken up by the United Nations Conference on Environment and Development that, meeting in Rio de Janeiro June 3-14, 1992, reaffirmed the "Stockholm

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66. PTL, *supra* note 34, at 221-22.

67. For a discussion of the scientific controversies surrounding the issues involved in the international environmental debate, see Jack M. Hollander, *Rushing to Judgment*, WILSON Q., 64-77 (Spring 2003) and V. Ramanathan & Tim P. Barnett, *Experimenting with the Earth*, WILSON Q., 78-84 (Spring 2003). For additional background information on Kyoto and the United State's role, *see generally* Micheal Betsill, *Environmental NGOs Meet the Sovereign State: The Kyoto Protocol Negotiations on Global Climate Change* 13 COLO. J. INT'L ENVTL. L. & POL'Y 49; Anita Margrethe Halvorssen, *Climate Change Treaties—New Developments at the Buenos Aires Conference* 1998 COLO. J. INT'L ENVTL L. Y.B. 1.

Declaration" and issued its own "Rio Declaration" with twenty-seven principles and a wish-list entitled "Agenda 21." Just before the conference in Rio de Janeiro, the "United Nations Framework Convention on Climate Change" was signed in New York on May 9, 1992. The much-controverted Kyoto Protocol of December 11, 1997 is officially an instrument of implementation for this earlier convention.

The Rio de Janeiro meeting was followed by two ministerial-level conferences in Nairobi (1997) and Malmo (2000) which, in turn, led to the World Summit on Sustainable Development in Johannesburg (August 26-September 4, 2002). The meeting issued a thirty-seven point political "Declaration,"[68] as well as a detailed "Plan of Implementation."[69] The latter document is a detailed regulatory undertaking to carry out the objectives of not only the Johannesburg conference, but also all of its predecessors. Its preamble deserves to be quoted in its entirety given the remarkable similarity to the process outlined by Kelsen with one norm founded on little else but the previous norm:

> The United Nations Conference on Environment and Development [UNCED], held in Rio de Janeiro in 1992, provided the fundamental principles and the programme of action for achieving sustainable development. We strongly reaffirm our commitment to the Rio principles, the full implementation of Agenda 21 and the Programme for the Further Implementation of Agenda 21. We also commit ourselves to achieving the internationally agreed development goals, including those

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68. World Summit on Sustainable Development, Declaration on Sustainable Development (17th Plenary Session, Sept. 4, 2002), *available at* www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm (last visited Mar. 31, 2004).

69. World Summit on Sustainable Development, Plan of Implementation, *available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter1.htm (last visited Mar. 31, 2004). The document contains, among others, the provision that:

> Good governance at the international level is fundamental for achieving sustainable development. In order to ensure a dynamic and enabling international economic environment, it is important to promote global economic governance.
>
> A vibrant and effective United Nations system is fundamental to the promotion of international cooperation for sustainable development and to a global economic system that works for all. To this effect, a firm commitment to the ideals of the United Nations, the principles of international law and those enshrined in the Charter of the United Nations, as well as to strengthening the United Nations system and other multilateral institutions and promoting the improvement of their operations, is essential. States should also fulfill their commitment to negotiate and finalize as soon as possible a United Nations convention.

Id. at n. 141-42.

Not only is global governance advocated, but also the text goes beyond the principle *pacta sunt servanda*, that nation-states should observe the obligations they assume, to admonish states to take on the obligations!

> contained in the United Nations Millennium Declaration and in the outcomes of the major United Nations conferences and international agreements since 1992.
>
> The present plan of implementation will further build on the achievements made since UNCED and expedite the realization of the remaining goals.[70]

The concerning feature of this pyramid construction is that the juridical norm does not oblige by reason of *consent*, much less by the inherently compelling nature of the truth claims of its *content* or their relationship to the demands of justice, as understood by classical philosophers and jurists. For Kelsen, "there are no *mala in se*, but only *mala prohibita*,"[71] that is, no crimes that are wrong in themselves rather than wrong simply by being declared wrong by the law. Thus, a norm is rendered obligatory by reason of its logical coherence with the normative scheme for the production of juridical norms.[72]

Once he had established that law was a pyramid-like system of norms, Kelsen was confronted with the question: "What constitutes the unity of a multitude of norms?"[73] Closely tied to this question is another one: "Why is a norm valid, what is the reason for its validity?"[74] The answer Kelsen gives to these queries is almost Kantian:

> The norm which represents the reason for the validity of another norm is called, as we have said, the "higher" norm. But the search for the reason of a norm's validity cannot go on indefinitely like the search for cause and effect. It must end with a norm which, as the last and highest, is presupposed. It must be *presupposed*, because it cannot be "posited," that is to say: created, by an authority whose competence would have to rest on a still higher norm. This final

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70. *Id.* at n. 1-2.
71. PTL, *supra* note 34, at 112.
72. As Kelsen noted:

> The norm system that presents itself as a legal order has essentially a dynamic character. A legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm [*Grundnorm*], but because it was created in a certain way ultimately in a way determined by a presupposed basic norm. For this reason alone does the legal norm belong to the legal order whose norms are created to this basic norm. Therefore any kind of content might be law. There is no human behavior which, as such, is excluded from being the content of a legal norm. The validity of a legal norm may not be denied for being (in its content) in conflict with another norm that does not belong to the legal order whose basic norm is the reason for the validity of the norm in question.

Id. at 198.
73. *Id.* at 193.
74. *Id.*

> norm's validity cannot be derived from a higher norm, the reason for its validity cannot be questioned . . . . All norms whose validity can be traced back to one and the same basic norm [*Grundnorm*] constitute a system of norms, a normative order. The basic norm is the common source for the validity of all norms that belong to the same order—it is their common reason of validity.[75]

Therefore a given norm is binding by reason of the validity conferred on it by a higher norm. It must be obeyed, and any disobedience must be punished. Kelsen added that this normative system is the basis for the state since "as a political organization, the state is a legal order," specifically a "relatively centralized legal order."[76] He went on to define the state as "a corporation, that is, a community constituted by a normative order which institutes organs directly or indirectly . . . . The order constituting this community is the legal order, designated as national legal order in contradistinction to the international legal order."[77]

While the question of the basic norm (*Grundnorm*) was formulated in reference to the state, it also enters into play both in Kelsen's philosophy of law and for purposes of the present inquiry into the legal ideology driving the U.N.'s ambitions to governance in questions regarding the relationship of the law of the nation-state and international law. There are two schools of thought in this regard. The classical view, since the Peace of Westphalia (1644) ended the Wars of Religion in Europe, has been that a norm of international law is binding on a given sovereign state only if the government of that state, through the means provided for in its constitution, has explicitly recognized that international norm.[78] According to this view, international law constitutes "only a part of the national legal order, regarded as sovereign" and "the validity of the national legal order is the basic norm referring to the effective constitution" of the state.[79]

Kelsen, however, proposed a revolutionary view.

> International law is not regarded as part of the national legal order, but as a sovereign legal order, superordinated to all national legal orders, limiting them in their spheres of

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75. *Id.* at 194-95.

76. *Id.* at 286.

77. PTL, *supra* note 34, at 290.

78. *See* David Fagelson, *Two Concepts of Sovereignty: From Westphalia to the Law of Peoples?*, 38 INT'L POL. 499 (2001) (discussing the development of the Westphalian idea of sovereignty as well as the incremental assaults on it in recent times). For a different reading of the same history with a relatively sympathetic treatment of recent developments, see DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS 73-105 (2001).

79. PTL, *supra* note 34, at 214.

> validity; in other words, one does not assume the primacy of the national legal orders, but the primacy of the international legal order. The latter does, in fact, contain a norm that represents the reason for the validity of the individual national legal orders.[80]

Kelsen explained his view by noting that international law "consists of norms which originally were created by custom, which is by acts of the national states or, more correctly formulated, by the state organs authorized by national legal orders to regulate interstate relations."[81] These norms are "general" in that they create rights and obligations for all states. Among these norms, Kelsen cited the principle "*pacta sunt servanda*" ("pacts should be respected"), whereby individual states regulate by treaty the mutual relations between their organs and subjects. The authorized organs of the states, in Kelsen's terms, agree in the creation of norms whereby rights are created and obligations are imposed between them. Kelsen, however, noted that international law created by such bilateral treaties "does not have general but only particular character" since "its norms are not valid for all states, but only for two or a larger or smaller group of states," thus constituting only "partial communities."[82] Consequently,

> [p]articular international law created by treaties and general international customary law are not to be regarded as norms on the same level. Since the basis of the one group of norms is a norm that is part of the other group, the two have a relation of a higher and a lower level in a hierarchy.[83]

According to Kelsen, beyond these two lay a third level.[84] In the formation of national law, the preeminent role traditionally attributed to custom is extended to the creation of international law. In other words, if established constitutional convention—the *active* "consent of the governed"

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80. *Id.*
81. *Id.* at 323.
82. *Id.* at 324.
83. *Id.*
84. Kelsen states:

> If we consider also the legal norms created by international courts and by other international organs, established by treaties, a third level appears in the structure of international law. For the function of such an organ is itself based on an international treaty, that is to say, on a norm of the second level of international law. Since this second level, that is the international law created by international treaties, rests upon the norm of general customary international law (the highest level), the presupposed basic norm [*Grundnorm*] of international law must be a norm which establishes custom constituted by mutual behavior of states as law-creating fact.

PTL, *supra* note 34, at 324.

of American Founding Fathers—is the foundation of the national legal system, the *passive* "consensus" of the "community of nations" is the basis for international law. International organizations, their functionaries and international tribunals are charged with articulating what that "consensus" consists of specifically. Writing in the late 1950s, Kelsen admitted that his envisioned international legal order was only in its infancy, but he predicted its potential for growth.

This vision of international law necessarily entails the subordination of national legal systems to a global system, that is, the transfer of *sovereignty* from national states to the overarching structure of a supranational federation, if not the total absorption of that sovereignty by a single global "super state" that would be sole subject of sovereignty.[85]

Writing long before "globalization" became a catch phrase to describe an ill-defined phenomenon,[86] Kelsen argued that this evolution towards a single global order was a logical necessity given the identification of the state and its legal system. The international legal system was thus conceived as an instrument for the unification and centralization of a global society that would be characterized less by "*inter*-nationalism" than by "*supra*-nationalism." [87]

This is not only the monopolization of sovereignty by a super-state but, moreover, an *inversion* of the traditional principal of *subsidiarity*. In this scheme, it is not the super-state that plays a complementary role *vis-à-vis*

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85. Kelsen elaborates:

> International law is "law," if it is a coercive order, that is to say, a set of norms regulating human behavior by attaching certain coercive acts (sanctions) as consequences to certain facts, as delicts, determined by this order as conditions, and if, therefore, it can be described in sentences which—in contradistinction to legal *norms*—may be called as "rules of law."

Id. at 320.

86. Pundits still differ as to the specifics of the "globalization" phenomenon. Some, such as New York Times columnist Thomas Friedman, see it as a "dynamic ongoing process," driven by economics but having a cultural dimension. *See* THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 3-16 (Anchor Books rev. ed 2000). Others, like British philosopher Roger Scruton, see it in terms of the transfer of power to global organizations. *See* ROGER SCRUTON, THE WEST AND THE REST: GLOBALIZATION AND THE TERRORIST THREAT (2002). In his book, Scruton writes:

> Globalization does not mean merely the expansion of communications, contacts, and trade across the globe. It means the transfer of social, economic, political, and juridical power to global organizations, by which I mean organizations that are located in no particular sovereign jurisdiction, and governed by no particular territorial law. . . . These organizations pose a new kind of threat to the only form of sovereignty that has brought lasting (albeit local) peace to our planet.

Id. at 127.

87. PTL, *supra* note 34, at 328.

> The entire legally technical movement, as outlined here, has – in the last analysis – the tendency to blur the border line between international and national law, so that as the ultimate goal of the legal development directed toward increasing centralization, appears the organizational unity of a universal legal community, that is, the emergence of a world state.

Id.

individual states, but rather the latter that are subsidiaries of the former. If the point of departure is assumed, as under Kelsen's philosophy, to be that the validity of the international legal system, then national legal systems must base their own validity on their submission to a supranational system: "International law must be conceived . . . as a total legal order comprising all national legal systems as partial orders, and superior to all of them."[88]

Consequently, if one accepts this line of reasoning—and recognition of this point explains the moral indignation with which the withdrawal of the American signature from the Rome Statute of the International Criminal Court was greeted—international tribunals must be able to override national judicial systems because the judges of these international assizes, in collaboration with international functionaries, must affirm the superiority of global governance over national sovereignty.[89]

It does not require a conspiratorial mindset to note that the instruments for vindicating these claims are being put into place with the establishment of the International Criminal Court. In a break with centuries-old principles of the *lex gentium*, the Rome Statute extends the Court's jurisdiction even to citizens of countries that are either not signatories or signatories who have not ratified the treaty.[90] In addition to the International Criminal Court, to which

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88. *Id.* at 333.

89. As Kelsen expounds:

> [I]t becomes manifest that what is regarded as conflict between the norms of international law and the norms of national law is not a conflict of norms at all. . . . It has been shown before that a norm contrary to a norm does not mean a conflict between a norm of a lower level and a norm of a higher level, but only means that the validity of the lower may be abolished or the responsible organ may be punished.

Id. at 330.

90. Even for citizens of states that have ratified the Rome Statute and, consequently, undeniably subject legally to its jurisdiction, the International Criminal Court's (ICC) structure should be of little comfort. As an institution, the Court is police, prosecutor, judge, jury, and jailer, all these functions being performed by its staff without regard for any separation of powers. Additionally, there are no provisions for appeal from its judgments. For a general critique, see Lee A. Casey & David B. Rivkin, Jr., *The International Criminal Court vs. the American People*, Heritage Found., Feb. 5, 1999, *at* http://www.heritage.org/Research/InternationalOrganizations/BG1249.cfm (last visited Feb. 24, 2004). The International Criminal Court's structure is of little comfort, even for citizens of states that have ratified the Rome Statute, because they are undeniably legally subject to its jurisdiction. *Id.* For another critical appraisal of the ICC, including its statutory conflicts with the United States Constitution, see Gary T. Dempsey, *Reasonable Doubt: The Case against the Proposed International Criminal Court*, Cato Institute, July 16, 1998, *at* http://www.cato.org/pubs/pas/pa-311.html (last visited Feb. 25, 2004) (appraising the ICC, including its statutory conflicts with the Untied States Constitution). On the question of the judicial independence of the ICC, whose judges, once selected by a political process, will have extraordinary discretionary authority, see Silvia de Bertodano, *Judicial Independence in the International Criminal Court*, 15 LEIDEN J. INT'L L. 409 (2002). The judicial independence of the ICC, once selected by a political process, will have extraordinary discretionary authority. *Id.*

Even proponents of international assizes admit the shortcomings, to put it mildly, of recent experiences. *See* David Tolbert, *The Evolving Architecture of International Law: The*

International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, FLETCHER F. WORLD AFF. J., Fall 2002, at 7. *See also* Victor Peskin, *Conflicts of Justice: An Analysis of the Role of the International Criminal Tribunal for Rwanda*, 6 Int'l Peacekeeping 128 (2000). *See* Victor Peskin, *Rwandan Ghosts*, LEGAL AFF, Sept.-Oct. 2002, at 21, *available at* http://www.legalaffairs.org/issues/September-October-2002/feature_peskin_sepoct2002.html (last visited Feb. 24, 2004). An observer's journal of the difficulties encountered by the International Criminal Tribunal for Rwanda includes some disturbing anecdotal accounts. *Id.* Serious questions of procedural safeguards for the rights of defendants before the International Criminal Tribunal for the Former Yugoslavia are raised in Renee C. Pruitt, *Guilt by Majority in the International Criminal Tribunal for the Former Yugoslavia: Does this Meet the Standard of Proof: Beyond Reasonable Doubt?* 10 LEIDEN J. INT'L L. 557 (1997).

The personal diplomatic experience of the present author while dealing with the Special Court for Sierra Leone during its formative period of 2001-2002 confirms in his mind some of the myriad of systematic procedural difficulties and lack of legal guarantees associated with these international tribunals. The Special Court is not directly a United Nations organ but rather an independent international institution with its own special status granted to it by the U.N. and the government of Sierra Leone to prosecute alleged war crimes that occurred during the brutal civil conflict in West Africa. The Special Court has jurisdiction only for offenses alleged to have occurred after November 30, 1996. S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc S/RES/ 1315 (Aug. 2000), *available at* http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement (last visited Feb. 42, 2004) [hereinafter Resolution 1315]. The Special Court, authorized by Resolution 1315 in August 2000, took shape when the U.N. Secretariat and the Sierra Leone government agreed on a twenty-three article "status agreement" and a twenty-five article statute for the tribunal on January 16, 2002. This took place, despite the fact that several potential principal defendants, including the Revolutionary United Front (RUF) leader, Foday Sankoh, had been in custody since early 2000. The legislation for the tribunal was passed by the parliament of Sierra Leone on March 19, 2002 and signed by President Ahmed Tejan Kabbah on March 29, 2002. On April 17, 2002, U.N. Secretary General Kofi A. Annan appointed David M. Crane, a former attorney with the U.S. Department of Defense, as the chief prosecutor for the Court and Briton Robin Vincent as its registrar. For the appointment of judges for the three-member trial chamber and the five-member appeal chamber, the statute called for the Sierra Leonian government to appoint one trial judge and two appeals judges and the U.N. Secretary General to appoint two trial judges and three appeals judges and the two parties to agree on two alternate judges. The appointment of judges was delayed until July 29, 2002.

Since then, the Court has been busy with many things, although one might be excused for asking if proceeding to an expeditious trial of the defendants is one of them. Crane, a well-respected international lawyer, has traveled extensively giving speeches at various international and national conferences and issued statements to commemorate such occasions as International Women's Day. However, Crane only managed to indict five highly suspect defendants. Two other men were indicted, but one was killed shortly thereafter in Liberia while the other was at large on March 10, 2003. Some of the judges appointed have only been in Sierra Leone (the tribunal is to sit in the capital of Freetown) on the occasion of their swearing-in on December 2, 2002. The five indicted defendants in custody were transferred to the custody of the Court on March 21, 2003. It took another two weeks, until April 7, 2003, for the administrators of the tribunal to come up with a statute for their imprisonment that regulated details of their incarceration, including the four-day rotation of the menu. As yet, no dates have been set for the initial hearing, much less for trials. A visit to the website of the tribunal reveals that as late as May 1, 2003, several significant posts had not yet been filled, most notably that of defense counsel. See Special Court for Sierra Leone, *at* www.sc-sl.org (last visited Apr. 12, 2004). The lead defendant, Foday Sankoh, died in custody on July 27, 2003, after waiting three years for proceedings against him to commence.

The entire episode has Kafka-like tones, which does not seem to have concerned

some attention has been focused in recent years, there are other examples of the creeping expansionism of the global legal system. To cite, by way of illustration, but one other example, there was the creation, by a fifty to three vote of the United Nations Human Rights Commission on April 26, 2000, of a whole new office, that of the "Special Representative of the Secretary-General for Human Rights Defenders,"[91] charged with enforcement of an ill-defined categories of "rights" (and their promoters, hence the job title) described as "universally recognized."[92] This development was, once again, postulated by Kelsen as part of the subsuming of national legal systems into a unitary international system.[93]

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many of those associated with the process. The Special Court's statute states that it will rely on the jurisprudence of the appeals chambers of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda to create its procedural law, although they are themselves both "works in progress." The defendants, as reprehensible as their alleged actions were, have now been held for over three years, and there is no clear indication of when their cases will be adjudicated. Even when it comes to judgment, the statute of the Court provides for a determination of guilt by a majority vote (i.e., two out of three judges of the trial bench (art. 18)), hardly much protection for the accused. The Special Court, meanwhile, is looking at expanding its reach and has issued an arrest order for Charles Ghankay Taylor, until last year president of neighboring Liberia, citing his role in the Sierra Leonean conflict.

Catherine Cissé, *Le Tribunal spécial pour la Sierra Leone*, 4 INT'L LAW FORUM DU DROIT INT'L 3, 7-11 (2002). Cissé chronicles the discussion surrounding the establishment and early development of the Special Court for Sierra Leone.

91. This office is to be distinguished from that of the "High Commissioner for Human Rights," created by the United Nations General Assembly in 1993.

92. *See* Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, U.N. GAOR, 53rd Sess., U.N. Doc A/RES/53/144 (1999) (calling upon each state to implement such varied list of ambiguously defined rights). The notorious homosexual pedophile group, the North American Man/Boy Love Association (NAMBLA), has used its provisions obliging states to respect "rights of association" in its fight against U.S. prosecutors.

93. *See* PTL, *supra* note 34, at 336-37.

> If we start from the validity of international law which does not require recognition by the state, then the mentioned constitutional provision [of adherence to and ratification of the international norm by the state] does not mean that it puts into force international law for the state concerned, but merely that international law—by general clause—is transformed into national law. Such transformation is needed, if the organs of the state, especially its tribunals, are only authorized (by the constitution) to apply national law; they can, therefore, apply international law only if its content has assumed the form of national law (statute, ordinance) that is, if it has been transformed into national law. If, in default of transformation, a norm of international law cannot be applied in a concrete case, then (if we start from the validity of international law) this does not mean that this norm of international law is not valid for the state; it only means that, if it is not applied and therefore international law is violated by the state's behavior, the state exposes itself to the sanctions prescribed by international law.

Id.

In fact, the consequence of Kelsen's legal philosophy is that the national state's existence is dependent upon its adherence to the international juridical system.

> The national state, then, in its legal existence appears determined in all directions by international law, that is, as a legal order delegated by international law in its validity and sphere of validity. Only the international legal order, not the national legal order, is sovereign. If national legal orders or the legal communities constituted by them, i.e., the states, are denoted as "sovereign," this merely means that they are subject only to the international legal order.[94]

This highlights one of the basic consequences of Kelsen's theory: that there exists no difference in the nature of national law and international law.[95] Traditionally, the jurisdiction of the national legal system was concerned with either the relationships between the state and its citizens ("public law," in the parlance of the civil law tradition) or the relationships between the citizens themselves ("private law"). The international legal system only concerned itself with relations between nation-states, international law being created through the consent of states. Underlying this was the traditional doctrine that states, being sovereign, cannot be bound by higher laws without their consent. Corollary to this principle, recognized by the Permanent Court of International Justice, the predecessor to the present-day International Court of Justice at The Hague, is that a sovereign state may lawfully do as it pleases unless it has otherwise consented to restrict itself.[96]

In contrast, Kelsen brought into focus the idea, now quite current in global circles, that international law is not confined to relations among states, but it can encompass all areas of human activity. In fact, an increasing quantity of international legislation now applies to private individuals, not

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94. *Id.* at 338.

95. *See* François Rigaux, *Hans Kelsen on International Law*, 9 EUR. J. INT'L LAW 248, 325-43 (1998).

96. The Case of S.S. Lotus, (Fr. V. Turk.) P.C.I.J. Ser. A. No. 10 (1927), *available at http://www.worldcourts.com/pcij/eng/cases/lotusintro.htm* (last visited Mar. 2, 2004).

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Id. See also Anthony Clark Arend, *Is Preemption Necessary?*, WASH. Q., 89-103 (Spring 2003) (providing an interesting analysis, in terms of this traditional international law doctrine, of the "Bush Doctrine" of the unilateral preemptive use of force).

merely to sovereign entities, raising a host of civil liberties questions.[97] Other international agreements, such as the Convention on the Elimination of All Forms of Discrimination Against Women[98] and the Convention on the Rights of the Child,[99] while binding on state parties, have given rise to permanent bureaucracies charged with "monitoring" the accords and generating, without the legal process of treaty adoption and ratification, ongoing norms.[100] Recently, international law considerations have even been injected into both trial and appellate courts in domestic death penalty cases in the United States. Lawyers in the United States have tried to get courts to recognize international legal standards—some of which are matters of policy to which the U.S. government has never consented—as applicable to individual defendants and enforceable against the individual American states.[101]

In this new order, the traditional nation-state survives as a mere shadow of its former self, much in the manner that the member states of the European Union have seen more and more of their former legislative prerogatives taken over by the Brussels-based bureaucrats of the many regulatory agencies of the European Commission. European Commission President Romano Prodi is very candid about this process.[102] According to Kelsen, the advent of the

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97. *See, e.g.*, Ronald D. Rotunda, *Constitutional Problems with Enforcing the Biological Weapons Convention,* Cato Institute Foreign Pol'y Briefing, No. 61 (2000).

98. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 14, *available at* http://www.un.org/womenwatch/daw/cedaw (last visited Apr. 1, 2004).

99. Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm (1989).

100. *See* Fact Sheet, UN Office of the High Commissioner for Human Rights, *The Rights of the Child, available at* http://www.unhchr.ch/html/memu6/2/fs10.htm#ii??? (last visited Mar. 3, 2004) (listing the ongoing activities of the United Nations Committee on the rights of the child). *See also* UN Economic and Social Development, Division for the Advancement of Women, General Recommendations on Reporting, *available at* http://www.un.org/womenwatch/daw/cedaw/recommendations.htm (last visited Mar. 3, 2004); UN Economic and Social Development, Division for the Advancement of Women, Reporting, *available at* http://www.un.org/womenwatch/daw/cedaw/reporting.htm (last visited Mar. 3, 2004); Patrick F. Fagan, *How U.N. Conventions on Women's and Children's Rights Undermine Family, Religion, and Sovereignty: Supplemental Material: Quotations from CRC and CEDAW Committees of the United Nations*, (Feb. 5, 2001), Heritage Found., *available at* http://www.unhchr.ch/html/memu6/2/fs10.htm#ii (last visited Mar. 3, 2004) (analyzing the two conventions and their effects on both familial law and national sovereignty).

101. *See* Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LEIDEN J. INT'L L. 367, 367-87 (2002).

102. President of the European Commission Romano Prodi, Speech at the Institut d' Etudes Politiqes, Paris, France (May 29, 2001), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/244|0|AGED&lg=EN&display= (last visited Feb 7, 2004). Prodi states:

> The genius of the founding fathers lay in translating extremely high political ambitions . . . into a series of more specific, almost technical decision. This indirect approach made further action possible. Rapprochement took place gradually. From confrontation we moved to willingness to cooperate in the economic sphere and then on to integration.

supranational order will leave individuals states entirely dependent upon the international system.[103]

Not only may the international legal system limit the sovereignty of the individual nation-states, it may even eclipse it entirely. [104] Commenting on the relationship of national legal systems and European Community law with explicit reference to Kelsen's legal philosophy, one scholar has asserted that this is precisely the case already with regard to the sovereignty of the nation-states that are members of the European Union.[105]

Of course, the risk contained in an absolute principle whereby national legal systems must always defer to supranational systems is amply illustrated in European community laws which are often more ambiguous and general than the more precisely-defined provisions contained in the legislation of some member-states. This is a consequence of not all rights being recognized by all

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Id. Citing to this success, Prodi asserted that as a consequence the, "[European] Union has a role to play in world 'governance,'" based on replicating the European experience on a global scale. *Id.* On the ideological foundations of the European Union and its bureaucracy, see ROLAND HUREAUX, LES HAUTEURS BÉANTES DE L'EUROPE, LA DÉRIVE IDÉOLOGIQUE DE LA CONSTRUCTION EUROPÉENNE (1999).

103. PTL, *supra* note 34, at 337.

> Since international law regulates the behavior of states—it must determine what is a "state" in the sense of international law, it must determine under what conditions individuals are to be regarded as the government of a state; therefore, under what conditions the coercive order under which they function is to be regarded as a valid legal order; under what conditions their acts are to be regarded as acts of state, that is, legal acts in the meaning of international law.

Id.

104. Kelsen noted this eclipsing:

> Although the individual states remain competent, in principle (even under international law) to regulate everything, they retain their competence only so far as international law does not regulate a subject matter and thereby withdraws it from free regulation by national law. Under the assumption of international law as a supranational legal order, the national legal order, then, has no longer an, illimitable competence (*Kompetenzhoheit*).

Id. at 338.

105. *See* Ines Weyland, *The Application of Kelsen's Theory of the Legal System to European Community Law—The Supremacy Puzzle Resolved,* 21 L. & PHIL., INT'L J. JURISPRUDENCE & LEGAL PHIL. 1 (2002).

> If the basic norm also confers law creating powers on Community constitutional organs then the supremacy principle will resolve conflicts between national and Community constitutional norms, ... The supremacy principle subordinates substantive national constitutional norms to substantive Community constitutional norms . . . . The relationship of subordination will result in the disapplication of the national constitutional norms in the areas falling under the competence of Community law and would afford a principle of construction requiring the courts to choose, whenever possible, the interpretation that is most compatible with Community principles. It would also give the [European Court of Justice] ultimate jurisdiction in matters of interpretation.

Id. at 23-24. For a discussion of the obligation of national executive and judicial authorities to defer to European-wide norms, see John Temple Lang, *The Duties of National Courts Under Community Constitutional Law*, 21 EUR. L. REV. 3 (1997); John Temple Lang, *The Duties of National Authorities Under Community Constitutional Law*, 23 EUR. L. REV. 109 (1998).

member-states. Thus, these rights are not encompassed in the "common traditions" of the European Union which prevail, to the detriment of the principle of subsidiarity.[106]

On a more global level, the United Nations Development Program (UNDP), in its official *Human Development Report 2002*, a document that was entitled that year *Deepening Democracy in a Fragmented World*, hailed the new International Criminal Court in terms nearly identical to those set out by Kelsen regarding limits to traditional notions of national sovereignty.[107]

Kelsen disallows that the creation of international organizations by treaties entered into by individual nation-states in anyway limits the claims of the new organization with respect to their constituting sovereignties.

> It may be objected that the individual state cannot be conceived as an order delegated by international law, because historically the states—the national legal orders—preceded the creation of general international law, which was established by custom prevalent among states. This objection, however, is based on the lack of differentiation between the historical relation of facts and the logical relation of norms. The family too, as a legal community, is older than the state which embraces many families; and yet the validity of family law is based upon the national legal order. In the same way, the validity of the order of a single member state is based upon the constitution of the federal state, although the latter's creation is later in time than the formerly independent states which only subsequently gathered together in a federal state. Historical and normative-logical relations should not be confounded.[108]

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106. *See* Leonard F.M. Besselink, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, 35 COMMON MKT. L. REV. 585 (1998). The complications that have arisen due to the application of overarching supranational jurisdiction over national jurisdictions ranges from matters of family law to those of environmental regulations. *See, e.g.*, Adelina Adinolfi, *The Judicial Application of Community Law in Italy (1981-1997)*, 35 COMMON MKT. L. REV. 1227, 1313-69 (1998). *See also* Hans Petter Graver, *Mission Impossible: Supranationality and Nationality Legal Autonomy in the EEA Agreement*, 7 EUR. FOREIGN AFF. REV. 73 (2002).

107. UN Development Programme, Human Development Report 2002: Deepening Democracy in a Fragmented World, 105-07 (2002) [hereinafter Human Development Report 2002]. "International relations have long been based on state sovereignty and sovereign immunity . . . the establishment of a widely ratified international court is promising innovation. . . . It limits territorial sovereignty by making leaders accountable to external standards." *Id.*

108. PTL, *supra* note 34, at 338-39. *See also* Human Development Report 2002, *supra* note 106. It chronicles approvingly the establishment of new international tribunals, noting "[t]hese new processes challenge the traditional intergovernmental model of international relations." *Id.* at 108.

There is a subtle, but significant, maneuver in this affirmation. While Kelsen recognized that international law emerged at a later stage in history than national, and that there was a time when the law of the nation-state was the supreme norm, his focus on the principle of efficacy means that he can both assert that the pre-international national system was valid—their then-validity being determined by some other, unexplained, method—and that their present validity nonetheless depends on the international system. According to Kelsen, this principle, which, as a norm of international law, determines the territorial sphere of validity of the state order, becomes, when he focuses on the analysis of the concept of a legal system, a condition of validity. As he asserted in his earlier work *General Theory of Law and the State*, "[a] norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious."[109] Hence, without recourse to the norm of international law, Kelsen reaffirms the validity of these pre-international national systems with an appeal to efficacy. Once the international system is established, he asserts the primacy of the international legal system over the national legal system and postulates that the national legal systems derive their validity from the basic norm of international law.

Thus, Kelsen's legal theory arrives back at the question of *the* basic norm (*Grundnorm*), a concept which, according to the author, is hypothetical. Paraphrasing Kant, this is the postulate of juridical reason that Kelsen's project needs in order to cement its structure. This *hypothetical* and *presupposed* basic norm is needed, according to the logic of Kelsen's philosophy, not only to assure the validity of lower order norms, but also that of the international legal system itself: "As a genuine basic norm, it is a presupposed—not a positive norm. It represents the presupposition under which general international law is regarded as the set of objectively valid norms that regulate the mutual behavior of states . . . . These norms are interpreted as legal norms binding the states . . . ."[110] The national laws of states constitute merely a "partial system" in relation to the universal jurisdiction of the international legal system. Thus, domestic norms can never conflict with international ones, on pain of nullity.

In the purely logical system constructed by Kelsen's legal philosophy, there is no place for rights that precede the state, since the recognition of such rights would lead, according to the logic of his theory, into the intolerable *subordination* of the state to those rights. This concern is all the more applicable in the case of the supranational state and its global legal monopoly, even at the expense of states. The individual must simply obey the law because it is established as a norm by the state, and not because it is a just law

109. KELSEN, *supra* note 31, at 42.
110. PTL, *supra* note 34, at 215-16.

deriving from reason or nature, much less from a divine command.[111] In Kelsen's system, the validity of a norm is assured if its emanation conformed with the established procedure for the creation of norms, that is, it is based on the preceding level of norms and so on, back to the hypothetical, presupposed basic norm of the superiority of the supranational legal system. It is a question of *process* rather than *content* as Kelsen made explicitly clear:

> [A]n individual who regards the law as a system of valid norms has to disregard morals as such a system, and one who regards morals as a system of valid norms has to disregard the law as such a system. . . . [N]o viewpoint exists from which both morals and law may simultaneously be regarded as valid normative orders. No one can serve two masters.[112]

This is what renders Kelsen's philosophy of law, distilled as it was in academia, a potent ideology in the international political sphere for those who would look to the United Nations as the nucleus for global governance.[113] What is decided according to the procedures of the U.N. Charter is normative and binding, irrespective of content. And because the mechanisms of the Charter favor "consensus," the "consensus" of the world body determines what ought to occur or not occur. In fact, many of the recent criticisms of "unilateralism" by proponents of a "multilateral" approach echo Kelsen's division of legal theorists into those with "subjectivistic" viewpoints and "objectivistic" vision:

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111. *See, e.g.*, DAS NATURRECHT IN DER POLITISCHEN THEORIE. INTERNATIONALES FORSCHUNGSZENTRUM FÜR GRUNDFRAGEN DER WISSENSCHAFTEN IN SALZBURG 1-37 (Franz Martin Schmölz ed., 1963). Kelsen himself admitted that, as a logical consequence of the "Pure Theory," even monstrous perversions of jurisprudence such as the "justice" meted out by totalitarian regimes would qualify as "legal." In the discussion following his conference on Die Grundlage der Naturrechtslehre ("Foundation of the Theory of Natural Law") he stated:

> From the point of view of juridical science, the legal system established by the Nazi regime was one of law. We can regret it, but we cannot deny that it was a rule of law. The legal system of the Soviet Union is one of law! We can deplore it as we would a venomous serpent, but we cannot deny that it exists and can say what it will.

Id. at 148. Although Kelsen's address was subsequently translated into English and published as Hans Kelsen, *Foundation of Natural Law Doctrine*, 2 ANGLO-AM. L. REV. 87 (1973), the discussion section of the Salzburg conference was omitted by the translator.

112. PTL, *supra* note 34, at 329.

113. *See* Charles Leben, *Hans Kelsen and the Advancement of International Law*, 9 EUR. J. INT'L LAW 287 (1998). The author, who is unabashedly enthusiastic about increasing international jurisdiction, observed that:

> The particularly fascinating point of Kelsen's thinking is not only the cogency and rigor of his reasoning but also the fact that his work, which was reputed to be theoretical, even dogmatic, and remote from the concerns of the real world, provides us with the sharpest conceptual tools with which to think through the contemporary developments of international law.

Id. at 287.

> The subjectivistic view starts from the sovereign Self in order to conceive the external world. . . . The subjectivistic, egocentric interpretation of the world leads to solipsism, that is, the view that only one's Self exists as a sovereign being . . . in the same way the primacy of national legal order means that only one's own state can be conceived as being sovereign. . . . With this in mind, we can describe the primacy of one's own national legal order as state subjectivism, indeed as state solipsism. The objectivistic world view starts from the reality of the external world in order to conceive the Self . . . but does not allow this Self to exist as a sovereign being . . . but only as an essential part of the world; in the same way the construction described as primacy of the international legal order starts from the external world of law, international law, as valid legal order, to conceive of the legal existence of individual states, but cannot afford to consider them as sovereign authorities—only as partial legal orders integrated into international law.[114]

In this "objectivistic" scheme, the individual state is "bound by a majority decision of a collegiate organ" of the international system as long as the "this collegiate organ and its procedure has been created by a treaty concluded by the state,"[115] as well as by the decisions of international tribunals which can declare norms of national law "annulled for reasons of being 'contrary to international law.'"[116] However, as the younger Kelsen conceded, in an observation that goes far in explaining the visceral reactions to the American *hyperpuissance,* that for this project to work, it is:

> Possibly exclusively through the aid of a legal hypothesis: that above the legal entities considered as states there is a legal system that delimits the spheres of validity of the individual states, preventing interference by one in the sphere of the other, or associating such interference with certain conditions that are equal for all. That is, it is essential for there to be a legal system regulating, through norms equal for all, the reciprocal conduct between these entities and excluding at the root, as regards the legal relations between the individual states, any *legal overvalue* of one *vis-à-vis* the other . . . . It is only on the basis of the primacy of the

114. PTL, *supra* note 34, at 344-45.
115. *Id.* at 343.
116. *Id.* at 342.

> international law that the particular states appear on the same legal plane and can count legally as entities of equal rank, being subject equally to the higher international legal system.[117]

As noted previously, what constitutes this international legal system is "consensus"-driven, not only by an international "community" of theoretically equal sovereign nation-states,[118] but also the "community" constituted of intergovernmental bodies like the United Nations and its related tribunals and agencies, the international non-governmental organizations who have associated with the globalist agenda of the world body,[119] and the international class of bureaucrats who staff both sets of organizations.[120]

It is not that leading exponents of this international "community" act furtively or hide their ambitions. In an essay commissioned for the UNDP *Human Development Report 1994*, Jan Tinbergen, winner of the first Nobel Prize for Economics in 1969, called for nothing less than a single world government:

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117. HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS. BEITRAG ZU EINER REINEN RECHTSLEHRE (1920).

118. For an interesting critique of the surrealism of this theoretical equality when confronted with geopolitical reality, see Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., 16 (May-June 2003). Glennon observed:

> This year, the irrationality of treating states as equals was brought home as never before when it emerged that the will of the Security Council could be determined by Angola, Guinea, or Cameroon—nations whose representatives sat side by side and exercised an equal voice and vote with those of Spain, Pakistan, and Germany. The equality principle permitted any rotating council member to cast a de facto veto (by denying a majority the critical ninth vote necessary for potential victory). Granting a de jure veto to the permanent five was, of course, the charter's intended antidote to unbridled egalitarianism. But it didn't work: the de jure veto simultaneously undercorrected and overcorrected for the problem, lowering the United States to the level of France and raising France above India, which did not even hold a rotating seat on the council during the Iraq debate. Yet the de jure veto did nothing to dilute the rotating members' de facto veto. The upshot was a Security Council that reflected the real world's power structure with the accuracy of a fun-house mirror—and performed accordingly.

Id. at 33.

119. These NGOs include not only the well-known advocacy groups, but also organizations whose issue is itself global governance. A notable example is the self-styled "Commission on Global Governance," an organization made up of former United Nations officials and political leaders from a number of developed and developing countries that was endorsed by the U.N. Secretariat. It has even published a detailed program for an expanded international system: Commission on Global Governance, Our Global Neighborhood: The Report of the Commission on Global Governance (1995).

120. For information on the bureaucracy of the United Nations and its subordinate institutions, see ROSEMARY RIGHTER, UTOPIA LOST: THE UNITED NATIONS AND WORLD ORDER (1995). For a dated but, in retrospect, exceptionally prescient study, see Doug Bandow, *Totalitarian Global Management: The UN's War on the Liberal International Economic Order*, Cato Pol'y Analysis No. 61 (1985).

> Mankind's problems can no longer be solved by national governments. What is needed is World Government.
>
> This can best be achieved by strengthening the United Nations system. In some cases, this would mean changing the role of UN agencies from advice-giving to implementation. Thus the FAO would become the World Ministry of Agriculture, UNIDO would become the World Ministry of Industry, and the ILO the World Ministry of Social Affairs.
>
> In other cases, completely new institutions would be needed. These could include, for example, a permanent World Police which would have the power to subpoena nations to appear before the International Court of Justice, or before specially created courts. If nations do not abide by the Court's judgment, it should be possible to apply sanctions, both non-military and military.[121]

It would hardly be fair to blame Hans Kelsen for the excesses of the United Nations and other international organizations that are increasingly ambitious in their quest for a system of global governance. The late jurist was, after all, working within a theoretical framework at a time when the horrors of two world wars caused many to look for a new Kantian-inspired "state of universal peace" to be brought about by a benevolent world government.[122] Kelsen himself thought of the ideas expounded in his *Pure Theory of Law* as "a theory of positive law in general, not of a specific legal order . . . not an interpretation of specific national or international legal norms."[123] He even cautioned that he offered a theory that described "what and how the law *is*, not how it ought to be."[124] However, in proposing a "pure theory of law" that attempted to eliminate all considerations of ethics and political theory, Kelsen admittedly created a philosophy of law that was indifferent to these other considerations,[125] thus leaving open the door to a course of evolution that his theory, even if it did not actively encourage it, had no instrument with which

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121. UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1994, 88 (1994).

122. *See* IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS (Ted Humphrey trans., 1992). The European adoption of this Kantian vision in contrast to the American retention of a Hobbesian worldview is the subject of fascinating thesis, originally raised in an essay published in POL'Y REV., expounded in a brief book. *See also* ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003).

123. PTL, *supra* note 34, at 1.

124. *Id.*

125. *Id.* at 345-47.

to judge, much less arrest.[126] As Juvenal once asked: "*Quis custodiet ipsos custodes*?"[127]

Not long after the attacks of September 11, Ambassador Richard N. Haass, director of the Office of the Policy Planning Staff of the U.S. State Department, defined the American administration's policy as "hardheaded multilateralism," explaining that:

> We are willing to listen, learn, and modify policies when we hear compelling arguments. But we will not go along simply to get along. By the same token, we do not take lightly the "costs" to ourselves and to others when we forego participation in some multilateral initiative. In the future, we will give consultations every "reasonable" chance to produce an acceptable compromise. And if we conclude that agreement is beyond reach, we will explain why and do our best to put forth alternatives.[128]

In this regard, a "decent respect for the opinions of mankind," to borrow the felicitous phrase of the Founding Fathers, will require an effort to recognize and understand, regardless of whether one agrees with it or not, Kelsen's philosophy of law and its significance as the legal ideology that motivates the insistence of international organizations, like the United Nations, as well as other countries on "consensus" and their drive for a system of global governance. While the former insistence is frustrating and the latter ambition may seem far-fetched and beyond the horizons of today's political landscape, it nonetheless behooves one to keep in mind the warning of philosopher Richard Weaver that "ideas have consequence."[129] And in a dynamic geopolitical continuum, the forgotten theories of yesterday are all-too-often the hidden perils of today and the real challenges of tomorrow.

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126. On at least one occasion, however, Kelsen did throw methodological caution to the winds and ventured into advocacy. *See* KELSEN, *supra* note 116, at 319.

> It is only temporarily, by no means forever, that contemporary humanity is divided into states, formed in any case in more or less arbitrary fashion. Its legal unity, that is the *civitas maxima* as organization of the world: this is the political core of the primacy of international law, which is at the same time the fundamental idea of that pacificism which, in the sphere of international politics, constitutes the inverted image of imperialism.

Id.

127. JUVENAL, SATIRES, VI, 347-48.

128. Richard N. Haass, *American Foreign Policy After September 11th*, Remarks to the World Affairs Council of Northern California (Nov. 16, 2001), *at* http://www.state.gov/s/p/rem/6310.htm (last visited Mar. 5, 2004).

129. RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES (1984).

TOWARDS A GLOBAL BAR: A LOOK AT CHINA, GERMANY, ENGLAND, AND THE UNITED STATES

Mary C. Szto*

I. INTRODUCTION

The legal profession is globalizing rapidly. This is evidenced by the ease of world communications, burgeoning international issues,[1] and mergers among firms of different countries.[2] Bar admission requirements qualify attorneys to practice law. Around the world, law schools are sometimes under pressure to conform their curricula to state bar examinations. In the United States, often, applicants measure schools by their "bar passage rates."

How well do bar requirements prepare candidates for the practice of law, locally and globally? Also, do they accurately measure the knowledge, skills, and qualities an international attorney should possess?

A global look at bar requirements seeks to broaden the discussion of how best to train attorneys. By examining different country standards, any particular country can begin to "think outside the box." It also allows attorneys from different countries, who more and more are working side-by-side, to understand how they can practice law together. A third outcome might be to contribute to a dialogue for a global bar.[3]

This article explores the requirements necessary to practice law in four countries: China, England, Germany, and the United States. These include

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1. *See* David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 5 (1999). For example, globalization removes the geographical limitations to the flow of data creating additional legal issues and concerns in areas of privacy, data protection, and surveillance. *Id.*

2. *See, e.g.*, *Chance Backs Legal Merger*, THE TIMES (London), Sept. 6, 1999. In September 1999 the partners of Clifford Chance, Rogers & Wells and Pünder, Volhard, Weber & Axster voted for a three-way merger of their venerable English, American, and German law firms. *Id.* Other legal institutions have also responded to the challenges of globalization. The American Arbitration Association has launched their Global Center for Dispute Resolution Research. See *AAA Faces Up to 21st Century Issues – Fact-Finding, E-Commerce and Globalization*, METROPOLITAN CORP. COUNS. (Aug. 2002) Northeast Ed. at Special Story 1.

3. One may assert the next step in globalization is a bar that would allow a single attorney to practice in dozens of countries. This is already occurring in the European Union as EU Council directives have enhanced cross-border rights for individual practitioners. *See generally* Diane M. Venezia, Note, *An EU Lawyer's Right to Practice Throughout the European Union*, 3 CARDOZO J. INT'L & COMP. L. 427 (1995).

education, practice, exam, and moral requirements. The requirements for foreign attorneys are also considered. The article concludes with observations and suggestions for future practice.

In recent years, China has responded to rapid economic change and the need to produce hundreds of thousands of practitioners. England and Germany have responded to changes brought about by membership in the European Union. The United States has experienced less dramatic developments. However, foreign attorneys have long been welcome in the United States. Interestingly, the United States stands alone in not requiring supervised practice training of law candidates. This is perhaps because law training is a post-college degree in the United States.

II. THE COUNTRIES

A. *The People's Republic of China*

Overview

China is a country with an ancient history; however, its current legal system is very young.[4] China began developing its present legal system in the late 1970s in its efforts to achieve economic modernization.[5] Legal education has become more widely available since 1980, which has also led to increased legal education exchanges between China and other countries with an "ever-increasing" number of law students, teachers, and scholars flowing between Chinese and foreign institutions.[6]

China's system is a blend of civil, socialist, and increasingly American legal influences. Since the late 1970s, the legal service profession in China has also been "ever-expanding" and has become more lucrative, which continues to attract many people to the field.[7] Whereas in 1979 there were 212 lawyers in seventy-nine firms in China, in 1999, there were 110,000 lawyers in nearly 9,000 law firms.[8] However, there are still some aspects of the legal profession in China that need desperate help.[9]

As China advances rapidly in the development of its legal system, we can expect additional provisions and regulations to shape the process. Most

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4. Shao Zongwei, *Lawyers Urged to Improve Ethics*, CHINA DAILY, Apr. 29, 1999, *available at* http://www.chinadaily.com.cn/cndydb/1999/04/d2-8law.d29.html (last visited Mar. 9, 2004).

5. *Id.*

6. Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751, 758 (1991).

7. Shao Zongwei, *Lawyers Exam Sets Record*, CHINA DAILY, Sept. 10, 1999.

8. Shao Zongwei, *supra* note 4.

9. *See* Elisabeth Rosenthal, *In China's Legal Evolution, The Lawyers are Handcuffed*, N. Y. TIMES, Jan. 6, 2000, at A1 (a tragic account of the recent plight of criminal defense attorneys in China).

recently, in 2002, in accordance with the amended Judges Law, Prosecutors Law, and Lawyers Law, over 360,000 people took the newly instituted two-day State Judicial Exam in order to qualify for jobs as judges, prosecutors and practicing attorneys.[10]

One of China's major concerns is that many of its judges and prosecutors have little or no university or college-level legal training. Many judges actually attended law school after they became judges.[11]

History

In traditional China, government, law, and courts existed without the existence of lawyers as an officially recognized occupational group.[12] Scholars of the Confucian classics dominated the ruling elite.[13] Civil disputes were usually resolved informally through mediation, conducted by respected leaders or elders of clans, villages, and guilds in accordance with customary rules and prevailing notions of morality, which stressed harmony and the giving of concessions and discouraged litigation and the pursuit of self-interest.[14]

Interestingly, "*songshi*, meaning experts in litigation, began to practice as early as the Tang dynasty [(700-1000 AD)]. They learn[ed] their knowledge of the law and of judicial proceedings through apprenticeship or self-study, and offered the services of advising on litigious matters and drafting petitions and pleadings."[15] However, their status was not officially recognized and they had no right to represent their clients in courts or in any other capacity.[16] "The business which these *songshi* engaged in was not considered respectable."[17] They were sometimes labeled *daobi xieshen*, or "evil gods of the knife-pen."[18] This is understandable in a society where the concept of legal rights was not known, where social harmony was a paramount virtue, and where litigation and conflicts involving the pursuit of self-interest were discouraged and held in contempt.[19]

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10. Vincent Cheng Yang, *Judicial and Legal Training in China-Current Status of Professional Development and Topics of Human Rights* 19-20 (Aug. 2002) (a background paper for the United Nations Office of the High Commissioner for Human Rights), *at* http://www.icclr.law.ubc.ca/publications/reports/Beijing_August_2002.pdf (last visited Mar. 9, 2004).

11. *Id.* at 5.

12. 12ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 128 (3rd ed. 1993).

13. *Id.* at 17.

14. *Id.* at 12.

15. *Id.* at 13.

16. *Id.* at 13-14.

17. *Id.* at 14.

18. *Id.* at 128 (quoting Wu Lei, THE CHINESE JUDICIAL SYSTEM 351 (1988); Xiong Xianjue, THE CHINESE JUDICIAL SYSTEM 308 (1986)).

19. *Id.*

As China entered the twentieth century, it pursued attempts at Westernization of its political and legal system, including legislation for the legal profession.[20]

Once established in 1949, the People's Republic of China (PRC) abolished the collection of laws established under the previous National Government.[21] The first mentioning of lawyers in formal PRC legislation appeared in 1954.[22] There was no broad statute regulating qualifications, organization, and lawyer conduct during the 1950s; however, the Ministry of Justice did establish a series of "legal advisory offices."[23] By 1957, there were around 800 legal advisory offices throughout China and a total of about 3000 lawyers.[24]

The anti-rightist movement brought the beginning legal movement to a halt in 1957. Many of China's legal experts were transferred to the countryside to be "reeducated" through hard labor. The Ministry of Justice was abolished and the advisory offices were closed in 1959.[25] China had to emerge from a national nightmare during the late 1970s, the Cultural Revolution, before continuing work on the establishment of a modern Chinese legal system.[26]

Governing Law

The governing law in China for attorneys is the Law of the People's Republic of China on Lawyers, promulgated May 15, 1996. The first of its kind, the law took effect in 1997 and clearly defines the rights and obligations of lawyers and law firms.[27] In 2001, China amended its Judges Law, Prosecutors Law, and Lawyers Law to increase the qualifications required for these posts.[28] In general, a lawyer must uphold the Constitution of the People's Republic of China, meet educational requirements, pass the national exam, have practice training in a law firm for one year, and be a person of good character and conduct.[29]

Education

Legal education in China usually requires four to five years of education after the high school level. Attorneys in China are qualified by law faculties

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20. *Id.* at 129.
21. Gelatt, *supra* note 6, at 752.
22. *Id.*
23. *Id.* at 753.
24. *Id.*
25. *Id.*
26. *Id.* at 754.
27. *Lawyers Playing More Important Role*, CHINA DAILY, Apr. 29, 1999.
28. Yang, *supra* note 10, at 19.
29. Law of the People's Republic of China on Lawyers, ch. II, art. 8.

of universities and colleges or must have qualifications from other faculties of universities or colleges to show that they possess the "professional knowledge of law." They must also pass the uniform national judicial exam.[30] A look at the curriculum and subject areas of study from China's Peking University can give us a picture of the typical law candidate's studies. Peking University runs a four-year LL.B. program. Categories of courses include Theoretical Legal Science and Applied Legal Science. The first category, Theoretical Legal Science, includes Theories of Jurisprudence, Sociology of Law, Contemporary Western Jurisprudence, and the First Amendment to the U.S. Constitution.[31] The second category, Applied Legal Science, includes Internet Law, Technology/Economy and Law, Labor Law and Social Protection Law, General Part of Civil Law, International Financial Law, and Environmental Law.[32] In addition, LL.B students usually must write a thesis.[33]

Practical Training

There is a required traineeship with a law firm for a full year. After completing the training period at a Chinese law firm a training appraisal report is issued.[34]

Examination

From 1986 to 2001, China administered a uniform national examination formulated by the Judicial Administrative Department of the State Council for lawyers.[35] In 2002 the State Judicial Exam was instituted. It is required for judges, prosecutors, and lawyers. The examination is administered by the Ministry of Justice,[36] held once a year,[37] and is a closed-book exam.[38] Its contents include "theoretical jurisprudence, applied jurisprudence, existing legal provisions, legal practice and legal profession moralities."[39]

Theoretical jurisprudence includes the concept of the "rule of law, basic rights and freedoms, and the relationship between the state and the individuals."[40] Applied jurisprudence includes criminal law, civil law, family law, procedural laws, labor law, environmental law, "laws on women and

30. Law of the People's Republic of China on Lawyers, ch. II, art. 6.
31. Yang, *supra* note 10, at 10.
32. *Id.*
33. *Id.* at 12.
34. Law of the People's Republic of China on Lawyers, ch. II, art. 10(3).
35. Law of the People's Republic of China on Lawyers, ch. II, arts. 6, 7.
36. PRCLEG 2096, Measures for the Implementation of State Judicial Examination, art. 5 (Oct. 21, 2001).
37. *Id.* art. 6.
38. *Id.* art. 9.
39. *Id.* art. 7.
40. Yang, *supra* note 10, at 20.

children, and laws on association, trade unions, press and religions."[41] Eligibility to take the exam requires being a PRC national, "abiding by the Constitution of the People's Republic of China, having the right to vote and stand for election, having full capacity for civil conduct," and meeting the educational requirements for either the Judges Law, the Prosecutors Law, or the Lawyers Law and being of "good character and conduct."[42]

The profession is attracting hundreds of thousands of applicants. In 1999, 180,000 candidates registered to take the lawyers' examination. In 2000, 220,000 candidates took the last lawyers' examination.[43] In 2002, over 360,000 took the first State Judicial Exam.[44] This was a world history record.[45] Of these 360,000, "about one-third were staff members of the courts, procuratorates, police departments and other workers in the field of law."[46] Only 7% passed the examination.[47]

Moral Character

China requires that the applicant be of good character in order to practice law. The following persons may not take the State Judicial Examination: persons who have been "subject to criminal punishment due to an intentional crime," those who have been discharged "from employment by a State organ" or whose license to practice law has been revoked, and those who cheated on the exam and have been disallowed from taking the exam for a period of time.[48] In addition, a person will not be issued a lawyer's practice certificate if he or she has no capacity or limited capacity for civil acts.[49]

Foreign Attorneys

Foreign attorneys are not allowed to take part in the litigation process in China. They can neither interpret Chinese laws nor provide advisory papers concerning Chinese law.[50] Foreign attorneys can, and do, consult in China. The main work of foreign lawyers is in introducing foreign investment, representing Chinese clients in lawsuits in foreign countries, and providing

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41. *Id.*
42. Law of the People's Republic of China on Lawyers, ch. II, art. 13.
43. Yang, *supra* note 10, at 20.
44. *Id.*
45. *Id.* at 3.
46. *Id.*
47. *Id.*
48. Law of the People's Republic of China on Lawyers, ch. II, art. 14.
49. Law of the People's Republic of China on Lawyers, ch. II, art. 9(1).
50. PRCLEG 2402, Provisions of the Ministry of Justice on the Execution of the Regulations on the Administration of Foreign Law Firms' Representative Offices in China, art. 32 (June 25, 2002). *See also* Shao Zongwei, *Legal Service Sector to Open Wider to Foreigners*, CHINA DAILY (Aug. 14, 1998), *available at* http://www.chinadaily.com.cn/cndydb/1998/08/d1-598.h14.html (last visited Mar. 9, 2004).

advice in matters of trade, technology transfer, real estate, intellectual property rights, bonds, and securities.[51] Even lawyers from Hong Kong are not eligible to take the State Judicial Examination.[52]

Summary

As China continues to develop its legal system, its requirements to practice law will also develop and change. The legal profession is growing in acceptance from what was once an unpopular profession.[53] China's desire to achieve greater economic development has led to an explosion in the number of legal personnel being trained. There is also a very critical need to provide more training for China's current judges.

B. England

Overview

England uses a common law system. There are two main types of law practitioners: barristers and solicitors. In 2000, there were around 90,000 solicitors in England and Wales and 10,000 barristers.[54] The Law Society regulates solicitors; the General Council of the Bar (the Bar Council) regulates barristers.[55] Traditionally, only solicitors dealt directly with clients as general agents,[56] and only barristers could appear in the higher courts (Crown courts, High Court, Court of Appeal and House of Lords).[57] Barristers belong to one of the four Inns of Court described further below. Over the years, the distinction between solicitors and barristers has begun to blur.[58]

The following deals mainly with the requirements for solicitors, with a brief summary of barrister requirements. For both solicitors and barristers there are three training paths: the law graduate path, the non-law degree path, and the non-graduate path. All three paths include a training period and a practice course.

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51. Zongwei, *supra* note 50.

52. Cliff Buddle, *Tall Order for SAR Lawyers to Climb Wall; Trade Rules Have Made China Cautious About Giving Hong Kong Law Firms Preferential Treatment*, S. CHINA MORNING POST, Mar. 8, 2002, at 18.

53. *Lawyers Playing More Important Role*, *supra* note 27.

54. MARTIN PARTINGTON, AN INTRODUCTION TO THE ENGLISH LEGAL SYSTEM 224 (2d. ed. 2002).

55. *Id.* at 226.

56. RICHARD L. ABEL, THE LEGAL PROFESSION IN ENGLAND AND WALES 139 (Basil Blackwell ed., 1988).

57. *Id.* at 35.

58. PARTINGTON, *supra* note 54, at 227-29.

History

English legal history shows remarkable continuity, dating from the King of Kent in the late 500s.[59] It is not codified and mainly judicial in nature.[60] It is an amalgamation of common law, equity, and some law with Roman roots.[61] The history of the barrister dates back to the serjeant-at-law. The Crown appointed these advocates and, in the thirteenth century, only they could appear in the Court of Common Pleas.[62] They held this privilege until 1846.[63] Eventually these serjeants became common law judges and had their own Inns.[64] Originally, barristers were apprentices of serjeants and they formed the four Inns still in existence today. The Inns were at first educational institutions.[65] Barristers also received the unique privilege of appearing before the King's or Queen's Bench.[66]

The origins of the solicitor date to the *attornatus*, who was an officer of the court in the Middle Ages.[67] Interestingly, solicitors were expelled from the Inns in the 1500s.[68] The Law Society was formed in 1845.[69] Beginning in the 1800s, solicitors had to complete a formal education and apprentice for several years.[70] An examination in law was required for solicitors in 1836.[71]

Governing Law

The Law Society prescribes the legal education and training required to qualify as a solicitor in England and Wales in accordance with the Solicitors Act of 1974.[72] The Training Regulations of 1990[73] apply the Solicitors Act.

Education

Two of the three paths to becoming a solicitor require a degree, either in law or another subject. Around 25% of solicitors do not have a law degree.[74]

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59. *See* O. HOOD PHILLIPS, A FIRST BOOK OF ENGLISH LAW 1 (7th ed. 1997).
60. *Id.* at 3.
61. *Id.* at 6-7.
62. ABEL, *supra* note 56, at 35.
63. *Id.*
64. *Id.*
65. *Id.* at 38.
66. *Id.* at 35.
67. PETER SHEARS & GRAHAM STEPHENSON, JAMES' INTRODUCTION TO ENGLISH LAW 52 (13th ed. 1996).
68. ABEL, *supra* note 56, at 139.
69. SHEARS & STEPHENSON, *supra* note 67, at 52.
70. ABEL, *supra* note 56, at 142.
71. *Id.* at 41.
72. *The Students' Guide to Qualification as a Solicitor*, LAW SOC'Y, July 17, 1999, at 4 [hereinafter *Students' Guide*].
73. *Training Regulations 1990*, regulations 2, 7 LAW SOC'Y, Aug. 1998, Version 4.
74. JACQUELINE MARTIN, THE ENGLISH LEGAL SYSTEM 180 (1997).

After receiving a degree, students take a Legal Practice Course, before working for a solicitor's firm for two years. The Training Regulations state that a person satisfies the academic stage of training by:

> (i) graduating with a qualifying law degree incorporating a legal practice course; or
> (ii) graduating with a qualifying law degree; or
> (iii) passing a common professional examination course; or
> (iv) gaining a post-graduate diploma in law; or
> (v) satisfactorily completing a course of study which incorporates the foundations of legal knowledge and a legal practice course.[75]

Options (i) and (ii) are commonly known as the Law Degree Route. Options (iii) and (iv) are commonly known as the Non-Law Degree Route.[76] There is also a Non-Graduate Route, which allows non-degreed candidates who are working in legal employment to qualify as a solicitor.[77] They fulfill their academic stage by options (iii) or (v). Key to fulfilling the academic stage is study of the Seven Foundations of Legal Knowledge. They are Obligations I (Contracts), Obligations II (Torts), Criminal Law, Equity and the Law of Trusts, the Law of the European Union, Property Law, and Public Law.[78]

The Law Degree Route is the quickest and most common route to qualify as a solicitor.[79] However, this route is very competitive. Applicants need high grades in any academic subject to be considered. The Non-Law Graduate can have a degree in any subject but must go through the Common Professional Examination or Post-Graduate Diploma in Law.[80] The preparation required for the Common Profession Examination amounts to one academic year (two years for the part-time program). During this time the applicant studies the Seven Foundations of Legal Knowledge. The Common Professional Examination is given in early summer.[81] A three-hour paper is due in each of the seven courses and an additional area of law. A candidate will normally pass the examination if all of the papers are successfully completed on the same occasion.[82] Barring the most exceptional circumstances, a candidate may not attempt any paper on the Common Professional Exam on more than three occasions.[83]

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75. *Training Regulations 1990*, *supra* note 73, regulations 2, 7.
76. *Students' Guide*, *supra* note 72, at 4.
77. *Id.*
78. *Id.* at 6.
79. *Id.* at 4.
80. *Id.* at 18.
81. *Id.* at 15.
82. *See Students' Guide*, *supra* note 72, at 14.
83. *Id.*

All candidates who are eligible for the Common Professional Examination may apply for a Diploma in Law Course. The course is approximately thirty-six weeks long and varies from institution to institution.[84] The Non-Graduate route is open to persons who do not wish to take a degree and are working in legal employment. The process is lengthy, demanding, and academically challenging. This process requires one to qualify as a member of the Institute of Legal Executives. Study is done usually part time at local colleges or home study courses. There are several paper examinations.[85]

Practical Training/Examination

Commonly, the academic stage of training must precede the vocational stage of training.[86] The vocational stage of training requirement is fulfilled by:

(1) completing a legal practice course, or an integrated course, or an exempting law degree; and
(2) serving a training contract (equal to two years full-time); during which
(3) a professional skills course, and such other courses as the Law Society may prescribe, are completed.[87]

The purpose of the Legal Practice Course is to ensure that trainee solicitors entering training contracts have the necessary knowledge and skills to undertake appropriate tasks under proper supervision during the contract. A full-time Legal Practice Course runs for one academic year; a part-time course runs for two years.[88] The Legal Practice Course includes core courses in Ethics, Skills (advocacy, interviewing, writing and drafting, and practical research), Taxation, European Union Law, and Probate and Administration of Estates. There are also compulsory areas, which include Business Law and Practice, Conveyancing, and Litigation and Advocacy. Other areas of law fall into elective areas like Private Client and Corporate Client work and pervasive areas such as Accounts, Revenue Law, and Professional Conduct and Client Care.[89]

Candidates are responsible for finding their own employment that will fulfill the training contract. A firm or organization carries out the Training Contract as authorized by the Law Society. Larger firms offer the majority of training places and usually recruit two years in advance.[90] The Training

84. *Id.* at 16.
85. *Id.* at 18.
86. *Training Regulations 1990, supra* note 73, regulation 14(2).
87. *Id.* regulation 14(3).
88. *Students' Guide, supra* note 72, at 20.
89. *Id.*
90. *Id.* at 30.

Contract usually lasts for two years.[91] Sometimes, the training contract must provide for a salary no less than that prescribed by the Society.[92] A training establishment may have up to two trainee solicitors for each solicitor/partner or solicitor/director in private practice or each solicitor in any organization who is not forbidden to take on a trainee solicitor.[93]

During the Training Contract it is expected that the applicant practice and learn communication skills, practice support skills, legal research, drafting, interviewing and advising and gain experience in negotiations, advocacy and oral presentation skills.[94] Additionally the applicant must gain experience in three other areas from a list of twenty-three areas such as Banking, Employment, Family, Immigration, Personal Injury, Intellectual Property, Welfare, etc.[95] There are checklists for each subject showing the tasks the trainee should be able to perform by the end of his or her training.[96]

The training establishment must provide a desk available for the trainee solicitor's own work, appropriate secretarial support, and convenient access to a library or suitable material for research.[97] A training principal ensures that each trainee solicitor maintains a training record for inspection at review of progress meetings.[98] In addition to regular meetings with each trainee solicitor, there are adequate arrangements for daily guidance.[99]

On a day-to-day basis, a supervisor should:

1. give the trainee tasks and work;
2. give clear instructions and check that the trainee understands them;
3. provide the trainee with sufficient factual background;
4. suggest available office or library reference materials;
5. provide the trainee with a realistic framework for the trainee to complete the task and work;
6. answer the trainee's questions;
7. assign the trainee tasks with an increasing degree of difficulty;
8. ensure that the trainee has enough but not too much work;
9. provide a balance of work across substantive and procedural areas;

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91. *Training Regulations 1990*, *supra* note 73, regulation 21(1).
92. *Id.* regulation 23(ii), (iii).
93. *The Training Code*, 1(ii), THE LAW SOC'Y, Version 3, Oct. 1997.
94. *Information About Your Training Contract 1999*, THE LAW SOC'Y, Version 4, Apr. 1999.
95. *Id.* at 3.
96. *Id.*
97. *The Training Code*, *supra* note 93, at 1(iii).
98. *Id.* at 2(iii).
99. *Id.* at 4(iii).

10. provide work which will enable the trainee to use different skills;
11. create an environment where the trainee is not afraid to ask questions;
12. encourage the trainee to propose solutions even though they may not be correct;
13. provide regular feedback and guidance on the trainee's performance;
14. ensure that the trainee's achievements and improvements are recognized and praised;
15. ensure that aspects of the trainee's performance that need to be improved are discussed thoroughly with the trainee;
16. encourage the trainee to develop him or herself; and
17. ensure that the trainee keep any training record required by the firm of the Law Society.[100]

In addition, the trainee has the responsibility to:

1. inform the firm if it is not fulfilling its obligations particularly with regard to basic skills and legal topics;
2. manage his/her time, effort and resources to develop good working practices;
3. seek clarification when tasks and work are ill-defined or too open-ended or the trainee is given insufficient facts;
4. inform the firm when the trainee has too much or too little work; the tasks are too challenging or not challenging enough, or there is no variety in the type of work and tasks that have been allocated to the trainee;
5. be open and honest when the trainee is given feedback or appraised on his or her performance;
6. take responsibility for his or her own self-development; and
7. inform his or her supervisor when a mistake is made.[101]

During the Training Contract, one must also complete the Professional Skills Course.[102] This is comprised of three compulsory courses: Advocacy and Oral Communication, Financial Awareness and Business Accounts, and Ethics and Client Responsibilities.[103] The Law Society states, "These topics

100. *Information About Your Training Contract 1999*, *supra* note 94, at 2.
101. *Id.*
102. *Students' Guide*, *supra* note 72, at 32.
103. *Id.*

are ones which the Society believes are best studied once you have some experience of work in a solicitor's office."[104] The Training Contract is normally waived for those pursuing the Non-Graduate Route.[105] After the Training Contract is completed, the applicant can be added to the Roll of Solicitors.[106]

Moral Character

The candidate applies for the Roll of Solicitors approximately eight weeks before the expected completion of the Training Contract.[107] The application must include successful completion of all training, and the candidate and their principal supervisor must certify that there are no circumstances that may affect the character and suitability of the applicant, including criminal convictions. If the Society at any time is not satisfied as to the character and suitability of an unadmitted person to become a solicitor, it may cancel enrollment, prohibit entry into a training contract, or discharge a training contract.[108]

Foreign Attorneys

Sections 20 and 21 of the Solicitors Act 1974 prohibit anyone other than a certified English solicitor from acting as an English solicitor.[109] Foreign lawyers have two choices. They may practice in England under their own home title, e.g., *abogado*, *Rechtsanwalt* or attorney-at-law. Alternatively, they may re-qualify as an English solicitor.[110] Foreign lawyers do not have a right of audience in any of the English courts except such rights as derive from European Union law. They may not employ a person to act as a solicitor for the public.[111] However, if a foreign lawyer registers with the Law Society, they may enter into a partnership with a solicitor. The partnership of which the solictor(s) and the foreign lawyers are members is known as a multi-national partnership.[112]

The Law Society of England and Wales maintains a list of foreign lawyers in the country who report their presence in accordance with section 89 of the Courts and Legal Services Act 1990. The Foreign Lawyers Registration Regulations 1995 set out what must be on the register, what must be done to

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104. *Id.*
105. *Id.* at 3.
106. *Id.*
107. *Information About Your Training Contract 1999*, *supra* note 94.
108. *Training Regulations 1990*, *supra* note 73, regulation 33(2).
109. *Foreign Lawyers in England and Wales*, LAW SOC'Y, Int'l Note § 2, Mar. 16, 1999.
110. *Information Pack III*, *in Foreign Lawyers in England and Wales*, THE LAW SOC'Y., Mar. 16, 1999, 2-4 [hereinafter *Information Pack III*].
111. *Id.* at 3.
112. *Information Pack III*, *supra* note 110, at 3.

register, renew registration, change a name on the register, and remove a name from the register. The formalities of re-qualification depend on the jurisdiction of original qualification. It is not necessary to have British nationality in order to qualify as a solicitor. Lawyers from the European Union and European Economic Area member states, as well as from certain Commonwealth and Common Law jurisdictions, are entitled to re-qualification as solicitors by way of a special Qualified Lawyers Transfer Test. The test covers the following subjects: Property, Litigation, Professional Conduct and Accounts, and Principles of Common Law.[113] Separate procedures exist for other lawyers.

Barristers

There are three routes to becoming a barrister: law degree, non-law degree, and non-graduate mature student.[114] Those who do not have a law degree must take the Common Professional Examination Course.[115] All three routes include membership in one of the four Inns of Court: the Inner Temple, Middle Temple, Gray's Inn, and Lincoln's Inn. Each student must satisfy the requirement of "term keeping" by attending twelve qualifying sessions at his or her Inn of Court.[116] A "qualifying session" is an educational and collegial event.[117] Before 1997, candidates had to dine a certain number of times at their Inn of Court in order to keep terms.[118]

A student must complete an Academic Stage and a Vocational Stage before being "called to the bar."[119] The Academic Stage may be fulfilled by either obtaining a law degree, another degree, or by completing the Common Professional Examination Course.[120] Both the law degree and the Common Professional Examination Course must include a "study of the 'foundations of legal knowledge' and one other area of legal study, and assessments and examinations in those subjects."[121] The Foundations of Legal Knowledge are:

(i) Obligations I (Contract)
(ii) Obligations II (Tort)
(iii) Criminal Law
(iv) Public Law

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113. *The Qualified Lawyers Transfer Regulations* 1990, THE LAW SOC'Y., Regulation 4 (amended July 16, 1998).

114. The Consolidated Regulations of the Inns of Court and the General Council of the Bar 12, *available at* http://www.legaleducation.org.uk/careers/regs.php (last visited Oct. 1, 2002) [hereinafter Consolidated Regulations].

115. *Id.* at 12(a)(ii).

116. *Id.* at 9.

117. *Id.* at 9(f).

118. *See* MARTIN, *supra* note 74, at 184.

119. Consolidated Regulations, *supra* note 114, at 4, 11.

120. *Id.* at 12.

121. *Id.* at Schedule 1.

(v) Property Law
(vi) Equity and The Law of Trusts
(vii) Foundations of EU Law.[122]

Finishing a Vocational Course completes the Vocational Stage.[123]

A student is then "called to the bar" after completing the Bar Vocational Course. The Vocational Course teaches "skills, knowledge and attitudes" required of barristers.[124] The student must be at least twenty-one years of age to be called to the bar.[125] Then the student must complete a pupilage before practicing as a barrister. The pupilage consists of a "non-practicing six months" and a "practicing six months."[126] The practicing six months may be spent with a barrister, solicitor, or lawyer in a Member State of the European Union.[127] A Pupil Master usually may not supervise more than one pupil at a time.[128]

Previously, barristers took a Bar Examination. The first law examination for barristers began in 1872.[129] In 1980, the pass rate was 87%.[130] The Bar Examination is being faded out in favor of the Vocational Course. Solicitors may apply to become barristers.[131] A European attorney may register with one of the Inns under his home professional title.[132] He or she may also apply to become a barrister. This usually entails passing an Aptitude Test and attending six qualifying sessions.[133] Applicants are ineligible for the Bar if they are engaged in an "incompatible" occupation, have been convicted of a "relevant criminal offence," have had a bankruptcy order against him, or have been prohibited from practicing any profession.[134]

Summary

The two branches of the legal profession in England have two separate training regiments. The Law Society has prescribed detailed requirements for academic and vocational training for solicitors. There are three routes to becoming a solicitor. The most common route is to graduate with a law degree, then take a legal practice course (one year), and then enter into a two-

122. *Id.* at Schedule 1.
123. *Id.* at 16.
124. *Id.* at Schedule 1.
125. *Id.* at 22(a).
126. *Id.* at 41.2.
127. *Id.* at 46.1.
128. *Id.* at 47.2.
129. ABEL, *supra* note 56, at 42.
130. *Id.* at 43.
131. Consolidated Regulations, *supra* note 114, at 35.
132. *Id.* at 28.
133. *Id.* at 30(d), (h).
134. *Id.* at 4.

year training contract. The two-year training contract also includes the Professional Skills Course that must be completed prior to applying for the Roll of Solicitors. The academic stage includes learning the Seven Foundations of Law and many practical courses in the skills of advocacy, drafting, and negotiations.

There are also three routes to becoming a barrister: law degree, non-law degree and non-graduate experienced student. Students must belong to and keep terms at one of the Inns of Court. Their pupilage is only one year long. They also are required to take a Vocational Course. The differences in training solicitors and barristers are blurring. In either case, the mentoring and careful supervision of trainees in England is to be particularly commended. Also, the eligibility of European Union lawyers to practice in England and the broadening of trainee options to article elsewhere will no doubt lead to further changes.

C. Germany

Overview

Germany's law is based on a civil law system. Today's requirements for attorneys (*Rechtsanwälte*) trace their beginnings to eighteenth century Prussia.[135] Federal and state law governs the requirements for attorneys. Attorneys have a long and arduous path to admission to practice including university training, state-supervised professional training, and two state examinations. Since the reunification of Germany, requirements for the legal profession have also become fairly uniform throughout Germany.

History

German law has its roots in Roman and canon law.[136] The initial requirement for five years of legal education in Germany developed in 1455.[137] In 1713, Prussia required all judges to show adequate theoretical knowledge and practical experience[138] by observing the courts at work,[139] leading to the preparatory service requirement as a part of the legal education requirements in Germany.[140]

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135. INTRODUCTION TO GERMAN LAW 28 (Werner F. Ebke & Matthew W. Finkin eds., 1996).

136. NIGEL G. FOSTER, GERMAN LAW & LEGAL SYSTEM 6 (1993).

137. Juergen R. Ostertag, *Legal Education in Germany and the United States–A Structural Comparison*, 26 VAND. J. TRANSNAT'L L. 301, 307 (1993).

138. *Arbeitskreis fur Fragen der Juristenausbildung, Die Ausbildung der Deutschen Juristen* 52 (1960) [hereinafter *Arbeitskreis*].

139. Ostertag, *supra* note 137, at 308.

140. *Arbeitskreis*, *supra* note 138, at 54.

In 1749, Prussia's Codex Fridericiani Marchici established a detailed set of state exams and preparatory services for judges.[141] In 1877, the Judiciary Constitutional Act established the legal education framework for the entire German Reich with a two-phase legal education system. The original need of eighteenth century Prussia to train a uniform, loyal, and well-qualified cadre of judges to govern a diverse and spread out geography has left its imprint on German legal training today.[142]

Governing Law

Government control of the German legal education process exists through detailed federal and state legislation. The governing law in Germany for judges is the *Deutsches Richtergesetz*.[143] The governing law for attorneys is the *Bundesrechtsanwaltsordnung* (BRAO), which contains the rights and obligations of attorneys.

Every major change of legal education must gain federal and state approval, making change more difficult to introduce.[144] There are sixteen *Länder*, or states. While this system makes it more difficult to change, the quality of legal education is basically uniform throughout the country.[145] Therefore, the reputation of the university plays a lesser role as compared to some western countries, such as the United States.[146]

Education/Practical Training

Students usually enter a university between the ages of nineteen and twenty-two.[147] Although university education is free,[148] students must pass two state examinations and complete university and state-supervised practical training. Before the first state examination (*Erste Staatsexamen*), students usually take three and a half years of study.[149] However, many students take six years to complete this first phase; the absolute minimum is two years.[150] Most applicants are usually admitted to law school with classes of four to five hundred students.[151]

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141. *Id.* at 52.

142. Ebke & Finkin, *supra* note 135, at 28.

143. Deutsches Richtergesetz (Auszug) [German Federal Judicial Office Act] (July 1, 2003) [hereinafter DriG].

144. Ostertag, *supra* note 137, at 320.

145. *Id.* at 321.

146. *Id.*

147. FOSTER, *supra* note 136, at 82.

148. Philip Leith, *Legal Education in Germany: Becoming a Lawyer, Judge, and Professor*, 4 WEB J. CURRENT LEGAL ISSUES 3 (1995).

149. FOSTER, *supra* note 136, at 84.

150. *Id.*

151. Ebke & Finkin, *supra* note 135, at 30.

The German Law on the Judiciary (*Deutsches Richtergesetz*; DRiG) requires certain core subjects during this first phase: Civil Law, Criminal Law, Public Law and Procedural Law, including that of the European Community, Legal History, Legal Philosophy, and Jurisprudence.[152] Although elective courses are available, these core subjects take up most of a student's semesters.[153] Electives may cover administrative law, labor law, company law, commercial law, or other subjects.[154] In addition to taking required courses before the first state examination, students must also spend three periods of one month in practical training.[155] They also usually complete written assignments (*Hausarbeiten*) and tests in the three core areas of civil law, criminal law and public law before qualifying to take the first state examination. Requirements vary among the *Länder*.

Requirements also vary among the *Länder* for the first state examination. The Court of Appeals (*Oberlandesgericht*) of each region administers the exam.[156] Usually, the exam consists of several five-hour written tests (*Klauser*), and a one-hour oral exam.[157] In Bavaria, students write eight five-hour papers: four in private law, one in criminal law, two in public law, and one of their choice.[158] One practitioner and one professor grade papers.[159] For each paper, a student must write a legal opinion for a hypothetical situation.[160] This opinion must include all relevant legal issues and arguments.[161]

If the student achieves a certain grade, he may take the oral exam.[162] The oral exam is administered to between four and five students at once[163] and takes several hours, allowing each candidate about an hour. Each panel of graders for the oral exam includes two practitioners and two professors.[164] The oral exam covers private law, criminal law, public law, and a subject of the student's choice.[165] Private law includes obligations, property, family law and succession, commercial law, company law, and labor law.[166] Electives range from legal history to antitrust law.[167]

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152. FOSTER, *supra* note 136, at 68. *See also* DRiG § 5a (2) [German Federal Judicial Office Act] (July 1, 2003).
153. FOSTER, *supra* note 136, at 68.
154. *Id.*
155. DRiG § 5a (3).
156. Ebke & Finkin, *supra* note 135, at 28.
157. FOSTER, *supra* note 136, at 69.
158. Ebke & Finkin, *supra* note 135, at 29.
159. *Id.*
160. *Id.*
161. *Id.* at 31.
162. *Id.* at 29.
163. *Id.*
164. *Id.* at 29.
165. *Id.*
166. *Id.*
167. *Id.*

The exams may only be retaken once, unless a *Land* allows for a "free shot," or *Freischuss*, after two and a half years of university study.[168] Of some 15,000 law students, only approximately 7,000 complete their first phase. Of these, 25% fail the first state examination.[169] In 1992, 33.8% had only a passing score, and only 3.2% received a "good" or "very good" score.[170]

If students pass the first state examination, they enter a two-year training period before qualifying to take the second state examination. This professional training period is known as *Referendarzeit*.[171] During this period, students are known as *Referendar* and are temporary civil servants. The state organizes and pays for their professional training.[172] In 1995, they were paid around 1,800 DM a month.[173] They must serve in four mandatory positions (*Stationen*) for a minimum of three months each and in one position of their choice for four to six months.[174] The mandatory positions are with a civil court, a criminal court or prosecutor's office, an administrative body, and an attorneys' office.[175] The optional placement may be with a court or public body, a notary, a trade union, a business, or in another legal jurisdiction.[176] During the *Referendarzeit*, the students learn how to draw pleadings, draft acts, and write judgments.[177] Trainees also attend courses run by judges or other civil servants.[178] These sessions focus on court procedures and case analysis.[179]

After the *Referendarzeit*, the students may return to school for additional preparation for the second state examination.[180] The second state examination (*Zweites Staatsexamen* or *Grosse Staatsprüfung*) is grueling and may include up to twelve written or oral exams between three and eight hours in length.[181] This is sometimes done over a period of three weeks.[182] Once a person has passed the second state examination, he or she is called an *Assessor* or *Volljurist*. Most *Assessoren* are close to thirty years of age.[183] Around 20-25%

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168. FOSTER, *supra* note 136, at 69.
169. Ebke & Finkin, *supra* note 135, at 31.
170. *See id.*
171. FOSTER, *supra* note 136, at 86.
172. *Id.*
173. Leith, *supra* note 148, at 7.
174. FOSTER, *supra* note 136, at 69.
175. DriG § 5b (1) [German Federal Judicial Office Act] (July 1, 2003).
176. *Id.*
177. Ebke & Finkin, *supra* note 135, at 31.
178. *Id.* at 32.
179. REGULATION OF PROFESSIONS: A LAW AND ECONOMICS APPROACH TO THE REGULATION OF ATTORNEYS AND PHYSICIANS IN THE US, BELGIUM, THE NETHERLANDS, GERMANY AND THE UK 227 (Michael Faure et al. eds., 1993).
180. FOSTER, *supra* note 136, at 69.
181. *Id*; Ebke & Finkin, *supra* note 135, at 32.
182. Ebke & Finkin, *supra* note 135, at 32.
183. *Id.*

will eventually become judges.[184] They may also become notaries, prosecutors, private practitioners, and legal advisors.[185]

Interestingly, many students (sometimes 90% in some universities) take private cram courses (*Repetitorium*) for up to eighteen months to prepare for the state examinations.[186] Usually, students will attend weekly classes of about three to four hours.[187] Before reunification, lawyers in East Germany were required to have four years of university study, with one year spent in practice, before passing one exam.[188] Since 1991, the new *Länder* have the same requirements as the rest of Germany.[189]

Moral Character

Candidates applying for admission to the court can be refused admission for certain conduct and disqualifying behavior.[190] The following offenses, if found guilty, will disqualify a candidate: unworthy conduct, which makes him appear unfit to exercise the profession; a clear breach of the duty of candor when applying for admission; use of a "doctoral" qualification which has not been earned; dishonest concealment of income from the revenue authorities; and alcoholism.[191] Additionally, a candidate who is found to oppose the democratic order, leaving him open to criminal sanctions, or conducting activity "incompatible" with the profession can be refused admission.[192]

Foreign Attorneys

Lawyers within the European Union may practice in other member states, including Germany.[193] They must use the professional title of their home State[194] but may qualify as *Rechtsanwälte* after a period of three years of practicing German law[195] or after passing an aptitude test.[196] The examination consists of a written and oral test and is conducted in German.[197]

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184. FOSTER, *supra* note 136, at 70.
185. Ebke & Finkin, *supra* note 135, at 32.
186. FOSTER, *supra* note 136, at 70.
187. Leith, *supra* note 148, at 5.
188. FOSTER, *supra* note 136, at 71.
189. *Id.* at 89.
190. Institute of European Law, *available at* http://elixir.bham.ac.uk/Country%20information/Germany/lawyers_frameset.htm (last visited Mar. 26, 2003)
191. *Id.*
192. *Id.*
193. Law Regulating the Activity of European Lawyers in Germany § 2(1) (2000) [hereinafter EuRAG].
194. EuRAG § 2(1).
195. EuRAG § 11(1).
196. EuRAG § 16.
197. EuRAG § 21.

The written part consists of two papers on one compulsory subject and one elective subject.[198] The oral part consists of a presentation and interview.[199]

Summary

Lawyers in Germany undergo rigorous academic and training requirements within a framework established in eighteenth century Prussia. Of particular note are two arduous state examinations and a two-year training period where the state pays candidates to train in mandatory public and private legal offices. The use of "cram courses" is popular in Germany. Recently lawyers from member states of the European Union have been allowed to qualify as *Rechtsanwälte*.

As the European Union continues to develop and solidify, more changes will come. The EU has extensive rulemaking powers and has used them to revolutionize competition law throughout Western Europe, establish a monetary union, transform national labor workers into continent-wide labor markets, and begin the process of harmonizing private and criminal law throughout western Europe.[200] The EU model may be a predecessor to a much larger unified global law community in the future.

D. United States

Overview

The U.S. legal system is rooted in the English common law with judicial review of legislative acts. The American Bar Association has been given the authority to oversee acceptance to the bar in the United States. Each state, however, has bar examiners who are given authority by the judiciary to administer the bar exam and regulate the requirements for admission to the bar. Two states, New York and California, will demonstrate the requirements needed for admission to the bar in the United States.

History

Compared to other countries, the United States is a new country. However, Boston and New York are over three hundred years old, and the U.S. Constitution is one of the world's oldest "living" organic laws.[201] Today, American legal education generally takes three years for most full time students. In 1850, however, the standard course in many law schools ran for

198. EuRAG § 21(1), (2).

199. EuRAG § 21(4).

200. Henry H. Perritt, Jr., *The Internet is Changing International Law*, 73 CHI.-KENT L. REV. 997, 1022 (1998).

201. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 19 (1985).

one year.[202] The coursework later developed into two-year programs. The three-year program, an L.L.B., was a late innovation started at Harvard University.[203] Prominent judges and lawyers constituted the faculty at the majority of the schools.[204] In 1908, the American Bar Association adopted a canon of professional ethics.[205]

Governing Law

The requirements for admission to practice in California are set forth in the State Bar of California Rules Regulating Admission to Practice Law in California.[206] In New York State, the requirements are listed in the Rules of the Court of Appeals for the Admission of Attorneys and Counselors of Law Part 520.[207]

Education

In California, every applicant has the burden of establishing that he or she has met the following legal education requirement:

> (a) Graduated from a law school approved by the American Bar Association or accredited by the Committee of Bar Examiners; or
> (b) Studied law diligently and in good faith for at least three years in any of the following manners:
> (1) In a law school that is authorized by the State of California to confer professional degrees; is registered with the committee; and which requires classroom attendance of its students for a minimum of 270 hours a year; or
> (2) In a law office in California and under the personal supervision of a member of the State Bar of California who is, and who has been continuously, an active member of the State Bar of California for at least the last past five years; or

202. *Id.* at 609.
203. *Id.*
204. *Id.*
205. *Id.* at 690.
206. CAL. CODE REGS. tit. 3, § 2 (2004); California Rules of Court, tit. Three, D. II, Rules Relating to Attorney Admission and Disciplinary Proceedings and Review of State Bar Proceedings.
207. N.Y. JUR 2D CT. APP. R § 520; Rules, Court of Appeals, § 520, Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law [hereinafter Admission Rules].

(3) In the chambers and under the personal supervision of a judge of a court of record of this State; or
(4) By instruction in law from a correspondence law school requiring 864 hours of preparation and study per year and which is registered with the committee; or
(5) By any combination of the methods referred to in this subsection.[208]

New York has similar requirements, however, the applicant without a degree must successfully complete at least one academic year as a matriculated student in a full-time program or the equivalent in a part-time program at an approved law school and at the conclusion be eligible to continue in that school's degree program.[209]

Practical Training

There is no additional training required in California or New York other than that listed above for those substituting supervised legal training directly for education at a law school.[210] While many newly admitted attorneys may undergo some tutoring on the job, most, especially in larger law firms, are expected to "hit the ground running." This is in contrast to the carefully supervised English training contract and the two-year German state-supervised trainee rotations.

Examination

The bar examination is the major hurdle for most attorney candidates. New York and California are generally known to have the most difficult bar exams in the United States because of the amount of legal material that is tested and lower bar passage rates. The bar passage rate in California was 49.4% in July 2003;[211] in New York it was 69.4%.[212]

The New York examination is given over two days and is divided into two sections.[213] The first day tests primarily New York state law and is pre-

208. CAL. CODE REGS. tit. 3, § 2 (2004).
209. N.Y. JUR 2D CT. APP. R § 520.
210. N.Y. JUR 2D CT. APP. R § 520.
211. State Bar Announces Results for July 2003 California Bar Examination, State Bar of California News Release, *available at* http://www/calbar.ca/gov/state/calbar (last visited Mar. 29, 2004).
212. NYS Bar Exam Results, July 2003, *at* http://www.law.com/special/students/ny_barexam/index.shtml. (last visited Mar. 28, 2004).
213. The Bar Examination, New York State Board of Law Examiners, *available at* http://www.nysba.org/Template.cfm?Section=FAQ (last visited Mar. 29, 2004).

pared by the New York Board of Bar Examiners with one portion, the Multistate Performance Test (MPT), developed by the National Conference of Bar Examiners. The New York section is divided into two sessions. The morning session is three hours and fifteen minutes and includes three essay questions and fifty multiple-choice questions.[214] The afternoon session is three hours and includes two essay questions and the MPT.[215] The exam tests numerous areas of law that includes Contracts, Constitutional Law, Criminal Law, Evidence, Real Property, and Torts (including statutory no-fault insurance provisions).[216] In addition, the questions may deal with Business Relationships, Conflict of Laws, New York Constitutional Law, Criminal Procedure, Family Law, Remedies, New York and Federal Civil Jurisdiction and Procedure, Professional Responsibility, Trusts, Wills and Estates including Estate Taxation, and Uniform Commercial Code Articles 2, 3, and 9.[217]

The MPT is a ninety-minute essay, which requires applicants to write an answer to a problem posed by a "supervising attorney."[218] The applicant is provided with a "file" and a "library" which contains relevant cases, statutes, and regulations.[219] The applicant may be asked to write a memorandum, a brief, a complaint, or other legal document.[220] The second day of testing is dedicated to the Multistate Bar Examination (MBE). The MBE portion consists of 200 multiple-choice questions prepared by the National Conference of Bar Examiners.[221] Of the 200 questions, there are thirty-four in Contracts and thirty-four in Torts.[222] There are thirty-three in each of the following areas including Constitutional Law, Criminal Law, Evidence and Real Property.[223] Each question consists of a statement of facts followed by four stated alternative answers, and the applicant is required to choose the best of the stated alternatives.[224] Almost all states require the MBE.[225]

The California Bar Exam is a three-day exam. On days one and three, the exam's morning session consists of essay exams (three essay questions in each session) and an afternoon session testing performance skills (one

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214. *Id.*

215. *Id.*

216. *Id.*

217. N.Y. BD. OF LAW EXAMIN'RS, CH. 1, PT. 6000 RULES, § 6000.6 EXAMINATION (amended Jan. 2003; effective Feb. 1, 2003).

218. Multistate Performance Test (MPT), http://www.nybarexam.org/MPT.htm (last visited Mar. 29, 2004).

219. *Id.*

220. *Id.*

221. Multistate Tests, National Conference of Bar Examiners website, *at* http://www.ncbex.org/tests.htm (last visited Mar. 29, 2004).

222. *Id.*

223. *Id.*

224. National Conference of Bar Examiners, The MBE: Multistate Bar Examination 2003 Information Booklet 2-3 (2003).

225. Multistate Tests, Multistate Examination Use, National Conference of Bar Examiners, *at* http://www.ncbex.org/tests.htm (last visited Mar. 29, 2004).

performance test problem in each session). On the second day, applicants take the MBE. The subjects tested in California include MBE subjects and Civil Procedure, Corporations, Community Property, Professional Responsibility, Remedies, Trusts, and Wills and Succession.

California uses its own performance test, not the MPT. The performance section consists of "closed universe" practical problems using instructions, factual data, cases, statutes, and other reference material supplied by examiners.[226] This examination is intended to test analysis and drafting skills of attorneys.

In the United States, many states allow for reciprocity, allowing attorneys who have passed the bar exam in another state to "waive in." New York State permits admission on motion, without examination, for applicants who have practiced for five of the preceding seven years, are admitted to practice in at least one reciprocal jurisdiction, and have graduated from an American Bar Association approved law school.[227]

Finally, the last exam usually taken while candidates are in law school is the Multistate Professional Responsibility Exam (MPRE), which is required in most jurisdictions.[228] The MPRE is assembled and administered by ACT, Inc., on behalf of the National Conference of Bar Examiners. The examination is administered three times per year at established test centers across the country.[229] This exam consists of fifty multiple-choice questions and is two hours and five minutes in length.[230]

The MPRE looks at the conduct of lawyers in certain roles that are applied in disciplinary and bar admission procedures; by courts in dealing with issues of appearance, representation, privilege, disqualification, contempt or other censure; in lawsuits seeking to establish liability for malpractice; and other civil or criminal wrongs committed by a lawyer while acting in a professional capacity.[231] It does not attempt to test the personal ethics of the candidate.

Moral Character

California and New York both require that every applicant be of good moral character. The term "good moral character" includes qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation,

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226. There is also now a Multistate Performance Test. *See* National Conference of Bar Examiners, The MPT: Multistate Performance Test 2003 Information Booklet 1-2 (2003).

227. Admission Rules, *supra* note 207, at § 520, Subch. B, Rule 520.10(a).

228. National Conference of Bar Examiners, The MPRE: Multistate Professional Responsibility Examination 2003 Information Booklet 2 (2003).

229. *Id.* at 3.

230. *Id.* at 4.

231. *Id.* at 3.

and respect for the rights of others and for the judicial process. The applicant has the burden of establishing that they are of good moral character.[232] New York's standards are outlined in the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, Section 520.12, Proof of Moral Character.[233]

As a practical matter, candidates for both California and New York must fill in detailed forms outlining their employment history, residences, and criminal records (if any). Former employers and other references are required to fill out recommendation forms for candidates.

Foreign Attorney

Foreigners are allowed to take the New York State bar exam; however, the Board must evaluate his or her legal education according to the New York State Board of Law Examiners. In order to consider a foreign educated applicant eligible to take the bar examination under section 520.6, the Board must determine that the applicant's first degree in law was based on a period of study which is (1) the duration equivalent and (2) the substantial equivalent of the legal education obtained at an approved law school in the United States.[234] The California rules governing foreign attorneys are similar to New York and fall under Rule 988 of the California Rules of Court.[235]

In addition to the requirements discussed, many law schools in the United States offer graduate law degrees known as the Master of Laws or LL.M. This additional training is not required but may often increase the worth of an attorney. Depending on the state, obtaining the LL.M. may also qualify foreign attorneys to sit for the bar exam.

Summary

Usually U.S. bar candidates are required to obtain a degree from a law school accredited by the American Bar Association. This legal education requirement does not mandate a practical training component. Once bar candidates have also passed a state bar examination, they are licensed to practice law in that state. The bar examination usually consists of a multiple-choice exam given throughout the United States along with an essay portion given by the relevant state. A professional responsibility exam is also required. Some states also require a simulated practice exam, and this number is likely to increase. There are various avenues for foreign attorneys to qualify to practice in the United States.

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232. CAL. CODE REGS. tit. 3, § 2 (1996).
233. N.Y. JUR 2D CT. APP. R § 520.12.
234. *Id.*
235. CAL. CODE REGS. tit. 3, § 2 (1996).

What is curiously lacking in the bar admission process in the United States is a practical training requirement in either law school or afterwards. The careful supervision, for example, required in England and Germany is not present in the United States. A law graduate who has passed a state bar examination may "hang up their shingle" with no prior experience working for another attorney. This causes this author to surmise that there are not "too many" lawyers in America, but that there may be too many *inexperienced* attorneys, who practice without adequate supervision.

CONCLUSION

This article has surveyed admissions requirements in four countries. All four countries have rich historical traditions. China has had the most sweeping changes in recent years. All of the countries require some state or national standards to practice law. Germany and China have more extensive state control over the lawyer admission process. Combined education and training requirements range from five to seven years after the secondary school level.

All four countries allow for law candidates to receive either formal legal education or its practical equivalent. Curiously, only the United States seems not to require jurisprudence and legal history in its mandatory curriculum. Also, only the United States offers legal education as a post-baccalaureate program.

Three of the four countries require at a minimum a one-year training or internship period. Germany and England (for solicitors) require two years. The United States does not mandate a training period either during or after law school, or after passage of the state bar exam. Law students in the United States generally try to gain some legal experience over their summer breaks; however, this is not mandatory and is not regulated by the states or the local bar associations. All four countries require that applicants be of good moral character. The definition of this varies; however, all of the countries can refuse a candidate the ability to practice law for moral reasons or defects in character such as criminal convictions.

All four countries have rigorous entrance examinations, although in England this can be avoided by obtaining a law degree. China's new State Judicial Exam had a pass rate of only 7% in 2002. In three of the countries, England, the United States, and Germany, students often use commercial "cram courses" to bridge the gap between their university training and the examination process. It will be interesting to see if China develops this industry.

Germany has an oral exam in addition to its written exams. In England, it is expected that the applicant practice and learn communication skills. In the United States, students can sharpen their oral skills during law school; however, that is somewhat dependent on the student and his or her choice of classes. Germany, England, and the United States are requiring more testing

in practical skills. In the United States, the use of the Multistate Performance Test is increasing. Only the United States requires a separate exam for professional ethics.

Foreign attorneys are eligible to practice in the United States, but not in China. Germany and England allow lawyers from the European Union to practice. China may want to consider more how it may preserve its traditional preference for alternative dispute resolution. England and Germany have unique opportunities as the influence of the European Union grows. The United States may want to consider requiring jurisprudence and legal history in its curriculum and how more attorneys can be supervised and trained before they are "unleashed" on the public.

Finally, while all four countries are responding to globalization, relatively few steps have been taken to require training for international or foreign law. The time is ripe for a global dialogue on licensing requirements. There is much to be gained from learning from other countries' experiences.

ARTHRITIC FLEXIBILITIES FOR ACCESSING MEDICINES: ANALYSIS OF WTO ACTION REGARDING PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

Professor Brook K. Baker*

1. CONTEXT—DEVELOPING COUNTRIES' NEED FOR ACCESS TO ESSENTIAL ON-PATENT MEDICINES FOR TREATING HIV/AIDS AND OTHER DISEASES

As recognized by the U.N. Millennium Development Goals Project, the burden of untreated, but treatable, disease in developing countries is staggering.[1] For example, over 40 million people are living with HIV/AIDS, including nearly 26.6 million in Africa,[2] precipitating a global emergency[3] far overshadowing the SARS scare or the war on terror. Although millions of people living with AIDS in developing countries need immediate access to affordable antiretroviral medicines, ninety-three percent of them, including ninety-eight percent in Africa, are living—and dying—without medicines that have dramatically extended lives in the United States and Europe.[4] AIDS is

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1. United Nations Development Programme: Millennium Development Goals ("Goal 6: Combat HIV/AIDS, malaria and other diseases" targets: have halted by 2015 and begun to reverse the incidence and spread of HIV/AIDS, tuberculosis, malaria, and other major diseases), *available at* http://www.undp.org/mdg/ (last visited Apr. 1, 2004).

2. UNAIDS, *AIDS Epidemic Update: December 2003*, 5 (Dec. 1, 2003).

3. World Health Organization (WHO) declared HIV/AIDS a global emergency on September 22, 2003. WHO Fact Sheet 274 (Sept. 2003), *available at* http://www.who.int/mediacentre/factsheets/2003/fs274/en/print.html/html (last visited Apr. 1, 2004). At the Barcelona AIDS Conference in July of 2002, WHO committed to treating 3 million people living with AIDS by the end of 2005. *See* Barcelona HIV Conference website, http://www.actupny.org/reports/bcn/ (last visited Apr. 1, 2004).

4. Nearly six million people living with HIV/AIDS in developing countries need immediate access to affordable medicines or they will die within two years. WHO & UNAIDS, Treating 3 Million by 2005: Making it Happen: The WHO Strategy, 5 (2003), *available at* http:// www.Who.int/3by5/publications/documents/en/Treating3millionby2005.pdf (last visited Apr. 1, 2004). Despite this compelling need, only 400,000 developing world patients are receiving antiretroviral therapy including 100,000 in all of Africa. *Id.* One-third of the developing country total was being treated in Brazil, which provides universal free access to antiretroviral therapy. *See* Jane Galvão, *Access to Antiretroviral Drugs in Brazil*, LANCET, Nov. 5, 2002, *available at* http://image.thelancet.com/extras/01art9038web.pdf (last visited Apr. 1, 2004).

the paradigmatic example, but the issue of access to on-patent essential medicines is not limited to HIV/AIDS or antiretrovirals (ARVs) alone. Poor people in developing countries face a host of infectious diseases, e.g., tuberculosis, malaria, respiratory infections, diarrhea, and chagas disease, for which there is little or no access to medicines, even where cures exist. In addition to infectious diseases, people in developing countries contract many more familiar and equally untreated diseases, including diabetes, asthma, heart disease, cancer, and mental illness.[5] For these diseases, as common in the North as the South, there are a wider array of on-patent medicines, including anti-diabetics, beta-blockers, oncology drugs, and psychiatric drugs, all of which are critically important to the physical and mental health of poor people in developing countries and all of which are priced well beyond affordability.

It is against this backdrop of millions of lives lost needlessly every year that one must judge the world's hesitant and often counter-productive response to the AIDS pandemic and other health problems in developing countries and applaud the growing movement to catalyze a robust trade in low-cost generic medicines. The enormous gap between the need for access to affordable on-patent medicines and its realization reflects a disconnect between the perceived interests of rich countries in the global North, including the highly profitable proprietary pharmaceutical companies[6] that research, develop, and produce patented medicines, and the interests of developing countries in the global South that require life-saving medicines to fight HIV/AIDS and other pandemics that are decimating their poverty-stricken populations. This disconnect occurs at the juncture of national and international intellectual property regimes, especially the World Trade Organization (WTO) Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS),[7] national and regional capacities to manufacture and market pharmaceutical products efficiently, and global patterns of income inequality and poverty. While rich, developed countries continue to pursue intellectual property

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5. As stated,

> Noncommunicable diseases such as cardio-vascular diseases, cancer and diabetes are clearly on the increase in African countries. According to the WHO Regional Office for Africa, if this situation is not contained, sixty percent of deaths in the Region by the year 2020 will be caused by NCDs, compared to forty-one percent in 1990.

WHO, *Noncommunicable Diseases: Regional Strategy for 2000-2010* (Aug. 28–Sept. 2, 2000), *available at* http://www.afro.who.int/press/2000/regionalcommittee/rc5006.html (last visited Apr. 4, 2003).

6. Pharmaceuticals have ranked as the most profitable sector in Fortune 500 rankings for the past three decades. Scott Gottlieb, *Drug Companies Maintain "Astounding" Profits*, 324 B.M.J. 1054 (2002).

The top ten U.S. drug makers increased their profits by 32% from $28 billion in 2000 to $37 billion in 2001. *Id.* Together these ten companies report profits of 18.5 cents for every dollar of sales, eight times higher than the median for all Fortune 500 industries. *Id.*

7. Art. 8(1), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 81 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited Feb. 9, 2004) [hereinafter TRIPS Agreement].

protections and trade rules designed to guarantee incentives for innovation by and profits for the proprietary pharmaceutical industry, there is a critical lack of access to medicines essential to counteract disease and to lower the body count of poor people in Africa, Asia, South America, and other developing regions.

Developed countries often promote enhanced intellectual property rights, including those of pharmaceutical producers, as important to development, where the rising tide of import-export economies will rehabilitate failed public health sectors and intellectual property protection will promote local research and development of medicines for diseases primarily found in Africa, South America, and Asia. An alternative solution, pursued by developing countries and treatment activists internationally, is the promotion of efficient generic production by a sufficient number of manufacturers at meaningful economies-of-scale so that medicines can be accessed at lowest cost. To enable trade in generic medicines, developing countries and pro-public health activists have launched a broad-based attack on intellectual property rights that hamstring developing countries' ability to respond proportionately to their urgent crises and more prosaic public health needs by making treatment costs prohibitive.

That generic medicines are cheaper than their brand-name, patent-protected counterparts is undeniable. For example, in February 2001, Cipla of India announced a price heard around the world—a standard package of ARVs for as little as $350/year to NGOs and $600/year to governments in Africa.[8] As more Indian producers entered the market, prices fell even further, and the quality of the drugs was assured through the World Health Organization's (WHO) new pre-qualification program. This fall, a new benchmark price has been established by four generic producers, three Indian and one South African—less than $140/year for the WHO preferred fixed-dose combination medicine.[9] Accordingly, standard quality generics are now available for a penny on the dollar of what the major pharmaceutical companies charge in rich markets.[10]

To enable purchase of assured quality generic drugs, developing countries and activists have also succeeded in convincing donors to establish

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8. Donald G. McNeil Jr., *Indian Company Offers to Supply AIDS Drugs at Low Cost in Africa* N.Y. TIMES, Feb. 7, 2001, *available at* http://www.nytimes.com/2001/02/07/health/07AIDS.html (last visited Feb. 7, 2001).

9. Mark Schoofs, *Clinton Program Would Help Poor Nations Get AIDS Drugs*, WALL ST. J., Oct. 23, 2003.

10. Major pharmaceutical companies have offered price discounts through the WHO co-sponsored Accelerating Access Initiative. However, this Initiative has gotten off to a painfully slow start such that only 36,000 additional patients received medicines between May of 2000 and March of 2002. WHO & UNAIDS Progress Report, *Accelerating Access Initiative: Widening access to care and support for people living with HIV/AIDS* 1-2 (June 2002). Although the figure rose to 150,000 people worldwide by the end of 2003, the conditions that companies impose and the requirement for country-by-country, drug-by-drug negotiations have resulted in a widening gap in access to treatment.

funding structures such as the Global Fund to Fight AIDS, Tuberculosis, and Malaria (Global Fund)[11] and in agitating for greatly enhanced bilateral and multilateral donations so that there are reliable and sustainable reservoirs of purchasing power sufficient to provoke generic entry and to finance purchase of large quantities of medicine. In this regard, the promised tripling of the U.S. response to global AIDS, from $5 billion over five years to $15 billion, may be significant as is the $1 billion commitment to date from the World Bank's Multi-Country HIV/AIDS Program.[12] Although the WHO Commission on Macroeconomics and Health recognizes the centrality of funding for AIDS, tuberculosis, and malaria in the fight against global disease, it advocates spending $34 billion a year by 2007 on *both* general *and* targeted health care programs in developing countries.[13] With this level of funding, the world can begin to reverse the tide of disease, prevent 8 million deaths a year, and generate $360 billion in economic benefits a year.

Developed-country trade policy and pursuit of enhanced intellectual property rights have complicated a viable response to HIV/AIDS and other diseases where patented medicines are too expensive for poor countries to purchase. In place of an energetic global reaction speeding medical care to developing countries, the United States and its European and Japanese allies have enforced a protectionist system of intellectual property protections that frequently keeps low-cost drugs from people in need. This system, designed primarily to preserve drug companies' exclusive access to private sector markets in middle-income developing countries, often forestalls access to dramatically cheaper generic medicines for people in immediate need.

The prime example of this imbalanced sense of priorities occurred in multilateral negotiations that established a uniform system of international intellectual property rights, the WTO TRIPS Agreement. But even after securing a new international standard of patent protection in the GATT negotiations, the United States continued to pursue its goal of heightened intellectual property protections through an ongoing series of trade sanction

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11. *The Global Fund to Fight AIDS, Tuberculosis, and Malaria: FAQ, available at* http://www.globalfundatm.org/en/faq/ (last visited Feb. 10, 2004).

> The concept for an international funding mechanism to fight HIV/AIDS, TB, and malaria began at the Okinawa G8 Summit in July 2000. At the urging of UN Secretary General Kofi Annan and many national leaders, the concept of the Global Fund was unanimously endorsed in June 2001 at the first UN General Assembly Special Session to focus on HIV/AIDS. In July 2001 at its meeting in Genoa, G8 leaders committed US $1.3 billion to the Fund.

Id.

12. The Bush administration has sent mixed messages about whether it will allow purchases of lowest cost generics or preferred proprietary drugs in its new initiative. *See infra* subsection 5.2.

13. Report of the Commission on Macroeconomics and Health, Analysis of the Costs of Scaling Up Priority Health Interventions in Low- and Selected Middle-Income Countries (Appendix 2), *available at* http://www3.who.int/whosis/cmh/cmh_report/e/report.cfm?path=cmh,cmh_report&language=english (last visited Apr. 4, 2004).

threats, its stubborn resistance in WTO negotiations aimed at liberalizing access to medicines, and its pursuit of bilateral and plurilateral negotiations designed to "ratchet" intellectual property protections to an even higher level.[14]

Section 2 of this paper presents a critical analysis of the United States' continued defense of drug company prerogatives and of its multi-forum efforts to achieve even higher levels of intellectual property protection. Concurrently, Section 2 reviews the struggle of developing countries to codify greater recognition of public health perogatives and to engineer increased intellectual property flexibilities, a struggle that reached its high point in Doha, Qatar, on November 14, 2001, when the WTO adopted the Doha Declaration on the TRIPS Agreement and Public Health (the Doha Declaration).[15] Although the Doha Declaration confirmed member states' freedom to issue compulsory licenses and to rely on parallel imports as an alternative source for lower-cost branded medicines, it left open sourcing issues for poor countries that cannot produce medicines efficiently through domestic manufacturers because of insufficient or inefficient pharmaceutical capacity. For these countries, local production is impossible and importation from exporters is increasingly restricted because of a requirement in TRIPS that countries bypassing patent rights for particular medicines must produce predominately for their own domestic markets rather than for export. Thus, Paragraph 6 of the Doha Declaration required a resolution to the production-for-export dilemma by the end of 2002. Despite this deadline, U.S. intransigence resulted in impasse at the end of 2002, necessitating another nine months of negotiation. Finally, on August 30, 2003, WTO members unanimously approved the Decision of 30 August 2003: Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (Paragraph 6 Implementation Agreement).[16]

Section 3 of this paper, its major section, summarizes the August 30, 2003 compromise on the Paragraph 6 dilemma and then outlines in detail the multiple options that developing countries have for accessing medicines from willing producers under the TRIPS Agreement, the Doha Declaration, and the new August 30 Paragraph 6 Implementation Agreement. Section 4 of the

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14. Peter Drahos, *Bilateralism in Intellectual Property* (2001), *available at* http://www.oxfam.org.uk/what_we_do/issues/trade/bilateralism_ip.htm (last visited Apr. 1, 2004) (discussing the United States strategy of using bilateral and regional forums to establish higher intellectual property protections which it then pursues in larger regional and international trade negotiations).

15. Declaration on the TRIPS Agreement and Public Health, Ministerial Conference, Fourth Session, Doha, Nov. 9-14 2001, WT/MIN(01)/DEC/2 (Nov. 20, 2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm (last visited Apr. 4, 2004) [hereinafter Doha Declaration].

16. WTO, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (Sept. 1, 2004) WT/L/540, *available at* http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm (last visited Apr. 4, 2004) [hereinafter Paragraph 6 Implementation Agreement].

paper then outlines the breadth of legislative reform that developing countries must enact in order to take advantage of the entire range of flexibilities that they now have. Because developing countries with marginal pharmaceutical capacity will still face questions about whether to invest in or subsidize local generic manufacturing or to import essential medicines from abroad, Section 5 provides a brief economic analysis of the prerequisites of efficient generic manufacture and the special importance of economies-of-scale in securing lowest prices. Section 6 discusses procurement policies of the Global Fund and the World Bank and of unilateral initiatives such as the President's Emergency Program for AIDS Relief (PEPFAR) that might impact sourcing decisions.

Arthritic flexibilities achieved in the Doha Declaration and in the Paragraph 6 Implementation Agreement risk being undermined because of the negative impact of bilateral and plurilateral free trade agreements being negotiated by the United States with individual developing countries and with developing regions. Thus, Section 7 of the paper highlights negative aspects of recent U.S. free trade agreements and other trade and intellectual property initiatives. This section recommends that developing countries insist on removing intellectual property provisions affecting medicines from bilateral and plurilateral trade agreements and that the TRIPS Agreement should now be seen as both a floor and a ceiling on such intellectual property rights.[17] Finally, in Section 8, the paper argues first for guaranteed access to proprietary registration data to enable marketing of generic drugs and second that developing country negotiators should not settle for the flawed Paragraph 6 Implementation Agreement during their upcoming negotiation to amend the TRIPS Agreement on a permanent basis. Instead, this paper argues that developing countries should return to a simplified Article 30 solution that puts them on equal footing with large, rich countries that can routinely satisfy their compulsory licensing needs through no-hassle, no-limit domestic production.

17. Although Article 1.1 of TRIPS explicitly allows Member states to "implement in their law more extensive protection than is required by this Agreement," that permission should not end the analysis of whether or not TRIPS should act as a ceiling with respect to the IPR obligations of developing countries.

2. A BRIEF HISTORY OF INTELLECTUAL PROPERTY PROTECTION NEGOTIATIONS: THE TRIPS AGREEMENT, THE DOHA DECLARATION, AND THE PARAGRAPH 6 IMPLEMENTATION AGREEMENT.

2.1: The WTO TRIPS Agreement

The 1994 TRIPS Agreement introduced minimum global standards for protecting and enforcing nearly all forms of intellectual property rights: patents, copyrights, and trade secrets, including those applying to pharmaceuticals.[18] The Agreement was the result of a decade-long movement by a coalition of industries in the United States that united to secure an international standard of intellectual property protections that could be enforced through trade sanctions. Frustrated by the inability of the World Intellectual Property Organization[19] to engineer global standardization and harmonization of IP standards, the pharmaceutical, computer software, publishing, and entertainment industries in the United States cooperated to form their own internal alliances and to lobby business groups to back enhanced intellectual property protections. This strengthened U.S. alliance then worked with industry leaders and networks in other developed countries to motivate the importance of globalizing IP protections. While they were cementing their intercontinental business alliances, these forward thinking industries convinced first the U.S. Trade Representative and then the E.U. and Japanese trade representatives that the General Agreement on Trade Tariffs (GATT)[20] was the forum within which intellectual property protections should be pursued. Although developing countries tried to create a coalition of the unwilling, the United States used its new Section 301 Special Trade List IPR authority to

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18. *See* Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy* (2003) (detailed history of the political and strategic genesis of the TRIPS agreement as engineered by U.S. knowledge industries). For a detailed and technical analysis of the background and main policy issues of TRIPS, see *UNCTAC/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development, TRIPS and Development: Resource Book* (2002). For a discussion of the flexibilities available to developing countries with respect to TRIPS-compliant implementation, see Carlos Correa, *Integrating Public Health Concerns into Patent Legislation in Developing Countries, available at* http://www.southcentre.org/publications/publichealth/toc.htm (last visited Apr. 5, 2004). For a discussion of the impact of the TRIPS Agreement and access to medicines, see World Health Organization, *The TRIPS Agreement and Pharmaceuticals: Report of an ASEAN Workshop on the TRIPs Agreement and its Impact on Pharmaceuticals* (2000), *available at* http://www.eldis.org/static/DOC9116.htm (last visited Apr. 5, 2004); Michael Bailey, Ruth Mayne & Dr. Mohga Smith, *Fatal Side Effects: Medicine Patents under the Microscope*, (Feb. 2001), *available at* http://www.oxfam.org.uk/what_we_do/issues/health/fatal_side_effects.htm (last visited Apr. 5, 2004) [hereinafter *Fatal Side Effects*].

19. *See generally About WIPO*, WIPO website, http://www.wipo.int/about-wipo/en/overview.html (last visited Apr. 5, 2004).

20. *See generally* CIESIN Thematic Guides: General Agreement on Tariffs and Trade, *available at* http://www.ciesin.org/TG/PI/TRADE/gatt.html (last visited Apr. 5, 2004).

discipline recalcitrant nations and to split the alliance. Reacting to competition from generic producers, the U.S. and E.U. pharmaceutical industries played a lead role in TRIPS negotiations.[21] At the end of the day, its principal negotiator stated that the industry had achieved all of its aims: controlling the process and the content.[22]

The resulting TRIPS Agreement covers basic principles, standards, and use of patents, enforcement and dispute settlement mechanisms, and multiple other subjects, many of which are tilted in favor of intellectual property owners and against the interests of consumers. Under its key patent provisions, member countries must provide patent protection for a minimum of twenty years from the filing date of a patent application, Article 33, for any invention, including a pharmaceutical product or process, that fulfils the criteria of novelty, inventive step and usefulness, Article 27.1. Although preceding patent-rule pluralism in both the developed and undeveloped world had allowed policy-based discrimination between fields of invention, for example by excluding medicines, Article 27.1 expressly outlawed such discrimination. Similarly, it was no longer permissible to discriminate routinely against imports in favor of locally produced products, thus allowing major pharmaceutical companies to control the *place* of production despite illusory promises to undertake technology transfer.[23] Because of Article 28, the major pharmaceutical producers secured exclusive rights to exclude others from "making, using, offering for sale, selling, or importing" patented pharmaceutical products or products made with a patented process. In addition, Article 39.3 protects undisclosed information (including clinical test data) from "unfair commercial use," a provision that may ultimately be interpreted to impede registration of generic drugs even where patent bars are overcome.[24]

Admittedly, there are important flexibilities in TRIPS, discussed in detail in Section 3, including autonomy under Article 6 to establish international exhaustion rules, which would thereby permit parallel importation,[25] and

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21. *Fatal Side Effects*, *supra* note 18, at 38.

22. "In the words of Edmund Pratt of Pfizer, 'Our combined strength enabled us to establish a global private sector-government network which laid the groundwork for what became TRIPS.'" *Id.*

23. "The protection and enforcement of intellectual property rights should contribute to promotion of technological innovation and to the transfer and dissemination of technology...." Art. 7, TRIPS Agreement, *supra* note 7. Shortly after the adoption TRIPS, a number of developing countries, including Chile and South Africa, lost a significant number of pharmaceutical facilities.

24. For an extended discussion of options concerning appropriate use of undisclosed data, see Carlos Correa, *Protection of Data Submitted for the Registration of Pharmaceuticals: Implementing the Standards of the TRIPS Agreement* (2002). The ability of generic producers to compare generic drugs against previously registered medicines to establish bio-equivalent and comparable bio-availability is crucial to avoid cost-prohibitive, time consuming, and wasteful duplication of clinical trials. *Id.*

25. *See* discussion *infra* subsection 3.2.2.

authority under Article 31 to issue compulsory licenses[26] and under Article 30 to grant limited exceptions to patent holders' right to exclude competition,[27] but the undeniable effect of the TRIPS agreement has been to consolidate the economic power and monopoly privileges of the proprietary drug industry. Given its pre-existing advantage in conducting research and development (96% vs. 4%), the developed world's drug industry secured near absolute competitive advantage over the developing world's via the TRIPS Agreement.[28] This advantage will eventually result in the net transfer of billions of dollars from the impoverished Global South to the affluent Global North.

At the time of its passage, many public health specialists in both developed and developing countries seemed unaware of the looming consequences of a rising tide of patent protection on the treatment of diseases.[29] However, the burgeoning AIDS crisis quickly caught people's attention, especially given the astronomical cost of triple-therapies brought to the market in the mid-1990s. As the developing world confronted the reality of tens of millions of HIV infections and the unaffordability of billions of patent-protected pills, critics questioned the deal that had been struck in the Uruguay Round. Early critics were joined later by more mainstream sources, many of whom offered their own critique of intellectual property fundamentalism, including the prestigious U.K. Commission on Intellectual Property Rights,[30] the UNDP,[31]

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26. *See* discussion *infra* subsections 3.2.3 and 3.2.4.

27. *See* discussion *infra* subsection 3.2.6.

28. WORLD BANK, WORLD DEVELOPMENT INDICATORS 2000, Table 5-12 (2000).

29. There is little doubt that the U.S. and European negotiators were intimately aware of the cost implications of the expanded patent protections—they were negotiating at the bequest and often with the assistance of representatives of the pharmaceutical industry. Likewise, India and Brazil seemed knowledgeable about the future impacts of the agreement, but a divide and conquer strategy by the United States undermined a potential developing country alliance that opposed grafting monopoly-based intellectual protections on top of a multilateral "free trade" agreement. The main tool that the United States used in splitting the incipient alliance was Special 301 Lists and threats of trade sanctions under 19 U.S.C. § 2242 (2003), which was amended in the Omnibus Trade and Competitiveness Act of 1988 to include close surveillance of IPRs. For a history of this use of bilateral threats, see Drahos & Braithwaite, *supra* note 18, at 85-107.

30. Report of the Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (2002), *available at* http://www.iprcommission.org/papers/pdfs/final_report/ciprcoverintrofinal.pdf (last visited Apr. 5, 2004).

31. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2001: MAKING NEW TECHNOLOGIES WORK FOR HUMAN DEVELOPMENT (2001), *available at* http://hdr.undp.org/reports/global/2001/en/pdf/completenew.pdf (last visited Apr. 5, 2004).

the World Bank,[32] UNTACD/ICTSD,[33] and even the WTO itself in collaboration with the WHO.[34]

Even after codifying a universally higher standard of patent protections for the pharmaceutical industry in the TRIPS Agreement, the United States continued its existing pro-PhRMA[35] trade policy by threatening developing countries such as Thailand,[36] South Africa,[37] and Brazil[38] with trade sanctions

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32. *Intellectual Property: Balancing Incentives with Competitive Access in* GLOBAL ECONOMIC PROSPECTS, 129-50 (Washington, D.C. 2001), *available at* http://www.worldbank.org/prospects/gep2002/chapt5.pdf (last visited Apr. 6, 2004).

33. UNCTAD-ICTSD, *Intellectual Property Rights: Implications for Development, available at* http://www.ictsd.org/pubs/ictsd_series/iprs/pp/pp_1intro.pdf (last visited June 3, 2004).

34. WTO AGREEMENTS & PUBLIC HEALTH: A JOINT STUDY BY THE WHO AND THE WTO SECRETARIAT (2002).

35. PhRMA (the Pharmaceutical Research and Manufacturers of America) is the trade association for major proprietary drug companies in the United States, PhRMA Homepage, *at* http://www.phrma.org (last visited June 3, 2004). The international pharmaceutical lobby group is called the International Federation of Pharmaceutical Manufacturers Association (IFPMA). IFPMA Homepage, *at* http://www.ifpa.org (last visited June 3, 2004). When referring to PhRMA, this paper is not just referring to the formal trade association but to the international cartel of patent holders that have pursued mutually advantageous intellectual property strategies often in collaboration with U.S. and European trade negotiators.

36. Efforts by the Thai government in 1999-2000 to produce the drug under the compulsory licensing provision of TRIPS, as demanded by Thai NGOs and PLWHAs, failed as the United States government brought intense pressure and made a threat of Special 301 sanctions on Thai exports through its trade arm, the U.S. Trade Representative (USTR), in clear violation of its obligations under the WTO.

> In fact, GPO's attempt at procuring raw materials in December 1999 for DDI from a Japanese company (which is also the main supplier to BMS) also failed because of pressure from BMS. Therefore GPO had to turn to Canadian suppliers who charged twice the price. The BMS case in Thailand is a classic example of the overriding profiteering motives of drug multinationals over access to essential medicines for public health, how companies use patents with minor modifications to establish monopolies and extend the period of patent protection, the bullying trade tactics of the U.S. government and its attempts to preserve the monopoly of its transnational drug companies.

R. Ramachandran, *A Patent War in Thailand,* (Oct. 2003).

37. *See, e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681 (1999):

> [N]one of the funds appropriated under this heading may be available for assistance for the central Government of the Republic of South Africa, until the Secretary of State reports in writing to the appropriate committees of the Congress on the steps being taken by the United State Government to work with the Government of the Republic of South Africa to negotiate the repeal, suspension, or termination of section 15(c) of South Africa's Medicines and Related Substances Control Amendment Act No. 90 of 1997.

According to U.S. State Department documents and statements at the time, "[multiple federal agencies] have been engaged in an assiduous, concerted campaign to persuade the Government of South Africa to modify the provisions of Article 15(C)" that the United States believed violated the TRIPS Agreement. PATRICIA D. SIPLON, AIDS AND THE POLICY STRUGGLE IN THE UNITED STATES 120-21 (2002). For a discussion of early pro-pharma U.S. trade policy in South Africa, see Patrick Bond, *Globalization, Pharmaceutical Pricing and*

because they refused to grant greater TRIPS-plus rights to patent holders and/or because they proposed using TRIPS compliant means to access more affordable medicines. At the same time that the United States was engaged in "a full court press" against South Africa,[39] thirty-nine pharmaceutical plaintiffs sued the Mandela government, challenging new legislation designed to permit parallel importation of medicines a patent holder had sold more cheaply in another country, generic substitution in filling prescriptions of off-patent medicines, and greater price transparency.[40] Fortunately, the trade threats against South Africa, the now infamous pharmaceutical lawsuit, and the WTO complaint against Brazil were all defeated between 1999-2001 by a Southern/Northern alliance that engaged in a coordinated public campaign against U.S./PhRMA policy. As a result of this intense pressure, the Clinton administration eventually reversed some of its more draconian trade threats and promised to pursue a slightly more benign trade policy in sub-Saharan Africa.[41]

2.2: The Doha Declaration

As the pandemic intensified and as treatment activists worldwide demanded a relaxation of the stranglehold patent holders held over life-saving medicines, developing countries collaborated to demand that public health be given a more meaningful role in the interpretation and implementation of the TRIPS Agreement.[42] Thus, in April 2001, Zimbabwe, on behalf of the Africa

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South African Health Policy: Managing Confrontation with U.S. Firms and Politicians, 29 INT'L J. HEALTH SERV. 765, 768 (1999).

38. For a brief history of the U.S. WTO complaint against Brazil, see Ellen t'Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT'L L. 27, 30-33 (2002).

39. SIPLON, *supra* note 37, at 121.

40. Pharm. Mfrs. Ass'n of S. Africa v. President of the Republic of S. Africa, Case No. 4193/98 (filed Feb. 18, 1998). The lawsuit was unconditionally dismissed in April 2001 following "strong international public outrage." t'Hoen, *supra* note 38, at 31.

41. SIPLON, *supra* note 37, at 123-26. Of particular note is the Clinton Executive Order of May 10, 2000, Exec. Order No. 13,155, 3 C.F.R. 268 (2000), which, in relevant part, reads:

> (a) In administering sections 301-310 of the Trade Act of 1974, the United States shall not seek, through negotiation or otherwise, the revocation or revision of any intellectual property law or policy of a beneficiary sub-Saharan African country, as determined by the President, that regulates HIV/AIDS pharmaceuticals or medical technologies if the law or policy of the country: (1) promotes access to HIV/AIDS pharmaceuticals or medical technologies for affected populations in that country; and (2) provides adequate and effective intellectual property protection consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(15)).

42. For a detailed account of this collaboration, see Frederick M. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO*, 5 J. INT'L ECON. L. 469, 480-90 (2002). Developing countries rejected the theory that differential pricing would meet their needs.

Group, demanded that the TRIPS Council convene a special session on access to medicines. The resulting June 2001 meeting provoked stark positioning by the United States[43] and European Union,[44] who jointly advanced pro-PhRMA positions. However, it also resulted in a strong platform by developing countries that evolved with later submissions to include the following points: (1) developing countries have a broad spectrum of public health concerns, not just HIV/AIDS, and they are particularly concerned about the lack of research on so-called neglected diseases; (2) patents raise prices and thus impede access to medicines; (3) developing countries should be free to use existing TRIPS flexibilities including compulsory licenses and parallel importation without being threatened by developed countries; (4) least developed members need an extension of transitional periods beyond 2006; (5) developing countries need to be able to source generic medicines from exporting countries despite the "predominately for domestic use" rule in Article 31(f) of the TRIPS Agreement, preferably through an Article 30 limited exception; and (6) developing countries need assurances that data protection rules in Article 39.3 would not impede registration of generics.[45]

Although the United States continued to discount the importance of patent protection on either price or access to treatment,[46] to insist on limiting discussion to "emergencies" like HIV/AIDS, malaria, and tuberculosis, and to advocate for restricting parallel importation,[47] the negotiations took a sharp

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43. U.S. Statement at TRIPS Council Meeting, *available at* http://lists.essential.org/pipermail/pharm-policy/2001-June/001175.html (last visited Feb. 10, 2004).

44. Communication from the European Communities and Their Member States, IP/C/W/280 (June 12, 2001).

45. *See* Developing Country Group's Paper, IP/C/W/296 (June 29, 2001); Draft Ministerial Declaration—Proposal from a Group of Developing Countries, IP/C/W/312 (Oct. 4, 2001).

46. In making this argument, the United States relied heavily on an unpublished study subsequently published in the fall of 2001. Amir Attaran & Lee Gillespie-White, *Do Patents for Antiretroviral Drugs Constrain Access to AIDS Treatment in Africa?*, 286 JAMA 1886, 1888 (2001). Although HIV medicines have not been patented pervasively throughout the developing world, particularly in sub-Saharan Africa, the explanation for this pattern of non-uniform patenting is that smaller and poorer nations do not have markets that warrant the cost of patent applications. Despite incomplete patenting, however, there are multiple antiretroviral patents in those few countries, South Africa, Kenya, and Nigeria, that have meaningful market size and some pharmaceutical capacity. Similarly, there is a pattern whereby some of the most important low-dose, low-cost antiretroviral medicines are patented in countries where the disease is concentrated. Low-cost, front-line antiretroviral therapies involving 3TC, d4T, AZT, Abacavir, and/or Nevirapine are significantly blocked by patents in countries containing sixty-eight percent of HIV positive persons in sub-Saharan Africa. Consumer Project on Technology et al., *Comment on the Attaran/Gillespie-White and PhRMA Surveys of Patents on Antiretroviral drugs in Africa* (Oct. 16, 2001), *available at* http://lists.essential.org/pipermail/ip-health/2001-October/002097.html (last visited Apr. 5, 2004). *See* Sean Flynn, *Legal Strategies for Expanding Access to Medicines*, 17 EMORY INT'L L. REV. 535, 538-39 (2003).

47. Ministerial Declaration pmbl., Contribution from Australia, Canada, Japan, Switzerland and the United States, IP/C/W/313 (Oct. 4, 2001), *available at* http://www.wto.org/english/tratop_e/trips_e/mindecdraft.w313_e.htm (last visited Jan. 31, 2004); *Non-Paper, Contribution from Canada, the Czech Republic, Japan, New Zealand,*

turn in the wake of the anthrax scare in the United States post September 11. Based on a handful of deaths and some anthrax-laden letters delivered to government offices, officials in both the United States and Canada threatened Bayer, the patent owner of ciprofloxacin, a preferred anthrax treatment, with compulsory licenses if Bayer could not supply needed quantities of ciprofloxacin at low cost and in high volumes. Suddenly, the urgency of public health concerns became palpable to U.S. decision-makers. In response, the resolve of the developing world stiffened and prospects for a pro-public health TRIPS accord soared.

Accordingly, on November 14, 2001, WTO members unanimously approved the Doha Declaration. Designed by developing countries to counteract continuing trade threats and a crisis in medical care, the Doha Declaration emphasized the primacy of public health and the right of Member Nations to take measures designed to increase access to affordable medicines. In relevant part, the Doha Declaration states:

Switzerland and the United States, available at http://lists.essential.org/pipermail/ip-health/2001-September/001899.html (last visited Feb. 13, 2004).

1. We recognize the gravity of public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.
2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.
3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.
4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.
5. In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.
   (a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
   (b) Each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.
   (c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
   (d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN [Most Favored Nation] and national treatment provisions of Articles 3 and 4.[48]

48. Doha Declaration, *supra* note 15.

In addition to clarifying the preeminence of public health and the importance of access to medicines and confirming key flexibilities within the TRIPS Agreement, the Doha Declaration also promised to resolve the so-called production-for-export problem:

> 6. We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.[49]

Via paragraph 6, all WTO members recognized that countries with insufficient or inefficient manufacturing capacity would not be able meet their needs for cheaper pharmaceutical products by internal production even when they override patents through the issuance of compulsory licenses.[50] Key transitional time periods in the TRIPS agreement would soon require worldwide protection for pharmaceutical products beginning in 2005, even for countries like India that had previously given patent protection only to pharmaceutical processes.[51] This change in India's patent law would dramatically curtail its current lawful practice of reverse-engineering drugs and then producing them for export. Instead, post-1995 generics produced in any WTO member country (except hypothetically in least developed countries) would ordinarily have to be produced pursuant to compulsory licenses.[52] As previously discussed, Article 31(f) of TRIPS limits production under a compulsory license "predominantly" to the domestic market. This then was

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49. *Id.*

50. Paragraph 6 refers to compulsory licenses, but Article 31 of TRIPS refers to the broader concept of "unauthorized use," which as a practical matter covers both compulsory licenses and non-commercial, governmental use, or "crown use" as it is called in Commonwealth countries.

51. TRIPS Agreement, *supra* note 7, art. 65.4. There is now an even longer transitional period for least developed countries (increased from 2006 to 2016), but the short-term prospect that any of them will become large-scale manufacturers and exporters of pharmaceuticals seems remote. *See id.* art. 66. *See also* Doha Declaration, *supra* note 15, ¶ 7.

52. The problem does not arise simply with respect to medicines newly patented in 2005 or thereafter. TRIPS already has a "mail-box" rule whereby developing countries are obligated to establish mechanisms for receiving, processing, and establishing "priority-in-time" for pharmaceutical patent applications. Furthermore, developing countries have to grant exclusive distribution rights to the patent applicant when certain prescribed conditions were satisfied. TRIPS Agreement, *supra* note 7, art. 70. Thus, the mailbox rule effectively precludes generic manufacturers in developing countries that do not recognize patents on medicines or product patents from producing "copies" of medicines described in pending "mailbox" applications. Stated differently, patent applicants have significant and exclusive market advantages with respect to post-1995 discoveries even before the full adoption of TRIPS in developing countries.

the essence of the production-for-export dilemma—desperate demand but no certain source of future supply.

> 7. We also agree that the least-developed country Members will not be obligated, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these sections until 1 January 2016.[53]

Finally, the Doha Declaration proposed an extension for least-developed country members concerning their obligations to grant and enforce product patents on pharmaceutical products; that and an additional waiver affecting market exclusivity for patent applications held in a transition-period "mailbox" pursuant to Article 70.9 were subsequently voted upon by the General Council.[54] Accordingly, as a matter of TRIPS enforcement, countries could suspend the future operation of their medicines patent and market exclusivity schemes even where they had prematurely and improvidently granted such protections before the expiration of their transition period, January 1, 2006. If they fail to do so by suspending or amending their product patent law, however, patent-holders can continue to file and enforce patents.[55] Moreover, freedom from threat of TRIPS sanctions does not relieve least-developed countries from pre-existing obligations to patent holders who can continue to protect their vested patent rights. Those rights can still be abrogated only via a compulsory license or government use order.

The terms of a fair and expeditious solution for accessing medicines in countries with inadequate domestic capacity were repeatedly advanced by the Africa Group and an affiliated coalition of developing countries[56] and

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53. Doha Declaration, *supra* note 15.

54. The additional ten-year transition period was granted on June 27, 2002. *See Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products*, IP/C/25 (July 1, 2002), *available at* http://www.wto.org/english/tratop_e/trips_e/art66_1_e.htm (last visited Apr. 6, 2004). The waiver on market exclusivity was granted on July 8, 2002. *See Least-Developed Country Members—Obligations under Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products*, WT/L/478 (July 12, 2002), *available at* http://www.wto.org/english/tratop_e/trips_e/art70_9_e.htm (last visited Apr. 6, 2004).

55. According to a recent study by the U.K. Commission on Intellectual Property Rights, the majority of least developed countries have prematurely granted patent protections for pharmaceutical products. Phil Thorpe, *Study on the Implementation of the TRIPS Agreement by Developing Countries*, Commission on Intellectual Property Rights, Study Paper 7 (2001).

56. *See* Statement on the Considerations for Paragraph 6 Modalities Delivered by Kenya on Behalf of the African Group, Brazil, Cuba, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Malaysia, Sri Lanka and Thailand at the TRIPS Council Meeting on March 5, 2002, IP/C/M/35 (Mar. 22, 2002), *available at* www.law.suffolk.edu/faculty/visiting-past/mpatterson/globaltech/materials/African%20Group%20statement.html (last visited Feb.

NGOs[57]. According to this pro-public health coalition, the production-for-export accord should cover a broad range of diseases and public health needs, so that medicines for multiple debilitating and deadly conditions could be accessed more cheaply. Countries should be able to import a broad range of products including medicines, vaccines, diagnostic tests, and other medical products. Likewise, any country should be able to make use of the Declaration's public health provisions, even though it is undoubtedly true that developing countries had the greatest need. To supply importing countries, any country should be eligible to be an exporter; however, there is an underlying need to fulfill the promise of technology transfer. In addition, onerous diversion rules should not be imposed to address the illusory risk of re-export and sale in rich countries like the United States and Europe that are perfectly capable of reducing or eliminating product diversion on their own. Finally, procedural requirements should be minimized, meaning that a limited exception under Article 30 of the TRIPS Agreement, as endorsed by the WHO[58] and

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26, 2004); Joint Communication from the African Group in the WTO, IP/C/W/351 (June 24, 2002), *available at* http://lists.essential.org/pipermail/ip-health/2002-june/003193.html (last visited Feb. 27, 2004); Communication from Brazil on behalf of Bolivia, Brazil, Cuba, China, Dominican Republic, Ecuador, India, Indonesia, Pakistan, Peru, Sri Lanka, Thailand and Venezuela, IP/C/W/355 (June 24, 2002), *available at* http://commerce.nic/in/ip_c_w_355.htm (last visited Feb. 27, 2004); South African Non-Paper on Substantive and Procedural Elements of a Report to the General Council under Paragraph 6 of the Declaration on the TRIPS Agreement and Public Health, Job(02)/156 (Nov. 5, 2002), *available at* http://www.cptech.org/ip/wto/p6/southafrica11052002.html (last visited Jan. 30, 2003); Communication from Kenya, the Coordinator of the African Group, IP/C/W/389 (Nov. 14, 2002), *available at* http://essential.org/pipenmail/ip-health/2002-November/003729.html (last visited Feb. 27, 2004).

57. A partial list of international NGOs active in the campaign for access to treatment and for simplified Article 30 procedures includes: Oxfam International; Action Aids Alliance; Consumer Project on Technology US; Health Global Access Project (GAP); Health Action International; Lawyers Collective' HIV/AIDS Unit, India; Medecins sans Frontieres; Thai NGO Coalition on AIDS and Thai Network of People with HIV/AIDS; Third World Network; and Treatment Action Campaign, South Africa.

58. This is the solution expressly endorsed on September 17, 2002, by the World Health Organization:

> [T]he limited exception under Article 30 is the most consistent with this public health principle. This solution will give WTO Members expeditious authorization, as requested by the Doha Declaration, to permit third parties to make, sell and export medicines and other health technologies to address public health needs.

WTO Council for Trips, Statement by the Representative of the WHO, Sept. 17, 2002, *available at* http://www.cptech.org/ip/health/who/who091722002.html (last visited Feb. 27, 2004).

It is also the solution implicitly endorsed by the UK Commission on Intellectual Property Rights, which emphasized the importance of economies-of-scale in attracting generic producers. And, finally, it is the solution temporarily endorsed by the European Parliament to amend its medicines regulation scheme:

> Manufacturing shall be allowed if the medicinal product is intended for export to a third country that has issued a compulsory license for that product, or where a patent is not in force and if there is a request to that effect of the competent public health authorities of that third country.

Amendment 196 to the Directive 2001/83/EC of the European Parliament (since rejected).

many other countries,[59] was vastly superior to the proposed U.S. solution requiring hundreds of product-by-product, country-by-country compulsory licenses in exporting countries. A solution with these terms, articulating definite and enduring rights, would have been a huge step in addressing the crisis of access to affordable medicines in the developing world.

2.3 Unilateral Impasse

After initially agreeing to do so in the Doha Declaration, the United States, for nearly two years, blocked meaningful efforts to liberalize access to generics and in particular blocked an expeditious and efficient solution to the production-for-export dilemma.[60] The extent of the U.S. blocking strategy was epitomized in its first two Paragraph 6 submissions to the TRIPS Council,[61] which proposed the following conditions:

(1) a requirement that export licenses be limited to addressing "grave" or "urgent" public health emergencies, such as HIV/AIDS, TB, and malaria only (a restriction previously defeated in the Doha Declaration);
(2) limits on the types of public health products to be covered by the agreement to pharmaceutical products only;
(3) limits on the sectors which might be supplied by the agreement, specifically excluding the private or "commercial, for-profit sector;"
(4) limits on the importing countries that might benefit from the agreement:
    (a) no application to small market countries that theoretically have technical capacity to produce medicines but insufficient market size to achieve economies-of-scale,
    (b) strict application of the "insufficient manufacturing capacity" standard to exclude countries where production was theoretically possible but otherwise infeasible or impractical,

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59. Developing countries championed an explicit Article 30 solution right up until the fall of 2002, though it is notable that the South African Non-Paper, *supra* note 56, and the Communication from Kenya, the Coordinator of the African Group, *supra* note 56, both fail to mention Article 30 directly.

60. These measures include parallel importation, relaxation of the predominately for domestic use rule in Article 31(f) of the TRIPS Agreement, and use of the limited exception option in Article 30 of the TRIPS Agreement.

61. Communication from the United States, IP/C/W/340 (Mar. 14, 2002); Second Communication from the United States, IP/C/W/358 (July 9, 2002).

(c) income limits that would exclude many developing countries, especially middle-tier countries;

(5) limits on the countries that might export (developing countries only);

(6) a preference for Article 31(f) compulsory licensing solutions in the exporting state that create multiple barriers to implementation including:

(a) prior negotiation on commercially reasonable terms with the patent holder who might impose onerous conditionalities;

(b) costly, burdensome, and protracted individual determinations in administrative or judicial proceedings to grant each license on a case-by-case basis;

(c) dependency on the willingness of a third country to go through such burdensome procedures because of a public health need in a third country,

(d) proof both of a triggering public health need in the affected country and of technical incapacity to produce a particular medicine; and

(e) determination of the level of license compensation in the producing country rather than in the importing country and imposition of a licensing fee even with respect to imports into a no-patent country;

(7) strict anti-diversion guarantees and limitations on re-export, especially to developed countries, but perhaps even regionally between developing countries with comparable public health needs.[62]

According to developing world critics and their allies, each of these conditions violated the letter and spirit of the Doha Declaration and each risked undermining expeditious and efficient responses to public health needs. Although the United States eventually retreated on three conditions,[63] it succeeded in inserting most of them in a "compromise" text agreement

62. Communication from the United States, *supra* note 61; Second Communication from the United States, *supra* note 61.

63. The United States first relaxed its insistence on market segmentation, which theretofore had excluded the for-profit sector. Next, it dropped its insistence on production by developing countries only, but only after this strategy had driven a partial wedge into the developing country coalition, essentially raising questions among some African countries as to whether India and Brazil were pursuing an industrial policy option that would undermine the development of pharmaceutical capacity in Africa. Finally, it agreed to allow more efficient regional trade of generics in WTO-sanctioned regional trading groups, so long as the groups contained at least 50% least developed countries.

prepared by Ambassador Motta, Chairman of the TRIPS Council.[64] However, because it could not impose further agreement with respect to its restrictive view on covered disease,[65] the United States unilaterally rejected the Motta compromise on December 20, 2002,[66] ensuring that a Paragraph 6 solution would not be realized by the end of 2002, as promised.

As expected, developing countries were deeply offended by the U.S. attack on their sovereignty and by its suggestions that only a few diseases should be covered by the paragraph 6 solution. Even though rich countries with ample productive capacity would be able to issue compulsory licenses on any grounds whatsoever pursuant to the baseline flexibilities of Article 31, poorer and smaller countries would have options to address a short list of pandemic diseases and a baker's dozen of tropical diseases for which there were few, if any, medicines.[67] Suddenly, the scales of compulsory licensing were tilted in favor of the United States and Europe, which can produce on-patent medicines domestically should they so decide, and against countries like Malawi, which have to rely on imports. These disfavored countries would, according to Northern demands, have to favor AIDS patients over people with diabetes, or people with malaria over people with asthma. This imbalance

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64. Draft Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, JOB(02)/217 (Dec. 16, 2002), *available at* http://www.cptech.org/ip/wto/p6/wto12162002.html (last visited Feb. 27, 2004).

65. The U.S. position on the scope of disease issue was that the Paragraph 6 solution should only cover grave public health crises associated with HIV/AIDS, malaria, or tuberculosis and other infectious epidemics of comparable scale and gravity. Second Communication from the United States, *supra* note 61.

66. Ambassador Eduardo Pérez Motta of Mexico, who chaired the TRIPS Council, told the General Council of the WTO on December 20, 2002, that "intensive consultations had not resolved differences over the diseases that would be covered by the draft decision on intellectual property and health." WTO Press Release, Press/329, Supachai Disappointed Over Governments' Failure to Agree on Health and Development Issues (Dec. 20, 2002), *at* http://www.wto.org/english/news_e/pres02_e/pr329_e.htm (last visited Feb. 27, 2004).

67. Europe and Japan backed the U.S. attempt to dramatically limit the scope of diseases by jointly proposing a list of tropical diseases, most of which had no effective treatment whatsoever or which had no viable medical treatment still under patent.

> This decision applies to public health problems arising from yellow fever, plague, cholera, meningococcal disease, African trypanosomiasis, dengue, influenza, HIV/AIDS, leishmaniasis, TB, malaria, hepatitis, leptospirosis, pertussis, poliomyelitis, schistosomiasis, typhoid fever, typhus, measles, shigellosis, haemorrhagic fevers, and arbovirues and other epidemics of comparable gravity and scale including those that might arise in the future whether due to natural occurrence, accidental release or deliberate use.

PhRMA/US/Korea/EC/Mexico proposed footnote, *available at* http://www.cptech.org/ip/wto/p6/listofdiseases12202002.html (last visited Feb. 27, 2004). When Europe asked the WHO to broker the list of diseases, ("When requested by a Member, the World Health Organization shall give its advice as to the occurrence in an importing Member, or the likelihood thereof, of any other public health problem," EU Draft Proposal for a Compromise Solution (Jan. 7, 2003)), the WHO politely but firmly declined, (Interview by Vittorio De Filippis and Christian Lossun with German Velasquez, WHO (Jan. 13, 2003), *at* http://www.cptech.org/ip/wto/p6/velasquez01102003.html (last visited Feb. 27, 2004)) sending the negotiators back to the drawing board.

seemed to violate the promise that Doha was a pro-development round and further violated one of the bedrock principles of the WTO free trade system and the TRIPS Agreement, namely that the trading system should not preferentially advantage domestic producers over importing producers.

3. COVERAGE OF THE AUGUST 30 PARAGRAPH 6 IMPLEMENTATION AGREEMENT AND ITS RELATIONSHIP TO PRE-EXISTING AND CONTINUING FLEXIBILITIES IN THE TRIPS AGREEMENT AND THE DOHA DECLARATION

Although the United States and PhRMA continued efforts to influence developing countries to accede to disease restrictions, the pro-public health coalition held firm. In the face of developing country solidarity, the United States and PhRMA eventually relented, but only after insisting that the Paragraph 6 Implementation Agreement be supplemented by the General Council Chairperson's "clarifying" Statement.[68] The exact legal effect of the Chairperson's Statement is uncertain, but it is directly referenced in the underlying Agreement and may well influence interpretation and enforcement of the Agreement at the WTO.[69] Of course, rather than merely clarifying, the Chairperson's Statement wrapped the Paragraph 6 solution with an even tighter tangle of red tape. Nonetheless, developing countries must strive to unravel this tangle in order to access cheaper generic medicines most efficiently.

3.1: Limited Flexibilities in the Paragraph 6 Implementation Agreement and Chairperson's Statement

Although there are many remaining flexibilities for importing generic medicines,[70] neither singly nor collectively do they go far enough to ensure an energetic market in developing countries for generic medicines essential to combat AIDS and other public health problems. In essence, and with the benefit of hindsight, one can see that the United States has engaged in a future-oriented, two-part squeeze play designed to downsize the impact of the Doha Declaration. To counteract this, developing countries must argue for the

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68. *See* WTO News, The General Council Chairperson's Statement (Aug. 30, 2003), *available at* http://www.wto.org/english/news_e/news03_e/trips_stat_28aug03_e.htm (last visited Apr. 6, 2004) [hereinafter Chairperson's Statement].

69. "This Decision was adopted by the General Council *in light of* a statement read out by the Chairman which can be found in JOB(03)/177." Paragraph 6 Implementation Agreement, *supra* note 16 (emphasis added). At the very least, developed countries will argue that the Chairperson's Statement represents some interpretive guidance with respect to the intention of Member States in adopting the Paragraph 6 Implementation Agreement.

70. *See* subsection 3.2 *infra*.

broadest possible interpretations of the Paragraph 6 Implementation Agreement and resist all efforts to implement it narrowly.[71]

Two structural issues concerning the Paragraph 6 Implementation Agreement should be clarified at the outset. First, the Agreement permits importing by countries where a blocking patent is on file (these countries will need to issue an import license), and by countries with no patent on file, (these countries will not have to issue any license whatsoever).[72] However, the Agreement does require a no-patent importer to use the Agreement's mechanisms when it seeks to import quantities of medicines from the exporting country that would exceed the primarily-for-domestic-use clause of TRIPS Article 31(f). A second structural feature is that the Agreement covers both the compulsory licenses and non-commercial, governmental or "crown" use. Admittedly, most of the express language of the Agreement addresses compulsory licenses, but the Agreement is fundamentally a waiver from the obligations of TRIPS Article 31(b) and (f), which covers all unauthorized uses, including non-commercial, governmental use.[73]

3.1.1 Pharmaceutical products and diseases covered

> 1. For the purposes of this Decision: (a) "pharmaceutical product" means any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address the public health problems as recognized in paragraph 1 of the Declaration. It is understood that active ingredients necessary for its manufacture and diagnostic kits needed for its use would be included. . . .[74]

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71. One of the first instances of possible narrowing of the scope of Paragraph 6 implementation was a statement by the Canadian government that it was considering disease limitations in its proposed amendments to its Patent Act. A concerted campaign led by Canadian NGOs has defeated that threat.

72. Paragraph 2(a) of the Decision requires notification of intent to file for a compulsory license when a pharmaceutical product is patented in the imported country, but the necessary implication of this provision is that countries without such patent bars may also make notifications of intent to import an expected quantity of a medicine. *See* Paragraph 6 Implementation Agreement, *supra* note 16.

73. Such governmental use would, in turn, permit production by a state-owned industry, but it would also cover production by a government contractor for public sector provision. An even more sweeping interpretation might allow the government to provision both the public and private sector if it did so without imposing additional mark-ups for non-public-sector uses.

74. *See* Paragraph 6 Implementation Agreement, *supra* note 16.

Developing countries did not obtain the desired clarification that the term "pharmaceutical products" covered vaccines and microbicides, but the definition was expanded to cover "diagnostic kits" needed for the use of another pharmaceutical product. Thus, important blood test technologies are covered. Likewise, including coverage of "active ingredients necessary for the manufacture" of a pharmaceutical product is important in order to access active pharmaceutical ingredients where those ingredients are separately patented.

Developing countries fought hard in the Doha Declaration for the broadest possible disease coverage by the naming of the Declaration, by the unrestricted reference to protecting public health in Paragraph 4,[75] and by the interpretive principles of Paragraph 5(a).[76] Nonetheless, the Paragraph 6 Implementation Agreement cites "public health problems as recognized in paragraph 1 of the Declaration,"[77] rather than paragraph 4, in referencing diseases covered by the Agreement. However, given the tortured nine months of negotiations described in Section 2.3. above, whereby developing countries firmly resisted any efforts to codify disease limitations, the only felicitous interpretation of the phrase "public health problems as recognized in paragraph 1 of the Declaration" is that it covers the broadest range of public health problems, not merely the listed "grave" or pandemic problems.

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75. "We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to *protect public health*. . . . [W]e affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to *protect public health* and, in particular, to *promote access to medicines for all*." Doha Declaration, *supra* note 15 (emphasis added). Paragraph 4 makes no reference to grave public health problems recognized in Paragraph 1, nor does it even make reference to the non-restrictive list of diseases, "HIV/AIDS, tuberculosis, malaria and other epidemics," listed in Paragraph 1. *See id.*

76. *Id.* Paragraph 5 (a) requires that "each provision of the TRIPS Agreement shall be read in light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles." *Id.* Those objectives and principles in TRIPS specifically include Article 8.1 under which "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect *public health*. . . ." TRIPS Agreement, *supra* note 7 (emphasis added).

77. Paragraph 6 Implementation Agreement, *supra* note 16.

3.1.2 "Eligible importing Members" and required notifications

> 1(b) "eligible importing Member" means any least-developed country Member, and any other Member that has made a notification[2] to the Council for TRIPS of its intention to use the system as an importer, it being understood that a Member may notify at any time that it will use the system, in whole or in a limited way, for example only in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. It is noted that some Members will not use the system set out in this Decision as importing Members[78] and that some other Members have stated that, if they use the system, it would be in no more than situations of national emergency or other circumstances of extreme urgency. . . .[79]
>
> 2. It is understood that this notification does not need to be approved by a WTO body in order to use the system set out in this Decision.

In controlling importing country eligibility, the United States and other developed countries succeeded in imposing four limits on the number of countries that are permitted to import generic medicines to address a public health need using a compulsory license. First, the United States/European Union brokered an absolute agreement with twenty-three relatively rich countries that they would not issue compulsory licenses for importation under any circumstances. Obviously, many of these countries are large enough and have sufficiently capable generic industries to issue a compulsory license for domestic production. But still the United States has succeeded in shrinking the richest part of the international market, essentially engaging in protectionism at a historic level.

Second, the United States/European Union convinced some other, generally smaller or slightly poorer countries (twelve in all), to agree to issue compulsory licenses for import only in order to address national emergencies or other circumstances of extreme urgency.[80] Accordingly, another piece of the potential market for generic medicines was lopped off, including some countries that have no domestic capacity whatsoever. Third, the United States/European Union, forced ten E.U. accession countries to import only on an emergency or urgency basis and to relinquish even this right when they

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78. Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and United States of America.

79. *Id.*

80. Chairperson's Statement, *supra* note 68. The countries are Hong Kong China, Israel, Korea, Kuwait, Macao China, Mexico, Qatar, Singapore, Chinese Taipei, Turkey, and United Arab Emirates. *Id.*

joined the European Union.[81] This will certainly have a devastating impact on the costs of medicines in some very poor Eastern European countries, including some that are facing an escalating HIV/AIDS crisis.

The fourth limitation on the eligibility of importing countries is more subtle and arises with respect to a developing country's right to determine that it lacks sufficient domestic manufacturing capacity in the pharmaceutical sector. Here requirements of proof, opportunities for behind-the-scenes pressure, and the possibility of ad-hoc review impact the potential willingness of developing countries to make use of Paragraph 6 production-for-export mechanisms.

IMPLEMENTATION AGREEMENT PROVISION

2. The obligations of an exporting Member under Article 31(f) of the TRIPS Agreement shall be waived with respect to the grant by it of a compulsory license to the extent necessary for the purposes of production of a pharmaceutical product(s) and its export to an eligible importing Member(s) in accordance with the terms set out below in this paragraph:

a. the eligible importing Member(s)[4] has made a notification[2] to the Council for TRIPS, that

. . .

ii. confirms that the eligible importing Member in question, other than a least developed country Member, has established that it has insufficient or no manufacturing capacities in the pharmaceutical sector for the product(s) in question in one of the ways set out in the **Annex** to this Decision;

4. Joint notification providing the information required under this subparagraph may be made by the regional organization referred to in paragraph 6 of this Decision on Behalf of eligible importing Members using the system that are parties to them, with the agreement of those parties.

2. It is understood that this notification does not need to be approved by a WTO body in order to use the system set out in this Decision.

81. *Id.* These countries are Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, and Slovenia. *Id.*

ANNEX

Assessment of Manufacturing Capacities in the Pharmaceutical Sector

Least-developed country Members are deemed to have insufficient or no manufacturing capacities in the pharmaceutical sector.

For other eligible importing Members insufficient or no manufacturing capacities for the product(s) in question may be established in either of the following ways:

(i) the Member in question has established that it has *no manufacturing capacity* in the pharmaceutical sector;

OR

(ii) where the Member has *some manufacturing capacity in this sector, it has examined this capacity and found that, excluding any capacity owned or controlled by the patent owner, it is currently insufficient for the purposes of meeting its needs.* When it is established that such capacity has become sufficient to meet the Member's needs, the system shall no longer apply.[82]

Pursuant to this provision, least developed countries are automatically eligible importers, regardless of actual capacity. However, other developing countries are eligible only if they have no capacity or insufficient current capacity based on an unspecified form of self-examination. Moreover, they are required to monitor their domestic capacity over time so that when the capacity becomes sufficient, "the system shall no longer apply." Despite the imprecision of the "insufficient capacity" requirement, developing countries were originally pleased that prior notification was not equal to prior "approval by a WTO body" and thus that countries' sovereign decision-making processes were to be honored. Unfortunately, the Chairperson's Statement undermines that reprieve and provides for *ad hoc* review of determinations of insufficient capacity that might deter some countries from using the Paragraph 6 solution.

82. Paragraph 6 Implementation Agreement, *supra* note 16 (emphasis added).

CHAIRPERSON'S STATEMENT

Third, it is important that Members seek to resolve any issues arising from the use and implementation of the Decision expeditiously and amicably:

- To promote transparency and avoid controversy, notifications under paragraph 2(a)(ii) of the Decision *would include information on how the Member in question had established, in accordance with the Annex, that it has insufficient or no manufacturing capacities in the pharmaceutical sector.*
- In accordance with the normal practice of the TRIPS Council, notifications made under the system shall be brought to the attention of its next meeting.
- *Any Member may bring any matter related to the interpretation or implementation of the Decision,* including issues related to diversion, *to the TRIPS Council for expeditious review, with a view to taking appropriate action.*
- *If any Member has concerns that the terms of the Decision have not been fully complied with, the Member may also utilise the good offices of the Director General or Chair of the TRIPS Council, with a view to finding a mutually acceptable solution.*

Fourth, *all information gathered on the implementation of the Decision shall be brought to the attention of the TRIPS Council in its annual review* as set out in paragraph 8 of the Decision.[86]

With the Chairperson's Statement, the United States succeeded in imposing a fourth eligibility barrier that threatens importation for many middle-income developing countries. Basically, the United States has set up an ad hoc notification-and-review process forcing countries that need to import generics because of incapacities in their pharmaceutical sectors to prove, and then defend, their determinations. The standard for proving "insufficient capacity" is terribly uncertain. The United States, in its negotiation positions, has treated insufficient capacity as a technical term addressing theoretical

83. Chairperson's Statement, *supra* note 68 (emphasis added).

physical plant capacity no matter how inefficient or impracticable local production would be. Similarly, the United States does not acknowledge that an industry may be technologically capable, but unable in the short run to produce a needed medicine. Additionally, the United States fails to account for an industry that may be unwilling to apply for a compulsory license because of an overly restricted local market.

On the other hand, developing countries and treatment activists have consistently argued that "insufficient" capacity must be analyzed in pragmatic economic terms to cover situations where local production would be economically inefficient because of inability to reach meaningful economies-of-scale. Access activists essentially argue for an expansive definition of incapacity to mean an inability to produce the medicines quickly, efficiently, and sustainability on terms equal to or better than generic medicines sourced on the international market.[84] Paragraph 6 of the Agreement, where Members acknowledge the importance of reaching economies-of-scale when discussing technology transfer, supports the viability of this interpretation.

Although developing countries have a strong basis to argue that their determinations of insufficient capacity should be given presumptive weight and that their obligations to justify their decisions require only minimum evidence and rationality, the reporting-and-review process could well deter some countries from risking involvement in a damaging and costly WTO dispute resolution process. This prove-it-and-review-it standard does not name countries, but it could have a deterrent effect on middle-income developing countries with some capacity that might otherwise choose to import cheaper generics. To counteract this forced self-exclusion from the Paragraph 6 Implementation Agreement, developing countries will need to be aggressive

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84. The recent threat by Brazil to import three generic anti-retroviral drugs (ARVs) from India (Efavirenz, Lopinavir, and Nelfinavir) is a perfect example of how this fight might play out in the future. *Brazil May Break Patents on Merck & Co., Roche, Abbott Labs AIDS Drugs* (Aug. 21, 2003), *available at* http://lists.essential.org/pipermail/ip-health/2003-August/005140.html (last visited Feb. 27, 2004). It is important to remember, however, that Brazil's threat to import is not subject to Paragraph 6 Implementation Agreement because it involves generics that India can still legally produce. If the Agreement did apply, the United States would certainly argue that Brazil has capacity to manufacture generic ARVs—it has done so in the past, and it has already reverse-engineered the new ARVs. However, Brazil would counter that it cannot make the new generics quickly and perhaps that it cannot do so efficiently in comparison to the lower cost of imported Indian generics.

The United States insisted on a forum for making these kinds of objections and for having the TRIPS Council and even the WTO General Council "review" the operation of the production for export solution. One can imagine the United States complaining that the solution is being abused and that too many countries are seeking import licenses. Developing countries tried to limit this review and argued that the required documentation of incapacity need only be skeletal at best, but now they and generic producers must worry about after-the-fact challenges to import licenses. Once again, one can imagine the reluctance of a generic producer to invest in productive export capacity and to begin to manufacture medicines only to have the import license pulled because of U.S./TRIPS Council review or because of behind-the-scenes U.S. bullying.

in making their incapacity determinations and in resisting after-the-fact micromanagement from the United States or other Member states.

The notification and oversight obligations of least-developed country (LDC) importers differ slightly from those of non-LDC importers with insufficient manufacturing capacity in the pharmaceutical sector. Non-LDC importers must notify the WTO in a timely fashion that they intend to the use the system "in whole or in a limited way" with respect to a particular decision to import a pharmaceutical product.[85] No such obligation is required for a least-developed country Member because they are automatically eligible to use the Agreement's import/export system. However, Paragraph 2(a) of the Agreement requires all importing members to file notifications concerning expected quantities of named medicines and concerning their intent to issue a compulsory license if necessary.[86] Similarly, under Paragraph 2(b)(i), the exporting country may only export to Members who have notified the TRIPS Council of their needs.[87]

3.1.3 Eligible importing "regions"

One of developing countries' victories in the Paragraph 6 negotiations was a provision allowing developing countries to notify the WTO of their collective decision to import medicines and more importantly, the right of a regional trade group to trade generic medicines whether medicines were first produced domestically or imported from a non-regional trade member.

85. Members' flexibility concerning such notification presumably permits countries to opt back in as well as to opt out, though this interpretation is not yet confirmed.

86. *See* Paragraph 6 Implementation Agreement, *supra* note 16.

87. *Id.*

6. With a view to harnessing economies of scale for the purposes of enhancing purchasing power for, and facilitating the local production of, pharmaceutical products:

> (i) where a developing or least-developed country WTO Member is a party to a regional trade agreement within the meaning of Article XXIV of the GATT 1994 and the Decision of 28 November 1979 on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (L/4903), at least half of the current membership of which is made up countries presently on the United Nations list of least developed countries, the obligation of that Member under Article 31(f) of the TRIPS Agreement shall be waived to the extent necessary to enable a pharmaceutical product produced or imported under a compulsory license in that Member to be exported to the markets of those other developing or least developed country parties to the regional trade agreement that share the health problem in question. It is understood that this will not prejudice the territorial nature of the patent rights in question; . . .[88]

An acknowledged rationale for permitting regional procurement and regional trade in generic medicines was to "harness economies-of-scale." Accordingly, this provision recognizes the value of collaboration to enhance purchasing power and the importance of expanded markets to give incentives for local production. Obviously, this provision will be important in the African context, where regional trading groups could easily involve more than fifty percent least developing countries.

> (ii) it is recognized that the development of systems providing for the grant of regional patents to be applicable in the above Members should be promoted. To this end, developed country Members undertake to provide technical cooperation in accordance with Article 67 of the TRIPS Agreement, including in conjunction with other relevant intergovernmental organizations.[89]

88. *Id.*
89. *Id.*

One of the unfortunate trade-offs in this regional trade provision, however, is developing countries' agreement that a regional patent system is desirable. Of course, there are already two regional patent agreements in Africa.[90] Moreover, it is important for developing countries to try to conserve their administrative resources and to avoid overly duplicative structures between similarly situated members. However, it is by no means certain that harmonization of patent standards will inure to the long-term benefit of developing countries despite the efforts of the World Intellectual Property Organization to achieve the same.[91] This is particularly true since the "technical assistance" provided by developed countries is so often patent-enhancing. The details of patent harmonization, even on an expanded regional basis, should be approached with great caution.

3.1.4. "Eligible exporting Members" and "technology transfer"

> 1.(c) "exporting Member" means a Member using the system set out in this Decision to produce pharmaceutical products for, and export them to, an eligible importing Member.[92]

The definition of exporting Member is broad enough to include any WTO member. This represents a partial victory for developing countries that did not want to be limited to an unnecessarily restricted list of potential suppliers. Pursuant to this new-found authority, both Canada and the European Commission are pursuing legislation authorizing production-for-export. On the other hand, developing countries had also argued vigorously for enhancements in local capacity to produce medicines and thus had argued for technology transfers and other assistance to help development of that capacity. Gains in this area were meager and contradictory.

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90. Organisation Africaine de la Propriete Intellectuelle (16 members) and African Regional Industrial Property Association (15 members). African Organization of the Intellectual Property homepage, *at* http://www.oapi.wipo.net/fr/about/message.html (last visited Feb. 27, 2004); African Regional Industrial Property Organization homepage, *at* http://www.aripo.wipo.net/membership.html (last visited Feb. 27, 2004).

91. *See, e.g.*, WIPO Working Group on Reform of the Patent Cooperation Treaty, *Options for Future Development of International Search and Examination: Making Greater Use of International Reports*, PCT/R/WG/5/9 (Sept. 19, 2003).

92. Paragraph 6 Implementation Agreement, *supra* note 16.

> 7. Members recognize the desirability of promoting the transfer of technology and capacity building in the pharmaceutical sector in order to overcome the problem identified in paragraph 6 of the Declaration. To this end, eligible importing Members and exporting Members are encouraged to use the system set out in this Decision in a way which would promote this objective. Members undertake to cooperate in paying special attention to the transfer of technology and capacity building in the pharmaceutical sector in the work to be undertaken pursuant to Article 66.2 of the TRIPS Agreement, paragraph 7 of the Declaration and any other relevant work of the Council for TRIPS.[93]

Undoubtedly technology transfer is an important issue for developing countries, but it had received little real commitment from developed countries. Indeed most evidence post-TRIPS is that manufacturing capacity in developing countries has been reduced as major producers shut down smaller in-country "finishing factories" that were established to satisfy pre-TRIPS local-working requirements. However, the focus on technology transfer is a double-edged sword. Local production within a country or region can fulfill employment, industrial-policy, and development goals; it can synergistically build technical capacity regarding manufacturing processes; it can ease procurement and distribution problems, contribute to the local tax base, and decrease demand for foreign currency reserves and import financing, though in most instances active ingredients and expertise will still be imported. On the other hand, there may be inefficiencies in local production and therefore real cost disadvantages. Moreover, developing countries should be cautious about over-investment or over-reliance on local production options, especially since so many countries are hoping to become regional suppliers in Africa. Exactly how many generic drug companies in Africa can become cost-effective and price-competitive producers for the region?[94] The Clinton Foundation's ARV agreement with Aspen Pharmacare of South Africa suggests that some African generics can compete with Cipla, Ranbaxy, and Matrix, three Indian producers,[95] but should each African country be wooed into imagining itself as a significant player in the regional market for essential generic medicines?

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93. *Id.*

94. So far Cosmos Pharmaceuticals Ltd. of Kenya, Aspen Pharmacare of South Africa, Farco Mozambique Pty of Mozambique, Bethlehem Pharmaceuticals of Ethiopia, Kimia Farma of Indonesia, Brazilian supported companies in Genin Republic, Ghana, and Nigeria, a Cuban supported firm in Namibia, Shanghai Desano Biopharmaceutical of China, two unidentified companies in Ethiopia, and perhaps others have announced intentions to manufacture generic medicines.

95. Tamar Kahn, Clinton, Aspen to Cut Prices of AIDS Drugs, LIMITED BUS. DAY (S. Afr.), Oct. 24, 2003, at 1.

Answering this question depends in part on the economics of viable generic manufacturing,[96] but developing countries should also be leery of whether the United States and other developed countries will use developing countries' early attempts to establish generic capacity against them. Since the previous discussion of the Paragraph 6 Implementation Agreement already highlighted the fact that the United States has a very narrow technical interpretation of productive capacity, developing countries might soon see themselves shut out, or at least challenged, should they try to switch options and seek imports of other on-patent generic medicines from abroad under the Paragraph 6 accord. In other words, inefficient and thus unsustainable local capacity might haunt developing countries' subsequent resort to alternative, superior sourcing options.

3.1.5 Non-commercial motivation

> Members recognize that the system that will be established by the Decision should be used in good faith to protect public health and, without prejudice to paragraph 6 of the Decision, not be an instrument to pursue industrial or commercial policy objectives.[97]

Questions have been raised whether the Chairperson's Statement directly restricts generic exporters' right to make a profit or whether it has alternative meanings.[98] In particular, commentators are concerned about whether an exporting nation like India will be permitted to support the export market by making ready use of the Paragraph 6 Agreement to issue compulsory licenses for export. The U.S. and pharmaceutical interests originally argued (as late as August 2003) that export should be on "humanitarian" grounds only, meaning not for commercial profit.[99] Because of public outcry, however, the United

96. See discussion in sub-section 5, *infra.*

97. Chairperson's Statement, *supra* note 68.

98. Reports in the press have argued that the text is designed to limit drug use in the importing country to public, non-commercial use, that it applies to both locally produced generics and imported ones, and that developing countries should not take measure to promote a domestic pharmaceutical industry. Scott Miller et al., *U.S. Reaches Patent Compromise to Provide Drugs to Poor Nations*, WALL ST. J., Aug. 28, 2003, at A3; Kaiser Daily HIV/AIDS Report, *WTO Deal on Generic Drug Access for Developing Countries Close; Agreement Could Prevent Breakdown of Trade Talks*, Aug. 28, 2003, *available at* http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=1&DR_ID=19584 (last visited Jan. 31, 2004); TWN Info Service on WTO Issues, *Latest Developments on TRIPS and Health Paragraph 6 and Chair's Statement of Understanding and Analysis of the Text*, Aug. 27, 2003, *available at* http://www.twnside.org.sg/title/twninfo71.htm (last visited Mar. 3, 2004).

99. "In a way, there is a refreshing frankness in the nakedness of the U.S./PhRMA position—'we don't want generic drug companies to make money, we want them to operate on a humanitarian, nonprofit basis while we rake in tens of billions of dollars in profit each and

States eventually agreed to allow the language to be changed from "humanitarian" to that in the Chairperson's Statement: *"[T]he Decision should be used in good faith to protect public health and . . . not as an instrument to pursue industrial or commercial policy objectives."*[100]

Given this language and given PhRMA's historic concern about competition from Indian generics, it is quite likely that the United States will continue to argue that developing countries should not enter the export/compulsory license business if they do so only to develop a competitive pharmaceutical industry and thereby gain comparative advantage in international trade. In light of the U.S.'s concern over diversion, however, it is also possible that the United States is seeking to clarify that the ultimate destination of exported medicines must remain in the Global South and that drugs must not be re-exported through parallel importation or otherwise to the United States and European Union; otherwise, the re-exporter would be pursuing industrial or commercial policy (namely making money on re-export). A final plausible interpretation of the "industrial or commercial policy objective" clause is that the United States is trying to resurrect the private sector limitation that it had originally proposed pre-Doha. A close analysis of the U.S. position suggests, however, that it is primarily interested in deterring the emergence of an even stronger pharmaceutical sector in India.

In rebuttal to the U.S.'s preferred interpretation, public health and access advocates argue that no generic company is going to sell for long on a no-profit basis. For the Paragraph 6 Implementation Agreement to work at all, countries like India, and hopefully China, South Africa, Thailand, and Brazil, will have to become even bigger players in the production and export of generic medicines. However, every time one of these exporting countries issues a compulsory license for export, it would arguably be advancing an industrial and commercial policy of actually enabling a generic manufacturer to provide a sustainable source of supply of standard-quality, low-cost generics to countries that cannot product medicines efficiently on their own. One could wish that the generic industry were altruistic enough to make HIV/AIDS and other medicines on a nonprofit basis, despite investing in productive capacity,

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every year.'" U.S. Latest Conditions on Paragraph 6—Illusory Humanitarian Sales, *available at* http://lists.essential.org/pipermail/ip-health/2003-August/005105.html (last visited Mar. 3, 2004). Confirming this objective, in Montreal, at a July 30 press conference, USTR Zoellick expressly said that the United States does not want the new post-Doha system to become a loophole for creating a commercial export industry. *Zoellick Vows to Work for TRIPS Deal, Lays Out U.S. Conditions,* INSIDE U.S. TRADE, *available at* http://lists.essential.org/pipermail/ip-health/2003-August/005053.html (last visited Feb.27, 2004). Zoellick and PhRMA have consistently charged that the production-for-export system could be "abused" by the generic drug industries in Brazil, China, and most especially India. To limit that "abuse," the U.S./PhRMA team have attempted to limit markets by excluding middle-income developing countries and by excluding medicines for most diseases. Here, they tried to go even further - they would let generic producers export, but only on a hypothetical "humanitarian and non-profit" basis.

100. Chairperson's Statement, *supra* note 68.

fixed-dose combinations, and drug registration. But even the new Clinton Foundation offer of $140/year is premised on some slim margin of profit and a certain quantum of guaranteed purchases.[101]

3.1.6. Conditions on compulsory licenses: quantity terms and royalty rates

> 2.(b) the compulsory license issued by the exporting Member under this Decision shall contain the following conditions:
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> > i. only the amount necessary to meet the needs of the eligible importing Member(s) may be manufactured under the license and the entirety of this production shall be exported to the Member(s) which has notified its needs to the Council for TRIPS;
>
> 3. Where a compulsory license is granted by an exporting Member under the system set out in this Decision, adequate remuneration pursuant to Article 31(h) of the TRIPS Agreement shall be paid in that Member taking into account the economic value to the importing Member of the use that has been authorized in the exporting Member. Where a compulsory license is granted for the same products in the eligible importing Member, the obligation of that Member under Article 31(h) shall be waived in respect of those products for which remuneration in accordance with the first sentence of this paragraph is paid in the exporting Member.[102]

The Paragraph 6 Implementation Agreement directly limits the quantity of medicines that can be produced for export by requiring that only an amount necessary to meet notified needs of all eligible Members shall be manufactured and that all medicines produced under the export license shall be exported rather than be sold domestically. Fortunately, there is clarity in this provision that supply totals can be aggregated to include authorized demand from regional trade groups. On the other hand, it is extremely unfortunate that the Agreement requires that each export license be for a discrete quantity of a medicine. Using the AIDS pandemic as any example, it will is nearly impossible to predict future need based on expanding capacity and uptake by people testing positive. Thus, it is unavoidable that exporting countries will

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101. Aspen Pharmacare of South Africa, one of the Clinton Foundation's suppliers (the others are Cipla, Ranbaxy, and Matrix, all of India), is already on record that it will earn a "wafer thin" margin of profit. Tamar Kahn, *Clinton Aspen to Cut Price of AIDS Drugs*, BUS. DAY (Cape Town), Oct. 24, 2003, at Health-1, *available at* http://allafrica.com/stories/printable/200310240136.html (last visited Apr. 6, 2004).

102. Paragraph 6 Implementation Agreement, *supra* note 16.

have to issue successive compulsory licenses and/or that the system will need to tolerate quantity amendments to open-ended licenses.

The second required condition on the license is a counter-intuitive obligation that the amount of royalty compensation be set in the exporting country rather than the importing country and that it be set according to the "economic value to the importing Member of the [authorized use]." At first blush, this provision would seem to require exporting Members to rigorously investigate "economic value" in the importing country. The more rational interpretation, however, is to recognize that the value need be only roughly proportional to importing-country GDP, degree of innovation, public versus private research and development costs, prior earnings, remaining life of the patent, purpose of use, and perhaps other factors. An even more rational solution is that the exporting country set a narrow range of presumptive royalty rates in line with common practice.

An added paradox of this remuneration requirement is that it requires a royalty even if the medicine is being produced for a country where the medicine is not patented. In this regard, an importing poor country is worse off under the Paragraph 6 Implementation Agreement than it would have been if it had local capacity to produce medicines. As the ultimate consumer, the importing, no-patent Member will be required to pay the added cost of a license royalty even though there would have been no royalty on locally produced medicines. This is yet another example of how the Paragraph 6 Implementation Agreement is unfairly biased against generic imports.

3.1.7 Product differentiation requirements

> 3. the compulsory license issued by the exporting Member under this Decision shall contain the following conditions:
>
> > ii. products produced under the license shall be clearly identified as being produced under the system set out in this Decision through specific labeling or marking. Suppliers should distinguish such products through special packaging and/or special colouring/shaping of the products themselves, provided that such distinction is feasible and does not have a significant impact on price; . . .[103]

The Paragraph 6 Implementation Agreement contained a compromise on product differentiation. Developed countries and pharmaceutical interests had sought strong differentiation requirements so that there is less temptation to divert nearly identical products from developing countries to more lucrative

103. *Id.*

developed country markets. Developing countries, in contrast, worried about the economic impact of product differentiation and won concessions that such differentiation would not be required if it had "a significant impact on price." The U.S./PhRMA team, however, remained unsatisfied with this compromise and thus insisted on the insertion of the following language in the Chairman's Statement.

> Members recognize that the purpose of the Decision would be defeated if products supplied under this Decision are diverted from the markets for which they are intended. . . . It is the understanding of Members that in general special packaging and/or special colouring or shaping *should not have a significant impact on the price of pharmaceuticals.*
>
> In the past, companies have developed procedures to prevent diversion of products that are, for example, provided through donor programmes. "Best practices" guidelines that draw upon the experiences of companies are attached to this statement for illustrative purposes. Members and producers are encouraged to draw from and use these practices, and to share information on their experiences in preventing diversion.
>
> Attachment: "Best practices" guidelines
>
> Companies have often used special labelling, colouring, shaping, sizing, etc. to differentiate products supplied through donor or discounted pricing programmes from products supplied to other markets. Examples of such measures include the following:
>
> - Bristol Myers Squibb used different markings/imprints on capsules supplied to sub Saharan Africa.
> - Novartis has used different trademark names, one (Riamet®) for an anti-malarial drug provided to developed countries, the other (Coartem®) for the same products supplied to developing countries. Novartis further differentiated the products through distinctive packaging.

- GlaxoSmithKline (GSK) used different outer packaging for its HIV/AIDS medications Combivir, Epivir and Trizivir supplied to developing countries. GSK further differentiated the products by embossing the tablets with a different number than tablets supplied to developed countries, and plans to further differentiate the products by using different colours.
- Merck differentiated its HIV/AIDS antiretroviral medicine CRIXIVAN through special packaging and labelling, i.e., gold-ink printing on the capsule, dark green bottle cap and a bottle label with a light-green background.
- Pfizer used different colouring and shaping for Diflucan pills supplied to South Africa.

Producers have further minimized diversion by entering into contractual arrangements with importers/distributors to ensure delivery of products to the intended markets.

To help ensure use of the most effective anti-diversion measures, Members may share their experiences and practices in preventing diversion either informally or through the TRIPS Council. It would be beneficial for Members and industry to work together to further refine anti-diversion practices and enhance the sharing of information related to identifying, remedying or preventing specific occurrences of diversion.[104]

Any requirement that exporters vary pill size, shape, and color is not cost-free, particularly when moving from round, white tablets or capsules of a standard size, to hexagogonal pills in different sizes and colors.[105] Although it may be sensible to have protections against using a proprietary name or identical packaging (possible trade mark infringements), there is no sense in adding dramatically to costs (and potentially altering bio-equivalence) by changing size, coating, and shape. This unnecessary added cost burden is especially egregious when producers might have to change trade dress, size, and shape for multiple small markets.[106]

Although the Chairperson's Statement adds a presumption that product differentiation does not adversely affect costs, developing countries and

104. Chairperson's Statement, *supra* note 68 (emphasis added). The Statement extended product differentiated rules to cover finished products produced from Paragraph 6 imported active ingredients. "In this regard, the provisions of paragraph 2(b)(ii) apply not only to formulated pharmaceuticals produced and supplied under the system but also to active ingredients produced and supplied under the system and to finished products produced using such active ingredients." *Id.*

105. Rene Shen, *WTO to Close Deal on Medicines Supply, at* http://lists.essential.org/pipermail/ip-health/2003-August/005139.html (last visited Feb. 15, 2004).

106. *Id.*

generic producers should be prepared to argue and document that they do. Even more significantly, if product differentiation affects bio-equivalence, they should argue that the differentiation is "infeasible" as well as uneconomical under the Paragraph 6 Implementation Agreement. Finally, developing countries should select the "best practices" with the least onerous terms, i.e., Novartis.

3.1.8 Other anti-diversion measures

> 4. In order to ensure that the products imported under the system set out in this Decision are used for the public health purposes underlying their importation, eligible importing Members shall take *reasonable measures within their means, proportionate to their administrative capacities and to the risk of trade diversion to prevent re-exportation* of the products that have actually been imported into their territories under the system. In the event that an eligible importing Member that is a developing country Member or a least-developed country Member experiences difficulty in implementing this provision, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in order to facilitate its implementation.
>
> 5. Members shall ensure the availability of effective legal means to prevent the importation into, and sale in, their territories of products produced under the system set out in this Decision and diverted to their markets inconsistently with its provisions, using the means already required to be available under the TRIPS Agreement. If any Member considers that such measures are proving insufficient for this purpose, the matter may be reviewed in the Council for TRIPS at the request of that Member.[107]

The Paragraph 6 Implementation Agreement requires importing Members to "take reasonable measures within their means, proportionate to their administrative capacity, and to the risk of trade diversion to prevent re-exportation."[108] Should their efforts to prevent re-exportation be "difficult," then developing countries are obligated to seek mutually agreeable technical and financial cooperation from developed country Members. Although this language imposes no directly enforceable obligations on importing Members with respect to any particular anti-diversion measure, it does suggest that

107. Paragraph 6 Implementation Agreement, *supra* note 16 (emphasis added).
108. *Id.*

pressure will be brought to bear regarding methods designed to reduce product diversion.

In addition to requiring product differentiation and administrative efforts against product diversion, the Paragraph 6 Implementation Agreement also requires a series of notifications from importing and exporting countries and the licensee concerning the identity of the licensed generic producer, the identity and quantities of drugs being produced and exported, and the distinguishing features of the products.[109] Presumably this elaborate system of publicly available notifications is at least partially designed to enable proprietary drug companies to police product diversion.

3.1.9 A procedural morass

The Paragraph 6 notification scheme is elaborate enough, but it builds on the procedural complexity of double-licensing under Article 31 of the TRIPS Agreement. Under the discipline of the combined texts, in order to import medicines in a country where a drug has been patented, the following steps must be followed for a "routine" pro-public health license:

(1) The importing country's potential licensee(s) must seek a voluntary license[110] on commercially reasonable terms for a commercially reasonable period of time from the patent holder.[111] The importing country can ease this requirement by specifying a relatively short time for negotiations, e.g., 30 days, and by specifying presumptively reasonable and unreasonable terms (see discussion on regulation of voluntary licenses, subsection 4.2 *infra*).

(2) Failing that, the potential licensee(s) must apply for a compulsory license from the importing country pursuant to procedures satisfying Article 31 of the TRIPS Agreement, including individual determinations, 31(a),

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109. Paragraph 6 Implementation Agreement, *supra* note 16, Paragraph 2(a), (b)(iii) and (c).

110. Non-exclusive voluntary licenses with relaxed geographical limitations could have a number of advantages. In the best-case scenario, the patent holder could transfer technology and manufacturing know-how to the voluntary licensee, which might produce greater efficiencies and ensure quality. In addition, the patent holder would ordinarily allow its licensee to obtain registration by comparing bio-availability and bio-equivalence of the generic product to confidential data previously filed with the drug registration authority.

111. Prior negotiation is not required under Article 31 (b) and (k) of the TRIPS Agreement where the license is being sought with respect to: (1) an emergency or other matter of extreme urgency (note: HIV/AIDS, TB, and malaria are presumptively such emergencies, Doha Declaration, Paragraph 5(c)); (2) governmental, non-commercial use; and (3) remedies for anti-competitive practices.

limited scope and duration, 31(c) and (g),[112] non-exclusivity and non-assignability, 31(d) and (e), and rights of review, 31(i) and (j).

(3) The importing country must assess its generic industry's capacity and/or willingness to produce the medicine locally, and, if capacity is insufficient, it must notify the WTO of its decision or intention to issue a compulsory license, specify the names and expected quantities of the products needed[113] and explain and justify its rationale concerning insufficient capacity, which rationale is subject to ad hoc challenge and review.[114]

(4) The importing country must license the potential exporter, presumably the one that has already engaged in voluntary license negotiations in the importing country, Article 31(b); this license need not have quantity restriction and could presumptively be issued for the remaining term of the patent so long as it was terminable when the public health need subsided or when domestic manufacturing capacity becomes sufficient.

(5) The exporter may need to seek a voluntary license on commercially reasonable terms for a commercially reasonable period of time in the exporting country, though this requirement is needlessly duplicative and irrational.[115]

(6) The exporter must seek a fully TRIPS-compliant compulsory license from its own government on a single-country, single-product basis, Article 31(a), (c), (d), (e), (g), (i), (j); the export license must be for a specific quantity.

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112. Article 31(c) limits a license to the purpose for which it was authorized; Article 31(g) mandates termination when the circumstances which led to it cease to exist and are unlikely to reoccur; and the Annex to the Implementation Agreement limits it to the period of time that local capacity is insufficient. In the event of ordinary public health licenses, the duration would be at least as long as the public health problem prevails. However, the duration can be shortened further because of increased capacity in the domestic pharmaceutical sector. Paragraph 6 Implementation Agreement, *supra* note 16, Annex, Option ii.

113. "This notification will be made available publicly by the WTO Secretariat through a page on the WTO website dedicated to this Decision." *Id.* fn. 5.

114. *Id.* at Paragraph 2(a), Annex; Chairperson's Statement, *supra* note 68.

115. Although this result seems unnecessarily duplicative, especially since the company involved probably first sought a voluntary license in the importing country, the current text of Article 31(b) and the failure of the Paragraph 6 Implementation Agreement to address this second negotiation would seem to require such a ridiculous result.

(7) Compensation by royalty must be individually determined based on economic value in the importing country.[116]

(8) "The exporting Member shall notify the Council of TRIPS of the grant of the license, including the conditions attached to it. The information provided shall include the name and address of the licensee, the product(s) for which the license has been granted, the quantity(ies) for which it has been granted, the country(ies) to which the product(s) is (are) to be supplied and the duration of the license. The notification shall also indicate the address of the website [upon which the licensee posts its required notifications]." [117]

(9) If a license is granted, the exporter must investigate pill size, shape, coloring, labeling, and packaging of the patent-holder's product in the importing country and differentiate its new product in material respects, unless to do so is demonstrably too costly or infeasible.

(10) The licensee must post certain required information on a website before shipping detailing: "the quantities being supplied to each destination . . . and the distinguishing features of the product(s)."[118]

(11) The generic producer will need to seek product registration and prove bio-equivalence in the importing country despite the patent holder's effort to prevent "unfair commercial use" of its confidential registration data (TRIPS Article 39.3).

(12) This process must be fulfilled over and over again for each and every drug and for each and every country to which or from which the drug will be exported; moreover, the system may require multiple and successive export licenses for each drug because the precise-quantity requirements.

Shrink the market, increase costs, and add burdensome procedural requirements—is that the simple and efficient solution promised at Doha? The answer is obviously no. The demand-end of the developed-country, post-Doha

116. Despite a requirement of individual determinations, it seems likely that countries could issues guidelines for royalty rates and a presumptive range of royalty rates and that they could shift the burden of persuasion concerning the unreasonableness of the rate to the patent holder.

117. Paragraph 6 Implementation Agreement, *supra* note 16, ¶ 2(c).

118. *Id.* ¶ 2(b)(iii).

strategy was designed to dramatically shrink the potential market for generic drugs and to exclude virtually all markets with meaningful and stable purchasing power. At the supply end, developed countries succeeded in increasing the risks and costs of producing generic medicines for export and in reducing the benefits. In part, the risk factors and reduced benefits for generic producers include shrinking markets. But, in addition, generic producers will be uncertain whether a particular country has properly determined that it lacks sufficient pharmaceutical capacity or whether there is a public health need—decisions that can result in review by the WTO and might also prompt lawsuits by patent-holders such as that previously filed against South Africa.[119] Even more problematic, however, is the procedural labyrinth that stands between a country desperately needing imported generics and a willing manufacturer where the drug is on-patent.

Unfortunately and for reasons are that hard to fathom, developing countries traded their citizens' health for long-promised and indefinitely-delayed reductions in farm export subsidizes and/or for temporary access to developed countries' textile markets (before an even cheaper producer arrives on the scene). Although culpability for the incredible shrinking Doha Declaration rests primarily with the United States (and secondarily with the European Union and Japan), developing countries became co-complicit in enforcing a pharmaceutical embargo, which risks millions of unnecessary deaths.

Despite this critique, both of the Paragraph 6 Implementation Agreement and of developing countries' premature capitulation to developed country power, developing countries held firm on the scope of disease issue, on securing import/re-export rights for regional trade alliances, and on eliminating market exclusivity during extended transitional periods for least developed countries.[120] It is also true that one loophole in the TRIPS agreement, the "predominantly for domestic use rule" was significantly widened as a result of the August 30 accord.

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119. The risk of pharmaceutical company law suits against governments will likely increase if NAFTA-like investment rules are ever engrafted into WTO or other bilateral or plurilateral agreements. These clauses give "investors," meaning foreign companies, the right to take governments to dispute resolution for damages if governmental policy undermines their property rights. Although a full discussion of the investment rule is far beyond the scope of this paper, developing countries should be aware of the future risks of current policy proposals.

120. Paragraph 7 of the Doha Declaration had granted least developed countries an exemption from TRIPS compliance with respect to pharmaceutical products until January 1, 2016. On June 27, 2002, the TRIPS Council voted an addition waiver that would exempt least developed countries from providing five years of market exclusivity to pharmaceutical products under Article 70.9 of the TRIPS Agreement.

3.2 The Full Spectrum of Sourcing Alternatives for Developing Countries Post-Doha

Fortunately, as demonstrated in Chart One below, developing countries retain a great deal of flexibility to use TRIPS-compliant mechanisms to access medicines from abroad, despite the Paragraph 6 Implementation Agreement, though some of these options will narrow in the future. In this regard, it is important to note at the outset that there are now four nestled texts—the original TRIPS Agreement, the subsequent Doha Declaration, the Paragraph 6 Implementation Agreement, and the Chairperson's Statement—which regulate the production and export of generic medicines and their importation. In this regard, it is also important to remember that options within a particular country will also be circumscribed by national legislation and perhaps by its participation in bilateral or regional trade agreements that limit rights it might otherwise have under the four international agreements referenced above.

A threshold problem in assessing sourcing options concerns what might be called the import/export patent thicket.[121] It is extraordinarily difficult to determine the number of patents that might apply to any given pharmaceutical product. These difficulties are intensified in developing countries with antiquated, paper-based patent systems and in patent regimes where patent protections might be forfeited or suspected because of failure to pay an annual patent maintenance fee. The problem is not limited to determining patent status in the importing country—there must be a full search in the exporting Member's patent office as well. Because patents are territorial and because of different filing decisions and filing dates in differing jurisdictions, it is quite likely that the compulsory license in the importing country will differ significantly from that in the exporting country.[122] Thus, a clear area of future reform to make the compulsory license import/export system more rationale and user-friendly is to require patent-holders to create a central facility for listing pharmaceutical patents and/or to require WIPO to perform this function. Fortunately, the World Health Organization has taken a significant step in this direction, with respect to HIV/AIDS by establishing its AIDS Medicines and Diagnostic Service which will develop data base detailing country specific information concerning the patent and registration status of key AIDS medicines. Unfortunately, there is no clear plan at present for comparable data bases for medicines treating other diseases.

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121. *See* Medecins San Frontieres, *Drug Patents Under the Spotlight: Sharing Practical Knowledge about Pharmaceutical Patents* (2003).

122. Carlos Correa, *Implementation of the WTO General Council Decision on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, 6 (Draft, Dec. 2003).

Chart One—Flexibilities for Import/Export

EXPORTING COUNTRY (right to export if):	**IMPORTING COUNTRY (right to import if):**
1. Exportation of a drug first sold by the patent holder or with its permission (for parallel importation, no quantity restrictions) 2. Post-patent or off-patent drug (no quantity limits) 3. No patent filed or patent found to be invalid 4. National patent regime did not patent pre-1995 drugs (no retroactivity, no quantity limits) 5. *Compulsory license predominantly for domestic use, Art. 31(f), (49% can be exported)* 6. *Compulsory license for abuse of patent, Art. 31(k), (unlimited export)* 7. *Limited exception to effectuate compulsory license in importing country with no capacity or insufficient market on humanitarian grounds, Art. 30.* 8. *Limited exception to permit export to a no capacity/no patent market on humanitarian grounds, Art.30.* 9. *Paragraph 6 Implementation Agreement, compulsory license with all attendant notifications and limitations, (will be required for post-1995 mailbox drugs and post 2005 new drug inventions; limited quantities.*	1. Parallel importation if country has international exhaustion rule, TRIPS Art. 6; may permit importation of drug produced under compulsory license in exporting country 2. *Regular compulsory license for import, Art. 31 (import allowed pursuant to Art. 27)* 3. *No patent on file (mainly in smaller and poorer countries)* 4. *Paragraph 6 Implementation Agreement compulsory license for import with all attendant notifications and limitations.*

Many different kinds of exporters are currently permitted to sell generics for export where they are not covered by patent protection in the exporting countries. Countries permitted to export, depending on their own national legislation, include:

(1) non-WTO members that can produce and export medicines without WTO complications because of their non-membership, though they might have national legislation protecting patents which would forestall their rights to produce and export generic versions of patented medicines;
(2) least developed countries that do not have to provide patent protection for pharmaceutical products or processes until 2016, although many do so prematurely or under pressure; again national legislation should be amended to permit such production and export;
(3) countries that did not start granting patents on medicines until compelled to do so by the TRIPS Agreement and who can thus make generic versions of pre-1995 drugs legally even without a compulsory license; and
(4) countries like India, who did not have patent production for pharmaceutical "products" in 1994 but only for pharmaceutical "processes" and thus have until 2005 to become fully TRIPS-compliant.

Pursuant to flexibilities and transitional periods in the TRIPS agreement, India can continue to make lawful copies of pre-1995 medicines for export without restriction and will continue to be able to do so indefinitely—the Paragraph 6 Implementation Agreement and the Chairman's Statement arguably have nothing to do with this. The story for post-1995 medicines is more complicated because of a "mailbox rule" in Article 70.9 of the TRIPS Agreement. Under the so-called "mailbox" rule, countries like India are supposed to hold post-1995 patent applications in a "mailbox" pending their TRIPS compliance in 2005. At that time, the patent application would be given priority and the patent, if granted, would extend for the remainder of its twenty-year term. Moreover, even while the patent application is waiting in the "mailbox," the patent holder is supposed to be given five years of marketing exclusivity once the product has been registered for distribution by the country's medicines registration agency assuming it has also been patented and registered by another WTO member. India has just granted its first exclusive marketing rights to a "mailbox" cancer drug, Glivec. Fourteen other pipeline applications have been filed but several, including

Roche's Saquinavir, have been rejected for not fulfilling the required criteria.[123]

Brazilian/Indian Example

In September of 2003, Brazil took the first steps towards issuing a compulsory license to import generic antiretroviral drugs from India. It did so by means of a presidential decree that created a juridical mechanism for generic importation in the case of national emergency or national interest. Through negotiations with Abbott Laboratories, Merck & Co. and Roche, proprietary owners of Lopinavir, Efavirez, and Nelfinavir respectively, Brazil was seeking cheaper sources of supply because it was spending 63% of its $573 million ARV budget on these three medicines alone. On November 19, 2003, only Merck had settled with Brazil after granting a 25% price break on Efavirez (savings $10 million). However, Bristol-Myers Squibb, a fourth company announced a 76% discount on Atazanavir, producing a $60 million annual saving for Brazil.

Admittedly, Brazil has a highly competent generic industry, led by the Far-Manguinhos state laboratory, which has been producing seven non-patent protected ARVs locally. This local production capacity and the credible threat of compulsory licenses have dramatically reduced Brazil's annual costs per patient for antiretroviral therapy. However, even while Brazil evaluates its internal pharmaceutical production capacity and while Far-Manguinhos investigates the development processes of these three newer ARVs, Brazil is seeking to fill a temporary gap in its ability to source these drugs locally.

India is producing the three drugs in question lawfully because its patent system currently protects processes only. Thus, it can export reverse-engineered and differently produced drugs lawfully to any country where there is no patent bar. Because the drugs themselves are not patent protected in India, this entire transaction is not subject to the new Paragraph 6 Implementation Agreement. Instead, India can produce and export any quantity it desires and Brazil can override the existing patents with an ordinary compulsory license.

123. *Novartis Receives EMR for Glivec, available at* http://lists.essential.org/pipermail/ip-health/2003-November/005611.html (last visited Mar. 4, 2004).

3.2.2 Parallel imports

Parallel importation is importation, without the direct consent of the patent-holder, of a product voluntarily and legally marketed in another country by the patent-holder or by another authorized party. The rationale for permitting parallel importing is to promote price competition for patented products by allowing importation of patented products marketed at a lower price in another country by or with the consent of the patent-holder. This indirect competition with oneself is thought to increase the likelihood of fair pricing between countries.

In TRIPS terminology, a patent-holder's right to limit distribution of a product after its first sale has been "exhausted" once the product has been marketed by or with the consent of the patent-holder. Almost all countries have a minimal principle of national exhaustion, permitting resale within a country after a first sale; such resale is necessary to the ordinary movement of products through the wholesale and retail distribution system. In addition to this minimal provision, some countries have adopted an international exhaustion rule, meaning that products can be lawfully imported from a foreign source once the patent holder or its licensee had made a profit (exhausted its rights) via the original sale of the product.

The TRIPS Agreement does not prohibit member countries from adopting the principle of international exhaustion; in fact, it explicitly permits it. That permission starts with Article 6 which states that disputes relating to exhaustion are not subject to the WTO dispute settlement process.[124] Although the United States and European Union argued that Article 27.1 barred parallel importation, despite the Article 6 rule, any doubts on this score were eliminated by the Paragraph 5(d) of the Doha Declaration, which expressly recognized Members' right to elect their own exhaustion rule and thereafter to parallel import.[125]

Under an even more liberal parallel importation rule, a country that recognizes "international exhaustion" might be permitted to import drugs produced under a compulsory license issued in another country, even if there were no compulsory license issued in the importing state. Pursuant to this analysis, parallel importation would be TRIPS-compliant because rights would have been exhausted (or permission for sale would have been granted) by the compulsory licensee.[126] The uncertainty in using this approach, however, is whether the product would be considered to have been "permissibly" placed

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124. TRIPS Agreement, *supra* note 7.

125. *See* Doha Declaration, *supra* note 15.

126. *See generally* Carlos Correa, *Integrating Public Health Concerns into Patent Legislation in Developing Countries*, Section X.2 (2000), *available at* http://www.southcentre.org/publications/publichealthHoc.htm (last visited Mar. 4, 2004) (advocating this approach).

in the stream of commerce if the product were being produced pursuant to an "involuntary" or compulsory license.

The pharmaceutical industry is highly critical of parallel importation because it limits companies' ability to charge whatever a local market will bear. It also potentially reduces profits in high-price countries, but only if consumers can lawfully obtain cheaper sources of supply with a lower profit margin elsewhere. To allay this risk, most developed countries have imposed significant restrictions on parallel importation of medicines. For example, the United States prohibits the practice completely except for consumer's personal supply of medicines purchased abroad, whereas the European Community permits regional importation only between members of the European Union. In addition, pharmaceutical companies have several private options to circumvent parallel importation rules. The most draconian would be to impose a uniform high price worldwide thereby decreasing affordability in middle-income and low-income nations. Other solutions are subtler. For example, a company could limit its supply to a low-price country to an amount sufficient for internal consumption only. Some patent holders are already pursuing this strategy in Canada where U.S. consumers are beginning to engage in a larger volume of internet sales with Canadian distributors.[127] Alternatively, especially in a price-control jurisdiction, a company could charge two prices, one for domestic consumption and a second for export products.[128]

Although there are many contexts where activists would disapprove of protective anti-parallel pricing practices by multinational pharmaceuticals, prohibitions against parallel export/import probably make the most sense when a company has been "convinced" to make major price concessions to a particular developing country or region, as in the Accelerating Access Initiative.[129] However, a more progressive analysis would not necessarily object to parallel export/import to other developing countries not yet reached by concessionary or discount pricing. Oxfam and others have addressed this dilemma by proposing that there be one parallel import rule for developing countries and another for developed countries. Although developing countries would be free to parallel import from any cheaper branded source, developed countries would not be permitted to parallel import from nations receiving concessionary pricing.[130]

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127. Bernard Simon, *Curtailing Medicines from Canada*, N.Y. TIMES, Nov. 11, 2003, at C1.

128. *See* Medecins Sans Frontieres Access to Essential Medicines Campaign and the Drugs for Neglected Disease Working Group, *Fatal Imbalance: The Crisis in Research and Development for Drugs for Neglected Diseases, available at* http://www.msf.org/source/access/2001/fatal/fatal.pdf (last visited Feb. 25, 2004) [hereinafter *Fatal Imbalance*].

129. *See generally* World Health Organization, Accelerating Access Initiative, Widening Access to Care and Support for People Living with HIV/AIDS Progress Report (June 2002), *available at* http://www.who.int/hiv/pub/prev_care/aai/en/ (last visited Apr. 6, 2004).

130. *Fatal Imbalance*, *supra* note 128.

3.2.3 "Ordinary" Article 31(b), (f) compulsory licenses—non-predominant quantities

If authorized by local law, Article 31 of TRIPS permits a competent government authority, including a health or patent department, to license the manufacture, sale, and use of an invention to an authorized third-party or government agency without the consent of the patent-holder. Although such licenses could stimulate price-lowering competition and ensure availability of needed medicines, few developing nations, except Malaysia, Mozambique, the Phillipines, and Cameroon, have issued a compulsory license for HIV/ AIDS medicines, though an application is pending in South Africa and licenses have been threatened on several occasions by Brazil. Complicating any such effort is the fact that few developing countries have comprehensive compulsory licensing clauses in their patent legislation. Even as developing countries amend their intellectual property regimes to become TRIPS compliant, many of them are not taking advantage of the TRIPS-compliant compulsory license provisions that exist.

The permissible grounds for compulsory licenses are not fully enumerated or delimited in the TRIPS Agreement, and thus developing nations have significant discretion in selecting health sensitive policies. Permissible grounds for compulsory licensing include public health and the public interest broadly defined, see Article 8, national emergencies, matters of extreme urgency such as epidemics, and public non-commercial use, Article 31(b), and/or to remedy anti-competitive practices, Article 31(k) (discussed further in the following sub-section). Some of these grounds justify expedited governmental action. For example, under Article 31(b), when the government declares an emergency or a matter of extreme urgency, such as the AIDS pandemic, it could seek a compulsory license for itself or for an authorized third party to begin commercial exploitation without first negotiating with the patent holder. Similarly, when the government is seeking a license for public, non-commercial use, the government or its authorized agent is not required to seek prior approval and it can limit the patent-holder's remedies to review of the amount of compensation.[131] Finally, under Article 31(k), if the government acts to redress anti-competitive practices or abuse of patent, it can both reduce the amount of compensation to the patent holder and distribute the product without quantity restrictions outside the domestic market.

Although TRIPS is relatively indifferent about the grounds for issuing a compulsory license, it is relatively strict about the procedures that must be followed in order for an ordinary license to be granted. Except in cases of governmental, non-commercial use, cases arising from anti-competitive practice, or cases involving emergency or extreme urgency, the prospective licensee is ordinarily required to seek a voluntary licensee on commercially

131. TRIPS Agreement, *supra* note 7, art. 42.

reasonable grounds for a reasonable period of time.[132] In addition, as previously stated, the licensee is required to pay adequate compensation.[133] Despite a requirement of case-specific determinations, however, it might be appropriate to set forth factors affecting royalty rates including public expenditures, inventiveness, research and development costs, remaining life of the patent, purpose of use, and other valid factors. Alternatively, countries could specify relatively modest royalties in the range of two to ten percent that have become traditional in the pharmaceutical field.[134]

Even if a compulsory license is granted, the patent-holder retains its underlying intellectual property rights in the patent. The license granted is non-exclusive, meaning the patent-holder and its other licensees can still compete; moreover, the license is non-assignable.[135] More significantly, the license is revocable once the circumstances that led to its granting have ceased to exist, though some consideration must be given to the interests of the licensee who may have invested heavily in order to manufacture the licensed product.[136] This possibility of revocation creates barriers to entry in developing countries even in those rare circumstances where they have sufficient drug manufacturing capacity to produce drugs locally.

One of the most problematic features of the compulsory license regime is that licenses must be issued "predominantly for the supply of the domestic market," except in cases of patent abuse where this limit does not apply.[137] The meaning of this "domestic supply" requirement is inherently unclear as it might mean that "the predominant portion of products produced must be *consumed* domestically" or alternatively that "the license shall be predominantly for the *benefit* of domestic consumption."[138] With the latter interpretation, a country would be justified in exporting a major portion of its production, if such export were necessary in order to have large production runs so as to efficiently supply the domestic market. This is the preferable interpretation of Article 31(f) because it could result in a regional manufacturer being able to supply several small markets in order to achieve cost efficient economies-of-scale. Under any interpretation, however, an

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132. *Id.* art. 31(b).

133. *Id.* art. 31 (h).

134. James Love, Compulsory Licensing: *Models for State Practice in Developing Countries, Access to Medicine and Compliance with WTO TRIPS Accord* paras. 35-42, *available at* http://www.cptech.org/ip/health/cl/recommendedstatepractice.html (last visited Mar. 7, 2004). Canada's proposed royalty rate in its pending patent law amendment is a flat two percent. *Id.*

135. TRIPS Agreement, *supra* note 7, art. 42

136. *Id.* art. 31(c), (g).

137. *Id.* art. 31(f), (k).

138. Robert Weissman, *A Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, 17 U. PA. J. INT'L ECON. L. 1069, 1075-94 (1996).

importing country could utilize a non-Paragraph 6 compulsory license to import the non-predominate portion of an exporting country's generic product.

3.2.4 Article 31(k), competition-based compulsory license

Fortunately, as referenced above, there is a predominately-for-the-domestic-market exception in Article 31(k) where a patent-holder has been found to have anti-competitively abused its patent, by excessive pricing or otherwise, in the producing country. In these circumstances, a generic producer operating under a compulsory license could produce on a large scale for export, most relevantly even where a non-special, non-Paragraph-6 compulsory license had been granted in the importing country. Since TRIPS provides no definition of what might constitute an anti-competitive practice, since Article 1 states that Members should "determine the appropriate method of implementing the provisions of [TRIPS] within their own legal system and practice,"[139] and since Article 8.2 grants Members authority "to prevent abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade,"[140] it seems clear that individual countries are permitted to develop definitions of anti-competitive behavior so long as they are not transparently TRIPS-nullifying. In this regard, Article 40 directly empowers Member states to address anti-competitive practices in licensing agreements.

By their very nature, drug patents are anti-competitive because they ordinarily enable the patent holder to exclude other manufacturers and vendors. Therefore, although "normal" exploitation of patent rights might not constitute an anti-competitive practice, excessive prices and refusals to license might be held anti-competitive in specific settings, particularly where a pharmaceutical product dominates a therapeutic class, where product substitution is not feasible, and where a supra-competitive price prevails.

Given that many competition schemes are designed to prohibit excessive pricing, it is possible to argue that high prices are unwarranted especially where there is market domination for a particular drug because of the impracticability of product substitution and where the drug is considered an essential commodity. This argument is bolstered when it can be shown that excessive pricing effectively eliminates product availability for a large class of poorer consumers, creating a disproportionate dead-weight loss whereby the vast majority of patients lack affordable access to the medicine. If medicines are not being provided on a reasonably affordable basis, bearing some reasonable relation to the costs of production, then a country could issue a compulsory license under Article 31(k) on the basis of exploitative pricing. Other factors may add to the argument for compulsory licenses, including the

139. TRIPS Agreement, *supra* note 7, art. 1.
140. *Id.* art. 8.2.

fact that the medicines were discovered and developed with public money, such as many AIDS drugs.[141] Another price-related anti-competitive practice might be the now routine practice of patent holders discriminating in prices offered to the public and private sector and the practice of price differentiation among countries. Since price discrimination is frowned upon in many competition schemes, discriminatory pricing might justify the issuance of a license.

An even more promising competition theory is one that combines exploitative pricing and exclusionary practices, e.g., refusals to license generic competitors, where the combined effect creates an access gap for the product. If the patent holder charges a supra-competitive price and if this price is traceable, at least in part to its refusal to license its patent to generic competitors, then this too could be found to be an actionable exclusionary practice. The more radical form of this analysis is that each patent is, in essence, an essential facility and that the patent holder should ordinarily make this patent available to competitors in developing countries once they have obtained approval to market the medicine. An alternative, less radical access-gap theory focuses on the issue of downstream innovation, product improvement, or product combinations. Under this version, the essential facilities doctrine is utilized where a follow-up product cannot be marketed without the approval or a license from one or more patent holder. This doctrine has particular utility with respect to fixed-dose combination medicines[142] and other product improvements. Drug companies rarely make fixed-dose combinations of the most effective antiretroviral therapy combinations because patents on the different medicines are held by different companies and those companies have been unwilling thus far to cross-license medicines with competitors.[143]

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141. James Love, *Public Citizen's Prescription Drug Update—Drug Company Profits* (Oct. 11, 2000) (a thirty-eight percent return on equity, making the pharmaceutical industry the most profitable sector in the U.S. economy).

142. Fixed-dose combinations put three different antiretroviral drugs into a single pill. The WHO endorsed fixed-dose medicines as a crucial component of its ambitious plan to help the world treat three million people living with AIDS by the end of 2005. WHO, *Scaling Up Antiretroviral Therapy in Resource-Limited Settings: Treatment Guidelines for a Public Health Approach*, 9-13, *available at* http://www.who.int/3by5/publications/guidelines/en/arv_guidelines.pdf (last visited Mar. 7, 2004); WHO & UNAIDS, *Treating 3 Million by 2005: Making it Happen: The WHO Strategy, supra* note 4.

143. GlaxoSmithKline does make a fixed dose of its own patented ARVs and one of these, Combivir, is an important therapy. However, Trimune, its three-medicine, fixed-dose combination is no longer a recommended therapy. On January 6, 2004, the FDA approved a combination of Roche's Invirase and Abbott Laboratories' Norvir, where the second acts as a "booster" for the first. Kaiser Daily HIV/AIDS Report, *FDA Approves Antiretroviral Drug Combination of Roche's Invirase, Abbott's Norvir, available at* http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=1&DR_ID=21549 (last visited Mar. 7, 2004). On May 16, 2004, Bristol-Myers Squibb, Gilead Sciences, Inc., and Merck & Co. Inc. announced talks to co-package and eventually to develop a fixed-dose combination involving Viread, Emtriva, and efavirenz. Lawrence K. Altman, U.S. Speeding Up Approval Steps for AIDS Drugs, N.Y. Times, May 17, 2004, available at http://query.nytimes.com/gst/abstract.html?res=F10F15FB3F5B0C748DDDAC0894DC404482&n=Top%252fNews%252fHealth%252fTopics%252fAIDS (last visited May 27, 2004).

This refusal has had negative public health consequences because it increases patients' pill burden and complicates patient compliance with complex pill-taking schedules. Generic companies, on the other hand, face no such constraint and gladly produce combination medicines when patent rules do not prevent them from doing so.

A final advantage of competition-based compulsory licenses is that they might authorize additional remedies beyond production and sale of a medicine. A competition-based license could, for example, require access to confidential drug registration data, thereby greatly easing the ability of the generic licensee to establish bio-equivalence even where a country had improvidently granted data exclusivity rights.[144] In addition, the patent holder might be forced to transfer secret manufacturing know-how. Both of these expanded intellectual property remedies have been granted in U.S. anti-trust cases involving pharmaceutical companies.[145]

144. According to a recent study, ten percent of seventy developing countries do not permit a second applicant to rely on previously submitted data, while another seventy-five percent have unclear law or no provision on point. Thorpe, *supra* note 55. These numbers are getting worse over time as countries accede to U.S. trade demands. Recent agreements with Chile, Singapore, Jordan, and Central American countries all provide for data exclusivity of at least five years.

145. Colleen Chien, *Cheap Drugs at What Price to Innovation: Does Compulsory Licensing of Pharmaceuticals Hurt Innovation?*, 18 BERKELEY TECH. L. J. 853 (2003).

SOUTH AFRICAN EXAMPLE

These arguments are no longer theoretical. On October 16, 2003, the South African Competition Commission announced a finding upholding a complaint by the Treatment Action Campaign and others against two pharmaceutical giants, GlaxoSmithKline South Africa and Boehringer Ingelheim, and holding that both companies had charged excessive prices for their patent-protected antiretroviral medicines. The ruling further held that they had unlawfully refused to issue voluntary licenses to generic competitors and that they had thereby unreasonably restricted access to an essential facility preventing production of fixed-dose combination medicines.

Menzi Simelane, Commission at the Competition Commission, said in the Commission's media release that "Our investigation revealed that each of the firms has refused to license their patents to generic manufacturers in return for a reasonable royalty. We believe that this is feasible and that consumers will benefit from cheaper generic versions of the drugs concerned. We will request the Tribunal to make an order authorising any person to exploit the patents to market generic versions of the respondents patented medicines or fixed dose combinations that require these patents, in return for the payment of a reasonable royalty. In addition, we will recommend a penalty of ten percent of the annual turnover of the respondents' ARVs in South Africa for each year that they are found to have violated the Act."

In response to the looming threat of punishing hearings before the Competition Tribunal in South Africa, on December 10, GSK and BI both announced voluntary licensing agreements with the complainants. Under the terms of the settlement agreement, negotiated in the shadow of threatened anti-competitive-practices compulsory licenses, (1) sales will be permitted in public, private, and NGO sectors; (2) there will be an expand geographical scope permitting manufacturers to reach efficient economies of scale so long as they produce the medicines in South Africa; (3) the licenses are open to a reasonable number of producers (four for GSK and three for BI); (4) the licenses permit combination of licenses and production of fixed-dose medicines; and (5) they are be based on modest royalties of five percent only. As of May 2004, final licenses on these terms had still not been consumated.

3.2.5 Legal certainty concerning post-Paragraph 6 Implementation Agreement sourcing flexibilities

Some commentators have been concerned that the Paragraph 6 Implementation Agreement and Chairman's Statement might somehow

compromise or limit flexibilities for accessing imported generics that existed under previous agreements. This is not a credible concern with respect to the four no-patent options first described above, nor even for the Article 31(f) and Article 31(k) options. Paragraph 9 of the Paragraph 6 Implementation Agreement reads as follows:

> This Decision is without prejudice to the rights, obligations and flexibilities that Members have under the provisions of the TRIPS Agreement other than paragraphs (f) and (h) of Article 31, including those reaffirmed by the Declaration, and to their interpretation. It is also without prejudice to the extent to which pharmaceutical products produced under a compulsory license can be exported under the present provisions of Article 31(f) of the TRIPS Agreement.[146]

This paragraph expressly acknowledges all of the no-patent options outlined above. Likewise, it does not directly limit rights under 31(k) or non-predominate amounts under 31(f).

3.2.6 Limited exceptions under Article 30

Paragraph 9 might be interpreted even more liberally to mean that the Paragraph 6 Implementation Agreement does not exclude the possibility of Article 30 production in an exporting country. Although there is no direct recognition of an Article 30 approach, the "Decision is without prejudice to the rights, obligations and flexibilities that Members have under the provisions of the TRIPS Agreement other than paragraphs (f) and (h) of Article 31,"[147] and Article 30 is still one of those flexibilities.

The text of Article 30 of the TRIPS Agreement certainly evidences enough flexibility to justify limited exceptions designed to address the public health needs of the developing world, including those arising for poor countries that are not able to make effective use of compulsory licenses because they lack meaningful capacity to manufacture medicines locally.

> Members may provide *limited* exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not *unreasonably* conflict with a normal exploitation of the patent and do not *unreasonably* prejudice the legitimate interests of the patent owner, *taking into account the legitimate interest of third parties.*[149]

146. Paragraph 6 Implementation Agreement, *supra* note 16, ¶ 9.
147. *Id.*
148. *Id.* (emphasis added).

As a guiding interpretive principle, it is important to recognize that Article 8 of the TRIPS Agreement authorizes member countries to consider public health and public interests needs when drafting their patent laws "provided that such measures are consistent with the provisions of this Agreement."[149] Similarly, Article 7 provides that intellectual property rights "should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users . . . in a manner conducive to social and economic welfare, and to a balance of rights and obligations."[150] For these two provisions to mean anything, they should mean that member states can balance public health, public interest, and consumer needs in some affirmative way that impacts the unfettered exercise of patent rights. Thus, given the extent of the public health problems in developing countries and given the realities that many developing countries cannot produce medicines locally, it makes sense under public health, trade, and human rights principles to fashion limited exceptions that permit the export-import of generic medicines to those poor nations.

Moreover, the language of Article 30 supports an interpretation that *some* significant impact on patent rights is permissible. For example, the first requirement of Article 30 is that the exception must be limited. Although "limited" does not mean that total abrogation of patents would be permitted, it must mean that some impact is possible, such as the quite significant impact of the "Bolar" exception,[151] which can accelerate approval of generic competition by as much as three years costing the patent holder millions, even billions, of dollars. Similarly, the second and third clauses of Article 30 permit some conflict with the normal exploitation of a patent, though not an "unreasonable conflict," and some prejudice to the legitimate interests of the patent owner, though not "unreasonable prejudice." Lawyers are used to talking about the meaning of what is "unreasonable," but once again the language necessarily suggests that some conflict and some prejudice is permissible—so long as the limited exception does not go too far.

When producing for export only under an Article 30 limited exception, there is no real curtailment of the patent holder's rights in the consuming country. If that country had manufacturing capacity, it could produce medicines own its own. Since it does not, a limited exception simply gives no-capacity countries a legal source of off-site manufacture, leveling their playing

149. TRIPS Agreement, *supra* note 7, art. 8.

150. *Id.* art. 7.

151. *WTO, Canada—Patent Protection of Pharmaceutical Products, Report of the Panel*, WT/DS114/R (March 17, 2000), *available at* http://www.wto.org/english/tratop_e/dispu_e/7428d.pdf (last visited Mar. 7, 2004) [hereinafter Generic Medicines]. In Generic Medicines, the panel found that manufacture before patent expiration so as to register a medicine, the so-called "Bolar" exception was lawful, but that a six-month stock-piling rule was unlawful. In particular to the point under discussion, Generic Medicines found that any exception which resulted in a substantial curtailment of [any exclusionary right] cannot be considered a limited exception. *Id.* ¶ 7.44.

field vis-à-vis countries with productive capacity. If the medicine were on-patent in the importing country, the importer would pay a previously determined royalty fee. Alternatively, if the medicine were off-patent in the importing country, then a royalty imposed in the exporting country would not unreasonably burden its consumers.

Fortunately, the language of Article 30 does not suggest that only the patent holder's rights be considered; instead, it requires that the exception be judged "taking account of the legitimate interests of third parties"[152] including presumably millions of poor people living with HIV/AIDS and other treatable diseases. There is no geographical scope given about "third parties" who count, and thus the legitimate interests of third parties living in developing countries weigh heavily. This last proviso strongly suggests that Article 30 incorporates a principle of proportionality such that if the public health interests of third parties are substantial, then a more significant limitation on patent rights is permissible. In the real world, if these "third parties" in developing countries do not get the lowest-price, assured-quality generics available, they *will* die.

3.2.7 The Paragraph 6 Implementation Agreement

The real difficulties of the Paragraph 6 Implementation Agreement and Chairman's Statement concern post-1995 discoveries and arise much more broadly in 2005 when no one but non-WTO members, least developed countries, and/or companies in WTO member countries that have issued compulsory licenses will be able to manufacture and export a patented medicine. It is at this time that countries like India will have to become fully TRIPS compliant and will have to provide patent protection for post-1995 pipeline/mailbox patent applications and for all post 2005 discoveries if a patent has been filed and granted.

The Implementation Agreement also applies to countries where a medicine is currently on patent and where it seeks to export more than forty-nine percent of the product under a non-competition-remedy compulsory license. Thus, for example, were Nigeria to seek becoming a regional producer and exporter in Southern Africa, it would need to issue Implementation Agreement-compliant compulsory licenses. On the more immediate horizon, Canada would need to do so also if it succeeds in amending its patent legislation as promised.

152. TRIPS Agreement, *supra* note 7, art. 30.

THE CANADIAN EXAMPLE—LEGISLATIVE REFORM

On Thursday, November 6, 2003, the Canadian government introduced a bill that would amend its Patent Act to provide for the issuance of compulsory licenses that would allow Canadian generic manufactures to make and export generic versions of patented pharmaceutical products to developing countries lacking their own manufacturing capacity. Canadian NGOs and the UN Special Envoy on HIV/AIDS in Africa, Stephen Lewis, had urged the government to take this initiative following the August 30 Paragraph 6 Implementation Agreement. Canadian civil society organizations were reportedly pleased that the proposed bill did not authorize compulsory licensing of pharmaceuticals only to treat specific diseases or to address only "emergencies" or other circumstances of extreme urgency as initially reported. However civil society organizations identified some serious flaws in the bill as introduced.

(1) *Provisions permitting patent-holders a right of first refusal to block export licenses.* The original bill included provisions that gave the company holding the Canadian patent on a pharmaceutical product the right of first refusal to take over contracts negotiated by generic pharmaceutical manufacturers with developing country governments or other authorized importers. In order to do so, the patent-holding company would have 30 days to meet the terms of the contract negotiated between the Canadian generic producer and the developing country purchaser. Under the Bill as initially drafted, if the patent-holder took over the contract the patent holder would be relieved from any obligation to negotiate the terms of a voluntary license for the generic manufacturer to make and export the product and the Commissioner of Patents would be prohibited from issuing a compulsory license to the generic company. Under such a legislative scheme, generic manufacturers might quickly lose incentive to negotiate export contracts in the first place. Instead the patent-holder would be able to repeatedly block the generic manufacturer from obtaining the export license needed to make the product and fulfill the contract.

(2) *Limited list of pharmaceutical products.* The original bill listed pharmaceutical products for which a compulsory license might be obtained, limited to patented medicines on the WHO Model List of Essential Medicines. The bill also contemplated that the Canadian Cabinet could authorize the addition (or removal) of any other "patented product that may be used to address public health problems." Given the protracted battle over disease limitations post-Doha, a limited list of products represents a step backward and is certainly not required by the Paragraph 6 Implementation Agreement.

(3) *Denial of benefit to developing countries that are not WTO members.* Under the initial bill, all countries recognized as "least-developed countries" could benefit from the export of generic pharmaceutical products as could developing country WTO members. However, developing countries that did not belong to the WTO were unable to benefit from the possibility of importing generic pharmaceuticals from Canada.

Because of opposition from AIDS activists and other opinion leaders, the original bill was substantially improved before its enactment on May 14, 2004. The right of first refusal was removed, but unfortunately replaced with a still onerous clause restricting "commercial motivation" and placing caps on prices and cost-markups for Canadian produced generics. The exclusion of non-WTO members was also removed, but here too an unnecessary restriction was engrafted, one requiring the importing country to declare an emergency. Nonetheless, although the enacted law has not yet been proclaimed into force pending promulgation of implementing regulations, Canada has become the first nation to pass Paragraph 6 Implementation Agreement legislation to permit export of medicines to countries without meaningful productive capacity.

4. Legislative Reform in Importing and Exporting Countries [153]

In order for any exportation of on-patent medicines to be lawful, whether pursuant to exhaustion rules, an Article 31(f) or 31(k) compulsory license, or an Article 30 limited exception, there must be enabling legislation in the exporting country permitting such exportation. Likewise, there must also be provisions for issuance of import compulsory licenses in importing nations where medicines are under patent. Accordingly, in order to maximize their future flexibilities, most countries should enact legislation with respect being both an importer and an exporter of generic medicines.

A previous review of developed country patent laws reveals that few of them have incorporated pro-public health flexibilities into their patent schemes. For example, only thirteen countries have adopted legislation permitting issuance of voluntary licenses to address public health emergencies, only eleven to remedy anti-competitive practices, and only four for failure to license.[154] Moreover, another constellation of developing and least developed

153. *See* Canadian HIV/AIDS Legal Network, *Update: Amendment to Canada's Patent Act to Authorize Export of Generic Pharmaceuticals*, *available at* www.aidslaw.ca/Main content/issues/cts/patent-amend/Patent ActAmendment_Update.pdf (last visited Feb. 12, 2004).

154. Carlos Correa, WHO Health Economics and Drugs, EDM Series No. 12, *Implications of the Doha Declaration on the TRIPS Agreement and Public Health*, WHO/EDM/PAR/2002.3, *available at* http://www.who.int/medicines/library/per/who-edm-par-2002-3/doha-

countries has prematurely adopted TRIPS compliant legislation and in some cases TRIPS-plus legislation. Thus, in order to secure the hard fought gains in the Doha Declaration and the Paragraph 6 Implementation Agreement, developing countries must quickly operationalize all the flexibilities they have achieved by amending national legislation as outlined in Chart Two below.

implications.doc (last visited Mar. 7, 2004).

CHART TWO LEGISLATIVE REFORM

Legislative Reform in Importing Country	**Legislative Reform in Exporting Country**
1. Authority to grant compulsory licenses on all permissible grounds: *a. For emergencies and other matters of extreme urgency without prior notification (TRIPS Art. 31(b)); would be wise to designate HIV/AIDS, TB, and malaria as public health matters of extreme urgency not subject to emergency declaration standards, constitutional or legislative (Doha Declaration ¶ 5(c));* *b. For governmental non-commercial use without prior notification (TRIPS Art. 31(b);* *c. On other public health grounds for any diseases and medical conditions requiring access to more affordable pharmaceutical products (TRIPS Art. 31(b), Doha Declaration ¶ 5(b))* *d. To remedy anti-competitive practices and therefore to be able to export to other countries (TRIPS Art. 31(k), Art. 40):* *i. Abusive or excessive pricing leading to a gap in access (S.A. Comp. Comm.);* *ii. Refusal to issue voluntary licenses (S.A. Comp. Comm.);* *iii. Essential technology or essential facilities doctrine especially important with respect to sourcing fixed-dose combination medicines (S.A. Comp Comm.)* *iv. Any and all other anti-competitive practices;* *e. Stipulation that all such licenses can be satisfied by local production and/or import (TRIPS Art. 27.1)* *f. Special compulsory licenses for import when country determines it lacks capacity to manufacture efficiently or timely domestically (Para. 6 Implementation Agreement);* *g. Ability to register generics produced under a compulsory license via comparison to confidential data (TRIPS Art. 39.3);* *h. Limits on patent-holders' rights of appeal and preclusion of injunctive relief.* *2. International exhaustion regime allowing parallel importation (TRIPS Art. 6, Doha Declaration ¶ 5(d)).* *3. Ability to export regionally if part of a regional trade agreement (Paragraph 6 Implementation Agreement ¶ 6(i)).*	*1. Authority to grant regular compulsory license on all permissible grounds (emergencies, governmental/non-commercial use, public health, and to remedy anti-competitive practices) (TRIPS Art. 31(b), 31(k), Doha Declaration ¶ 5(b) and (c);* *2. Authority to export non-predominate quantities pursuant to a regular compulsory license (TRIPS Art. 31(f)) and authority to export unlimited quantities in the event of practices found anti-competitive (TRIPS Art. 31(k), see 1.d opposite, grounds for issuing licenses for anti-competitive practices).* *3. Authority to grant compulsory licenses on the basis of notification by a member developing country to the TRIPS Council pursuant to the Paragraph 6 Implementation Agreement;* *a. Should allow simplified procedures;* *b. Should allow joint consideration of concurrent licenses on multiple drugs and for multiple importers;* *c. Must require notification, procedures and limitations of the Paragraph 6 Implementation Agreement (and perhaps the Chairperson's Statement);* *d. Should limit rights of appeal and preclude injunctive relief by patent holders;* *4. Authority to produce medicines for export based on a Paragraph 6 request as a limited exception (TRIPS Art. 30— untested);* *5. Authority to produce medicines for export on humanitarian grounds as a limited exception (TRIPS Art. 30— untested);* *6. Authority for wholesalers and other buyers to export patented medicines already sold by patent holders to other developing countries to satisfy their parallel importation needs (TRIPS Art. 6);* *a. Consider making it an anti-competitive practice for a patent holder to restrict quantities or to place contract limits on right to "parallel export;"* *7. Require least costly methods of differentiation required to satisfy the Paragraph 6 Implementation Agreement's provisions concerning danger of product diversion.* *8. Encourage technology transfer to developing countries without capacity to manufacture medicines.*

Although it is beyond the scope of this paper to suggest actual language for amendment of domestic legislation, it is possible to outline some of the desirable features of such reform. However, when actually drafting implementing legislation, developing countries should be leery of technical assistance from traditional sources like WIPO and USAID. Despite refraining from comprehensively addressing all the permutations of legislative reform, this paper will directly address three areas of special concern: implementing the August 30 Agreement, energizing competition policy, and regulating voluntary licenses.

4.1 Implementing the August 30 Paragraph 6 Implementation Agreement

Actual implementation of the August 30 Paragraph 6 Implementation Agreement will require careful legal and regulatory implementation in both importing and exporting countries. Despite arthritic flexibilities in the Agreement, countries should craft legislation that tries to make the system as streamlined and efficient as possible. Rob Weissman of Essential Action has offered guidelines for exporting countries aimed at streamlining production for export:

> 1. Exporting country authorities should grant all applications for a compulsory license by a potential exporting manufacturer, contingent on a showing by the exporter that they plan to export in response to a request by an eligible importer.
> 2. A country is an eligible importer if it is a least-developed country, or any country that has made a notification to the Council for TRIPS of its intention to use the system as an importer, and which makes its own determination that it lacks sufficient manufacturing capacity to met its needs.
> 3. Licenses should authorize production of a quantity needed by the eligible importer. The license should be open-ended, so that exporters are authorized to export, over time, whatever amounts an importing country indicates it needs, subject to a system whereby the importing country provide notification of the required amounts, and those amounts are disclosed on a timely basis in a manner consistent with the WTO system for transparency.[155]

155. This open-ended license is a little risky given that the Paragraph 6 Implementation Agreement specifies that an export license must be for a specific quantity of a specific medicine. Weissman's proposal certainly makes sense in that it is onerous to require iterative license applications when transparency could be achieved merely by notifications concerning new quantities.

4. The term of the license should be for the life of the patent in the exporting country, unless the importing country indicates that it is no longer eligible.
5. There should be no requirement in the exporting country for a prior negotiation with the patent holder, and certainly not if one took place in the importing country. The TRIPS obligation for negotiation for a "reasonable period of time" shall be deemed met by negotiations, if required, that occurred in the importing country.[156]
6. The Paragraph 6 implementation decision obligates exporters to distinguish their products as produced under the implementation decision. The main concern is to ensure they are not confused with patented products, and thereby potentially subject to diversion to countries where the patent owner maintains a marketing monopoly. The most important distinguishing feature is to use a different trademark name for the export product. Exporting countries should require exporters either to use a different trademark name from the patented product, or only a generic name. Exporters should also be encouraged to use different external packaging from the patent holder, including marks indicating that the product is not for re-export. Where there is no medical reason to the contrary, and where the cost of doing so is de minimis, exporters should alter the color and/or shape of products to distinguish them from the patented version.
7. Before shipment, exporters should be required to post on their website (or, as an alternative at their discretion, the WTO website), the quantities being supplied and the distinguishing features they have applied to the product or packaging.
8. Compensation. The WTO requirements for compensation under a Paragraph 6 export compulsory license is the standard of "adequate remuneration" from Article 31(h) of the TRIPS. This is a less stringent standard than "reasonable commercial terms." Under the terms of the Paragraph 6 Agreement, the exporting country is required to set compensation, taking into

156. Weissman proposes that prior negotiations should generally not be required in the exporting country despite the language to the contrary in Article 31(b) of TRIPS. His argument is most cogent when prior negotiations have already occurred in the importing country where a patent bar exists. His argument also makes sense if the importer is a no-patent country, that country's access should not be delayed by negotiation rights that would not occur if the country had domestic manufacturing capacity. Despite the logic of Weissman's argument, some cautious exporting countries would provide for a period of prior negotiations given the specter of an Article 31(b) challenge.

> account the economic value of the product in the importing country. The importing country can waive compensation when compensation is paid in the exporting country. ...
> Wherever compensation is set, the key issue is to ensure the compensation system is simple, quick and predictable . . . [recommending royalties ranging from two to six percent be set by an appropriate administrative body].
> 9. The validity of a compulsory license in the exporting country shall be subject only to administrative review. Injunctive relief should not be available to the patent owner.
> 10. The implementing legislation should ideally apply to all healthcare inventions, and at least to all pharmaceutical products, defined in the Paragraph 6 Agreement as inclusive of all products of the pharmaceutical sector, including active ingredients needed for manufacture of pharmaceuticals and diagnostic kits. Implementing legislation should specify that it applies to vaccines.[157]

Weissman's proposals for legislative and regulatory reform in exporting countries would apply nearly equally to importing countries where a patent bar exists. Importing-country legal reform should: (1) permit compulsory licenses responding to any public health need, (2) apply to all healthcare products in the pharmaceutical sector, (3) allow administratively easy and minimally justified determinations of insufficient or inefficient local manufacturing capacity, (4) be open ended so that the licensee can provide whatever amounts the importing country needs, subject to proper notifications, (5) have a presumptive term of the life of the patent, though the term might be revocable based either on the termination of the public health need or meaningful expansion of economically efficient domestic manufacturing capacity, (6) require prior licensing negotiations on commercially reasonable terms, terms which may be regulated as discussed in subsection 4.3, *infra*, (7) preclude an import license royalty where compensation has been established in the exporting country and otherwise set presumptive royalties pursuant to streamlined administrative procedures, and (8) permit administrative review only and preclude injunctive relief to the patent holder.

Importing countries without patents on medicines, most likely least developed countries, will also be permitted to use the August 30 Paragraph 6 Implementation Agreement. Although they will not necessarily need to immediately adopt legislation permitting compulsory licenses, they should

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157. Robert Weissman, *Paragraph 6 Implementation Recommendations* (Feb. 3, 2004), *available at* http://lists.essential.org/pipermail/ip-health/2004-February/005892.html (last visited Mar. 7, 2004).

nonetheless enact legislation allowing for importation of medicines pursuant to the notification requirements of the August 30 Agreement.

4.2 Competition Policy Reform

One of the principle policy options that developing country have for accessing generic medicines is to invigorate their competition law as it applies to the pricing and licensing of pharmaceutical products. As the South African Competition Commission case demonstrates, aggressive, pro-access competition policy can be a formidable weapon in countries' efforts to obtain access to generics and to achieve economies-of-scale by inclusion of non-domestic markets. Because of the path-breaking nature of South Africa's emerging competition law, this subsection will analyze the application of that law in some depth so that other developing country members might consider the wisdom of adopting similar or improved measures.

Section 56 of the South African Patents Act 57 of 1978, as amended by the Intellectual Property Laws Amendment Act 38 of 1997, covers four specific circumstances whereby "(1) any interested person who can show that the rights in a patent are being abused may apply to the commissioner in the prescribed manner for a compulsory license under the patent."[158] The legal definitions of abuse of patent are quite specific:

1. *Non-working on a commercial scale or to an adequate extent (within a 3 or 4 year period of filing the patent application or certification of the patent) and there is no satisfactory reason for such non-working (sub-sec. (2)(a)).* The requirement of working to "an adequate extent" is somewhat imprecise, but does appear to cover supply amounts that are deficient in terms of market demand.
2. *Demand for the product is not being met to an adequate extent and on reasonable terms (sub-sec. (2)(c)).* The statute appears to require the demand to be an actual not merely anticipatory. In South Africa, there is no doubt that the true demand for AIDS medicines is not being met primarily as a result of high prices for medicines. Thus, the question becomes whether the

158. The State itself may apply for compulsory licenses under the Patents Act Section 4 which permits the Minister of State to seek a voluntary license for the use of the patented product for public purposes and in default of such voluntary agreement for the Minister to filed application to the Commissioner of Patents for an involuntary use (compulsory license) on terms or conditions to be set by the Commissioner. Section 78, permits the government to go even further and to "acquire" any invention or patent. Under the Constitution, the government could also "take" the patent and pay just compensation.

"reasonable terms" provision includes price. Fortunately, there appears to be little doubt that the phrase "reasonable terms" refers primarily to the price charged.[159] Even though drug companies have dramatically lowered prices, frequently by as much as eighty-five percent, current conditional discount prices by pharmaceutical patent holders are still three or four times as expensive as the much cheaper generics offered by Cipla, Rambaxy, and Hetero of India. Moreover, the price differentials are much sharper in the private sector where the drug companies continue to seek higher profits (private sector ARVs still cost over $2000/year in South Africa in 2003). Thus, because of unreasonable pricing in the private sector and comparatively unreasonable pricing terms even in the public and NGO sectors, a strong case could be made for the issuance of a compulsory license under this subsection.

3. *Refusal to grant a license on reasonable terms that prejudices an existing or emerging trade or industry and it is in the public interest to grant a license (sub-sec. (2)(d)).* This provision potentially applies to the issue of pharmaceutical access.[160] If the provision were to be interpreted to consider patents to be essential facilities, especially with respect to fixed-dose combinations, this provision would be much more helpful. In general it would be highly desirable for a patent scheme to include an explicit refusal to deal provision.[161]

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159. *James Lomax Cathro's Applications* (1934) 51 RPC 75, 82.

160. In the only reported case to date, the Supreme Court of Appeal denied an application for a compulsory license. Syntheta (Pty) Ltd v Janssen Pharmaceutica NV & Another, 1999(1) SA 85 SCA. The Appellant presented two allegations of abuse of patent: (1) the non-working of the patented invention in South Africa on a commercial scale, or to an adequate extent (section 56(2)(a)); and (2) the refusal of the patentee to grant a license on reasonable terms, being the Appellant's offer of six percent royalty on selling price (section 56(2)(d)). The Court found against the Appellant on both grounds because of an insufficiency of evidence. In relation to the subsection 2(d) ground, the court focused on the issue of public use and need. This focus represents a signal that 'public benefit' can be an important factor.

The computation of royalties also vexed the Court. It relied on the English decision of *Hoffmann-La Roche & Co AG's Patent (1973) RPC 601* in suggesting that computation of royalty should, at a minimum, take account of three elements, namely: (1) the patentee's expenditure on research and development; (2) the patentee's expenditure on promotion; and (3) a servicing of the capital element to allow a reasonable return on the preceding two elements.

161. There is European precedent for a refusal to license a key chemical intermediate for a drug effective against tuberculosis. ICI & Commercial Solvents Corp. v. Comm'n of the E.C., 223 E.C.R., 250 (1974) (abstracted in *Refusal by a Dominant Firm to Sell Raw Materials*, 19 Antitrust Bull. 605-18 (1974)). The United Kingdom has also permitted compulsory licensing

4. *Demand is being met by importation and the price is excessive in relation to the price charged in the countries where the patented article is manufactured (sub-sec. (2)(e)).* Since most pharmaceutical manufacturing is done in the United States and in rich European countries where prices are high, there is no "unfavorable price discrimination" in South Africa on most drug prices compared to First World prices. However, some patented medicines are more expensive in some developing countries than in the country of origin. In these limited circumstances, South Africa could issue a compulsory license.[162]

In addition to the Patent Act, the South African Competition Act 89 of 1998 provides remedies for anti-competitive practices and presumably permits the issuance of open compulsory licenses for anti-competitive pricing practices by the pharmaceutical industry. Section 8 of the South African Competition Act prohibits dominant firms from engaging in excessive pricing, refusing access to an essential facility, and engaging in other exclusionary acts:

8. Abuse of dominance prohibited. It is prohibited for a dominant firm[163] to -
(a) charge an excessive price to the detriment of consumers;
(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
(c) engage in an exclusionary act, other than an act listed in paragraph (d),[164] if the anti-competitiveeffect

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when a patent owner has refused to grant a license on reasonable terms under section 48 of the Patents Act. In a recent ECJ opinion, the court held that "refusal to grant a license to use protected intellectual property constitutes an abuse [under Section 82 of E.U. competition law]" where the potential licensee has "the intention of producing goods and/or services with different characteristics." Ingrid Hering, *ECJ Opinion Could Lead to Uncertainty* (Oct. 13, 2003), *available at* http://lists.essential.org/pipermail/ip-health/2003-October/005420.html (last visited Feb. 12, 2004).

162. A more direct route with respect to differential pricing across countries, however, is parallel importation under the Medicines and Related Substances Control Act No.101 of 1965, as amended.

163. Section 7 states "A firm is dominant in a market if—(a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power.

164. (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act—

(i) requiring or inducing a supplier or customer to not deal with a competitor;

(ii) refusing to supply scarce goods to a competitor when supplying those goods is

of that act outweighs its technological, efficiency or other pro-competitive gain; . . .

Section 1 provides key definitions:[165]

(viii) 'essential facility' means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers;
(ix) 'excessive price' means a price for a good or service which—
(aa) bears no reasonable relation to the economic value of that good or service; and
(bb) is higher than the value referred to in subparagraph (aa);
(x) 'exclusionary act' means an act that impedes or prevents a firm entering into, or expanding within, a market;
(xii) 'goods or services', when used with respect to particular goods or services, includes any other goods or services that are reasonably capable of being substituted for them, taking

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economically feasible;
(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
(iv) selling goods or services below their marginal or average variable cost; or
(v) buying-up a scarce supply of intermediate goods or resources required by a competitor.

165. Section 1 also provides guidance on interpretation of the Act:
(2) This Act must be interpreted—
(a) in a manner that is consistent with the Constitution and gives effect to the purposes set out in section 2; and
(b) in compliance with the international law obligations of the Republic.
(3) Any person interpreting or applying this Act may consider appropriate foreign and international law.

Section 2 defines the purposes:
2. Purpose of Act
The purpose of this Act is to promote and maintain competition in the Republic in order
(a) to promote the efficiency, adaptability and development of the economy;
(b) to provide consumers with competitive prices and product choices;
(c) to promote employment and advance the social and economic welfare of South Africans;
(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

> into account ordinary commercial practice and geographical, technical and temporal constraints; . . .

In its recently announced decision, the South African Competition Commission supported three theories for issuing a pharmaceutical compulsory license.[166] Under the first theory, compulsory licenses should be granted whenever it can be shown that there is a gap between need for the medicine and its accessibility due to excessive pricing, in other words, whenever an "above market value" or supra-competitive price contributes to the access gap. The second theory involves the failure to grant voluntary licenses, which can be considered exclusionary where the anti-competitive effect of non-licensing outweighs any "technological, efficiency or other pro-competitive gain." Under the third access-to-an-essential-facility theory, a compulsory license should be issued whenever a patent holder's failure to grant voluntary licenses denies consumer access to a competitor's product. This theory has particular salience with respect to downstream innovation, such as fixed-dose combination drugs where a generic company is seeking a license to make a pill combining medicines patented by several different companies.

In adopting pro-consumer competition policy challenging drug company prices and refusals to license, developing countries would be charting relatively new territory. Anti-trust/intellectual property regulations and jurisprudence in the United States and European Union have generally evolved to support the interests of intellectual property holder at the expense of consumers and of market competition when construing the essential facilities doctrine.[167] Opposing this trend, some commentators suggest that it is appropriate "to attempt, in some way, to balance the costs of monopoly pricing

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166. Although the Competition Commission did not directly adopt a price discrimination theory, a dominant firm may be found guilty of prohibited price discrimination if the firm discriminates between purchasers in the price charged. §§ 9(1)(b) & 9 (c)(ii). At present, pharmaceutical companies discriminate significantly between the public and private sectors in for antiretrovirals and other drugs. Although some differences might be accounted for because of bulk purchase, clearly these discounts are not related solely to cost. On the other hand, it is highly desirable that the public sector obtains deep price discounts and it would be an unconscionable outcome if companies reacted to the price discrimination issue by revoking public sector discounts. Since the long-term public health mandate is for cheap medicines in both the public and private sector, it seems desirable to seek compulsory licenses on the basis of price discrimination while carefully balancing the risk of a backlash from the pharmaceutical companies.

167. *See* Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443 (2002); Valentine Korah, *The Interface Between Intellectual Property And Antitrust: The European Experience*, 69 ANTITRUST L.J. 801 (2002); Sergio Baches Opi, *The Application of the Essential Facilities Doctrine to Intellectual Property Licensing in the European Union and the United States: Are Intellectual Property Rights Still Sacrosanct?*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 409 (2001).

associated with the specific practices against the incentives to innovation associated with the patent system."[168]

It is well beyond the scope of this article to fully articulate and defend a new competition law for developing countries. Despite this hesitance, however, it is appropriate to note that the pro-innovation effects of compulsory licenses in marginal developing country markets on drugs that have global sales is much less problematic than effects would be in dominant markets.[169] It is also appropriate to note that many developing countries have internal and domestic obligations to promote progressive realization of the right to health, and that obligation should inform the promulgation, implementation, and interpretation of their positive law, including their competition law. Finally, the real impact of widespread lack of access to higher priced proprietary medicines must be taken into account in balancing the tradeoffs involved in redressing a refusal to grant a patent license on reasonable terms and a refusal to discount medicines closer to their true costs of production.

As previously discussed, the remedial implications of a robust competition policy should also be considered. A competition-based compulsory license should ordinarily permit access to confidential drug registration data despite any data exclusivity rules to the contrary. Likewise, the license might also require access to manufacturing know-how. With these features in place, the risk of a competition-based compulsory license would generate even greater pressure for the issuance of voluntary licenses.

4.3 Regulating voluntary licenses

Voluntary licensing agreements result from negotiations between patent holders and other entities and are minimally regulated in the North.[170]

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168. John Barton, *Patents and Antitrust: A Rethinking in Light of Patent Breath and Sequential Innovation*, 65 ANTITRUST L.J. 449, 459 (1997).

169. "Research to date suggests that if compulsory licenses are taken in less significant markets, their impact on innovation should be marginal." Chien, *supra* note 145, at 893.

170. Michael A. Friedman et al., *Out-licensing: A Practical Approach for Improvement of Access to Medicines in Poor Countries*, 361 LANCET 341-44 (2003); M. Howard Morse, *Intellectual Property Licensing: The Intersection Between Intellectual Property Rights and the Antitrust Laws*, 1355 PLI/CORP 947 (2003). Although the United States generally regulates intellectual property licenses under a rule of reason standard, it has passed statutes and regulations both permitting and restricting certain licensing practices. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995). For example, exclusive licensing and territorial limits are expressly permitted under U.S. patent law, 35 U.S.C. § 261 (2000), as are unilateral refusals to license that do not illegally extend a patent right, § 271(d)(4). However, the United States has also passed guidelines questioning certain horizontal licensing practices including naked price fixing, output restraints, market division, minimum resale prices, and certain price maintenance agreements. IP Guidelines ¶ 3.4. In the European Union, licensing practices by patent holders are also regulated with a relatively light touch, but exceptional circumstances, including harm to particular competitors, may create an obligation to grant a license, particularly when the new license facilitates the sale of a "new" product. *See* Joined Cases c-241/91 & c-242/91, Radio Telefis Eireann v. Comm'n,

Ordinarily voluntary licensing agreements allow third parties to use a patent holder's patent to produce, market, or otherwise distribute the patented product normally in exchange for a royalty or licensing fee to the patent holder. In addition to requiring agreed-upon compensation for licensing, the patent holder commonly imposes restrictions on the sale or transfer of the license and on the geographical distribution and marketing of the affected product. In addition, the patent holder can limit the duration of agreement and can even make it terminable at will or revocable on certain conditions. When voluntary licenses are relatively unregulated, pharmaceutical companies can enforce terms on the amount of compensation, permitted usages, and distribution, especially export.

To counterbalance the risk of anti-competitive outcomes in voluntary licenses mandated by compulsory licensing schemes, developing countries could choose to regulate the following pro-competitive/commercially reasonable terms of voluntary licenses: (a) expansion of geographical scope and explicit options for export within a Paragraph 6 Implementation Agreement authorized regional trade group, (b) prohibition of sector limitations (no public sector or NGO-only sector clauses), (c) non-exclusivity, (d) direct permission to produce fixed-dose combination medicines, (d) requirements of some degree of technology transfer and/or manufacturing know-how, (e) access to confidential test data for purposes of establishing bio-equivalence, and (f) public disclosure of royalty rates negotiated within a range of reasonableness. This kind of regulation of voluntary licenses to prevent anti-competitive practices is directly authorized by Article 40 of the TRIPS Agreement.[171]

1. **Geographical restrictions**. For voluntary licenses to be of any real use in increasing access to high quality, affordable medicines, the licensee has to be able to achieve economies-of-scale sufficient to justify investment in human and physical capacity. For a few countries and for a few drugs, the internal market may be sufficiently large and/or rich to justify investment by the licensee and to achieve meaningful economies-of-scale. However, for many smaller economies and/or economies with severely limited purchasing power, efficient economies-of-scale can only be achieved by means of regional markets. As a general proposition, therefore, voluntary licenses should not be unduly burdened with unrealistic geographical restrictions. In this context, permitting licenses for distribution throughout Africa would certainly make some sense, both to countries with and without patents in place. Likewise, an

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1995 E.C.R I-743.

171. This right is subject to a process of consultation between affected Members with respect to anti-competitive licensing agreements.

even broader distribution to all "developing" countries might also make sense.[172]

Another reason to have few geographical restrictions with respect to voluntary licenses is the issue of non-exclusivity. Ordinarily, it will not be desirable to give a voluntary license to one producer only. Of course, there is a complex balancing act to figure out how many licenses can exist within a given national or regional market before the number of licenses begins to create disincentives to entrepreneurial investment in capacity. On the other hand, recent research indicates that prices go down dramatically, in the absence of price controls, only when a certain number of generic competitors enter the market. Rather than reproduce a small number of generic monopolists, each with its own individual market concentration, it would be better, as a matter of policy, to open up the geographical scope of a license to permit competition between licensees, each of whom could achieve economies-of-scale but still be subject to stiff competition in any given market. An alternative route to affordability would be voluntary price control terms in the license itself. However, these price-ceiling agreements might raise some competition concerns in some countries though price maintenance/fixing concerns are usually a problem with respect to price floor, not price ceilings.

Despite urging few geographical restrictions with respect to developing country markets, it might be appropriate to permit patent holders to impose geographical restrictions with respect to developed country markets. In this regard, and into the foreseeable future, the industry is going to be able to affect national legislation in developed economies to prohibit parallel importation from developing countries where the industry has offered discount prices or where it has issued voluntary licenses. However, with a geographical limitation, there will be a contractually enforceable patent bar in developed countries as well. In this regard, the industry might well be concerned about allowing contractual sanctions for improper diversion of licensed drugs to developed economies. However, as long as national exhaustion (United States) and regional exhaustion (European Union) are the only options within developed countries, the prospects of product diversion and gray markets is greatly reduced. Even so, a given company could impose some reasonable sanction on intentional breaches of geographical limitations by a license holder. These sanctions could range all the way from multiple royalties to eventual termination of the license for repeated bad faith breaches.

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172. Some might wonder if a country has sovereign authority to require a patent-holder to relinquish patent rights in another country in order to prevent the issuance of a compulsory license in the subject state. Although countries might not be able regulate truly voluntary licenses in this way, the voluntary licenses in this instance are part of a compulsory licensing scheme wherein a nation has a sovereign interest in increasing access to medicines to address a valid public health concern. In these special regulatory circumstances, it seems appropriate to regulate geographical restrictions so that generic producers can reach efficient economies-of-scale and thus sell medicines even more cheaply.

2. **Market segmentation**. Market segmentation, e.g., public vs. private, is problematic especially in developing countries. At present, major pharmaceutical companies have made a decision to seek profits off the small elite populations within developing markets, even at the cost of unaffordability for the vast majority of people infected with diseases such as AIDS. However, a generic licensee is going to want some access to private sector buyers with money to spend, rather than bet solely on uncertain public expenditures by poor countries or evaporating donor support for the Global Fund. It may be galling to proprietary companies that even small but rich "profit centers" will be lost, but if they really want to contribute to the global treatment, they will have to bite the bullet and give up on public/private sector differentiation.

One problem with trying to maintain a private sector/public sector market differentiation is that it will become virtually impossible to secure distribution channels so as to prevent theft, corruption, and diversion to the more lucrative private market, undercutting the marketing advantage there anyway. Similarly, even in the private sector, most Africa developing country consumers cannot afford moderately discounted ARVs. Thus, if there are large price differentials between medicines in the private and public sector, an additional effect of high prices in the private sector might be disruptive migration of more affluent HIV-positive consumers to the already overburdened public sector. Accordingly, if developing countries want to get the maximum treatment to the most people at the lowest cost and if they want to avoid disruption of the public sector by migration from the private sector, drug companies will have to give up their goal of market segmentation.

Despite arguing for basic price parity between the public and private sector, it might be possible to have some slight differences in royalty payments due based on defensible market segments, e.g., 5% vs. 10% royalties. The problem would be to avoid pricing differentials that would prompt the disruptions described above.

3. **Non-exclusivity**. The general principle for compulsory licenses should be non-exclusivity, meaning that multiple licenses should be issued. To the extent that regulation of voluntary licenses is motivated by a desire to enhance competition, regulators would want to disrupt the more normal practice of simply transferring or even sharing the monopoly. Therefore, there are arguments that the best practice might be the issuance of open licenses. However, too many entrants can also deter investment and entry by a particular licensee. Canada is the country that has had the greatest experience in issuing compulsory licenses for pharmaceutical products and it granted an average of three licenses per drug, with a variance of one to eleven.[173] The WHO, in its procurement practices tries to ensure the presence of at least five competitors. Prices approach the marginal cost of production when there are

173. F.M. Scherer, *The Economics of Drug Patent Licensing*, WORLD BANK, June 24-25, May 2003, at 9.

8-10 competitors in a market.[174] Especially if licenses have no geographical limits and no market restrictions, more competitors can be licensed.

4. **Cross-licensing for fixed-dose combinations**. Clearly the licenses should permit freedom to research and cross-license fixed-dose combination medicines and other therapeutic advances. One of the greatest irrationalities in the current patent regime is that it creates disincentives for patent holders to develop rational drug combination therapies with their competitors. In the long run, this will become one of the main rationales for the issuance of compulsory licenses. Therefore, in the interest of promoting public health and of maximizing treatment compliance, the license should certainly permit, indeed promote, cross-licensing and combination of products.

5. **Manufacturing know-how and technology transfer**. To make voluntary licenses work and to avoid risks of poor quality drugs, the companies should be required to transfer technology. AIDS medicines in particular are complicated medicines needing special care in quality control to ensure bio-availability in a narrow range. Accordingly, licensees should not have to reinvent the wheel; they should get the very best assistance possible for transfer of technology and expertise. In this regard, voluntary licensors should specifically be required to transfer manufacturing know-how as well as essential technologies. In the event of trade secrets, the drug company can require confidentiality.

6. **Registration data**. The voluntary license should include access to and/or comparison against otherwise confidential data submitted to a drug registration authority to secure market approval. The voluntary licensee should not have to conduct independent clinical studies, but instead should be expressly permitted to establish bio-equivalence via cross-over studies. In the special case of fixed-dose combinations, where a combined product registration dossier has not previously been filed, patent holders should have even greater obligations to permit access to underlying data so that fixed-dose combination registration can be eased.

7. **Duration**. The time line on voluntary licenses should be long, with a presumption of renewability except for cause, so that generic manufacturers can estimate their market and invest in productive capacity. Many newer medicines are hard to produce. High quality pharmaceutical capacity is expensive and time-consuming to build. Registration in multiple countries is also expensive. Thus, the time horizon must be long enough to secure investment under conditions of uncertainty.

8. **Royalty rates**. The regulation of voluntary licenses should include some attempt to limit royalty rates. Relatively small royalties in the range of two to ten percent have become traditional in the pharmaceutical field. Setting rates in this general range could be done by means of legislative findings about a

174. David Reiffn & Michael Ward, Generic Drug Industry Dynamics, working paper, *at* http://www.uta.edu/faculty/mikeward/GenericDynamics.pdf (last visited Mar. 8, 2003).

presumptive permissible range. This range could be further calibrated by reference to the list of factors that might sensibly affect royalties including public expenditures, inventiveness, research and development costs, remaining life of the patent, and purpose of use.

5. POSSIBLE RAMIFICATIONS OF GLOBAL FUND AND UNITED STATES PROCUREMENT RULES

Because of fiscal constraints, many developing countries will rely on donor funding for purchasing important on-patent medicines, including antiretrovirals and combination anti-malaria medicines containing Artemisinin. These funding sources will in turn often prescribe procurement policies for grant recipients. Some of these requirements may impact sourcing decisions, including the decision whether to import medicines from abroad or to produce them domestically. Generally these procurement policies address questions of price, quality, and intellectual property legality.

5.1 Global Fund policies

C. PROCUREMENT AND PRICING

7. Procurement practices

The Fund will require that, as a minimum, Recipient procurement offices and any contracted agencies/services adhere to the Interagency Operational Principles for Good Pharmaceutical Procurement.[175] Where practices differ from the Interagency Guidelines, Recipients or their agents must demonstrate to the LFA comparable systems for competitive bidding within a group of pre-qualified suppliers, transparency and accountability to their practices, and their application of necessary quality assurance mechanisms. Recipients should also demonstrate the existence of a full set of contractual documentation to govern each transaction.

8. Procurement responsibilities

a) The Recipient is responsible for all procurement, with the use of contracted local, regional or international procurement agents being at the discretion of the Recipient. The exception to this would be for those product categories for which local procurement capacity is insufficient, as judged by the Procurement and Supply Management Assessment. For such product categories, Recipients would be required to use established regional or international procurement services and will be informed by the Fund on which mechanisms are available.

b) Even for product categories for which Recipients have procurement capacity, the use of capable regional and global procurement services is encouraged wherever pooling of demand lowers prices for products of assured quality.

175. World Health Organization, *Operational Principles for Good Pharmaceutical Procurement* (Interagency document). WHO/EDM/PAR/99.5, *available at* http://www.who.int/medicines/library/par/who-edm-par-99-5/who-edm-par-99-5.pdf (last visited Mar. 7, 2004).

9. Monitoring supplier performance

Recipients are responsible for monitoring the performance of suppliers with respect to product and service quality and for submitting that information electronically for web publication through a mechanism established by or identified by the Fund. Reporting guidelines for supplier performance should be specified by the LFA, according to guidelines provided by the Secretariat of the Fund.

10. Lowest possible price

a) The Fund requests Recipients to use Good Procurement Practices, which includes competitive purchasing from qualified manufacturers and suppliers, as outlined in section B of these recommendations, to attain the lowest price of products. The Fund encourages Recipients to comply with national laws and applicable international obligations in the field of intellectual property including the flexibilities provided in the TRIPS agreement and referred to in the Doha declaration in a manner that achieves the lowest possible price for products of assured quality.

b) The Fund encourages the voluntary efforts of pharmaceutical companies to expand current tiered or preferential pricing arrangements, among other mechanisms, to promote differential pricing.

c) Disclosure of information on prices paid for purchases by Fund Recipients is a matter of principle and will facilitate a process leading to lower prices. The Fund will ensure that information on prices paid on products of assured quality with the same conditions (e.g., including other goods or services included in the contract) is made publicly available. The disclosure of this information will be pursued by the Fund. A methodology for assuring this transparency will be presented to the Board by January 2003.

d) In the cases of this policy, price refers to DDU costs—delivered duty unpaid. The approach taken may be to publicly list average, minimum, maximum, and mode prices and/or prices for individual companies and/or Recipients. This choice requires further consideration by the Fund to identify or develop standard methods to ensure to the extent possible that price information is based on a consistent set of definitions. It is understood that price comparisons are indicative and must include special "add ons"/conditions included in the price and that actual prices will vary.

E. BUDGETING AND FINANCE

17. Direct payment to suppliers upon delivery

Prompt payment in compliance with the terms of payment of the contractual provisions encourages timely delivery of products and reduces transaction costs. Direct payment to suppliers by the Trustee, on confirmation of delivery, will be allowable upon request of the Secretariat if, as confirmed by the LFA, such payment arrangements are expected to reduce costs and to be consistent with necessary accounting requirements.

18. Exemption from duties, tariffs and taxes

a) The Fund strongly encourages the relevant national authorities in the Primary Recipient's country to exempt from duties and taxes all public health products financed by the Fund to NGOs, groups of NGOs, or national authorities, or any other PRs.

b) In any case, Fund resources may not be used to pay duties, tariffs, local or national taxes on public health products procured with Fund resources. If payment of such fees is required by relevant national authorities, such payment is the responsibility of the Recipient.

19. Additionality of Fund resources and contribution to sustainability

a) The Fund encourages Recipients to manage and to apply Fund resources as part of a sustainable long-term plan for local public health financing. Recipients will be required to declare in the original proposal to the Fund other international financing and product donation programs being utilized by Recipients. Ongoing indicators must show the magnitude of product financing supported by domestic versus international financing.

b) Programs which include consumer cost recovery mechanisms are eligible for funding by the Fund when such programs are part of a pre-existing healthcare financing policy, which should be specified in the proposal to the Fund; in these cases, the budget request to the Fund must not duplicate costs to be reimbursed by consumers.

21. Prices used for budgeting proposals

a) For budget requests for pharmaceutical products, proposals to the Fund must use the lessor of current procurement prices, firm offers from suppliers, or existing public price information sources specified by the Secretariat in the Guidelines for Proposals. A rationale for budgeting using prices other than those specified above should be described in the proposal. All prices should be expressed in standard trade terminology to allow transparent comparison.

b) During implementation, these budgeted prices will not act as a defined reimbursable ceiling or floor to the full cost of products paid by the Recipient, provided that products are of assured quality and that procurement practices adhere to the policies of the Recipient and Fund.

(GF/B4/2)

The Global Fund has adopted a lowest cost pricing requirement.[176] In general, this means that grant recipients will be obligated to procure the lowest cost medicine that meets other standards concerning quality and legality.[177] The Board of the Global Fund considered the possibility of permitting a premium for domestically produced products.[178] This preference would have been consistent with the then existing policy of the World Bank, which provided for a ten to fifteen percent domestic preference margin to local manufacturers on government tenders.[179] However, the Board rejected adopting a domestic preference mark-up even where the government was the

176. *See generally* Health Action International, *Assured quality and lowest price: What the Global Fund requires for buying medicines*, *at* http://www.haiafrica.org/globalfund/GF%20HAI%20Factsheet.pdf (last visited Mar. 7, 2004).

177. *See generally* Report of the Third Board Meeting, Oct. 10-11, 2002, GF/B4/2, *available at http://www.globalhealth.org/view_top.php3?id=138 (last visited Mar. 7, 2004)*; Report of the Fourth Board Meeting, January 29-31, 2003, GF/B5/2; Guidelines for Proposals, The Global Fund, March 2003, *available at* http://www.theglobalfund.org/en/apply/proposals/ (last visited Mar. 4, 2004); Report of the Portfolio Management and Procurement Committee to the 5th Board Meeting, GF/B5/9, *available at* http://www.haiafrica.org/globalfund/refs.htm (last visited Mar. 4, 2004) [hereinafter Report of the Fourth Board Meeting]. Of course, the basic procurement price is only part of the total cost of procuring and delivering the medicine to end-users. Other elements can add significantly to actual costs: freight/shipping, insurance, registration, quality assurance, storage, internal transportation, dispensing, administration, distribution costs charged by intermediaries, duties, tariffs, and national and local taxes.

178. Report of the Fourth Board meeting, *supra* note 177. Although the PMC recommended up to a fifteen percent price premium, this recommendation was no adopted, meaning that recipients must continue to source at lowest cost.

179. World Bank Group, *Bidding for Goods and Works Contracts*, *available at* http://www.worldbank.org.ru/eng/constant/answer4.html (last visited Feb. 7, 2004).

purchasing entity.[180] Accordingly, whenever patented antiretrovirals or other drugs can be lawfully sourced more cheaply from international producers, the recipient will be required to utilize that source of supply. As an example of the stringency of this requirement, the Global Fund requires that "all procurement of medications for Multi-Drug Resistant TB (tuberculosis) must be conducted through the Green Light Committee."[181]

180. *See* Report of the Fourth Board Meeting, *supra* note 177.

181. *See* WHO, *Green DOTS plus & Green Light Committee*, WHO/CDS/TB/2000.283, *available at* http://www.who.int/gtb/policyrd/PDF/DOTSGLC.pdf (last visited Mar. 8, 2004). The Green Light Committee also serves an important function as the means by which the correct treatment of MDR-TB is assured as much as is possible through the dissemination of information and the review of existing TB treatment programs. The treatment of MDR-TB can be extremely complex. One of the concerns is that without a strong, existing DOTS program to oversee administration of the DOTS-Plus protocols, there is a risk of creating even stronger strains of MDR-TB, resistant to even the second and third line treatments.

B. QUALITY ASSURANCE

4. Compliance with quality standards

a) For any medicinal product to be eligible for purchase with Fund resources, its compliance with quality standards must be assured. For multi-source, off-patent products with available dosage from public pharmacopoeial quality standards, verification of product compliance with standards would be conducted in accordance with the existing national procedures of the Recipient's country.

b) Provided products are accepted by the national drug regulatory agency (NDRA) of the Recipient country (see 5 below), to be eligible for purchase with Fund resources any single or limited source product (that is, a medicinal product for which there are not publicly available quality assurance standards, analytic methods, and reference standards) must (a) have been found to be acceptable by the WHO-initiated UN Pilot Procurement Quality and Sourcing Project, or (b) have been authorized for consumption in its country by a stringent regulatory authority, or (c) have been authorized by the national drug regulatory authority in the Recipient's country. Option (c) is applicable only until December 31, 2004, after which suppliers must comply with one of the two standards as set out in (a) and (b)—and in all cases are subject to monitoring product quality standards prescribed by the Fund as in 6.1.

5. National drug registration

a) Products procured with Fund resources are subject to authorization by the National Drug Regulatory Authority (NDRA) in the country in which they will be used, following its standard practices for drug registration for pharmaceutical products. For products that have passed the UN Pilot Procurement Quality and Sourcing Project review, as described in above, NDRAs are encouraged to expedite registration by accepting WHO pre-qualification inspection and supporting dossiers in lieu of national requirements.

b) For products which have been authorized by stringent drug regulatory authorities, NDRAs are encouraged to expedite registration by accepting in lieu of national requirements the Executive Summary of the Common Technical Document (CTD) or Summary parts for quality, safety and efficacy together with all necessary information to perform quality control testing of products and necessary reference standards.

6. Monitoring product quality

a) Recipients, their procurement agents, or NDRA's must systematically draw random samples of pharmaceutical products purchased with Fund resources for quality control testing to monitor compliance with quality standards. Testing may be budgeted in proposals, to be funded by the Fund. For multi-source off-patent products with available public standards, samples should be sent to WHO-recognized laboratories in cases where the NDRA have no capacity for this testing.

b) For single- or limited-source products without public standards and pre-qualified by UN Pilot Procurement Quality and Sourcing Project, samples should be sent to WHO-recognized laboratories already participating in the WHO pre-qualification project in case the NDRA has no capacity. For single- or limited-source products that have been pre-qualified on the basis of authorization by a regulatory authority in an ICH and/or PIC/S member, testing shall be done by a laboratory identified by the purchaser as stated in the purchase contract. The laboratory should be a WHO-recognized laboratory, or a laboratory in ICH and/or PIC/S countries in case the country does not have identified laboratory capacity.

(GF/B4/2)

Decision 4: (Sixth Board Meeting)[182]

National Drug Regulatory Authorities (NDRA) laboratories or laboratories recognized by the NDRA should be used for quality monitoring by the PR (principal recipient). To ensure the respective laboratories have adequate capacity for full pharmacopoeial testing, they must meet one of the following criteria: acceptance for collaboration with WHO pre-qualification project; accredited in accordance with ISO17025 and/or EN45002; accepted by a stringent authority.

Because poor quality medicines can have serious health and financial consequence, the Global Fund has adopted exacting quality standards during both the production and distribution process. If medicines do not contain the specified active ingredients in correct quantities, if quality and efficacy deteriorate because of improper handling or expiration, or if medicines contain harmful substances, patients will be exposed to substandard or even dangerous therapies that can lead to treatment failure, drug resistance, and even death. Accordingly, the Global Fund requires that pharmaceutical products procured with Fund resources be authorized by the relevant national drug regulatory authority (NDRA) in the country in which they will be used and that agency is instructed to follow its standard practices for drug registration of pharmaceutical products.

However, the Global Fund is not content to rely on potentially unreliable national safety certifications; thus it will require a separate quality assurance guarantee starting in 2005. At that time, pharmaceuticals will have to be pre-approved by the U.N. Pilot Procurement Quality and Sourcing Project[183] [WHO pre-qualification project] or be accepted for use in a country with a stringent NDRA. This is a far-reaching requirement that will dramatically affect countries' decisions to support local production. Unless they can buy AIDS, TB, and malaria medicines on their own, they will be required to have their domestic supplier go through the WHO pre-qualification process, a

182. *See* Chiang Mai, The Portfolio Management and Procurement Committee recommendation at the Sixth Board Meeting, GF/B6/9 (Oct. 15-17 2003).

183. WHO pre-qualification will not replace the requirement of in-country registration, but it should help fill a capacity gap in low-income countries that have difficulty independently assessing quality of medicines and manufacturers' adherence to Good Manufacturing Practice. The frequently updated list of pre-qualified medicines is not binding on governments, but it does provide evidence-based quality assessments of manufacturers and of key medicines. *See* WHO, http://www.who.int/medicines/organization/gsm/activities/pilotproc/pilotprocmain.shtml (last visited Mar. 8, 2004).

rigorous process that has already proved onerous and time-consuming for some experienced Indian producers. This process is particularly fraught with respect to fixed-dose combination ARVs where there is no pre-existing registration portfolio.

On the other hand, the Global Fund is also interested in speeding up the in-country registration of medicines that have been pre-qualified by the WHO or by a stringent registration authority. As an aid to fast-track approval of essential medicines, the Fund urges expedited approval for products that have been accepted by the WHO pre-qualification project or authorized by a stringent NDRA, one that is a member of the Pharmaceutical Inspection Convention/Scheme and/or the International Conference of Harmonisation.[184]

Since quality can deteriorate during distribution, the Global Fund also requires rigorous quality control testing thorough various stages of the supply chain from manufacture to final consumption. This testing too will need to be performed by a high-quality lab.

The WHO has just released a study documenting the growing problem of substandard and counterfeit medicines estimating that up to twenty-five percent of medicines consumed in poor countries are deficient and that the deficiencies are particularly problematic for high-markup products treating HIV/AIDS, tuberculosis, and malaria.[185] "Trade in substandard and counterfeit medicines is most prevalent in countries with weak drug regulation control and enforcement, scarcity and/or erratic supply of basic medicines, unregulated markets and unaffordable prices," according to the WHO press release. The risk of counterfeit medicines also rise "[w]hen prices of medicines are high and price differentials between identical products exist," inducing some consumers to seek medicines outside of the normal supply system. This finding highlights one of the dangers of market segmentation whereby drug companies seek to maintain higher profit margins in private sector sales at the same time that discount prices are available in the public or NGO sector. To redress these recurrent problems, the WHO recommends legislative reform to strengthen enforcement powers in drug regulatory authorities, strategies to reduce corruption and criminal activity, and international cooperation like its own pre-qualification program for HIV, AIDS, tuberculosis, and malaria medicines.

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184. The ICH brings together the regulatory authorities from the United States, the European Union, and Japan. *See* ICH, http://www.ich.org (last visited Mar. 8, 2004). The IPC/S is comprised of Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Malaysia, Netherlands, Norway, Portugal, Romania, Singapore, Slovak Republic, Spain, Sweden, Switzerland, and the United Kingdom. *See* IPC/S, http://www.picscheme.org/overview/picsauth.htm (last visited Mar. 8, 2004).

185. WHO, *Substandard and Counterfeit Medicines*, Fact Sheet no. 275 (Nov. 2003), *available at* http://www.who.int/mediacentre/factsheets/2003/fs275/en/print.html (last visited Mar. 8, 2004).

The net impact of the Global Fund's concerns about quality, bolstered by the recent WHO report, is that developing countries will need to be quite strict about quality issues for both imported and domestically produced drugs. Absent the Global Fund rule, there has been some concern that developing countries with weak NDRAs might be tempted to cut corners to register substandard domestically produced medicines. Obviously, this would be disastrous for the long-term control of infectious diseases and for treatment of chronic conditions; moreover, it would waste scarce fiscal resources. In sum, developing countries should be concerned about the quality of medicines not only price or country of origin. The required Global Fund standard is the lowest price for drugs of assured quality—both sides of the equation are important.

Global Fund—IP issues

"[I]n making its funding decisions, the Fund will support proposals which . . . [a]re consistent with international law and agreements, respect intellectual property rights, such as TRIPS, and encourage efforts to make quality drugs and products available at the lowest possible prices for those in need." (Framework Document, GFATM/B1/doc 4.)

"The Fund encourages recipients to comply with national laws and applicable international obligations in the field of intellectual property, including the flexibilities provided in the TRIPS . . . agreement and referred to in the Doha declaration, in a manner that achieves the lowest possible price for products of assured quality." (GF/B4/2)

The Global Fund "encourages" countries to procure products that are legal under national and international law, but it has not undertaken a close review of recipients' decisions in this regard. The Global Fund takes special pains to emphasize the use of flexibilities within the TRIPS Agreement and the Doha Declaration. (Given the adoption of the Paragraph 6 Implementation Agreement, its flexibilities should also now be considered.) At a minimum these flexibilities including sourcing from no-patent countries, parallel importation, non-predominate export pursuant to a "normal" compulsory license, and export pursuant to a "special" paragraph 6 compulsory license. However, there is also room for countries to source from countries using an Article 30 limited exception to patent rights. This option was not explicitly endorsed at the WTO, but it was not specifically rebuffed either.

A second and important feature of the Global Fund IP rule is that recipients are encouraged to use flexibilities "in a manner that achieves the lowest possible price." This requirement is designed to prevent "gaming" by developing countries with respect to their sourcing choices. For example, some countries might be tempted to issue compulsory licenses for local

production even where that production will be uneconomical with respect to the global market, where the lowest price for fixed-dose combination ARVs is now below $140/year. Although a country would certainly be able to preferentially source local products drawing from its own fiscal reserves, in using Global Fund money it is obligated to import cheaper medicines from abroad whether generic or proprietary. As a practical matter, this "lowest-cost" requirement, in conjunction with the intellectual-property-legality standard, requires developing countries to issue compulsory licenses open to both local production *and* importation so that they might eventually choose the most cost effective alternative.

At present, it is unclear whether Global Fund rules can be bent to permit developing countries to pay a domestic-production premium out of their own funds (lowest cost price reimbursed by the Global Fund, domestic premium paid by the recipient).[186] In the long run, however, this choice is terribly inefficient as it wastes scarce resources on commodity purchases that could more wisely be spent on health care infrastructure and systems and enhanced salaries for health care workers.

Since the announcement of the Global Fund's drug procurement policy, the World Bank has revised its guidelines for purchasing HIV/AIDS related medicines to match Global Fund rules in all material respects.[187] It too allows no preference for locally produced products and requires procurement of lowest cost products.[188] Likewise, it mandates WHO pre-qualification, as well as registration by the local drug regulatory authority,[189] and encourages fast track registration of WHO pre-qualified medicines.[190] Finally, the World Bank advances an interpretation of Article 39.3 of the TRIPS Agreement that permits a drug regulatory authority to establish bio-equivalence and to grant marketing approval by comparing generic data against proprietary data previously filed by the product innovator.[191]

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186. This option, even if it exists, would be subject to the Global Fund's principle of additionality, which requires countries to maintain or expand current fiscal commitments to the health sector. Thus, countries would at the very least have to appropriate additional funds to pay the price differential.

187. The World Bank, *HIV/AIDS Medicines and Related Supplies: Contemporary Context and Procurement—Technical Guide, available at* http://www1.worldbank.org/hiv_aids/docs/Technical%20Guide%20for%20HIV%20AIDS%20Final%20February%202004.pdf (last visited Feb. 25, 2004).

188. *Id.* ¶ 5.33.

189. *Id.* ¶ 4.76.

190. *Id.* ¶ 5.20. The World Bank also expressly endorses use of fixed-dose combination medicines, including fixed-dose combination generic ARVs. *Id.* ¶¶ 4.29 & 4.32.

191. *Id.* ¶ 2.14 and Appendix B, ¶ 63.

3.2 United States' PEPFAR policies

The United States was originally less than forthcoming about its planned procurement policies for the President's Emergency Plan for AIDS Relief [PEPFAR]. Given the historic alignment of U.S. policy and that of the pharmaceutical industry, however, it seemed likely that U.S. purchasing decisions would be slanted toward purchases of price-discounted, patented medicines. Evidence for this preference came from direct statements by certain administration officials who downplay the likelihood of generic purchases and instead tout the benefits of buying "American" and buying drugs of "highest" quality.[192] Moreover, there was mounting evidence that the United States intended to sidestep the WHO Pre-Qualification Project and that it would devise its own unilateral system for assessing safety, efficacy, and quality of generic drugs.

The clearest evidence of the U.S.'s eventually policy on drug procurement and its intent to discount the WHO Pre-qualification Project was contained in the CDC's call for proposals on PEPFAR (Funding Opportunity 04080)[193] which provides for $115 million in funding each of the next 5 years as part of the overall Bush Administration treatment proposal. The CDC has published "responses to inquiries" several of which address the issue of generic medicines.[194] Most on point is number 40:

> 40. **Question:** (a) When the U.S. Government endorses the use of safe and effective therapy, how is safety and efficacy confirmed? (b) For example, if the WHO says that something is safe and effective, would that be adequate?

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192. Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Disease, is reported as saying that there will not likely be any "direct purchase" of generic drugs. "It's likely we will try to get the best possible price from drug companies . . . for 'classic drugs,' where the efficacy is proven and the quality we are sure of." He nonetheless acknowledged that there might still be an opening for indirect purchases by local programs that buy generics directly through lawful sources. Sabin Russell, *AIDS Relief Showcase of Bush's Africa Tour: Critics Wary of Funding Level, Focus On Abstinence*, SAN FRANCISCO CHRON., July 7, 2003, at 2. Attacking the quality of generics has been a long-term strategy of PhRMA, which has used the twin-icons of piracy and substandard-quality to demonize the generic industry. *Id.* Even more recently, Randall Tobias, Mark Dybul, and John Lange, the PEPFAR leadership team, has repeatedly questioned whether WHO pre-qualified fixed-dose combination ARVs meet exacting quality standards. Although their challenge to fixed-dose combinations has varied over time ("there is no process, no principles, no standards in place today," "WHO is not a regulatory agency," "combinations have not been studied over a long period of time," and "we need to see the underlying data"), their most widely quoted statements question the fundamental safety, efficacy, and quality of the medicines and the specter of "endangering people's lives" and "provoking resistance."

193. *See* CDC, http://www.cdc.gov.od/pgo/funding/04080.htm (last visited Jan. 7, 2004).

194. *See* CDC, http://www.cdc.gov.od/pgo/funding/04080QA.htm (last visited Jan. 7, 2004).

> **Response**: (a) As stated in a previous response to your questions, the U.S. Government endorses the use of safe and effective therapy and diagnostics at the lowest possible cost. For the purposes of this program announcement, the following represents current guidance in this area:
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> For grantees to procure pharmaceuticals that are not *approved by* the U.S. FDA or another stringent regulatory agency, they would need to submit a waiver that would address the following four points: (1) the request must attest to issues of safety, quality and efficacy by demonstrating that the necessary information is available if requested (to be reviewed by appropriate authorities); (2) demonstrate the procurement is essential to the activity; (3) demonstrate savings; and (4) must be in accordance with national and international laws.
>
> For this announcement, other stringent regulatory agencies include drug regulatory agencies of Canada, Japan, and Western Europe. Grantees who plan to procure pharmaceuticals that are not *approved by the* US FDA or drug regulatory agencies of Canada, Japan, or Western Europe should submit a waiver that addresses the four points in the preceding paragraph.
> (b) No, a statement by the WHO that a pharmaceutical is safe and effective is not adequate.

It is important to note that at this time none of the generic antiretrovirals currently pre-qualified by WHO are registered by the FDA or any other stringent drug regulatory agency. The explanation for this is quite simple—it is unlawful in the United States or in the European Union to obtain final marketing approval for a generic product during the life of a patented medicine. Thus, U.S. procurement policies placed generic companies in a double bind—they were not permitted to seek final registration during the period of patent protection but they were condemned on quality grounds for not having obtained such regulatory approval. Caught in this Catch-22, generics will now be subjected to a recently announced stringent but expedited regulatory review by the FDA, a review that is likely to be equivalent to that required by a U.S. generic registrant proving bio-equivalence for the marketing of an off-patent medicine.

The newly announced FDA policy promises to expedite tentative approval of co-packaged and fixed-does combination HIV/AIDS medicines thereby granting a quality assurance that would permit purchases of AIDS medicines with PEPFAR funds. Although manufactures will have to re-establish bio-equivalence and Good Manufacturing Practices according to

criteria that are virtually identical to those already used by the WHO Prequalification Project in order to prequalify the very same medicines, the U.S. has agreed to expedite the FDA approval process to as little as two to six weeks for co-packaged drugs and to a somewhat longer, but still expedited, framework for fixed-does combinations. As an additional incentive to seeking tentative approval, the U.S. has also agreed to waive its usual $500,000 filing fee.

However, the U.S. has also made clear that it will continue to respect data exclusivity rights that might preclude even tentative approval of the newest AIDS medicines. Thus, medicines like tenofovir, atanazivir, and emtricitabine, all of which still enjoy data exclusivity as new chemical entities, will be immune from provisional registration at least during the first four years of their five-year data exclusivity. Even more problematic, when proprietary drug companies themselves eventually produce co-licensed fixed-does combinations, those new combinations may be considered new chemical entities or at least new products and thus be entitled to three to five years of exclusivity. This means, for example, that generic producers will not be able to produce WHO-recommended fixed-does combinations involving efavirenz for three to five years should Gilead, Merck, and Bristol-Myers Squibb succeed in registering their fixed-does combination first.

Despite the U.S.'s regulatory concessions and promises of speed, NGOs and activists are concerned that the U.S. has interposed an unnecessary, duplicative, and potentially burdensome process that requires generic companies to jump over additional hurdles to establish the quality of medicines that have already been vetted by the internationally recognized WHO Pre-qualification Project. And, it is hard to imagine that the expedited process will be truly fast given the volume of documentation required and the slow pace of scientific review and of inspecting manufacturing facilities overseas. Moreover, any delay in procuring generic drugs of assured quality is potentially problematic because PEPFAR grantees will be locked into supply chains, contracts, and procurement systems with higher-priced, proprietary manufacturers. Changing back from the U.S.-backed brand-name prescriptions will create chaos in the future as developing countries wean patients from one complicated drug regimen to switch them to another much cheaper regimen. Finally, the U.S. tentative approval process will not work for the newest medicines, including some important new proprietary fixed-dose combinations and some second-line therapies that will be crucial as patients develop drug resistance.

Thus, rather than join the existing multilateral process at the WHO, the U.S. is insisting on a unilaterally adding an unnecessary parallel process that will for all intents and purposes merely duplicate WHO approvals made many months earlier. Although this troubling process will be problematic in the short run, developing countries must adhere to the U.S. FDA-approval process when spending PEPFAR dollars. Hope fully in the long run, generic producers

will be willing to undergo both the WHO and the FDA process and incongruities between drug procurement requirements will lessen.

6. ECONOMIC ANALYSIS OF EFFICIENT GENERIC MANUFACTURE AND THE IMPORTANCE OF ECONOMIES-OF-SCALE

As discussed previously, developing countries have important incentives to develop their own indigenous capacity to manufacture pharmaceutical products. They can do so by encouraging a wide variety of entities, ranging from purely domestic companies to subsidiaries of multinational companies that site a relatively large facility within the country. Similarly, they can encourage local production that covers a wide range of productive activity varying from producers with innovative and manufacturing capacities of both active pharmaceutical ingredients and final formulations to producers that merely package already formulated medicines.[195] Developing countries can encourage this expanded capacity lawfully under TRIPS both by direct subsidy and by their own procurement preferences for pharmaceutical products manufactured locally. However, the allure of local production may blind some developing countries to its true cost. That cost may include decreased future flexibility to rely on Paragraph 6 Implementation Agreement importation options and the long-term payment of excessive prices for medicines that can be sourced much more cheaply from overseas.

In this regard, understanding the issue of economies-of-scale is vitally important. The United States has long understood the issue of advantageous economies-of-scale for its own pharmaceutical industry:

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195. The typology established by UNIDO (1980) differentiated production based on differences in the source of the finished product: (1) packaging of already formulated medicines and perhaps small-scale local production of formulations such as IV fluids; (2) formulation of drugs in final dosage form and perhaps some production from imported intermediates; (3) production from imported intermediates and manufacture of other intermediates from local materials, and (4) production of active substances and processing to produce the required dosage forms. An alternative typology differentiates (1) integrated corporations engaged in all stages of production and capable or generating new molecular entities for distribution through subsidiaries and licenses, (2) innovative companies typically producing off-patent medicines but capable of some innovation, and (3) reproductive firms that rely entirely on active pharmaceutical ingredients procured from others. Warren Kaplan, *"Local Production": Industrial Policy and Access to Medicines: An Overview of Key Concepts, Issues, and Opportunities for Future Research*, World Bank Meeting on the Role of Generics and Local Industry in Attaining the Millennium Development Goals in Pharmaceuticals and Vaccines, *available at* http://www.worldbank.org/hnp/hsd/documents/pharma_production.pdf (last visited Feb. 23, 2004).

The pharmaceutical manufacturing process, depending on the end product, includes chemical synthesis, fermentation, extraction of organic chemicals from vegetative sources or animal tissues, and formulation into dosage forms such as tablets, capsules, injectable solutions, ointments, etc. and packaging in bottles, blister packs, etc. *Id.* at 2.

> The foundation of free trade embodied in the WTO system is the removal of conditions that lead to inefficiencies in global trade. The WTO has long recognized the trade-distorting nature of local content, import substitution, and local production requirements. We note that the non-discrimination clause of Article 27.1 of the TRIPS Agreement is built on this foundation.
>
> Pharmaceuticals are among the best examples of products where these principles are true. Pharmaceuticals can be efficiently produced in a small number of locations and transported through international trade to markets needing those products. Such efficiencies of production and distribution lead to lower prices and faster supply of products to meet demands, including those caused by public health emergencies.[196]

Although the United States was trying to valorize its own proprietary drug industry with this statement and although there is little evidence that U.S. pharmaceutical monopolists have ever reduced their prices because of manufacturing efficiencies, economies-of-scale are demonstrably important to generic industries, as recognized by Canada in the EC-Canada pharmaceutical products case at the WTO.[197]

> Smaller countries that . . . have generic industries [do] not have domestic markets sufficiently large to enable those industries to operate on an economic scale. Those industries [have] to export in order to be able to manufacture in sufficient quantities to achieve economies-of-scale, so that domestic consumers [can] receive the benefits of cost-effect generic products.[198]

The efficiency concerns stated publicly by the United States and Canada confirm earlier studies that concluded that local production of pharmaceuticals did not make good sense for most developing countries because of diseconomies-of-scale and technological demands. The few exceptions were countries like China, India, Brazil, Thailand, Egypt, Mexico, Yugoslavia, Turkey, and Argentina that had large local markets and the ability to produce active pharmaceutical ingredients.[199] That number may have grown to include

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196. United States Statement at TRIPS Council Meeting, IP/C/M/31 (June 20, 2001).

197. Canada—Patent Protection of Pharmaceutical Products Complaint by the European Communities and their member States, Report of the Panel, WT/DS114/R (Mar. 17, 2000).

198. *Id.* ¶ 4.38(a).

199. Kaplan, *supra* note 195, at 5-6.

other countries with productive capacity such as South Africa. But, if the economic cost of creating local pharmaceutical capacity is excessive, if the quality of products is doubtful, or if the final pricing is not competitive with existing foreign generic manufacturers because of diseconomies-of-scale or otherwise, then "this 'local production solution' will be no solution at all."[200]

Moreover, developing countries will have to be willing to take a hard look at other factors affecting competitiveness including: a shortage of skilled labor; a weak financial sector; diminished flows of foreign direct investment; and other disadvantages facing smaller enterprises and smaller countries.[201] They will also have to consider the economic viability of single-drug facilities, for example, those that might primarily or exclusively produce fixed-dose combination ARVs.

Based on empirical research, Kaplan and others have concluded that:

> [t]here is a 'critical mass' of industrial and socioeconomic development and human and technical resources that must be reached before any 'indigenous' pharmaceutical industry can survive. These include:
> - GDP great than about $100 billion
> - Population greater than about 100 million
> - Sufficient numbers of the population enrolled in secondary and tertiary education
> - Competitiveness index (UNIDO) grater than about 0.15
> - A net position pharmaceutical balance of trade.[202]

These hesitancies about the economics of local production are compounded by additional concerns about quality assurance. As discussed in subsection 5.1, the issue of quality assurance is not just a function of good manufacturing practice, but also a function of quality control based on a functioning drug regulation and registration system, a functioning drug quality control laboratory, an efficient system for storing and transferring drugs, and an enforceable regime of drug legislation.[203]

Accordingly, there is considerable uncertainty about the ability of smaller developing countries to achieve efficiencies in drug manufacturing especially with respect to active ingredients and harder to formulate medicines. Some experts believe that only regional economies-of-scale can be achieved in sub-Saharan Africa and that South Africa is the only country

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200. *Id.* at 8.

201. *Id.* at 9.

202. Warren A. Kaplan et al., *Draft: Is Local Production of Pharmaceuticals A Way to Improve Pharmaceutical Access in Developing and Transitional Countries? Setting a Research Agenda*, (Apr. 23, 2003), *available at* http://www.worldbank.org/hnp/hsd/documents/LOCAL PRODUCTION.pdf (last visited Apr. 6, 2004).

203. *Id.* at 45.

with a reasonable chance to develop an African regional capacity.[204] Other experts, and indeed some countries assisting local production, appear to believe that smaller finishing plants can be efficient in making formulations and in labeling and packaging drugs for local consumption.[205] This debate is surely important to developing countries and they should investigate these issues very closely lest too many countries erroneously assume that each can become a major regional supplier. Moreover, developing countries should not lose sight of the importance of accessing standard quality, generic medicines at lowest cost thereby speeding and easing the flow of treatment to poor people bearing an unbearable burden of disease.

Whatever sourcing decisions they make, developing countries should seek to reduce barriers to generic entry and to generic companies achieving economies-of-scale. In order to invest in producing medicines efficiently, generic manufacturers need predictable markets, regulatory access, freedom from patent-infringement lawsuits, and relief from ancillary trade agreements that undermine their ability to sell standard-quality medicines cheaply. They also need *some* profit motivation.

7. NEGATIVE IMPACT OF EMERGING BILATERAL AND PLURILATERAL FREE TRADE AGREEMENTS ON POST-DOHA AND POST-PARAGRAPH 6 FLEXIBILITIES.

It would be gratifying to report that developed countries suffered a secure setback in their battle for TRIPS-plus intellectual property protections via the Doha Declaration and Paragraph 6 Implementation Agreement and that developing country solidarity and multilateralism had permanently restrained U.S. unilateralism. However, the persistence of the United States and other developed countries in pursuing the interests of their pharmaceutical industries has not yet ceased. Thus, at the same time that developed countries, led by the United States, were enacting a strategy of export containment in the WTO, the United States, in particular, was negotiating bilateral and regional trade agreement with greatly enhanced intellectual property protections.

To this end, in the past year the United States has concluded negotiations with Chile and Singapore and is negotiating further bilateral agreements with Morocco, Thailand, the Dominican Republic, Panama, and Australia. In addition, it is pursuing regional negotiations in Central America, the Andes, Southern Africa, and the entire Western Hemisphere. In each of these negotiations, the United States is seeking to impose TRIPS-plus intellectual property protections that would dramatically undermine both the Doha Declaration and the Paragraph 6 Implementation Agreement.

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204. *Id.* at 51.

205. *See, e.g.*, Bill Haddad, Chairman/CEO, Biogenerics, Inc, *Presentation*, World Bank Meeting on the Role of Generics and Local Industry in Attaining the Millennium Development Goals in Pharmaceuticals and Vaccines (June 23-24, 2003).

For example, even in Africa, at the heart of the AIDS pandemic, the USTR is undertaking trade negotiations to transplant U.S.-style patent protections into the South African Customs Union.[206] In order to meet "standards of protection similar to that found in U.S. law," SACU nations would be required:

- to limit compulsory licenses to national emergencies, to governmental, non-commercial use, and to anti-competitive practices remedies only;
- to bar parallel trade;
- to extend patent monopolies for administrative delays;
- to link drug registration rights to patent status;
- to enhance protections for clinical trial testing data by providing at least five years of data exclusivity, thereby precluding registration of medicines produced under compulsory licenses;
- to adopt criminal enforcement for patent violations, including improvidently granted compulsory licenses.

In sum, the proposed negotiation objectives would completely eviscerate the Doha flexibilities, dramatically increase IP protection, and reduce trade in affordable generic medicines.

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206. On November 4, 2002, United States Trade Representative Robert B. Zoellick formally notified Congressional leaders of the Administration's intent to initiate negotiations for a free trade agreement with the nations of the South African Customs Union: Botswana, Lesotho, Namibia, South Africa, and Swaziland. With respect to intellectual property rights, the negotiations would:

> — Seek to establish standards that reflect a standard of protection similar to that found in U.S. law and that build on the foundations established in the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement) and other international intellectual property agreements, such as the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and the Patent Cooperation Treaty.
>
> —Establish commitments for SACU countries to strengthen significantly their domestic enforcement procedures, such as by ensuring that government agencies may initiate criminal proceedings on their own initiative and seize suspected pirated and counterfeit goods, equipment used to make or transmit these goods, and documentary evidence. Seek to strengthen measures in SACU countries that provide for compensation of right holders for infringements of intellectual property rights and to provide for criminal penalties under the laws of SACU countries that are sufficient to have a deterrent effect on piracy and counterfeiting.

USTR Resources, *Letter from Robert Zoellick to Senator Byrd, available at* http://www.ustr.gov/releases/2002/11/2002-11-04-SACU-byrd.PDF (last visited Feb. 25, 2004).

7.1 Export Limitations

More particularly, in the context of the production-for-export problem, the SACU and FTAA negotiations could be even more disastrous. For example, in the FTAA, the United States is the presumed sponsor of a troubling bracketed provision that would explicitly prohibit compulsory licensing for export (8.64 (6) (b)). In this regard, PhRMA has been very explicit that it is advocating this export ban in South Africa saying: "The USG should seek to limit the scope of Government use authority to exclude the possibility of Government use for the purpose of export, or for sale to the general public."[207] Basically, PhRMA and the USTR, by limiting compulsory licenses to national emergency and public non-commercial use, seek to prevent exports.[208]

If this no-export ban were to be imposed on SACU nations, then South Africa would be prevented from being a supplier of standard quality generic medicines to other SACU nations or to the subcontinent as a whole. If the ban were imposed on Brazil in FTAA negotiations, it too would be barred from becoming a regional supplier for generics in Latin America. Moreover, if the ban is imposed on Thailand in its bilateral negotiations, Asia would lose an important regional supplier. Since regional and international production-for-export of generic medicines is necessary for countries with little or no efficient manufacturing capacity, excluding one of the few technically competent Africa producers, all of the technically competent South America producers, and one of the more efficient Asia producers would be a huge blow to poor countries trying to import affordable generic medicines. Thus, any effort by U.S. free trade negotiators to sabotage pro-public health interpretations of TRIPS that would otherwise[209] permit the export of low-cost generic medicines is morally and legally unacceptable.

7.2 Data exclusivity and patent/registration linkage

Major drug companies and their champions in U.S. and E.U. trade offices are increasingly turning to data exclusivity and patent/registration linkage as their newest and sharpest tools for securing market hegemony. For example, in nearly all of its recent and pending bilateral and regional trade agreements, the United States is seeking data exclusivity for confidential drug

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207. PhRMA 2003 Annual 301 Report to the USTR, 71 (2003).

208. Exports would still be permitted where there has been a competition violation pursuant to Article 31(k) of the TRIPS Agreement.

209. The U.S.T.R.'s pursuit of heightened intellectual property rights is not limited to formal trade agreements. It has recently used its Special 301 Priority Watch List power against Guatemala, which thereafter passed stringent data protection legislation. Similarly, the U.S. required Cambodia to become TRIPS compliant in 2003 instead of 2016, as a condition of its entry to the WTO.

registration data that a company submits on a new drug entity, even when that entity is not itself separately patented. Once a country grants five years of data exclusivity on U.S. terms, generic producers are completely precluded from relying on the pre-existing data to establish the bio-equivalence of their medicines. Thus, in order to establish the quality, safety, and efficacy for purposes of registering a medicine for use, a generic company would have to duplicate time-consuming, expensive and ultimately unethical and wasteful clinical trials. Since it would not make sense to do so for time reasons alone—clinical trials ordinarily take 6-8 years to complete—data exclusivity spells a death knell to an effective import/export compulsory license scheme for the first five years that a new drug is on the market.

This five-year embargo is bad enough, but the United States is seemingly trying to totally eviscerate compulsory licensing schemes under even more recent provisions linking drug registration to patent status. For example, the recent CAFTA draft text, Chapter Fifteen Article 15.10.3 reads as follows:

> Where a Party permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the person originally submitting safety or efficacy information, to rely on evidence or information concerning the safety and efficacy of a product that was previously approved, such as evidence of prior marketing approval in the Party or in another territory, that Party:
>
> (a) shall implement measures in its marketing approval process to prevent such other persons from marketing a product covered by a patent claiming the product or its approved use during the term of that patent, unless by consent or acquiescence of the patent owner; and
>
> (b) if the Party permits a third person to request marketing approval of a product during the term of a patent identified as claiming the product or its approved use, it shall provide that the patent owner be informed of such request and the identity of any such other person.[210]

This provision, although it permits an application for registration during the term of a patent, requires notification of such application to the patent holder, who can thereafter make mischief for the applicant. Even worse precludes actual registration for marketing until patent expiration. Unless there is an implied limitation in the text to permit registration of medicines

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210. USTR, Central American Free Trade Agreement, draft texts, *available at* http://www.ustr.gov/new/fta/Cafta/text/index.htm (last visited Apr. 6, 2004).

produced under a compulsory license, the United States may have succeeded in euthenizing both the Doha Declaration and the August 30 Implementation Agreement in one fell swoop. Sure, countries can bypass patents, but then they confront new and insurmountable registration barriers that preclude registration for the remaining term of a patent, even after the five-year data exclusivity term has concluded! This outcome is not in any sense mandated by Article 39.3 of TRIPS, which only requires unspecified protection against "unfair commercial use."[211] Where a developing country has already determined that the public interest requires partial abrogation of a patent via a compulsory license, it is inconceivable there are not concurrent, just grounds for accessing confidential drug registration data to avoid the preclusive burden of repeat clinical testing.

In sum, there is a strong argument that the persistent effort by the United States to expand patent protections and data protection rules in the face of worst health crisis in the last six hundred years violates legal limits on U.S. trade policy[212] and an even stronger argument that it violates international human rights norms.[213] To counteract dangers implicit in the United States' continued pursuit of expanded intellectual property protections for its profit-bloated pharmaceutical industry, developing countries should unite to adopt a collaborative position resisting any efforts to add TRIPS-plus measures to the intellectual property provisions of regional or bilateral trade agreements. TRIPS, the Doha Declaration, and the Paragraph 6 Implementation Agreement should be seen as creating an impenetrable ceiling for intellectual property protections, particularly in the pharmaceutical sector. Only by uniting can developing countries resist being picked off one-by-one and region-by-region by U.S. trade negotiators.

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211. For an extended analysis of Article 39.3 and the options developing countries have to permit registration of bio-equivalent products, see Carlos M. Correa, *Protection of Data Submitted For the Registration of Pharmaceuticals: Implementing the Standards of the TRIPS Agreement* (2002), *available at* http://www.southcentre.org/publications/protection/protection.pdf. (last visited Apr. 6, 2004).

212. These intellectual property negotiation objectives directly violate the principal negotiating objectives in the Trade Act of 2002, which requires the United States "to respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001." 19 U.S.C. § 3802(b)(4)(C) (2002). Similarly, by seeking TRIPS-plus provisions found in U.S. law, the U.S. Trade Representative is also directly violating Exec. Order 13155, 3 C.F.R. § 268.

213. Richard Elliott, *TRIPS and Rights: International Human Rights Law, Access to Medicines and the Interpretation of the WTO Agreement on Trade-Related Aspects of Intellectual Property,* Canadian HIV/AIDS Legal Network and the AIDS Law Project of South Africa (Nov. 2001), *available at* http://www.aidslaw.ca/Maincontent/issues/cts/briefs/TRIPS-human-rights-briefPDF.pdf (last visited Feb. 26, 2004).

8. THE SHORT-TERM MANDATE FOR ACCESS TO DRUG REGISTRATION DATA AND FOR AN ARTICLE 30 LIMITED EXCEPTION FOR ACCESS TO EXPORTED GENERICS AND A LONG-TERM MANDATE FOR EXPLORING ALTERNATIVES TO THE TRIPS AGREEMENT FOR MEDICINES.

A deep paradox of developed countries' trade policies and their persistent effort to maintain and expand the proprietary industry's hegemony in developing country markets is that these markets, where the AIDS, tuberculosis, and malarial pandemics are at their worst, comprise so little of the global pharmaceutical market. A frequent argument from the USTR and PhRMA is that intellectual property rights must be protected and even expanded to provide incentives for future research and development and that the interests of consumers in continued path-breaking medical discoveries is jeopardized if patent protections are not maintained worldwide. To rebut this false contention, one need only survey the current structure of the global drug market where the world pharmaceutical market in 2000 was estimated at $406 billion dollars. North America, the European Union, and Japan purchased eighty percent of that total, by dollar volume, and all of them have robust systems of patent protection that protect patent holders against generic competition. On the other hand, all of Africa, Latin America, and Asia, the so-called developing world, comprised only twelve percent of the global market in 2000 (despite having eighty percent of the world's population).[214] Sub-Saharan Africa, the center of the HIV/AIDS pandemic, comprises a miniscule 1.3% of worldwide drug sales and the poor countries of Asia and the Indian subcontinent only add another 3.9%.

Accordingly, pharmaceutical companies make the vast bulk of their profits on secure sales in rich countries that have strong protections for intellectual property rights. Moreover, drug companies earn a very handsome rate of return, on their sales—18.5%—which places them at the top of all U.S. industry groups, five times the all-industry average. As a result, the largest U.S. pharmaceutical concerns earned nearly $37 billion dollars in 2001, even after deducting expenses for current research and development. In sum, the pharmaceutical industry is remarkably profitable (and has been so for many years) and its ability to conduct future research and development is in no real jeopardy based on anything that happens to low-volume sales of some of its products in some developing countries facing compelling public health dilemmas.

However, even if the drug companies were not already making huge profits in rich countries, which is more than enough to fund future research and development, are they losing profits by preventing access to medicines in developing countries? To the contrary, tens of millions of poor people are

214. Kaplan et al., *supra* note 202, at 8-9.

going without access to affordable patented medicines, and drug companies aren't making a dime on those non-sales. How exactly are drug companies being hurt if someone else makes generic drugs much more cheaply, sells them to customers previously priced out of the market, and then pays a royalty, even a small one, to the patent holder, as they must under existing compulsory license rules? The worst that will happen to drug companies is that they might lose some highly profitable sales to a narrow spectrum of rich elites in developing countries if their market segmentation strategy fails. However, this "loss" is a small price to pay in order to dramatically increase access to life-saving medicines for the other 98% of the population in poor countries. Accordingly, PhRMA's intellectual property fundamentalism in developing countries produces little real benefit to shareholders or to consumers in developed countries.

As a result of coordinated global campaigns and activists' strategic focus on drug pricing and intellectual property barriers, the prices for antiretroviral therapy have plummeted in three and a half years from $10,439/year to $140.[215] As a result of those same campaigns, generic producers are now empowered to produce fixed-dose combinations, endorsed by the World Health Organization, that permit patients to take one pill twice a day rather than multiple pills at widely different times, thereby facilitating patient compliance and reducing drug resistance. Prices have plummeted because people imagined and believed that lives in developing countries are worth saving and worth fighting for. As a result, for the same amount of money that could buy branded and patented medicines for 20,000 rich people in Africa in 2000, the world can now buy generic ARVs for 2,000,000 Africans living with AIDS by 2005.

When unified in the aftermath of the anthrax scare, developing countries succeeded in overpowering the United States and producing the Doha Declaration. Now, they are letting the developed world juggernaut condition-alize recent advances to the point of rendering them difficult, if not impossible to achieve. Not only should they have rejected the Chairperson's draft statement, they should they have rejected the earlier Motta text as well. It contained too many compromises of vital public health interests and too many substantive and procedural inefficiencies. Developing countries would have done better to rely on the text of the Doha Declaration and the baseline flexibilities of the TRIPS Agreement. Then, willing generic producers could have exported under Article 30 of TRIPS (permitting limited exceptions to patent rights) to willing importers that have issued compulsory licenses. People living with treatable diseases need a full-size, fully operational Doha Declaration.

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215. In May of 2000 the combination of d4T/3TC/nevirapine was $10,439/patient/year. J. F. Wilson, *Building Africa AIDS Care From the Ground Up*, 139 ANN. INTERN. MED. 157, 157-60 (2003).

As a short-term solution to some of the most glaring defects in the current system for accessing cheaper generic drugs of assured quality, this article recommends two modest modifications of existing rules. First, with respect to data exclusivity and patent/registration linkage, WTO members should enact a permanent solution granting direct permission to access confidential drug registration data for the purposes of establishing bio-equivalence of a pharmaceutical product lawfully produced under TRIPS flexibilities, including new, if arthritic flexibilities under the Paragraph 6 Implementation Agreement.

ARTICLE 39 AMENDMENT

4. For purposes of implementing paragraph 3 above, a Member may nonetheless permit a subsequent registrant of a pharmaceutical product to compare its product against undisclosed test data, or, where authorized, against evidence of registration in another jurisdiction, in order to establish bio-equivalence of the product and thus its quality, safety, and efficacy of use. This permission may be limited to products lawfully produced pursuant to this Agreement or to any subsequent amendments, clarifications, or waivers thereof.

The second recommendation is that developing countries return to the bargaining table and undo the damage done by the Paragraph 6 Implementation Agreement and Chairperson's Statement. Instead of relying on a highly conditioned, limited, and procedurally burdensome Article 31(f) solution, developed countries should go back to the simplified approach they championed for so long and that was subsequently endorsed by the European Parliament, the WHO, and leading NGOs around the world—a limited exception under Article 30 of the TRIPS Agreement.

ARTICLE 30 PRODUCTION-FOR-EXPORT LIMITED EXCEPTION

Under Article 30 of the TRIPS Agreement and pursuant to Paragraph 6 of the Doha Declaration, manufacturing shall be allowed: (1) if the pharmaceutical product is intended for export to a third country that has issued a compulsory license for that product, or where a patent is not in force, (2) if there is a request to that effect by the competent public health authorities of that third country arising from a specified public health needs, (3) if that third country certifies that it has insufficient current capacity in its pharmaceutical sector to manufacture the medicines efficiently, and (4) if low-cost methods are utilized to differentiate the labeling and packaging of the product from the patented version.

Although this particular language may not be perfect, an Article 30 solution is vastly superior as an easy-to-use mechanism for getting quality-assured generics to developing countries in need. Having been forced into a strategic retreat by U.S. intransigence, developing countries should not solemnize an ineffective mechanism that locks in patent holders' prerogatives and lock outs the most cost-effective forms of generic production.

Despite these two essential short-term recommendations, tinkering with the TRIPS Agreement and trying to forestall even more draconian intellectual property protections affecting access to medicines may, in the long run, be an ineffective strategy. The TRIPS system was designed, fundamentally, to protect the interests of intellectual property industries in the Global North at the expense of poor consumers in the Global South. That is problematic enough when the product at stake is a form of entertainment or a fancy software package, but it is far more problematic when lives are at stake, as they are with respect to access to essential medicines.

Therefore, developing countries and their allies should consider alternatives to the intellectual property system both with respect to the development of medicines and to access. In this regard, treating medicines as global public goods is a particularly attractive theory. The public goods theory imagines that benign and well-funded public institutions can take over the supervision of research, development, and manufacturing of new drugs for neglected diseases and in addition supply large quantities of low cost medicines to poor consumers.[216] Although a detailed exploration of this and

216. *See* James Boyle, *Symposium, The Public Domain*, 66 DUKE J. LAW & CONT. PROBLEMS 33 (2003); James Love, *Benefits of a Treaty on R&D*, Session on Alternative Frameworks to Finance R&D, The Drugs for Neglected Diseases (DND) Working Group, Rio de Janeiro, Brazil (Dec. 3, 2002), *available at* http://lists.essential.org/pipermail/ip-health/2002-December/003797.html (last visited Jan. 31, 2004); Royal Society, *Keeping Science Open: The*

other alternatives to the patent and data exclusivity regime is well beyond the scope of this paper, it does behoove public health activists to imagine a world where medicines are not guarded by intellectual property rules that present nearly insurmountable barriers to pro-developing-country innovation *and* access. Despite the attractiveness of such an exploration, however, a long-term revolution in intellectual property rules offers little short-term solace for tens of millions of people living with diseases today that will kill them tomorrow. For these fellow world citizens, pragmatic battles in the thicket of existing rules must also be waged.

Effect of Intellectual Property Policy on the Conduct of Science (April 2003), *available at* http://www.royalsoc.ac.uk/files/statfiles/document-221.pdf (last visited Feb. 25, 2004); John Sulston, *The Heritage of Humanity*, LeMonde Diplomatique (2002), *at* http://mondediplo.com/2002/12/15genome (last visited Feb. 25, 2004) (discussing decisions not to patent the human genome). Certain elements of such an approach are underway. *See* Medecins Sans Frontieres Access to Essential Medicines Campaign and the Drugs for Neglected Disease Working Group, *Fatal Imbalance: The Crisis in Research and Development for Drugs for Neglected Diseases, available at* http://www.msf.org/source/access/2001/fatal/fatal.pdf (last visited Feb. 25, 2004); *Cf.* Luis Jodar, F. Marc LaForce, Constante Ceccarini, Teresa Aguado, Dan M. Granoff, *Menigococcal Conjugate Vaccine for Africa: a Model for Development of New Vaccines for the Poorest Countries*, LANCET, Apr. 1, 2003, *at* http://image.thelancet.com/extras/02art7254web.pdf (last visited Feb. 25, 2004).

APPELLATE COURTS SPLIT ON THE INTERPRETATION OF THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT: SHOULD THE FLOODGATES BE OPENED?

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I. INTRODUCTION

January 17, 2003, may well come to be a watershed date in U.S. antitrust history. It was the date the U.S. Court of Appeals for the D.C. Circuit issued a decision in *Empagran S.A. v. F. Hoffman-LaRoche* (*Empagran*).[1] Taking an expansive view of the way U.S. antitrust laws apply to foreign claims, the court ruled that international purchasers of vitamins, whose injury stems solely from their non-domestic transactions, are free to bring claims under the 1890 Sherman Act, where the defendants have engaged in global price-fixing of vitamin sales and there is harm to a private party in the United States. Central to the ruling was an interpretation of the 1982 Foreign Trade Antitrust Improvements Act (FTAIA), which amended the Sherman Act.[2] The court determined that the FTAIA allows claims by foreign plaintiffs even when the specified domestic injury does not give rise to their respective claim. Put another way, as long as at least one party in the United States suffers an injury as a result of the global price-fixing, foreign purchasers can bring their claims before U.S. federal courts. This is true even though the injury to foreign plaintiffs is rooted entirely in transactions external to the United States. Implicit in this newly extended right are the additional privileges of injunctive relief, treble damages, jury trial and lawyers' fees. The court buttressed its legal reasoning with a tolerant reading of the FTAIA's legislative history, as well as with relevant public policy arguments.

While the predictions of increased U.S. antitrust suits brought by foreign plaintiffs may hold true, possibly crowding federal dockets, judgment should be reserved until other developments have run full course. Two months after *Empagran*, the Department of Justice (DOJ)[3] and the Federal Trade

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1. Empagran S.A. v. F. Hoffman-LaRoche, 315 F.3d 338 (D.C. Cir. 2003).

2. Sherman Act, 15 U.S.C.S. § 6a (1982).

3. *See generally* United States Department of Justice homepage *at* http://www.usdoj.gov/ (last visited Apr. 10, 2004).

Commission (FTC)[4] submitted a joint amicus brief to the D.C. Circuit, calling for an en banc rehearing of *Empagran*. The impact of *Empagran* is not to be underestimated, but it remains to be seen if the case will stand as is.

II. BACKGROUND

Empagran breaks new legal ground with its liberal interpretation of the FTAIA. Prior to 2002, the general understanding was that foreign plaintiffs could not bring claims under U.S. antitrust law for injuries suffered as a result of their non-domestic transactions, regardless of whether domestic trade or commerce was affected. The 2001 case coming out of the Fifth Circuit Court of Appeals, *Den Norske Stats Oljeselskap As v. HeereMac v.o.f.* (*Den Norske*),[5] went far in bolstering this belief. It held that the "plain language" of the FTAIA requires foreign plaintiffs who wish to sue under U.S. antitrust law to have a claim arising specifically from a domestic injury.[6] In other words, the plaintiff could be foreign, but the injury and the claim arising from it could not.

This was the generally held view, but this area of the law was hardly the most settled; it took American courts the better part of a century to reach this modest stance. As early as 1909, in *American Banana Co. v. United Fruit Co.* (*American Banana*),[7] the Supreme Court was asked to consider the reach of U.S. antitrust law. Although *American Banana* stated that the Sherman Act had no application external to the United States, subsequent cases, reflecting the increased importance international trade began to have on American markets, evinced a more relaxed reading of the jurisdictional elements of the Sherman Act. In 1945, the scope of U.S. antitrust law spread further. In *United States v. Aluminum Company of America* (*Alcoa*),[8] the Second Circuit introduced the "effects test," which established domestic jurisdiction over foreign conduct that intended to or did in fact have an effect on U.S. trade or commerce. The effects test achieved gradual acceptance in the majority of federal courts, albeit in various forms. One case in the 1970s[9] and another in the 1980s[10] introduced to the already loosely interpreted "effects test" a balancing test where the principle of comity was taken into account. The most recent development in U.S. antitrust jurisdiction came in the 1993 case *Hartford Fire Insurance Co. v. California* (*Hartford*), which reconfirmed that

4. *See generally* Federal Trade Commission for the Consumer homepage *at* http://www.ftc.gov (last visited Apr. 10, 2004).

5. Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001).

6. *Id.* at 421.

7. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

8. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

9. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).

10. American Rice v. Arkansas Rice Growers Coop Ass'n, 701 F.2d 408 (5th Cir. 1983).

"the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[11]

III. THE FTAIA

Prior to *Hartford*, U.S. lawmakers tried to elucidate the extraterritorial scope of domestic antitrust law by passing the FTAIA in 1982. The FTAIA amended the Sherman Act such that the latter "shall not apply to conduct" involving non-import trade or commerce with a foreign nation unless:

(1) "such conduct has a direct, substantial, and reasonably foreseeable effect" on trade or commerce in the United States,[12] and
(2) "such effect gives rise to a claim" under the Sherman Act.[13]

Unless these two criteria are met, U.S. federal courts lack subject matter jurisdiction over the case. The FTAIA was intended to exempt from antitrust prosecution those transactions that did not have a harmful effect on the U.S. economy.[14] It aimed to do this with its objective three-prong effects test.

IV. THE INTERPRETATION OF THE FTAIA BY THE APPELLATE COURTS

While the FTAIA was meant to lead to clarity, it has recently led to confusion. Since 2001, three federal circuit courts of appeal have interpreted the aforementioned provisions of the FTAIA in three different ways.

A. Den Norske

The first and most restrictive interpretation came in the 2001 case *Den Norske*.[15] In this case, a Norwegian oil company, whose business extended no further than the North Sea, brought a U.S. antitrust conspiracy claim against a handful of defendants who provided maritime heavy-lift services.[16] Although the heavy-lift services reached to all parts of the globe, the oil company claimed no specific harm suffered in the U.S.[17] Instead, the oil company made the indirect charge that the heavy-lift providers operated as a

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11. Hartford Fire Ins. Co. v. California, 509 U.S. 769, 796 (1993).
12. 15 U.S.C.S. § 6a (1)(A).
13. 15 U.S.C.S. § 6a (2).
14. *See* H. R. Rep. No. 97-686, pp. 2-3, 9-10 (1982).
15. Den Norske, 241 F.3d 420.
16. *See id.* at 421.
17. *Id.*

worldwide cartel; their stranglehold on barge-borne heavy-lift services led to inflated prices not only in the North Sea (where the oil company was affected) but also in the United States. U.S. trade was, therefore, affected under the Sherman Act.[18]

The Fifth Circuit did not agree with the plaintiff's argument, however, and dismissed the case for lack of subject matter jurisdiction.[19] The court ruled that a "plain language" reading of section 6a (2) of the FTAIA unavoidably led to the conclusion that foreign plaintiffs whose injury is rooted solely in foreign conduct should be barred from bringing claims under the Sherman Act.[20] It was immaterial that the conduct may harm U.S. trade as well.[21] To put the issue in the context, even if it were true that the defendants in *Den Norske* had engaged in a conspiracy to fix global heavy-lift prices and that this conspiracy had harmed U.S. trade, the Fifth Circuit ruled that the injured Norwegian oil company could not bring a claim to U.S. federal court under domestic antitrust laws. In this situation, only an injured domestic plaintiff could bring a claim.

The issue before the Fifth Circuit revolved almost entirely around the presence of the minutest of words, "a," in section 6a (2) of the FTAIA.[22] The court believed that "a claim," as it existed in section 6a (2), should be interpreted narrowly to mean "the claim of the plaintiff before the court." The court reasoned that if "a" were interpreted broadly to include both domestic *and* foreign claims, this would open U.S. courts to a flood of international claims. The majority deemed it inconsistent with the controlling statutory language, as well as with the intent of the Congressional drafters, to interpret the FTAIA so expansively as to allow claims from all over the world in U.S. federal courts.

In his dissent, Judge Higginbotham disagreed that a "plain language" understanding of the text necessarily precluded claims by foreign plaintiffs. While he acknowledged that the intent of the Congressional framers was, first,

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18. *Id.*
19. *Id.*
20. *Id.* at 426.
21. Den Norske, 241 F.3d 420.
22. The statute reads as follows:

§ 6a. Conduct involving trade or commerce with foreign nations

This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--
   (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
   (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
(2) such effect *gives rise to a claim* under the provisions of this Act, other than this section.

Sherman Act, 15 U.S.C.S. § 6a (1982) (emphasis added).

to protect American citizens from anticompetitive behaviour, Judge Higginbotham did not believe that their intent went so far as to "close the door to a foreign company injured by the same illegal conduct."[23] He maintained that the meaning of the word "a" was clear and simple and should not be construed narrowly.[24] The drafters had the choice to use a definite article ("the"), and they picked an indefinite one instead ("a"); let the interpretation reflect this choice, Higginbotham advocated.[25]

The majority no doubt would have sided with Judge Higginbotham had the situs of the injury suffered by the Norwegian oil company been situated in the United States. The difference between the two views was not the domestic character of the plaintiffs but the domestic character of the situs of the injury. Specifically, there was no domestic character to the situs of the oil company's injury. The effect and injury were entirely foreign.

In the end, *Den Norske* foreclosed one avenue of redress for injured foreign plaintiffs. The court ruled that although the anticompetitive conduct may have simultaneously injured U.S. consumers, foreign plaintiffs had no federal cause of action under the Sherman Act. The only claims allowed under the court's interpretation of the FTAIA were those that arose from the anticompetitive effects on the U.S. economy. It should be remembered that the Fifth Circuit certainly did not condone global price-fixing, nor deny that the price-fixing scheme had an effect on domestic trade or commerce. Rather, the Fifth Circuit held in *Den Norske* that the particular plaintiff, the Norwegian oil company, had not suffered an injury recognizable under the jurisdiction requirements of the Sherman Act as amended by the FTAIA.

B. Kruman

In 2002, the Second Circuit issued a decision that agreed with the Fifth Circuit's *Den Norske* in theory but disagreed in fact. That is, the Second Circuit also adhered to a "plain language" reading of the FTAIA, yet it reached the opposite conclusion of its sister circuit.

In *Kruman v. Christie's International PLC (Kruman),*[26] the plaintiffs filed a class action suit under the Sherman Act against Christie's International PLC and Southeby's Inc., the world's largest auction houses for fine art, collectibles, and similar items. The plaintiffs claimed that these two companies (the former a U.K. company, the latter a Michigan corporation) had engaged in global price-fixing of items sold at auction. In brief, the *Kruman* decision held that the effect on U.S. trade or commerce "need not be the basis for a plaintiff's injury, it only must violate the substantive provisions of the

23. *Den Norske*, 241 F.3d. at 431.
24. *Id.* at 432.
25. *Id.* at 433-33.
26. Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002).

Sherman Act."[27] In other words, the plaintiffs, although their transactions were external to the U.S. economy, could bring antitrust claims because the defendants' conduct had an effect on U.S. trade or commerce that violated the main strictures of the Sherman Act.

Like its sister circuit, the Second Circuit judged the FTAIA language clear and unambiguous. "Congress used the indefinite article ("a") rather than the definite article ("the"). As a court, we must be faithful to, and honor legislative meaning."[28] Strikingly, however, the Second Circuit made a decision opposite to that of the Fifth Circuit. The court struck down the defendants' argument to limit antitrust claims to those plaintiffs whose injury stemmed from domestic conduct, observing that to do so would fly in the face of *Alcoa*'s longstanding principle that it is the situs of the effect on trade that determines whether U.S. antitrust law applies, not the situs of the conduct.

Given the relevance and timeliness of *Den Norske*, it was inevitable that the *Kruman* defendants would rely on it in their pleadings. The "floodgates" argument figured centrally. The defendants claimed that reading the language of the FTAIA broadly would open U.S. federal courts to all varieties of antitrust claims by foreign plaintiffs. This was especially true, argued the defendants, because the world's markets were becoming increasingly interdependent.

The *Kruman* majority dismissed this argument, noting that Section 6a (1) of the FTAIA was in place to combat just such a wave of frivolous and unrelated foreign lawsuits. Not only must the claim highlight an effect on the U.S. economy (as required in subsection (2) of 6a), but the effect must be "direct, substantial, and reasonably foreseeable."[29] Clearly, the court believed these elements of the FTAIA sufficient to stem the supposed flood of internationally driven lawsuits.

C. Empagran

The most recent addition to the mix was the 2003 case *Empagran*, decided by the D.C. Circuit. If the Fifth Circuit's holding was the most restrictive reading of the FTAIA and the Second Circuit's the most lenient, then the D.C. Circuit's ruling fell in the middle but leaning more toward the Second's interpretation. The D.C. Circuit agreed with the Second Circuit that foreign plaintiffs should be allowed to bring their claims in U.S. federal court.

In *Empagran*, a class of vitamin retailers brought suit against the world's leading vitamin producers, alleging a global price-fixing conspiracy among the several defendants. Just as in *Den Norske* and *Kruman*, the plaintiffs in *Empagran* made no claim that their injuries arose from domestic transactions.

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27. *Id.* at 400.
28. *Id.*
29. 15 U.S.C. § 6a (1).

All their transactions, in fact, had happened outside the U.S. stream of commerce. Instead, the plaintiffs charged that the defendants' global price-fixing scheme adversely affected the U.S. economy. Prices were kept high all over the world, particularly in the United States, and American consumers suffered as a result.

To the foreign plaintiffs, the two requirements of Section 6a of the FTAIA had been met. First, by virtue of the fact that the alleged cartel controlled billions of dollars in revenue from vitamin sales, the plaintiffs argued that the actions of the vitamin producers had a "direct, substantial, and reasonably foreseeable effect" on the U.S. economy.[30] Second, they argued that this effect gave "rise to a claim."[31] Again, the issue boiled down to the interpretation of the FTAIA language.

Unlike the two previous circuits, the D.C. Circuit found no "plain meaning" in the language of the FTAIA. Instead, they found that they had to reinterpret the provisions all over again. This time, citing the statutory language itself, the FTAIA's legislative history, and public policy considerations, the D.C. Circuit determined that foreign plaintiffs should be allowed to bring their claims. While the majority deemed the Fifth Circuit's interpretation of the FTAIA "overly rigid," they also saw the Second Circuit's holding as going too far, particularly in its determination that only the "substantive provisions" of the Sherman Act need be violated to give rise to a claim.

In striking new legal ground, the court supported its judgment with three legal pillars. First, referencing the statutory language itself, the D.C. Circuit issued the following holding:

> We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct must violate the Sherman Act and the conduct's harmful effect must give rise to "a claim" by someone, even if not the foreign plaintiff before the court. Thus, the conduct's domestic effect must do more than give rise to a government action for violation of the Sherman Act, but it need not necessarily give rise to the particular plaintiff's (private) claim.[32]

The court remarked of its holding: "This interpretation has the appeal of literalism."[33] Next, the court concluded that, by and large, the legislative

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30. 15 U.S.C.S. § 6a(1).
31. 15 U.S.C.S. § 6a(2).
32. *Empagran*, 315 F.3d at 341.
33. *Id.*

history of the FTAIA favored an expansive reading of the Act's jurisdictional elements. Specifically, the court said that the legislative history, if it were interpreted to favor the more restrictive view of the FTAIA (as seen in *Den Norske*), did not exclude the less restrictive reading (*Kruman*). However, if the roles were reversed, the less restrictive reading *would* exclude the more restrictive view. The majority found this not only significant but also dispositive.

Lastly, in regard to the public policy issues, the court borrowed from the ruling in *Kruman* and Judge Higginbotham's dissent in *Den Norske*. Both had argued that allowing foreign plaintiffs in U.S. federal court would have a strong deterrence effect on potential anticompetitive conspirators on a worldwide scale. Whereas precluding these foreign claims in U.S. federal court could encourage a conspirator to engage in global price-fixing and offset his U.S. liabilities with profits from abroad, allowing foreign claims would obligate the conspirator "to internalize the full costs of his anticompetitive behavior."[34] Moreover, the court reasoned that domestic consumers would also benefit if foreign claims were permitted. Closing U.S. courts would have the effect of diminishing the efficacy of U.S. laws, while at the same time driving the plaintiffs back to their home fora, where the possibilities of prosecution and enforcement were uncertain. The *Empagran* majority finished assertively: "The U.S. consumer would only gain, and would not lose, by enlisting enforcement by those harmed by the foreign effects of a global conspiracy."[35]

As a corollary to the main holding, the majority in *Empagran* ruled that the foreign plaintiffs in question had standing to bring their case in U.S. federal court. This issue had been left unanswered at the district court level.

Given the facts that *Den Norske* and *Kruman* reached opposite rulings and that the court split in *Den Norske*, the split decision in *Empagran* should not come as a surprise. Dissenting, Judge Henderson deemed the more "natural reading" of the FTAIA to be the narrower one espoused by the majority in *Den Norske*. She found it peculiar that a claim by a foreign plaintiff would be judged actionable based on the potentiality of a domestic, hypothetical claim. More reasonable to Judge Henderson was the idea that a claim – *the* claim before the court – be based on the domestic injury that affects U.S. trade or commerce.

To recap, *Empagran* held that U.S. federal courts have subject matter jurisdiction over Sherman Act claims brought by foreign plaintiffs whose injury resulted solely from transactions that were external to the U.S. economy but, nonetheless, had an effect on U.S. trade or commerce and gave rise to a domestic (private) claim. As long as at least one domestic plaintiff can bring a claim against these domestic or foreign defendants, so too can the foreign

34. *Id.*
35. *Id.* at 55.

plaintiff. *Empagran* followed the overall result of *Kruman* but diverged in its reasoning. The latter case was deemed to have gone too far in setting the requirements for subject matter jurisdiction, providing for a jurisdictional nexus simply when the main provisions of the Sherman Act are contravened.

V. THE GOVERNMENT'S AMICUS CURIAE BRIEF

In response to an invitation from the D.C. Circuit court, the Department of Justice (DOJ) and Federal Trade Commission (FTC) issued an amicus curiae brief in March of 2003, stating the position of the U.S. government on *Empagran*. Contrasting sharply with both *Kruman* and *Empagran*, the position of the government was that only those claims that arise from domestic conduct and accompanying domestic effect should be permitted under the FTAIA. Citing the importance of this area of the law and the need for agreement among the circuits,[36] the brief called for an en banc rehearing of *Empagran* by the D.C. Circuit to mend the split of authority. The government's argument came in three parts.

First, the brief stated that the "most natural reading" of Section 6a (2) of the FTAIA would understand the phase "gives rise to a claim" as referring not to a claim by any plaintiff but only to a claim "by the *particular plaintiff* before the court."[37] As the FTAIA does not talk to the purpose of allowing a remedy for foreign conduct and foreign effect, the Sherman Act cannot be stretched to include the sorts of foreign plaintiffs seen in the three controlling cases.

Next, the brief countered the legislative history argument put forth by the D.C. Circuit. Whereas the majority in *Empagran* concluded that, absent "express legislative history to the contrary, Congress must have intended the more expansive interpretation"[38] of the FTAIA, the government determined this to be dubious logic. The brief proposed that the default position, absent controlling language, should be one that is wholly domestically focused in terms of the *effect* of anticompetitive conduct. The government brief supported the position put forth in *Den Norske*: "Nothing is said about protecting foreign purchasers in foreign markets."[39]

Lastly, the government disagreed with the majority in *Empagran* that extending U.S. antitrust laws would have a deterring effect on global anticompetitive conduct. In fact, the government maintained that just the

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36. In January 2002, the DOJ and FTC issued a joint amicus curiae brief commenting on *Den Norske*. Their logic unchanged from 2002, the *Empagran* brief borrowed substantially from its predecessor.

37. Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing *en banc* at 8, Empagran S.A. et al., v. F. Hoffman-LaRoche, Ltd., et al., No. 01-7115, 2003 U.S. App. LEXIS 647 (D.C. Cir. Jan. 17, 2003) [hereinafter Brief].

38. *Id.* at 10.

39. *Den Norske*, 241 F.3d at 429, n. 28.

reverse was true. Prefacing its argument with the fact that "price-fixing conspiracies are inherently difficult to detect and prosecute [and therefore require the help of co-conspirators,]"[40] the government made the case that extending the jurisdiction of the Sherman Act to foreign plaintiffs injured by foreign conduct "would create a potential disincentive for corporations and individuals to report antitrust violations and seek leniency. . . ."[41] In other words, there is a certain balance at the moment between anticompetitive behavior and resulting lawsuits. The government, through its leniency program, has a way of controlling criminal prosecutions against anti-competitive entities, which in turn influences subsequent civil prosecutions. However, if jurisdiction is broadened, then countless more plaintiffs enter the equation, potentially upsetting the delicate equilibrium. This equilibrium is crucial, it will be recalled, in getting the necessary co-conspirators to come forward in the first place. Thus, co-conspirators will ultimately be deterred from divulging what they know and stopping anticompetitive conduct.

As a corollary to this counter-deterrence argument, the government highlights the "floodgates" argument as well. Noting that the government is "unaware of any decision pre-dating the FTAIA that permitted" suits based on a theoretical domestic plaintiff, the brief surmised that *Empagran*'s new rule "threatens to burden the federal courts" with suits concerned with foreign anticompetitive conduct.[42]

In summary, the government's brief centered almost entirely around the notions of domestic and foreign conduct. While the government recognized the right of foreign plaintiffs to bring antitrust claims for injuries stemming from domestic conduct, it refused to concede a similar right to those injured solely by foreign conduct. Moreover, the government found fault with the logic that this latter group of plaintiffs received this right based only on the existence of a single domestic plaintiff. In the end, the government clearly believed that the D.C. Circuit had strayed too far afield in making the jurisdictional nexus between conduct and effect.

VI. IMPLICATIONS

Two major events will flow from *Empagran*. First, given the split of authority and the three distinct opinions expressed by three federal circuit courts, it seems apparent that this issue is ripe for review by the Supreme Court. Second, a wave of lawsuits by foreign plaintiffs may inundate the federal court system. This was certainly foreseen in a number of sources: the holding in *Den Norske*, the defendants' arguments in *Kruman*, and the amicus brief following *Empagran*. Discounting this argument is not easy, for few

40. Brief, *supra* note 37, at 12.
41. Brief, *supra* note 37, at 13.
42. Brief, *supra* note 37, at 14.

nations have antitrust laws allowing plaintiffs to recover treble damages and lawyers' fees in civil suits. Thus, it is not unlikely that these existing benefits, in tandem with the newly broadened jurisdictional elements to the Sherman Act, may prompt foreign plaintiffs to bring claims when they otherwise might have refrained.

Certain aspects relevant to *Empagran* do nothing to undercut the "floodgates" argument. Specifically, the DOJ has already obtained against the *Empagran* defendants, both corporate and individual, fees in excess of $900 million, including the largest criminal fee ever levied by the DOJ ($500 million).[43] These huge fines hardly dissuade foreign plaintiffs from trying themselves to reach into the defendants' deep pockets.

Conversely, opponents to the "floodgates" theory are not without their own persuasive arguments. They note that Section 6a (1) exists explicitly for the purpose of ensuring a logical nexus between the injury suffered and the right to bring suit. As well as having a direct and reasonably foreseeable effect on U.S. trade or commerce, the injurious effect must be *substantial.* Many commentators feel confident that only the most egregious of cases--those that have a substantial effect on the U.S. economy – will thus be allowed in federal court. Other legal requirements, such as standing, personal jurisdiction, and forum non conveniens, will also contribute to the filtering of marginal cases.

However, the argument put forth in the DOJ/FTC amicus brief that the extension of American jurisdiction as suggested by *Empagram* may dissuade co-conspirators from cooperating with prosecutors seems to be decisive. Put succinctly, *Empagram's* interpretation of the FTAIA may undercut the efficacy of foreign government leniency programs. Given the fact that, by *Empagran*, foreign defendants can be hauled into U.S. federal court to face treble damages and significant personal liability for their exclusively foreign conduct, the ante has been upped considerably in the eyes of many foreigners. It has been increased so much that foreign national competition authorities worry that co-conspirators will be deterred from coming forward to report anticompetitive conduct. As the successful prosecution of anticompetitive behavior hinges so greatly on co-conspirator testimony, detecting and dissolving cartels becomes that much harder.

VII. CONCLUSION

Clearly, the issue of whether to extend the jurisdiction of U.S. antitrust laws is a contentious one, for it has divided courts and circuits. Supreme Court review does appear necessary. The weight of judicial opinion favors the opening of U.S. courts to the class of plaintiffs seen in *Kruman*, and *Empagran*. The benefits to this course of action are several and not easily discounted. However, the joint opinion of the DOJ and the FTC, coupled with

43. Brief, *supra* note 37, at 2.

similar opinions from other national competition authorities, is highly persuasive. Control over foreign antitrust matters is rightly left in the hands of those who know the field the best: foreign national competition authorities. *Empagran* and *Kruman* have gone one step too far. The advice in the joint DOJ/FTC brief should be heeded, and the jurisdiction of the Sherman Act as amended by the FTAIA should be rolled back.

IN THE BEST INTERESTS OF THE CHILD?[1]: AN INTERNATIONAL HUMAN RIGHTS ANALYSIS OF THE TREATMENT OF UNACCOMPANIED MINORS IN AUSTRALIA AND THE UNITED STATES

Emily A. Benfer*

I. INTRODUCTION

"[M]ankind owes to the child the best it has to give."[2]

A young boy in solitary confinement lay motionlessly on the concrete.[3] His face was red, as though he had been crying.[4] In order to walk, he had to be physically supported by guards.[5] Horrified by being shackled and transferred to a high-security prison, he had not eaten for five days.[6] The child[7] was not allowed to make calls to an attorney and had no contact with the outside world.[8] The warden finally alerted an attorney after the boy stopped breathing during an anxiety attack.[9] When he saw the attorney, the young boy repeatedly begged: "Help me!"[10] Once the attorney left, the boy was strip

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1. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, Annex at 167, U.N. Doc. A/44/49 (1989); entered into force Sept. 2, 1990 [hereinafter CRC].

* J.D. Candidate, 2005, Indiana University School of Law – Indianapolis; B.A., 1999, English, Writing, Providence College. To Professor Helen Grant, thank you for your guidance during the writing of this Note and for teaching me about the Australian legal system and Refugee-Asylum Law. To Lisa Koop, thank you for your assistance and for inspiring me through your endless dedication to ensuring the rights of migrant workers. This Note is dedicated to the thousands of children seeking refuge in countries not their own and suffering endless human rights violations as a result; may you find a safe haven and freedom from abuse.

2. Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at Preamble, U.N. Doc A/4359 (1959).

3. AMNESTY INTERNATIONAL, "WHY AM I HERE?" UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION 41 (2003), *available at* http://www.amnestyusa.org/refugee/children_detention.html (last visited Mar. 13, 2004).

4. *Id.*

5. *Id.*

6. *Id.*

7. In this article, "child," "youth," "minor," and "juvenile" are used to describe a person under the age of eighteen.

8. AMNESTY INTERNATIONAL, *supra* note 3, at 41.

9. *Id.*

10. *Id.*

searched[11] and returned to a facility[12] where he was shackled again and subject to punishment and isolation.[13] The reason for the young boy's solitary confinement is unknown.[14] One reason underlying his detention is clear: he was an unaccompanied minor who sought asylum in the United States.[15]

More than 100,000 children around the world flee from abuse and glaring human rights violations at any given time.[16] When they arrive in a country perceived as a safe haven, these children are extremely vulnerable and are often suffering, emotionally and psychologically, from the trauma they experienced and from which they fled.[17] Children escaping persecution have the right to seek asylum.[18] International law establishes the best interests of the child as the highest priority and primary consideration in these types of asylum cases.[19]

Despite their internationally-declared rights,[20] children seeking asylum in the United States and Australia are typically detained for an undetermined

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11. *Id.* In the United States, detention centers report regularly subjecting unaccompanied minors to strip searches. *See id.* at 33-34. Juvenile offenders (people under 18 who have committed a crime) who are residents of the United States are exempt from strip searches in many detention facilities. *See id.*

12. *Id.* at 41.

13. *See Id.* at 36.

14. AMNESTY INTERNATIONAL, *supra* note 3, at 41.

15. *Id.*

16. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), THE WORLD OF CHILDREN AT A GLANCE, *at* http://www.unhcr.ch/children/glance.html (last visited Mar. 13, 2004); *See* AMNESTY INTERNATIONAL, *supra* note 3, at 7. Refugees flee from risk of being "killed, raped, abducted, imprisoned, or tortured, often leaving behind everything they have." *Id.* Children are specifically vulnerable to human rights violations including "recruitment as child soldiers, child prostitution, child labor, slavery, trafficking, or abuses as street children." *Id.* WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN 4 (2002) *available at* http://www.womenscommission.org/pdf/ins_det.pdf (last visited Mar. 13, 2004). *See also* AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 133 (Regina Germain ed., 3d ed. 2003). "Children are victims of persecution and torture throughout the world. They are subjected to abusive child labor practices, are recruited by regular or irregular armies, are sold into prostitution or indentured servitude, and are subjected to various other human rights abuses." *Id.*

17. *See* Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 590 (1998). Fifty percent of children who flee suffer from post-traumatic stress disorder upon arrival in the United States. *Id.*

18. Universal Declaration of Human Rights, art. 14, G.A. Res. 217 (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR].

19. CRC, *supra* note 1, art. 3.

20. *See* UDHR, *supra* note 18, art. 14. *See also* Convention Relating to the Status of Refugees, July 28, 1951, art. 31, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 137, 152 [hereinafter Refugee Convention 1951]. *See generally* CRC, *supra* note 1. Only two countries in the world, the Unites States and Somalia—which has not had a government since 1991—are not signatories to the Convention on the Rights of the Child. *See generally* LAWRENCE J. LEBLANC, THE CONVENTION ON THE RIGHTS OF THE CHILD (1995).

period until their immigration status is reviewed.[21] This time period can extend into months or years.[22] In 2001, over 5,000 unaccompanied minors were detained in the United States,[23] and over 1,100 children were detained in Australia.[24] In detention, children face harsh conditions that affect their physical,[25] mental, and emotional health.[26] They are physically abused,[27] sexually assaulted,[28] and treated like prisoners.[29]

This Note seeks to analyze and critique the treatment of unaccompanied minors seeking asylum in the United States and Australia. Part II of this Note describes the current policies and legal doctrine in refugee and asylum law as they pertain to unaccompanied minors entering into, and already inside, the

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21. AMNESTY INTERNATIONAL, *supra* note 3, at 1-2. In the United States, a child is detained until their immigration status is reviewed before the Executive Office of Immigration Review (EOIR). *Id.* In Australia, children are detained until their application for asylum is reviewed by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). REFUGEE COUNCIL OF AUSTRALIA, ADVOCATE'S HELP KIT (2003), *at* http://www.refugeecouncil.org.au/html/resources/advocateskit.html#howdo (last visited Mar. 13, 2004).

22. *See* AMNESTY INTERNATIONAL, *supra* note 3, at 1-2.

23. WOMEN'S COMMISSION, *supra* note 16, at 1; *Young Would-Be Refugees Find Harsh Fate Awaits in U.S.*, TORONTO STAR, Dec. 21, 2001, at A35. In 2001, 5,385 unaccompanied minors fled to the United States. *See* AMNESTY INTERNATIONAL, *supra* note 3, at 1. Seventy-five percent of these children are boys and twenty-five percent are girls. *See id. See also* WOMEN'S COMMISSION, *supra* note 16, at 1.

24. AMNESTY INTERNATIONAL AUSTRALIA, FACTSHEET 4: CHILDREN IN IMMIGRATION DETENTION IN AUSTRALIA (2003), *at* http://www.amnesty.org.au/refugees/ref-fact04.html (last visited Mar. 13, 2004).

25. *See* M.M. Suarez-Orozco, *Everything you Ever Wanted to Know About Assimilation but Were Afraid to Ask*, *in* ENGAGING IN CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES 31 (R. Shweder, M. Minow & H. Rose Markus eds., 1002). *See also* Jacqueline Bhabha, *Children, Migration and International Norms in* MIGRATION AND INTERNATIONAL LEGAL NORMS 203, 210 (Alexander Aleinikoff & Vincint Chetail eds., TMC Asser Press 2003). *See also* Nikki Todd, *Clinical Review Needed of Asylum Seekers*, AAP NEWSFEED, May 8, 2002 (describing poor immunization levels and vitamin D deficiencies).

26. Todd, *supra* note 25. "Current practices of detention of infants and children are having immediate effects on their development and their psychological and emotional health which are likely to extend to the longer term." *Id.* "[C]hildren showing signs of deprivation and emotional neglect were 're-traumatized by the things that they witness or experience in detention.' Unaccompanied minors were particularly at risk," Dr. Louise Newman, the director of the NSW Institute of Psychiatry at Cumberland Hospital, Western Sydney, who was involved in a study that found "quite epidemic" levels of self-harm and suicide attempts, *quoted in* Larry Schwartz, *No Respite For Child Detainees*, SUNDAY AGE, Mar. 9, 2003, at 4. *Totally Amazing Mind, So Understanding and So Kind; Prevalence of Mental Disorders*, U.N. CHRONICLE, Mar. 22, 1999, at 24 (describing mental illness among unaccompanied minors).

27. *See* AMNESTY INTERNATIONAL, *supra* note 3, at 30.

28. Navarro, *supra* note 17, at 600. *See also* Rob Taylor & Joe Hildebrand, *Govt Rebukes Human Rights Watchdog Over Child Detention*, AAP NEWSFEED, Nov. 28, 2001 (describing how an allegation that a young boy was sold for sex in return for a cigarette in a detention center was dismissed).

29. *See* Navarro, *supra* note 17, at 590. *See also* AMNESTY INTERNATIONAL, *supra* note 3, at 28-38.

United States and Australia. Part III describes the actual legal treatment of, or conditions faced by, unaccompanied minors in the United States and Australia. Part IV compares the practices in the United States and Australia to the international law and international agency recommendations which seek to guide the treatment of unaccompanied minors seeking asylum. The comparison reveals that the treatment of unaccompanied minors in both the United States and Australia violates international human rights law pertaining to children and should be redressed immediately. Finally, Part V provides recommendations to guide the United States and Australia in the process of making changes that are vital to the well-being of unaccompanied children fleeing dangerous situations.

II. LEGAL DOCTRINE AND PRACTICE GUIDING REFUGEE AND ASYLUM LAW IN THE TREATMENT OF UNACCOMPANIED MINORS

A. The International Responsibility to Children Seeking Asylum

> "All rivalries, all racial or religious antagonisms have vanished in the face of the agony of the children—who are the sacred heritage of the human race."[30]

Historically, the recognition of children's rights was sporadic and oftentimes absent.[31] It was not until 1924, when the League of Nations[32] adopted the Declaration of the Rights of the Child,[33] that children were internationally recognized (even then, however, adversaries protested that children were not entitled to any rights at all).[34] In 1989, the Convention on the Rights of the Child (CRC) expanded international recognition of children's rights and

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30. An appeal to the League of Nations prior to the adoption of the 1924 Declaration of the Rights of the Child. PAUL GORDON LAUREN, THE EVOLUTION OF HUMAN RIGHTS 119 (Bert Lockwood, Jr., ed., 1998) (quoting Societe des Nations, Document 20/48/160, "Intervention en faveur des enfants des pays eproves par la guerre," Dec. 2, 1920).

31. *See* Bhabha, *supra* note 25, at 203-04. In 1946 the Constitution of the International Refugee Organization included orphans under age sixteen as a category of refugees. *Id.* at 204. In 1949, the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War asserted special treatment "in international armed conflicts to the wounded and sick, and to expectant mothers, but not to children" without specific circumstances. *Id.* at 204. Children's entitlement to special treatment during armed conflict was recognized by the 1977 Geneva Protocol I. *See id.* at 205.

32. LAUREN, *supra* note 30, at 92-103. The League of Nations was created at the Paris Peace Conference of 1919 in response to the first World War. *Id.* U.S. President Woodrow Wilson, was instrumental in the development of the League of Nations and submitted the Draft Covenant which served as the basis for the League. *Id.* When the League failed to prevent the Second World War, it was replaced by the United Nations in 1942. *See* UNITED NATIONS, HISTORY OF THE UN, *at* http://www.un.org/aboutun/history.htm (last visited Mar. 13, 2004).

33. Bhabha, *supra* note 25, at 203-04.

34. LAUREN, *supra* note 30, at 120, 130.

became the most rapidly and widely adopted human rights treaty.[35] The CRC was ratified by Australia in 1990;[36] the United States signed the Convention in 1995, but has yet to ratify it.[37] Australia, as a ratifier, and the United States, as a signatory, are obligated to abide by the objectives and purposes of the treaty.[38] The CRC codified a child's right to special protection and required that the treatment of children promote the child's best interests.[39] The CRC requires that "[n]o child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment."[40] It also necessitates that a child's liberty be respected and restricted only if reasonably necessary.[41]

Detention of a child is only permitted "in conformity with the law . . . as a last resort and for the shortest appropriate period of time."[42] If a child is detained, the CRC requires that he or she be separated from adults, [43] unless

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35. CRC, *supra* note 1, art. 22(1) covers both children who have been granted refugee status and those seeking asylum. *See* GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 362 (1995).

36. AMNESTY INTERNATIONAL AUSTRALIA, FACTSHEET 11: AUSTRALIA'S OBLIGATIONS (2003), *available at* http://www.amnesty.org.au/refugees.ref-fact11.html (last visited Mar. 13, 2004).

37. AMNESTY INTERNATIONAL, *supra* note 3, at 11. The United States and Australia were involved in the creation of Article 22 of the CRC. Considerations 1982 Working Group E/1982/12/Add.1, C, 64-68 *in* THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PREPARATOIRES" 321 (Sharon Detrick ed., 1992)

> The representative of Australia proposed the replacement in the first sentence of the words 'recognize that' by the words 'shall ensure that'; he also proposed that the words 'needs special protection and assistance' at the end of the first sentence and the whole of the second sentence should be replaced by 'receives adequate protection and assistance in the enjoyment of the rights contained in this Convention' . . . . The delegation of the United States suggested the addition of the words 'and in the best interests of the child' to the words 'where appropriate.'

Id.

38. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331. *See also* AMNESTY INTERNATIONAL, *supra* note 3, at 11.

39. VAN BUEREN, *supra* note 35, at 205. CRC, *supra* note 1, art. 3(1). *See also* UDHR, *supra* note 18, art. 5.

40. CRC, *supra* note 1, art. 37(a). *See also* UDHR, *supra* note 18, art. 9.

41. CRC, *supra* note 1, art. 37(b).

42. *Id.* Any person who is detained internationally has the right to be notified of their rights and the reason for their detention. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, prin. 11, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Annex, Supp. No. 49, at 298, U.N. Doc. A/43/49 (1988); International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 14, 999 U.N.T.S. 172, 175, 177 (*entered into force* Mar. 23, 1976) *reprinted in* INTERNATIONAL DOCUMENTS ON CHILDREN (Geraldine Van Bueren, ed., 1993) [hereinafter ICCPR]. The ICCPR was ratified by the United States in 1992 and Australia in 1993. *Id.* However, the United States reserves the right to only abide by the ICCPR where it is consistent with domestic law. AMNESTY INTERNATIONAL, *supra* note 3, at 9.

43. CRC, *supra* note 1, art. 37 (c). International law requires that juvenile offenders also be separated from adults. ICCPR, *supra* note 42, art. 10(2) (b). "Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication." *Id. See also* American Convention on Human Rights, Nov. 22, 1969, art. 5(5), Series no. 36, at 1,

the best interest of the child necessitates otherwise.[44] In the event a child is deprived of his or her liberty, the CRC requires that the child be "treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons his or her age."[45] A child who is detained has the right of "prompt access" to legal assistance and the right to challenge the legality of his or her detention in front of an "independent and impartial authority."[46] Furthermore, he or she has the right to consular notification and access.[47]

The Universal Declaration of Human Rights (UDHR) provides everyone with "the right to education"[48] which is granted "on the basis of equal opportunity."[49] Equal opportunity requires that children be accommodated according to their language and economic background.[50] Children also have the right to exercise religious and moral beliefs which must be respected by all governments.[51]

The UN describes the prolonged detention of unaccompanied minors as "not only inhumane but illegal."[52] Articles Three and Nine of the 1948

Organization of American States, Official Record, OEA/Ser.L/V/II.23 (entered into force July 18, 1978) [hereinafter American Convention]. "Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors." *Id.*

44. *See* Bhabha, *supra* note 25, at 212-16. In situations where the child is accompanied by an adult, parent or legal guardian, they have the right not to be separated from them. *Id.*

45. *See generally* CRC, *supra* note 1. *See also* ICCPR, *supra* note 42, art. 39.

46. CRC, *supra* note 1, art. 37(d). The child has the right to a "prompt decision in any such action." *Id.*

47. Bhabha, *supra* note 25, at 208; Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261, *available at* http://www.courtinfo.ca.gov/programs/courtinterpreters/ documents/vienna.pdf (last visited Mar. 13, 2004).

48. UDHR, *supra* note 18, art. 26(1). *See generally* VAN BUEREN, *supra* note 35, at 232-61. Only primary education is compulsory, though secondary education and special education for handicapped people are recommended. CRC, *supra* note 1, art. 28(1). *See also* International Covenant on Economic, Social and Cultural Rights, art. 13, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, (entered into force on Jan. 3, 1976 [hereinafter ICESCR]; Refugee Convention 1951, *supra* note 20, art. 22; European Convention on Human Rights, Prot. 1, art. 2, 213 U.N.T.S. 221 [hereinafter ECHR]; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," adopted Nov. 17, 1988, art. 13(3)(a)(b)(e), O.A.S. Treaty Series 69, *reprinted in* INTERNATIONAL DOCUMENTS ON CHILDREN, *supra* note 42, at 73. Although the United States is not a party to these treaties, it has recognized the right of children, even undocumented and non-citizen children, to free primary education. *See generally* Plyler v. Doe, 457 U.S. 202 (1981).

49. CRC, *supra* note 1, art. 28(1).

50. Bhabha, *supra* note 25, at 210. *See also* INTERNATIONAL DOCUMENTS ON CHILDREN *supra* note 42; Convention Against Discrimination in Education, Dec. 14, 1960, art. 3(e), 429 U.N.T.S. 93, *available at* http://www.unesco.org/education/pdf/DISCRI_E.PDF (last visited Mar. 13, 2004) (granting equal access to education to children who are resident and foreign nationals).

51. Bhabha, *supra* note 25, at 210; VAN BEUREN, *supra* note 35, at 32-38.

52. Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, U.N. Doc. E/CN.4/2001/83/Add.1 (2001).

Universal Declaration of Human Rights protect everyone from arbitrary arrest and detention.[53] The International Covenant on Civil and Political Rights (ICCPR) regards unnecessary detention as a violation of the rights to liberty and security of person.[54] Accordingly, separated children[55] and unaccompanied minors should not be detained.[56] Only certain circumstances necessitate initial detention.[57] For example, establishing a person's identity or performing health and security checks may justify short-term detention.[58] In addition, juvenile offenders—children alleged to have committed or who have been found to have committed an offense or who pose a threat to themselves or society—may be detained as a last resort.[59] Although it may be necessary to detain a child when he or she poses a risk to public safety, this Note is premised on situations where the unaccompanied minor is not a threat. International human rights law forbids detaining people beyond a reasonable length of time if they do not threaten national security.[60]

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53. UDHR, *supra* note 18, art. 3, art. 9. Detention "does not, per se, violate the prohibition on arbitrary arrest and detention; however, such detention must conform with domestic law and be reasonable in length." Bhabha, *supra* note 25, at 211. *See also* ICCPR, *supra* note 42, art. 9; European Convention Human Rights, art. 5(1) (f) (1950) *available at* http://www.hri.org/docs/ECHR50.html (last visited Mar. 13, 2004); A. v. Australia, CCPR/C/59/D/560/1993 (Human Rights Committee, Apr. 30, 1997) (holding that prolonged detention without evidence of necessity may violate the principle of proportionality).

54. ICCPR, *supra* note 42, art. 9.1, 9.4.

55. Separated children are those children who are divided from their parents or legal guardian and outside their country of origin; these children may be alone, with extended family, or with an adult (some are being trafficked, labored, or subjected to another form of force). *See* S. RUXTON, SEPARATED CHILDREN SEEKING ASYLUM IN EUROPE: A PROGRAMME FOR ACTION (2000). In the event a child arrives in a country with his or her family, the child has the right not to be separated from the family. Bhabha, *supra* note 25, at 212-16.

56. UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum § 7.6 (Feb. 1997), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=MEDIA&id=3d4f91cf4&page=publ (last visited Mar. 13, 2004) [hereinafter Guidelines on Policies].

57. AMNESTY INTERNATIONAL AUSTRALIA, FACTSHEET 9: MANDATORY DETENTION OF ASYLUM SEEKERS (2003), *at* http://www.amnesty.org.au/refugees/ref-fact09.html (last visited Mar. 13, 2004).

58. *Id.*

59. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), G.A. Res. 40/33, U.N. GAOR, 40th Sess., Annex, Supp. No. 53, at 207 U.N. Doc. A/40/53 (1985) *reprinted in* INTERNATIONAL DOCUMENTS ON CHILDREN *supra* note 42, at 200 [hereinafter The Beijing Rules].

60. FACTSHEET 9, *supra* note 57.

International human rights documents,[61] such as the Universal Declaration of Human Rights (UDHR) and the United Nations Convention Relating to the Status of Refugees (1951 Refugee Convention), apply to children[62] unless expressly stating the contrary.[63] Thus, the UDHR applies to "*everyone* ... without distinction of any kind."[64] It grants "everyone ... the right to seek and enjoy asylum from persecution." [65] The UDHR also specifically enumerates a child's entitlement to "special care and assistance."[66] The 1951 Refugee Convention provides that no one should be returned to a country where he or she faces serious human rights violations. It also offers protection to all who meet its requirements.[67] The international laws and guidelines,

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61. In addition to international law, the international community has adopted non-treaty standards that provide guidelines and have authoritative force. *See generally* UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, (Feb. 1999); UNHCR, Refugee Children: Guidelines on Protection and Care, (1994) *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/protect (last visited Mar. 13, 2004) [hereinafter Guidelines on Protection and Care]; Guidelines on Policies *supra* note 56; United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. GAOR, 45th Sess., Annex, Supp. No. 49A, at 205, U.N. Doc A/45/49 (1990) [hereinafter Protection of Juveniles]; The Beijing Rules, *supra* note 59; Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, U.N. GAOR 45th Sess., Annex, Supp. No. 49A, at 200, U.N. Doc. A/45/49 (1990); Standard Minimum Rules for Treatment of Prisoners, Aug. 30, 1955, Annex I, at 67, U.N. Doc. A/CONF/6/1 (1956), adopted by E.S.C. Res. 663 (XXIV) C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957).

62. Bhabha, *supra* note 25, at 205. *See* UNHCR Exec. Comm., Refugee Children, para. (u), No. 47 (XXXVIII)(1987), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/excom (last visited Mar. 13, 2004); Guidelines on Protection and Care, *supra* note 61, at chp. III; UNHCR, Guidelines on Policies *supra* note 56, at 1-21. *See also* UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention; Protocol Relating to the Status of Refugees, Jan. 31, 1967, para. 213-19, U.N. doc. HCR/IP/4/Eng/Rev.1, 606 U.N.T.S. 267. 268 (text dedicated to unaccompanied minors) [hereinafter 1967 Protocol]; UNHCR Exec. Comm., General Conclusion on International Protection, para. (m), conclusion 47, 91, No. 41 (XXXVII) (1986), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/excom (last visited Mar. 13, 2004).

63. *See* Bhabha, *supra* note 25, at 205. "All children have fundamental human rights, including the right to due process and to be treated humanely." AMNESTY INTERNATIONAL, *supra* note 3, at 7.

64. LAUREN, *supra* note 30, at 248.

65. UDHR, *supra* note 18, art. 14.

66. *Id.* art. 25, § 2. *See also* ICESCR, *supra* note 48. "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions." *Id.*

67. AMNESTY INTERNATIONAL, *supra* note 3, at 7-8 (citing Refugee Convention 1951, *supra* note 20). Although the United States was involved in the creation of refugee rights and in 1980 brought its laws in line with the 1967 Protocol, it reduced protection in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *Id. See also* 1967 Protocol, *supra* note 62. The concept of non-refoulement is highlighted by Article 33 of the 1951 Convention: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened ...." Refugee Convention 1951, *supra* note 20, at art. 33. *See also* KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 40, 57-146 (2002). "There is no lower age limit to the well-established international right to claim asylum

which recognize children as deserving of special status and treatment, are derived from the knowledge that children are especially vulnerable due to their nascent stage of development and their dependency on adults for their well-being.[68]

B. The Legal and Procedural Response to Unaccompanied Minors Seeking Asylum in the United States

> "Children have a very special place in life which [the] law should reflect."[69]

On March 1, 2003, the responsibility for immigration-related services in the United States, including asylum, was transferred from the Immigration and Naturalization Service (INS) to the Bureau of Citizenship and Immigration Services (BCIS) in the Department of Homeland Security (DHS).[70] The Secretary of Homeland Security delegated to BCIS the discretionary authority to admit any "refugee who is not firmly resettled in a third country, who is determined to be of special humanitarian concern, and who is admissible as an immigrant."[71] The transfer was authorized by the Homeland Security Act of 2002 and gave the Office of Refugee Resettlement (ORR) responsibility for the provision of care for unaccompanied immigrant minors.[72] The responsibilities of the ORR include making placement decisions, identifying sufficient qualified placements to house unaccompanied minors, developing a plan to ensure the appointment of counsel, and conducting investigations of facilities

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or resist refoulement to a persecuting or torturing country." Bhabha, *supra* note 25, at 211 (citing UDHR, *supra* note 18, art. 14, Refugee Convention 1951, *supra* note 20, art. 32, 33). *See also* ICCPR, *supra* note 42, art. 13; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, art. 3, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force 26 June 1987); ECHR, *supra* note 48, art. 3, 213 U.N.T.S. 221. *See also* Cartagena Declaration on Refugees, Inter-Am. C.H.R, OAS/Ser.L/V/ II.66, doc. 10, rev. 1 (1984) *reprinted in* 2 UNHCR, Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons: Regional Instruments 206, UN Sales No. GV. E. 96.0.2 (1995).

68. AMNESTY INTERNATIONAL, *supra* note 3, at 11. *See* A. GLENN MOWER, JR., THE CONVENTION ON THE RIGHTS OF THE CHILD: INTERNATIONAL LAW SUPPORT FOR CHILDREN 3 (1997); CRC, *supra* note 1, Preamble.

69. May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

70. U.S. DEPARTMENT OF HOMELAND SECURITY, *available at* http://www.dhs.gov/dhspublic/theme_home4.jsp (last visited Mar. 13, 2004).

71. BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES (BCIS), USCIS AUTHORITY IN REFUGEE PROCESSING, *at* http://uscis.gov/graphics/services/refugees/INSAuthority.htm (last visited Mar. 13, 2004).

72. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 § 462 (Nov. 25, 2002). 45 F.R. Part 400, Subpart H Child Welfare Services; Immigration and Nationality Act (INA) 8 U.S.C. § 412 (a)(6) [hereinafter INA]; INA § 412 (d)(2)(A); INA § 412 (d)(2)(B); Title V of the Refugee Education Assistance Act of 1980. *See 8 Members of Congress Urge Release of Immigrant*, N.Y. TIMES, Aug. 23, 2003, at A9.

housing unaccompanied minors.[73] This shift in responsibility marked a positive step from hostility toward children as "unpredictable illegal aliens," who should be deported under the recent homeland security perspective, to concern for them as "particularly vulnerable migrants" needing guardians.[74] Although the transfer to ORR signals an improvement, the treatment of unaccompanied minors in the United States still does not conform to international human rights law.[75] This failure is discussed in greater depth in Part IV.

In practice, immigration officials initiate a "removal proceeding" for nearly all unaccompanied minors who arrive at the U.S. border without documentation.[76] While children await their removal proceeding, they are usually detained;[77] the average period of detention is 34.2 days.[78] However, children have been held for months or even years.[79] In order to avoid deportation, children must raise a defense,[80] which, under limited circumstances, may include applying for asylum[81] or for status as a victim of torture, abuse, neglect,[82] trafficking,[83] and other crimes committed against them.[84] An unaccompanied minor or child at risk may obtain Special Immigrant Juvenile status if he or she has been a victim of abuse, abandonment, neglect, or domestic violence.[85] Additionally, unaccompanied minors who are victims of trafficking or child abuse may receive protection under the Victims of Trafficking and Violence Protection Act (2000).[86] If unaccompanied children

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73. Letter from Nguyen Van Hanh, Ph.D., Director Office of Refugee Resettlement, to State Refugee Coordinators (Jan. 29, 2003), *at* http://www.acf.dhhs.gov/programs/orr/policy/sl03-01att.htm (last visited Mar. 13, 2004) [hereinafter Letter].

74. J. Bhabha, *Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers*, 3 EUR. J. MIGRATION L. 299-324 (2001).

75. Bhabha, *supra* note 25, at 211.

76. AMNESTY INTERNATIONAL, *supra* note 3, at 12; INA, 8 C.F.R. § 212 (1952)

77. Letter, *supra* note 73. The Immigration and Nationality Act (INA) mandates detention of people entering the United States without necessary documentation. INA *supra* note 72, § 236.3; 8 U.S.C. § 1226.

78. Letter, *supra* note 73.

79. *Young Would-Be Refugees, supra* note 23. The average time in custody is forty days. *Id.* However, in Mohamed Boukrage's not uncommon case, the sixteen year-old was detained for over two years. *Id.*

80. *Id.*

81. INA, *supra* note 72, § 101(a)(42).

82. *Id.*, § 101(a)(27)(J).

83. Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-396, 114 Stat. 1464 (2000) [hereinafter Victims]. Victims must show that they would be subjected to severe harm if deported. *Id.*

84. *See id. See also* C. Nugent & R. Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 INTERPRETER RELEASES (2001) at 1569. Less than fifty percent of unaccompanied minors receive the assistance of counsel. *Id.*

85. INA, *supra* note 72, § 101(a)(27)(J). Eligible minors receive permanent citizenship status. *Id.*

86. Victims, *supra* note 83.

gain refugee status, the Office of Refugee Resettlement (ORR) assists them in resettling.[87]

The detention policy codified in the Immigration and Nationality Act (INA) requires that minors may only be released from detention to their parents, close relatives, or legal guardians.[88] However, if parents come forward and are themselves illegally in the United States, they risk immediate detention.[89] In *Reno v. Flores*, the U.S. Supreme Court held that limiting release to non-family members in only unusual and compelling circumstances did not violate the immigrant minors' procedural due process and was not unreasonable.[90] Following the law suit, a settlement agreement, known as the *Flores* guidelines, created nationwide obligations that pertain to the detention and release of children in immigration custody.[91] The obligations are based on the premise that children must be treated with "dignity, respect, and special concern for their vulnerability as minors."[92] Regretfully, the *Flores* guidelines were never implemented.[93] Coupled with international law, however, these guidelines provide the standard against which the U.S. treatment of unaccompanied minors may be compared.[94]

On May 22, 2003, the Unaccompanied Alien Child Protection Act of 2003 was introduced by U.S. Senator Dianne Feinstein in the Senate and referred to the Committee on the Judiciary.[95] This bill is sponsored by eighteen senators and responds to the shortcomings of immigration law as it

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87. U.S. DEPARTMENT OF HEATH & HUMAN SERVICES, OFFICE OF REFUGEE RESETTLEMENT (ORR), THE UNACCOMPANIED REFUGEE MINORS PROGRAM, *at* http://www.acf.dhhs.gov/programs/orr/programs/urm.htm (last visited Mar. 13, 2004). Services provided by the ORR include English language tutoring, career planning, physical and mental health care, family reunification, residential placement and Ethnic and religious preservation. *Id.*

88. 8 C.F.R. § 236.3 (2002).

89. MUSALO ET AL., *supra* note 67, at 808.

90. Reno v. Flores, 507 U.S. 292 (1993). *See also* MUSALO ET AL., *supra* note 67, at 808; Daniel D'Angelo, *Reno v. Flores: What Rights Should Detained Alien Juveniles Be Afforded?*, 21 N.E. J. CRIM. & CIV. CON. 463 (1995). *See also* Gail Quick Goeke, *Substantive and Procedural Due Process for Unaccompanied Alien Juveniles*, 60 MO. L. REV. 221 (1995); Michael C. Ranalli, *Reno v. Flores: Plenary Power Over Immigration Alive and Well*, 45 MERCER L. REV. 889 (1994).

91. AMNESTY INTERNATIONAL, *supra* note 3, at 16 (citing Flores v. Reno, Case No. CV85-4544-RJK (C.D. Cal.1996) 75 Interpreter Releases 1020 (July 27, 1998)).

92. *Id.* Obligations include

> (1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending, or for whom no release option is available, in the 'least restrictive' setting appropriate to the age and special needs of minors; and (3) implement standards relating to care and treatment of children in U.S. immigration detention.

Id. The *Flores* standards have expired and were not incorporated into INS regulations. *See id.*

93. AMNESTY INTERNATIONAL, *supra* note 3, at 17.

94. *Id.*

95. Unaccompanied Alien Child Protection Act of 2003, S. 1129, 108th Cong. (2003) [hereinafter UACP].

pertains to unaccompanied minors, discussed in Part III. The bill sets forth procedures for immigration officers who find unaccompanied minors entering the United States.[96] It provides that care of unaccompanied minors who have not been convicted of a felony are the responsibility of the ORR.[97] Furthermore, it prohibits the detention of minors with adults or in facilities for juvenile offenders, and mandates the provision of counsel.[98] At the time this Note was written, government representatives had yet to oppose the Unaccompanied Alien Child Protection Act of 2003.[99] However, the likelihood of passage is only twenty-two percent in the Senate Committee and one percent in the House Committee. [100] If this proposed legislation, sponsored by eighteen senators, is enacted, it would greatly improve the treatment of minors in the United States and align the United States with international law and policy pertaining to unaccompanied minors.

C. The Legal and Procedural Response to Unaccompanied Minors Seeking Asylum in Australia

> "This is a local problem and we can address it our own way, but I won't have any bleeding heart or anybody else telling us what to do."[101]

Australia is the only Western country with a mandatory detention policy for all undocumented immigrants.[102] The Australian Migration Act of 1958 provides that an "unlawful non-citizen" must be kept in "immigration detention" until deported or granted a visa.[103] The Immigration Minister, under the Migration Act, has the authority to designate Immigration Detention Centers.[104] Detention Centers are the standard; alternative custody arrange-

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96. *Id.* at Summary.

97. *See id.*

98. *See id.*

99. E-mail from Megan McKenna, Media Liaison, Women's Commission for Refugee Women and Children, to Emily Benfer, J.D. Candidate 2005 (Nov. 14, 2003, 09:25 CST) (on file with author).

100. *See* S. 1129 Billcast, 108th Congress (2003-2004) *at* http://www.westlaw.com (last visited Mar. 13, 2004).

101. Australian Mayor Joy Baluch *quoted in* Mark Phillips, *Asylum Policy Softer*, HERALD SUN, Dec. 3, 2002, at 15.

102. Alexander J. Wood, *The "Pacific Solution": Refugees Unwelcome in Australia*, 9 HUM. RTS. BR. 22 (2002); *UNICEF Demands Children be Released From Detention*, AAP NEWSFEED, June 6, 2002; Pam O'Toole, *Analysis: Australia's Tough Asylum Policy*, BBC, Jan. 24, 2002; P. Barkham, *No Waltzing in Woomera*, THE GUARDIAN, May 25, 2002, at 24.

103. Savitri Taylor, *Protecting the Human Rights of Immigration Detainees in Australia: An Evaluation of Current Accountability Mechanisms*, 22 SYDNEY L. REV. 50, 51 (2000). An unlawful non-citizen is a person who is present in Australia and is not a citizen and does not hold a visa. *Id.*

104. *See Id.*, at 52. *See also, id.* at 52, n. 7.

ments have seldom been established and only in response to pressure from the Commonwealth.[105] For example, in 2002, guidelines under which unaccompanied minors would be placed in foster care as an alternative to high-security detention centers produced only a 0.4% decrease in the number of children in detention.[106] The Immigration Act of 1946 makes the Minister for Immigration and Multicultural and Indigenous Affairs both the guardian of children and the person responsible for removing them from the country.[107] The Minister's dual role presents a conflict of interest because the child's welfare may not always be a priority.[108]

The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) outsourced management of detention centers to Australian Correctional Services (ACS).[109] ACS is responsible for providing guards, translators, meal services, cleaning services, education, health care, escort and transportation services in addition to "any other services necessary to enable delivery of Detention Services in accordance with the Immigration Detention Standards."[110] In the event services are not satisfactory, provisions are in place for detainees to complain directly to DIMIA.[111] However, detainees are typically afraid that their visa status will be affected or their time in detention made harder and are often unwilling to report the details of their treatment.[112]

The High Court in Australia is currently deciding the legality of indefinitely detaining children.[113] Five children who had been in detention for thirty-two months were released from detention on August 25, 2003, after the Family Court found that prolonged detention placed the children's health at risk.[114] The Family Court decided that the indefinite detention of child asylum

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105. *See id.*

106. Larry Schwartz, *supra* note 26.

107. X v. Minister for Immigration and Multicultural Affairs, Federal Court of Australia FCA995 (July 23, 1999). The court found that there is no requirement for the appointment of a tutor in cases against the minor's guardian, the Minister. *See id.*

108. CHILOUT, THE HEART OF THE NATION'S EXISTENCE 140 (2002) *available at* http://www.chilout.org (last visited Mar. 13, 2004). In an appeal from the Family Court which held that continued detention of children was unlawful, the government argued that UN Convention on the Rights of the Child was irrelevant to the detention of children. *See* Minister for Immigration and Multicultural and Indigenous Affairs v. B (Infants) and B (Intervener) (2003) 30 Fam LR 251.

109. Taylor, *supra* note 103, at 54. Australian Correctional Services is a partnership between Australian Correctional Management and Thiess Contractors Pty. Ltd. *Id.*

110. Taylor, *supra* note 103, at 54.

111. *See id.* at 57.

112. *See id.*

113. *See generally* Minister for Immigration and Multicultural and Indigenous Affairs v. B & Anor (2003) A246.; Cynthia Banham, *Battle Over Child Detention Policy Goes to High Court*, SYDNEY MORNING HERALD, Oct. 1, 2003.

114. *See generally* B (Infants) & B (Interveners) v. Minister for Immigration and Multicultural and Indigenous Affairs (2003) 30 Fam.C.A. 181; Meaghan Shaw, *High Court Invites Child Detention Pleas*, AGE, Oct. 1, 2003.

seekers is illegal.[115] The government appealed the case, arguing that international law, like the CRC, does not apply, and only the Migration Act is binding.[116] Frustrated that the case was before the court on appeal rather than as a direct challenge to the constitutionality of it, the High Court invited refugee lawyers to file a case to challenge the legality of detaining minors.[117] During the writing of this Note, the High Court adjourned a preliminary hearing and had yet to publicize its ruling.[118] If the High Court upholds the decision of the Family Court, it might result in the reformation of Australia's mandatory detention policy.

III. THE TREATMENT OF UNACCOMPANIED MINORS AND THE EFFECTS OF DETENTION ON CHILDREN

A. The Experience of the Unaccompanied Minor Seeking Asylum in the United States

> When a child's life or liberty or innocence is taken, it is a terrible, terrible loss. And those responsible have committed a terrible crime. Our society has a duty, has a solemn duty, to shield children from exploitation and danger.... Our first duty as adults is to create an environment in which children can grow and thrive without fearing for their security. That's what we've got to do. Because children are so vulnerable, they need the care of adults. Because they're so vulnerable, those who are cruel and predatory often target our children.

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115. *See id.*

116. Banham, *supra* note 113. Immigration Minister Philip Ruddock said, "What we have is the courts saying, 'We don't care that there's a public policy way in which these matters are properly looked at. We're going to impose our views . . . Now I think that's in excess of the Family Court's jurisdiction . . . That's why I'm appealing the Family Court's decision." *Ruddock Says Refugee Policy Has Saved Many Lives*, AAP NEWSFEED, Aug. 26, 2003. The government's appeal of the Family Court decision to release the children from detention was met with shock: "The cold-hearted actions by this minister continue to astound us . . . The fact that he is unable to accept a decision by a court that specializes in the welfare of children shows that he just does not care," said Senator Andrew Bartlett, who leads the Australian Democratic party. *Court Rules that Locking Children in Refugee Detention Camps is Illegal*, AP WORLD NEWS, June 19, 2003, *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/print?tbl=NEWS&id=3ef2c4934 (last visited Mar. 13, 2004). Philip Ruddock, the Immigration Minister, was recently appointed to Attorney General of Australia. Cynthia Banham, *The Law Unto Himself*, SYDNEY MORNING HERALD, Oct. 7, 2003, at 14.

117. Shaw, *supra* note 114.

118. *High Court Adjourns Child Detention Hearing*, ABC VICTORIA, Oct. 31, 2003, at Local News. The hearing is tentatively scheduled for February 2004. Dan Silkstone, *Detentions Challenge Can Proceed,* AGE, Nov. 20, 2003, at 9.

> . . . All these dangers put children at risk. All these dangers demand action to protect our children from harm.[119]

Children are especially vulnerable to abuse and are often exploited by virtue of their youthfulness and naiveté.[120] Oftentimes, unaccompanied minors have already suffered from harm and abuse.[121] Minors arrive in the United States unaccompanied for multiple reasons, including, but not limited to, separation from their guardian, flight from abuse, for survival, or because their families—hoping to give them safety—have sent them ahead.[122] Regardless of why they arrived illegally and alone, children, of all the people seeking refuge in the United States, are the most in need of careful individual attention.[123] Despite the urgent need, states' practice toward children is "more generous in relation to expulsion than it is in relation to admission."[124] For example, the United States accepted only one unaccompanied minor for resettlement in 1997 and only eleven in 1998.[125]

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119. AMNESTY INTERNATIONAL, *supra* note 3, at 15-16 (*quoting* President George W. Bush, Remarks at White House Conference on Missing, Exploited, and Runaway Children, Ronald Regan Building, Washington, D.C., October 2002).

120. *See id. See also* MOWER, *supra* note 68, at 42. Children are often victims of people smuggling and trafficking. Bhabha, *supra* note 25, at 219; G. Thompson, *Guatemala Intercepts 49 Children Illegally Bound for U.S.*, N.Y. TIMES, Apr. 8, 2002, at A2; D.M. Halbfinder, *Three Charged with Running Mexican Baby-Smuggling Ring*, N.Y. TIMES, May 28, 1999, at A1; *On the Fence: Former INS Commissioner Doris Meissner on the Contradictions of Migration Policy in a Globalizing World*, CARNEGIE ENDOWMENT FOR INT'L PEACE FOREIGN POL'Y, Mar. 1, 2002, at 23. For more information about children recruited or forced to become soldiers, see Bhabha, *supra* note 25, at 218. For more information about the sexual, economic and other exploitations of children, see VAN BUEREN, *supra* note 35, at 262 - 86.

121. AMNESTY INTERNATIONAL, *supra* note 3, at 7.

122. Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 160 (1990). Immigrant minors usually arrive in the U.S. unaccompanied because they "either fled their country without adults, were sent ahead by family members in hope that they would emigrate more safely, or become accidentally separated from adults during flight." *Id.*

123. AMNESTY INTERNATIONAL, *supra* note 3, at 7; Bhabha, *supra* note 25, at 203; CRC, *supra* note 1, Preamble.

124. Bhabha, *supra* note 25, at 207.

125. *Prepared Testimony of Nicholas A. Dimarzio Bishop of Camden Chairman National Conference of Catholic Bishops' Committee on Migration Before the Senate Judiciary Committee Subcommittee on Immigration*, FED. NEWS SERVICE, Aug. 4, 1999 [hereinafter *Prepared Testimony of Nicholas A. DimarzIO*]

. In 2000, Elian Gonzales received exceptional treatment which is not the norm. *See* Natalie Allen, *Attorney General Reno Holds News Conference on Elian Gonzalez Court Decision*, CNN BREAKING NEWS, June 1, 2000; *Battle Over Elian Plays Out in Front of Cameras Amid Questions About Methods and Motives*, CNN, Apr. 23, 2000. With the publicity surrounding the Gonzales case, the public concern for unaccompanied minors increased and resulted in congressional moves to change policy. *See* Unaccompanied Alien Child Protection Act of 2001, S. 121 107th Cong. (2001); H.R. 1904, 107th Cong. (2001). The Bill has yet to be passed. See UACP, *supra* note 95.

1. The Physical Conditions and Treatment of Unaccompanied Minors in Detention in the United States

"All I think about is when I'm going to be free."[126]

The treatment of unaccompanied minors in the United States is inconsistent and exposes children to multiple human rights violations while they await their interview with immigration officers.[127] Unaccompanied minors, who have oftentimes fled violent and traumatic situations, are subjected to punishment and strict rules when they arrive in the United States.[128] In one detention center in Pennsylvania, a child was forced to do 200 push-ups because he did not pick up a napkin.[129] When he was unable to complete the punishment due to his lack of physical strength, he was forced to sit at a table with his hands on his head for the remainder of the day.[130] Other forms of punishment include taking away a child's blankets and mattress as well as adjusting the thermostat to extremely cold temperatures.[131] According to one child, "The rules mean they can throw people around."[132]

Guards often physically and verbally abuse the children.[133] When a child, excited about playing a game, waved his hand and jumped up and down, staff members knocked his head against the wall and kicked him.[134] "They sometimes hit me with their sticks and shoved me and other boys when they thought we were not following their orders," said one unaccompanied minor in detention.[135] Another minor, who was punished for trying to watch television, described the physical effects: "As a result of being held like a pig, I was badly injured. I was walking with a big limp."[136]

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126. Seventeen-year-old asylum seeker to Amnesty International delegate after being in detention for ten months *quoted in* AMNESTY INTERNATIONAL, *supra* note 3, at 56.

127. Wendy Young, *U.S. Detention of Women and Children Asylum Seekers: A Violation of Human Rights*, 30 U. MIAMI INTER-AM. L. REV. 577, 597-99 (1999).

128. AMNESTY INTERNATIONAL, *supra* note 3, at 29.

129. *Id.*

130. *Id.*

131. *Id* at 30.

132. *Id.* at 29.

133. *See Improvements Noted at INS Detention Center Better Guard Training and Oversight Needed,* HUMAN RIGHTS WATCH, Oct. 4, 2002, *available at* http://hrw.org/press/2002/10/san-1004.htm (last visited Mar. 13, 2004). U.N. Rules for the Protection of Juveniles Deprived of Their Liberty allows restraint and force in "exceptional cases, where all other control methods have been exhausted and failed . . . in order to prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property." Protection of Juveniles, *supra* note 61, at Rule 64.

134. AMNESTY INTERNATIONAL, *supra* note 3, at 30-31.

135. *Id.*

136. *Id.*

Although it is arguably cruel and unusual punishment for a child, [137] unaccompanied minors are also punished with solitary confinement for minor infractions such as talking during class.[138] Solitary confinement and seclusion often result in depression and mental stress for a child, and the results may be even more dramatic for a child who has already experienced great trauma.[139] Yet, fifty-seven percent of detention facilities for unaccompanied minors report using solitary confinement for punishment.[140]

Unaccompanied minors are routinely held in the same cell as juvenile offenders.[141] Xaio Ling, a young girl from China, did not speak any English when she was detained by the INS.[142] Unaware of the reason for her detention, Xaio was placed among children guilty of violent crimes, including rape and murder.[143] While in detention she was shackled with handcuffs and subjected to frequent strip-searches.[144] Xaio was not guilty of a crime but was forced to endure a criminal's punishment.[145] She was even forbidden to laugh, under the policies of the detention center.[146] Xaio's experience is not uncommon among unaccompanied minors.

Sixty-one percent of facilities regularly strip-search the children in their care, regardless of age or stage of development.[147] Strip-searches often occur after visits from lawyers: "Every time [my lawyer] visited, they made me take off all my clothes to search my body. This embarrassed me."[148] Similarly, although international standards require that restraints only be used in extraordinary circumstances, children are often transported in leg and wrist shackles (even when they are sick and pose no threat) and are forced to wear restraints in court and in detention facilities.[149]

The protection and security of unaccompanied minors in detention are equally suspect. Detained minors are easy and frequent targets for juvenile offenders, who rob, beat up, harass, and attack unaccompanied minors.[150]

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137. Protection of Juveniles, *supra* note 61, at I.2; VAN BUEREN, *supra* note 35, at 224 (arguing that treatment of an adult that is legal may not be legal as applied to a child; for example, it is cruel to subject a child to solitary confinement).

138. AMNESTY INTERNATIONAL, *supra* note 3, at 32.

139. *Id.* at 33.

140. *See id.* at 32.

141. *Id.* Forty-eight percent of detention facilities report housing minors in the same cell as juvenile offenders. *Id.*

142. 121 CONG. REC. S396-398 (daily ed. Jan. 22, 2001) (statement of Mrs. Feinstein). Congressional Record supporting the Unaccompanied Alien Child Protection Act.

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.*

147. AMNESTY INTERNATIONAL, *supra* note 3, at 33-34. Staff in one detention center allegedly referred to the minors as "you little whores" while strip-searching them. *Id.*

148. *Id.*

149. *Id.* at 35. Other forms of restraint include chemicals, like pepper spray. *See id.* at 37.

150. Navarro, *supra* note 17, at 600.

Even guards present a threat to an unaccompanied minor's safety: in 1989, an INS guard was convicted of sexually assaulting detained minors in his care.[151] The situation in the United States is especially urgent because some children are reportedly housed among adult criminal inmates, thereby increasing their risk of harm.[152] In the United States, one in five men and one in four women is raped in prison.[153] The victims of rape are usually young and non-violent offenders; the risk for a detained immigrant youth is much greater.[154] Detention practices like these are physically unsafe for unaccompanied minors.[155]

2. The Emotional and Mental Effect of Detention for Unaccompanied Minors in the United States

> "Gets pressure. Can't breathe. Like a needle . . . It's when I'm thinking."[156]

As this section will reveal, detention facilities prove mentally and emotionally traumatizing for unaccompanied minors who are deprived of education and adequate mental health services. Although international and domestic law requires at least primary education for children in detention, twelve percent of facilities provide no education at all.[157] Those that do provide education do not take into account the language barriers many of the children experience.[158] English as a second language is only taught in forty-

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151. *See id citing* Lisa Baker, *INS Guard Pleads Guilty to Molesting Two Teenagers*, BROWNSVILLE HERALD, Aug. 31, 1989, at 1.

152. AMNESTY INTERNATIONAL, *supra* note 3, at 27. *See also* Cate Doty, *Teenage African Immigrant is Freed After 3 Years in Detention*, N.Y. TIMES, Dec. 25, 2003 at A17. A mentally retarded fifteen-year-old boy was detained with adults when INS declared him to be an adult despite a birth certificate to the contrary. *Id.* He suffered multiple abuses while in detention. *Id. See also* Julia Stiles, *I Had to See for Myself,* MARIE CLAIRE, Jan. 2004, at 40. After Fantiz, age sixteen, suffered genital mutilation and other physical abuses in West Africa, she fled to the United States. *Id.* A dentist incorrectly determined she was eighteen and she was immediately sent to an adult prison where she was detained for over a year. *Id.*

153. Lara Stemple et al., *Doing Something About Prison Rape*, HUMAN RIGHTS WATCH, Sept. 26, 2003, *available at* http://www.hrw.org/editorials/2003/prison092603.htm (last visited Mar. 13, 2004).

154. *See id.* The U.S. Congress unanimously passed the Prison Rape Elimination Act of 2003 which authorizes federal grants for programs to prevent and punish prison rape and cuts federal funding for states that do not control sexual abuse of prisoners. *Prison Rape: Groundbreaking New U.S. Law,* HUM. RTS. WATCH July 2003, *at* http://www.hrw.org/update/2003/07/#1 (last visited Mar. 13, 2004).

155. Navarro, *supra* note 17, at 600.

156. AMNESTY INTERNATIONAL, *supra* note 3, at 40 (statement from a child describing an anxiety attack to Amnesty International in 2002).

157. *Id.* at 39.

158. *Id.* at 40. Forty-eight percent of facilities do not provide education in the child's native language. *Id.*

three percent of facilities.[159] What more, religious services are not provided and religious practice is inconsistently facilitated in detention centers.[160]

Children, specifically unaccompanied minors, react to detention facilities by exhibiting signs of depression, mental distress, crying continuously, or becoming listless.[161] Despite the emotional torment of long-term detention, only thirty percent of detention facilities provide mental counseling or emergency health treatment.[162] In one case, a child, whose mental health deteriorated significantly when he was placed in detention, began suffering visual and auditory hallucinations.[163] Although authorities, including the INS, and the facility superintendent, were aware of his condition, the child did not receive treatment or an evaluation of his psychiatric symptoms.[164] The mental health of this child and others decline when they are forced to remain in detention centers, which predictably exacerbate the mental and emotional trauma already inherent in their unaccompanied immigration.[165] Guards are not trained to deal with mental illness and often their dealings with traumatized children catalyze greater damage.[166]

3. The Barriers to Legal Assistance for Unaccompanied Minors in the United States

> "Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance."[167]

Unaccompanied minors are ignorant about U.S. immigration proceedings and are unaware of the rights to which they are entitled.[168] Yet, they are expected to independently maneuver through deportation proceedings that will determine the legality of their presence in the United States. Deportation

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159. *Id.*

160. AMNESTY INTERNATIONAL, *supra* note 3, at 43.

161. *See id.* at 40.

162. *See id.* at 41.

163. *See id.* at 42.

164. *See id.*

165. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1291 (1990); AMNESTY INTERNATIONAL, *supra* note 3, at 42. *See* Kristine K. Nogosek, *It Takes a World to Raise a Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees*, 24 HAMLINE L. REV. 1, 10. The lack of consideration of special needs of gender also contributes to the emotional stress associated with detention. *Id.* Females are rarely given privacy and their facilities are not consistently guarded by females. *Id.* This places them at greater risk. *See id.* In one facility a male guard was overseeing the girls' wing. *Id.* From his control station, he could clearly see the open shower and toilet facilities for the girls. *Id.* at 44.

166. *See* AMNESTY INTERNATIONAL, *supra* note 3, at 41-42.

167. CRC, *supra* note 1, art. 37(d).

168. Navarro, *supra* note 17, at 602. *See also* Guidelines on Protection and Care, *supra* note 61, at 97-103.

proceedings are considered civil matters, as opposed to criminal determinations.[169] Therefore, unaccompanied minors are not appointed counsel.[170] Unaccompanied minors who are represented by attorneys are four times more likely to be granted asylum than those who are unrepresented.[171] If they wish to be assisted by counsel, they are required to obtain a lawyer by their own means.[172] However, the means available to them are limited; unaccompanied minors are often denied access to telephones during business hours and are thus constructively denied access to potential counsel.[173] This practice violates the *Flores* guidelines, which require that children be given a list of pro bono attorneys.[174] Presenting an additional barrier, it is difficult for attorneys to access the detention facilities, which are typically located in remote areas.[175] Non-governmental organizations (NGOs) and pro bono attorneys must develop relationships and form agreements with the detention facilities before given access to the children.[176] In many facilities, NGOs and pro bono attorneys are denied access to the children if they express their views regarding the treatment of unaccompanied minors.[177]

Children are not informed of their rights and often remain in detention facilities, for "weeks [or] months, without such information."[178] Although children have the right to contact their consulate, very few children are made aware of this right and some are denied it.[179] In one—not uncommon—

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169. Nelson v. Immigration and Naturalization Servs. (INS), 232 F.3d 258 (1st Cir. 2000) (holding that because deportation proceedings are civil proceedings and not criminal proceedings, the Sixth Amendment does not require the appointment of government-provided counsel for the prospective deportees and an alien is afforded the right to counsel at his own expense).

170. *See id.*

171. AMNESTY INTERNATIONAL, *supra* note 3, at 61. Less than half of unaccompanied minors in the United States are represented by counsel. *See id*; WOMEN'S COMMISSION, *supra* note 16, at 6. "Eighty percent appear in immigration court without the benefit of a lawyer, guardian ad litem, or adult assistance of any kind." Andrew Morton, attorney, Latham & Watkins, testimony before the U.S. Senate Committee on the Judiciary, Subcommittee on Immigration, Feb. 28, 2002. Another source finds that as few as eleven percent of detainees receive legal assistance. Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 INTERPRETER RELEASES 649 (May 11, 1998) *quoted in* WOMEN'S COMMISSION, PROTECTING THE RIGHTS OF CHILDREN: THE NEED FOR U.S. CHILDREN'S ASYLUM GUIDELINES 14 (1998), *available at* http://www.womenscommission.org/pdf/ins_child.pdf (last visited Mar. 13, 2004).

172. Nelson, 232 F.3d at 260. The number of children who are actually represented by counsel during immigration proceedings is less than half. WOMEN'S COMMISSION, *supra* note 16, at 2.

173. Navarro, *supra* note 17, at 590. *See also* AMNESTY INTERNATIONAL, *supra* note 3, at 44. "[T]he practical implication of this is that the majority of children detained by the INS do not have legal representation." *Id.*

174. Flores, *supra* note 90, at exhibit (2)(J).

175. AMNESTY INTERNATIONAL, *supra* note 3, at 45.

176. *See id.* at 46.

177. *See id.*

178. AMNESTY INTERNATIONAL, *supra* note 3, at 45.

179. *See id.* at 51-52.

instance, a child was taken into INS custody and told he had the right to an attorney.[180] He was then given papers: "The officers just told me to sign here."[181] The papers waived his right to an attorney and the opportunity to see a judge; the waiver also declared he was willing to voluntarily depart from the United States.[182]

In many cases, unaccompanied and unrepresented minors make incriminating statements to INS authorities when filling out forms.[183] Board of Immigration Appeals (BIA) board members have based deportation decisions on children's statements to INS officials[184] despite federal regulations[185] and Federal Court decisions that the practice was inconsistent with prior rulings.[186] BIA decisions fail to recognize that a minor, especially under the age of sixteen, lacks "sufficient maturity to appreciate the significance of an interrogation by an INS official and lacks the capacity to evaluate

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180. *See id* at 45.

181. *Id.*

182. *See id.*

183. *See generally* Terry Coonan, *Tolerating No Margin for Error: The Admissibility of Statements by Alien Minors in Deportation Proceedings*, 29 TEX. TECH. L. REV. 75 (1998).

184. *In re* Amaya, Int. Dec. 3293, 1996 WL 507350, 587 (BIA Aug. 23, 1996) (holding that if a judge determines a minor is capable of understanding, then their admissions are acceptable). *See also* Coonan, *supra* note 183, at 85, 89-90; *In re* Ponce-Hernandez, 22 I. & N. Dec. 784 (May 28, 1999) (holding that there were no grounds for finding that the Form I-213 would be fundamentally unfair although the statements on it were made by an unaccompanied minor and it is not clear that that minor was advised that the form would be used against him); *See also* Coonan, *surpa* note 183, at 80 *citing In re* Hernandez-Jimenez, No. A29-988-097, slip op. at 6 (BIA Nov. 8, 1991) (holding that evidence from INS which was not corroborated and gathered under duress of child was admissible in deportation proceeding – however, all custodial interrogations would be treated as inherently suspect). *See* Coonan, *supra* note 183, at 82 *citing In re* Garcia, No. A70-006-067, slip op. at 3, 5 (BIA Aug. 17, 1993) (finding that the only source of alienage was from an interrogation proceeding in which the minor was unaccompanied; holding that the information, absent a showing otherwise, is regarded as trustworthy and the INS met its burden; however, the submission of a Form I-213 by INS as sole evidence of deportability was insufficient). *But see In re* Y-C, 23 I. & N. Dec. 286 (Mar. 11, 2002) (holding that being an unaccompanied minor may constitute a legal disability); Bellotti v. Baird, 443 U.S. 622, 635 (1979) "[D]uring the formative years of childhood . . . minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Id.*

185. 8 C.F.R. § 1240.48 (b) (2003).

> The immigration judge shall not accept an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge may not accept an admission of deportability, he or she shall direct a hearing on the issues.

Id.

186. Davila-Bardales v. INS, 27 F.3d 1, 5 (1st Cir. 1994) (holding that a BIA Judge may not base a finding of deportability merely upon a minor's affirmation that the same allegations in a Form I-213 are true). *See also* Coonan, *supra* note 183, at 87-88.

the foreseeable consequences of any responses provided."[187] These are significant barriers for a child that would be surmountable if he or she were provided access to an attorney.

4. The U.S. Government Perspective

The purpose of the detention policy is to prevent future illegal immigration and is motivated by an interest in promoting national security.[188] Opponents to an immigration policy, which would not violate a child's human rights, speculate that alternatives to detention would cause a "magnet effect" for those who are seeking a better life, in addition to those fleeing danger.[189] It is rationalized that regulation of community safety, and the safety of immigrant minors, takes precedence over the minor's liberty interest and justifies prolonged detention.[190] Furthermore, it is posited that if the child's release from custody were to result in harm to the child, it would affect international relations and the U.S. government would be liable.[191] It is reasoned that the detention of a child will eliminate risk of harm because the child will be monitored at all times.[192] As discussed in Part IV, justifications for the incarceration of unaccompanied minors such as these are artificially cloaked in "the best interests of the child" and should be prohibited.[193] The U.S. policy of detaining unaccompanied children[194] completely ignores

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187. Coonan, *supra* note 183, at 77. *See also* Perez-Funez v. INS, 619 F. Supp. 656, 662 (C.D. Cal. 1985) (holding that voluntary departure procedures as applied to unaccompanied minors violate their due process rights). Unaccompanied children in INS custody

> encounter a stressful situation in which they are forced to make critical decisions. Their interrogators are foreign and authoritarian. The environment is new and the culture completely different. The law is complex . . . . In short, it is obvious to the Court that the situation faced by unaccompanied minor aliens is inherently coercive.

Id.

188. Dana Canedy, *Hope for Speedy Release of Haitian Refugees Fades*, N.Y. TIMES, Dec. 16, 2002, at A18.

189. Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 571 (1998); David A. Martin, *supra* note 165, at 1288.

190. Navarro, *supra* note 17, at 605. Government officials also claimed their efforts to forcibly return Haitians in 1992 to persecution in their country was for the purpose of saving the lives of others who would travel by sea to the United States. Cheryl Little, *Beyond/Between Colors: InterGroup Coalitions and Immigration Policies: The Haitian Experience in Florida*, 53 U. MIAMI L. REV. 717, 726 (1999).

191. *See id.*

192. *See id.*

193. Bhabha, *supra* note 25, at 208.

194. *See* HUMAN RIGHTS WATCH, DETAINED AND DEPRIVED OF RIGHTS: CHILDREN IN THE CUSTODY OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE, (1998), *available at* http://www.hrw.org/reports08/ insz (last visited Mar. 13, 2004); C. Nugent, *supra* note 84; HUMAN RIGHTS WATCH, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE (1997), *available at* http://www.hrw.org/reports/1997/uscrcks (last visited Mar. 13, 2004). Domestic law requires

international standards for the "fair and humane treatment of *any* child in detention."[195]

B. The Experience of the Unaccompanied Minor Seeking Asylum in Australia

> "They were prisoners without having committed any offence. . . . Their only fault was they had left their native home and sought to find refuge or a better life on Australian soil."[196]

1. The Physical Conditions and Treatment of Unaccompanied Minors in Australia

Qamar, a fifteen year old girl from Afghanistan, and her eleven year old brother are orphans detained in Woomera Detention Center.[197] After their parents were killed by the Taliban, their grandparents paid smugglers to take them to safety.[198] The last words her grandparents said to the terribly worried Qamar were, "We will try to raise money and follow you, so we can take care of you in Australia."[199] When she and her brother first arrived in Australia, they were interviewed by DIMIA.[200] Now, every morning, Qamar and her brother dress carefully, waiting to be called for another interview.[201] At the end of the day in detention, Qamar cries herself to sleep while trying to comfort her brother.[202]

Woomera Detention Center, a former missile base in a remote area where Qamar is detained, is one of the immigration detention centers in Australia.[203] The Migration Act of 1958 requires that any person, adult or

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refugees, victims of torture, and children remain in detention until processed. *See* Anderson Cooper, *African Orphan Fights for Asylum*, (CNN POINT television broadcast, Mar. 20, 2002).

195. Bhabha, *supra* note 25, at 211.

196. Penelope Debelle, *Detention of Migrants Condemned*, AGE, Aug. 1, 2002, at 2 (quoting Justice P.N. Bhagwati).

197. Tony Stephens, *Bared-wire Playground*, SYDNEY MORNING HERALD, Dec. 15, 2001, at 26 (at the time of the article they had been detained for seven months). For additional accounts of unaccompanied minors, see Rebekah Devlin, *Centres Cruel to Children, Experts Say*, ADVERTISER, Dec. 3, 2001, at 12; Lucy Clark, *When We Do Nothing About Child Abuse*, DAILY TELEGRAPH, Feb. 8, 2002, at 23; Megan Saunders, *Suburban Poverty of Orphan Refugees*, AUSTRALIAN, Dec. 17, 2001, at 1.

198. Tony Stephens, *supra* note 197.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Senator Amanda Vanstone, *Border Protection: Immigration Detention Centres*, *at* http://www.minister.immi.gov.au/borders/detention (last visited Mar. 13, 2004); Wood, *supra* note 102, at 24.

child, who arrives in Australia be detained until granted a visa or deported.[204] Children are detained among adults[205] behind 1200-volt electric,[206] barbed wire fences until their cases are reviewed.[207] Detention may last as long as five-and-a-half years.[208] When they arrive at a detention center all their belongings are confiscated and they are given a number by which they are identified.[209] Pursuant to detention center rules, there is a mandatory head count four times a day.[210]

Unaccompanied minors are particularly vulnerable to injury.[211] While in detention, unaccompanied minors are subjected to a culture of self-harm and suicide; the children have witnessed other people mutilate themselves, start riots,[212] participate in hunger strikes,[213] and be subdued by tear gas.[214] Some unaccompanied children were forced to have their lips sewn together by adult detainees protesting the human rights violations in the detention centers.[215] Such "actions are extreme, but it's out of a complete sense of desperation and hopelessness."[216]

In detention, unaccompanied minors become victims of child abuse, which is "anything individuals, institutions, or processes do, or fail to do,

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204. Senator Amanda Vanstone, *Frequently Asked Questions*, *at* http://www.minister.immi.gov.au/faq/ detention.htm (last visited Mar. 13, 2004).

205. *States to Help Free Detained Children*, SYDNEY MORNING HERALD, Dec. 24, 2001, at 2. This increases a child's risk of physical and sexual assault. *Id. The Children Alone Behind the Wire*, SYDNEY MORNING HERALD, Nov. 28, 2001, at 1. It is even more likely among unaccompanied minors. *See id.*

206. HUMAN RIGHTS WATCH, BY INVITATION ONLY: AUSTRALIAN ASYLUM POLICY 79 (2002), *available at* www.hrw.org/reports/2002/australia/australia1202.pdf (last visited Oct. 15, 2003).

207. Mia Handshin, *No Justice Done to Young and Old Refugees*, THE ADVERTISER, Dec. 11, 2001, at 18. Legal team was appalled by the conditions for unaccompanied minors. *Id.*

208. BY INVITATION ONLY, *supra* note 206, at 78.

209. Zachary Steel, *Summary Evidence Regarding the Psychological Damage Caused by Long Term Detention*, July 3, 2002, *at* http://www.amnesty.org.au/airesources/docs/refugee/psychological-damage.doc (last visited Mar. 13, 2004).

210. Michael Millett & Michael Bradley, *Criminals 'Better Off Than Asylum Seekers,'* SYDNEY MORNING HERALD, June 7, 2002, at 2.

211. CHILOUT, *supra* note 108, at 42.

212. *Curtin Riot Highlights Need to Remove Children From Centres*, AAP NEWSFEED, Apr. 20, 2002.

213. Russell Skelton, *ALP Considers Policy Overhaul on Detainees*, AGE, Feb. 15, 2002, at 6.

Minors were removed from Woomera during a hunger strike in 2002 after pressure from community. *Id.*

214. *Ruddock Removes Children*, AGE, Jan. 24, 2002, at 1. "This protest is about freedom and basic human rights, it is no longer about visas." *Detainees Say Protest is About Human Rights, Not Visas*, AAP NEWSFEED, Jan. 20, 2002 (statement from detainees). A group of unaccompanied minors in Woomera threatened to kill themselves en masse if they were not released into foster homes. Conor Lally, *200 Australian Asylum Seekers End Hunger Strike*, IRISH TIMES, Jan. 31, 2002.

215. Lally, *supra* note 214.

216. *Ruddock Removes Children*, *supra* note 214.

which directly or indirectly harms children or damages their prospects of a safe and healthy development into adulthood."[217] Incident reports at the detention centers include allegations of sexual assault.[218] Multiple incidents of abuse go undocumented or uninvestigated.[219] For example, a nurse filed a medical report for a twelve-year-old boy she suspected was raped and abused.[220] Yet, DIMIA reported that no evidence was found to confirm the allegation and no further investigations were needed.[221]

2. The Emotional and Mental Effect of Detention on Unaccompanied Minors in Australia

> "[I'm] like a person who is drowning and is holding themselves up by one arm, but my arm is getting tired and it will soon be easier to just let go."[222]

As a result of detention, "[t]hese children are now completely dysfunctional and we cannot treat them in a detention environment. . . . What is happening in Woomera is a medical and psychiatric emergency."[223] Over a period of five months in 2001, twenty-nine children harmed themselves physically while in DIMIA detention facilities.[224] In addition to threats of self-harm, incidents of actual harm include body mutilation, ingestion of shampoo, and attempted suicide.[225] A psychiatric report found that incarceration in immigration detention centers results in the "widespread psychological and emotional abuse of children and young people" and will have permanent effects on the children's outlook.[226] Many children become withdrawn, quiet, and difficult to engage and begin to show signs of post-traumatic stress disorder.[227] Mental health services are ineffective as long as the children

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217. National Association for the Prevention of Child Abuse (2002) *quoted in* CHILOUT, *supra* note 108, at iii.

218. CHILOUT, *supra* note 108, at 11.

219. *See id.* at 11-12.

220. *See id.*

221. DIMIA, *Response to ChilOut Report "The Heart of the Nation's Existence"* (2002), *available at* http://www.immi.gov.au/detention/chiloutreport_b.htm (last visited Mar. 13, 2004).

222. BY INVITATION ONLY, *supra* note 206, at 80 (statement from a fifteen year-old-boy in Villiwood Detention Center on April 6, 2002).

223. Julie Macken, *The Face of the Refugee, in Focus,* AUSTL. FIN. REV., Dec. 7, 2002, at 25. *See also* Todd, *supra* note 25; Schwartz, *supra* note 26; *Totally Amazing Mind, supra* note 26; Rebecca Holmes, *Child Interns Suffer Social, Mental Trauma,* ADVERTISER, July 2, 2002; Penelope Debelle, *Children 'Not Protected,'* AGE, July 2, 2002, at 6; *Suffer the Children,* SYDNEY MORNING HERALD, Aug. 1, 2001, at 11.

224. *Ruddock Removes Children, supra* note 214.

225. *See id. See also* Devlin, *supra* note 197.

226. *See id.*

227. *See id.*

remain in detention.[228] A past staff member at a Woomera detention center cited "a disturbing gap between our international obligations and what is actually happening at Woomera" after witnessing "unlawful child neglect."[229]

The lack of educational stimulation stunts the child's development and increases the detrimental effects of detention. Children only leave their room to attend one hour of English class four days a week.[230] One fifteen-year-old boy expressed his concern about the lack of educational facilities.[231] He described one class for children of all ages with only one teacher.[232] He said the detention facility is "taking my future along with them because they take my chance of education."[233] The lack of educational stimuli results in dejection for adolescents.[234] Even if adequate educational opportunities existed, the prolonged, indefinite periods in detention cause depression and reduce the child's motivation to learn.[235]

3. The Barriers to Legal Assistance for Unaccompanied Minors in Australia

> "We came here to seek refuge, not to be treated like criminals."[236]

Unaccompanied minors are without judicial ways to challenge their detention.[237] Despite the findings of the UN Human Rights Committee in *A v. Australia* that "every detention decision should be open to periodic review so that the justifying grounds can be assessed" and that the absence of this review equates to arbitrary detention, no mechanism for review is in place.[238] Although the children are not detained in prisons, their experience is even more dangerous because there is less of an accountability framework in the detention centers than in prisons.[239] UN officials claimed that criminals were treated better than asylum seekers in Australia.[240]

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228. CHILOUT, *supra* note 108, at 7.
229. *Ruddock Removes Children*, *supra* note 214.
230. Handshin, *supra* note 207.
231. BY INVITATION ONLY, *supra* note 206, at 80.
232. *Id.*
233. *Id.*
234. CHILOUT, *supra* note 108, at 24.
235. *See id.*
236. Refugee family interviewed by Amnesty International in March 1998 *quoted in* AMNESTY INTERNATIONAL, A CONTINUING SHAME: THE MANDATORY DETENTION OF ASYLUM-SEEKERS 19 (1998).
237. Navarro, *supra* note 17, at 590. *See also* AMNESTY INTERNATIONAL, *supra* note 3, at 44, 61.
238. *See* A v. Australia, *supra* note 53. *See also* Mr. C v. Australia, U.N. Doc. CCPR/C/76/D/900 (1999) (Human Rights Committee, Nov. 5, 2002).
239. BY INVITATION ONLY, *supra* note 206, at 79.
240. Millet & Bradley, *supra* note 210.

The remote location of facilities serves as a barrier to attorneys and other visitors attempting to contact the children.[241] Although some unaccompanied minors are informed of their legal rights, the practice is inconsistent and may not occur until the second interview with DIMIA, if at all.[242] In addition, the government has refused requests by lawyers and other organizations to visit the detention centers and educate recent detainees on their rights.[243] The Australian government states that the no-contact policy is in sync with its obligation to protect asylum seekers because its goal is to prevent prolonged legal proceedings.[244]

4. The Australian Government Perspective

The Australian government denies the human rights watchdogs' reports pertaining to the treatment of unaccompanied minors.[245] It alleges that the health care in immigration detention centers is even better than the health care most Australian children receive.[246] The government denies that mandatory detention violates human rights and said that the UN "lacks objectivity and misrepresents important aspects of Australia's management of immigration detention."[247] The official rationale of the Australian mandatory detention policy, though admittedly also for deterrent purposes, is to ensure an unlawful non-citizen's availability for processing and removal.[248] According to the government, outsiders like the UN exacerbate health problems in immigration detention centers.[249] The Australian government forewarns that any other policy toward illegal immigrants would result in the detainee's disappearance into the country.[250] In contrast, the UNHCR directs that national security measures should only be implemented when the asylum seeker acts criminally and never as "part of policy to deter future asylum-seekers."[251] The Australian government's attack on the reliability and integrity of human rights bodies, the dismissal of international opinion contrary to its own, and the desire to prevent international human rights law from invading domestic affairs creates an "air

241. BY INVITATION ONLY, *supra* note 206, at 79.

242. CHILOUT, *supra* note 108, at 68.

243. A CONTINUING SHAME, *supra* note 236, at 25-27.

244. *See id.*

245. Schwartz, *supra* note 26.

246. Todd, *supra* note 25. *See also* Rob Taylor *supra* note 28; *UN Rights Expert Slams Australian Detention of Immigrants,* AGENCE FRANCE PRESSE, July 31, 2002.

247. *UN Rights Expert, supra* note 246.

248. Taylor, *supra* note 103, at 51; *Detention Not Intended as Deterrent – Immigration Official,* AAP NEWSFEED, Dec. 2, 2002. *See also Mandatory Detention Deters Illegal Immigrants: Australian Official,* AGENCE FRANCE PRESSE, Dec. 2, 2002.

249. Millet & Bradley, *supra* note 210. Immigration Minister, now Attorney General, Philip Ruddock blames the courts for uncertain lengths of detention saying the issue is "out of my hands." *Id.*

250. Wood, *supra* note 102, at 24.

251. *Id.*

of Australian inviolability" and a disregard for the well-being of a child seeking asylum, which ultimately results in a breach of international human rights law.[252]

DIMIA faults researchers for blaming the mental health problems of children on their detention experience rather than on the child's experience in their home country prior to arrival in Australia.[253] The government reports that the immigration detention centers are in good condition: for each unaccompanied minor there are individual management plans, counseling sessions to determine stability, special education comparable to the standard for Australian children, extra-curricular activities, and recreational supplies.[254] Nevertheless, human rights advocates describe detention centers for an unaccompanied minor as "the anatomy of a death in custody except we're still waiting for the death to take place."[255]

IV. THE ILLEGALITY OF THE TREATMENT OF UNACCOMPANIED MINORS

A. The Treatment of Unaccompanied Minors in Australia and the United States Violates International Human Rights Law

"We just ignore international conventions now, do we?"[256]

The United States and Australia detain children in harsh and threatening conditions.[257] Both the United States and Australia regularly deny unaccompanied minors access to counsel, [258] detain them for prolonged periods of time,[259] and subject them to prison-like conditions.[260] These practices violate

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252. David Kinley & Penny Martin, *International Human Rights Law at Home: Addressing the Politics of Denial*, 26 MELB. U. L. REV. 466, 471, 476 (2002).

253. DIMIA, *supra* note 221, at Issue 2.

254. David Penberthy, *Fair Go for Children Behind the Fences—Officials Provide Different Account—Five Star Asylums*, DAILY TELEGRAPH, Dec. 17, 2002, at 4. *But see* Penelope Debelle, *Detention of Migrants Condemned*, THE AGE, Aug. 1, 2002, at 2; *UN Human Rights Envoy Finds More Humane Approach to Illegal Immigration in Australia 'Would Be Desirable,'* M2 PRESSWIRE, Aug. 1, 2002; Megan Saunders, *Woomera Degrades Children: UN Envoy*, AUSTRALIAN, Aug. 1, 2002, at 1.

255. Charandev Singh, Human Rights Activist at the Brimbank Community Legal Centre, *quoted in* Macken, *supra* note 223.

256. Justice Kirby, during the Australian High Court's hearing of the appeal of Family Court decision that released children in immigration detention *quoted in* Meaghan Shaw, *High Court Invites Child Detention Pleas*, AGE, Oct. 1, 2003.

257. *See id.*

258. *See generally* Nelson, 232 F.3d 258; A CONTINUING SHAME, *supra* note 236, at 25.

259. WOMEN'S COMMISSION, *supra* note 16, at 1; FACTSHEET 4, *supra* note 24.

260. *See generally* AMNESTY INTERNATIONAL, *supra* note 3; A CONTINUING SHAME, *supra* note 236.

even the minimum standards established by international human rights law.[261]

1. The Detention of Children

Arbitrary detention violates multiple international conventions addressing the plight of individuals fleeing from gross human rights violations. Both Australia and the United States are bound by the provisions of the 1951 Refugee Convention.[262] Article 31.1 of the 1951 Refugee Convention provides that presumed refugees, including children, should not be punished for seeking protection in a state, even if they arrive without the necessary visa or documentation.[263] Similarly, the ICCPR, which was ratified by the United States in 1992[264] and Australia in 1980,[265] gives everyone the right to freedom from "arbitrary arrest and detention"[266] and forbids "cruel, inhuman or degrading treatment or punishment."[267] Policies, such as detention, impose punishment on children and are contrary to the intentions of the 1951 Refugee Convention and the ICCPR.[268]

The U.S. and Australian governments' contention that detention will prevent flight, render the unaccompanied minor accessible for hearing, and deter future migrations does not justify prolonged detention of minors.[269] Imposing harsh deterrent measures, meant to discourage future applicants from entering the country, results in devastating consequences for children seeking asylum.[270] In *A v. Australia,* the Human Rights Committee found the detention of a man for ten years to be "arbitrary."[271] The case set limits on states and emphasized that detention was an option only when necessary.[272]

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261. AMNESTY INTERNATIONAL, *supra* note 3, at 8. "These children have not committed a crime so punishment by way of incarceration in a detention facility is totally unacceptable." *UNICEF, supra* note 102.

262. *Id.* The United States acceded to the 1967 Protocol to the 1951 Convention and amended the Immigration and Nationality Act to conform to the 1967 Protocol. 1967 Protocol, *supra* note 62, at art. 1, para. 2. *See* 1951 Refugee Convention, *supra* note 20.
Id. Australia ratified the 1951 Refugee Convention in 1954 and the 1967 Protocol in 1973. FACTSHEET 11, *supra* note 36. The reader should note that in order for international law to become a part of Australian or United States law it must be incorporated into domestic law. *See id.* Otherwise, neither country is bound by it. *See id.*

263. Refugee Convention 1951, *supra* note 20, art. 31.1.

264. AMNESTY INTERNATIONAL, *supra* note 3, at 9.

265. FACTSHEET 11, *supra* note 36.

266. ICCPR, *supra* note 42, art. 9.1. This article expressly apples to Immigration Control. AMNESTY INTERNATIONAL, *supra* note 3, at 9. Arbitrary has been defined as including "elements of inappropriateness, injustice, and lack of predictability. *Id.*

267. ICCPR, *supra* note 42, art. 7.

268. AMNESTY INTERNATIONAL, *supra* note 3, at 8; ICCPR, *supra* 42, art. 9.1, 9.4.

269. Bhabha, *supra* note 25, at 208.

270. David A. Martin, *supra* note 165, at 1291.

271. A v. Australia, *supra* note 53.

272. *See id. See also* AMNESTY INTERNATIONAL, *supra* note 3, at 9.

In light of the CRC, the governments' justifications for prolonged detention necessarily fail.[273] Therefore, the United States and Australia shall not deprive a child of "his or her liberty unlawfully or arbitrarily. . . . [D]etention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate time."[274]

2. Access to Counsel and Judicial Review

> "When we treat these children harshly, they are further traumatized, and our country's credibility as a protector of rights is eroded."[275]

The practices in Australia and the United States deny the unaccompanied minor the right "to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."[276] Children must be afforded the opportunity to challenge the deprivation of their liberty;[277] detention of children must be subjected to periodic judicial review.[278] Yet, no mechanism for review or challenge is available to children who arrive in Australia without documentation.[279] The U.S. legal system places significant barriers in front of a child who does not speak English, is developmentally immature, or is too afraid to question his or her predicament.[280] The child-centered and rights-based approach of the CRC is not applied in these countries.[281] By denying or impeding attorneys and NGOs access to the children who are unaware of their rights, Australia and the United States constructively deny unaccompanied minors the right to "legal and other appropriate assistance" in contravention of international human rights law.[282]

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273. *See id. See also* FACTSHEET 11, *supra* note 36.

274. CRC, *supra* note 1, art. 37(b) (1989). *See* BY INVITATION ONLY, *supra* note 206, at 75. *See also* Protection of Juveniles, *supra* note 61, Rule 2; Beijing Rules, *supra* note 59, Rule 179(c).

275. Press Release, *First National Survey of Children in Immigration Detention Exposes Mistreatment, Lengthy Detentions, Legal Barriers*, AMNESTY INTERNATIONAL, June 18, 2003, *available at* http://www.amnestyusa.org/news/2003/usa06182003.html (last visited Mar. 13, 2004).

276. CRC, *supra* note 1, art. 37(d).

277. *See id.*

278. FACTSHEET 4, *supra* note 24.

279. *See id.*

280. Coonan, *supra* note 183.

281. AMNESTY INTERNATIONAL, *supra* note 3, at 13; CRC, *supra* note 1.

282. *See id.*

3. Conditions of Detention Facilities

> "This protest is about freedom and basic human rights, it's no longer about visas."[283]

The conditions of detention centers and the use of corporeal punishment and solitary confinement by Australian and U.S. officials breach the ICCPR's mandate that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . ."[284] and that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[285] In the United States, services available to the unaccompanied minor are insufficient and holding cells are reportedly cold and filthy, with or without bedding.[286] The secure facilities are intended to hold incarcerated youth offenders.[287] In Australia, detention centers and facilities are unsanitary, poorly ventilated, and inadequate.[288] To prevent escape, the detention centers are secure and bordered by barbed wire and high-voltage fences.[289] These settings are inappropriate for innocent children and are the source of psychological and physical harm because they not only aggravate any previous hardship or torture but create new trauma as well.[290] This represents a serious breach of the CRC, which recognizes the need to

> take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.[291]

The conditions of detention centers violate the international standards pertaining to the treatment of children. Rather than fulfill their duty to the

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283. *Detainees Say Protest is About Human Rights, Not Visas*, AAP NEWSFEED, Jan. 20, 2002.

284. ICCPR, *supra* note 42, art. 7; CRC, *supra* note 1, art. 37. *See also* Taylor, *supra* note 103, at 55.

285. ICCPR, *supra* note 42, art. 10; CRC, *supra* note 1, art. 37. *See also* Taylor, *supra* note 103, at 55.

286. AMNESTY INTERNATIONAL, *supra* note 3, at 20-21.

287. *See id.*

288. Taylor, *supra* note 103, at 55.

289. Handshin, *supra* note 207.

290. BY INVITATION ONLY, *supra* note 206 at 80. *See also* Guidelines on Refugee Children, art. 24, UNHCR, U.N. Doc. E/CN 4/28 (1988). "Detention or confinement . . . inflict less visible but nevertheless serious psychological and developmental harm on refugee children." *Id.*

291. CRC, *supra* note 1, art. 39.

children in need of special protection, the U.S. and Australian practices towards the unaccompanied minor create even greater trauma in their defenseless lives.

4. The Detainment of Children Along with Adults

> I was the youngest one among them and was very scared that the criminal detainees would hurt me. My cell mate had killed someone and would tell me about the crimes he had done. I was so afraid that I couldn't sleep at night . . . I felt like my life was finished. I was too young to be there.[292]

Unaccompanied minors in both Australia and the United States report being detained among adults.[293] This practice places a child in grave danger of sexual and physical abuse.[294] Children and detention center staff have reported multiple allegations of abuse.[295] Furthermore, a child's confinement among adults violates the requirements of the CRC, the ICCPR, and the American Convention on Human Rights that children in detention be held separately from adults.[296] The situation in the United States is especially urgent because some children are housed among adult criminals, increasing their risk of harm.[297] In Australia, children housed among adult asylum seekers witness adults committing suicide and beginning riots.[298] The unaccompanied minors, without parents or guardians to protect them, are often forced into protests.[299] As demonstrated, the failure to provide special measures to separate children from the adults in detention places the children in grave danger and at risk of attack and harm. This practice is in violation of international human rights law.[300]

5. The Insufficiency of Services

The lack of services such as educational programs in detention centers in the United States and Australia, deprives children of their rights and is

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292. AMNESTY INTERNATIONAL, *supra* note 3, at 27 (statement of Mekabou Fofana, a sixteen-year-old unaccompanied minor in an U.S. adult criminal detention center).

293. *Id.*; CHILOUT, *supra* note 108, at 42.

294. *Id.*; CHILOUT, *supra* note 108, at 42.

295. FACTSHEET 4, *supra* note 24; Navarro, *supra* note 17, at 600; *States to Help Free Detained Children*, *supra* note 205; *Children Alone Behind the Wire*, *supra* note 205.

296. ICCPR, *supra* note 42, art. 10(2)(b); American Convention, *supra* note 42; CRC, *supra* note 1, art. 3(1); UDHR, *supra* note 18, art.5.

297. AMNESTY INTERNATIONAL, *supra* note 3, at 27.

298. *Curtin Riot Highlights*, *supra* note 212; *Ruddock Removes Children*, *supra* note 214; *Detainees Say Protest is About Human Rights*, *supra* note 214; 200 Australian, *supra* note 214.

299. *Ruddock Removes Children*, *supra* note 214.

300. *See* CRC, *supra* note 1, art. 3(1). *See also* UDHR, *supra* note 18, art.5.

inconsistent with international law.[301] "Everyone has the right to education."[302] The UDHR,[303] the UNHCR Guidelines for Refugee Children,[304] the UN Rules for the Protection of Juveniles Deprived of their Liberty,[305] and the ICESCR[306] enumerate the right to education for children. Education is a necessity that ensures the "full development of the human personality and the strengthening of respect for human rights and fundamental freedoms."[307] Yet, in Australia and the United States, education is sporadic, remedial, and inadequate for unaccompanied minors.[308] International law requires children be granted at least an elementary education.[309] This requires accommodations for age, language abilities, and economic status without prejudice.[310] The Australian and the U.S. educational systems, as it pertains to unaccompanied minors, fail to meet international and domestic standards.[311]

Likewise, the medical services available to unaccompanied minors remain deficient.[312] The experience of indefinite detention results in extreme emotional, physical, psychological, and mental stress.[313] Children become easily traumatized by the scenes they witness, the harm they endure, and the conditions to which they are subjected.[314] Despite the fragile state of these children, the numbers of mental health physicians or counselors are limited

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301. Plyler, 457 U.S. 202. In the United States, domestic law also requires refugee children be given a free primary education. *Id.*

302. UDHR, *supra* note 18, art. 26.

303. *See id.*

304. Guidelines on Refugee Children, *supra* note 290, art. 22(1).

305. Protection of Juveniles, *supra* note 61, Rule 38.

306. ICESCR, *supra* note 48, art. 13.

307. UDHR, *supra* note 18, art. 26.

308. AMNESTY INTERNATIONAL, *supra* note 3, at 40-44; BY INVITATION ONLY, *supra* note 206, at 80; Macken, *supra* note 223. *See also* Todd, *supra* note 25; Schwartz, *supra* note 26; *Totally Amazing Mind*, *supra* note 26; Holmes, *supra* note 223; Debelle, supra note 223; *Children 'Not Protected,' supra* note 223; *Suffer the Children, supra* note 223.

309. Refugee Convention 1951, *supra* note 20, art. 22; UNHCR Guidelines on Refugee Children provides that refugee children must be given the same education that national children receive. Guidelines on Refugee Children, *supra* note 290, chap. 2, § 1.

310. Bhabha, *supra* note 25, at 210.

311. *See generally* Plyer, 457 U.S. 202.

312. AMNESTY INTERNATIONAL, *supra* note 3, at 40-44; BY INVITATION ONLY, *supra* note 206, at 90; Macken, *supra* note 223. *See also* Todd, *supra* note 25; Schwartz, *supra* note 26; *Totally Amazing Mind*, *supra* note 26; Holmes, *supra* note 223; Debelle, *supra* note 223; *Children 'Not Protected,' supra* note 223; *Suffer the Children, supra* note 223.

313. AMNESTY INTERNATIONAL, *supra* note 3, at 40-44; BY INVITATION ONLY, *supra* note 206, at 90; Macken, *supra* note 223. *See also* Todd, *supra* note 25; Schwartz, *supra* note 26; *Totally Amazing Mind*, *supra* note 26; Holmes, *supra* note 223; Debelle, *supra* note 223; *Children 'Not Protected,' supra* note 223; *Suffer the Children, supra* note 223.

314. AMNESTY INTERNATIONAL, *supra* note 3, at 40-44; BY INVITATION ONLY, *supra* note 206, at 90; Macken, *supra* note 223. *See also* Todd, *supra* note 25; Schwartz, *supra* note 26; *Totally Amazing Mind*, *supra* note 26; Holmes, *supra* note 223; Debelle, *supra* note 223; *Children 'Not Protected,' supra* note 223; *Suffer the Children, supra* note 223.

and incapable of addressing the needs of every child.[315] International conventions require that action be taken to ensure "physical and psychological recovery."[316] The failure to provide counseling and medical services not only violates international obligations, but also increases the irreparable harm done to the children in governmental care.[317]

V. RECOMMENDATIONS FOR REFORM

> "It is always when the world is undergoing a metamorphosis, when certainties are collapsing, when the lines are becoming blurred, that there is greatest recourse to fundamental reference points, that the quest for ethics becomes more urgent, that the will to achieve self-understanding becomes imperative."[318]

This section lays out recommendations for the treatment of unaccompanied minors which, if incorporated into domestic law, will align Australia and the United States with international human rights law. The recommendations present the ideal practice and might not be immediately achievable in every situation, such as when the minor presents a threat to the safety of self or others, but should be followed as closely as possible and implemented to the best of a nation's ability. To ensure that the rights of the unaccompanied minor are upheld, suggestions for improvement should be incorporated into legislation.[319]

A. Alternatives to Detention

For the sake of the child's welfare, and in the best interest of the child, unaccompanied minors must immediately be removed from detention facilities.[320] Detention is only a last resort.[321] Alternatives to detention include shelters run by NGOs, state welfare organizations, or other child

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315. AMNESTY INTERNATIONAL, *supra* note 3, at 41.

316. CRC, *supra* note 1, art. 39.

317. AMNESTY INTERNATIONAL, *supra* note 3, at 40-44; BY INVITATION ONLY, *supra* note 206, at 90; Macken, *supra* note 223. *See also* Todd, *supra* note 25; Schwartz, *supra* note 26; *Totally Amazing Mind*, *supra* note 26; Holmes, *supra* note 223; Debelle, *supra* note 223; *Children 'Not Protected,'* *supra* note 223; *Suffer the Children*, *supra* note 223.

318. VAN BUEREN, *supra* note 35, at 292 *quoting* Boutros Boutros-Ghali, June 14, 1993, UN Publication DPI/1394/Rev.1/HR, World Conference on Human Rights, at 6.

319. *See* Kinley & Martin, *supra* note 252, at 472. "International human rights law relies on states for the application and enforcement of human rights norms at the domestic level." *Id.*

320. *Denying the Rights of Asylum Seekers*, NEWCASTLE HERALD, Aug. 23, 2001, at 9. *See* Guidelines on Policies, *supra* note 56; Guidelines on Protection and Care, *supra* note 61.

321. CRC, *supra* note 1, art. 37(b).

specialists who will ensure a child's safety.[322] In multiple instances, relatives or friends of the unaccompanied minor's family are willing and available to act as the guardian for the child pending immigration decisions.[323] Assessments of available guardians or alternative foster care locations should be expedited to limit the time a child spends in detention.[324] Where a guardian is unavailable, a foster care system should provide an appropriate place for the child to stay.[325] To prevent further disruption and trauma in the child's life while in custody, transfers between facilities should only take place if it is in the best interest of the child.[326] At the very least, detention facilities should be upgraded to meet the international human rights standards.[327]

B. Ensuring Mental and Physical Health

Children should be treated with respect and dignity by all staff.[328] The responsible parties should "take all appropriate . . . measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment."[329] A child should not be restrained with shackles (handcuffs, leg irons, and belly chains) as it is inconsistent with international regulations on the humane treatment of children.[330] The use of force, chemicals, and other restraint mechanisms should be prohibited.[331] "Procedures must be in place to ensure that children are not subject to cruel, inhuman, or degrading treatment."[332] Harsh punishments like solitary confinement should be prohibited because the practice's harm to the child is not justified by its disciplinary character.[333] Violations of a child's body

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322. Bhabha, *supra* note 25, at 208. These alternatives could be modeled after the systems in place for children who are at risk of being kidnapped or harm from domestic abuse. *See id.*

323. AMNESTY INTERNATIONAL, *supra* note 3, at 53; WOMEN'S COMMISSION, *supra* note 16, at 39; ICCPR, *supra* note 42, art. 9.1, 9.4.

324. AMNESTY INTERNATIONAL, *supra* note 3, at 79. Procedures for assessments should also be reviewed and improved. *Id. See also* WOMEN'S COMMISSION, *supra* note 16, at 37; CRC, *supra* note 1, art. 37(b). Protection of Juveniles, *supra* note 61, Rule 2; Beijing Rules, *supra* note 59, Rule 179(c).

325. AMNESTY INTERNATIONAL, *supra* note 3, at 79. This will ensure the "least restrictive setting." *Id.*

326. *See* AMNESTY INTERNATIONAL, *supra* note 3, at 80; ICCPR, *supra* 42, art. 7.

327. *See id. See generally,* Protection of Juveniles, *supra* note 61.

328. *See* AMNESTY INTERNATIONAL, *supra* note 3, at 80; ICCPR, *supra* note 42, art. 7, 10; CRC, *supra* note 1, art. 37.

329. CRC, *supra* note 1, art. 19; ICCPR, *supra* note 42, art. 7.

330. AMNESTY INTERNATIONAL, *supra* note 3, at 79; Guidelines on Refugee Children, *supra* note 290, art. 24.

331. AMNESTY INTERNATIONAL, *supra* note 3, at 81. CRC, *supra* note 1, art. 24, art. 25, art. 39; WOMEN'S COMMISSION, *supra* note 16, at 38.

332. AMNESTY INTERNATIONAL, *supra* note 3, at 81; CRC, *supra* note 1, art. 24, art. 25, art. 39; WOMEN'S COMMISSION, *supra* note 16, at 38.

333. AMNESTY INTERNATIONAL, *supra* note 3, at 82. ICCPR, *supra* note 42, art. 7; CRC, *supra* note 1, art. 37.

through routine pat-downs and strip-searches should be prohibited.[334] If a staff member engages in prohibited behavior, he or she should be disciplined.[335]

In accordance with international and domestic law, a child should be guaranteed education equivalent to the entitlement of any citizen of the country where the child is detained.[336] Reading material in the child's own language and other leisurely activities should be made available to the children.[337] Equally important, children should be provided with regular physical and mental health services.[338] Detention facility staff should be trained to work with children who have physical and mental disabilities.[339] These basic health standards could be met with adequate government funding.[340]

C. Access to Counsel and Child-Centered Immigration Proceedings

Australia and the United States should revise their immigration systems to ensure that all unaccompanied minors arriving in the country after fleeing persecution receive immediate assistance in maneuvering through the asylum system.[341] This should include instructions regarding their rights in a language and literacy level the unaccompanied minor will understand.[342] For this purpose, trained interpreters should be available.[343] Children should be given immediate access to counsel or the pro bono attorney organizations willing to assist them.[344] This access should be guaranteed at all stages in their immigration application.[345] If there are not available NGOs or pro bono attorneys to represent the child, the government should provide legal assistance for the child.[346]

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334. AMNESTY INTERNATIONAL, *supra* note 3, at 82. WOMEN'S COMMISSION, *supra* note 16, at 38. ICCPR, *supra* note 42, art. 7; CRC, *supra* note 1, art. 37.

335. AMNESTY INTERNATIONAL, *supra* note 3, at 81-82.

336. *See id.* at 82; *See generally* Plyer, 457 U.S. 202, CRC *supra* note 1, art. 28(1)(a-b).

337. AMNESTY INTERNATIONAL, *supra* note 3, at 82. Refugee Convention 1951, *supra* note 20, art. 22; Guidelines on Refugee Children, *supra* note 290, chap. 2, § 1.

338. AMNESTY INTERNATIONAL, *supra* note 3, at 82. Female children should be given special attention. *Id.* Because the number of female unaccompanied minors is less than males, females are more likely to be placed in detention with convicts, where there is available space. *Id. See also* CRC, *supra* note 1, art. 39.

339. AMNESTY INTERNATIONAL, *supra* note 3, at 82; CRC, *supra* note 1, art. 39, art. 28 (1).

340. AMNESTY INTERNATIONAL, *supra* note 3, at 82; CRC, *supra* note 1, art. 39.

341. A CONTINUING SHAME, *supra* note 236, at 28; CRC, *supra* note 1, art. 39. UACP, *supra* note 95.

342. A CONTINUING SHAME, *supra* note 236, at 28; CRC, *supra* note 1, art. 39.

343. AMNESTY INTERNATIONAL, *supra* note 3, at 81.

344. *See id.* Children should be allowed free telephone calls during working hours to contact attorneys or other advocates. *See id.* They should be assisted in making these calls. *See id. See also* CRC, *supra* note 1. Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1116-19.

345. AMNESTY INTERNATIONAL, *supra* note 3, at 13, 81. *See generally* CRC, *supra* note 1.

346. AMNESTY INTERNATIONAL, *supra* note 3, at 13, 81.

Immigration proceedings should conform to international law.[347] Unaccompanied minors should be able to participate fully in proceedings and allowed to appear in person before the judge or asylum officer.[348] Claims should be processed in a timely manner and hearings held in a language the child will understand.[349] Any decision to detain a child must be made before a judge during a proceeding in which the child is continually made aware of his or her status.[350] If a child is detained, he or she should be given the opportunity to appeal the decision.[351]

NGOs and other international human rights organizations should be allowed to train detention center guards and staff, to help improve their skills in treating children and interviewing children.[352] All employees who have contact with minors, including those of BICE in the United States and DIMIA in Australia, should receive continuing training on the "special needs and rights of unaccompanied minors."[353] For example, regard should be paid to the child's limited knowledge of the political or civil strife or the conditions occurring in his or her country of origin.[354] Immigration officials responsible for deciding the status of a child's claim for asylum must be trained in interpreting a child's behavior.[355] Otherwise, a child's hardship in delivering the horror of his or her situation may be mistaken for fabricated stories.[356] Unaccompanied minors, who are most detrimentally affected by detention, should have an expedited process.[357]

D. Monitoring and Enforcing Human Rights Provisions

> "[T]he people of the United Nations have . . . re-affirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote

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347. *See id.* at 83. "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, supra note 42, art. 9(4)

348. CRC, *supra* note 1, art. 37(d), 9(4).

349. CRC, *supra* note 1, art. 37(d).

350. AMNESTY INTERNATIONAL, *supra* note 3, at 83.

351. AMNESTY INTERNATIONAL, *supra* note 3, at 83; FACTSHEET 4, *supra* note 24.

352. *See id.* Interviewing children in asylum cases is crucial in ascertaining the facts relevant to their claim. Peter Margulies, *Children, Parents, and Asylum,* 15 GEO. IMMIGR. L. J. 289, 309.

353. AMNESTY INTERNATIONAL, *supra* note 3, at 78.

354. Bhabha, *supra* note 25, at 218.

355. *Id.*

356. Taylor, *supra* note 103, at 86-91.

357. AMNESTY INTERNATIONAL, *supra* note 3, at 83; CRC, *supra* note 1, art. 37(b) (1989). *See* BY INVITATION ONLY, *supra* note 206, at 78. *See also* Protection of Juveniles, *supra* note 61, Rule 2; Beijing Rules, *supra* note 59, Rule 179(c).

> social progress and better standards of life in larger freedom."[358]

There must be a confidential mechanism in place for lodging complaints and violations of liberty. Without an effective way of monitoring authority figures and the mistreatment of unaccompanied minors and other immigrants, a risk exists that the most inexpensive method of administration will be relied upon while sacrificing the child's well-being.[359] All allegations of abuse should be thoroughly and independently investigated by an agency focused on the best interests of the child.[360]

Data collection should be given significant attention to ensure improvement in the treatment of current and future unaccompanied minors.[361] The informational file for each minor should detail any and all contact with NGOs, attorneys, and other advocates as well as the child's progress through the immigration system.[362] Information about the characteristics of unaccompanied minors and other asylum seekers (such as age, nationality and gender) as well as any policy changes should be made publicly available, subject to the right to privacy.[363]

E. Suggestions for Reform Specific to the United States

> "The United States must acknowledge and uphold the rights and needs of newcomer children in order to live up to its reputation as a leader in human rights and a nation that protects its children."[364]

The U.S. government should immediately ratify the Unaccompanied Alien Child Protection Act of 2003 and the UN Conventions on the Rights of the Child.[365] The United States should also implement the provisions of *Flores*.[366] By codifying these documents, the United States will ensure that children are not housed in detention centers.[367] In accordance with these

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358. Declaration, *supra* note 2.

359. Taylor, *supra* note 103, at 58 (describing the bonus and demerit system in Australian detention centers which allows contractors to remain profitable without improving performance).

360. FACTSHEET 4, *supra* note 24.

361. AMNESTY INTERNATIONAL, *supra* note 3, at 83.

362. *See id.*

363. *See id.*

364. WOMEN'S COMMISSION, *supra* note 16, at 3.

365. AMNESTY INTERNATIONAL, *supra* note 3, at 77. WOMEN'S COMMISSION, *supra* note 16, at 40; UACP, *supra* note 95; CRC, *supra* note 1.

366. *See* AMNESTY INTERNATIONAL, *supra* note 3, at 79; Flores, *supra* note 91.

367. *See* AMNESTY INTERNATIONAL, *supra* note 3, at 79; ICCPR, *supra* note 42, art. 9.1, 9.4.

documents, unaccompanied minors should be separated from juvenile offenders and adults in circumstances where no alternatives to detention centers exist.[368]

The United States must establish more accurate age determination procedures.[369] In the event the procedure is unreliable, the child must be given leniency.[370] The age determination procedures should conform to the standards of the UNHCR Guidelines on Policy and Procedures in dealing with Unaccompanied Children Seeking Asylum.[371] In addition, the unaccompanied minor's statements to officials should not be used against him or her.[372] The burden of proving the deportability of a child should be left to the official.[373] This will help to ensure that no child is returned to a country where his or her life will be in jeopardy.[374]

The U.S. government should ensure that the ORR is adequately funded and supported in carrying out proposed improvements.[375] The government should seek the assistance of international human rights groups and watchdogs and invite them to evaluate the current system and propose changes.[376] The UN Working Group on Arbitrary Detention should be included as an evaluator.[377] "The unique dilemma of the alien minor raises a claim for legal protection that must be more humanely and consistently addressed by U.S. immigration law."[378] Should the United States reform its policy towards unaccompanied minors, multiple organizations within the country will support the change.[379]

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368. *See* AMNESTY INTERNATIONAL, *supra* note 3, at 79; CRC, *supra* note 1, art. 3(1); UDHR, *supra* note 18, art. 5; ICCPR, *supra* note 42.

369. Bhabha, *supra* note 25, at 218.

370. AMNESTY INTERNATIONAL, *supra* note 3, at 78. In the event age can not be determined, rather than placing the child with adults a separate facility should be designated for the unaccompanied people who may be minors. *See id.*

371. *Id*; Guidelines on Policies, *supra* note 56; WOMEN'S COMMISSION, *supra* note 171, at 14-16.

372. Coonan, *supra* note 183, at 89-90.

373. *See id.* Establish a rebuttable presumption to enhance judicial efficiency. *Id.*

374. AMNESTY INTERNATIONAL, *supra* note 3, at 78.

375. *See id.* UDHR, *supra* note 18, art. 14.

376. AMNESTY INTERNATIONAL, *supra* note 3, at 78

377. *See id.*

378. Coonan, *supra* note 183, at 96.

379. *8 Members of Congress Urge Release of Immigrant*, N.Y. TIMES, Aug. 23, 2003, at A9 (Congressional Human Rights Caucus called for the release of immigrants from prison); *African Orphan Fights for Asylum, supra* note 194; Catholic Bishop asks the United States to protect refugees globally, especially unaccompanied minors and other vulnerable groups. *Prepared Testimony of Nicholas A. Dimarzio, supra* note 125.

F. Suggestions for Reform Specific to Australia

> "To make this Commonwealth of ours renowned of all the lands; for those who've come across the seas we've boundless plains to share; with courage let us all combine to Advance Australia Fair."[380]

Although Australia has ratified international human rights treaties, including the CRC, it has not followed them.[381] Though presented with alternatives to detention on multiple occasions, Australia has been unwilling to implement them.[382] This shows detention is not a measure of "last resort."[383] The government dismisses alternatives to detention as invitations for large numbers of asylum seekers to disappear into the community and result in a high absconding rate.[384] "[F]ar from being the only Western country to detain unauthorized arrivals, Australia is providing the model that other countries are seeking to follow," opined the Immigration Minister.[385] The government's air of imperviousness and conflicting roles of both the guardian of unaccompanied minors and the entity responsible for deporting them must be repaired.[386]

Australia should repeal the mandatory detention policy of unaccompanied minors and revise its relevant laws and regulations that allow the existence of a system so detrimental to unaccompanied minors.[387] Representatives from the government, the UNHCR, NGOs, and HREOC should be invited to assist in revisions to ensure their conformity to international human rights law.[388]

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380. Peter Dodds McCormick, Australian National Anthem (1878) *available at* http://www.dfat.gov.au/facts/nat_anthem.html (last visited Mar. 13, 2004).

381. FACTSHEET 11, *supra* note 36. In 1949, Australia initiated the UN Human Rights Commission's adoption of a prohibition against the "arbitrary arrest or detention" of a person, which is found in article nine of the draft International Convention on Civil and Political Rights (ICCPR).

382. BY INVITATION ONLY, *supra* note 206, at 77. Alternatives to detention have been presented to the Australian government by the Justice for Asylum Seekers (model designates a case worker to oversee asylum seekers and act as an intermediary), Human Rights and Equal Opportunity Commission, Refugee Council of Australia, Human Rights Watch (parole arrangements and release into community), Refugee Action Collective (detention standard that meets international standards or an absolute no-detention standard). *Id.*

383. CRC, *supra* note 1, art. 37(b); BY INVITATION ONLY, *supra* note 207, at 78.

384. AMNESTY INTERNATIONAL AUSTRALIA, FACTSHEET 3: ALTERNATIVES TO DETENTION, *available at* http://www.amnesty.org.au/refugees/ref-fact03.html (last visited Mar. 13, 2004).

385. *Id.*

386. Taylor, *supra* note 103, at 86-91.

387. A CONTINUING SHAME, *supra* note 236, at 28; Refugee Convention 1951, *supra* note 20, art. 31(2); Wood, *supra* note 102, at 23-4.

388. A CONTINUING SHAME, *supra* note 236, at 28; Refugee Convention 1951, *supra* note 20, art. 31(2); Wood, *supra* note 102, at 23-4.

VI. CONCLUSION

> The children of the world are innocent, vulnerable and dependent. They are also curious, active and full of hope. Their time should be one of joy and peace, of playing, learning and growing. Their future should be shaped in harmony and co-operation. Their lives should mature, as they broaden their perspectives and gain new experiences.... We ourselves hereby make a solemn commitment to give high priority to the rights of children, to their survival and to their protection and development. This will also ensure the well-being of all societies.[389]

An analysis of the treatment of unaccompanied minors in Australia and the United States reveals that the current policy and practice pertaining to unaccompanied minors in these countries ignore the best interests of children and violate their basic human rights. Australia and the United States are bound by international human rights law, yet their treatment of the most vulnerable of asylum seekers places the mere potential for a national security breach before commitment to children's well-being.

Multiple problems surrounding unaccompanied minors remain unresolved in U.S. and Australian asylum law.[390] To place a child seeking asylum in a detention center where he or she rarely sees the sun, has few educational opportunities, and feels threatened and fearful, qualifies as cruelty. To subject an unwitting child to corporal punishment for innocent behavior, frequent violations of his or her body through strip searches, and a culture of self-harm among adults and criminal offenders qualifies as inhumane. The treatment of the unaccompanied minors and the attitude of governments that allow it represent a disregard for the human rights of the unaccompanied minors and both must be adjusted to end human rights violations of children in Australia and the United States.[391]

There are significant gaps in the legal and social responsibility for decisions affecting unaccompanied minors in the United States and

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389. *World Declaration on the Survival, Protection and Development of Children*, World Summit for Children, Annex 2, para. 23, at art. 2, 19, U.N. Doc. E/CN.4/1991/59 (1990).

390. *See* Bhabha, *supra* note 25, at 218. Problems include

> measures to address the absence of adequate legal representation or guardianship arrangements; unreliable or harmful age determination procedures; the protracted and often inconclusive nature of legal proceedings to secure permanent legal status; the abusive use of detention, including in some cases punitive measures; the vulnerabilities arising out of smuggling and trafficking arrangements, and the failure to promote family reunification in the receiving or home country.

Id.

391. FACTSHEET 3, *supra* note 385.

Australia.[392] To meet the requirements of international human rights law, the United States and Australia should reform their detention laws.[393] Namely, the United States and Australia should immediately end the detention of unaccompanied minors. Under international law the detention of asylum seekers is only allowed as a last resort and should not be routine or for prolonged periods.[394] These children have not committed any crime and deserve refuge from the harm inflicted upon them in their own countries. Their non-citizenship and illegal entry into Australian and the United States do not justify the harsh treatment they receive.

The United States and Australia must take immediate measures to reform their treatment of unaccompanied minors. Children, regardless of their citizenship or origin, deserve the best humankind has to offer.[395] To ensure the future welfare of society, children should be given no less.

392. *See id.*
393. AMNESTY INTERNATIONAL, *supra* note 3, at 77.
394. *See id.*
395. Declaration, *supra* note 2, Preamble.

A NEW TRUSTEESHIP FOR WORLD PEACE AND SECURITY: CAN AN OLD LEAGUE OF NATIONS IDEA BE APPLIED TO A TWENTY-FIRST CENTURY IRAQ?

Brian Deiwert*

INTRODUCTION:

On May 1, 2003, U.S. President George W. Bush declared that "major combat operations in Iraq" had ended.[1] The United States led coalition, which included the United Kingdom, Australia, and Poland, now had the task of rebuilding a devastated Iraq and administrating a defeated country until the Iraqi people "establish a [new] government of, by and for the Iraqi people."[2] The coalition would "stay until our work is done and then we will leave and we will leave behind a free Iraq."[3] The coalition, labeled by the United Nations Secretary Kofi Annan[4] on March 28, 2003, as occupying powers under the Fourth Geneva Convention of 1949, Relative to the Protection of Civilian Persons in Persons in Time of War[5] had assumed "responsibilities, and obligations under applicable international law," or a de-facto trusteeship over Iraq.[6]

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1. President George W. Bush, Address on U.S.S. Abraham Lincoln (May 1, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html (last visited Mar. 8, 2004) [hereinafter *Abraham Lincoln*].

2. *Id.*

3. *Id.*

4. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/un/UN.html (last visited Mar. 8, 2004). Established in 1945, it is an international organization composed of currently 191 nations. *See id.* The purposes of the United Nations are "the maintenance of international peace and security; the development of friendly relations among states; and the achievement of cooperation in solving international economic, social, cultural, and humanitarian problems. It also expresses a strong hope for the equality of all people and the expression of basic freedoms." *Id.* Kofi Annan was elected as U.N. Secretary in 1997. *See id.*

5. *See* Wikipedia: The Free Encyclopedia 2003 Iraq War Timeline, *available at* http://en.wikipedia.org/wiki/2003_Iraq_war_timeline (last visited Mar. 8, 2004).

6. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

The use of territorial trusteeships[7] or trusteeship-like arrangements has increased over the years.[8] Politicians, editorialists, and legal experts have called for trusteeships of the Palestinian territories,[9] Cambodia,[10] East Timor,[11] Kosovo,[12] Liberia,[13] Bosnia,[14] and now Iraq.[15] It has been suggested the United Nations can "help the United States bear the burdens of lone-superpower status"[16] by reactivating "one of the world body's most vital organs,"[17] the U.N. Trusteeship Council.[18]

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7. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/tr/trustees.html (last visited Feb. 16, 2004) [hereinafter Trusteeship]. The territorial trusteeship was a "system of UN control for territories that were not self-governing." *Id.* "[T]he trusteeship system was intended to promote the welfare of the native inhabitants and to advance them toward self-government." *Id.*

8. *See generally* TOM PARKER, CENTRE FOR EUROPEAN AND ASIAN STUDIES AT NORWEGIAN SCHOOL OF MANAGEMENT, THE ULTIMATE INTERVENTION: REVITALISING THE UN TRUSTEESHIP COUNCIL FOR THE 21ST CENTURY (2003).

9. *See* Suzanne Nossel, *A Trustee For Crippled States*, WASH. POST, Aug. 25, 2003, at A17. *See also* Martin Indyk, *A U.S.-Led Trusteeship For Palestine*, WASH. POST, June 29, 2002, at A23.

10. *See* Nossel, *supra* note 9. Cambodia is a country located in Southeast Asia. The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/ca/Cambodia.html (last visited Mar. 8, 2004). Cambodia is bordered by Vietnam to the east, by Laos to the north, by the Gulf of Thailand to the south, and by Thailand on the west and north. *See id.*

11. *See* Nossel, *supra* note 9. East Timor occupies the eastern half of the island Timor located at the eastern end of the Indonesian archipelago in South East Asia. *See* CIA – World Factbook—East Timor, *at* http://www.cia.gov/cia/publications/factbook/geos/tt.html (last visited Mar. 8, 2004) [hereinafter East Timor]. East Timor is northwest of Australia. *Id.*

12. *See* Nossel, *supra* note 9. Kosovo is a Serbian province in the former Yugoslavia in Southeast Europe. *See* The Columbia Encyclopedia, 6th ed. (2001), *at* http://www.bartleby.com/65/ko/Kosovo.html (last visited Mar. 8, 2004).

13. *See* Nossel, *supra* note 9. Liberia is a west African country with the Atlantic Ocean forming the southwestern border and Guinea on the northern border. *See* The Columbia Encyclopedia, 6th ed. (2001), *at* http://www.bartleby.com/65/li/Liberia.html (last visited Feb. 16, 2004).

14. *See* Henry Kissinger, *Toward a Moment of Truth in Bosnia*, WASH. POST, July 11, 1995, at C07. Bosnia is located on the Balkan peninsula in southern Europe. *See* The Columbia Encyclopedia, 6th ed. (2001), *at* http://www.bartleby.com/65/bo/BosniaNH.html (last visited Mar. 8, 2004). The Bosnians voted for independence from Yugoslavia in October, 1991. *See id.*

15. *See* Paul Kennedy, *UN Trusteeship Council Could Finally Find a Role in Postwar Iraq*, May 9, 2003, *available at* http://www.globalpolicy.org/security/issues/iraq/after/2003/0511trusteeshipcouncil.htm (last visited Mar. 8,, 2004). *See also* Michael McFaul, *Wrong Time to 'Stay the Course'*, WASH. POST, Aug. 24, 2003, at B07. *See also* Nossel, *supra* note 9.

16. Nossel, *supra* note 9.

17. *Id.*

18. *See* PARKER, *supra* note 8, at 3. The U.N. Trusteeship Council was set up to promote the welfare of native inhabitants in territories that were not self-governing. *See* Trusteeship, *supra* note 7. Membership in the Trusteeship Council included those nations administering trust territories, other members of the U.N. Security Council that were not administering trust territories, and as many member nations elected to the Council as needed to ensure the total number of members on the Trusteeship Council were equally divided between those countries administering trust territories and those not administering trust territories. U.N. CHARTER art. 86.

If the Trusteeship Council were revived to assist the United States in Iraq administration, what difference would it make? Could the United States "still remain in day-to-day control . . . but [with] overall supervisory authority . . . stay[ing] with the U.N.,"[19] while granting easier access to international organizations that can assist in the redevelopment of Iraq, such as the World Bank, the U.N. Development Program, UNICEF, and the World Health Organization?[20] This Note attempts to answer the question of whether a nation-state that has been militarily intervened, such as Iraq, can be placed under a U.N. trusteeship until the native population is capable of governing themselves. Additionally, this Note addresses what legal problems could arise from an attempt to revive the Trusteeship Council, and how can such problems be resolved?

Part I of this Note explains the historical context of the trusteeship. Part II discusses the elements of a trusteeship. Then Part III analyzes the recent challenges faced by the international community where the Trusteeship Council could have been of assistance. Part IV analyzes the legal problems confronting a revival of the trusteeship process. Finally, Part V discusses how Iraq could benefit from a revival of the Trusteeship Council.

PART I. HISTORICAL BACKGROUND ON TRUSTEESHIP

A) Origins Of The Trust Concept

The discovery of the New World by European explorers allowed legal theorists of the day to raise the issue of a trusteeship.[21] Those theorists "argued that the New World should be developed in the interests of its native peoples and not just for the profit of Spaniards."[22] The trusteeship concept developed more explicitly during the British colonial and expansion era.[23] The Eighteenth Century British politician Edmund Burke is widely credited as being the first to invoke the concept of 'trust' during his speeches that addressed British policy in India and North America; and he "coined the phrase 'sacred trust' which appears in Article 22(1) of the Covenant of the League of Nations and Article 73 of the UN Charter."[24] That philosophy eventually permeated British Imperial thinking.[25] In 1898, the British were acting as "trustees of civilisation for the commerce of the world,"[26] according

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19. Stephen Handelman, *U.N. as Colonial Power? Why not?*, TORONTO STAR, Sept. 2, 2003, at A17.

20. Kennedy, *supra* note 15.

21. *See* PARKER, *supra* note 8, at 3 - 4. Mr. Parker states those first legal theorists were Jean Lopez de Palacios Rubios and Franciscus de Vitoria. *Id.* at 3.

22. PARKER, *supra* note 8, at 4.

23. *See id.*

24. *Id.*

25. *See id.*

26. *Id.*

to the British Colonial Secretary Joseph Chamberlain.[27] Other European countries along with the United States also explored the concept of trusteeship during the Nineteenth Century.[28] Fifteen European nations produced the "General Act which bound the signatories to 'care for the improvement of the conditions of the moral and material well-being' of the natives of the Congo Basin"[29] at the Berlin Conference of 1884-1885.[30]

The trusteeship concept "took on an added dimension . . . of international accountability"[31] at the beginning of the Twentieth Century.[32] The outbreak of World War I in 1914[33] caused a shift in attitude as the trusteeship concept became linked with "plans to create an international body to regulate and oversee international affairs."[34] The U.S. President Woodrow Wilson,[35] captured this idea in his Fourteen Points for peace address on January 8, 1918.[36] Two points in particular stand out. First, Point V which proclaimed,

> [a] free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.[37]

Second, Point XIV which stated, "[a] general association of nations must be formed under specific covenants for the purpose of affording mutual

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27. PARKER, *supra* note 8, at 4. Joseph Chamberlain served as Colonial Secretary of the British Conservative government from 1895 to 1903. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/ch/ChamberlJos.html (last visited Mar. 8, 2004). He "pursued a vigorous colonial policy aimed at imperial expansion, cooperation, and consolidation." *Id.*

28. *See* PARKER, *supra* note 8, at 4.

29. *Id.* at 4 – 5.

30. *Id.* at 4. The Berlin Conference settled the problems of having colonies in west Africa that the European countries were experiencing. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/be/BerlinConf.html (last visited Mar. 8, 2004). Members of the Berlin Conference were all European nations, the United States, and the Ottoman Empire. *See id.*

31. PARKER, *supra* note 8, at 5.

32. *See id.*

33. *See* MARGARET MACMILLAN, PARIS 1919, SIX MONTHS THAT CHANGED THE WORLD 89 (2001), xxv.

34. PARKER, *supra* note 8, at 5.

35. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/wi/Wilson-W.html (last visited Feb. 16, 2004). Woodrow Wilson was the 28th President of the United States and served from 1913 – 21. *See id.*

36. *See* President Woodrow Wilson, Address to Joint Session of Congress (Jan. 8, 1918), *available at* http://usinfo.state.gov/usa/infousa/facts/democrac/51.htm (last visited on Mar. 8, 2004).

37. *Id.*

guarantees of political independence and territorial integrity to great and small states alike."[38]

In December 1918, the South African soldier-statesman General Jan Smuts took President Wilson's ideas and released a paper titled "The League of Nations: A Practical Suggestion."[39] General Smuts suggested the colonial territories belonging to Austria, Russia, and Turkey should be administrated by the victorious nations of the war under a mandate of the League of Nations.[40]

B) The League Of Nations Mandate System

The Paris Peace Conference[41] established a Commission on the League of Nations which was chaired by President Wilson on January 25, 1919.[42] The issue of mandates proved to be the most contentious item on the agenda.[43] President Wilson's views prevailed over other dignitaries in Article 22 of the Covenant of the League of Nations.[44] The colonies of Turkey and Germany that were "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world"[45] were placed under the mandate system.[46] However, President Wilson had to compromise with France, South Africa, Australia, and New Zealand whose delegates favored annexation.[47] General Smuts helped craft a compromise which created a three-tiered Mandates System.[48] 'A' class mandates were for nations, such as those in the Middle East, nearly ready to be independent.[49] 'B' class mandates were for territories that would be run by the mandatory power, and 'C' class mandates

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38. *Id.*

39. *See* MACMILLAN, supra note 33, at 89.

40. *See* PARKER, *supra* note 8, at 6. The League of Nations was established by the Treaty of Versailles and other peace treaties ending World War I in order to promote international peace and security. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/le/LeagueNa.html (last visited Mar. 8, 2004) [hereinafter League].

41. *See* MACMILLAN, *supra* note 33, at xxv - xxxvi. The Paris Peace Conference of 1919 – 20 was the attempt to end World War I. *See id.* The most well-know result of the conference is the Treaty of Versailles ending Germany's involvement in the war signed in June 1919. *See id.*

42. *See* PARKER, *supra* note 8, at 6.

43. *See id.* Mandates were the system of administrative trusteeships of the former German colonies and Turkish territories established by the League of Nations after World War 1. *See* League, *supra* note 40. The mandate power, the administrator of the mandated territory or mandatory, had assumed obligations to the inhabitants of the territory and to the League of Nations, which supervised the mandates through the eleven members of the Permanent Mandates Commission. *See id.*

44. *See* PARKER, *supra* note 8, at 6.

45. LEAGUE OF NATIONS COVENANT art. 22, para. 1., *available at* http://www.yale.edu/lawweb/avalon/leagcov.htm (last visited Mar. 8, 2004).

46. *See* PARKER, *supra* note 8, at 7.

47. *See id.*

48. *See* MACMILLAN, *supra* note 33, at 103.

49. *See id.*

were created for "territories contiguous or close to the mandatory power which would be run as an extension of its own territory subject to certain restrictions."[50]

In spite of the colonial powers wrangling, Article 22 of the League of Nations Covenant still had most of President Wilson's vision of trusteeship.[51] The Mandate System was to apply "the principle that the well-being and development of such peoples form a sacred trust of civili[z]ation and that securities for the performance of this trust should be embodied in [the League Covenant]."[52] To give effect to that principle "the tutelage of such peoples should be entrusted to advanced nations . . . who are willing to accept [such responsibility] . . . on behalf of the League."[53] International supervision was accomplished under Article 22(7) where "the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge."[54] "[A] body of practice and precedent relating to international oversight"[55] was created for the administration of territories.[56]

In 1920, fourteen former Turkish and German territories that contained approximately 20 million people were placed under mandate.[57] "Three 'A' class mandates . . . (Iraq, Syria-Lebanon and Palestine), six 'B' class mandates were carved out of . . . Togoland-Cameroons and German East Africa and five 'C' class Mandates created from former German colonies in South West Africa and the Pacific."[58]

The Mandate System had flaws.[59] First, the Permanent Mandates Commission could do little more than publicly condemn blatant breaches of Trusteeship by the Mandatory Powers.[60] Second, "the manner in which the administration of the 'B' and 'C' class mandates was approached looked very similar in consequence to direct annexation."[61] Despite these flaws, when the Mandate System was abolished in 1946, both Iraq and Syria-Lebanon had achieved independence.[62]

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50. PARKER, *supra* note 8, at 7. *See also* MACMILLAN, *supra* note 33, at 103.
51. *See* PARKER, *supra* note 8, at 7.
52. LEAGUE OF NATIONS COVENANT art. 22, para. 1.
53. LEAGUE OF NATIONS COVENANT art. 22, para. 2.
54. LEAGUE OF NATIONS COVENANT art. 22, para. 7.
55. PARKER, *supra* note 8, at 9.
56. *See id.*
57. *See id.* at 8.
58. *Id.*
59. *See id.* at 8-9
60. *See id.* at 8-9.
61. PARKER, *supra* note 8, at 8.
62. *See id.* Lebanon became an independent country in 1943; however, French troops did not leave until 1946. *See* Wikipedia, The Free Encyclopedia, *available at* http://en.wikipedia.org/wiki/1948_Arab-Israeli_War (last visited Mar 8, 2004). Syria became independent on April 17, 1946 from France when French troops evacuated and left Syria in the hands of a republican government formed during the period of French Mandate. *See* Wikipedia, The Free Encyclopedia, *available at* http://en.wikipedia.org/wiki/History_of_Syria (last visited Mar. 8, 2004). Iraq achieved independence from the British Mandate in 1932. *See* Wikipedia,

C) The International Trusteeship System Of The United Nations.

After World War II, the creation of the United Nations allowed the international community "to address the shortcomings that had become apparent in the Mandates System."[63] The international climate had changed considerably; now the practice of colonialism was "under fire from all sides."[64]

In August 1941, both the British Prime Minister Winston Churchill and the U.S. President Franklin D. Roosevelt publicly stated in a joint declaration known as the Atlantic Charter that they would respect the right of all people to choose the form of government they wished to live under.[65] The colonial territories started to develop independence movements.[66] Colonial commitment to the Allied[67] cause had been brought, in part, with promises of change.[68] The myth of European invincibility had been devastated by Japan's initial military success against the colonies of the European colonial powers.[69] Some European nations had lost the will to continue as colonial powers due to the war or occupation.[70] The public attitude had shifted away from colonial aspirations.[71]

The idea of an International Trusteeship System was discussed at the Yalta Conference in February 1945.[72] At the insistence of Winston Churchill

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The Free Encyclopedia, *available at* http://en.wikipedia.org/wiki/Iraq (last visited on Mar. 8, 2004).

63. PARKER, *supra* note 8, at 9.

64. *Id.* (citing THE UNITED NATIONS AT THE MILLENIUM: THE PRINCIPAL ORGANS 142 (Paul Graham Taylor & A.J.R. Groom eds., 2000)).

65. *See id.* President Roosevelt and Prime Minister Churchill meet "in Argentina Bay, off Newfoundland to issue a joint declaration on the purposes of the war against fascism." The Atlantic Charter (1941), *at* http://usinfo.state.gov/usa/infousa/facts/democrac/53.htm (last visited Mar. 8, 2004). The joint declaration was issued on August 12, 1941. *See* Hyperwar: The Atlantic Charter, *at* http://www.ibiblio.org/hyperwar/Dip/Atlantic.html (last visited Mar. 8, 2004).

66. *See* PARKER, *supra* note 8, at 10.

67. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/ww/WW2.html (last visited Mar. 8, 2004)[hereinafter WWII]. The Allies were the victorious powers of World War II that fought against the Axis Powers of Germany, Italy, and Japan. *See id.*

68. *See* PARKER, *supra* note 8, at 10.

69. *See id.* Japan initially conquered Malaya, Burma, and the Netherlands East Indies. *See* WWII, *supra* note 67.

70. *See* PARKER, *supra* note 8, at 10.

71. *Id.*

72. *See id.* (citing R. Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study*, at 18 (1955)). The Yalta Conference was one of a series of conferences held by the United States, United Kingdom, and the U.S.S.R. during World War II. *See* Wikipedia, The Free Encyclopedia, *available at* http://en.wikipedia.org/wiki/Yalta_Conference (copy on file with author). The conference was held from February 4-11, 1945. *See id.* Among the ideas discussed was the creation of the United Nations to replace the League of Nations, the dismemberment of Germany, and the U.S.S.R.'s entry into the war against Japan when Germany was defeated. *See id.*

and French General Charles de Gaulle, there would to be no discussions of the territories to be affected by the new trusteeship system at the upcoming San Francisco Conference where the United Nations Charter would be created.[73]

Like the previous Mandates System of the Paris Peace Conference, the International Trusteeship System "became one of the most contentious issues of the [San Francisco] [C]onference" due to the need to find compromise.[74] States' experience with the Mandates System led to the implicit ideas in the sparsely worded League Covenant being transformed into the detailed text of *The International Trusteeship System* in the United Nations Charter.[75]

The International Trusteeship System was spelled out in great detail in Chapters XII and XIII of the U.N. Charter.[76] Issues of trusteeship were distinguished from issues of colonial administration.[77] The later issues formed Chapter XI entitled *Declaration Regarding Non-Self-Governing Territories*.[78] Among the changes Chapter XII imposed, was a far more detailed set of obligations for the Administering States to fulfill and the Trusteeship Territories had "more sophisticated [legal] personality than under the League Covenant."[79] "The Charter also identified the promotion of political, economic, social and educational development towards self-government as one of the System's principle objectives."[80] The lackadaisical practices of the Mandates System were thrown out with the explicitly stated purposes of the new International Trusteeship System.[81]

The main differences from the previous Mandates System consisted of substantial changes in the security, the oversight system, and the economic relationship between the Trusteeship Territory and the Administering Power were.[82] The Trusteeship Council was a principal organ of the United Nations along with the Security Council, General Assembly, and the International Court of Justice.[83] Rather than composing of private citizens that was typical under the mandate Commission, the Trusteeship Council was to be composed

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73. *See* PARKER, *supra* note 8, at 10. The San Francisco Conference to create the United Nations charter began on April 25, 1945. *See* Wikipedia, The Free Encyclopedia, *available at* http://en.wikipedia.org/wiki/United_Nations (last visited Mar. 8, 2004). The fifty nations at the conference signed the charter on June 26, 1945 and the United Nations came into existence on October 24, 1945. *See id.*

74. *See* PARKER, *supra* note 8, at 10 – 11.

75. *See id.* at 11 (citing H. Duncan Hall, *Mandates, Dependencies and Trusteeships*, 277 (1948)).

76. *See generally* U.N. CHARTER art. 75 – 91.

77. *See* PARKER, *supra* note 8, at 11.

78. *See id.*

79. *See id.* (citing A. Anghie, *The Heart of My Home: Colonialism, Environmental Damage and the Naure Case*, 34 Harv. Int. L. J. 454-55 (1993)).

80. *Id. See also* U.N. CHARTER art. 76, para. 1(b).

81. *See* PARKER, *supra* note 8, at 11.

82. *See id.*

83. *See* U.N. CHARTER art. 7, para. 1. An Economic and Social Council and the Secretariat were the other principle organs listed. *See id.*

of government representatives that could be "backed by the full authority of his or her government"[84] The Council membership was to be evenly divided among administering members and non-administering members.[85] The ultimate authority concerning Trusteeship matters was the General Assembly.[86]

The new trusteeship system also echoed the post-war concerns of security and defense.[87] The Administrating Powers were obligated to provide for and assist the Trust Territories in maintaining "international peace and security."[88] Chapter XII created the concept of Special Strategic Areas[89] allowing the U.N. Security Council to place all or part of a Trust Territory under its jurisdiction.[90] The importance of this unusual clause became very clear as the United States established a string of military bases in the Pacific using that exemption.[91]

The League of Nations dissolved on April 18, 1946, and with that the Mandates System terminated.[92] The majority of the Mandates were voluntarily submitted to the new Trusteeship System.[93] The goal of the Trusteeship Council was "to give the Trust Territories full statehood."[94] After the last trusteeship, Palau,[95] attained statehood in December 1994, the Trusteeship Council suspended operation with a claim that it had succeeded in its duty.[96]

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84. PARKER, *supra* note 8, at 11 (citing H. Duncan Hall, *Mandates, Dependencies and Trusteeships*, 278 (1948)).

85. *See* U.N. CHARTER art. 86, para. 1. Administering members had trust territories to administrate while non-administering members had no trust territories to administer. *See generally id.*

86. *See id.* at art. 85, para. 1.

87. *See* PARKER, *supra* note 8, at 11.

88. *Id. See also* U.N. CHARTER art. 76, para. 1(a).

89. *See id.* at art. 82, para. 1.

90. *See id.* at art. 82. para. 1.

91. *See* PARKER, *supra* note 8, at 11-12.

92. *See id.*

93. *See id.* at 12. Eleven territories were placed under the Trusteeship System. *See id.* at 25.

94. *Id.* at 12. Comment made by U.N. Secretary General Trygve Lie to the Trusteeship Council's first session on March 26, 1947. *See id.*

95. *See* Wikipedia: The Free Encyclopedia, *available at* http://en.wikipedia.org/wiki/Palau (last visited on Mar. 8, 2004). Palau was granted independence on October 1, 1994. Palau is a tropical island nation in the Pacific Ocean located 500 km east of the Philippines. *See id.* Spain colonized the islands during the late 1800's. *See id.* Germany purchased the islands in 1899; however, Japan seized them during World War I. *See id.* Japan obtained a Mandate from the League of Nations and held the islands until the end of World War II. *See id.* The islands were controlled as a Trust Territory of the United States under the United Nations. *See id.* The citizens of Palau elected to have independence instead of joining the Federated States of Micronesia; independence was official in 1994. *See* Wikipedia: The Free Encyclopedia, *available at* http://en.wikipedia.org/wiki/Palau (last visited on Mar. 8, 2004). Palau maintains relations with the United States under a Compact of Free Association, which states the United States will provide for military defense for the island nation for 50 years. *See* Wikipedia: The Free Encyclopedia, *available at* http://en.wikipedia.org/wiki/Foreign_relations_of_Palau (last visited on Mar. 8, 2004).

96. *See* PARKER, *supra* note 8, at 12.

D) International Territorial Administration

The International Trusteeship System and the Mandates System were not the only programs that allowed for the stewardship of so-called undeveloped peoples.[97] An "*ad-hoc* device for the international stewardship of peoples and territory"[98] termed "international territorial administration"[99] should be noted as well. International Territorial Administration [hereinafter ITA] often operated in conjunction with, or as an alternative to, the system of mandates and trusteeships.[100] The overlap of state practice in administering other territories, whether by mandate/trusteeship or ITA,[101] requires an analysis of the ITA as it has evolved over time, especially in conjunction with the mandate/trusteeship concept.[102] A common denominator among all International Territorial Administrations was the "desire to impose order on chaos and help territories and peoples no longer in a position to help themselves."[103] This desire is at the core of the trusteeship concept.[104]

The term, *territorial administration*, "refers to a formally constituted, locally based management structure operating with respect to a particular territorial unit; it can be limited (e.g., a territorial program concerned with certain matters [such as distribution of medicine or electoral monitoring]) or plenary (e.g., a territorial government) in scope."[105] The right to "either ... supervise and control the operation of this structure by local actors, or to operate the structure directly" is asserted by an international organization.[106] This right "can pertain to the structure as a whole, or certain parts of it (e.g., the legislature)", and is exercised by the international organization within the territory.[107]

ITA, as a device, is used "to replace local actors [from administrating], either partly or fully, because of two perceived problems with the 'normal' model [of administration in the territory]."[108] The perceived problems of local administration include: 1), "a perceived sovereignty problem with the presence of local actors exercising control over the territory[;]"[109] and 2), "a perceived governance problem with the conduct of governance by local

97. *See id.*
98. *Id.*
99. Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583, 584-85 (2001).
100. *See id.* at 602-03.
101. *See id.* at 604.
102. *See* PARKER, *supra* note 8, at 12.
103. *Id.*
104. *See id.*
105. Wilde, *supra* note 99, at 585.
106. *See id.*
107. *See id.*
108. *Id.* at 587.
109. Wilde, *supra* note 99, at 587.

actors."[110] "The first problem concerns the identity of the local actors being excluded from administration; the second problem concerns the quality of governance being exercised in the territory."[111]

i.) International Territorial Administration prior to World War I.

The Treaty of Paris of 1856[112] can be said to be the historical origin of the ITA.[113] That treaty established the European Danube Commission for the purpose of restoring lower reaches of the Danube River to a navigable state.[114] The Commission consisted of seven countries including Great Britain, France, Austria, Prussia, Russia, Sardinia and Turkey.[115] As the Commission successfully completed its duties, it was given new powers, including the power "to levy charges, effect public works and regulate river traffic."[116] By World War I, the Commission operated in complete independence of territorial authority, and its personnel and works were accorded neutral status.[117]

Another pre-League of Nations manifestation of ITA was created by the International Sanitary Convention of 1892, which established the International Sanitary Councils.[118] For many decades, the successful operation of the Sanitary Councils in Constantinople, Alexandria, and Tangier helped prevent the spread of infectious diseases.[119] These Councils are noted to "constitute an early humanitarian challenge to the concept of absolute state sovereignty."[120]

The outbreak of World War I ruined a promising pre-League of Nations experiment in ITA concerning the Spitzbergen Archipelago.[121] Located in the Artic Ocean, the Spitzbergen Archipelago was "considered *terra nullius* of

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110. *Id.*

111. *Id.*

112. Treaty of Paris, Mar. 30, 1856, 114 Parry's T.S. 409. *See also* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/pa/Paris-Co.html (last visited Mar. 8, 2004). The Treaty of Paris of 1856 negotiated the peace after the Crimean War between France, Great Britain, the Ottoman Empire, Sardinia, Russia, Austria, and Prussia. *See id.*

113. *See* PARKER, *supra* note 8, at 12.

114. *See id.* at 12-13.

115. *See id.* at 12.

116. *Id.* at 13.

117. *See id.* An internationally recognized flag even flew over the European Danube Commission's establishments. *See id.*

118. *See* PARKER, *supra* note 8, at 13.

119. *See id.*

120. *Id.*

121. *See id.* The Spitzbergen Archipelago appears to be currently named Svalbard with Spitzbergen being the largest island. *See* Wikipedia: The Free Encyclopedia, *available at* http://en.wikipedia.org/wiki/Spitzbergen (last visited Mar. 8, 2004). The islands are located at Seventy-Eight degrees north latitude and Twenty degrees west longitude in the Artic Ocean and are approximately the size of the state of West Virginia. *See* CIA – The World Factbook – Svalbard, *available at* http://www.cia.gov/cia/publications/factbook/print/sv.html (last visited Feb. 16, 2004) (copy on file with author) [hereinafter Svalbard].

little or no value until the discovery of workable coal deposits in 1900," which prompted interest from Norway, Sweden, and Russia.[122] The three countries drafted a convention creating a neutral Spitzbergen open to all nationalities in 1912.[123] The draft convention was never ratified due to the start of World War I; however, the draft "became the blueprint for subsequent 'free city' proposals."[124] In 1920, Norway's sovereignty was recognized; it took over the territory in 1925.[125]

While the above examples of direct international territorial administration were largely successful, most attempts at ITA failed and gave the drafters of the League of Nations Covenant a negative impression of the ITA concept.[126] These failures included an attempt to create an International Police Force in the Sultanate of Morocco,[127] and the Albanian International Commission of Control.[128] In 1919, these failures provided President Wilson's opponents at the Paris Peace Conference with ample reason to reject Wilson's idea of writing the principle of direct international administration into the League Covenant.[129]

ii.) International Territorial Administration between the World Wars.

The absence of the principle of direct international administration in the League Covenant was not an obstacle for the League to press the concept "into service as a convenient solution to a variety of disparate problems during the inter-war years."[130] The League first exercised ITA in the Free City of Danzig, where the League "possessed certain governmental rights between

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122. *See* PARKER, *supra* note 8, at 13.

123. *See id.*

124. *Id.*

125. *See* Svalbard, *supra* note 121. At the Paris Peace Conference of 1919, the option of putting Spitzbergen under the Mandates System was discussed. *See* PARKER, *supra* note 8, at 13.

126. *See* PARKER, *supra* note 8, at 13.

127. *See id.* at 14. The International Police was created at the Algeciras Conference of 1906 to maintain order and relieve rising tensions between the European, mostly French, residents and the local population. *See id.* The idea behind the International Police was to suppress unrest in the Sultanate of Morocco in order to deprive France of a reason to occupy Morocco. *See id.* It failed in 1911 when France occupied Morocco. *See id.*

128. *See* PARKER, *supra* note 8, at 13. The Albanian Commission of Control began operations in October 1913 to shepherd the Albanians toward independence after the Ottoman Turk administration left. *See id.* The European powers offered the Commission little support and did not send troops to impose order in the chaotic Albanian territory. *See id.* at 14. When World War I broke out in July 1914, the Commission members withdrew, leaving Albanian on its own. *See id.* Austria occupied Albania in 1916 after a year and a half of anarchy in the territory. *See id.*

129. *See id.*

130. PARKER, *supra* note 8, at 15.

1920 and 1939."[131] To establish a permanent solution to competing Polish and German claims to the city, the Treaty of Versailles[132] created the Free City.[133] Poland enjoyed authority over certain domestic issues as well as foreign policy.[134] Danzig itself was self-administered, however, the League was empowered "to ensure that the city's 'free' status was not imperiled by the local administration,"[135] and "to settle disputes between the [F]ree [C]ity and Poland."[136]

The League also administered the German Saar Basin between 1920 and 1935.[137] Under the Treaty of Versailles, France was entitled to reparations from Germany by exploitation of mines located in the Saar region for fifteen years.[138] France had desired to annex the Saar outright, but those efforts were thwarted during negotiations at the Paris Peace Conference.[139] In light of France's desire of the Saar, French administrative control was seen as problematic.[140] The solution was to have the League administrate the Saar during the fifteen year period of reparations, after "which the citizens of the Saar would be given the opportunity to choose between union with France, union with Germany or remaining under League control."[141] With respect to sovereignty claims, the League was seen as neutral.[142] The interests of both Germany and France were protected by the League and allowed the two countries to address the issue of the Saar in a less hostile atmosphere.[143]

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131. Wilde, *supra* note 99, at 586. *See also* PARKER, *supra* note 8, at 15. Danzig was an ethnically German city on the Baltic coast in the German state of West Prussia. *See* United States Holocaust Memorial Museum, *at* http://www.ushmm.org/wlc/article.php?ModuleID =10005438 (last visited Oct. 29, 2003)(copy on file with author). After World War I, the Treaty of Versailles required Germany to cede West Prussia to the new state of Poland. *See id.* After World War II, the Danzig was acquired by Poland, the ethnic Germans expelled or fled, and the city was renamed Gdansk. *See id.*

132. Treaty of Versailles, June 28, 1919. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/ve/VersaillTr.html (last visited Mar. 8, 2004). The Treaty of Versailles was the most important among the five peace treaties that ended World War I. *See id.* It was signed on June 28, 1919 by Germany and the countries that fought against Germany save Russia. *See id.*

133. *See* PARKER, *supra* note 8, at 15.

134. *See* Wilde, *supra* note 99, at 596.

135. PARKER, *supra* note 8, at 15. *See also* Wilde, *supra* note 99, at 596.

136. Wilde, *supra* note 99, at 596.

137. *See id.* at 586. *See also* PARKER, *supra* note 8, at 15. The Saar is bordered by France in the south and west and Luxembourg in the northwest. *See* The Columbia Encyclopedia, Sixth Ed. (2001), *available at* http://www.bartleby.com/65/sa/Saarland.html (last visited Mar. 8, 2004) [hereinafter Saarland].

138. *See* Wilde, *supra* note 99, at 589. *See also* PARKER, *supra* note 8, at 15. The Saar has extensive coal mines. *See* Saarland, *supra* note 137.

139. *See* PARKER, *supra* note 8, at 15.

140. *See* Wilde, *supra* note 99, at 589. *See also* PARKER, *supra* note 8, at 15.

141. PARKER, *supra* note 8, at 15.

142. *See* Wilde, *supra* note 99, at 589.

143. *See* PARKER, *supra* note 8, at 15.

League administration was successfully dissolved in 1935, when the residents of Saar voted for union with Germany.[144]

More significant development of the ITA principle occurred in 1933 when Peruvian irregulars invaded and occupied the Colombian border town of Leticia.[145] Peru, while claiming no responsibility for the attack, promised to come to the irregulars' aid if Columbian forces attempted to retake the border town.[146] Tensions along the border were high as the League's assistance was sought to resolve the crisis.[147] The solution reached was plenary administration of Leticia by the League in the name of Columbian government for one year, accompanied by withdrawal of the Peruvian irregulars.[148] Columbia was responsible for the League Commission's expenses and administrative costs along with providing troops for the Commission's security.[149]

The mission features reflected that it was common acceptance that Leticia was part of Colombia.[150] "[F]or Colombia the League's intervention simply facilitated the peaceful hand-over of control of [Leticia] to its forces."[151] Peru agreed to the League solution because it provided "that the territory would [be held in trust and] not be transferred to Colombia until the wider border dispute between the two countries was resolved."[152] The League ITA allowed Leticia to be shielded from further conflict as Peru and Colombia negotiated on all other outstanding issues.[153] Upon the creation of a border agreement that resolved the issues, only then could control of Leticia be transferred back to Columbia.[154]

Though invited by the disputants to assist in the resolution of their border conflict, the League set precedent by intervening on its own initiative to place the sovereignty of a territory in dispute within its own powers.[155] This is in contrast to the League's administration of the Saar, due to authority being granted to the League by the Treaty of Versailles.[156]

iii.) International Territorial Administration during the Cold War.

After World War II, the idea of international cooperation and performing as a group of united nations was fashionable, especially among minor

144. *See id.*
145. *See* Wilde, *supra* note 99, at 588. *See also* PARKER, *supra* note 8, at 15.
146. *See* Wilde, *supra* note 99, at 588.
147. *See* PARKER, *supra* note 8, at 15.
148. *See* Wilde, *supra* note 99, at 588.
149. *See id. See also* PARKER, *supra* note 8, at 15.
150. *See* Wilde, *supra* note 99, at 588.
151. PARKER, *supra* note 8, at 15.
152. Wilde, *supra* note 99, at 588.
153. *See id.*
154. *See id.*
155. *See* PARKER, *supra* note 8, at 16.
156. *See id.*

states.[157] President Wilson's idea for direct international government was crafted into Article 81 of the United Nations Charter, which identified the United Nations as a potential Administering Authority within the International Trusteeship System.[158] These factors allowed the possibility of "a considerably more proactive international organi[z]ation than the League."[159]

An ITA was set up with the United Nations as a potential Administering Authority for Libya; thereby, promoting the ideals behind Article 81 in a setting outside of the International Trusteeship System.[160] In 1947, the victorious Allied countries of World War II were empowered to decide the status of Libya, a former Italian colony.[161] The Allies passed the issue to the United Nations General Assembly, who then appointed a United Nations Commissioner for Libya whose duties were to prepare the territory for independence.[162] Two other Administrating Powers, France and Britain, in conjunction with the United Nations, administered Libya until independence in 1951.[163]

Early in the United Nations' life, other experiments in ITA were crafted, but never implemented for one reason or another.[164] The U.N. General Assembly adopted a resolution for the international administration of the City of Jerusalem in November 1947.[165] Upon British withdrawal from the Mandate of Palestine, two independent states, one Jewish and one Arab, were to be created with the U.N. Trusteeship Council administrating Jerusalem no later than October 1, 1948.[166] The General Assembly delegated to the Trusteeship Council powers clearly not identified in the U.N. Charter.[167] The 1948 war between Israel and Jordan halted the implementation of this plan.[168] It should be noted that "more than two-thirds of the votes cast in the General Assembly [favored] the plan underlined the willingness of the Member States right from the outset to consider using the Trusteeship Council for tasks outside those explicitly stated in the Charter."[169]

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157. *See id.*

158. *See id.* Article 81 reads, "The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself." U.N. CHARTER art. 81

159. PARKER, *supra* note 8, at 16.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

164. *See generally* PARKER, *supra* note 8, 16-20.

165. *See* G.A. Res. 181(II), U.N. GAOR, 2nd Sess, U.N. Doc. A/516 (1947).

166. *See id.*

167. *See* PARKER, *supra* note 8, at 16-17.

168. *See id.* at 17.

169. *Id.*

Another failure in international territorial administration, "the refusal of South Africa to place its former class 'C' Mandate South West Africa under the International Trusteeship System[,]"significantly impacted the development of international law. [170] The International Court of Justice (ICJ) issued four advisory opinions and two judgments on this issue over the next thirty years when South Africa attempted to annex South West Africa after the dissolution of the League of Nations and its Mandates system in 1946.[171]

In 1950, the first advisory opinion issued by the ICJ considered whether or not South Africa was obligated to place South West Africa under the U.N. Trusteeship System.[172] The Court reasoned that a Mandate was not required to be placed in the Trusteeship System; however, South Africa could not unilaterally alter the international status of South West Africa either.[173] The Court noted that despite the dissolution of the League of Nations "those powers of supervision now belong to the General Assembly of the United Nations."[174]

Two further advisory opinions issued by the ICJ concerned the manner in which supervisory powers could be exercised by the General Assembly.[175] In 1956, "the ICJ found that the General Assembly's Committee on South West Africa could grant oral hearings to petitioners despite [the] fact that the League Council had never actually exercised this right."[176] South Africa continued to ignore the Court's opinions.[177]

In 1966, South Africa successfully contested the jurisdiction of the ICJ in the case of South West Africa (Ethiopia v. South Africa: Liberia v. South Africa).[178] The Court's judgment that Ethiopia and Liberia could not enforce rights that did not belong to them so enraged the developing countries that redress was sought through the U.N. General Assembly.[179]

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170. *See id.*

171. *See id.* at 17-19.

172. *See* International Status of South-West Africa, 1950 I.C.J 128 (July 11).

173. *See* PARKER, *supra* note 8, at 17. *See also* International Status of South-West Africa, 1950 I.C.J. 128 (July 11).

174. International Status of South-West Africa, 1950 I.C.J 128, at 141 (July 11).

175. *See* PARKER, *supra* note 8, at 17. *See also* International Court of Justice: List of all Decisions and Advisory Opinions Brought Before the Court Since 1946, *at* http://www.lawschool.cornell.edu/library/cijwww/icjwww/idecisions.htm (last visited Mar. 8, 2004). The two advisory opinions are Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, 1955 I.C.J. 67 (June 7) and Admissibility of Hearings of Petitioners by the Committee on South-West Africa, 1956 I.C.J. 23 (June 1). *See id.*

176. PARKER, *supra* note 8, at 17. *See also* Admissibility of Hearings of Petitioners by the Committee on South-West Africa, 1956 I.C.J. 23 (June 1).

177. *See* PARKER, *supra* note 8, at 17.

178. *See* South West Africa (Ethiopia v. South Africa: Liberia v. South Africa), 1966 I.C.J. 6 (July 18).

179. *See* PARKER, *supra* note 8, at 18.

In October 1966, the General Assembly cancelled South Africa's Mandate and placed South West Africa under United Nations' responsibility.[180] The General Assembly created the United Nations Council for South West Africa to administrate the former Mandate by Resolution 2248; however, South Africa refused to accept the withdrawal of its mandatory power, and refused the Council's entry into the territory.[181]

The last advisory opinion issued by the ICJ in 1971 concerning South West Africa, [182] (since renamed Namibia) concluded the U.N. General Assembly was the legal successor to the League's supervisory powers and it lawfully terminated South Africa's Mandate.[183] It was not until 1988 that South Africa finally agreed to Namibian independence; at that time the only administrative role exercised by the United Nations was to supervise and control the local elections.[184]

Though the territory never became the subject of an ITA, the General Assembly clearly intended that it should have been.[185] A bright side to the failure of the South West Africa situation is that a strong body of law developed concerning "a number of key aspects of the Trusteeship System including its overall purpose, the powers invested in the General Assembly and the accountability of Administering Authorities."[186]

The United Nations made "one more substantive attempt during the Cold War period to exercise sole executive authority" over a disputed territory, Irian Jaya (the western half of the island of New Guinea).[187] The territory remained under Dutch administration when the rest of the Dutch East Indies gained independence as Indonesia.[188] By 1960, the Netherlands and Indonesia had such a long running dispute over the territory that "serious consideration" was given to a Malaysian proposal to create a trusteeship under the joint supervision of Malaysia, Netherlands, and Australia.[189] The proposal received Dutch approval; however, the Indonesians saw that independence was the logical end of a U.N. trusteeship and subsequently rejected the proposal.[190]

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180. *See id.* The General Assembly's actions cancelled the Mandate. *See* G.A. Res. 2145, U.N. GAOR, 21th Sess., Supp. No. 21, U.N. Doc. A/RES/2145 (1966).

181. *See* PARKER, *supra* note 8, at 18. *See also* Wilde, *supra* note 99, at 592.

182. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21).

183. *See* PARKER, *supra* note 8, at 18.

184. *See* Wilde, *supra* note 99, at 593. Under U.N. Supervision South African forces withdrew from Namibia in 1990. *See also* PARKER, *supra* note 8, at 18.

185. *See* PARKER, *supra* note 8, at 18.

186. *Id.* at 18 – 19.

187. *See id.* at 19.

188. *See* Wilde, *supra* note 99, at 588.

189. *See* PARKER, *supra* note 8, at 19.

190. *See id.*

The U.N performed an ITA for seven months (October 1962 to May 1963) in Irian Jaya to manage the transfer of authority from Dutch colonial authorities to Indonesia.[191] The U.N. followed up by monitoring a popular vote to determine if the people wished to stay with Indonesia or become independent.[192]

iv.) International Territorial Administration After the Cold War.

The end of the Cold War was a new dawn for the United Nations in its exercise of authority in significant new ways to address conflicts and resolve the aftermath.[193] By this time, the U.N. Trusteeship Council had nearly disappeared from the international stage with only one trusteeship left under its supervision.[194] The Trusteeship Council was regarded as a relic and some suggested it was time to kill off the institution.[195] The U.N. Security Council was now the rising star on the stage as it was providing the diplomatic leadership for the international community.[196]

The 1991 Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia provided the first major U.N. exercise in governance.[197] The Cambodian factions delegated various governmental functions to the United Nations Transitional Authority in Cambodia (UNTAC),[198] including foreign affairs, finance, and defense.[199] UNTAC was created by the U.N. Security Council.[200]

The former Yugoslavian territories of Eastern Slavonia, Baranja, and Western Slavonia, were placed under U.N administration for two years as a result of the Dayton Peace Accords.[201] The U.N. ousted a military regime in Haiti that usurped the power of the democratically elected President

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191. *See* Wilde, *supra* note 99, at 588. *See also* PARKER, *supra* note 8, at 19 - 20.

192. *See* Wilde, *supra* note 99, at 588. *See also* PARKER, *supra* note 8, at 19 - 20.

193. *See* Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L. L. 76 (2001).

194. *See* PARKER, *supra* note 8, at 20.

195. *See id.*

196. *See id.*

197. *See* Matheson, *supra* note 193, at 77.

198. *See id.*

199. *See* PARKER, *supra* note 8, at 20-21.

200. *See* Matheson, *supra* note 193, at 77. *See also* PARKER, *supra* note 8, at 21.

201. *See* PARKER, *supra* note 8, at 21. The talks at Dayton, Ohio led to a peace accord between Bosnia, Croatia, and Serbia following the breakup of Yugoslavia. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/yu/Yugoslav.html (last visited Mar. 8, 2004).

Aristide.[202] All of the above missions "embody aspects of international territorial administration."[203]

"The U.N. was back in the State-building business with a vengeance . . ."[204] when it was engaged in the tasks of rebuilding and governing both Kosovo and East Timor in 1999 – 2000.[205] The interventions in Kosovo and East Timor have been described "as examples of 'Security Council-Mandated Trusteeship Administration.'"[206] Some began to look at the star of the Trusteeship Council to see if it could rise again to meet these new challenges.[207]

E) The Principles of Non-Self-Governing Territories

The U.N. Charter, through Articles 73 and 74, commit member states with colonial possessions or non-self-governing-territories (NSGTs)[208] to the good stewardship principles proclaimed by the Trusteeship System.[209] "The first designated NSGTs [by the U.N.] were voluntarily admitted to the U.N. regime."[210] After Spain and Portugal refused to voluntarily comply with Chapter XI of the U.N. Charter, the General Assembly passed Resolution 1541 (XV) of 1960 which allowed a special committee to designate certain territories as NSGTs without the consent of the colonial or occupying power.[211]

PART II: THE PRINCIPLES OF TRUSTEESHIP

Chapters XII and XIII of the U.N. Charter contain the textual legal framework of the U.N. Trusteeship System.[212] Combined with the operational practice performed by the Trusteeship System, this section of the Note will

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202. *See* PARKER, *supra* note 8, at 21. In 1994, the U.N. authorized the use of force to restore democratic rule to Haiti. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/ha/Haiti.html (last visited Mar. 8, 2004). As United States forces were about to invade, the Haitian military leaders negotiated an amnesty and allowed President Aristide to return to power on October 15, 1994. *See id.* By then, United States forces had landed to oversee the transition. *See id.*

203. PARKER, *supra* note 8, at 21.

204. *Id.*

205. *See id. See also* Matheson, *supra* note 193, at 78 - 83.

206. PARKER, *supra* note 8, at 21.

207. *See id.*

208. *See* U.N. CHARTER art. 73. Article 73 broadly defines Non-Self-Governing Territories as "territories whose peoples have not yet attained a full measure of self-government . . . ." *See Id.*

209. *See* PARKER, *supra* note 8, at 22.

210. *See id.* The territories voluntarily admitted were administered by Australia, Belgium, France, the Netherlands, New Zealand, the United Kingdom, and the United States. *See id.*

211. *See id.*

212. *See id.*

analyze the key principles of a trusteeship: positive development, eligibility, consent, accountability, and legal status.[213]

A) Positive Development

"The core aims of the Trusteeship System are enumerated in Article 76 of the UN Charter as the furtherance of international peace and security; the promotion of political, economic, social and educational advancement; progressive development towards self-government or independence; respect for human rights and equal administration of justice."[214] The Administrating Authorities have the duty to protect and defend the Trust Territories from aggressive external threats and to maintain public order internally to ensure "international peace and security."[215] Political advancement towards a democratic government is clearly expressed by "freely expressed wishes of the peoples" in Article 76(b).[216] The Trusteeship Council has promoted this ideal from the beginning. For example, the Trusteeship Council recommended to the Administering Authorities of Ruanda-Urundi[217] and Tanganyika[218] that

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213. *See* PARKER, *supra* note 8, at 22 - 30.

214. PARKER, *supra* note 8, at 23. Article 76 of the U.N. Charter states in its entirety:

> 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.

215. PARKER, *supra* note 8, at 23. *See also* U.N. CHARTER art. 76(a).

216. U.N. CHARTER art. 76(b).

217. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/ru/RuandaUr.html (last visited on Mar. 6, 2004). The territory of Ruanda-Urundi is now divided between the central African states of Rwanda and Burundi. *See id.*

218. *See* The Columbia Encyclopedia, 6th ed. (2001), *available at* http://www.bartleby.com/65/ta/Tanzania.html (last visited on Mar. 6, 2004) [hereinafter Tanzania]. In 1964, the African countries of Tanganyika and Zanzibar combined to form modern Tanzania. *See id.* Tanganyika was originally a British colony, then was transferred to Germany in 1890, and was transferred back as a Mandate to Britain after World War I. *See id.* Tanganyika was declared an independent nation on December 9, 1961. *See id.*

they take immediate steps to transition the population from a tribal system to a modern electoral political system.[219]

In order to be truly politically independent, a territory must have some degree of self-sufficiency and economic independence; however, the Administering Authorities must temper the pursuit of legitimate economic development or else it is simple exploitation of the Trust Territories' resources.[220] "[P]rovisions for keeping the land and its natural resources in the hands of the local population" have been included in most Trusteeship Agreements.[221]

Without improvements to social and educational areas, the previously mentioned improvements of political and economic development would be hollow.[222] Although most Trusteeship Agreements contain few details about these improvements, Administering Authorities often point to successes in this field.[223] The British note the number of children in school in Tanganyika (modern Tanzania)[224] rose from 35,000 in 1937 to 400,000 in 1960.[225] France notes the French Cameroons' figure was 100,000 in 1937 to 370,000 in 1961.[226] The Trusteeship Agreement for Italian Somaliland was atypically specific in expressing the positive changes expected in social improvement: "slavery and child marriage is to be abolished, the sale of drugs, alcohol and firearms controlled and hospitals built."[227]

Although improvements concerning social and educational issues are generally vague in Trusteeship Agreements, agreements are more concrete concerning "the promotion of human rights and [other] fundamental freedoms."[228] The Administering Authority is to promote "progressive development towards self-government or independence."[229] "[T]he population of a territory may wish to exercise their right to self-government in one of three ways: independence, local autonomy within a larger association of some kind or even assimilation into a larger sovereign State."[230] The determination as to when a population of the Trust Territory has the right to self-determination proved to be a major sticking point between Trust Territories and the Administrating Powers.[231] Although the Trusteeship Council only once

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219. *See* PARKER, *supra* note 8, at 23.
220. *See id.*
221. *Id.*
222. *See id.*
223. *See id.* at 24.
224. *See* Tanzania, *supra* note 218.
225. *See* PARKER, *supra* note 8, at 24.
226. *See id.*
227. *Id.*
228. *Id.*
229. U.N. CHARTER art. 76(b).
230. PARKER, *supra* note 8, at 24.
231. *See id.*

applied a time limit on a Trusteeship Agreement,[232] the practice of the Council shows an expectation that the Trusteeships be concluded at the earliest possible moment.[233]

B) Eligibility

Article 77 of the U.N. Charter created three categories of territories eligible for placement in the International Trusteeship System.[234] First, territories which had been placed under the League of Nations Mandates System fell under Article 77(1)(a).[235] Second, territories formally controlled by the defeated countries of World War II were covered in Article 77(1)(b).[236] Third, a state could voluntarily place a territory for which it is responsible for administering into the Trusteeship System by the powers of Article 77(1)(c).[237] The Trusteeship System had eleven territories placed into it;[238] "ten were former Mandates of the League of Nations"[239], and one was a territory detached from a defeated nation of World War II.[240] At this time no territory has been voluntarily placed under the Trusteeship System using Article 77(1)(c).[241]

C) Consent

The only serious attempt of voluntary placement in the Trusteeship System was made by India by exercising Article 77(1)(c).[242] The Indian

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232. *See id.* A time limit of ten years was placed on Italian Somaliland. *See id.*

233. *See id.*

234. *See* U.N. CHARTER art. 77(1). Article 77(1) states:

The trusteeship shall apply to such territories in the following categories as may be placed there under by means of trusteeship agreements:

a. territories now held under mandate;
b. territories which may be detached from enemy states as a result of the Second World War; and
c. territories voluntarily placed under the system by states responsible for their administration.

Id.

235. *See* U.N. CHARTER art. 77(1)(a).

236. *See* U.N. CHARTER art. 77(1)(b).

237. *See* U.N. CHARTER art. 77(1)(c).

238. *See* PARKER, *supra* note 8, at 25.

239. *Id.* The ten territories placed into trusteeship under Article 77(1)(a) were British Togoland, French Togoland, French Cameroons, British Cameroon, Tanganyika, Ruanda-Urundi, Western Samoa, Nauru, New Guinea, and the Trust Territory of the Pacific Islands consisting of Micronesia, the Marshall Island, the Northern Mariana Islands and Palau. *See* Mapping the United Nations with Gender Perspective, *at* http://www.peacewomen.org/un/basics/unbeg.html (last visited Mar. 6, 2004). *See also* Trusteeship, *supra* note 7.

240. *See* PARKER, *supra* note 8, at 25. The former Italian colony of Somaliland was the one territory placed into trusteeship under Article 77(1)(b). *See id.*

241. *See id.*

242. *See id.*

delegate to the United Nations "described the International Trusteeship System as: '[t]he surest and quickest means of enabling the peoples of dependent territories to secure self-government or independence.'"[243] India sponsored a draft resolution to see if any of the states administering dependent territories (colonies) intended to place them in the Trusteeship System, but it ultimately failed to obtain adequate support.[244] India tried again with a different resolution to "encourag[e] the colonial powers to consider voluntarily placing 'relatively backward' territories and colonies afflicted by racial discrimination under the 'progressive and impartial' supervision of the United Nations."[245] The colonial powers did not respond well to this draft and it was defeated in a General Assembly vote.[246]

Article 79 states "[t]he terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned[,]"[247] indicating that the states involved in the trusteeship, either as Trusteeship Territories or Administering Powers, must consent to any changes to the agreement.[248] Without the consent of a state that is directly concerned in the situation, the international community will not approve a trusteeship. [249] This was demonstrated when Indonesia objected a Malaysian proposal to place Irian Jaya under a U.N. Trusteeship.[250]

D) Accountability

A trilateral relationship exists between the Trust Territory, the Administering Authority/Authorities, and the United Nations acting as the neutral Supervising Authority.[251] Although the Administering Authority/Authorities has in practice been a State(s), Article 81 allows the United Nations to have a dual role as both Supervisor and Administrator.[252] Articles 87 and 88 of the U.N. Charter provided the Trusteeship Council with great administrative power to ensure the Administrating Authorities were accountable to the Council and the General Assembly.[253]

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243. *Id.*
244. *Id.*
245. *See* PARKER, *supra* note 8, at 25.
246. *See id.* at 25-26.
247. U.N. CHARTER art. 79.
248. *See* PARKER, *supra* note 8, at 26.
249. *See id.*
250. *See id.*
251. *See id.*
252. *See id.* Article 81 states, "The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states *or the Organization itself.*" U.N. CHARTER art. 81. (Emphasis added)
253. *See* PARKER, *supra* note 8, at 26 - 27.

Article 87(a) provided the Trusteeship Council the ability to receive "reports submitted by the administering authority"[254] based upon "a questionnaire on the political, economic, social, and educational advancement of the inhabitants" that the Trusteeship Council formulated itself. [255] The Administering Authority had to present the results of the questionnaire to the General Assembly via an annual report.[256]

Accountability was further enhanced by Article 87(b) allowing the Trusteeship Council to "accept petitions and examine them in consultation with the administering authority."[257] Inhabitants of the Trust Territories sent both written and oral petitions to the Trusteeship Council to have grievances redressed.[258]

A further enhancement of accountability in the Trusteeships System was provided in Article 87(c) by allowing "periodic [inspection] visits to the respective trust territories at times agreed upon with the administering authority."[259] This increased the accountability that the League of Nations had against the Mandatory Powers, who had successfully resisted the idea of regular inspection visits against them.[260] The inspection visits had positive effects upon the Trust Territories, including the abolishment of racial discrimination and corporal punishment.[261]

Perhaps the best example of an Administering Authority being held accountable to the Trust Territory and the native population is the Island of Nauru.[262] The small island had rich phosphate deposits so valuable that Australia, New Zealand, and Britain positioned themselves for control of the island.[263] After World War II, the trusteeship for the island was awarded to Australia.[264] To assist in the mining operations, Australia attempted to move

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254. U.N. CHARTER art. 87(a).

255. U.N. CHARTER art. 88. Article 88 states:

> The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

Id.

256. *See id.*

257. U.N. CHARTER art. 87(b).

258. *See* PARKER, *supra* note 8, at 27. This was a bit of a change from the Permanent Mandates Commission of the League of Nation which had refused to hear oral petitions. *See id.*

259. U.N. CHARTER art. 87(c).

260. *See* PARKER, *supra* note 8, at 27.

261. *See id.*

262. *See id.* Nauru is an island in the slightly south of the equator in the South Pacific Ocean, south of the Marshall Islands. *See* CIA – The World Factbook – Nauru, *at* http://www.cia.gov/cia/publications/factbook/geos/nr.html (last visited on Mar. 6, 2004). At twenty-one square kilometers, Nauru is the world's smallest independent republic. *See id.*

263. *See* PARKER, *supra* note 8, at 27.

264. *See id.* at 28.

the population; however, that failed by August 1964.[265] As a result of the ecological damage caused by the mining operations, the United Nations "General Assembly reaffirmed the 'inalienable right of the people of Nauru to self-government and independence' and resolved that Australia should take immediate steps to restore the island 'for habitation by the Nauruan people'".[266]

In June 1992, the International Court of Justice ruled that it had jurisdiction to hear the Nauru case.[267] This was the first case where an Administering Authority had an action brought against it by a former Trust Territory.[268] The people of Nauru sought restitution for having one-third of the island mined out during Australian administration, and failing to rehabilitate the land after mining.[269] Eventually the case was settled for 107 Million Australian Dollars with 2.5 Million Australian Dollars going to rehabilitation projects for a period of twenty years.[270]

E) Legal Status

"It has been an assumption of the international political system that states are 'sovereign,' though there was sometimes confusion as to whether sovereignty was a characteristic, an implication, a consequence, or a definition of statehood."[271] While it is beyond the scope of this Note to debate the exact nature of sovereignty, its importance to the Trusteeship System cannot be denied.[272] Where sovereignty resides in the Trusteeship System is a complex problem.[273]

Judge McNair of the International Court of Justice opined in *International Status of South West Africa*[274] that "[s]overeignty over a [m]andated [t]erritory is in abeyance."[275] Judge McNair stated that when a territory became an independent State "sovereignty will revive and vest in the new state."[276] This concept was further expanded by Judge Ammoun in the *Advisory Opinion on Namibia* when he maintained that, "sovereignty was

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265. *See id.*

266. *See id.*

267. *See* Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 I.C.J. 240 (June 26).

268. *See* PARKER, *supra* note 8, at 28.

269. *See id.*

270. *See id.* The Compact of Settlement was signed on August 10, 1993. *See id.*

271. LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS (4th ed. 2001) at 3.

272. *See* PARKER, *supra* note 8, at 29.

273. *See id.*

274. *See* International Status of South West Africa, 1950 I.C.J. 128, at 150 (July 11) (separate opinion of Sir Arnold McNair).

275. *Id. See also* PARKER, *supra* note 8, at 29.

276. International Status of South West Africa, 1950 I.C.J. 128, at 150 (July 11) (separate opinion of Sir Arnold McNair).

inherent in every people, including those subject to [a] Mandate, and that in such circumstances sovereignty had simply been temporarily deprived of freedom of expression."[277]

Although sovereignty may be temporarily deprived of freedom of expression, the Trust Territories have some international legal personality as "the U.N. Charter brought [those territories] into existence."[278] Whatever legal personality the Trust Territories possess, it "is clearly distinct from that of the Administering Power whose authority over the territory is constrained by the terms of the Trusteeship Agreement."[279] The Trust Territories do not enjoy the same legal rights as fully sovereign states, such as entering into treaties or becoming members of international conventions.[280] Yet, "[a]s the ICJ highlighted in its *Advisory Opinion on the International Status of South West Africa* the indigenous peoples of Trust Territories enjoy passive rights that are not dependent on the bounty of the Administering Authority."[281] The description given by Judge McNair that the Trusteeship Territories are "a new species of international government" appears to be well founded. [282]

PART III: CONTEMPORARY CHALLENGES OF THE MODERN WORLD

The United Nations eagerly rid the world of colonialism by providing for the self-determination of peoples around the world.[283] Before World War II erupted in 1939, "nine colonial powers controlled 150 territories that were inhabited by 650 million people."[284] By the 1970s, the colonial empires had all but disappeared.[285] Against this wave of decolonialism, the Trusteeship System could not protect the territories under its care from "premature statehood."[286] This was noted in ironic form by the U.N. General Assembly when it terminated the Trusteeship Agreement for Ruanda-Urundi[287] and then authorized U.S. $2,000,000 "'to ensure the continuation of essential services

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277. PARKER, *supra* note 8, at 30. *See generally* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J 16, at 67 – 100 (June 21) (separate opinion of Vice-President Ammoun).

278. PARKER, *supra* note 8, at 30.

279. *Id.*

280. *See id.*

281. *Id.*

282. *See* PARKER, *supra* note 8, at 30 (quoting International Status of South West Africa, 1950 I.C.J. 128, at 150 (July 11) (separate opinion of Sir Arnold McNair).

283. *See id.*

284. Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U.J. INT'L. & POL'Y 903, 953 (1997).

285. *See id.*

286. *See* PARKER, *supra* note 8, at 31.

287. *See* Trusteeship, *supra* note 7. Ruanda-Urundi became the modern day nations of Rwanda and Burundi. *See id.*

in the two countries' at the very moment that they were supposedly now able 'to stand by themselves.'"[288]

In the report *An Agenda for Peace*, U.N. Secretary-General Boutros Boutros-Ghali noted a new priority for the United Nations would be "post-conflict peace-building."[289] To pursue this goal, the Secretary-General stated the Security Council, under its Chapter VII powers "to maintain or restore international peace and security," was the U.N. organization of choice to lead in peace-building.[290] This methodology can be termed 'Security Council-mandated Trusteeship Administrations.'[291] The Trusteeship Council was given no role in the report.[292] This section of this Note analyzes the challenges the Security Council has faced or attempted to resolve, and discusses whether the Trusteeship Council could have played a role.

A) State Failure

A failed state has been defined as "the total breakdown of a state without some other 'centrali[z]ed entity' emerging in its place to claim statehood."[293] The response of the international community so far has been to provide humanitarian aid, but they have not addressed the foundational reasons of a state's collapse.[294]

The United Nations response to Somalia as a failed state is noteworthy. In May 1993, the United Nations Operation In Somalia II (UNOSOM II), acting under the authority of Security Council Resolution 814 began the task of 'enforced peace-building.'[295] The purpose of UNOSOM II was to "help create the basic building blocks that would enable [a ruling transitional Somalian authority] to lead the country firmly back onto the road to recovery."[296] Those building blocks were based on humanitarian, political,

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288. PARKER, *supra* note 8, at 31 (quoting G.A. Res. 1746 (XVI), U.N. GAOR, 16th Sess., (1962)).

289. *An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peace-Keeping; Report of the Secretary-General*, U.N. Doc. A/47/277 – S/24111 at ¶5 (1992), *available at* http://www.un.org/Docs/SG/agpeace.html (last visited Mar. 6, 2004).

290. U.N. CHARTER art. 39. Article 39 fully reads, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id. See also* PARKER, *supra* note 8, at 31.

291. PARKER, *supra* note 8, at 37.

292. *See id.* at 31.

293. *Id.*

294. *See id.*

295. *Id.* at 33. *See generally* PARKER, *supra* note 8, at 32-33.

296. *Id.* at 33.

and security grounds.[297] Local warlords began attacks on UNOSOM II personnel and the security situation worsened.[298]

The security and political objectives of UNOSOM II were abandoned by summer 1994.[299] Commentators have noted that a "principle reason[ ] that UNOSOM II failed was that it ultimately subordinated political imperatives to military objectives resulting in each development on the ground being met by a military rather than political response."[300] The principles of governance, not security, are an advantage of the Trusteeship approach.[301]

B) Disintegrating States

The artificial boundaries of a state often do not correspond with the different peoples and cultures living within that state.[302] This has become a destabilizing force in Africa, Europe, and Asia, most notably with the Soviet Union and Yugoslavia, where as states break away, or attempt to break away, into smaller states whose boundaries more closely align themselves to a specific people.[303]

The history of the breakup of Yugoslavia after the Cold War is too extensive to go into detail in this Note. Suffice it to say, that the Kosovo[304] situation is a continuance of a long series of civil wars within the region.[305] The U.N. Security Council, on June 10, 1999, adopted Resolution 1244 creating a United Nations Interim Administration Mission in Kosovo (UNMIK).[306] UNMIK's goal was to create the ability of the Kosovar Albanians "to exercise a degree of self-government within the framework of the Federal Republic of Yugoslavia."[307] To eventually accomplish that goal, "the Secretary-General's Special Representative assumed 'all legislative and executive authority with respect to Kosovo.'"[308]

Although this arrangement sounds somewhat like the international territorial administrations discussed earlier, UNMIK's goal was to create an autonomous Kosovo within the Federal Republic of Yugoslavia, despite the clearly expressed wishes of the population for independence.[309] The Security

297. *See id.* at 32-33.
298. *See id.* at 33.
299. *See id.*
300. *Id.*
301. *See* PARKER, *supra* note 8, at 33.
302. *See id.* at 34.
303. *See id.*
304. *See* The Columbia Encyclopedia, 6th ed. (2001), *at* http://www.bartleby.com/65/ko/Kosovo.html (last visited Mar. 6, 2004). Kosovo is a Serbian province with an ethnic population of approximately eighty percent Albanians. *See id.*
305. *See* PARKER, *supra* note 8, at 34.
306. *See id.*
307. *Id.*
308. *Id.*
309. *See id.*

Council effectively ignored Article 1(2) of the U.N. Charter concerning "self-determination of peoples"[310] in order to create a peace in an unstable region.[311]

No formal Trusteeship Agreement has been created between the States directly concerned and the United Nations, nor has any attempt been made by these States and authorities to raise the issue of the Trusteeship system;[312] therefore, Kosovo is not a Trust Territory as defined by Articles 77[313] and 78.[314] It can be said that Resolution 1244 has created a "*de facto* trusteeship" that has the same goals of a true trusteeship: "peace and security, promotion of self-government, promotion of human rights and equal treatment."[315] Other commentators believe the arrangement in Kosovo is not worthy of the name 'trusteeship' because there is "an expectation that the Trustees will act in the best interests of their charges not in the best interests of the global *status quo*."[316]

C) Disputed Territory

East Timor[317] had been a Portuguese possession until Indonesian forces seized it in 1975.[318] After the population of East Timor voted for independence, pro-Indonesian militias sacked the territory and displaced hundreds of thousands of civilians.[319] Subsequently order was restored and the U.N. Security Council passed Resolution 1272 to establish the United Nations Transitional Administration in East Timor (UNTAET).[320] Some of the administrative acts UNTAET performed included reconstruction of infrastruc-

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310. U.N. CHARTER art. 1. para. 2. It states that one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *Id.*

311. *See* PARKER, *supra* note 8, at 35.

312. *See id.*

313. *See* U.N. CHARTER art. 77(1). Article 77(2) states, "It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms." U.N. CHARTER art. 77(2).

314. *See* U.N. CHARTER art. 78. Article 78 states, "The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality." *Id.*

315. *See* PARKER, *supra* note 8, at 35.

316. *Id.* at 36.

317. *See* East Timor, *supra* note 11. East Timor occupies the eastern half of the island Timor located at the eastern end of the Indonesian archipelago in South East Asia. *See id.* East Timor is northwest of Australia. *See id.*

318. *See id.*

319. *See* Matheson, *supra* note 193, at 81.

320. *See id.* at 82. The U.N. Secutiry Council established UNTAET with the mission to assume overall administrative responsibility for East Timor and exercise executive and legislative authority. *Id.*

ture, appointment and removal of judges and prosecutors, currency transactions, training of civil servants, and regulation of budgetary matters.[321]

UNTAET was more similar than its predecessors in fulfilling the role that would be expected of an Administering Authority under the disfavored Trusteeship System.[322] Resolution 1272 did not ignore the expressed wishes of the East Timorese, their aspirations for self-government, and on May 20, 2002, East Timor became an independent state.[323] "UNTAET can be said to have acted in the best interests of the East Timorese people as they themselves saw it."[324] The 'Security Council-mandated Trusteeship Administrations' had come of age; however, the Security Council was never designed for this function.[325]

PART IV: LEGAL PROBLEMS WITH TRUSTEESHIP

Two concepts pose significant obstacles to imposing trusteeships on states: sovereignty and self-determination.[326] Part IV of this Note analyzes the legal obstacles and determines how the concept of a trusteeship can still be applied or modified to allow compliance with international law.

A) The Sovereignty Problem

"The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality."[327] On its face, such text seems "not to permit the imposition of trusteeship status on Member States,"[328] like Iraq. However, "sovereignty is a relative notion that has varied over time and has adapted to new situations and exigencies . . . ."[329] During the history of the United Nations, the concept of sovereignty has changed and weakened due to an increased interdependence by states via trade, culture, telecommunications, human rights, and other matters.[330] "Control of internal and external

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321. *See id.*

322. *See* PARKER, *supra* note 8, at 36.

323. *See id.* East Timor is currently the world's newest democracy. *See* East Timor, *supra* note 11.

324. PARKER, *supra* note 8, at 37.

325. *See id.*

326. *See* Ruth Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 304 (1995).

327. U.N. CHARTER art. 78. Sovereign equality has been interpreted to mean "each State enjoys the rights inherent in full sovereignty; all States enjoy equal rights and duties as well as juridical equality . . . each State has the right freely to choose and develop its political, economic, and cultural systems . . . ." Gordon, *supra* note 326, n62 (citing Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L.1, 14(1993)).

328. Gordon, *supra* note 326, at 312.

329. *Id.* at 313-14.

330. *See Id.* at 314-15.

affairs is the essence of sovereignty, and surrendering all power over these matters to another entity [such as in a trusteeship] is a relinquishment of sovereignty."[331]

The results of the Iraq war may have simplified the complex issues of sovereignty in a trusteeship context. The question is now, once a country is invaded is it still sovereign? The answer is no. As the United States and United Kingdom are currently administering Iraq with the purpose to transfer sovereignty to the Iraqi people,[332] it cannot be said that Iraq is fully sovereign within the meaning of Article 78 of the U.N. Charter. The sovereignty issue is not a legal obstacle for applying a trusteeship to Iraq due to their, the Iraqi people's, current lack of control over internal and external affairs at this time.

B) A People's Self-Determination

Would the creation of a trusteeship "infringe the right of an indigenous people of a territory to self-determination and to what extent[, if any, can] such an infringement . . . be considered permissible[?]"[333]

"The International Court of Justice has found that self-determination is a legal right specifically applicable to non-self-governing territories."[334] Self-determination has an external component, "that is the right of [the] people to be free of foreign domination."[335] Self-determination also has an internal component, "the right of [the] people to assert its will against its own government."[336] If self-determination means freedom from all forms of foreign control and independence, then a trusteeship, which implies dependence and tutelage under an Administering Authority, sounds conflicting to the principle at first glance.[337]

"Self-determination . . . include[s] the right of a people freely to determine their own political status. While peoples have generally preferred independence when exercising that choice, it is feasible that they might choose a more or less benign form of outside control."[338] This has occurred in a limited fashion for the International Territorial Administration of Cambodia

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331. *Id.* at 316.

332. *See generally* Marina Ottaway & Thomas Carothers, *Policy Brief: The Right Road to Sovereignty in Iraq*, CARNEGIE ENDOWMENT FOR INT'L PEACE, Feb. 15, 2004, *available at* http://www.ceip.org/files/publications/documents/Policybrief27_000.pdf (last visited Mar. 6, 2003).

333. PARKER, *supra* note 8, at 41.

334. Gordon, *supra* note 326, at 319-20. Concerning the right of self-determination to non-self-governing territories see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J 16 (June 21). *See also*, Western Sahara, 1975 I.C.J. 12 (Oct. 16).

335. PARKER, *supra* note 8, at 42.

336. *Id.*

337. *See* Gordon, *supra* note 326, at 321.

338. *Id.* at 322.

as discussed in Part I(D)(iv) of this Note[339] when the warring factions delegated certain duties, such as foreign affairs, finance, and defense to the United Nations Transitional Authority in Cambodia (UNTAC).[340] If self-determination means to pay attention to the freely expressed will of the people, then the people could freely choose, under a democratic process, foreign supervision by an inter-governmental organization.[341]

The U.N. Charter does not appear to find conflict with the principles of trusteeship and self-determination.[342] Article 76(b) states as one of the "basic objectives of the trusteeship system"[343] is to "promote . . . progressive development towards self-government or independence . . . [through] the freely expressed wishes of the peoples concerned."[344] "It would therefore appear that as with the notion of sovereignty, in [the] Trusteeship Territories self-determination is a right held in suspension or abeyance until the Administering Authority can create the circumstances in which it can once more receive expression."[345]

Such a standard was nearly articulated by the International Court of Justice in its Advisory Opinion on the *Western Sahara*.[346]

> The validity of the principle of self-determination . . . is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting [with] the inhabitants of a given territory. Those instances were based . . . on the conviction that a consultation was totally unnecessary, in view of special circumstances.[347]

The broad language of 'special circumstances' can easily cover the situations discussed by Party III of this Note. The Albanian inhabitants of Kosovo under Yugoslav leadership, the East Timorese under either Portuguese or Indonesian rule, nor the Somalians under a state of anarchy and civil war could "truly be said to have been enjoying self-determination prior to the involvement of the international community."[348]

In summary, although the people of Non-Self-Governing Territories have a right to self-determination, that right may be held in suspension until conditions provided by an Administering Authority allow such right to be expressed.

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339. *See infra* Part I (D)(iv).
340. *See* Matheson, *supra* note 193, at 77.
341. *See* Gordon, *supra* note 326, at 322.
342. *See* PARKER, *supra* note 8, at 42.
343. U.N. CHARTER art. 76.
344. U.N. CHARTER art. 76(b).
345. PARKER, *supra* note 8, at 42.
346. *See id.*
347. Western Sahara, 1975 I.C.J. 12 (Oct. 16), at ¶ 59.
348. PARKER, *supra* note 8, at 43.

PART V: A NEW IRAQ WITH THE OLD TRUSTEESHIP COUNCIL

Iraq is currently a land in transition. The March 2003 invasion, led by the United States, ended the regime of dictator Saddam Hussein.[349] Though more control is slowly going back to the Iraqi people, Iraq is currently under the administration of the United States and United Kingdom as occupying powers.[350] Certainly it is theoretically possible that the United States and United Kingdom can voluntarily call the Trusteeship Council back into meeting. The annual meetings were suspended by the Trusteeship Council after it discharged its last Trusteeship Agreement; however, the Council still exists due to the lethargy of the member states in rewriting the United Nations Charter which has prevented the abolition of the Trusteeship Council.[351]

The administering countries can invoke Article 77(1)(c) and voluntarily place the Iraqi territory, as a territory under their responsibility, under the Trusteeship System.[352] This could have occurred between Portugal, Indonesia, concerning the pre-independent territory of East Timor.[353] Several advantages do exist if Iraq were to be placed in the Trusteeship System. The purpose of the Trusteeship Council was to promote peace and security, encourage respect for human rights and equal treatment of people, and advance the economic, social, and political goals of the native people.[354] These are all goals the United States and United Kingdom are pursuing that would add an air of international accountability that some commentators feel is lacking.[355]

As noted in Part III of this Note, the U.N. Security Council was not designed to perform these trusteeship-like tasks due to its focus on maintaining peace.[356] Additionally, the Security Council has a veto power vested in the

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349. *See* CIA – World Factbook – Iraq, *at* http://www.cia.gov/cia/publications/factbook/geos/iz.html (last visited Mar. 6, 2004).

350. *See* S.C. Res. 1483, U.N. SCOR, U.N. Doc. S/RES/1483 (2003).

351. *See* PARKER, *supra* note 8, at 12. *See also* Kennedy, *supra* note 15. During the 1990s there was serious discussion on using the Trusteeship Council in response to the number of failed states, such as Rwanda, Cambodia and Somalia, at that time; however, the idea stalled due to bureaucratic infighting and political objections. *See id.*

352. *See* U.N. CHARTER art. 77 para. 1(c).

353. *See* PARKER, *supra* note 8, at 43. After the citizens of East Timor voted in their popular consultation against future Indonesian rule, Portugal could have invoked Article 77(1)(c) to establish a trusteeship agreeable to both Indonesia and Portugal with the U.N. acting as Administering Authority. *See id.*

354. *See* U.N. CHARTER art. 76.

355. *See* Pierre M. Atlas, *Bold Policy Shifts Needed by U.S. in the Middle East*, INDIANAPOLIS STAR, Sept. 22, 2003, at A10. *See also* David Hannay, *The UN Must Have a Bigger Role in Iraq*, FINANCIAL TIMES, July 15, 2003, *available at* http://www.globalpolicy.org/security/issues/iraq/after/2003/0715unrole.htm (last visited Mar. 6, 2004).

356. *See* PARKER, *supra* note 8, at 37.

Permanent Five that the Trusteeship Council lacks.[357] As a result, the ability to veto turns the Security Council into "a more political animal where the domestic political concerns of its members often outweigh any other consideration[s]." [358]

The Trusteeship Council has access to the other organs of the United Nations under Article 91.[359] Availability of as many resources as possible can only help the situation in Iraq.[360] While access to those and other resources is in part a political question that is beyond the scope of this Note, the practical reality is that such concerns exist.[361]

Another practical concern is that some, perhaps many, countries will not assist in the rebuilding of Iraq unless the United Nations becomes more involved.[362] Under a true Trusteeship System, the United Nations would obtain the ultimate supervisory authority;[363] with the Administering Powers (the United States and United Kingdom already being recognized as "the Authority") having day to day control of the Trust Territory.[364]

As discussed in Part IV of this Note, the legal questions of sovereignty and self-determination are not insurmountable.[365] It appears that under international law such legal issues are allowed to be held in abeyance by Administering Authorities when they are actively promoting the betterment of the people subject to the trust.[366]

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357. *Compare* U.N. CHARTER art. 89 para. 2, "Decisions of the Trusteeship Council shall be made by a majority of the members present and voting." *Id.*, *with* "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members *including the concurring votes of the permanent members.*" U.N. CHARTER art. 27 para. 3. (Emphasis added).

358. PARKER, *supra* note 8, at 50.

359. *See* U.N. CHARTER art. 91. "The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned." U.N. CHARTER art. 91.

360. *See* Kennedy, *supra* note 15. *See also* S. C. Res. 1483, U.N. SCOR, U.N. Doc. S/RES/1483 (2003).

361. *See generally* Jon Sawyer, *Bush Faces Challenges in Gaining U.N. Support*, INDIANAPOLIS STAR, Sept. 21, 2003, at A15. *See also* Atlas, *supra* note 355. *See also* Kennedy, *supra* note 15.

362. *See* Deutsche Welle, *Poland Takes up Iraq Command as U.S. Looks for More Help* (Aug. 3, 2003), *available at* http://www.dw-world.de/english/0,3367,7489_A_962158_1_A,00.html (last visited Mar. 6, 2003). The story notes "India, Pakistan, Turkey among others have been loath to get involved unless the United Nations is given more authority in reconstruction efforts." *Id.* "Some potential troop contributors have refused to commit soldiers unless a multinational force is deployed under a U.N. umbrella." Edith M. Lederer, *Resolution Offers U.N. Larger Role*, INDIANAPOLIS STAR, Sept. 2, 2003, at A1.

363. *See* U.N. CHARTER art. 81.

364. *See* S. C. Res. 1483, U.N. SCOR, U.N. Doc. S/RES/1483 (2003).

365. *See generally* PARKER, *supra* note 8, at 37 – 43.

366. *See id.* at 42.

CONCLUSION

The administration of other lands and peoples for their benefits has a long and well developed history.[367] In the Twentieth Century, the utilization of the Mandates System by the League of Nations and the International Trusteeship Sytsem used by the United Nations, both set up formal programs to assist territories that were not capable of governing themselves for whatever reasons.[368] The last of the Trusteeship Agreements under the U.N. Trusteeship Council expired in 1994.[369] Although originally conceived to assist colonies towards self-determination of their fate, there are situations present today where a trusteeship relationship is conceived to assist peoples that desire some form of self-government.[370]

Iraq is a good candidate to be placed into a trusteeship arrangement as the people are not currently governing themselves due to the occupation after the war; and those people, along with the occupying powers, desire assistance from the outside world to promote the Iraqi people's self-interest. Although the Trusteeship Council has not been in use for nearly a decade now, it still exists with all its chartered legal powers.[371] The initial legal concerns that a trusteeship would be incompatible with goals of sovereignty and self-determination are not as daunting after some analysis.[372] The issue of sovereignty is bypassed due to a military occupation by the United States and United Kingdom thereby preventing the exercise of Iraqi sovereignty.[373] An analysis of the U.N. Charter and several International Court of Justice cases demonstrates that a trusteeship can be utilized as a tool to further self-determination while holding the "right . . . in suspension or abeyance until the Administering Authority can create the circumstances in which it can once more receive expression."[374]

The purpose of the Trusteeship Council was to explicitly advance peoples toward a preferred form of self-governance.[375] The Security Council, whose purpose is the maintenance and restoration of peace and security,[376] has exhibited conflicting duties when imposing trusteeships in Somalia and

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367. *See generally* PARKER, *supra* note 8.

368. *See id.* at 6-9.

369. *See id.* at 12.

370. *See generally id. See also* Gordon, *supra* note 326. *See also* Matheson, *supra* note 193. *See also* Wilde, *supra* note 99.

371. *See generally* PARKER, *supra* note 8.

372. *See id.* at 37 – 43.

373. *See generally* Ottaway & Carothers, *supra* note 332. *See also* Atlas, *supra* note 355. An Islamic summit in Malaysia noted a desire to restore Iraqi sovereignty soon. *See* Patrick McDowell, *Iraq Tops Agenda at Islamic Summit*, INDIANAPOLIS STAR, Oct. 12, 2003, at A15.

374. PARKER, *supra* note 8, at 42.

375. *See* U.N. CHARTER art. 76.

376. *See id.* at art. 24.

Kosovo where security concerns dominated advancement issues.[377] Also, any political wranglings of the members of the Trusteeship Council are easily resolvable with a simple majority vote.[378] This differs from the Security Council, where one Permanent Member's veto power[379] can result in gridlock and inaction. Finally, the use of the United Nations generally, specifically through the Trusteeship Council, could open the floodgates of international aid that the people of Iraq need.[380]

A revival of the United Nations Trusteeship Council, as well as placing Iraq within it, could be the win-win-win solution the United Nations, the United States, and the Iraqi people all desire.

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377. *See* PARKER, *supra* note 8, at 30-36. *See also* Matheson, *supra* note 193.

378. *See* U.N. CHARTER art. 89 para. 2. "Decisions of the Trusteeship Council shall be made by a majority of the members present and voting." *Id.*

379. *See* U.N. CHARTER art. 27 para. 3. "Decisions of the Security Council on all other matters [those non-procedural] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . . ." *Id.* The permanent members are the People's Republic of China, France, Russia, the United Kingdom, and the United States. *See* U.N. CHARTER art. 23 para. 1.

380. *See generally* Ottaway & Carothers, *supra* note 332. *See also* Atlas, *supra* note 355. *See* also Hannay, *supra* note 355. *See also* Sawyer, *supra* note 361. *See also* Lederer, *supra* note 362.

NEW REGULATIONS FOR LAWYERS: THE SEC'S FINAL RULE FOR PROFESSIONAL CONDUCT IN THE WAKE OF SARBANES-OXLEY: CHALLENGES FOR FOREIGN ATTORNEYS

J. Curtis Greene*

I. INTRODUCTION

The 1990's was a period of great expansion and innovation in corporate America.[1] The era was characterized by the growth and exploitation of the technological industry.[2] From both a personal and business standpoint, technology throughout the decade became increasingly interwoven into the fibers of everyday life.[3] Unfortunately, the demand for innovation and technology brought with it the evolution of a stock market of new and poorly understood companies.[4] Also, the robust financial times attracted millions of investors who lacked business knowledge, and to business, the decade tempted thousands of high-level professionals who lacked moral scruples.[5] What followed was a number of major corporate and accounting scandals involving some of the most prominent companies in the United States, including such companies as WorldCom, Global Crossing, Tyco, Adelphia, and most notably Enron.[6]

In the wake of these scandals, investor trust in corporate accounting and financial reporting practices in public-issue companies significantly eroded.[7]

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1. Lawrence A. Cunningham, Professor of Law and Business, Boston College, Sarbanes-Oxley and all that: Impact Beyond America's Shores, Speech to the FESE in London (June 12, 2003), *available at* http://www.fese.be/efmc/2003/report/efmc_cunningham.htm: (last visited Feb. 7, 2004) [hereinafter Cunningham Speech].

2. *See id.*

3. *See id.*

4. Lawrence A. Cunningham, Symposium, *Crisis in Confidence: Corporate Governance and Professional Ethics Post-Enron Sponsored by Wiggin & Dana: The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And it Just Might Work)*, 35 CONN. L. REV. 915, 923 (2003).

5. *Id.*

6. *See* William H. Donaldson, Chairman, U.S. Securities and Exchange Commission, Testimony Concerning Implementation of the Sarbanes-Oxley Act, (Sep. 9, 2003), *available at* http://www.sec.gov/news/testimony/090903tswhd.htm (last visited Feb. 7, 2004) [hereinafter Donaldson Testimony].

7. *See id. See also* Press Release, U.S. Securities and Exchange Commission, SEC Charges Fastow, Former Enron CFO, With Fraud (Oct. 2, 2002), *available at* http://www.sec.gov/news/press/2002-143.htm (last visited Feb. 7, 2004) [hereinafter SEC Fastow Release].

In fact, the scandals left a large number of investors perplexed and destitute.[8] Many experts, including Chairman of the U.S. Federal Reserve, Alan Greenspan, believe that this lack of trust was a major contributor to the economic slowdown in U.S. capital market performance in the early twenty-first century.[9]

In response to the worldwide cries to do something, the U.S. Congress enacted arguably the most sweeping and important federal securities legislation since the 1930's,[10] the Sarbanes-Oxley Act of 2002 (Act).[11] Determined to reduce corporate misconduct and protect investors, the Act establishes new standards for corporate accountability and penalties for wrongdoing.[12] Primarily, the standards place increased responsibilities on those involved in the corporate financial reporting process.[13] The broad scope of the Act, which extends to foreign market participants accessing U.S. capital markets, largely ignores the differences in practices and corporate governance regimes between the United States and other countries.[14] Although the Act provides for the Securities and Exchange Commission (SEC) to reduce application of certain provisions to foreign companies, many are surprised by the extent to which U.S. law and regulatory authority has been extended beyond its borders to areas that would normally be governed exclusively by the law of foreign jurisdictions.[15]

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8. *See* Rosanna Ruiz, *Enron Employees file Suit Over Their 401(k) Losses*, HOUS. CHRON., Jan. 28, 2002, *available at* http://www.chron.com/cs/CDA/prinstory.hts/topstory/1228980.htm (last visited Feb. 7, 2004); Marilyn Geewax, *Accounting Reform Faces Key Vote in Senate Panel*, COX NEWS SERV., May 20, 2002, at Financial Pages (noting that the Enron bankruptcy wiped out thousands of jobs and tens of billions in investors' savings).

9. *See* PriceWaterhouseCoopers, Understanding the Independent Auditor's Role in Building Public Trust: A White Paper, at 2, (2003), *available at* http://www.pwcglobal.com/images/gx/eng/about/svcs/grms/pwc_sowp3.pdf (last visited Sept. 2, 2003); *Rebuilding Trust*, LEGAL WEEK GLOBAL, July 24, 2002, *available at* http://www.legalweekglobal.net/ViewItem.asp?id=9949&Keyword=Rebuilding (last visited Feb. 7, 2004).

10. Ethiopis Tafara, Acting Director, Office of International Affairs, U.S. Securities and Exchange Commission, Addressing International Concerns Under the Sarbanes-Oxley Act (June 10, 2003), *available at* http://www.sec.gov/news/speech/spch061003et.htm (last visited Feb. 7, 2004)[hereinafter Tafara Speech].

11. Public Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). The Act is better known by its short title "The Sarbanes-Oxley Act of 2002." The backdrop of this Note is Chapter 98 Public Company Accounting Reform and Corporate Responsibility codified at 15 U.S.C. § 7201 (et. seq.) (2003), which contains the new rules of professional responsibility for attorneys, 15 U.S.C. § 7245 (2003).

12. *See* Tafara speech, *supra* note 10.

13. *See id.*

14. *Id.*

15. *See* Wayne Kirk, Thelen Reid & Priest LLP, *Sarbanes-Oxley Act of 2002: Application to Foreign Private Issuers with Securities Registered Under the 1934 Act* (Aug. 8, 2002), *at* http://www.thelenreid.com/articles/article/art_135_idx.htm (last visited Feb. 7, 2004). *See also* Tafara Speech, *supra* note 10.

Recognizing the role of attorneys as corporate gatekeepers, Section 307 of the Act establishes new standards of professional conduct for attorneys "appearing and practicing" before the SEC in the representation of public-issue corporations.[16] This includes attorneys of foreign private issuers[17] and those that are licensed to practice in foreign jurisdictions.[18] Particularly, the Act and the subsequent final regulations established by the SEC impose responsibilities on corporate attorneys to monitor and report "up the corporate ladder" evidence of material violations of securities laws or fiduciary duties on the part of those involved in financial reporting process.[19] These responsibilities represent new territory in the realm of attorney accountability.[20] The controversial nature of the new SEC regulations has generated significant and extensive debate in the worldwide legal community.[21]

This Note analyzes the responsibilities the SEC's final rule enacting Section 307 imposes on corporate attorneys, specifically with regard to foreign attorneys who do not meet the SEC's definition of "non-appearing."[22] It begins in Part Two with a discussion of the events, including the many corporate scandals that occurred prior to the passage of the Act and the sharp decline in investor confidence that followed. Part Two also reviews the role of attorneys as gatekeepers in the corporate governance process, including an analysis of the attorneys' participation in the Enron scandal. Part Three then turns to congressional response to the corporate scandals, particularly the passage of the Act. This part provides an overview of the Act and discusses its scope and general impact on the foreign corporate community. Next, Part Four examines the details of the SEC's final regulations mandated by Section 307 of the Act. The discussion includes an in-depth analysis of the scope of the regulations, an analysis of each section, and the consequences of non-compliance. Finally, Part Five discusses the international community's reaction to the new regulations, reviews various application issues for foreign attorneys who do not meet the SEC's definition of "non-appearing," and offers practical suggestions for those attorneys to ensure compliance.

16. *See* 15 U.S.C. § 7245. *See also* Tafara Speech, *supra* note 10.

17. *See* 17 C.F.R. § 240.3b-4 (2003).

18. *See* 15 C.F.R. § 205.2(j) (2003).

19. *See* 15 U.S.C. § 7245; 17 C.F.R. § 205.3 (2003).

20. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6,296 (Feb. 6, 2003) (codified at 17 C.F.R. pt. 205). *See also* Tafara Speech, *supra* note 10.

21. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,296. *See also* Tafara Speech, *supra* note 10.

22. 17 C.F.R. § 205.2(a)(1) (2003).

II. WHAT WENT WRONG IN CORPORATE AMERICA: THE BACKDROP OF THE SARBANES-OXLEY ACT

A. Scandal and Corruption in Corporate America

The 1990's was a period of tremendous expansion and innovation in corporate America.[23] The economic growth was fueled largely in part by the exploitation of communications and information technology, which provided companies tremendous resources for conducting more efficient and broader scale operations.[24] In particular, the exploitation enabled widespread use of the internet and proliferation of the nation's extensive telecom infrastructure.[25] This was also true with the general public where technology throughout the decade became increasingly interwoven into the fabric of everyday life.[26] The use of cell phones and email serve as prime examples, where their usage grew from next to nothing in the mid-1990's to becoming the norm by 2000.[27]

Unfortunately, this demand for innovation and technology during that same time period brought with it the evolution of a "telecom/dot.com-infused" stock market of new and poorly understood companies.[28] Also, the robust financial times attracted to investing millions of first-time investors who lacked general business knowledge and to business, the decade attracted thousands of savvy executives who lacked moral scruples.[29] This combination produced and sustained a period of exaggerated achievements and camouflaged setbacks.[30]

The delusions of the 1990's came to an end in March of 2001 when investors began to realize that a "financial bubble" had developed.[31] The insecurity immediately drove stock prices sharply down, leaving them stagnant for months.[32] Eighteen months later, the market index was further jolted by the September 11, 2001 terrorist attacks and resulting threats of

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23. Cunningham Speech, *supra* note 1; Donaldson Testimony, *supra* note 6.

24. *See* Cunningham Speech, *supra* note 1; Donaldson Testimony, *supra* note 6.

25. *See* Cunningham Speech, *supra* note 1.

26. *See id.*

27. *See id.*

28. Cunningham, *supra* note 4, at 923. *See also* Donaldson Testimony, *supra* note 6 (noting that during the stock market boom of the mid 1990s through early 2000, new entrants undertaking IPOs in the market were among the biggest gainers, especially those from the "dot.com" sector of the economy).

29. Cunningham, *supra* note 4, at 923. *See* Donaldson Testimony, *supra* note 6. "Communications, the explosion of information technology and changes in the culture of equity investing, including the shift to more self-directed retirement accounts, brought millions of individuals with their savings into our stock market for the first time." *Id.*

30. Cunningham, *supra* note 4, at 923.

31. *Id.*

32. *Id. See also* Donaldson Testimony, *supra* note 6 (noting that investors fled the financial markets and the IPO market, which had been so strong during the 1990s, had disappeared).

war.[33] Similar to the events of 1929, the strong economic times and subsequent market decline revealed a series of major corporate scandals that significantly shook investor confidence in public-issue companies.[34] In fact, between December 2001 and July 2002, four of the six largest corporate bankruptcy filings in U.S. history occurred.[35] These four corporations, along with many others, concealed their true financial performance from creditors and shareholders until an inability to meet financial commitments forced them to restate earnings and reveal massive losses.[36]

The catalyst for the greed, malfeasance, and other illicit behavior was that during the boom years, corporate America became increasingly focused on short-term financial results, measured by quarter-to-quarter earnings.[37] "Hitting the numbers," rather than creating a strategy for sound, long-term strength and performance, became the primary business goal.[38] Ultimately, as noted by William H. Donaldson, SEC Chairman, "the perception that uninterrupted earnings growth was the standard for sound corporate progress caused too many managers to adjust financial results with the purpose of meeting projected results—in ways that were sometimes large and sometimes small, but especially given the purpose, in all cases unacceptable."[39]

The first of the major scandals and perhaps the most well known was Enron.[40] The corporation's financial troubles were the result of several Enron executives manipulating the corporation's reported financial results through

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33. Cunningham, *supra* note 4, at 923.

34. *See* SEC Fastow Release, *supra* note 7. *See also* Donaldson Testimony, *supra* note 6.

> As happened after the crash of 1929, the falling market that began in 2000 led to other revelations. Starting with the unfolding of the Enron story in October of 2001, it became apparent that the boom years had been accompanied by fraud, other misconduct and a serious erosion in business principles.

Id.

35. *See* Simon Romero & Riva D. Atlas, *WorldCom Declares Bankruptcy; $107 Billion Filing Largest in U.S. History*, HOUS. CHRON., July 22, 2002, at A1 (noting that the six largest bankruptcies in U.S. history by assets, in billions include WorldCom (2002) (107), Enron (2001) (63.3), Texaco (1987) (35.8), Financial Corp. of America (1988) (33.8), Global Crossing (2002) (25.5), and Adelphia Communications (2002) (23.2)).

36. *See* U.S. Securities and Exchange Commission, Litigation Release No. 18335, SEC v. Glisan, Case No. H-03-3628 (S.D. Tx.), SEC Charges Ben F. Glisan, Jr., Enron's Former Treasurer with Securities Fraud (Sept. 10, 2003), *available at* http://www.sec.gov/litigation/litrelease/lr18335.htm (last visited Feb. 7, 2004) [herinafter SEC Glisan Release]. *See also* U.S. Securities and Exchange Commission, Litigation Release No. 18277, SEC v. WorldCom, Inc., Civil Action No. 02-CV-4963 (S.D.N.Y.), J. Gonzalez Approves Settlement of SEC's Claim for Civil Penalty Against WorldCom (Aug. 7, 2003), *available at* http://www.sec.gov/litigation/litrelease/lr18277.htm (last visited Feb. 7, 2004).

37. Donaldson Testimony, *supra* note 6. Even with corporate financial analysts, the emphasis was on the game of "hitting the numbers." *Id.*

38. *Id.*

39. *Id.*

40. Geewax, *supra* note 8.

a series of fraudulent business transactions.[41] These transactions effectively inflated Enron's earnings and cashflows, while at the same time concealing the full extent of the company's debt.[42] They included several sham off-balance sheet partnerships and the manipulation of the company's reported financial results through a series of complex finance transactions, known as "prepays."[43] The off-balance sheet partnerships, which were formed using Enron equity to hedge against potential decline in its market-to-market investments, ultimately allowed Enron to avoid earnings write-downs of over one billion dollars.[44] The prepays, on the other hand, were fraudulently used to bolster financial results by reporting loans from financial institutions as cash from operating activities.[45] As the corporation's bankruptcy proceeded and as the SEC's subsequent investigation began to unfold, the number of Enron executives responsible for the misconduct began to grow.[46] Also, it became clear that a number of prominent financial institutions and professional service firms had aided in the wrongdoing, including Arthur Anderson, LLP; J.P. Morgan Chase & Co.; and Citigroup, Inc.[47] In the wake of the scandal and the massive decline in the company's stock price, Enron employees and outside shareholders were devastated.[48] Early estimates suggest that, in addition to the thousands of jobs that were lost, Enron employees collectively lost more than one billion dollars as a result of the decline in share value.[49]

The next major scandal to hit the mainstream occurred in January of 2002, with Global Crossing's announcement that it was filing bankruptcy.[50] Once again, it was faulty accounting methods and misleading financial reporting that signaled the end of the telecommunications giant.[51] Specifically, when Global Crossing's costly investment strategy failed to

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41. SEC Glisan Release, *supra* note 36.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Cunningham, *supra* note 4, at 924.

47. *Id. See also* In Re Enron Corporation Securities, Derivative & ERISA Litig., 235 F. Supp. 2d 549 (S.D. Tex. 2002); Press Release, U.S. Securities and Exchange Commission, SEC Settles Enforcement Proceedings Against J.P. Morgan Chase and Citigroup (July 28, 2003), *available at* http://www.sec.gov/news/press/2003-87.htm (last visited Feb. 7, 2004) (noting that J.P. Morgan Chase agreed to pay $135 million to settle SEC allegations that it helped Enron commit fraud, while Citigroup agreed to pay $120 million).

48. *See* Ruiz, *supra* note 8. *See also* Geewax, *supra* note 8 (noting that the Enron bankruptcy wiped out thousands of jobs and tens of billions in investors' savings).

49. *See* Enron Employees First Consolidated and Amended Complaint at 1-8 and 247-50, In Re Enron Corporation Securities, Derivative & ERISA Litig., 235 F. Supp. 2d 549, *available at* http://www.enronerisa.com/pdf/enron1stconsolidatedAmendedComplaint.pdf (last visited Feb. 7, 2004).

50. *See* Simon Romero & Seth Schiesel, *The Fiber Optic Fantasy Slips Away,* N.Y. TIMES, Feb. 17, 2002, § 3, at 1.

51. Cunningham, *supra* note 4, at 924.

materialize, the company began to use questionable accounting methods, including engaging in "swapping" fiber capacity with other communications companies and improperly disclosing the transactions in its financial reports.[52] During these swaps, the company would count the outgoing transfer of capacity as revenue while the incoming capacity was transacted as a capital expense, making it appear that the company's cashflow was climbing from such deals.[53] During some of these illicit transactions, Global Crossing and its counterparts issued checks to each other in equal amounts, allowing each to use the proceeds as an increase in revenue.[54] Like Enron, the scandals resulted in SEC allegations, criminal prosecutions, and left investors perplexed and destitute.[55]

In the Spring of 2002, a wave of corporate misbehavior of a different sort began to surface.[56] This time, the motivation was based on greed rather than direct accounting corruption.[57] The widely publicized cases of Adelphia Communications Corp. and Tyco International Ltd. serve as prime examples.[58] Both instances involved massive corporate loans to company executives at extremely favorable terms.[59] Most notably, in March of 2002, Adelphia disclosed that it had failed to report at least $2.3 billion in debt that was attributable to fraudulent loans made by the corporation to the founding family of Adelphia.[60] In July, shortly after the company filed for Chapter 11 bankruptcy, John Rigas, founder, Chairman, and CEO, and two of his sons, along with two other executives, were arrested and charged with nine counts of conspiracy and fraud.[61]

There are many other examples of accounting corruption and executive misbehavior that occurred between 2000 and 2002 that did not get the same notoriety, although they did not go completely unnoticed either.[62] Notable

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52. *See* Romero & Schiesel, *supra* note 50.

53. *Id.* Global Crossing engaged in these swapping transactions with many telecommunication companies around the world. The most notable transactions occurred with Qwest Communications International; however, other companies included Flag Telecom of Britain, China Netcom, and Telecom New Zealand. *Id.*

54. *Id.* In other transactions, no money changed hands. *Id.*

55. *See id.*

56. Cunningham, *supra* note 4, at 924.

57. *Id.*

58. *See id.*

59. *Id.*

60. Andrew Ross Sorkin, *Corporate Conduct* Prosecution, N.Y. TIMES, July 25, 2002, § C, at 1. *See also* Abigail Rayner, *Fallen King Pounced on by* Sleazebusters, THE TIMES (London), July 27, 2002, Business, at 46. In March of 2002 the Rigas family stated that they had borrowed $2.3 billion in company funds without the board's approval. On June 25, 2002 the company filed chapter 11 bankruptcy. *Id.*

61. *Id. See also* Christopher Stern, *Members of Rigas Family Indicted; 3 Ex-Adelphia Officials Accused of Conspiracy,* WASH. POST, Sep. 24, 2002, Financial, at E01 (stating that the Rigas family had been indicted on charges of conspiring to defraud investors out of $250 million and for failing to disclose $2.3 billion in loans to the family).

62. Cunningham, supra note 4, at 925.

corporations, such as AOL Time Warner Inc., Rite Aid Corp., Tyco, and Xerox Corp all faced allegations of corruption and fraud during that time period.[63] The final straw, however, occurred in June of 2002 with "a true and pure accounting deception so large that there was no turning away from Congressional action."[64] That month, WorldCom, the telecommunications goliath and parent company of MCI, announced that corporate financial executives had misled investors by overstating its income from as early as 1999 through the first quarter of 2002.[65] As a result of undisclosed and improper accounting, WorldCom materially overstated the income it reported on its financial statements for that time period by approximately $7.2 billion.[66] The magnitude of the deception was so great that it resulted in civil charges by the SEC against four corporate executives and the payment of a penalty by WorldCom that was seventy-five times greater than any prior penalty imposed on a U.S. corporation.[67] Once again, employees and shareholders were devastated.[68] More than 20,000 employees were laid off between January 2001 and June 2002,[69] and the company's stock price had fallen from its high of $61.99 per share to its post-scandal low of less than one dollar.[70]

B. The Impact of the Scandals on Investor Confidence

The heart of the passage of the Sarbanes-Oxley Act is found in the dramatic erosion in investor confidence and the public outcry that followed the recent corporate scandals.[71] Unquestionably, investor trust in corporate

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63. *Id.*

64. *Id. See also* Geewax, *supra* note 8.

65. U.S. Securities and Exchange Commission, Litigation Release No. 17783, SEC Charges Two Former WorldCom Accountants, Betty Vinson and Troy Normand, with Participating in Multi-Billion Dollar Financial Fraud (Oct. 10, 2002), *available at* http://www.sec.gov/litigation/litrelease/lr17783.htm (last visited Feb. 7, 2004).

66. *Id.*

67. U.S. Securities and Exchange Commission, Litigation Release No. 18219, The Honorable Jed Rakoff Approves Settlement of the SEC's Claim for a Civil Penalty Against WorldCom (July 7, 2003), *available at* http://www.sec.gov/litigation/litrelease/lr18219.htm (last visited Oct. 2, 2003). The court approved a settlement providing that WorldCom was liable for a civil penalty in the amount of $2,250,000,000. *Id.* The judgment, however, was to be deemed satisfied by the Company's payment of $500,000,000 in cash and by its transfer of common stock in the reorganized company having a value of $250,000,000 to a distribution agent appointed by the court. *Id.*

68. *See* Louis Uchitelle, *Turmoil at WorldCom: The Workforce: Job Cuts Take Heavy Toll on Telecom Industry*, N.Y. TIMES, June 29, 2002, § C, at 1. By June of 2002, WorldCom had announced that it would eliminate a total of 23,000 jobs, or roughly 16 percent of its entire workforce. *Id.*

69. *See id.*

70. James P. Miller et al., *SEC Accuses WorldCom of Fraud*, CHI. TRIB., June 27, 2002, News, at 1N.

71. *See Rebuilding Trust*, supra note 9.

accounting and reporting practices was drastically shaken.[72] In a recent press release, the SEC noted that the actions of executives at Enron and other similar companies had significantly "undermined investor confidence in our markets and our system of financial reporting."[73] The magnitude of the public's distrust can be seen in several polls conducted in mid-2002, which demonstrate that:

- Seventy-seven percent of the public believed that CEO greed and corruption had caused the U.S. "financial meltdown."[74]
- Seventy-one percent of investors believed that accounting fraud was rampant.[75]
- Eighty-two percent of investors believed that though new laws of corporate governance were necessary.[76]
- Eighty-one percent of fund managers and analysts believed that executives placed their own interests ahead of that of the shareholders.[77]

As noted by former SEC Chairman Harvey Pitt, the "[r]ecent events have underscored what we already knew—confidence in our capital markets cannot be maintained if the public believes that corporate leaders, their advisors or their cohorts, are 'gaming' the system and focusing principally if not exclusively, on their own personal gain."[78] Even as far as Europe, concerned commentators noted, immediately after the fall of WorldCom, that "[t]he need to rebuild investor confidence is now paramount. It is not just that without it there will be no market recovery. It is also that America's reputation as a place to do business will come under intense threat sending markets ever lower."[79] Ultimately, in the minds of worldwide investors, the recurring issue

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72. *See* Richard S. Dunham, *The Vindication of Arthur Levitt*, BUSINESSWEEK ONLINE, Feb. 19, 2002, *at* http://www.businessweek.com/bwdaily/dnflash/feb2002/nf20020219_2045.htm. (last visited Oct. 18, 2003).

73. SEC Fastow Release, *supra* note 7.

74. PriceWaterhouseCoopers, The Sarbanes-Oxley Act of 2002: Strategies for Meeting New Internal Control Reporting Challenges: A White Paper, at 2 (2003), *available at* http://www.pwcglobal.com/images/gx/eng/fs/acf/4.pdf (last visited Sept. 2, 2003), at 2 (citing CNN/USA Today Poll, July 2002).

75. *Id.* (citing Survey of Main Street Investors, July 2002).

76. *Id.* (citing Harris Poll, July 2002).

77. *Id.* (citing Broadgate Consultants, March 2002).

78. Harvey L. Pitt, Chairman, U.S. Securities and Exchange Commission, Remarks Before the Annual Meeting of the American Bar Association's Business Law Section (August 12, 2002), *available at* http://www.sec.gov/news/speech/spch579.htm (last visited Feb. 7, 2004) [hereinafter Pitt Speech Before the ABA] (Harvey Pitt was Chairman of the SEC during the passage of the Act).

79. Bill Jamieson, *Posse Rides Out to Lasso Investor Confidence*, THE SCOTSMAN, July 2, 2002, at 5. *See also Rebuilding Trust*, *supra* note 9.

was whether the scandals were enabled, promoted, or caused by a lack of corporate reform.[80]

C. *The Attorney's Role in Corporate Governance*

Most experts agree that the wave of recent corporate scandals could not have occurred without the widespread breakdown in the entire corporate oversight system.[81] As noted by former SEC Chairman, Arthur Levitt, this breakdown was the result of a "vast cultural erosion cutting across virtually every gatekeeper that operates in this arena."[82] This group includes corporate executives, corporate directors, accountants, investment bankers, analysts, and most notably, corporate attorneys.[83] These professionals appear to have forgotten (or ignored) that their primary responsibility is to the corporation and its shareholders.[84] Unfortunately, a culture of "what can I get away with" has engulfed the desired culture of "what is good for investors."[85]

This is especially true for corporate lawyers.[86] To restore public confidence, it is important for corporate lawyers to keep their eyes firmly fixed on their public responsibilities and to first make certain that those responsibilities are satisfied.[87] That means putting the interests of the corporation and its shareholders above all others, including their own.[88] The concept of attorneys guarding, defending, and promoting the interests of their

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80. *See* Cunningham, *supra* note 4, at 940.

81. Dunham, *supra* note 72. *See also* Harvey J. Goldschmid, Commissioner, U.S. Securities and Exchange Commission, Post-Enron America: An SEC Perspective, Speech at Third Annual A.A. Sommer, Jr. Corporate Securities & Financial Law Lecture (Dec. 2, 2002), *available at* http://www.sec.gov/news/speech/spch120202hjg.htm (last visited Feb. 7, 2004) (noting that what went wrong during the 1990s and early 2000s was the "systematic failure" of the entire corporate governance checks and balances system) [hereinafter Goldschmid Speech].

82. Dunham, *supra* note 72. *See also Rebuilding Trust*, *supra* note 9.

83. *See* Dunham, *supra* note 72. *See also Rebuilding Trust*, *supra* note 9 (stating that Alan Greenspan, Chairman of the U.S. Federal Reserve, blamed lawyers, among others for failing to check the "infectious greed" of the 1990's that led to the recent collapse of share values). *See also* Goldschmid Speech, *supra* note 81. As Judge Sporkin in *Lincoln Savings* put it, "[d]uring the most dramatic financial scandals that have occurred during my professional life, where were the lawyers?" *Id. (quoting* Lincoln Sav. Ass'n v. Wall, 743 F. Supp. 901 (D.D.C. 1990)).

84. Pitt Speech Before the ABA, *supra* note 78.

85. Dunham, *supra* note 72.

86. *See id.* (noting that in public companies, the most important "gatekeepers" are the accountants and attorneys); *see also* Patti Waldmeir, *Lawyers on Sentry Duty: Corporate Governance: SEC Proposals to turn the US Legal Profession into Guardians of the Market are Causing Controversy*, FINANCIAL TIMES (London), Nov. 6, 2002, Inside Track, at 15 [hereinafter Waldmeir, *Lawyers on Duty*] (discussing comments by Harvey Pitt, former SEC Chairman, that the recent corporate governance scandals have done nothing to improve the lawyers' image of "greed and duplicity").

87. Pitt Speech Before the ABA, *supra* note 78.

88. *Id.*

clients is not new.[89] Indeed, the ABA's Model Rules of Professional Conduct state as much.[90] This model, however, is premised on the idea that clients must feel comfortable in confiding in their attorney.[91] The sticking point is that many feel that governmental controls on how lawyers fulfill their responsibilities can negatively impact the willingness of clients to confide in their lawyers, and thus, curtail the lawyer's ability to maximize the benefits of the lawyer-client relationship.[92] The problem with this notion, however, is that it misses the point. "Lawyers for public companies represent the company as a whole and its shareholder-owners, not the managers who hire and fire them."[93] Too often, corporate attorneys in an effort to please the executives with which they have direct interaction, lose sight of the bigger picture.[94] The net result is that the eager attorney ends up as a necessary partner to corporate misconduct.[95] In fact, to be able to commit most complex corporate fraud, corporations need legal help.[96] It is the attorney's role to make everything look legitimate.[97]

If it is not a blatant violation of the law, the attorney will frequently justify his or her actions, at least in his own mind, by trying to force-fit the conduct into a potential gray area of the law.[98] However, as former SEC Chairman Harvey Pitt recently noted in a speech before the American Bar Association, "[h]elping [the] company to satisfy literal legal prescriptions, even if doing so is contrary to what those legal prescriptions were intended to accomplish, doesn't satisfy a corporate lawyer's duties."[99] Later he adds, "[l]awyers cannot escape their role in giving assistance to corporate wrongdoers by hiding behind their ability to craft a clever phrase to circumvent what they know to be the right answer."[100] He concludes that too often attorneys use their "high mental gifts for guile, and because of their higher endowment their sin is reckoned greater and their place is lower than that of thieves."[101]

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89. *Id.*

90. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2002). "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.*

91. Pitt Speech Before the ABA, *supra* note 78.

92. *Id.*

93. *Id. See also* Pamela Palmer, *Lawyers in the Spotlight*, LEGAL WEEK GLOBAL, Sept. 18, 2002.

94. *See* Pitt Speech Before the ABA, *supra* note 78.

95. *See* Susan P. Koniak, Symposium, *Regulating the Lawyer: Past Efforts and Future Possibilities: When the Hurlyburly's Done: The BAR's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1239 (2003).

96. *Id.*

97. *Id.*

98. *See* Pitt Speech Before the ABA, *supra* note 78.

99. *Id.*

100. *Id.*

101. *Id.*

1. The Attorneys' Role in the Enron Scandal

An appropriate example of an attorney's role in corporate misconduct is the allegations raised against the lawyers in the Enron case.[102] Specifically, the involvement of the large and prestigious law firm of Vinson & Elkins (V&E) was a necessary component of Enron's ability to execute its fraudulent behavior.[103] Before going into the details of V&E's participation in the misconduct, it is important to first lay the foundation of the relationship between the two entities. Enron was V&E's largest client, accounting for more than seven percent of the firm's total revenues.[104] Also, over the course of their relationship, more than twenty lawyers left V&E to join Enron's in-house legal department.[105] There is no doubt that there was a deep long-standing relationship between the two entities.[106]

The complaint filed against V&E in 2002 includes a long, elaborate history of improprieties on the part of V&E as Enron's chief outside counsel.[107] However, for purposes of brevity, discussion will focus on a few key behaviors. First, the complaint against V&E asserts that V&E participated in the negotiations and prepared the transaction documents for the illicit partnerships and Special Purpose Entities (SPE) that formed the basis for Enron's fraudulent behavior.[108] This was done with full knowledge that they were "manipulative devices, not independent third parties and not valid SPEs, designed to move debt off of Enron's books, inflate its earnings and falsify Enron's reported financial results and financial condition at crucial times."[109] Moreover, V&E, knowing that the legitimate investor of one of the SPE's had pulled out and that Enron wanted to keep the SPE's liabilities off the books, formed a company totally controlled by Enron to take the investor's place.[110] The Firm then advised Enron to put a non-executive employee in charge of the newly formed entity to avoid SEC and investor disclosure issues.[111]

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102. *See* In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549 (S.D. Tex. 2002).

103. *Id.* at 627.

104. *Id.* at 656.

105. *Id.*

106. *See generally id.*

107. *Id.* at 657. The case included motions to dismiss by several of the secondary defendants named in the original shareholder complaint. *See In re Enron*, 235 F. Supp. 2d at 686-707. With respect to V&E, the court denied its motion to dismiss the allegations. *See id.* at 704-05.

108. *Id.* at 657-60.

109. *Id.* at 657. *See id.* at 658-65.

110. *Id.* at 656-59.

111. *In re Enron*, 235 F. Supp. 2d at 662.

Next, V&E proceeded to prepare and file Enron's disclosure documents and advised Enron executives that the documents satisfied the Companies legal obligations, when they in fact did not.[112] The complaint alleges that between 1998 and 2002, V&E drafted and approved SEC filings, shareholder reports, and press releases knowing that they were false and misleading.[113] This included concealing material facts in Enron's quarterly reports on form 10-Q, annual reports on form 10-K, and in its annual proxies.[114]

Finally, in 2001, as Enron's use of the SPE's became more aggressive, an Enron Global Financing employee, Sherron Watkins, sent a memorandum to Enron's CEO, Kenneth Lay, complaining that the company was engaging in fraudulent misconduct that would likely lead to its collapse.[115] The letter further warned Kenneth Lay not to use V&E to investigate the issue because V&E had participated in the fraud and had a clear conflict of interest.[116] Despite her warning, Kenneth Lay immediately turned to V&E partners to determine how to cover up the allegations.[117] V&E, disregarding its obvious conflicts of interest, agreed to conduct an investigation and vowed to issue a report dismissing the allegations of fraud.[118] V&E also allegedly agreed to not second-guess the accounting services of Arthur Anderson and to limit its investigation into top Enron Executives.[119] According to the complaint, during the investigation, V&E only interviewed a few top executives that it knew were involved in the fraud but would deny the misconduct.[120] Not surprisingly, on October 15, 2001, V&E issued a letter that dismissed all of Watkins' allegations.[121]

These allegations represent the type of behavior that can and does occur in corporations. The problem is not so much that corporate attorneys engineer massive fraud or that they did so in each of the corporate scandals listed at the outset of this Note, but rather that different lawyer behavior might have prevented or stopped the fraudulent activity on behalf of management.[122]

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112. *Id.* at 659.

113. *Id.* at 657, 660-65.

114. *Id.* at 660-65.

115. *See id.* at 657 n.92. *See also* Email from Sherron Watkins, Global Financing employee, Enron Corp., to Kenneth Lay, Chairman, Enron Corp., (Jan. 20, 2002), *at* http://www.itmweb.com/f012002.htm (last visited Feb. 7, 2004).

116. *In Re Enron*, 235 F. Supp. 2d at 657.

117. *Id.* at 665.

118. *Id.*

119. *Id.*

120. *Id.* at 666.

121. *In Re Enron*, F. Supp. 2d at 666. *See also id.* at 666-68 (includes the letter quoted in part).

122. Jill E. Fisch & Kenneth M. Rosen, Symposium, *Lessons From Enron, How Did Corporate and Securities Law Fail? Is there a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1104 (2003).

2. American Bar Association's Attempt to Deal with Attorney Responsibility

It is true that the American Bar Association has attempted to deal with the attorney's obligations as corporate gatekeepers in its Model Rules of Professional Conduct.[123] At the outset, Rule 1.6 provides that:

> [a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except . . . a lawyer *may* reveal such information to the extent the lawyer reasonably believes necessary; to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.[124]

The key to this rule, however, is the use of the word "may." As stated, the lawyer is not required to disclose the information.[125] Also, because the rule only permits the lawyer to reveal information that will prevent a client from committing a criminal act that will likely result in death or bodily harm, the rule essentially precludes a lawyer from revealing a corporations ongoing financial fraud.[126]

Further, pursuant to Rule 1.2, an attorney "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[127] The attorney may, however, discuss the legal consequences of any proposed course of conduct with the client and may assist the client in making a good faith effort to determine the application of the law as it relates to that conduct.[128] The official comment to Rule 1.2 provides that:

> The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.[129]

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123. *See generally* Patti Waldmeir, *Hidden Dangers of Turning our Lawyers into Watchdogs*, FINANCIAL TIMES (London), May 5, 2003, Features Law and Business, at 10.

124. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) & (b)(1) (2002) (emphasis added).

125. *See id.*

126. *See* Goldschmid Speech, *supra* note 81.

127. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002).

128. *Id.*

129. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (2002).

If a lawyer discovers that his client is engaged in ongoing criminal or fraudulent conduct, ABA Model Rule 1.16 provides the attorney's course of action.[130] Essentially, the rule states that a lawyer must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct.[131] The rule also provides that a lawyer "may" withdraw if the client persists in a course of conduct that the attorney reasonably believes is criminal or fraudulent.[132] The key to Rule 1.16 is that an attorney's obligation to withdraw is only invoked if the client "demands" that the lawyer engage in criminal or unethical conduct.[133] In other words, if the attorney knows the client is engaging in illegal conduct with which he or she is not demanded to participate, the lawyer does not have to withdraw.[134] Also, in such instances where the lawyer does withdraw, he is not required to disclose the information.[135]

Finally, the attorney-client relationship in the context of an organization is described in Rule 1.13.[136] Under Rule 1.13, when the attorney knows that the organization or an employee is engaged in illegal conduct, the attorney is *permitted* to: (1) ask for reconsideration in the matter, (2) advise that a second legal opinion in the matter be sought, or (3) refer the matter to a higher authority within the organization.[137] If the organization refuses to take action to stop the behavior, the lawyer is *permitted* to resign.[138]

In addition to the obvious lack of substance to these rules, they have also been inadequately enforced.[139] Many believe that state bar associations have been lax in their efforts to discipline attorneys for their misconduct, especially when it comes to securities fraud.[140] In fact, the legal profession has largely taken advantage of the fact that it has been left to develop and enforce its own system of self-governance with little or no oversight by the government.[141]

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130. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. (2002).

131. *Id.*

132. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt., 116.

133. *See id.*

134. *See id.*

135. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

136. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (2002) (Rule 1.13 is discussed *infra* text accompanying notes 235-39).

137. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2002) (emphasis added).

138. MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2002) (emphasis added).

139. *See* Pitt Speech Before the ABA, *supra* note 78.

140. *Id. See* Patti Waldmeir, *SEC Retreats on Sarbanes-Oxley Measures for Company Lawyers*, FINANCIAL TIMES (London), Jan. 24, 2003, Companies & Finance The Americas, at 27 [hereinafter Waldmeir, *SEC Retreats*].

141. *See* Waldmeir, *Lawyers on Duty*, *supra* note 86. "For more than 200 years, the US legal profession has been mostly allowed to police itself. State courts have exercised gentle scrutiny, guided almost entirely by state Bar associations." *Id. See also* Linnea B. McCord & Gia H. Weisdorn, *Blowing the Whistle, Graziadio Business Report*, 6 J. CONTEMP. BUS. PRAC. 3 (2003), *available at* http://www.gbr.pepperdine.edu/033/lawyers.html (last visited Feb. 10, 2004); *see also* Palmer, *supra* note 93.

The frustration of the SEC in this regard is revealed in Harvey Pitt's recent statement that "I'm not impressed, or pleased, by the generally low level of effective responses we receive from state bar committees when we refer possible disciplinary proceedings to them."[142] It is this frustration that helped set the tone for new regulatory standards for corporate lawyers.[143]

II. THE SARBANES-OXLEY ACT

A. *Congressional Response to Corporate Misconduct*

The collapse of WorldCom, Global Crossing, Adelphia and the many others that followed, indicated to the world that Enron was not an anomaly and that drastic corporate reform was needed.[144] These catastrophes led to a fast-developing international consensus on critical areas of corporate reform necessary to restore investor confidence.[145] Responding to the worldwide cries to do something, the U.S. Congress passed the Sarbanes-Oxley Act of 2002 (Act).[146]

The Act was officially signed by President Bush on July 30, 2002, after passing through Congress in relatively quick fashion, bypassing much of the legislative process.[147] The Act is touted as arguably "the most sweeping and

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> In the 1970s and early 1980s, the SEC drew a firestorm of criticism from the US legal profession for seeking sanctions against lawyers based on alleged "unethical or improper professional conduct.". . . The SEC backed down, acknowledging that it had no mandate or expertise to regulate lawyers, aside from enforcing the securities laws and recognizing that there is not uniform US standard of legal ethics and conduct. By 1982, it was the SEC's stated policy to refrain from developing "independent standards of professional conduct" for lawyers.

Palmer, *supra* note 93.

142. Pitt Speech Before the ABA, supra note 78.

143. *See* Waldmeir, *Lawyers on Duty*, *supra* note 86.

144. *See* Tafara speech, *supra* note 10; Jamieson, *supra* note 79. *See also, Corporate Accountability: Hearing Before the House of Rep.*, 148th Cong. E1470, 1472 (2002) (statement of Elliot Spitzer, New York Attorney General) [hereinafter *Corporate Accountability Hearing*]. Before the House of Representatives as it was contemplating the passage of the Act, Mr. Spitzer stated that:

> [i]t is time to restore to boards and institutional shareholders the obligation of serious participation in corporate governance. We need to insist that public companies report results that reflect reality and not cleaver gamesmanship, and that allow investors to understand their true financial position. And we need to strictly punish corporate executives who falsely certify their company's financial statements.

Id.

145. *Id.*

146. Public Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

147. President George W. Bush, President Bush signs Corporate Corruption Bill (July 30, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/07/print/20020730.html (last visited Feb. 10, 2004). *See also Corporate Accountability Hearing*, *supra* note 144, at

important U.S. federal securities regulation since the SEC was created in 1934."[148] Determined to reduce corporate malfeasance and restore investor confidence, the Act establishes new standards for corporate accountability and penalties for wrongdoing.[149] Primarily, these standards place increased demands on those involved in the corporate financial reporting process.[150]

The Act contains eleven titles, ranging from additional responsibilities for corporate oversight to enhanced criminal penalties for white-collar crimes, including securities fraud.[151] Within those eleven titles, the Act contains sixty-six sections and provides for more than eleven studies to be conducted by the SEC and Comptroller General on various groups and issues relating to corporate governance.[152] The general categories of reform include public company disclosure, corporate governance, and auditor oversight.[153] The issues and groups addressed by the Act were singled out for their participation in the conduct that led to the Act's passage.[154] Many of the Act's provisions direct the SEC to establish regulating standards for implementation.[155] Without a doubt, the range of the act in terms of whom it affects within the realm of corporate governance and enforceability is broad and powerful.[156]

E1470 (statement of Richard Gephardt, Member, U.S. House of Rep.). The overwhelming consensus of the U.S. Congress in passing the Sarbanes-Oxley Act can be seen in a statement by Representative Richard Gephardt on the floor of the House of Representatives: "[t]his week, . . . the Senate unanimously passed and I'll say it again, unanimously passed, and that's a rare occasion, a crucial bill that would attack the current crisis in confidence." *Corporate Accountability Hearing*, *supra* note 144, at E1470.

148. Tafara Speech, *supra* note 10; Goldschmit Speech, *supra* note 81.

149. *See* Donaldson Testimony, *supra* note 6. *See also* Palmer, *supra* note 93.

150. *See* Palmer, *supra* note 93 (noting that the Act focuses on individual officers, directors, and accounting and legal professionals perceived as responsible for corporate governance and financial reporting); Donaldson Testimony, *supra* note 6.

151. *See* Public Accounting Reform and Investor Protection Act of 2002, *supra* note 11 (Eleven titles include: 1) Public Company Accounting, 2) Auditor Independence, 3) Corporate Responsibility, 4) Enhanced Financial Disclosures, 5) Analyst Conflicts of Interest, 6) Commission Resources and Authority, 7) Studies and Reports, 8) Corporate and Criminal Fraud Accountability, 9) White Collar Crime Penalty, 10) Corporate Tax Returns, and 11) Corporate Fraud and Accountability).

152. *See id.*

153. Tafara Speech, *supra* note 10.

154. *Id.* *See* Donaldson Testimony, *supra* note 6.

> The sweeping reforms of the Act address nearly every aspect and actor in our nation's capital markets. The Act affects every reporting company, both domestic and foreign, as well as their officers and directors. The Act also affects those that play a role in ensuring the integrity of our capital markets, such as accounting firms, research analysts and attorneys.

Id.

155. *See* Tafara Speech, *supra* note 10.

156. *See* Donaldson Testimony, *supra* note 6; Palmer, *supra* note 93.

B. Regulating the World: SEC Regulations on an International Stage

In examining the scope of the Act, it is important to understand the backdrop of foreign growth in U.S. markets. The increasing interdependence of capital markets around the world has virtually made it impossible for the SEC to enact securities regulation without considering its impact on foreign companies.[157] In fact, competition from foreign markets as an alternative source for raising equity capital, the fact that foreign companies often function in an entirely different corporate governance environment, and investor desire for foreign equities as a means for diversifying portfolios, are factors that the SEC has had to seriously consider in drafting and implementing regulations.[158] These considerations have resulted in the SEC's grant of accommodations and exemptions to foreign companies with regard to many of its regulations in the past.[159] The net affect has been a dramatic increase in the number of listings of foreign companies on U.S. public markets.[160] For instance, the number of foreign listings on the New York Stock Exchange (NYSE) increased from 33 listings in 1975 to 2,368 by the end of 2002, encompassing nearly seventeen percent of all listings.[161] In terms of market capitalization, the NYSE reports that in 2002, non-U.S. listed companies had a combined capitalization of $4.3 trillion, nearly one-third of the capitalization of the entire NYSE.[162] It is also important to note that since 1990 the number of foreign listings has more than quadrupled, while since 1998, the number of U.S. company listings has

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157. *See* Tafara Speech, *supra* note 10. "It is clear that, more than ever, capital markets around the world are increasingly interdependent, and changes to national laws can have repercussions outside its borders." *Id.*

158. *Id.*

159. *See* Press Release, U.S. Securities and Exchange Commission, Division of Corporate Finance: International Financial Reporting and Disclosure Issues (May 1, 2001), *available at* http://www.sec.gov/divisions/corpfin/internatl/issues0501.htm#P1052_165500 (last visited Feb. 11, 2004) (noting that the "integrated disclosure system designed for foreign private issuers provides a number of accommodations to practices in other jurisdictions") [hereinafter SEC Press Release, International Disclosure Issues]. *See also* Kirk, *supra* note 15 (recognizing the different treatment between foreign private issuers and domestic issuers in registering securities under 12(b) or 12(g) of the Securities and Exchange Act of 1934).

160. *See* John C. Coffee, Jr., Article, *Racing Towards the Top?: The impact of Cross Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1759-66, 1770-73 & 1824-27 (2002).

161. *Id.* at 1771. *See also* SEC Press Release, International Disclosure Issues, *supra* note 159 (stating that by the end of 1999, there were more than 1,200 foreign registered companies from more than fifty-five different countries registered with the SEC).

162. New York Stock Exchange, Annual Report 2002, at 14 & 43 (2002), *available at* http://www.nyse.com/pdfs/2002ar_NYSE-2002.pdf (last visited Feb. 11, 2004) (noting that the total global market capitalization for NYSE-listed companies for 2002 was 13.4 trillion, including 4.3 trillion for non-U.S. listed companies). The NYSE annual report also noted that it welcomed 152 new companies in 2002, 33 of which were non-U.S. *Id.* at 23. Further, the average daily share volume for non-U.S. companies grew from approximately 10 million in 1987 to approximately 130 million in 2002. *Id.* at 34.

steadily declined.[163] Needless to say, the environment in which the SEC operates has changed considerably.[164]

Given this, the Act poses special concerns for foreign market participants accessing U.S. capital markets.[165] That concern, of course, being that the Act imposes new standards on foreign issuers who are already subject to their home country's corporate governance regulations.[166] In making decisions on the scope of the Act, Congress was clear that the Act was generally to make no distinction between domestic and foreign firms.[167] Congress reasoned that "investors transacting on U.S. markets are entitled to the same protections regardless of whether the issuer is foreign or domestic."[168] The SEC, however, in establishing the final regulations felt it necessary to respect the growth and importance that foreign issuers play in U.S. markets.[169] In fact, the SEC recently noted that the greatest challenge it faced in implementing the Act was fulfilling the congressional mandate, while at the same time respecting foreign law and regulatory schemes.[170] The SEC concluded that the application of the provisions of the Act on foreign companies would need to be done in a reasonable manner.[171] Fittingly, the SEC in drafting its final regulations weighed heavily the concerns and comments of foreign countries expressed through open dialogue with its foreign counterparts, particularly European Union member countries.[172]

C. Scope of the Act and Foreign Private Issuers

The provisions of the Act are primarily directed at "issuers." The Act provides that:

> The term "issuer" means an issuer (as defined in section 3 of the Securities Exchange Act of 1934), the securities of which are registered under section 12 of that Act, or that is required to file reports under section 15(d), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933, and that it has not withdrawn.[173]

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163. Coffee, *supra* note 160, at 1771.

164. Tafara speech *supra* note 10. "It is clear that, more than ever, capital markets around the world are increasingly interdependent, and changes to national laws can have repercussions outside its borders." *Id.*

165. *Id. See also* Coffee, *supra* note 160, at 1824-27.

166. Tafara speech *supra* note 10. *See also* Coffee, supra note 160, at 1824-27.

167. Tafara speech *supra* note 10.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. 15 U.S.C. § 7201(7) (2003) (reference to U.S. Code omitted)

The breadth of this definition includes, "Foreign Private Issuers."[174] The definition of "Foreign Private Issuer" as proffered by the SEC in Rule 3b-4 includes any corporation or other organization established under the laws of any foreign country unless:

1. More than fifty percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and
2. Any of the following:
   a. The majority of the executive officers or directors are United States citizens or residents;
   b. More than fifty percent of the assets of the issuer are located in the United States; or
   c. The business of the issuer is administered principally in the United States.[175]

Essentially, any foreign company that seeks to list its securities on the NYSE, American Stock Exchange, or Nasdaq must register its securities with the SEC and thus, comes under the purview of the Act.[176] In the past, the distinction between foreign and domestic issuers has generally been important because most foreign private issuers that register securities under Sections 12(b) or 12(g) of the Securities and Exchange Act of 1934[177] have been treated differently and more favorably than their domestic counterparts.[178] As noted above, the SEC has justified the differing treatment as accommodations to attract foreign corporations and as recognition of the fact that foreign private issuers are subject to conflicting corporate governance regulations from their home country.[179]

Given the environment during which it was passed, the Sarbanes-Oxley Act, however, has generally disregarded this distinction.[180] The Act has, in fact, "largely ignored the differences in practices and corporate governance regimes between the United States and other countries, and has extended the reach of the (sic) United States laws to many aspects of the internal affairs and governance regimes of foreign companies and their auditors."[181] Although the Act provides for the SEC to reduce application of certain provisions to foreign

174. Palmer, *supra* note 93.
175. 17 C.F.R. § 240.3b-4.
176. SEC Press Release, International Disclosure Issues, *supra* note 159. *See* Palmer, *supra* note 93.
177. 15 U.S.C. § 78l (2003).
178. Kirk, *supra* note 15. *See* Tafara Speech, *supra* note 10.
179. Kirk, *supra* note 15. *See* Tafara Speech, *supra* note 10.
180. *See* Kirk, *supra* note 15; Tafara Speech, *supra* note 10.
181. Kirk, *supra* note 15.

companies, many will be surprised "by the extent to which United States law and regulatory authority has *prima facie* been extended beyond the borders of the United States into areas that would generally be considered to be governed exclusively by the law of the home country."[182]

III. SECTION 307 AND SEC REGULATIONS

On January 23, 2003, the Securities and Exchange Commission adopted its final rule as mandated by Section 307 of the Act, imposing new standards of professional conduct for attorneys appearing and practicing the Commission in the representation of public companies.[183] The final regulations were effective on August 5, 2003 and are detailed in Part 205 of Title seventeen of the Code of Federal Regulations.[184] Pursuant to Section 307, the standards were to provide for "up the ladder reporting" of evidence of material violations of securities law or breach of fiduciary duties or similar violations by the issuer to the company's Chief Legal Counsel (CLC) or Chief Executive Officer (CEO); and if they do not respond appropriately to the evidence, the attorney must report the violation to the audit committee of the board of directors, another committee of independent directors, or to the full board of directors.[185]

The final rule is intended to protect investors and increase their confidence in public companies by ensuring that attorneys who work for those companies respond appropriately to material misconduct.[186] Although this

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182. *Id.*

183. Tafara Speech, *supra* note 10. *See also* 15 U.S.C. § 7245 (2003) (official code site to Section 307, Rules of professional responsibility for attorneys).

184. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6,296 (Feb. 6, 2003) (codified at 17 C.F.R. pt. 205) (regulations became effective August 5, 2003). The regulations can also be found at U.S. Securities and Exchange Commission, Final Rule: Implementation of Standards of Professional Conduct for Attorneys, Release No. 33-8185 (Jan. 29, 2003), *available at* http://www.sec.gov/rules/final/33-8185.htm (last visited Feb. 11, 2004).

185. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,296. *See also* 15 U.S.C. § 7245. *See generally* European Commission, *Study of Corporate Governance Codes Relevant to the European Union and its Member States*, at 43 (March 27, 2002), *available at* http://europa.eu.int/comm/internal_market/en/company/company/news/corp-gov-codes-rpt_en.htm (last visited Feb. 11, 2004) [hereinafter European Commission Study]. In the majority of European Union member countries, the independent board of directors is known as the Unitary Board of Directors. *See id.* In countries that utilize a two-tiered board system, the "Supervisory Board" meets this definition. *See id.* Countries that utilize a two-tiered bard system include Germany, Austria, the Netherlands, and Denmark. *Id.*

186. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,297. *See also* 17 C.F.R. § 205.1 (2003). The purpose of Rule 205 is established under Section 205.1, which states:

> This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction

intent seems sensible enough, its embodiment within the final regulations generated controversy, especially with regard to foreign attorneys. In fact, as noted by the SEC, the original release of the regulations generated "significant comment and extensive debate" in the worldwide legal community.[187] Specifically, the SEC received 167 comment letters challenging various provisions: 123 came from domestic parties, with forty-four coming from foreign parties.[188] The greatest concern involved a proposed requirement that lawyers make a "noisy withdrawal" in the event that the board of directors ignores the attorney's report.[189] In fact, foreign and domestic reaction was so strong that the SEC decided to shelf but not abandon the noisy withdrawal issue for now.[190] In its final rule, the SEC both modified and clarified its proposed rules.[191]

A. The Scope of the SEC's Final Rule and its International Reach

Section 307 and Rule 205 place attorneys "appearing and practicing" before the SEC "in the representation of an issuer" under the purview of the SEC's rules of professional conduct.[192] Generally, an attorney is considered to be "appearing and practicing" before the SEC when he or she:

> (i) Transacts any business with the SEC, including communications in any form;
> (ii) Represents an issuer in an SEC administrative proceeding or in connection with any SEC investigation, inquiry, information request, or subpoena;
> (iii) Provides advice with respect to U.S. securities laws or the Commission's rules or regulations regarding any document that the attorney has notice will be filed with or submitted to the SEC; or

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> where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

Id.

187. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,296. *See also* Tafara Speech, *supra* note 10.

188. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,296.

189. Koniac, *supra* note 95, at 1270.

190. Tafara Speech, *supra* note 10; Donaldson Testimony, *supra* note 6 (noting that the SEC has not yet made a decision on the implementation of the noisy withdrawal provision or an alternative).

191. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,296.

192. *See* 15 U.S.C. § 7245; 17 C.F.R. § 205.1 (2003).

> (iv) Advises an issuer as to whether information or a statement, opinion or other writing is required to be filed with or submitted to the SEC.[193]

An attorney is not considered to be "appearing and practicing" before the SEC if he or she (i) conducts the items listed above outside the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or (ii) is a non-appearing foreign attorney.[194] "In the representation of an issuer" is then defined as "providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer."[195]

Many commentators and practitioners interpreting these provisions have concluded that the definition is extremely broad and covers both in-house and outside counsel, as well as foreign and domestic attorneys.[196] The SEC notes as an example that an attorney employed by an investment advisor who prepares, or assists in preparing materials for a registered investment company that the attorney has reason to believe will be submitted to or filed with the SEC is appearing and practicing before the SEC.[197]

From this, it is clear that under the SEC's final rule, attorneys need not serve in the legal department of an issuer to be covered, but they must be providing legal services in the context of an attorney-client relationship.[198] In other words, it would not include an attorney employed by a public company working in a non-legal capacity.[199] It is also important to note that an attorney-client relationship can exist even in the absence of a formal retainer or other agreement.[200] As for in-house attorneys, the Rule would encompass an attorney working for a non-public subsidiary of a public company if the attorney is assigned work that he or she has notice will be incorporated into documents submitted to the SEC by the parent company.[201]

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193. 17 C.F.R. § 205.2(a)(1) (2003). *See also* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,297-98.

194. 17 C.F.R. § 205.2(a)(2) (2003). *See also* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,297-98.

195. 17 C.F.R. § 205.2(g) (2003).

196. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,298. *See also* Palmer, *supra* note 93 (recognizing that one of the Act's most far reaching provisions is the standards imposed on lawyers practicing before the SEC, which will affect lawyers worldwide).

197. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,298.

198. *Id.*

199. *Id.*

200. *Id.*

201. Thompson & Knight LLP, Client Alert: Sarbanes-Oxley ACT of 2002 SEC Adopts Rules of Professional Conduct for Attorneys, Feb. 5, 2003, *available at* http://www.tklaw.com/website.nsf/719da00bf30d821086256be400670924/6a7e003d8b5a7e6386256cc9005755c9/$FILE/Sarbanes,%20SEC%20Adopts%20Rules.pdf (last visited Feb. 11, 2004) [hereinafter

With regard to attorneys of Foreign Private Issuers, the final rule excludes foreign attorneys not licensed to practice law in the United States.[202] "Non-appearing" foreign attorneys are described in section 205.2.[203] Under Section 205.2(j), a non-appearing foreign attorney is generally described as an attorney: (1) who is admitted to practice law in a jurisdiction outside the United States; and (2) who does not hold himself or herself out as practicing and does not give legal advice regarding U.S. securities or other laws.[204] Therefore, generally, only foreign attorneys who provide advice regarding U.S. securities law will be subject to the SEC's final rule.[205]

Furthermore, in response to feedback the SEC received regarding the proposed Rule 205.2(j), the SEC modified the regulation to include some situations in which the foreign attorney would be considered to be non-appearing even though the attorney's conduct would not fall under the definition above.[206] Those situations include ones in which the attorney conducts activities that would constitute appearing and practicing before the SEC only (i) incidentally to the practice of law in a foreign jurisdiction, or (ii) in consultation with U.S. counsel.[207] In other words, any foreign attorney that provides legal advice other than incidentally regarding U.S. securities or other law without working in conjunction with U.S. counsel will be accountable to the SEC under the standards of professional conduct.[208] For example, an attorney licensed in Canada who independently advises an issuer regarding the application of SEC regulations regarding periodic filings without consulting U.S. counsel will be subject to the Rule.[209] While this final definition does exclude some foreign attorneys, many others will fall squarely within its scope.[210]

It is important to note that the proposed SEC Rule 205 made no distinction between the obligations of U.S. and foreign attorneys.[211] That release, however, requested comments from attorneys licensed in foreign

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Thompson & Night].

202. Tafara Speech, *supra* note 10; Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,298.

203. *See* 17 C.F.R. § 205.2(j).

204. *Id.*

205. Tafara Speech, *supra* note 10; Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,298.

206. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,303 (noting that the definition of "non-appearing foreign attorney" was expanded due to world-wide reaction to its initial rule proposal).

207. 17 C.F.R. § 205.2(j)(3) (2003).

208. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,303. *See also* Thompson & Night, *supra* note 201, at 2.

209. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,303.

210. *Id.*

211. *Id. See also* Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg.71,670 (proposed Dec. 2, 2002) (final Rule is codified at 17 C.F.R. pt. 205).

jurisdictions or otherwise subject to foreign law, rules and ethical standards regarding the scope of the Rule.[212] The SEC made this request realizing that the proposed rule could pose difficult issues for foreign attorneys and international law firms subject to conflicting standards and regulations.[213] The SEC also recognized that many non-U.S. attorneys play a significant role in ensuring the compliance of both foreign and domestic issuers regarding SEC regulations.[214]

In December of 2002, the SEC conducted a roundtable on the international impact of the proposed Rule 205.[215] The roundtable participants included, among others, international regulators, professional associations, and foreign law firms.[216] Not surprisingly, participants objected to many aspects of the proposed Rule.[217] With regard to the definition of "appearing and practicing before the Commission," some expressed concern that a foreign attorney who prepares a contract that is filed as an exhibit to an SEC filing might be covered under the act.[218] Also, some felt troubling that a foreign attorney with little or no training on U.S. securities law may not be competent to recognize whether a "material violation" had in fact occurred, thus triggering his obligation to report the violation "up the corporate ladder."[219]

The SEC also received more than forty comment letters expressing concern regarding the international aspects of the proposed Rule.[220] Many requested that non-U.S. attorneys be exempted from the Rule altogether.[221] They argued that the SEC would be violating principles of international comity by exercising jurisdiction over the legal profession outside the shores of the United States.[222] Others alternatively recommended that the SEC take additional time to consider these conflicts and provide, in the interim, temporary exemption from the Rule.[223]

The SEC took these concerns under advisement in drafting the final definition of "non-appearing foreign attorney" and the scope of "appearing and practicing" before the commission.[224] The SEC ultimately rejected any

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212. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,303-04. *See* Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,670.

213. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,304.

214. *Id.*

215. *Id.*

216. *Id.*

217. *See id.*

218. *Id.*

219. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,304.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *See id.*

notion of exempting foreign attorneys noting that foreign attorneys who are concerned that they may not have the expertise to identify material violations of U.S. law should decline to advise their clients on such issues.[225] The SEC added that they should also seek the assistance of U.S. counsel when undertaking an activity that could potentially fall under the guise of "appearing and practicing before the Commission."[226] Also, the SEC clarified that mere preparation of a document that may be included as an exhibit to a filing with the SEC does not constitute "appearing and practicing" before the commission, "unless the attorney has notice that the document will be filed with or submitted to the [SEC] and he or she provides advice on [U.S.] securities law in preparing the document."[227] Finally, as discussed below, the SEC noted that section 205.6 protects a lawyer practicing outside the United States under circumstances where foreign law prohibits compliance with the SEC's final rule.[228]

B. Issuer as Client

The core of Rule 205 is found in Section 205.3(a), which explicitly states that an attorney representing an issuer, including foreign private issuers, owes his or her professional and ethical duties to the issuer as an organization and not to the individual officers or employees with whom the attorney regularly interacts in the course of that representation.[229]

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225. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,304.

226. *Id.* In response to any notion that foreign attorneys should be exempted from the Rule, the SEC noted that:

> [t]he Commission considers it appropriate . . . to prescribe standards of conduct for an attorney who, although licensed to practice law in a foreign jurisdiction, appears and practices on behalf of his clients before the Commission in a manner that goes beyond the activities permitted to a non-appearing foreign attorney.

Id.

227. *Id.*

228. *Id. See also* discussion *infra* text accompanying notes 329-34.

229. Charles Axelrod, *SEC's Proposed Attorney Responsibility Rules Present new Challenges for In-House and Outside Counsel*, CORPORATE COUNSEL WEEKLY, Jan. 1, 2003. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,305; 17 C.F.R. § 205.3(a) (2003), which provides:

> Representing an issuer. An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

17 C.F.R. § 205.3(a). *See also* Palmer, *supra* note 93. "The Act's message to lawyers is that the issuer is 'the client'—not the CEO or CFO." *Id.*

The proposed rule originally provided that an attorney "shall act in the best interest of the issuer and its shareholders."[230] However, the statement sparked significant controversy with both the foreign and domestic legal communities.[231] The concern was that: (i) the language was inapposite to traditional ethical standards for attorneys in that it required an attorney to act in the "best interest" of the issuer; and (ii) it implied that attorneys have a duty to shareholders, creating the basis for a potential private right of action.[232] After receiving extensive feedback from foreign and domestic sources, the Rule was modified to its current version.[233]

With regard to the first concern, the SEC adopted the language recognizing that it is the issuer/corporation acting through its management who decides on the objectives the lawyer must pursue, so long as they are not illegal.[234] The SEC, however, took issue with the idea being proffered by commenters that an attorney is never charged with acting in the "best interests" of the corporation.[235] The SEC pointed to ABA Model Rule 1.13, which provides that an attorney is obligated to act in the best interest of the corporation in circumstances when the attorney knows the organization is likely to be "substantially injured" by the actions of an individual associated with the organization that is in violation of the law.[236] The Official Comment to rule 1.13 states that in such instances, it is indeed in the best interests of the corporation to report the violation to higher authority within the organization.[237] However, the SEC ultimately determined that because the

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230. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,305; Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,670.

231. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,305. *See generally*, Koniac, *supra* note 95, at 1269-1273 (stating that proposed Rule 205 caught the BAR completely off-guard and that the BAR objected to many of the Rule's provisions).

232. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,305 (citing Comments of Cleary, Gottlieb, Steen & Hamilton, at 3-4; Comments of Corporations Committee, Business Law Section, The State Bar of California, at 7; Comments of the American Corporate Counsel Association, at 11; Comments of Task Force on Corporate Responsibility of the County of New York Lawyers' Association, at 2-3).

233. *Id.*

234. *Id.* at 6,305-06.

235. *Id.* at 6,306.

236. *Id.* (citing MODEL RULES OF PROF'L CONDUCT R. 1.13 (2002)); MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2002). *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. [3] & [7] (2002). Official Comment seven states that:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.

MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. [7].

237. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. [3].

corporate attorney is not obligated to act in the best interest of the issuer with respect to corporate decisions traditionally reserved for management, the statement would be removed.[238]

As to the concern that the proposed language creates a potential basis for a private right of action, the SEC made it clear that Rule 205 does not create a fiduciary duty to the shareholders of the organization.[239] The SEC was cognizant of the fact that courts have generally held that that an attorney does not owe a legal obligation to the constituents of an issuer, including its shareholders.[240] Accordingly, the SEC deleted from the final rule any reference to the attorney acting in the best interest of the shareholder.[241] The final rule makes it clear that the lawyer "owes his or her professional and ethical duties to the issuer as an organization."[242]

C. Material Violation and Up-the-Ladder Reporting

Section 205.3(b) clarifies the attorney's duty to protect the corporation by requiring the attorney to report: (i) "evidence of a material violation" of U.S. federal or state securities law; (ii) a material breach of fiduciary duty arising under U.S. federal or state law; or (iii) a similar material violation of any U.S. federal or state law.[243] Under the Rule, an attorney that becomes aware of evidence of a material violation of any of these categories committed by any officer, director, employee, or agent of the issuer, must report the evidence to the issuer's Chief Legal Officer (CLO) or Chief Executive Officer (CEO) (or the equivalents thereof).[244]

First, it is important to clarify "material violation." The final rule makes it clear that the violation must arise under U.S. federal or state law.[245] The rule does not apply to violations of foreign laws.[246] Also, the rule does not

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238. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,306.

239. *Id.*

240. *Id.* (citations omitted). *See, e.g.*, Carlson v. Fredrickson & Byron P.A., 475 N.W.2d 882 (Minn. Ct. App. 1991) (court held that representation of a business does not amount to representation of the business owner); Cole v. Ruidoso Mun. Sch., 43 F.3d 1373 (10th Cir. 1994); Bobbitt v. Victorian House, Inc. 545 F.Supp. 1124 (N.D. Ill 1982); Field v. Freedman, 527 F.Supp. 935 (Kan. 1981).

241. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,306.

242. 17 C.F.R. § 205.3(a). *See also* Palmer, *supra* note 93.

243. 17 C.F.R. § 205.3(b) (2003); 17 C.F.R. § 205.2(i) (2003). "Material violation means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law." 17 C.F.R. § 205.2(i).

244. 17 C.F.R. § 205.3(b).

245. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,303. *See also* 17 C.F.R. § 205.2(i).

246. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,303. *See also* 17 C.F.R. § 205.2(i).

define the word "material." The SEC indicates that the omission was intentional, stating that "[t]he final rule does not define the word 'material,' because that term has a well-established meaning under the federal securities laws and the Commission intends for that same meaning to apply here."[247] Case law to which the SEC was referring defined material violation as "conduct or information about which a reasonable investor would want to be informed before making an investment decision."[248]

The SEC did, however, feel that it was important to define "breach of fiduciary duty."[249] Under the final rule, a breach of fiduciary duty refers to any "breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions."[250] This definition was only slightly modified from the proposed rules.[251]

The next challenge in enforcement comes with the sufficiency of "evidence." Section 307 and Rule 205 require that the attorney report "evidence" of a material violation.[252] The final rule establishes that evidence includes only, "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur."[253] With this definition, the SEC made it clear that whether evidence of a material violation exists will be measured by an objective standard.[254] Because this essentially triggers the reporting requirement, the proposed definition brought with it extensive debate.[255] Many commenters felt the proposed standard was too high, while

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247. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,303 (citing Basic v. Levinson, 485 U.S. 224, 231-36 (1988); TSC Indus. v. Northway, Inc., 426 U.S. 438 (1976)).

248. *See* Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,679.

249. 17 C.F.R. § 205.2(d) (2003).

250. *Id.*

251. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,301.

> Several commenters suggested that the definition in the proposing release should be amended to include breaches of fiduciary duty arising under federal or state statues. The phrase "under an applicable federal or state statute" has been added to clarify that breaches of fiduciary duties imposed by federal and state statutes are covered by the rule.

Id.

252. *See* 15 U.S.C. § 7245(1) (2003); 17 C.F.R. § 205.3(b).

253. 17 C.F.R. 205.2(e).

254. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,301.

255. *See id.*

others thought it was too low.[256] The SEC settled for the objective standard currently imposed.[257]

Evidence of a material violation must first be credible.[258] It is only upon such evidence that an attorney must make the decision to determine whether there has been a material violation of U.S. law.[259] Determining the sufficiency of the evidence in supporting a finding that a material violation has occurred or is about to occur, will be a fact sensitive analysis, including the attorney's professional skills, background and experience, the time constraints under which the attorney is acting, the attorney's previous experience and familiarity with the client, and the availability of other attorneys with whom the attorney can consult.[260] The rule makes it clear that the initial duty to report is not triggered solely when the attorney "knows" that a material violation has occurred or when the evidence is "clear and convincing."[261] To be "reasonably likely," the SEC states that a material violation must be more than a mere possibility, but it need not be more likely than not.[262] Thus, a report up the corporate ladder is required when it is reasonably likely that a violation, has occurred, is ongoing, or when it is reasonably likely that a violation is about to occur.[263]

Once an attorney reports evidence of a material violation to the CLO, the CLO becomes subject to the final rule.[264] The CLO must make a reasonable inquiry into the evidence to determine if a violation has occurred or is about to occur.[265] If the CLO reasonably believes that there is no material violation, he or she must advise the reporting attorney of this conclusion.[266] If the CLO does believe that a material violation has occurred or is about to occur, he or she must take all reasonable steps to cause the issuer to adopt an "appropriate response," including remedial measures or sanctions

256. *See id.*
257. *See id.*
258. *See* 17 C.F.R. § 205.2(e) (2003).
259. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,302.
260. *See id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *See* 17 C.F.R. § 205.3(b) (2003).
265. *See id.*
266. *See id.*

to stop or prevent the violation.[267] The CLO must then advise the reporting attorney of the issuer's response.[268]

If the CLO does not provide an appropriate response to the reported evidence of a material violation within a reasonable period of time, the reporting attorney is then required to report "up the ladder," to the issuer's audit committee, another committee of independent directors, or to the full board of directors.[269] Similarly, as a bypass provision, if the attorney believes that it would be futile to report evidence of a material violation to the CLO or CEO, the attorney may report the information directly to the audit committee, another committee of independent directors, or the full board of directors.[270] An attorney who has received what he believes to be a reasonable and timely response to the reported evidence has satisfied his reporting requirement under the Rule.[271] If the reporting attorney does not believe that he has received an appropriate response to the report, he must explain his reasons to the CLO, CEO, or to the committee to whom he reported the evidence.[272]

By this point, the attorney has essentially navigated a legal minefield, analyzing issues of "material violation," "breach of fiduciary duty," "evidence of material violation," "appropriate response," "up-the-ladder reporting," and others. Already the tangled web of legal definitions and processes has created a labyrinth that will be challenging for foreign attorneys covered by the Act.[273] The question now becomes, provided the attorney does report the evidence up-

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267. 17 C.F.R. § 205.3(b)(2) (2003); Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,307. Under the Rule an "appropriate response" means:

> a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes: (1) That no material violation . . . has occurred, is ongoing, or is about to occur; (2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or (3) The issuer, with the consent of the issuer's board of directors . . . has retained or directed an attorney to review the reported evidence of a material violation and either: (i) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or (ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer . . . in any investigation . . . relating to the reported evidence of a material violation.

17 C.F.R. § 205.2(b).

268. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,307.

269. 17 C.F.R. § 205.3(b)(3) (2003); Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 6,307.

270. 17 C.F.R. § 205.3(b)(4) (2003).

271. 17 C.F.R. § 205.3(b)(8) (2003).

272. 17 C.F.R. § 205.3(b)(9) (2003).

273. Palmer, *supra* note 93.

the-ladder, what happens if, after all of this, the attorney still has not received an appropriate response to the reported evidence?

D. Noisy Withdrawal and Proposed Alternative

Under the 2002 proposed rule, the SEC detailed arguably the most controversial aspect of Rule 205; the requirement of the "noisy withdrawal."[274] The idea was to set a standard for notification of the SEC when appropriate action has not being taken by the corporation.[275] The provision, however, generated so much negative feedback that the SEC decided to delay its implementation while it further examines the issue.[276] Foreign attorneys argued that the "noisy withdrawal" requirement would conflict with laws and principles of confidentiality and attorney-client privilege recognized in many foreign jurisdictions.[277]

Under the proposed rule, an attorney who has not received an "appropriate response" from an issuer would be obligated or, in some cases, permitted to initiate a "noisy withdrawal."[278] The requirement, however, differs depending on whether the attorney is an outside counsel or one employed by the issuer.[279] With respect to outside counsel, the proposed rule imposes an obligation on attorneys who have not received an appropriate response to evidence of a material violation to withdraw from representation of the issuer in all matters.[280] This obligation, however, would only be triggered in situations where the attorney believes that a material violation is ongoing or is about to occur, and the violation is likely to result in substantial injury to the financial interest or property of the issuer or its investors.[281] Then, within one business day of withdrawing, the attorney would be required to notify the SEC, in writing, that the he or she had done so for "professional considerations."[282] The use of the phrase "professional considerations" would protect client confidences, while at the same time serving as a red flag to the

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274. *See* Waldmeir, *SEC Retreats*, *supra* note 140 (noting that with regard to the "noisy withdrawal" provision, "the legal profession unanimously condemned that measure, saying it would have turned lawyers into police and undermined their ability to counsel clients").

275. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,689.

276. *See* Tafara Speech, *supra* note 10; Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,308.

277. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,304. *See also* Waldmeir, *SEC Retreats*, *supra* note 140.

278. *See* Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,688-89 (discussion of proposed rule 205.3(d) (2003)).

279. *See id.* at 71,688.

280. *Id.* at 71,689. The additional requirement that the attorney must believe that the violation is likely to result in substantial injury to the financial interest or property of the issuer or its investors makes the threshold for action higher than for reporting "up the ladder." *See id.*

281. *Id.*

282. *Id.*

SEC that a material violation of U.S. securities law was ongoing or was about to occur.[283] Finally, the attorney would be required to disaffirm any document or other information filed with the SEC that was materially false or misleading.[284] In situations where the violation had already occurred and would not be considered ongoing, the proposed requirement would become permissive.[285] In other words, the attorney would be permitted to withdraw, notify the commission, and disaffirm filings but would not be required to.[286]

With regard to in-house attorneys, the proposed rule does not require the attorney to resign.[287] Instead, within one day of concluding that the issuer's response to the reported evidence is inappropriate or unreasonable, the attorney would be required to notify the SEC, in writing, that he or she intends to disaffirm documents filed that he or she believes is false or misleading.[288] The SEC reasoned that requiring an in-house attorney to resign when the attorney receives an inappropriate response to his or her reported evidence would be unreasonably harsh.[289] Similar to outside counsel, in circumstances where the material violation has already occurred and has no on-going effect, the in-house counsel would be permitted to take these steps but would not be required to.[290]

The SEC is also seeking comments from the public regarding an alternative to the "noisy withdrawal" provision.[291] Under this alternative approach, an attorney retained by the issuer would still be required to withdraw but instead of reporting this fact to the SEC, the attorney would be required to notify the issuer, in writing, that his withdrawal was based on professional considerations.[292] If the attorney is employed by the issuer, he or she would be required to cease participating in any matter concerning the violation and would be required to notify the issuer that it has not provided an appropriate response to the attorney's report of evidence of a material

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283. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,689.

284. *Id.*

285. *Id.* at 71,690. The threshold for action includes the same requirement that the attorney believe the past violation is likely to have resulted in substantial financial injury to the issuer. *See id.*

286. *Id.*

287. *See id.* at 71,689.

288. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,689. The SEC notes that if the attorney did not prepare or assist in the preparation of any false or misleading filings, the in-house attorney is not required to notify the SEC. *See id.*

289. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,690.

290. *Id.* at 71,690.

291. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6,324, 6,328 (proposed February 6, 2003); Donaldson Testimony, *supra* note 6.

292. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,328.

violation.[293] Unlike the original "noisy withdrawal" proposal, in either instance, the attorney would not be required to disaffirm any false or misleading documents filed with the SEC.[294] It would then become the issuer's responsibility to publicly disclose the attorney's notice of withdrawal or the in-house attorney's notice that he or she did not receive an appropriate response to a report of evidence of a material violation to the SEC.[295] The issuer would be required to report the information on form 8-K, 20-F, or 40-F within two business days of receiving the notice.[296] If the issuer does not comply with this disclosure requirement, the alternative proposal permits the attorney to notify the SEC of his or her withdrawal.[297] The SEC believes that this alternative approach, by placing the responsibility on the issuer instead of the attorney, addresses many of the concerns regarding conflicts of laws and attorney-client privilege expressed by the foreign and domestic legal communities.[298]

E. Qualified Legal Compliance Committee

As an alternative procedure for reporting evidence of a material violation, an issuer may elect to establish a Qualified Legal Compliance Committee (QLCC).[299] The composition of the QLCC must include at least one member of the issuer's audit committee or, if the issuer does not have an audit committee, one member from an equivalent committee of independent directors and two or more members of the issuer's board of directors.[300] The QLCC must be established by the issuer's board of directors and must adopt written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation.[301] To meet SEC requirements, the QLCC must be empowered with the authority to assess and investigate any report of material violation by the issuer, its officers, directors, employees, or agents and have the authority to recommend and oversee an appropriate response to the evidence.[302] The QLCC must also have the power to notify the

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293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,329.
299. *Id.* at 6,304. *See* 17 C.F.R. § 205.2(k)(1) (2003).
300. 17 C.F.R. § 205.2(k)(1). The provision provides that the members of the QLCC from the issuer's board of directors must not be employed by the company directly or indirectly, and in the case of a registered investment company, must not be "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. § 80a-2(a)(19)(2003). *Id.*
301. 17 C.F.R. § 205.2(k)(2) & (3) (2003).
302. 17 C.F.R. § 205.2(k)(3). Section 205.3 provides:
> a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph

SEC in the event that the issuer fails in any material respect to implement an appropriate remedial measure that has been recommended by the QLCC.[303]

If the issuer elects to utilize a QLCC and provided the Committee is formed prior to the report of evidence of a material violation, an attorney who becomes aware of such evidence may report it directly to the QLCC.[304] In that instance, the attorney's obligations under the final rule would be fulfilled.[305] Additionally, under Section 205.3, a CLO may refer a report of evidence of a material violation to the QLCC instead of conducting his or her own inquiry.[306] Once the CLO has reported the evidence to the QLCC, the QLCC will be responsible for responding to the report, including making a determination as to whether an investigation is necessary, conducting the investigation, and adopting appropriate remedial measures.[307] The CLO's only remaining obligation is to inform the reporting attorney that the issue has been referred to the corporation's QLCC for investigation.[308]

F. Supervisory Attorneys

A provision of the final rules that will be particularly important for attorneys of foreign issuers is that of supervisory responsibility. Under the final rules, a supervising attorney is an attorney who supervises or directs another attorney who is appearing and practicing before the SEC in the representation of an issuer.[309] This includes an issuer's CLO or the equivalent thereof.[310] The provision is based in part on Rule 5.1 of the ABA's Model Rules of Professional Conduct.[311] Essentially, the language adopted by the final rule provides that a supervisory attorney to whom a subordinate attorney reports evidence of a material violation is responsible for complying with the

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(c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation."
17 C.F.R. § 205.3(b)(2).

303. *See* 17 C.F.R. § 205.2(k)(4) (2003).

304. 17 C.F.R. § 205.3(c)(1) (2003).

305. *Id. See also* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,309 (noting that upon reporting to the QLCC of evidence of a material violation, the attorney is freed from any obligation to assess the issuers response to the report).

306. *See* 17 C.F.R. § 205.3(c)(2) (2003).

307. *See id.*

308. *See id.*

309. 17 C.F.R. § 205.4(a) (2003).

310. *Id.*

311. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,313. *See also* MODEL RULES OF PROF'L CONDUCT R. 5.1 (2002) (which provides (1) that a lawyer having direct supervisory authority over another lawyer must make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct; and (2) that a supervisory attorney may be held liable for a subordinate attorney's violation of the rules of professional conduct if he or she knowingly ratifies the behavior or fails to prevent the behavior when he or she is able to do so).

reporting requirements of Section 205.3.[312] This language modified the proposed rule by clarifying that "only a senior attorney who actually directs or supervises the actions of a subordinate attorney appearing and practicing before the Commission is a supervisory attorney under the rule."[313] An attorney who supervises or directs a subordinate attorney on matters unrelated to the subordinate's appearing and practicing before the SEC would not be a supervisory attorney under the final rule.[314] Conversely, if a senior attorney does not normally exercise direct supervisory authority over a subordinate attorney but does provide supervisory direction in matters related to the subordinate's appearing and practicing before the SEC, he or she would be a "supervisory attorney" under the final rule.[315]

This provision has potentially wide implications for supervisory attorneys of foreign issuers. Any senior attorney of a foreign issuer who has direct supervisory responsibility over an attorney who meets the definition of appearing and practicing before the SEC will be subject to the final rule.[316] In other words, even though the supervising attorney may not appear and practice before the SEC, he or she will to an extent be responsible for compliance with the Rule.[317]

G. Whistleblower Protection

It is important to note that the Act provides protection for in-house attorneys who comply with the final rule through Section 806's "whistleblower" provision.[318] Specifically, this "whistleblower" provision provides protection to attorneys, or any other employee, against retaliation because the employee provided information or assistance to a federal law enforcement agency or to a person of supervisory authority regarding alleged violations of U.S. securities law.[319] If an employee experiences retaliation and is able to bring a successful claim, the Act entitles the employee to all relief necessary to make the employee whole.[320] This includes reinstatement with the same

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312. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,313.

313. *Id.* In response to the proposed rule, the ABA argued that defining a supervisory attorney to include attorneys who "have supervisory authority over another attorney" would unnecessarily cover "all partners in a law firm and even senior associates," many of which may not actually exercise direct authority over the attorney in question. *Id.* (quoting Comments of the American Bar Association, at 22-23).

314. *Id.*

315. *Id.*

316. *See generally* 17 C.F.R. § 205.4 (2003); Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,313.

317. *See* generally 17 C.F.R. § 205.4; Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,313.

318. *See* 15 U.S.C. § 1514A (2003); 29 C.F.R. § 1980.100 (et. seq.) (2003).

319. *See* 15 U.S.C. § 1514A(a) (2003); 29 C.F.R. § 1980.102(a) (2003).

320. 15 U.S.C. § 1514A(c) (2003); 29 C.F.R. § 1980.109(b) (2003).

seniority status that the employee would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained, including litigation costs and attorney's fees.[321] As can be seen, an in-house attorney who elects to report evidence of a material violation will be provided protection and also means of restoration under the Act.

H. Discipline and Sanctions

There are four subparts to the Discipline and Sanctions provision of Rule 205, three of which are be applicable to foreign attorneys.[322] The underlying strategy of the SEC was to proceed against individuals violating Rule 205 as it would any other violator of U.S. federal securities law and, when appropriate, initiate proceedings under the Rule seeking appropriate disciplinary sanctions.[323]

The first subpart provides that a violation of Rule 205 will subject such attorney to the civil penalties and remedies for a violation of U.S. federal securities laws in an action brought by the SEC.[324] This provision clarifies that only the SEC may bring an action for violation of Rule 205.[325] The second subpart provides that an attorney appearing and practicing before the SEC who violates any provision of Rule 205 will be subject to the disciplinary authority of the SEC, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices.[326] This could result in many attorneys who violate the provisions of this rule being subject to discipline by both the SEC and the attorney's home country disciplinary authority.[327] Also, an administrative proceeding initiated by the SEC for a violation of Rule 205 can result in an attorney being censured or being temporarily or permanently denied the privilege of appearing and practicing before the SEC.[328]

Next, subpart (d) speaks directly to the liability of non-U.S. attorneys who do not meet the definition of a non-appearing foreign attorney.[329] As noted above, the adopted definition of non-appearing foreign attorney in subpart 205.2(j) was the response to the large number of comments and

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321. 15 U.S.C. § 1514A(c) (2003); 29 C.F.R. § 1980.109(b) (2003).

322. *See generally* 17 C.F.R. § 205.6 (2003).

323. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,314.

324. 17 C.F.R. § 205.6(a) (2003). *See also* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,314.

325. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,314.

326. 17 C.F.R. § 205.6(b) (2003).

327. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,314.

328. *Id.*

329. *See* 17 C.F.R. § 205.6(d) (2003).

feedback the SEC received from the legal community noting that attorneys practicing in many foreign countries will be subject to other home-jurisdiction regulations that will render compliance with the Rule impossible.[330] This point was also emphasized at the December 2002 Roundtable discussions.[331] As a result, the SEC implemented subpart (d) which provides that "[a]n attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law."[332] Therefore, the foreign attorney does not have to suffer the dilemma of which regulation to comply with.[333] Instead, the foreign attorney must comply with the final rule to the maximum extent allowed by the laws to which the attorney is subject.[334]

There is also a subpart (c) that provides protection for attorneys who comply with the rule in good faith under inconsistent standards imposed by any state or jurisdiction where the attorney is admitted to practice.[335] In such instances, the attorney will not be subject to discipline.[336] This provision, however, relates solely to attorneys who practice in the United States.[337]

Finally, the final rules provide a "safe harbor" provision with regard to private causes of action.[338] Specifically, Rule 205 does not create a private cause of action against an attorney, foreign or domestic, or issuer, based on their compliance or noncompliance with the Rule.[339] Moreover, the provision affirmatively states that only the SEC can enforce the requirements of Rule 205.[340] The SEC notes that this is intended to "preclude, among other things, private injunctive actions seeking to compel persons to take action under the final rule and seeking private damages against such persons."[341] This protection extends to law firms and issuers.[342]

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330. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,314.

331. *Id.*

332. 17 C.F.R. § 205.6(d).

333. *See id.*

334. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,314-15.

335. 17 C.F.R. § 205.6(c) (2003).

336. *Id.*

337. *See id.*

338. *See* 17 C.F.R. § 205.7(a) (2003).

339. *Id.*

340. 17 C.F.R. § 205.7(b) (2003).

341. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,315.

342. *Id.*

IV. INTERNATIONAL REACTION, APPLICATION ISSUES, AND PRACTICAL SUGGESTIONS

A. International Reaction to the SEC's Final Rule

While U.S corporate counsel are loudly struggling with the requirements and implications of the Sarbanes-Oxley Act, the SEC's final rule has had a slightly different impact on their foreign counterparts.[343] The concerns of the legal international community can be seen in a recent poll of delegates of the International Bar Association (IBA) conducted by Martindale-Hubbell.[344] While the issue of greatest importance in the minds of the members of the IBA was the application of the European Union (EU) Merger Regulations, the potential implications of the Sarbanes-Oxley Act and the SEC's final Regulations was an issue as well.[345] As a preliminary matter, of those surveyed, sixty-three percent revealed that their legal department's work crosses more than one jurisdiction, with a substantial portion (twenty-eight percent) indicating that ninety percent or more of their work is multi-jurisdictional.[346] Also, forty-six percent of the companies represented in the survey reported annual revenues in excess of one billion U.S. dollars.[347] The poll did not state what percentage of the attorneys surveyed provide legal advice regarding U.S. securities law or who might not otherwise meet the Rule's definition of "non-appearing foreign attorney."[348] That is the group that will feel the greatest effects and is likely to express the greatest concerns over the application of the new Rule.[349]

The poll indicates that the majority of the members of the IBA see corporate counsel playing an increasingly substantive role in the day-to-day business operations in the future.[350] This is supported by the fact that sixty percent of those surveyed see the broadening of the legal function as "essential" in business operations.[351] The members of the IBA ranked in order of importance the primary legal/business functions.[352] They included in order: 1) mergers and acquisitions; 2) business-focused legal advice; and 3)

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343. *See International Reaction to Enron and Sarbanes-Oxley: Results of 2003 IBA Poll,* Martindale-Hubbell's Counsel to Counsel, 3 CONNECTIONS 2 (Summer 2003) [hereinafter Martindale-Hubble Poll].

344. *See id.* Martindale-Hubbell polled delegates at the annual International Bar Association Conference held in February of 2003 in Barcelona, Spain. *See id.* at 1.

345. *See id* at 1.

346. *Id.* at 2.

347. *Id.*

348. *See generally* Martindale-Hubble Poll, *supra* note 343.

349. *See* discussion, *supra* text accompanying notes 192-228.

350. *See* Martindale-Hubble Poll, *supra* note 343, at 1.

351. *Id.*

352. *Id.*

corporate governance.[353] Interestingly, general management priorities for legal counsel were more focused on contributing to business strategy and solving business problems than on solving legal problems.[354] The single most important issue facing corporate counsel, however, was risk management.[355]

With regard to the repercussions of the Sarbanes-Oxley Act and the SEC's final regulations, fifty-eight percent indicated that the new regulations would impact their international legal function in some way.[356] The impact on legal counsel includes, more reporting responsibilities, more time spent understanding and applying the new regulations, and more paperwork.[357] Only thirty-two percent of the IBA reported that the regulations would not affect the legal function.[358] The survey further notes that of the companies represented in the survey, fifty-nine percent predicted that their reliance on outside counsel would remain stable, while those who did expect a change thought their reliance on outside counsel would increase.[359]

Finally, the President and CEO of Martindale-Hubbell, John Lawler, in discussing the impact of the new regulations and the corresponding public expectations noted that:

> [c]ommon perceptions—or misconceptions—are arguably the most difficult issues confronting counsel in the post-Enron, post-[Sarbanes-Oxley] environment. Regulations are a cake-walk compared to the shifting expectations of corporate clients, public feelings on pervasive misconduct, and even the self-image of the company itself, which may have unwittingly outgrown the style and structure of its governance program.[360]

He concluded that "[t]he slow process of refashioning corporate culture rests largely in the hands of the legal department."[361]

B. Application Issues For Foreign Attorneys and Foreign Private Issuers

The SEC's final rule for corporate attorneys was meant to change the culture of corporate governance that produced Enron, but some suggest that the real cultural revolution may come not in the way companies are ran but in

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353. *Id.*

354. *Id.*

355. *Id.*

356. Martindale-Hubble Poll, *supra* note 343, at 1.

357. *Id.*

358. *Id.* Ten percent of the IBA indicated that they were not sure how the new U.S. regulations would impact their legal responsibilities. *Id.*

359. *Id.* at 2.

360. John Lawler, A letter from the President, Martindale Hubbell's Counsel to Counsel, 3 CONNECTIONS 2, at 2 (Summer, 2003).

361. *Id.*

the way they relate to their lawyers.[362] They reason that turning corporate lawyers into "watchdogs" will cause corporate executives to avoid them not confide in them.[363] After all, corporate executives often avoid gatekeepers; they are attracted to problem solvers.[364] As a result, corporate executives "may end up breaking more laws out of ignorance than they ever did by design."[365] The unintended consequence may be that corporations will become more secretive, not more transparent.[366]

Furthermore, with regard to the behavioral impact of the SEC's final rule, some foresee potential personal dilemmas, especially with regard to outside counsel. [367] It starts with the notion that outside attorneys generally do not retain clients, rather clients retain attorneys.[368] Also, even though the organization is the client, the attorney is typically hired by and has primary contact with only a few corporate managers.[369] Those same individuals generally define the objectives of the representation and identify the responsibilities for which the attorney has been retained.[370] Ultimately, they make the critical decisions as to the attorney's retention, compensation, and performance evaluation.[371] As a result, even though the attorney's final allegiance runs to the corporation, the attorney's day-to-day responsibilities include reporting to and pleasing these individuals.[372] In an era in which major corporations routinely retain a number of outside law firms, no attorney's position is safe.[373]

The personal dilemma arises when the attorney becomes aware of a material violation of U.S. securities law (assuming the attorney meets the

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362. Waldmeir, *Hidden Dangers*, *supra* note 123.

363. *See id.*

364. *Id.*

365. *Id.* (quoting Burton Staniar, Chief Executive of Knoll, from his speech before a conference of attorneys at Georgetown University Law School). *See also* Waldmeir, *Lawyers on Duty*, *supra* note 86.

> Where lawyers are forced to spy on everything management does, second-guessing business decisions and ratting on managers to the board, company officials may be reluctant to seek legal advice . . . And if they do not know what the law is, there is even more chance they will break it.

Id.

366. Waldmeir, *Hidden Dangers*, *supra* note 123.

367. *See* Fisch & Rosen, *supra* note 122, at 1123. *See also* Palmer, *supra* note 93 (stating that the reporting duties raise "thorny management issues"). For global law firms serving international issuers, the difficulties are compounded. *Id.* Firms must determine how to comply with the new rule while at the same time preserving the confidentiality of communication and trust fundamental to the attorney-client relationship. *Id.*

368. Fisch & Rosen, *supra* note 122, at 1123.

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

elements of the final rules subjecting him or her to liability).[374] The attorney is faced with the option of reporting the violation to the corporation's CEO or Board of Directors or keeping it quiet and risking potential sanctions.[375] In many corporations, the attorney's decision to report the violation is likely to have serious consequences with his or her relationship with that client.[376] Particularly, if the Board of Directors has confidence in management, the attorney's report may place the Board in the undesirable position of taking sides between its trusted executives and the outside attorney.[377] The consequence is that if the attorney's report does not result in a finding of tangible evidence of a material violation, his or her future with that client will likely be jeopardized.[378] In addition, the attorney, in such an instance, may compromise his or her professional reputation.[379] Other managers and executives may be unwilling to hire an attorney known in the corporate community as a "whistleblower."[380] Legitimately, they will be concerned with the lack of trust in the attorney and the quality of the representation.[381] Given the abundance of attorneys in the world's legal market, this is a situation attorneys will want to avoid.[382]

On the other end of the spectrum, one can envision an attorney that is eager to avoid liability over-reporting evidence of material violations.[383] This might especially be true for in-house counsel, who will not likely face the replacement issues of outside counsel.[384] Given the somewhat vague standards contained in the final rule for "material violation," "credible evidence," and "appropriate response," an overzealous in-house attorney motivated by avoiding liability is likely to over-report, wasting time and resources.[385] The idea is that "if the scope of the reporting obligations is unclear or ambiguous and the attorney faces meaningful risk of liability, it becomes rational for him or her to report all evidence related to actual, likely or even improbable wrongdoing up the corporate ladder."[386] In fact, some suggest that over-

374. *See* Fisch & Rosen, *supra* note 122, at 1124-25.

375. *See id.*

376. *Id.* at 1125.

377. *Id.* (The situation is similar for in-house attorneys, however, the point is better illustrated with outside counsel).

378. *Id.* at 1126.

379. *Id.*

380. Fisch & Rosen, *supra* note 122, at 1126.

381. *Id. See also At the Top Table*, LEGAL WEEK, Sept. 26, 2002, *available at* LEXIS, News & Business, News, Major World Publications (last visited March. 4, 2004) (noting that "[t]here is . . . a fear that by being branded as potential whistleblowers corporate counsel may lose the trust of their bosses—and with it the ability to influence the decisions their companies make").

382. *See generally* Fisch & Rosen, *supra* note 122, at 1123.

383. *See id.* at 1125.

384. *See id.*

385. *See id.* at 1126.

386. *See id.*

disclosure is consistent with existing operational practices for corporate attorneys.[387]

The fear of potential liability may also reduce the corporate attorney's incentive to become fully informed about the client's business.[388] The final rule does not create a "should have known" standard.[389] As a result, the less the attorney knows, the more likely he or she is to avoid reporting obligations and ultimately liability.[390] Some have suggested that by reducing the lawyer's incentive to get more involved in the operations of the business, the final rule will reduce attorneys' overall performance as counselors.[391]

The SEC's final rule will also impose costs on corporations that fall under the Act.[392] As discussed above, the rule will ultimately cause the corporation's CLO to investigate evidence of material violations, evaluate such evidence, and implement necessary remedial action.[393] The Rule will also cause the CEO, QLCC, and Board of Directors to review evidence of material violations.[394] Each of which will cost in terms of time and financial resources.[395] For instance, a company that elects to form a QLCC might incur costs that include increased compensation and insurance for QLCC members and general administrative costs;[396] not to mention the cost of the corporate legal division's and executive management's time and resources spent learning, circulating, and implementing the new regulations.[397]

Finally, the foreign community has expressed concerns that the requirements of the new rules of professional conduct may have implications where an attorney is subject to conflicting home country ethical requirements.[398] The SEC, however, has made it clear that the provisions of the final rules will prevail.[399]

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387. *See id.*

388. Fisch & Rosen, *supra* note 122, at 1127.

389. *See id.*

390. *See id. See also* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,302.

391. *See* Fisch & Rosen, *supra* note 122, at 1125.

392. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,317.

393. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,307. *See* discussion *supra*, text accompanying notes 243-72. *See also* 17 C.F.R. § 205.3.

394. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,307 & 6,313. *See* discussion *supra* text accompanying notes 243-72 & 298-307. *See also* 17 C.F.R. § 205.3.

395. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,317.

396. *See id.*

397. *See id.*

398. *See* Tafara Speech, *supra* note 10.

399. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,304. The SEC stated that, "[n]on-United States attorneys who believe that the requirements of the rule conflict with law or professional standards of their home jurisdiction may avoid being subject to the rule by consulting with United States counsel whenever they engage in any

C. *Practical Suggestions to Ensure Compliance*

There are a number of things that foreign attorneys and the companies they represent can do to put themselves in the best position to ensure compliance with the new Rule.[400] First, it may be prudent for foreign private issuers to establish a QLCC, which can be the company's audit committee.[401] A properly-functioning QLCC can benefit everyone involved in the corporate governance process.[402] Under the SEC's final rule, if an attorney reports evidence of a possible material violation to the QLCC, his or her reporting obligations have been satisfied.[403] Also, the QLCC can relieve the CLO of the obligation to investigate and respond to reports of potential violations, which would free the CLO up to conduct his or her other legal functions and would likely result in a more consistent and efficient method of dealing with violations.[404] Some suggest that these benefits would outweigh any potential costs in establishing the Committee.[405]

Instituting a QLCC should not be such a leap for much of the world. For instance, Supervisory Body Committees, which function similarly to QLCC's, are common in many European Union member countries.[406] Generally, E.U. member countries rely on such committees to help organize the work of the supervisory board, particularly in areas where the personal interests of management and the interests of the company may come into conflict, such as with financial reporting, auditing, and remuneration.[407] In fact, the trend to use these committees among E.U. countries seems to be growing.[408] The only issue to overcome with regard to the establishment of the QLCC would be in the makeup of the committee itself. Generally, Supervisory Body Committees are composed of a mixture of independent directors and non-executive employees.[409] Under the SEC's final rule, the composition of a QLCC cannot contain a member that is employed directly or indirectly by the issuer.[410] As

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activity that constitutes appearing and practicing before the commission." *Id.*

400. *See* Thompson & Night, *supra* note 201, at 6.

401. *Id.*

402. *Id.*

403. *Id. See* 17 C.F.R. § 205.3(c)(1); discussion *supra* text accompanying notes 299-308.

404. *See* Thompson & Night, *supra* note 201, at 6.

405. *See id.*

406. *See generally* European Commission study, *supra* note 124.

407. *See id.*

408. *See id.* at 78 (nominating committees, audit committees, and remuneration committees are all common occurrences in Belgium, France, the Netherlands, Spain, Sweden, UK and others).

409. *See id.* The reason for having non-executive employees to serve on Supervisory Body Committees is that their presence provides additional assurance to market investors that their interests are defended. *Id.*

410. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,305.

a result, the QLCC would have to function as a subcommittee, excluding the employees of the issuer.

Next, depending on its size and structure, it may be advisable for foreign private issuers to establish a clear hierarchy within the company's legal department.[411] Designating "supervisory attorneys" within the department can minimize the obligations of subordinate attorneys to report evidence of material violations up to the Board of Directors or QLCC.[412] This will not only define roles and responsibilities with regard to the final rule but will also provide a system of checks and balances as to what is being reported and to whom.[413]

Moreover, to combat the inclination on the part of executives to avoid lawyers subject to the final rule, general counsels may want to establish regular meetings with a committee of independent directors and executives, dedicated to the discussion of breaches of law and duty.[414] The idea is that rather than trying to meet only in times of crisis, these gatherings would be routine.[415] As one expert put it, this "may sound like a structural solution to a substantive problem but anyone who has worked in a large organization knows that once the structure exists the substance will follow."[416] If the two sides make it a practice to meet regularly to discuss the law, the company will likely end up obeying it more often.[417]

Also, foreign attorneys should take necessary steps to learn the new regulations.[418] According to the above survey, nearly sixty percent believe that, in some way, the new SEC regulations will affect their performance as corporate counsel.[419] It stands to reason that foreign corporate counsel should take time to learn the new standards. This also applies to those individuals in supervisory roles that do not directly appear and practice before the SEC.[420] As the Rule notes, supervising attorneys have an obligation to ensure that

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411. *See* Briefing Paper, Securities and Litigation Teams, Pillsbury Winthrop LLP, SEC Sets Attorney Professional Conduct Standards under Sarbanes-Oxley Act, at 1 (Feb. 27, 2003), *a t* http://www.pillsburywinthrop.com/files/tbl_s31Publication/PDFUpload208/8727/Client%20Alert%20Securities-Litigation%2002-28-03_1069410.pdf (last visited March 4, 2004) [hereinafter Pillsbury Briefing Paper].

412. *Id. See generally* 17 C.F.R. § 205.4 (discussion *supra* text accompanying notes 309-17); 17 C.F.R. § 205.5 (2003).

413. *See generally* Pillsbury Briefing Paper, *supra* note 411, at 1.

414. Waldmeir, *Hidden Dangers*, *supra* note 123.

415. *Id.*

416. *Id.*

417. *Id.*

418. *See* Palmer, *supra* note 93; Thompson & Night, *supra* note 201, at 6.

419. *See* Martindale-Hubbell Poll, *supra* note 343, at 1.

420. *See generally* 17 C.F.R. § 205.4.

subordinate attorneys abide by the new rules.[421] This holds true for supervising attorneys practicing as in-house or as outside counsel.[422]

The learning process, however, should not stop there. In-house attorneys should also take time to educate and train the foreign issuer's officers and directors so that the company will be adequately equipped to handle evidence of possible material violations.[423] This includes training those individuals on the new governance standards imposed by the Act, generally with regard to securities law, and the attorney's obligations imposed by Section 307.[424] Also, it would be wise for the board of directors to establish and circulate throughout the company, written procedures for handling the receipt, consideration, and investigation of reports of material violations.[425] Only then will the company put itself in the best position to head-off potential securities law violations.[426]

With regard to outside law firms, it would be advisable to ensure that all attorneys within the firm know and understand the SEC's new regulations implementing section 307.[427] This includes every lawyer, not just those working within the corporate/securities practice group.[428] Once again, the goal being that with awareness of the proposed rules, the firm will put itself in the best position to ensure that it meets SEC standards.

Also with regard to the learning process, it is important for attorneys of foreign issuers to become familiar with U.S. securities laws. According to the final rule, the only way for an attorney who would not otherwise meet the definition of a non-appearing foreign attorney to avoid being subject to the rule would be to decline to advise their client on U.S. securities law or to seek the assistance of U.S. counsel when undertaking an issue that could constitute "appearing and practicing before the Commission."[429] As mentioned above, the final rule does not define "material" with regard to "material violation."[430] Instead, the final rule relies on the term's "well-established meaning under federal securities laws."[431] Naturally, an attorney who may be subject to liability under this rule would be well-served to know precisely what that definition is and how it applies to a given set of facts. In short, any attorney that could fall under the definition of "appearing and practicing before the

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421. *See id.*
422. *See id.*
423. *See* Thompson & Night, *supra* note 201, at 6.
424. *See id.*
425. *See id.*
426. *See generally id.*
427. *See id. See also* Palmer, *supra* note 93.
428. *See* Palmer, *supra* note 93.
429. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,304.
430. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,303.
431. *Id.*

Commission" should put forth the time and effort to know and understand U.S. securities law.[432] This will minimize risk to the attorney and to the corporation. Furthermore, because so much of the Rule suggests that a foreign attorney practicing before the SEC can avoid liability by consulting a U.S. attorney, it would be advisable for foreign issuers to retain U.S. law firms to serve as a resource for U.S. securities law issues.[433] Given the potential for liability and the immunity it provides, this might be well worth it.[434]

Finally, as a risk management measure, outside law firms may want to engage in stricter client screening.[435] Some suggest that when a client undergoes a change in control, such as in bankruptcy, merger, or takeover, the risk for SEC involvement and regulatory action will increase.[436] As a result, a law firm will want to screen the potential for such circumstances, and unless the firm specifically practices in those areas, it may want to avoid representation of that client.[437]

V. CONCLUSION

Section 307 of the Sarbanes-Oxley Act and Rule 205 are designed to protect investors and increase their confidence in public companies by ensuring that attorneys who represent issuers report up the corporate ladder evidence of material violations committed by their officers and employees.[438] The idea is that by requiring attorneys to act in this manner, investors will be comforted knowing that the corporation's executives and independent board members will evaluate and deal swiftly with such issues.[439] At the same time, general awareness of the corporate attorney's obligations under the SEC's final rule should deter incidents of corporate misconduct by company employees for fear that wrongdoing will be detected and reported as a matter of course.[440] Ultimately, the SEC's final rule improves the overall governance of corporations, by providing attorneys who appear and practice before the SEC clarity and guidance with regard to their duties and ethical obligations.[441]

Furthermore, the broad scope of the SEC's final rule reaches and will impact foreign attorneys who do not meet the SEC's definition of "non-

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432. *See generally* Palmer, *supra* note 93.

433. *See* 17 C.F.R. § 205.2(j)(3) (2003).

434. *See* 17 C.F.R. § 205.6; Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,314-15.

435. *See* Palmer, *supra* note 93.

436. *Id.*

437. *See generally id.*

438. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,297; 17 C.F.R. § 205.1. *See also* Tafara Speech, *supra* note 10; Palmer, *supra* note 93.

439. *See* Pitt Speech Before the ABA, *supra* note 78.

440. *Id.*

441. *Id.*

appearing and practicing."[442] At very least, the impact will come in the form of heightened reporting responsibilities, more time spent understanding and applying the complexities of the new regulations, and more paperwork.[443] Also, the Rule poses several potentially significant application issues in terms of the way corporations interact with their attorneys and with the personal choices attorneys will have to make in complying with the Rule.[444] However, by implementing a few practical suggestions, attorneys and the corporations that employ them can head off many of these application issues and can put themselves in the best position to ensure compliance with the new Rule.[445] Some have even suggested that as client service professionals, implementing the Rule in the right light may actually improve attorney performance.[446] As one expert put it, "[p]roactive firms will use the new conduct rules to enhance the quality of client service. After all, the new reporting obligations are intended to deter harm to clients from breaches of duty and to improve the quality of their public reporting."[447] Consequently, the net effect should be a reduction in material violations of U.S. securities law and ultimately an increase in investor confidence.

442. Palmer, *supra* note 93. *See also*17 C.F.R. § 205.2(a)(2) (2003); Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6,297-98.

443. *See* Martindale-Hubble Poll, *supra* note 343, at 1.

444. *See supra* text accompanying notes 362-91.

445. *See supra* text accompanying notes 400-437.

446. *See* Palmer, *supra* note 93.

447. *Id.*

STRUGGLING FOR AIR: THE KYOTO PROTOCOL, CITIZENS' SUITS UNDER THE CLEAN AIR ACT, AND THE UNITED STATES' OPTIONS FOR ADDRESSING GLOBAL CLIMATE CHANGE

Richard W. Thackeray, Jr.*

> The chemical and thermal dynamics of global warming are extremely complex, but scientists are looking especially carefully at the role played by one molecule: carbon dioxide (CO_2). Since the beginning of the industrial revolution, we have been producing increasing quantities of CO_2, and we are now dumping vast amounts of it into the global atmosphere . . . Given the apparent close relationship between CO_2 and temperatures in the past, it hardly seems reasonable—or even ethical—to assume that it is probably all right to keep driving up CO_2 levels. In fact, it is almost certainly not all right. Isn't it reasonable to assume that this unnatural and rapid change in the makeup of a key factor in the environmental equilibrium could have sudden and disastrous effects?[1]

> The greenhouse debate is short on facts and long on rhetoric. . . . [It] poses a serious dilemma for policy makers. The experts are deadlocked on both the likelihood and the timing of the problem. Enormous uncertainties remain in our understanding of the greenhouse effect, its likely consequences, and the possible effectiveness of various countermeasures. These uncertainties will not be resolved for decades.[2]

Carbon dioxide makes up less than one-tenth of one percent (0.03%) of the atmosphere and exists as a natural by-product of animal respiration and geothermal activity.[3] Nevertheless, the gas's relationship to global climate

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1. SENATOR AL GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 92, 96 (1992).

2. ALAN S. MANNE & RICHARD G. RICHELS, BUYING GREENHOUSE INSURANCE: THE ECONOMIC COSTS OF CARBON DIOXIDE EMISSION LIMITS 1 (1992).

3. Riehl, Herbert, "Air." *Grolier Multimedia Encyclopedia.* Scholastic Library Publishing 2004, *available at* http://gme.grolier.com (last visited Mar. 29, 2004).

change has nurtured one of the most contentious debates in the fields of environmental science, environmental law, and international relations.[4] On December 11, 1997, 157 nations tentatively agreed to "the most far-reaching proposed international environmental treaty obligation in history, the Kyoto Protocol to the United Nations Framework Convention on Climate Change," (Protocol).[5]

Protocol drafters called for a five percent reduction in greenhouse gas emissions[6] in industrialized countries, based on their 1990 statistics, by 2012.[7] By the end of September 2003, 119 countries ratified, accepted, acceded to, or approved the treaty, including all fifteen members of the European Union, China, and Canada.[8] The United States, under the administration of President Bill Clinton[9], was among the countries that agreed in principle to the Kyoto Protocol.[10] However, the U.S. Senate announced in two resolutions that it would not ratify the treaty as presented, and President George W. Bush said in March 2001, "As far as I'm concerned, the Kyoto Protocol is dead."[11]

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4. *See generally* THOMAS GALE MOORE, CLIMATE OF FEAR: WHY WE SHOULDN'T WORRY ABOUT GLOBAL WARMING (1998); GORE, *supra* note 1.

5. Thomas Richichi, *Although Storm Clouds Threatened Throughout the Global Warming Conference, in Kyoto, the Conferees Reached an Agreement on Greenhouse Gas Emissions*, 20 NAT'L L. J., Dec. 29, 1997, at B4, col. 1. *See also* United Nations Framework Convention on Climate Change, May 29, 1992, U.N. Doc. A:AC.237/18 (1992), *reprinted at* 31 I.L.M. 849 (1992) [hereinafter Convention]. *See also* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCC/CP/1997/L.7Add.1, *reprinted at* 37 I.L.M. 22 (1998) [hereinafter Protocol].

6. Carbon dioxide, combined with methane gas, represents about eighty-six percent of all the greenhouse gases being added to the atmosphere. *See* MOORE, *supra* note 4, at 10. (citing National Research Council, *Policy Implications of Greenhouse Warming: Scientific Assessment* (1991)). Chlorofluorocarbons and nitrous oxides are the other greenhouse gases which appear in the atmosphere in significant volumes. *Id.*

7. *Id.*

8. *See* Kyoto Protocol, Status of Ratification (last modified on Mar. 17, 2004), *available at* http://unfccc.int/resource/kpstats.pdf (last visited Mar. 29, 2004) [hereinafter Protocol Status]. *See also* Les Whittington, *Chretien Ratifies Kyoto*, TORONTO STAR, Dec. 17, 2002, at A6; Kurt Shillinger, *Russia Backs Kyoto Treaty as Criticism of US Grows*, BOSTON GLOBE, Sept. 4, 2002, at A6. Russian President Vladimir Putin recently balked after giving earlier indications he would ratify the treaty. *See* Susan B. Glasser, *Russian Stance Leaves Fate of Global Warming Pact in Doubt*, WASH. POST, Sept. 30, 2003, at A14. Attendees of September 2003's five-day U.N. World Climate Change Conference in Moscow expected Putin to announce his country's decision to ratify the treaty at his opening address to the conference. *See id.* Instead, the Russian leader told the assembly that "his government 'is closely studying' ratification but warned that it is 'part of a complex of difficult and unclear problems.'" *Id.*

9. President Bill Clinton served from 1993-2001. *See* Sitkoff, Harvard, "Clinton, Bill." *Grolier Multimedia Encyclopedia.* Scholastic Library Publishing 2004, *available at* http://gme.grolier.com (last visited Mar. 30, 2004).

10. *See* Protocol Status, *supra* note 8.

11. Shillinger, *supra* note 8; *see also* Jeff Nesmith, *Rejection of Kyoto Treaty On Climate May Leave U.S. Companies Out In Cold*, ATLANTA JOURNAL-CONSTITUTION, July 27, 2002, at 8G.

Despite the apparent lack of gravity the Bush administration and Congress assign to the carbon dioxide problem, some legal commentators believe the existing pollution control framework incorporated in the Clean Air Act[12] provides a way to reduce carbon emissions without international commitments.[13] One team of commentators noted, "The question of whether EPA has the authority to address the climate problem to any extent under the Clean Air Act should not be confused with the issue of implementing the terms of the Kyoto Protocol."[14]

Nonetheless, any mechanism the United States either elects to or is required to enact will likely bear some resemblance to the emissions reduction targets tied into the Kyoto Protocol.[15] This Note focuses on the Environmental Protection Agency's (EPA) ability to regulate carbon dioxide as a criteria pollutant under the Clean Air Act, and the relationship of that ability to the United States' would-be commitments under the Kyoto Protocol.[16] Part One provides a scientific background explaining the significance of atmospheric greenhouse gas volumes and their relationship to global warming.[17] Part Two traces the evolution of the international community's understanding of greenhouse gases and provides an outline of the mechanisms it has established to counter global warming.[18]

Part Three of this Note explores the authority Congress vests in the EPA to mitigate the effects of air pollutants in the nation's airspace. Part Four views the process of adopting a "criteria" pollutant through the example of lead, as established by the United States Court of Appeals for the Second Circuit.[19] Part Five analyzes the merits of carbon dioxide as a candidate for such regulation in light of two recent efforts by states to force the EPA's hand through the courts. Finally, Part Six compares the likely result of the EPA's forced regulation of carbon dioxide (either as a criteria pollutant or through motor vehicle emissions limits) with the emissions reduction limits assigned to the United States by the Kyoto Protocol. This Note suggests that any consent decree from the U.S. Court of Appeals for the D.C. Circuit will force the United States into at least partial de facto compliance with the Kyoto Protocol, an international treaty that President George W. Bush has declared "dead."[20]

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12. 42 U.S.C. §§ 7401-7671q (1995).

13. *See* Veronique Bugnion & David M. Reiner, *A Game of Climate Chicken: Can EPA Regulate Greenhouse Gases Before the U.S. Senate Ratifies the Kyoto Protocol?*, 30 ENVT'L. L. 491, 524. (2000).

14. *Id.*

15. *See generally id.*

16. *See generally id.*

17. *See generally id.*

18. *See generally id.*

19. Natural Res. Def. Council, Inc. v. Train, 545 F.2d 320 (2d Cir. 1976).

20. *See* Shillinger, *supra* note 8.

I. THE GREENHOUSE EFFECT AND GLOBAL CLIMATE CHANGE: A SCIENTIFIC OVERVIEW

The Earth's atmosphere is comprised of an amalgam of gases, including a class of gases which retain heat known as greenhouse gases.[21] Greenhouse gases, while just a fragment of the Earth's total atmosphere, serve a vital role by "keep[ing] the Earth at a temperature that sustains life as we know it."[22] The "Greenhouse Effect," or "infrared forcing," retains heat in the Earth's atmosphere by absorbing heat as it emanates from the Earth's surface and blocking its escape from the atmosphere.[23] Climate history studies show that since the mid-1800s, the proportion of carbon dioxide, the most plentiful greenhouse gas (GHG) in the atmosphere "has risen as a result of human activities from about 270 parts per million (p.p.m.) to about 360 p.p.m. or about 30 percent above what it was . . . and more than 20 percent above the highest concentration in 260,000 years."[24]

The term "human activities" encompasses all human actions that release carbon dioxide into the atmosphere, but commentators who use the term largely do so as a synonym for emissions.[25] Human activities caused about one-tenth of one billion metric tons of carbon emissions in 1860.[26] That number rose to one and one-half billion metric tons by 1940, passed three billion metric tons by 1960, and topped eight billion metric tons in the late 1980s.[27] Between 1950 and 1980, "worldwide emissions of carbon dioxide increased 219 percent, or 7.3 percent a year."[28] Increases in carbon dioxide

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21. *See* BRUCE E. JOHANSEN, THE GLOBAL WARMING DESK REFERENCE 3 (2002). "The Earth's atmosphere is comprised of 78.1 percent nitrogen and 20.9 percent oxygen. All the other gases, including those responsible for the greenhouse effect, make up only about one percent of the atmosphere. Carbon dioxide (CO_2) is 0.035 percent; methane (CH_4) is 0.00017 percent, and ozone 0.000001-0.000004 percent." *Id.*

22. *Id.*

23. *See id.*

24. *Id.* at xiv (quoting Paul Epstein, et al., Current Effects: Global Climate Change. An Ozone Action Roundtable, June 24, 1996, Washington D.C., *available at* http://www.ozone.org/curreff.html). Scientists have extrapolated these figures from carbon dioxide concentrations observed in Antarctic ice cores, which froze between 260,000 and 420,000 years ago. *See id.*

25. *See* JOHANSEN, *supra* note 21, at 3. Human activities are also understood to include land use changes. *See* Stabilisation and Commitment to Future Climate Change, United Kingdom, Dept. for Environment Food and Rural Affairs 6 (Oct. 2002), *available at* http://www.meto.gov.uk/research/hadleycentre/pubs/brochures/B2002/global.pdf (last visited Oct. 27, 2003) [hereinafter Stabilisation].

26. *See* JOHANSEN, *supra* note 21, at 3.

27. *See id.*

28. *Id.* Another report quantifies it this way: "Continuous high-precision measurements have been made of its atmospheric concentrations only since 1958, and by the year 2000 the concentrations have increased 17% from 315 [p.p.m.] . . . to 370 [p.p.m.]." *See* Climate Change Science: An Analysis of Some Key Questions, National Research Council (1991), at 10, *available at* http://books.nap.edu/html/climatechange/climatechange.pdf (last visited Mar. 30, 2004) [hereinafter NRC Report].

emissions coincide with the era of global industrialization, which "[b]etween 1850 and 2000, [saw] human combustion of fossil fuels . . . rise[] 50-fold."[29]

Not all emissions remain in the atmosphere, due to the interrelationship the atmosphere shares with oceans and the biosphere known as the carbon cycle.[30] Forests, oceans, and biomass, collectively known as "carbon sinks," absorb carbon dioxide from the atmosphere and do so at increasing rates relative to the concentration of the gas in the air.[31] However, the absorptive power of oceans, trees, and plantlife stabilizes once carbon dioxide emission levels surpass the rate at which it can be absorbed.[32] Scientists estimate that the stabilization phenomenon will occur when carbon dioxide levels reach 550 p.p.m., which could occur within the next century.[33]

Some parts of the world have witnessed a decline in carbon emissions, but the expansion of fossil fuel-based industrial development to new regions has yielded an overall increase of global carbon emissions through the 1990s.[34] The United States' carbon emissions rose from 2.86 billion tons in 1960 to 4.80 billion in 1988.[35] Over the same period, China's carbon emissions leapt from 0.79 billion tons to 2.24 billion tons.[36] While the United States' emissions more than doubled between 1950 and 1988, its percentage of global carbon emissions dropped from forty to twenty-two percent.[37]

Scientists generally agree about the science of the greenhouse effect and how human activities have exacerbated the phenomenon.[38] The bulk of the skepticism about climate change science centers on the use of models to predict future climate change effects.[39] However, a United Nations-chartered body of scientists has undertaken to improve the science in hope of predicting, and eventually preventing any adverse effects that global climate change

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29. JOHANSEN, *supra* note 21, at 3

30. *See* Stabilisation, *supra* note 25, at 6.

31. *See id.*

32. *See id.* For instance, "increases in CO_2 lead to changes in temperature and rainfall, which can affect natural carbon sinks. Over land, climate change can alter the geographical distribution of vegetation and hence its ability to store CO_2." *Id.* This pattern "results in a dying-back of the vegetation," "affects the amount of CO_2 emitted by bacteria in the soil," and due to "changes in circulation and mixing, which accompany climate change, alter[s] the ocean's ability to take up CO_2 from the atmosphere." *Id.* Finally, "warmer oceans absorb less CO_2." *Id.*

33. *See* Stabilisation, *supra* note 25, at 7.

34. *See* JOHANSEN, *supra* note 21, at 7, 8.

35. *See id.* at 8.

36. *See id.*

37. *See id* at 10.

38. *See* Patrick J. Michaels, *Global Warming: An Objective Overview*, *in* GLOBAL WARMING AND THE KYOTO ACCORD: WHAT IS TO BE DONE? 17 (David J. Eaton ed., 2001).

39. *See generally id.* Michaels noted, "models cannot be proven correct, but it is very easy to prove them wrong." *Id.* at 19.

might yield.[40] In 2001, the body predicted that "climate change is projected to increase threats to human health" through "reduced cold stress in temperate countries but increased heat stress, loss of life in floods and storms," changes in vectors of diseases such as malaria and dengue fever, "water-borne pathogens, water quality, air quality, and food availability and quality."[41]

The body also predicted that "[s]ignificant disruptions of ecosystems from disturbances such as fire, drought, pest infestation, invasion of species, storms, and coral bleaching events are expected to increase."[42] It added that "[c]limate change will exacerbate water shortages in many water-scarce areas," and that "[p]opulations that inhabit small islands and/or low-lying coastal areas are at particular risk of severe social and economic effects from sea-level rise and storm surges."[43] And while the Earth and humanity retain the capacity to adapt to some impacts of climate change, "[g]reater and more rapid climate change would pose greater challenges for adaptation and greater risks of damages than would lesser and slower changes."[44]

II. INTERNATIONAL EFFORTS TO REDUCE ATMOSPHERIC GREENHOUSE GAS LEVELS: THE ROAD TO KYOTO

A. Pre-1992 Developments leading to Collective Action

Carbon dioxide first entered the public dialogue in the late 1970s, but the international community took few strides toward regulation for over a decade.[45] Two developments marked the international community's recognition of climate change as a viable threat.[46] First, the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP), "[r]ecognising [sic] the needs of policy-makers for

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40. *See generally* Climate Change 2001: Synthesis Report, Intergovernmental Panel on Climate Change, at ix, *available at* http://www.grida.no/climate/ipcc_tar/vol4/english/index.htm (last visited Mar. 29, 2004) [hereinafter IPCC Third Report].

41. *Id.* at 9. The report uses "vectors of disease" to represent vehicles for disease transmission and proliferation, such as mosquitoes. *See id.*

42. *Id.* at 9, 12.

43. *Id.* at 12.

44. *Id.* at 14.

45. *See* Donald A. Brown, *Climate Change*, *in* STUMBLING TOWARD SUSTAINABILITY 273, 275 (John C. Dernbach ed., 2002). Brown observed that the Carter Administration was the first to recognize carbon dioxide as a potential threat to future generations but added that "global warming was not a priority of the successor Reagan Administration although international interest in climate change grew rapidly in the 1980s." *Id. See also* A Guide to the Climate Change Convention and its Kyoto Protocol, Climate Change Secretariat, 6 (2002), *available at* http://unfccc.int/resource/guideconvkp-p.pdf (last visited Mar. 29, 2004) [hereinafter Guide]. "Increasing scientific evidence of human interference with the climate system, coupled with growing public concern over global environmental issues, began to push climate change onto the political agenda in the mid-1980s." *Id.*

46. *See* Guide, *supra* note 45, at 6.

authoritative and up-to-date scientific information," established the Intergovernmental Panel on Climate Change (IPCC) in 1988.[47] One year later, governments and scientists representing twenty-two countries, including Canada, France, Japan, and Italy, "called for negotiations on a global warming treaty" in recognition of "the need to reduce the threat of human-induced climate change."[48] Soon after, the IPCC issued its "First Assessment Report," which "confirm[ed] that climate change was indeed a threat and call[ed] for a global treaty to address the problem."[49]

In December 1990, the UN General Assembly capped the preparations, "formally launching negotiations on a framework convention on climate change by its resolution 45/212" to be conducted by an Intergovernmental Negotiating Committee (INC).[50] INC started negotiating the terms of the future treaty's framework in February 1991.[51] Negotiating parties, led by the United States, immediately carved out positions on "several major contentious issues at the center of most discussions."[52] Many countries urged passage of a framework whose terms would impose far greater burdens on developed nations than those whose "governments were driven to address more urgent problems of development and basic human needs."[53]

The United States, under the leadership of President George H. W. Bush, stood most firmly against pressures to establish "enforceable emission reduction targets" and urged enactment of a framework free of specific dictates.[54] The United States "wanted the developing nations to accept responsibility" by industrializing in ways that would not exacerbate global warming.[55] By contrast, the developing world pursued a framework that would impose greater responsibility on the industrialized world, "since the developed countries were mainly responsible for causing climate change."[56]

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47. *Id. See also* Brown, *supra* note 45, at 275. "The specific task of the IPCC was to assess for the United Nations the scientific, technical, and socio-economic information relevant for an understanding [sic] the risk of human-induced climate change." *Id.*

48. Brown, *supra* note 45, at 275.

49. Guide, *supra* note 45, at 6. *See also* Brown, *supra* note 45, at 275. The First Assessment's conclusions included the prediction that "sea-level rise and adverse effects on ecosystems . . . were likely to be caused by climate change," but conceded the "considerable scientific uncertainty about the magnitude and timing of human-induced climate change." *Id.*

50. Guide, *supra* note 45, at 6.

51. *Id.*

52. Brown, *supra* note 45, at 275. Brown explains:

> Some of the most controversial issues included (1) the desirability of establishing enforceable targets and timetables to reduce GHG emissions; (2) the responsibility of developed nations to take the lead in reducing GHGs; and (3) the responsibility of developed nations to provide financial assistance to the poor nations to help them reduce GHG emissions.

Id.

53. *Id.* at 276.

54. *Id.*

55. *Id.*

56. *Id.*

B. The United Nations Framework Convention on Climate Change: Development and Entry-into-Force

Despite standing alone on the contentious issues, the United States won the battle, successfully excluding any enforceable emission reduction targets from the draft framework.[57] IPCC completed the framework on May 9, 1992, just under a month in advance of the UN Conference on Environment and Development's Earth Summit, in Rio de Janeiro, Brazil.[58] On June 4, 1992, the IPCC formally released the United Nations Framework Convention on Climate Change (Convention) to the Rio Earth Summit countries for signature.[59] By the end of the Rio Earth Summit, more than 150 countries, including the United States, signed the Convention.[60] The United States Senate ratified the Convention in October 1992.[61] The Convention entered into force on March 21, 1994, and as of February 2003, 188 governments "(including the European Community) are now Parties to the Convention and it is approaching universal membership."[62]

The Convention begins with an acknowledgment "that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind."[63] It sets as its "ultimate objective" the "stabilization of

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57. Brown, *supra* note 45, at 276.

58. *Id. See also* Guide, *supra* note 45, at 6.

59. *Id. See also* Convention, *supra* note 5.

60. Brown, *supra* note 45, at 276.

61. *Id.*

62. Guide, *supra* note 45, at 6. *See also* United Nations Framework Convention on Climate Change, Status of Ratification (last modified on Feb. 26, 2004), *available at* http://unfccc.int/resource/conv/ratlist.pdf (last visited Mar. 29, 2004) [hereinafter Framework Status]. The last wave of countries ratifying the Convention occurred between 2000 and 2001. *See id.* Belarus approved the Convention on May 11, 2000. *See id.* Angola ratified the Convention on May 17, 2000. *See id.* Kyrgyzstan acceded to the Convention on May 25, 2000. *See id.* Equatorial Guinea acceded to the Convention on August 16, 2000. *See id.* Bosnia and Herzegovina acceded to the Convention on September 7, 2000. *See* Framework Status, *supra* note 62. Yugoslavia ratified the Convention on March 12, 2001 (later changing its signatory name to "Serbia and Montenegro" on February 4, 2003). *See id.*

63. *See* Convention, *supra* note 5, at 851. The preamble also reflects accession to the United States stances on developing-world responsibility and firm emission reduction targets. *See id.* It recognizes "the need for developed countries to take immediate action in a flexible manner on the basis of clear priorities . . . with due consideration of their relative contributions to the enhancement of the greenhouse effect," that "all countries, especially developing countries, need access to resources required to achieve sustainable social and economic development," and that developing countries' "energy consumption will need to grow taking into account the possibilities for achieving greater energy efficiency and for controlling greenhouse gas emissions in general." *Id.* at 852, 853.

greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[64] The Convention defines greenhouse gases as "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation."[65]

Each Party signed onto a range of commitments under the Convention, according to its developmental status, socio-economic health, and ability to harness its natural resources.[66] All Parties are required to "update, publish and make available" information documenting the scope of its "national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol," and undertake several other GHG management steps domestically to help reverse climate change.[67] But, Parties are subject to two classes of additional commitments, depending on their level of industrial development.[68] The forty-one developed country Parties fall within the Convention's "Annex I," which includes "the relatively wealthy industrialized countries" of the Western World and "countries with economies in transition" (EITs) of the former Soviet Bloc.[69] The twenty-four Annex I Parties whose economies are not in transition are

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64. *Id.* at 854. It adds that "[s]uch a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner." *Id.*

65. *Id.* at 853. Anthropogenic gases are "human-induced," and are understood to differentiate those that occur naturally. *See* Beginner's Guide to the Convention, *available at* http://unfccc.int/resource/beginner.html (last visited Mar. 29, 2004).

66. *See generally* Convention, *supra* note 5, at 855-59.

67. *Id.* at 855. *See also* U.N. Protocol on Substances that Deplete the Ozone Layer, *reproduced from* text provided to International Legal Materials by the United Nations (Sept. 16, 1987), 26 I.L.M. 1541 (1987). The Montreal Protocol, opened for signature on Sept. 16, 1987, predated international consideration of the Convention and "establishe[d] specific obligations to limit and reduce use of chlorofluorocarbons and possibly other chemicals that deplete the ozone." *Id.*

Among the other charges, each Party must "[f]ormulate, implement, publish and regularly update" that information; promote the use of technologies "that control, reduce or prevent" GHG emissions and conservation practices; prepare for global impacts of climate change; consider socio-economic impacts of climate change; promote research into technology dedicated to sustainability; promote information exchange; and "[c]ommunicate to the Conference of the Parties information related to implementation." Convention, *supra* note 5, at 855-56.

68. *See generally* Convention, *supra* note 5, at 856-89.

69. Guide, *supra* note 45, at 10. The Annex I parties are Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, European Community, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, and United States. *Id.*

also listed on the Convention's "Annex II."[70] The 145 Parties not included within Annex I or II are known as "non-Annex I" Parties.[71] The delineation of the Parties into Annex I/II and non-Annex I requires "a fundamental obligation on both industrialized and developing countries to respond to climate change," but it imposes a greater burden on industrialized Parties, who, "in order to demonstrate their leadership in addressing climate change, are subject to a specific commitment to adopt climate change policies and measures with the non-legally binding aim that they should have returned their greenhouse gas emissions to 1990 levels by the year 2000."[72]

The Convention also established a mechanism called the Conference of Parties (COP) to "monitor [the Convention's] implementation and continue talks on how best to tackle climate change."[73] The COP bears thirteen specific duties, including serving as a data repository for all information about climate change and the parties, recommending revisions to the Convention's structure, and all other administrative duties stemming from the Convention.[74] Moreover, the Convention required the COP to hold a conference within one year of the date it entered into force and additional sessions at least once annually every year thereafter.[75]

C. COP-1 and the Berlin Mandate

As its name reflects, the Convention established a useful framework through which the international community could begin to reduce GHG and mitigate the effects of global warming.[76] However, Convention Parties recognized that the Convention's "commitments would not be sufficient to

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70. *Id.* The Annex II parties are Australia, Austria, Belgium, Canada, Denmark, European Community, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, and United States. *Id.*

71. *Id.* Among the non-Annex I Parties, some countries receive additional exemptions from the Convention due to their "particular vulnerability." *Id.* at 11. These Parties include those "prone to drought and desertification," whose economies "are highly dependent on income generated from fossil fuel production, processing or export." Guide, *supra* note 45, at 11-12.

72. *Id.* at 11. The delineation between Annex I and II Parties seeks to grant EITs "'a certain degree of flexibility' in implementing their commitments, on account of the economic and political upheavals recently experienced in those countries." *Id.* Annex II parties bear the greatest burdens, including the requirement "to provide financial resources to enable developing countries to meet their obligations . . . and . . . adapt to the adverse effects of climate change." *Id.* They must also "'take all practicable steps' to promote the development and transfer of environmentally-friendly technologies to both EITs and developing countries." *Id.*

73. *Id.* at 6. The Convention defines "climate change" as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods." Convention, *supra* note 5, at 853.

74. Convention, *supra* note 5, at 860, 861.

75. *Id.* at 862.

76. *See generally id.*

seriously tackle climate change."[77] As a result, the Parties sought to empower the COP to augment the original document with mechanisms that would more effectively reduce greenhouse gas volumes.[78] The Parties marked this recognition at the first COP session (COP-1), which opened in Berlin, in March 1995.[79] The session's tone was colored by the recent publication of IPCC's Second Assessment Report, which announced that "not only was human-induced climate change a real issue with likely adverse impacts to human health and the environment . . . but that it was possible to observe actual effects of human activities on climate that could be distinguished from natural climate variability."[80] In view of the new scientific conclusions, the collected Parties of COP-1 called for a more comprehensive set of commitments.[81]

The pronouncement, known as the Berlin Mandate, "launched a new round of talks to decide on stronger and more detailed commitments for industrialized countries."[82] The Mandate called for "a process to . . . strength[en] the commitments of the [Annex I] Parties . . . in Article 4, paragraph 2(a) and (b), through the adoption of a protocol or another legal instrument."[83] It stipulated that the process needed to "elaborate policies and measures" and include "quantified [emissions] limitation and reduction

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77. Guide, *supra* note 45, at 6. *See also* Brown, *supra* note 45, at 288. "By 1995, it was becoming quite clear that the weak nonbinding approaches to global warming contained in the UNFCCC were failing to make much progress on the growing global warming problem." *Id.*

78. Guide, *supra* note 45, at 6.

79. *Id.*

80. Brown, *supra* note 45, at 289. The IPCC's Second Assessment Report also highlighted "likely global warming impacts to human health and the environment. These included rising temperatures and oceans, adverse impacts to ecosystems, biodiversity, forests, water supplies, and human health, increased droughts, floods, and tropical storms for parts of the worlds, and negative impacts on farming for some parts of the world." *Id.*

81. Guide, *supra* note 45, at 6. *See also,* Clare Breidenich, Daniel Magraw, Anne Rowley & James W. Rubin, *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 AM. J. INT'L L. 315, 318 (1998). The Parties decided the Convention was inadequate for three reasons:

> First, national projections of GHG emissions indicated that most Annex I countries were not on track to meet the Convention's emissions aim for the year 2000. Second, the Convention contained no provision related to GHG emissions for the period after 2000. Finally, parties recognized that stabilization of GHG emissions at 1990 levels would not be sufficient to stabilize atmospheric GHG concentrations.

Id.

82. Guide, *supra* note 45, at 6.

83. UNFCCC Conference of Parties: Decisions Adopted by the First Session (Berlin), *reproduced from* UN Doc. FCCC/CP/1995/7/Add.1 (June 6, 1995), 34 I.L.M. 1671, 1676 (1995) [hereinafter Berlin Mandate]. Article 4.2(a) and (b) of the Convention called for "the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol" and reporting of each Party's progress toward this end, but called for no commitments after 2000. Convention, *supra* note 5, at 856.

objectives [QELROs] within specified time-frames . . . for their anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol."[84] Moreover, the Mandate declared that any protocol adopted should not demand new commitments from non-Annex I Parties, "in order [for those Parties] to achieve sustainable development."[85] Finally, COP-1 created a new "ad hoc group of parties" to negotiate a protocol reflecting these goals in advance of COP-3, set to take place in Kyoto, Japan, in 1997.[86]

D. The Kyoto Protocol: The Addition of Enforceable Emissions Targets to the Framework Convention

The United States changed its tack in 1996, when President Bill Clinton announced his willingness to negotiate binding GHG emissions limitations.[87] Nevertheless, "[m]any nations vehemently opposed the U.S. position on the basis that more stringent cuts in emissions were necessary to prevent global warming from getting out of hand."[88] While the United States urged extension

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84. Berlin Mandate, *supra* note 83, at 1677. One set of commentators notes that "QERCOs are essentially targets for emissions reductions. Policies and measures are essentially items that parties adopt and act upon to attain their QELROs." Breidenich, Magraw, Rowley & Rubin, *supra* note 81, at 331.

85. Berlin Mandate, *supra* note 83, at 1677. The Berlin Mandate's emphasis on industrialized Parties' commitments reflected "the view of many of the developing countries . . . that it is the responsibility of the industrialized countries to adopt significant measures to reduce their GHG emissions before the developing countries might place their economic development at risk by adopting any similar measures." Breidenich, Magraw, Rowley & Rubin, *supra* note 81, at 319.

86. *See* Berlin Mandate, *supra* note 83, at 1678.

87. *See* Brown, *supra* note 45, at 289. While President Clinton expressed a willingness to negotiate workable emission limitations under the Convention, the U.S. Senate was open in its opposition to binding supernational emissions targets. *See generally* Byrd-Hagel Resolution, S. Res. 98, 105th Cong., 143 CONG REC S8113-05 (1997) (enacted). Nevertheless, Clinton announced on Oct. 22, 1997, that the United States would "agree to stabilize GHG emissions at 1990 levels by 2012," extending its pledge under the Convention another twelve years. Brown, *supra* note 45, at 289.

88. Brown, *supra* note 45, at 289. Under Clinton's offered concessions, reducing U.S. emissions to 1990 levels by 2012 "would be a reduction of 23 to 30% below what emissions would otherwise be," without negotiating the additional cuts called for by other Parties. *Id.* at 290. One commentator notes

> this was so because the United States had done little after Rio to prevent emissions from spiraling upward. Five years after signing the UNFCCC, the United States had further to go than many other nations to reduce emissions to 1990 levels, in part because it only had adopted mild voluntary programs and Congress was not interested in doing much more. Much of the world was not sympathetic with the predicament the United States had created by its own inaction.

Id.

of the 1990 targets, other Parties pushed for more stringent, specific targets.[89] Despite the passage of time, the approach of COP-3 revealed that the division of opinions over shared responsibilities between the developed and developing worlds had not dissipated.[90]

On December 1, 1997, more than 160 Convention Parties collected in Kyoto, Japan, for the COP-3 session.[91] The session opened more than five years after the unveiling of the Convention at the Rio Earth Summit.[92] As days passed at the session, many feared that an impasse between the United States and the rest of the Parties would destroy the possibility of a protocol in line with the Berlin Mandate.[93] However, the Parties connected on terms on December 11, 1997, when the United States agreed to commit to a seven percent reduction below 1990 levels in exchange for a range of concessions that shaped what came to be the Kyoto Protocol.[94]

The Protocol "supplements and strengthens the Convention" and shares its "ultimate objective and principles, as well as its grouping of countries into Annex I, Annex II . . . and non-Annex I Parties."[95] The prime source of this strengthening rests in its binding emissions targets and timetables, which, "when taken together, should lead by 2012 to an overall reduction of emissions levels to [five] percent below 1990 levels."[96] The Protocol consists of five main elements: (1) Commitments, (2) Implementation, (3) Minimizing impacts on developing countries, (4) Accounting, reporting and review, and (5) Compliance.[97]

The Protocol binds Annex I Parties to "substantive commitments," including specific emission targets (QELROs),[98] and it "further elaborates FCCC commitments for all Parties."[99] The targets are set "against base year

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89. *Id.* In the summer of 1997, the European Union proposed that "developed countries commit to reduce emissions for three GHGs by 15% below 1990 levels by the year 2010, with an interim target of 7.5% by the year 2005," whereas a group of seventy-seven developing countries, joined with China, pushed for similar reductions, plus emission targets 35% below 1990 levels by 2020. *Id.*

90. *Id.* at 289.

91. *See* Breidenich, Magraw, Rowley & Rubin, *supra* note 81, at 315.

92. *See generally id.*

93. *See* Brown, *supra* note 45, at 290.

94. *See id.* at 291. *See also* Protocol, *supra* note 5.

95. Guide, *supra* note 45, at 21. The Protocol also adopted the Convention's Conference of Parties as its "meeting of the Parties," and changed the body's name to COP/MOP. *Id.*

96. Sean D. Murphy ed., *Kyoto Protocol to Climate Change Convention*, 93 AM. J. INT'L L. 491, 491-92 (1999).

97. Guide, *supra* note 45, at 21-22.

98. QELRO stands for quantified emissions limitation and reduction objectives. *See* Breidenich, Magraw, Rowley & Rubin, *supra* note 81, at 319.

99. *Id.* at 319. The authors note

> The Kyoto Protocol thus contains substantive commitments in all three areas specified by the Berlin Mandate: binding emission reduction targets (i.e., QELROs) for industrialized countries, a requirement for industrialized countries to implement or further elaborate appropriate policies and measures to meet their

emission levels."[100] The actual percentages are listed in Annex B of the Protocol.[101] Each Annex I Party's reduction commitment for the 2008-12 period is equal to an assigned percentage of its "aggregate anthropogenic carbon dioxide equivalent emissions" in 1990 or other relevant base year, multiplied by five.[102] The ninety-three percent commitment assigned to the United States, for instance, required it to reduce by seven percent its total 1990 GHG emissions amount by 2008-12.[103] Once other requirements of the Protocol are factored, all Parties' commitments taken together represent a 5.2 percent reduction in global emissions.[104]

One commentator noted, "The determination of reduction commitments for the Annex I Parties was one of the most contentious issues in the negotiations (because they contemplated and resulted in) . . . differentiated targets for individual Parties."[105] European and United States detractors chided the negotiations for imposing no commitments on developing countries and placing the burdens on industrialized ones.[106] Nonetheless, the United States signed the Protocol in the conference's waning moments, largely due to the inclusion of a series of "flexibility mechanisms" allowing innovative ways for Parties to comply with their commitments.[107]

QERLOs as established by Article 3 of the Protocol, and provisions that reaffirm and seek to advance the implementation of certain commitments that pertain to all FCCC parties.

Id. at 319-20.

100. *Id.* The base year is 1990 for most parties. *See id.* Turkey is the sole Annex I party, for which the Protocol assigns no QELROs. *See id.* Countries with "economies in transition"—largely, former Soviet Bloc members—are either authorized to use a different base year or apply to do so. *Id.* At COP-8, held in New Delhi, India, in 2002, the Parties agreed to allow Bulgaria and Poland to use 1988 as their base years, Romania to use 1989, Slovenia to use 1986, and Hungary to use the average of the years between 1985 and 1987. *See* Review of the Implementation of Commitments and of Other Provisions of the Convention, Conference of the Parties, Eighth Session, New Delhi, FCCC/CP/2002/8, at 5, *available at* http://unfccc.int/resource/docs/cop8/08.pdf (last visited Mar. 29, 2004).

101. *See* Protocol, *supra* note 5, at 42.

102. *Id.* at 34. The United States emission reduction commitment (QELRO) is ninety-three percent. *Id.* at 42. All members of the European Community are committed to ninety-two percent each. *Id.* Iceland and Australia's commitments are among the highest, at 110 percent and 108 percent each. *Id.* With values greater than 100 percent, Iceland and Australia are each permitted net percentage increases over their base year emissions amounts. *Id.*

103. *See* Guide, *supra* note 45, at 22.

104. Breidenich, Magraw, Rowley & Rubin, *supra* note 81, at 320.

105. Brendan P. McGivern, *Introductory Note: Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol*, 37 I.L.M. 22, 24 (1997).

106. *See* Brown, *supra* note 45, at 291. Supporters of differentiated targets, including Australia, Japan, Norway, and Iceland, argued that uniform targets were inappropriate "owing to the vast differences in countries' national circumstances, particularly natural resources and energy production and consumption profiles." Breidenich, Magraw, Rowley & Rubin, *supra* note 81, at 320.

107. Breidenich, Magraw, Rowley & Rubin, *supra* note 81, at 320.

Those mechanisms include (1) emissions banking, (2) joint implementation, (3) clean development, and (4) international emissions trading.[108] Emissions banking is authorized by Article 3.13, and provides Parties that do not exceed their assigned amounts an opportunity to allocate their unused allotments for use in "subsequent commitment periods."[109] Joint implementation, authorized by Article 6,[110] "allows developed nations with emissions targets to obtain credit toward the target by doing emission reduction projects in other nations that have targets."[111] Parties using the joint implementation mechanism "may transfer to, or acquire from, any other . . . [Annex I] Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy."[112]

Clean development, authorized by Article 12,[113] seeks to accomplish the concurrent goals of helping developing countries "achiev[e] sustainable development and in contributing to the ultimate objective of the Convention," and helping industrialized countries "achiev[e] compliance with their [QELROs]."[114] For example, an Annex I party that helps a non-Annex I party industrialize its economy through clean technologies "may use the certified emission reductions accruing from such project activities to contribute to compliance" with their own QELROs. [115]

Among the mechanisms, emissions trading received most of the attention at Kyoto and it has continued to do so since.[116] Emissions trading is authorized by Article 17, and though the Parties did not agree in Kyoto to "much detail on the type of system," the Protocol provided a framework upon which the COP could build.[117] Under this mechanism, "[a] party with an emission reduction commitment (i.e. a Party in Annex B) could 'buy' part of the emissions budget of another Annex B Party where it would be more cost effective for it to do so than to undertake the reduction domestically."[118]

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108. *See* McGivern, *supra* note 105, at 26-27.

109. Protocol, *supra* note 5, at 34.

110. *See id* at 35.

111. Brown, *supra* note 45, at 291.

112. Protocol, *supra* note 5, at 35. Joint implementation is also known as project-based credit transfer. *See* Breidenich, Magraw, Rowley & Rubin, *supra* note 81, at 324.

113. *See id* at 38.

114. *Id.*

115. *Id.* The emissions resulting from this mechanism "shall be certified by operational entities to be designated by [the COP]." *Id.*

116. *See* McGivern, *supra* note 105, at 26.

117. Breidenich, Magraw, Rowley & Rubin, *supra* note 81, at 324.

118. McGivern, *supra* note 105, at 26. The ability stems from Article 4.2 of the Convention, which states that "[p]arties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention." Convention, *supra* note 26, at 856. At its introduction, the Protocol included no specific language dictating the operation of the emissions trading system, but Article 3 "simply authorize[d] Annex B countries to participate in emissions trading with each other and

Article 16bis provides that the COP would define all terms of emission trading, that Parties "may participate in emissions trading for the purposes of fulfilling their commitments under Article 3," and that "[a]ny such trading shall be supplemental to domestic actions for the purpose of meeting [QELROs]."[119]

The Clinton Administration was largely responsible for the inclusion of flexibility mechanisms in the Kyoto Protocol, convincing the COP that market-based solutions would help countries achieve meaningful emissions reductions while avoiding the economic consequences feared by many critics in the developed world.[120] John D. Gibson, a former Senior Counsel to the White House Task Force on Global Climate Change under President Clinton, called Kyoto "a good deal for the earth, and . . . an even better deal for the United States," due to the flexible means through which Parties can meet their targets.[121] The Protocol, Gibson noted, "gives nations flexibility about how to meet their targets," about "when they achieve their reductions," and enables Parties to "[d]o wherever is the cheapest first."[122] For example, the United States, Thailand, and the global community benefit through use of joint implementation, where "an American company, for instance, could get emissions reduction credits by investing in a solar energy project in Thailand. We get the emission credits; Thailand gets cleaner air, and the transfer of environmentally friendly technologies."[123]

As of February 2004, the Protocol had not entered into force.[124] Article 24 of the treaty requires that "not less than [fifty-five] Parties to the Convention" must ratify, accept, approve, or accede to the Protocol before it enters into force.[125] Moreover, the aggregate emissions of the ratifying Parties must account for "at least [fifty-five] per cent of the total carbon dioxide

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to use such trading to meet emission target commitments . . . ." Breidenich, Magraw, Rowley & Rubin, *supra* note 81, at 324.

119. Protocol, *supra* note 5, at 40.

120. *See* Brown, *supra* note 45, at 291.

121. John D. Gibson, *Why the Kyoto Protocol Makes Sense for the United States*, *in* GLOBAL WARMING AND THE KYOTO ACCORD: WHAT IS TO BE DONE? 57, 58 (David J. Eaton ed., 2001).

122. *Id.* at 58, 59. The Protocol allows flexibility in how Parties meet their targets through several means, but notably through the use of "sinks activities," or "[a]ctivities that absorb carbon, such as planting trees, [which] can offset emissions . . . [and] has the potential to cut the cost of [United States'] compliance very dramatically." *Id.* at 58. It provides flexibility with when Parties can meet their targets by "stat[ing] targets in terms of average emissions over five years, 2008 to 2012, to smooth out short-term fluctuations due to economic performance or weather." *Id.* And, it provides flexibility with where Parties can meet their targets through cooperation between Parties and by solving the easiest emissions challenges first. *Id.* at 59.

123. *Id.* Gibson adds, "The earth's atmosphere doesn't care whether a ton of CO_2 reductions occur in the United States, Ukraine, or China. The earth's atmosphere doesn't care whether we reduce carbon emissions by a ton or sequester a ton of carbon by planting trees." Gibson, *supra* note 121, at 60.

124. *See generally* Protocol Status, *supra* note 8.

125. Protocol, *supra* note 5, at 41.

emissions for 1990 of the Parties included in Annex I" before the Protocol enters into force.[126] Through the end of September 2003, 119 Parties ratified, accepted, approved, or acceded to the Protocol.[127] But, because the combined emissions of those Parties accounts for only 44.2 percent of the 1990 global total, the Protocol has not reached its triggering goal.[128] Protocol backers expect Russia to ratify the treaty, and that the industrial giant's contribution to the 1990 emission total (seventeen percent) will push the treaty into force.[129] However, the certainty of Russia's ratification started to fade in September 2003, when President Vladimir Putin backed away from his earlier open support of the Protocol.[130] As one commentator recognized in October 2003, if the United States does not ratify the Protocol, "every other major industrial country on the planet had to ratify it before it could come into effect. . . . If Russia pulls out, the treaty dies."[131]

E. Developments after Kyoto: The United States' initial reluctance to ratify the Protocol and to institute domestic GHG reductions

The United States bears a thirty-six percent share of the 1990 global total of carbon dioxide emissions, but as arguably the most important country on the planet, its absence from the Protocol casts a shadow over the treaty's future regardless of percentages.[132] President George W. Bush has unequivocally opposed the Protocol since taking office, but American opposition to its tenets predates his inauguration.[133] As discussed, President Clinton's representatives negotiated Kyoto's terms, but the administration's support of binding, international emissions limitations clashed with the

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126. *Id.*

127. *See generally* Protocol Status, *supra* note 8.

128. *Id.* Ratifying Parties with significant global emissions percentages include Japan (8.5 percent), Germany (7.4 percent), United Kingdom (4.3 percent), Canada (3.3 percent), Italy (3.1 percent), Poland (3.0 percent), and France (2.7 percent). *Id.*

129. *See* Glasser, *supra* note 8.

130. *Id.* In 1997, Putin said of the treaty, "Russia actively stands for the quickest possible ratification of the Kyoto Protocol." *Id.* However, Putin spoke hesitantly about Russia's intentions before a global environmental conference held in Moscow in September 2003. *Id.* One month later, Putin injected additional uncertainty about his country's position, announcing that unlike "the USA, [which] withdrew from the Kyoto protocol . . . we didn't." *Putin Says Russia Must Not Become Kyoto Protocol's "Milch Cow"*, BBC MONITORING INT'L REP., Oct. 19, 2003. The Russian President added that "it will not be easy to talk the Russian State Duma into" ratification of the existing Protocol language, that the commitments of all Parties "must be fair," and that he did "not want Russia to become a milch (sic) cow at the expense of which environmental problems are tackled." *Id.*

131. Gwynne Dyer, *Putin Softens Kyoto Stance*, GUELPH MERCURY, Oct. 2, 2003, at A11.

132. *See generally* Glasser, *supra* note 8.

133. *See generally* Greg Kahn, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: ENVIRONMENT: The Fate of the Kyoto Protocol Under the Bush Administration*, 21 BERKELEY J. INT'L L. 548 (2003).

prevailing political sentiment in Washington at the time.[134] Even while American negotiators cheered the inclusion of flexibility mechanisms into the final treaty, Congress took steps that mooted the work of the President's team.[135]

First, the U.S. Senate unanimously passed the Byrd-Hagel Resolution[136] in 1997, which served notice to President Clinton that any effort to submit the Protocol for ratification as written would result in political defeat.[137] As it bears the sole power to ratify treaties under the Constitution, the Senate preempted the President's course of action on the Protocol.[138] The bipartisan measure stated:

> the United States should not be a signatory to any protocol to, or other agreement regarding [UNFCCC] . . . at negotiations in Kyoto in December 1997, or thereafter which would . . . mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or . . . would result in serious harm to the economy of the United States.[139]

In addition to the Byrd-Hagel Resolution's stern warning, Congress undertook a systematic blockade of any Clinton Administration funding requests for programs associated with GHG reduction or climate change research.[140] One commentator noted that Congress effectively prohibited all

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134. *See* Brown, *supra* note 45, at 291.

135. *Id.*

136. *See* Byrd-Hagel Resolution, S. Res. 98, 105th Cong., 143 CONG REC S8113-05 (1997) (enacted).

137. *See id.*

138. *See* U.S. CONST. art. II, § 2. The section provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." *Id.*

139. Byrd-Hagel Resolution, S. Res. 98, 105th Cong., 143 CONG REC S8113-05 (1997) (enacted). The resolution also called for "an analysis of the detailed financial costs and other impacts on the economy of the United States which would by incurred by the implementation of the protocol" to accompany any treaty such as Kyoto in an effort to seek ratification. *Id.*

140. *See, e.g.*, H.R. CONF. REP. NO. 106-914, P.L. 106-914 (2000). Section 329 of this act, a 2000-01 spending measure for the Department of the Interior and other agencies, reads:

> None of the funds appropriated by this Act shall be used to propose or issue rules, regulations, decrees, or orders for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol . . . which has not been submitted to the Senate for advice and consent to ratification pursuant to article II, section 2, clause 2, of the United States Constitution, and which has not entered into force pursuant to article 25 of the Protocol.

Id. at 76.

work "on climate issues that could be construed as 'back door' ratification of the Kyoto Protocol," and that "[t]his would prove to greatly hinder EPA from working with states and local governments who desired to take voluntary steps to reduce GHG emissions."[141] President Clinton continued to spar with Congress on all fronts of the global climate debate through the end of his term in 2000.[142] As a result, "not much was done during the Clinton Administration to reduce U.S. emissions of GHG other than some efficiency improvements encouraged by voluntary programs."[143] Because the United States implemented no carbon dioxide emissions reduction measures, even as required by its ratification of the Convention, "U.S. greenhouse emissions continued to soar" during this period.[144]

However, the EPA under President Clinton did not cave to Congress' efforts to bar domestic consideration of carbon dioxide regulation.[145] During 1998 hearings before the House Appropriations Committee, Rep. Thomas DeLay (R-Tex.) asked EPA Administrator Carol M. Browner to issue a formal opinion regarding the agency's authority to regulate carbon dioxide under the Clean Air Act.[146] In response to that request, the EPA's Office of General Counsel issued a legal memorandum, providing that the agency could regulate carbon dioxide within the existing framework of the Clean Air Act.[147] EPA

See also, H.R. REP. NO. 107-116 (2001). This spending bill, for the Department of Agriculture, rural development programs, the Food and Drug Administration, and other related agencies, featured nearly identical language, despite coming one year later and in a different department. *See id.* at 118.

141. Brown, *supra* note 45, at 291.

142. *See* 143 CONG. REC. S11007-01 (1997). President Clinton wanted to pursue other climate change legislation in advance of Protocol ratification, announcing on October 22, 2003, "I want to emphasize that we cannot wait until the treaty is negotiated and ratified to act." *Id.* In response, Byrd-Hagel co-author Senator Chuck Hagel, R-NE, addressed the Senate, stating

> What President Clinton proposed yesterday is for the American people to bear the cost and suffer the pain of a treaty that will not work. That is the legacy, or more appropriately the lunacy he would leave to the children of America. . . . We can do better. We must do better. Our future generations are counting on us to do better.

Id. at S11008-01.

143. Brown, *supra* note 45, at 291. Brown noted that Congress was "not only hostile to the Kyoto Protocol," but also against "taking any serious steps to reduce U.S. emissions." *Id.*

144. *Id.*

145. *See generally* Memorandum from Jonathan Z. Cannon, General Counsel, to Carol M. Browner, Environmental Protection Agency Administrator (Apr. 10, 1998) (on file with author) [hereinafter Cannon Memorandum].

146. *See id.* Senator DeLay referred to an EPA document entitled, "Electricity Restructuring and the Environment: What Authority Does EPA Have and What Does it Need," which stated that EPA already had authority under the Act to "establish pollution control requirements for four pollutants of concern from electric power generation: nitrogen oxides (NOx), sulfur dioxide (SO_2), carbon dioxide (CO_2), and mercury." *Id.* EPA Administrator Browner announced that the Clean Air Act provided such authority and promised to produce a legal opinion on behalf of her agency. *See id.*

147. *See id.*

General Counsel Jonathan Z. Cannon wrote that "the Clean Air Act provides EPA authority to address air pollution, and a number of specific provisions of the Act are potentially applicable to control these pollutants from electric power generation."[148] More importantly, Mr. Cannon recognized that "air pollutant[] . . . [is] broadly defined under the Act and include[s] . . . CO_2 . . . emitted into the ambient air."[149] He added "[w]hile CO_2, as an air pollutant, is within EPA's scope of authority to regulate, the Administrator has not yet determined that CO_2 meets the criteria for regulation under one or more provisions of the Act."[150] However, Cannon recognized that "[s]pecific regulatory criteria under various provisions of the Act could be met if the Administrator determined under one or more of those provisions that CO_2 emissions are reasonably anticipated to cause or contribute to adverse effects on public health, welfare, or the environment."[151]

Later in 1999, Cannon's successor Gary S. Guzy testified before a House subcommittee and affirmed his predecessor's opinions about the EPA's authority to regulate carbon dioxide.[152] Guzy announced that the EPA "ha[d] no intention of implementing the Kyoto Protocol . . . prior to its ratification," and that "there is a clear difference between actions that carry out authority under the Clean Air Act or other domestic law, and actions that would implement the Protocol."[153] However, Guzy went on to clarify that although "EPA has not made any of the Act's threshold findings that would lead to regulation of CO_2 emissions from electric utilities or, indeed, from any source . . . CO_2 is in the class of compounds that could be [regulated]."[154]

F. The 21st Century: IPCC's Third Assessment Report and the United States' continuing reluctance to regulate GHGs

The EPA's policy floating elevated the debate during the close of the Clinton Administration, but the fact remained that the United States had

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148. *Id.* at 2.

149. Cannon Memorandum, *supra* note 145, at 3. Mr. Cannon recognized that the Act requires EPA to regulate "each air pollutant that causes or contributes to air pollution that may reasonably be anticipated to endanger public health or welfare and that is present in the ambient air due to emissions from numerous or diverse mobile or stationary sources." *Id.*.

150. *Id.* at 4.

151. *Id.* at 4-5.

152. *See generally Is CO_2 a Pollutant and Does EPA Have the Power to Regulate It?: Joint Hearing of the Subcomm. on Nat'l Econ. Growth, Natural Res. and Regulatory Affairs of the Comm. on Gov't Reform and the Subcomm. on Energy and Env't of the Comm. on Science, U.S House of Representatives*, 106th Congress (1999) (Testimony of Gary S. Guzy, General Counsel, U.S. EPA), *available at* http://www.house.gov/science/guzy_100699.htm (last visited Mar. 15, 2004) [hereinafter Guzy Testimony].

153. *Id.* Guzy added, "there is nothing inconsistent in assessing the extent of current authority under the Clean Air Act and maintaining our commitment not to implement the Protocol without ratification." *Id.*

154. *Id.*

enacted no meaningful GHG emissions reductions or climate change legislation through 2000.[155] However, the transition of the presidency to George W. Bush likewise manifested a transition from executive branch support for the Kyoto process to outright hostility toward it.[156] The source of disconnect between the Bush and Clinton Administrations, other than partisan posturing, laid in the difference between the two camps' economic cost estimates of compliance with the emissions reductions limitations.[157] Clinton Administration studies forecast that Kyoto compliance, including the use of international emissions trading, would "cost the average American family about $70 to $110 a year."[158] While Bush Administration officials have not settled on one figure, the Administration has pronounced that compliance with the Protocol would be "potentially prohibitive," that "drastic cuts in emissions will have serious repercussions on the U.S. economy," and that "the economic sacrifices made by the United States would be greater than that of any other country."[159]

In addition to public statements made by several of his top advisors early in his term, President Bush wasted little time letting the Senate know that he shared its opposition to the Protocol and would not submit the treaty for ratification.[160] In a formal letter to members of the Senate, President Bush stated:

> As you know, I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such a China and India, from compliance, and would cause serious harm to the U.S. economy. The Senate's vote, 95-0, shows that there is a clear consensus that the Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns.[161]

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155. *See* Brown, *supra* note 45, at 291.

156. *See* Kahn, *supra* note 133, at 551.

157. *Id.* at 557.

158. Gibson, *supra* note 121, at 61. The former senior counsel to President Clinton added that this cost estimate also required "other common-sense measures like restructuring our electricity," and does not account for the "very large benefits that would come . . . from not having to build sea walls around Miami, Manhattan, or Corpus Christi; not having the corn or citrus belts shift a couple of hundred miles north; or not having to fight dengue fever outbreaks in Kansas City." *Id.*

159. Kahn, *supra* note 133, at 557.

160. *Id.* at 551. *See also,* Letter to Members of the Senate on the Kyoto Protocol on Climate Change, 37 WEEKLY COMP. PRES. DOC. 444445 (Mar. 19, 2001).

161. *Id.* The President added, "I do not believe, however, that the government should impose on power plants mandatory emissions reductions for carbon dioxide, which is not a 'pollutant' under the Clean Air Act." *Id.* This statement represented a reversal for President Bush on a campaign promise to pursue emissions control limits, and undercut his new EPA Administrator Christine Todd Whitman, who had stated days earlier that the administration was pursuing mandatory power plant emissions limits. *See* Kahn, *supra* note 133, at 551.

To affirm his stance, President Bush enlisted the National Academy of Sciences to study GHG and climate change and produce a report that would "identif[y] the areas in the science of climate change where there are the greatest certainties and uncertainties."[162] The twelve-person Committee on the Science of Climate Change of the National Academy of Science's National Research Council issued its report on June 7, 2001, announcing that "[g]reenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise."[163] The Council noted that it "generally agree[d] with the assessment of human-caused climate change presented in the IPCC Working Group I (WGI) scientific report," undercutting the Bush Administration's claims that IPCC slanted its scientific findings when it published its "Summary for Policymakers."[164] Moreover, the scientific panel announced that

> An effective strategy for advancing the understanding of climate change also will require (1) a global observing system in support of long-term climate monitoring and prediction, (2) concentration on large-scale modeling through increased, dedicated supercomputing and human resources, and (3) efforts to ensure that climate research is supported and managed to ensure innovation, effectiveness, and efficiency.[165]

Meanwhile, the IPCC adopted the final part of its Third Assessment Report at its September 2001 session in Wembley, England.[166] The panel shaped its 2001 report to answer the COP's specific concerns about "issues such as the extent to which human activities have influenced and will in the future influence the global climate, the impacts of a changed climate on ecological and socio-economic systems, and existing and projected technical and policy capacity to address anthropogenic climate change."[167] The report included the most unequivocal language about human influence on climate

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162. NRC Report, *supra* note 28, at App. A.

163. *Id.* at 1. NRC also announced that atmospheric carbon dioxide concentrations were rapidly increasing, and that "[h]uman activities are responsible for the increase." *Id.* at 2.

164. *Id.* at 1, 4. NRC recognized that IPCC's scientific reports were "an admirable summary of research science," and that the Summary for Policymakers "reflect[ed] less emphasis on communicating the basis for uncertainty and a stronger emphasis on areas of major concern associated with human-induced climate change." *Id.* at 4. It added, however, that the scientists worked with the policymakers to produce the summary, and that "no changes were made without the consent of the convening lead authors." *Id.*

165. NRC Report, *supra* note 28, at 5.

166. *See generally* IPCC Third Report, *supra* note 40.

167. *Id.* at vii.

change in the history of the Convention and IPCC's charter.[168] For the first time, the UN's scientists announced, "Human activities have increased the atmospheric concentrations of greenhouse gases and aerosols since the pre-industrial era," and that "atmospheric concentrations of key anthropogenic gases . . . reached their highest recorded levels in the 1990s, primarily due to the combustion of fossil fuels, agriculture, and land-use changes."[169] They recognized, at a ninety to ninety-nine percent chance of likelihood, that "the 1990s was the warmest decade, and 1998 the warmest year" between 1861 and 2000.[170]

While IPCC yielded that the projected climate change would provide some benefits to global environmental and socio-economic systems, it concluded that the benefits would "diminish as the magnitude of climate change increases."[171] In contrast, IPCC projected that adverse environmental and socio-economic effects will likely increase as the magnitude of climate change and GHG emissions increase.[172] The report projected these adverse developments under scenarios where global carbon dioxide emission levels increased or stabilized.[173] However, it recognized that the "projected rate and magnitude of warming and sea-level rise can be lessened by reducing greenhouse gas emissions."[174] It added, "[r]educing emissions of greenhouse gases to stabilize their atmospheric concentrations would delay and reduce damages caused by climate change."[175] IPCC yielded that its studies had not revealed "[c]omprehensive, quantitative estimates of the benefits of

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168. *See id.* at 4.

169. *Id.*

170. *Id.* Using a range of climate models, IPCC projected that global average surface temperatures will continue to increase 1.4 to 5.8 degrees centigrade between 1990 and 2100 if the global community institutes no climate policy intervention. *Id.* at 8. This increase will result from projected carbon dioxide atmospheric concentration increases to between 540 and 970 parts per million (ppm), "compared to about 280 ppm in the pre-industrial era and about 368 ppm in the year 2000." IPCC Third Report, *supra* note 40, at 8.

171. *Id.* at 9.

172. *Id.* The report noted, "[c]limate change can affect human health directly (e.g. reduced cold stress in temperate countries but increased heat stress, loss of life in floods and storms) and indirectly through changes in the ranges of disease vectors (e.g., mosquitos), water-borne pathogens, water quality, air quality, and food availability and quality." *Id.* It also projects increases in pest infestations, exacerbated water shortages, degraded freshwater quality, increased coastal floods and erosion, coral bleaching, melting of polar ice sheets, and a rise in sea level. *Id.* at 9, 12, 21.

173. *See id.* at 14, 16. IPCC noted, "Stabilization of CO_2 concentrations at any level requires eventual reduction of global CO_2 net emissions to a small fraction of the current emission level. The lower the chosen level for stabilization, the sooner the decline in global net CO_2 emissions needs to begin." IPCC Third Report, *supra* note 40, at 16.

174. *Id.* at 19. To stabilize "atmospheric CO_2 concentrations at 450, 600, or 1,000 ppm . . . global anthropogenic CO_2 emissions . . . [must] drop below the year 1990 levels, within a few decades, about a century, or about 2 centuries, respectively, and continue to decrease steadily thereafter." *Id.* "Eventually CO_2 emissions would need to decline to a very small fraction of current emissions." *Id.*

175. *Id.* at 21.

stabilization at various levels of atmospheric concentrations of greenhouse gases."[176] As a result, the body stopped short of publishing statistics with which policy makers could compare costs of mitigation efforts against the long-term costs of inaction.[177]

In spite of the emergence of the new data in IPCC's Second and Third Assessment Reports, and National Research Council's endorsement of IPCC's work, the Bush Administration has moved toward outright abandonment of the Kyoto Process.[178] This gradual movement has resulted in the United States' withdrawal from participation in the annual COP negotiations.[179] During that time, the COP continued to refine the original Protocol, its implementation manuals, and moved toward establishing regulatory mechanisms for developing countries.[180] Speaking to the Parties assembled in Bonn, Germany, U.S. Undersecretary for Global Affairs Paula J. Dobriansky announced that the United States continues to "be a constructive and active Party to the UN Framework Convention on Climate Change," adding that "[t]hough the United States will not ratify the Kyoto Protocol, we will not abdicate our responsibilities."[181] At the COP-8 session, held at Marrakech, Morroco, in November 2001, the United States delegation "arrived at the conference with no new offers and largely stayed in the background while the talks proceeded haltingly."[182] By the COP-9 session, held at New Delhi, India, in November 2002, the U.S. had moved its negotiating strategy away from Kyoto completely.[183]

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176. *Id.* at 22. The scientists yielded that, "[b]ecause of uncertainty in climate sensitivity, and uncertainty about the geographic and seasonal patterns of projected changes in temperatures, precipitation, and other climate variables and phenomena, the impacts of climate change cannot be uniquely determined for individual emission scenarios." IPCC Third Report, *supra* note 40, at 22.

177. *See id.* IPCC yielded that "the benefits of different greenhouse gas emission reduction actions, including actions to stabilize greenhouse gas concentrations at selected levels, are incompletely characterized and cannot be compared directly to mitigation costs for the purpose of estimating the net economic effects of mitigation." *Id.*

178. *See generally* Kahn, *supra* note 133.

179. *See id.* at 552, 553

180. *See id.* The United States sent delegations to both the July 2001 conference in Bonn, Germany, and the November 2001 conference in Marrakech, Morocco. *Id.*

181. Dobriansky Statement at Climate Change Meeting, U.S. Dept. of State, Int'l Info. Programs, July 19, 2001, *available at* http://usinfo.state.gov/topical/econ/group8/summit01/wwwh01072002.html (last visited Mar. 25, 2004). The Undersecretary added that the United States would continue to "develop a science-based, technology-oriented, market-friendly basis to deal with climate change." *Id.* She said the United States seeks "an environmentally sound approach that would not hard the U.S. economy," and that it would not "limit artificially the ability of the private sector to participate or restrict unnecessarily the helpful role of carbon sequestration in dealing with climate change." *Id.*

182. Eric Pianin, *160 Nations Agree to a New Global Warming Treaty; U.S. Sits Out Morocco Talks; Pact Sets Mandatory Targets for Reducing Greenhouse Gas Emissions*, WASHINGTON POST, Nov. 11, 2001, at A25.

183. *See* Kahn, *supra* note 133, at 554.

At the close of COP-9, the parties enacted the Delhi Ministerial Declaration, which focused "on ways to help developing countries adapt to climate change," urged promotion of "technological advances through research and development," pushed for increased development of renewable energy resources, and promoted "the transfer of technologies that can help reduce greenhouse gas emissions."[184] Despite the advances, discussion at the conference distilled down to one conclusion—that the Kyoto Protocol must be ratified.[185]

The Bush Administration moved on to other climate change policy ideas.[186] President Bush unveiled his "Clear Skies Initiative" in February 2002, announcing his plan to urge voluntary power plant emissions reductions and to attain seventy percent reductions by 2018.[187] He announced that "economic growth is key to environmental progress, because it is growth that provides the resources for investment in clean technologies."[188] The centerpiece of the Clear Skies Initiative is "a marketbased cap-and-trade approach," modeled on the sulfur dioxide/Acid Rain Program instituted by the Title IV of the Clean Air Act by way of the Clean Air Amendments of 1990,[189] through which utilities can trade "pollution credits" among each other.[190]

However, legislation, like treaty ratification, is a function of the Congress.[191] Congress's partisan divide has revealed fewer consensuses on the emerging issues of climate change than the Senate displayed when it resolved Byrd-Hagel.[192] One issue that has revealed disagreement is the work of IPCC.[193] Critics of the Kyoto Protocol and emissions reduction mechanisms have attacked IPCC for its inability to quantify the costs and benefits relative to emissions mitigation.[194] Senator James Inhofe (R-Okla.),

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184. *Action to Reduce Impacts of Global Warming Urged*, GLOBAL NEWS WIRE—ASIA AFRICA INTELLIGENCE WIRE, Nov. 12, 2002.

185. *Id.*

186. *See* President George W. Bush: Remarks Announcing the Clear Skies and Global Climate Change Initiatives in Silver Spring, Maryland, 38 Wk'ly Comp. Pres. Doc. 232 Feb. 14, 2002 [hereinafter Clear Skies Remarks].

187. *See id.*

188. *Id.* Such an approach would "harness the power of markets, the creativity of entrepreneurs, and draw upon the best scientific research." *Id.*

189. 42 U.S.C. §§ 7651-7651(o) (1998). Under the Title IV Acid Rain Program, EPA allocates sulfur dioxide emission limits to all sources. 42 U.S.C. § 7651b(a). Sources that emit less than their allowed emission limits may trade or sell their excess amounts to other sources that cannot meet their own limits. 42 U.S.C. § 7651b(b).

190. Clear Skies Remarks, *supra* note 186. President Bush lauded the Acid Rain Program, noting that the "cap-and-trade program . . . has cut more air pollution . . . in the last decade than all other programs under the 1990 Clean Air Act combined and by even more than the law required." *Id.*

191. *See* U.S. CONST. art. I, § 1.

192. *See* Byrd-Hagel Resolution, S. Res. 98, 105th Cong., 143 CONG REC S8113-05 (1997) (enacted).

193. *See, e.g., generally* 149 CONG. REC. S10012-01 (2003).

194. *See generally id.*

who chairs the U.S. Senate's Environment and Public Works Committee, chided IPCC and its three assessments before the Senate in July 2003.[195] Senator Inhofe called the global warming debate "the greatest hoax ever perpetrated on the American people," and stated, "[t]here is no convincing scientific evidence that human release of carbon dioxide . . . or other greenhouse gases is causing or will, in the foreseeable future, cause catastrophic heating of the Earth's atmosphere and disruption of the Earth's climate."[196]

While dramatic assertions such as those of Senator Inhofe exist in the debate, others in the Senate have pushed GHG reduction legislation despite their earlier endorsement of the Byrd-Hagel Resolution.[197] The Senate entertained bi-partisan legislation in the 108th Congress designed to provide for scientific climate change research, "accelerate the reduction of greenhouse gas emissions . . . by establishing a market-driven system of greenhouse gas tradeable allowances that could be used interchangeably with passenger vehicle fuel economy standard credits," reduce dependence on foreign oil, and ensure protection of consumers' interest.[198] The bill targeted "emissions of global warming pollutants by electrical utilities, major industrial and commercial entities, and refiners of transportation fuels," and did so in a way "patterned after the highly successful market-based acid rain program of the Clean Air Act."[199] Bill co-author Senator Joseph Lieberman (D-Conn.) addressed the Senate one day before it went to a vote, and predicted, based on a Massachusetts Institute of Technology study, that the measure would cost American households less than $20 annually.[200] He added that another study "calculated [that] every ton of pollutants needlessly emitted into our atmosphere costs Americans $160, and we are currently emitting billions of

195. *See generally id.* Speaking before the Senate, Senator Inhofe called the IPCC's three assessments, "over time . . . more and more alarmist" and dubbed the IPCC process akin to "a Soviet-style trial in which the facts are predetermined and ideological purity trumps technical and scientific examinations." *Id.* at S10016, S10017.

196. *Id.* at S10021 (quoting a statement by Dr. Frederick Seitz). Senator Inhofe added that American supporters of the Kyoto Protocol and carbon dioxide emissions reduction are motivated "not to solve environmental problems but to fuel their ever-growing fundraising machines, part of which are financed by the Federal taxpayers." *Id.* at S10022.

197. *See generally* 149 CONG. REC. S13484-02 (2003) [hereinafter McCain-Lieberman Debate].

198. *Id.* The legislation was co-authored by Senator Joseph Lieberman (D-Conn.) and Senator John McCain (R-Ariz.), both of whom signed the Byrd-Hagel Resolution in 1998. *See id. See also generally* Byrd-Hagel Resolution, S. Res. 98, 105th Cong., 143 CONG REC S8113-05 (1997) (enacted).

199. McCain-Lieberman Debate, *supra* note 197, at S13486.

200. *See id.* at S13487.

tons each year."[201] Moreover, Senator Lieberman ordered that the following be added to the record:

> [I]n the time since we ratified the Rio Treaty, the United States, which produces more global warming emissions than any other nation, has not developed a serious program to respond to the threat that global climate change poses to the planet's environmental and economic health. As a result, U.S. emissions of global warming gases have grown steadily and now exceed 7 billion metric tons of CO_2 equivalent gases—a growth of 14% from 1990 levels.[202]

The Senate rejected the proposal on October 30, 2003 by a fifty-five to forty-three vote.[203] Despite the defeat, bill proponents lauded the vote as a victory.[204] The measure drew "yea" votes by six Republicans and one independent in addition to the thirty-six Democrats.[205] More importantly, supporters included Senators representing states with heavy coal production, automobile manufacturing and other industrial bases.[206] Bill co-author Senator John McCain (R-Ariz.), encouraged by the vote, announced, "I want to assure my colleagues we will be back."[207] Nonetheless, the vote revealed a stark point regarding GHG emissions reduction— twelve years after signing the U.N. Framework Convention on Climate Change, the United States has not instituted any domestic effort to reduce greenhouse gas emissions.[208] Furthermore, the United States has withdrawn from international negotiations on a workable solution to the global threat of climate change.[209]

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201. *Id.* at S13488. He summarized, "We are making a proposal that the MIT study says will cost every American family $20 a year, compared to $150 billion a year within 10 years globally." *Id.*

202. *Id.* at S13487 (quoting Bob Epstein and Nicole Lederer, of Environmental Engineers (E2)).

203. *See* Eric Pianin, *Senate Rejects Mandatory Cap on Greenhouse Gas Emissions*, WASH POST, Oct. 31, 2033, at A4.

204. *See id.*

205. *See id.*

206. *See id.* The six Republicans included four from New England states: Sens. Lincoln Chafee (R-R.I.), Judd Gregg (R-N.H.), Olympia Snowe (R-Me.), Susan Collins (R-Me.), in addition to co-author Senator John McCain (R-Ariz.) and Vermont independent Senator James Jeffords (I-Vt.). *See id.* However, regulation proponents were particularly encouraged by the support of Indiana Sens. Richard Lugar (R-Ind.) and Evan Bayh (D-Ind.), as well as West Virginia Senator John D. Rockerfeller IV (D-W.V.), who faced strong lobbying opposition from coal producers. *See* Pianin, *supra* note 203. Likewise, supporters lauded favorable votes from Sens. Debbie Stabenow (D-Mich.) and Richard J. Durbin (D-Ill.), who turned against strong lobbying efforts from the automobile and other industries in their states. *Id.*

207. *Id.*

208. *See* McCain-Lieberman Debate, *supra* note 197, at S13487.

209. *Id.*

III. THE UNITED STATES' CLEAN AIR ACT: AN OVERVIEW AND A FOCUS ON NAAQS

When Congress enacted the Clean Air Act Amendments of 1970, it established that the federal government would set broad air pollution limits, which states would interpret into workable implementation plans (SIPs).[210] This federalist model extends to the two pollution control approaches wrapped into the Act: the National Ambient Air Quality Standards (NAAQS)[211] and the Hazardous Air Pollutants control standards.[212] Under Section 108 of the Act, Congress charged the EPA Administrator to establish a list of air pollutants "reasonably . . . anticipated to endanger public health or welfare," created by "numerous or diverse mobile or stationary sources."[213]

The U.S. Supreme Court has held that "[Section] 109(b)(1) and the NAAQS for which it provides are the engine that drives nearly all of Title I of the [Clean Air Act]."[214] Before reaching that section, the EPA must first identify the possible public health and welfare effects of the listed air pollutants, or "air quality criteria," based on the "latest scientific knowledge"[215] and publish "air pollution control techniques"[216] in the Federal Register.[217] Section 109 of the Act then requires the EPA to promulgate two sets of pollution standards, NAAQS, for each listed criteria pollutant.[218] Primary NAAQS must reflect the pollution limits required to protect the public health,[219] whereas secondary NAAQS must reflect the limits required to protect the public welfare.[220] The duty then shifts to the states, which must

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210. *See generally* 42 U.S.C. § 7401. (1995).

211. *See* 42 U.S.C. §§ 7408-7410.

212. *See* 42 U.S.C. § 7412.

213. 42 U.S.C. § 7408(a)(1)(A), (B) (1995). Section 302 of the Act defines an air pollutant as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and by product material) substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g) (1995). It adds that "[s]uch term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used." *Id.* Effects on public welfare includes

> but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

42 U.S.C. § 7602(h) (1995).

214. Whitman v. American Trucking Ass'ns., 531 U.S. 457, 468 (2001).

215. 42 U.S.C. § 7408(a)(2) (1995).

216. 42 U.S.C. § 7408(d) (1995).

217. 42 U.S.C. § 7408(b)(1) (1995).

218. *See* 42 U.S.C. § 7409(a) (1995).

219. *See* 42 U.S.C. § 7409(b)(1) (1995).

220. *See* 42 U.S.C. § 7409(b)(2) (1995).

each adopt plans (SIPs) to establish area-specific emission control limits consistent with the NAAQS of each criteria pollutant.[221]

Congress intended for the criteria pollutant list to be dynamic rather than static. In the Clean Air Act Amendments of 1970, Congress directed the EPA to, "within 30 days after December 31, 1970, publish, and . . . from time to time, thereafter revise, a list which includes each air pollutant . . . ."[222]

The Clean Air Act Amendments of 1970 gave the EPA no express direction, but the legislative history spurred the agency to list the first six criteria pollutants: carbon monoxide, sulfur dioxide, nitrogen dioxide, particulate matter, photochemical oxidants, and hydrocarbons.[223] By design, the Act provides an opportunity for citizens to shape the development of the NAAQS through its citizen suit provision in Section 304(a)(2).[224]

Soon after courts were interpreting Congress's intent under the listing process, as private parties urged the listing of new pollutants on a range of jurisdictional theories.[225] One court, for instance, held: "[W]hile the threshold decision to regulate under Sections 108-110 is not precautionary but rather requires proof of demonstrable harm caused by the suspect pollutant, once the decision is made the standards promulgated must be preventative in nature."[226] The EPA capped the first wave of challenges in 1978, when it promulgated NAAQS for lead—the first and last time the agency would act on pressure to add a new pollutant to the Section 108 list.[227]

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221. *See* 42 U.S.C. § 7410 (1995).

222. 42 U.S.C. § 7408(a)(1) (1995). Congress defines "air pollutant" as:

> [A]ny air pollution agent or combination of agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air . . . includ[ing] any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors . . . .
>
> 42 U.S.C. § 7602(g) (1995).

EPA defined "ambient air" as "the portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1 (2003).

223. *See* Natural Res. Def. Council, Inc. v. Train, 545 F.2d 320, 325, 326, 327 (citing Legislative History, Clean Air Act Amendments, Vol. 1). *See also* 36 Fed. Reg. 22384 (1971). Original proposed NAAQS for carbon monoxide. *Id. See also* National Primary and Secondary Ambient Air Quality Standards, 48 Fed. Reg. 628 (1983). EPA later decided to re-designate the photochemical oxidants and hydrocarbons criteria as ozone. *Id.*

224. 42 U.S.C. § 7604(a)(2) (1995). Section 304(a)(2) of the Clean Air Act provides that "any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . . ." *Id.*

225. *See* Natural Resources Defense Council, Inc. v. Train, 411 F. Supp. 864, 866 (S.D.N.Y. 1976). "Plaintiffs have alleged four separate grounds upon which the court might find jurisdiction: 1) § 304 of the Clean Air Act . . . 2) the Administrative Procedures Act, 5 U.S.C. §§ 701-706; 3) the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2; and 4) the mandamus provisions of 28 U.S.C. § 1361." *Id.*

226. Ethyl Corp. v. EPA, 541 F.2d 1, 15 (D.C. Cir. 1976).

227. *See* 43 Fed. Reg. 46258 (Oct. 5, 1978).

IV. FORCED PROMULGATION OF NAAQS FOR LEAD: *NATURAL RESOURCES DEFENSE COUNCIL V. TRAIN*

Pressure on the EPA to promulgate air quality criteria and NAAQS for lead, as indicated, arrived through the courts. In *Natural Resources Defense Council v. Train*, a group of environmental plaintiffs sought to compel the EPA to list lead as a pollutant under Section 108.[228] Plaintiffs claimed standing under four theories,[229] including that of Section 304 of the Act, which permits citizen-initiated actions against the EPA Administrator for failure to perform a non-discretionary duty under the Act.[230] Plaintiffs claimed that the Administrator's failure to list lead as a pollutant, in the face of acknowledged science and the state of the law, satisfied the breach of a non-discretionary duty requirement.[231] They maintained that

> the statutory language, legislative history and purpose, as well as current administrative interpretation of the 1970 Clean Air Act, all militate in favor of finding that the Administrator's function to list pollutants under § 108 is mandatory, once it is determined by the Administrator that a pollutant 'has an adverse effect on public health or welfare' and comes from the requisite numerous and diverse sources.[232]

The EPA conceded that lead pollution met elements (A) and (B) of Section 108(a)(1),[233] but countered that it must still have listing discretion because the Clean Air Act provides "alternative remedies provided in various sections" and because "any decision to utilize the remedies provided by [Sections] 108-110 involves complex considerations."[234]

Judge Charles E. Stewart Jr. of the U. S. District Court for the Southern District of New York, ruled for the plaintiffs, holding:

> There is no language anywhere in the statute which indicates that the Administrator has discretion to choose among the remedies which the Act provides. Rather, the language of [Section] 108 indicates that upon certain enumerated conditions, one factual and one judgmental, the Administrator 'shall' list a pollutant which triggers the remedial provisions

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228. *See Train*, 411 F. Supp. at 864.
229. *Id.*
230. *Id.* at 866. *See also*, 42 U.S.C. § 7604(a) (1995).
231. *See Train*, 411 F. Supp at 867.
232. *Id.*
233. *See id. See also*, 42 U.S.C. §§ 7408-7410.
234. *Train*, 411 F. Supp at 867 (quoting Defendants' Brief at 22).

> of [Sections] 108-110. The statute does not provide, as defendants would have it, that the Administrator has authority to determine whether the statutory remedies which follow a [Section] 108 listing are appropriate for a given pollutant.[235]

Judge Stewart found additional support for plaintiffs' position in the Senate Committee Report for the 1970 amendments, holding that Section 108(a)(1)(C) applied only to the initial list promulgated by the EPA.[236] Judge Stewart found that the "clear legislative intent to have strict mandatory health procedures in effect by mid-1976" could not comport with the defendant's reading of Section 108.[237] He added, "the phrase ['for which he plans to issue air quality criteria'] cannot mean that the Administrator need not list pollutants which meet the two requisites clearly set forth in the section."[238] Instead, the judge found:

> While the Administrator is provided with much discretion to make the threshold determination of whether a pollutant has 'an adverse effect on health,' after that a decision is made, and after it is determined that a pollutant comes from the necessary sources, there is no discretion provided by the statute not to list the pollutant.[239]

The EPA's decision to regulate the pollutant under a different section of the Act did not relieve the Administrator of the duty to list the pollutant under Section 108, Judge Stewart held.[240] Finally, he undercut the EPA's defense that it need not list a pollutant where "the data which would be necessary to support an ambient air standard for lead is arguably lacking:[241]

> We do not think that the potential lack of data would have been an appropriate consideration prior to listing a pollutant under [Section] 108 in any event. Under the statutory scheme, the listing of a pollutant is not more than a threshold to the remedial provisions. . . . Once he has [crossed that threshold], the Administrator does not have the discretion not

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235. *Id.* at 868.
236. *See id.*
237. *Id.*
238. *Id.*
239. *Id*
240. *See Train*, 411 F. Supp at 870. "Despite regulation under [Section] 211, however, the Administrator must nevertheless list lead as a pollutant since it concededly meets the two criteria of [Section] 108 . . . ." *Id.*
241. *Id.* at 870.

> to list lead as a pollutant because necessary data—data other than that necessary to make the initial decision as to 'adverse effect'—is unavailable. The statute appears to assume that, for each pollutant which must be listed, criteria and a national standard can be established.[242]

The U.S. Court of Appeals for the Second Circuit affirmed the district court, finding that "the interpretation of the Clean Air Act advanced by the EPA is contrary to the structure of the Act as a whole, and . . . would vitiate the public policy underlying the enactment of the 1970 Amendments as set forth in the Act and its legislative history."[243] The court mandated the EPA's listing of lead, holding that the Act, "its legislative history, and the judicial gloss placed upon the Act leave no room for an interpretation which makes the issuance of air quality standards for lead under [Section] 108 discretionary. The Congress sought to eliminate, not perpetuate, opportunity for administrative foot-dragging."[244]

V. NORTHEAST STATES' LAWSUITS: SEEKING TO MANDATE REGULATION OF CARBON DIOXIDE THROUGH THE COURTS

A coalition of citizens' groups, acting under Section 304 of the Act, spurred the drive that resulted in the EPA's promulgation of the lead NAAQS.[245] In 2003, a group of states set out to use the same process to compel the EPA's regulation of carbon dioxide emissions on one front, and a different section of the Clean Air Act to accomplish the same goal from another.[246]

On October 23, 2003, eleven states, the District of Columbia and American Samoa filed two petitions for review before the U. S. Court of Appeals for the District of Columbia Circuit.[247] The first petition seeks review

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242. *Id.*

243. *See Train*, 545 F.2d at 324.

244. *Id.* at 328.

245. See *Train*, 411 F. Supp. at 866. *See also* 42 U.S.C. § 7604 (1995). Section 304(a)(2) of the Clean Air Act provides that "any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . . ." 42 U.S.C. § 7604(a)(2).

246. *See generally* Complaint, Commonwealth of Mass., et al., v. EPA, U.S. Dist. Ct. (D. Conn. June 4, 2003) (No. 3:03-CV-984-PCD) (on file with author) [hereinafter Complaint]. Maine and Connecticut were also parties to the initial suit. *Id. See also generally* Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles under § 202 of the Clean Air Act, International Ctr. for Tech. Assessment v. EPA, (Oct. 20, 1999) (on file with author) [hereinafter Citizens' Petition].

247. *See* Petition for Review, Commonwealth of Mass. v. U.S. EPA, Docket No. 03-1365 (Oct. 23, 2003) (on file with author) [hereinafter §108 Appeal]. *See also* Petition for Review, Commonwealth of Mass. v. U.S. EPA, Docket No. 03-1361 (Oct. 23, 2003) (on file with author)

of an August 28, 2003 "final agency action,"[248] consisting of a memorandum issued by EPA General Counsel Robert E. Fabricant to the agency's Acting Administrator Marianne L. Horinko.[249] The memorandum dispelled any recognition of the agency's capacity to regulate carbon dioxide as a pollutant under the Clean Air Act, and formally withdrew the April 10, 1998 memorandum of former General Counsel Jonathan Z. Cannon "as no longer representing the views of EPA's General Counsel."[250]

The states' second petition seeks review of a different final agency action which the EPA undertook on August 28, 2003, when it denied a citizens' petition for rulemaking which "sought regulation of emissions of greenhouse gases (including carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons) from new motor vehicles and engines pursuant to Section 202[251] of the Clean Air Act."[252] On August 28, 2003, the EPA denied the petition, under which a coalition of environmental groups led by the International Center for Technology Assessment and the Sierra Club, pushed the agency to "undertake the . . . mandatory duties" to regulate the four greenhouse gases under Section 202(a)(1) of the Act.[253] Asserting their rights

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[hereinafter §202 Appeal]. The other ten states are Connecticut, Maine, Illinois, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *Id.*

248. One of their causes of action rests on their right to challenge "final agency actions," as provided by the Administrative Procedures Act. 5 U.S.C. §§ 701-706 (1998). An "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

249. *See* § 108 Appeal, *supra* note 247.

250. Memorandum from Robert E. Fabricant, General Counsel, to Marianne L. Horinko, Environmental Protection Agency Acting Administrator (Aug. 28, 2003), *available at* http://www.epa.gov/airlinks/co2_general_counsel_opinion.pdf (last visited Mar. 29, 2004) [hereinafter Fabricant Memorandum]. *See also generally* Cannon Memorandum, *supra* note 145.

251. 42 U.S.C. § 7521. Section 202 grants to EPA the authority to "prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [its] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1).

252. § 202 Appeal, *supra* note 247.

253. Citizens' Petition, *supra* note 246, at 2. *See also* Control of Emissions from New Highway Vehicles and Engines, Notice of denial of petition for rulemaking, 68 Fed. Reg. 52922 (2003) [hereinafter § 202 Petition Denial]. The original group of petitioners filed its own appeal of EPA's refusal to initiate rulemaking for carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons under Section 202 on Oct. 23, 2003. Petition for Review, International Ctr. for Tech. Assessment v. U.S. EPA, Docket No. 03-1363 (Oct. 23, 2003). The same group issued a separate "final agency action" challenge of the propriety of the Fabricant Memorandum. Petition for Review, International Ctr. for Tech. Assessment v. U.S. EPA, Docket No. 03-1367 (Oct. 23, 2003).

as aggrieved parties under the Administrative Procedures Act,[254] the States seek review of the EPA's denial of the citizens' petition.[255]

A. The Section 108 Challenge

The Attorneys General of Massachusetts, Connecticut, and Maine initially filed notice of intent to sue the EPA on January 30, 2003, announcing their aim to force the EPA into listing carbon dioxide as a criteria pollutant pursuant to Section 108.[256] The notice indicated the states' intent to proceed with a lawsuit against the Agency after the close of the sixty-day notice period proscribed by Section 304.[257]

The States contended that the EPA has "a mandatory duty under existing law to begin to regulate carbon dioxide as a 'criteria air pollutant' . . . ."[258] The states based this claim on two points: the EPA has acknowledged that carbon dioxide is an "air pollutant," under Section 302(g),[259] and the EPA has further recognized that carbon dioxide meets both elements of Section

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254. *See* 5 U.S.C. § 702 (1998). The section provides "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.*

255. § 202 Appeal, *supra* note 247.

256. Notice of Intent to Sue Under Clean Air Act § 7604, Commonwealth of Mass. v. EPA, Jan. 30, 2003 [hereinafter Jan. Notice], at 2. On Feb. 20, 2003, the States announced a second set of grounds for injunctive relief. Notice of Intent to Sue Under Clean Air Act § 304(b)(2), State of New York v. EPA, Feb. 20, 2003 [hereinafter Feb. Notice]. The Feb. 22 claims centered on EPA's "failure to review, and if appropriate, revise the New Source Performance Standards (NSPS) for fossil fuel fired electrical generating units . . . found at 40 CFR subpart Da." *Id.* The cited regulation sets out the emission caps for fossil fuel generating power plants with respect to particulate matter, sulfur dioxide, and nitrogen oxides. 40 C.F.R. § 60.41(a) (2003). EPA must, "at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection . . . ." 42 U.S.C. § 7411(b)(1)(B) (1995). The States sought to compel EPA to revise the existing standards for sulfur dioxide and particulates, contending that the standards "fail to reflect the technological advances that have occurred in the past two decades as well as the current information regarding the environmental harm posed by those pollutants." Feb. Notice, *supra* note 256, at 1, 2. The States further asserted "that subpart Da is inadequate in that it does not contain a standard for emissions of carbon dioxide, a pollutant that causes global warming with its attendant adverse health and environmental impacts." *Id.* at 2. While the Feb. Notice clearly laid out the States' potential course of action, they did not proceed with the claims under Section 304(b)(2) when they filed the Complaint later that summer. *See generally* Complaint, *supra* note 246.

257. Feb. Notice, *supra* note 256, at 1. Section 304(b) sets forth that "no action may be commenced . . . prior to 60 days after the plaintiff has given notice of such violation to the Administrator." 42 U.S.C. § 7604(b)(1)(B) (1995).

258. Jan. Notice, *supra* note 256, at 2.

259. *Id.* Section 302 defines an air pollutant as "any air pollution agent or combination of agents . . . which is emitted into or otherwise enters the ambient air," including "any precursors to the formation of any air pollutant" identified by the EPA as relevant to establishing an agent as an air pollutant. 42 U.S.C. § 7602(g).

108(a).[260] With respect to Section 108(a)(1)(A), the notice claimed that "there is no longer any genuine dispute that carbon dioxide emissions are endangering public health or welfare . . . [considering that] Section 302(h) of the Act defines 'welfare' to include effects on 'weather' and 'climate.'"[261] The notice also pointed to a U.S. government document,[262] which "details many specific examples of adverse impacts to weather and public health that are occurring . . . and health effects due to air pollution and extreme weather events."[263] It further contended that "it is an indisputable fact that carbon dioxide emissions 'result from numerous or diverse mobile or stationary sources,' including power plants, industrial sources and motor vehicles."[264] The states concluded that:

> Climate change attributable to carbon dioxide emissions will have dramatic effects for the quality and nature of life in the northeast . . . . Suffice it to say that carbon dioxide emissions will likely cause or contribute to wide-ranging, adverse changes to just about every aspect of the environment, public health and welfare throughout the northeast.[265]

Massachusetts, Maine, and Connecticut filed suit in the U.S. District Court for the District of Connecticut on, June 4, 2003.[266] The complaint rested on a single cause of action—the EPA's "Failure to Perform a Nondiscretionary Duty Pursuant to CAA § 304(a)(2)." [267] The parties argued that the EPA's failure to list carbon dioxide as a criteria pollutant

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260. *Id.* Section 108 charges the EPA to establish a list of air pollutants "reasonably . . . anticipated to endanger public health or welfare," created by "numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1)(A), (B).

261. Jan. Notice, *supra* note 256, at 3.

262. *U.S. Climate Action Report — 2002*, U.S. Dept. of State, Washington, D.C., May 2002, *available at* http://unfccc.int/resource/docs/natc/usnc3.pdf (last visited Mar. 29, 2004) [hereinafter Climate Action Report]. This report served as the United States' third National communication to the COP, as required by the terms of the U.N. Framework Convention on Climate Change. *See id.* at 4.

263. Jan. Notice, *supra* note 256, at 3.

264. *Id.* at 4; *see also* 42 U.S.C. § 7408(a)(1)(B) (1995).

265. Jan. Notice, *supra* note 256, at 6.

266. Complaint, *supra* note 246.

267. *Id.* at 29. The claim mirrored the analysis laid out in the Jan. Notice. *Id.* ¶114-123. *See also* Jan. Notice, *supra* note 256. It recognized that carbon dioxide meets the definition of "air pollutant," as established by "Section 302(g) of the Act, 42 U.S.C. § 7602(g)." Complaint, *supra* note 246 ¶115-17. It further stated that the both stationary and mobile sources produce the gas, as required by Sections 108(a)(1)(B) and 302(z) of the Act, 42 U.S.C. §§ 7408(a)(1)(B), 7602(z). *Id.* ¶119-21. "By failing to revise the list of air pollutants under Section 108(a)(1) of the Act, 42 U.S.C. § 7408(a)(1), to include carbon dioxide," the complaint announced, "the Administrator has failed to perform a nondiscretionary duty within the meaning of Section 304(a)(2) of the Act, 42 U.S.C. § 7604(a)(2)." *Id.* ¶122.

> is unlawfully increasing the likelihood of harming the economic interests of the Plaintiff States, is unlawfully increasing the likelihood and severity of damage to property owned by each of the Plaintiff States, is unlawfully denying residents of each of the Plaintiff States the benefits due them under the federal Clean Air Act, and is unlawfully subjecting residents of each of the Plaintiff States to increased risks of harm to human health, welfare, and general economy that are associated with the continued unregulated emissions of carbon dioxide.[268]

The complaint alleged that the EPA recognized carbon dioxide's status as a pollutant, "on at least three occasions," during the Clinton Administration.[269] Further, the complaint alleged that President Bush's EPA "made a judgment that emissions of carbon dioxide cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare within the meaning of Section 108(a)(1)(A) of the Act, 42 U.S.C. § 7408(a)(1)(A)."[270] Moreover, the States alleged that the EPA, under the

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268. *Id.* ¶123. The States alleged a range of harm they each continued to suffer as a result of EPA's failure to regulate carbon dioxide. *Id.* ¶¶65-107. The complaint listed harms by type—public health, coastal resources, water resources, agricultural resources, and forest resources. *Id.* For instance, the complaint estimated that "[b]y 2100, precipitation in Massachusetts [will] increase by about 10% in spring and summer, 15% in fall, and 20-60% in winter." Complaint, *supra* note 246 ¶68. It added that public health would suffer, for instance, where a "projected [two degree Fahrenheit] warming could increase heat-related deaths in Hartford [Connecticut] during a typical summer by about 20%, from close to 40 heat-related deaths per summer to near 50." *Id.* ¶71. It predicted that Massachusetts' coastal resources would be harmed, whereby "[s]ea level rise will likely inundate coastal wetlands, destroying habitat for commercial and game species as well as migratory birds and other wildlife." *Id.* ¶84. It further alleged Connecticut's water resources would be harmed, for instance, because "the Connecticut River is susceptible to changes in winter snow accumulation, which would be reduced in a warmer climate." *Id.* ¶94. It also predicted that Maine's agricultural resources would be harmed: "[g]lobal warming will likely reduce potato yields" and "[h]ay and pasture yields will likely decrease considerably as temperatures rise beyond the tolerance level of the crop." *Id.* ¶99. It also alleged that Maine's forest resources will suffer harm, where "[t]he already high threat of insect pest outbreaks in the northern forest will likely be exacerbated by warming-induced changes in the timing of spring frosts." *Id.* ¶105.

269. Complaint, *supra* note 246 ¶32, 33-36. The States pointed to former EPA Administrator Browner's statement to Rep. Thomas DeLay (R-Tex.) that the Clean Air provided authority to regulate carbon dioxide, and former EPA General Counsel Cannon's affirmation of that opinion in his April 10, 1998 memorandum. *Id.* ¶33, 34. *See also* Cannon Memorandum, *supra* note 145. The States also pointed to former EPA General Counsel Guzy's Oct. 6, 1999 testimony before Congress. Complaint, *supra* note 246, ¶35. *See also* Guzy Testimony, *supra* note 152.

270. Complaint, *supra* note 246 ¶118. The States pointed to a speech given by former EPA Administrator Christine Todd Whitman before the G8 Environmental Ministerial Meeting Working Session on Climate Change in Trieste, Italy, on March 3, 2001. *Id.* ¶36. The States alleged that Administrator Whitman "made a judgment under Section 108(a)(1)(A)" when she told the assembly:

Bush Administration, acknowledged carbon dioxide's status as a pollutant through its preparation and presentation of the United States' Third National Communication to the COP, pursuant to the U.N. Framework Convention on Climate Change.[271] The complaint highlighted the document's projected public health or welfare impacts of carbon dioxide-induced climate change.[272] It also noted the agency's documented acceptance and understanding of climate change threats, which undermined the Administration's basis for refusing to initiate rulemaking for carbon dioxide emissions reduction.[273] The States asked the Court to "[o]rder the Administrator to revise the list of air pollutants pursuant to Section 108(a)(1) of the Act, 42 U.S.C. § 7408(a)(1), to include carbon dioxide."[274]

On September 3, 2003 the States withdrew their lawsuit in the Connecticut court.[275] In response to General Counsel Fabricant's August 28, 2003 memorandum,[276] which officially withdrew EPA recognition of carbon dioxide's status as an air pollutant under the Clean Air Act, the States terminated their suit and packaged the substance of their Section 108 claims into a challenge before the U.S. Court of Appeals for the District of Columbia Circuit.[277] To proceed with their argument that the EPA had acknowledged carbon dioxide as an air pollutant, reasonably anticipated to endanger public health within the meaning of the Act, the States recognized the need to attack the propriety of the Fabricant Memorandum.[278] The States have proceeded with that attack by challenging the Fabricant Memorandum as an impermissible final agency action in the Court of Appeals.[279]

> Increasingly, there is little room for doubt that humans are affecting the Earth's climate, that the climate change we've seen during the past century is the result of human activity, and that we must continue our efforts to stop and reverse the growth in the emission of greenhouse gases. If we fail to take the steps necessary to address the very real concern of global climate change, we put our people, our economies, and our way of life at risk.

Id.

271. *Id.* ¶43.

272. *Id.* ¶57

273. *Id.* ¶58.

274. Complaint, *supra* note 246, at 31. The Complaint's Prayer for Relief also included requests to "[a]ward the Plaintiff States their costs of this action and attorneys' fees," and to "[g]rant such other relief as the Court deem[ed] just and proper." *Id.*

275. Telephone interview with Gerald D. Reid, Assistant Attorney General, Dept. of the Attorney General, State of Maine (Oct. 22, 2003) (on file with author) [hereinafter Reid Interview].

276. *See* Fabricant Memorandum, *supra* note 250.

277. *See* Reid Interview, *supra* note 275. *See also* § 108 Appeal, *supra* note 247. Because it officially withdrew the Cannon Memorandum as an official EPA opinion, the Fabricant Memorandum arguably stripped the States of their evidentiary foundation. *See* Fabricant Memorandum, *supra* note 250.

278. *See* Reid Interview, *supra* note 275.

279. *See* § 108 Appeal, *supra* note 247.

B. The Section 202 Challenge

The States are also challenging the EPA's denial of a petition to initiate rulemaking under Section 202 of the Clean Air Act filed by a coalition of citizens' groups (Coalition).[280] As of February 2004, the States had not filed briefs in support of their Petition for Review under Section 202, but they will do so pursuant to their standing conferred by the Administrative Procedures Act[281] as parties aggrieved by a final agency action.[282]

On October 20, 1999, the Coalition asked the EPA to "undertake her mandatory duty to regulate these as directed by §202(a)(1) of the [Clean Air Act]."[283] The Petition noted that the EPA had recognized carbon dioxide emissions to be an "air pollutant," "emitted from new motor vehicles," and that "the emission causes or contributes to air pollution which may reasonably be anticipated to endanger public health *or* welfare," thereby compelling regulation under Section 202.[284] The Petition stated that the language in Section 202(a) establishes a mandatory duty, due to Congress's use of "shall" in its charge to the EPA.[285] The Coalition added that, "even should the agency believe that there are scientific uncertainties regarding the actual impacts from global warming, the precautionary purpose of the [Act] supports actions regulating . . . these gases."[286]

The EPA rejected the petition on September 8, 2003, "conclud[ing] that it cannot and should not regulate GHG emissions from U.S. motor vehicles under the [Clean Air Act]."[287] In support of its decision, the EPA announced:

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280. *See* § 202 Appeal, *supra* note 247; *see also* Citizens' Petition, *supra* note 246.

281. 5 U.S.C. § 702 (1998).

282. *See* § 202 Appeal, *supra* note 247.

283. Citizens' Petition, *supra* note 246, at 9.

284. *Id.* The Coalition recognized that "mobile sources emit significant amounts of CO_2," and that "[t]he transportation sector contributes over 30% of U.S. greenhouse gas CO_2 emissions from fossil fuel combustion," and that "[a]lmost two-thirds of the emissions come from automobiles and the remaining emissions . . . from transportation sources are predicted to grow faster than any other emission source." *Id.* at 10. The Coalition relied on the Cannon Memorandum in support of its assertion that carbon dioxide met the air pollutant definition. *Id.* It submitted that carbon dioxide, by contributing to global warming endangers public health by "increase[ing] the threat of infectious diseases"; directly affecting human health due to heat stress, increases in cancer rates, cataracts, and immune suppression. *Id.* at 15, 16, 18, 19. The Coalition then submitted that carbon dioxide would endanger public welfare by harming the several elements of the environment and by affecting human welfare in indirect ways. *Id.* at 20, 21-23, 24-26.

285. *Id.* at 29. Section 202(a) states that EPA "shall by regulation prescribe . . . standards applicable to any air pollutant from any . . . class or classes of new motor vehicles." 42 U.S.C. § 7521(a)

286. Citizens' Petition, *supra* note 246, at 29. The Petition urged that EPA need not await conclusive scientific proof of adverse health effects where reasonable inferences can be drawn in support of such effects. *See id. See also* Ethyl Corp. v. EPA, 541 F.2d 1, 15 (D.C. Cir. 1976).

287. § 202 Petition Denial, *supra* note 253, at 52925.

> Based on a thorough review of the [Clean Air Act], its legislative history, and other congressional action and Supreme Court precedent, EPA believes that the [Act] does not authorize regulation to address global climate change. Moreover, even if CO_2 were an air pollutant generally subject to regulation under the [Act], Congress has not authorized the Agency to regulate CO_2 emissions from motor vehicles to the extent such standards would effectively regulate car and light truck fuel economy, which is governed by a comprehensive statute[288] administered by [the U.S. Department of Transportation].[289]

The EPA clarified this stance, announcing that it "does not have authority to regulate motor vehicle emissions of CO_2 and other GHGs under the [Clean Air Act]."[290] While it denied the Coalition's petition, the EPA

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288. *See* Energy Policy and Conservation Act, 42 U.S.C. §§ 6231-6246 (1998). This act assigned rulemaking authority over vehicular fuel economy to the U.S. Dept. of Transportation. *Id.*

289. § 202 Petition Denial, *supra* note 253, at 52925. EPA relied on guidance the U.S. Supreme Court's provided in its 2000 case, *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In that case, the Court was "obliged to defer not to [FDA's] expansive construction of [a] statute," in which the agency elected to regulate tobacco as a drug, "but to Congress' consistent judgment to deny the FDA this power." *Id.* at 160. Justice Sandra Day O'Connor wrote that judicial deference to agency actions, "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps," must have limits. *Id.* Justice O'Connor highlighted the particular need for limits in "extraordinary cases," where "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* EPA analogized Congress's reluctance to authorize regulation of carbon dioxide to the "extraordinary case" of FDA's attempt to regulate tobacco absent specific authorization from Congress. *See* § 202 Petition Denial, *supra* note 253, at 52925-28. It announced, "[a]gainst this backdrop of consistent congressional action to learn more about the global climate change issue before specifically authorizing regulation to address it, the [Clean Air Act] cannot be interpreted to authorize such regulation in the absence of any direct or even indirect indication of congressional intent to provide such authority." *Id.* at 52928. EPA concluded:

> In light of Congress' attention to the issue of global climate change, and the absence of any direct or even indirect indication that Congress intended to authorize regulation under the [Act] to address global climate change, it is unreasonable to conclude that the [Act] provides the Agency with such authority. An administrative agency properly awaits congressional direction before addressing a fundamental policy issue such as global climate change, instead of searching for authority in an existing statute that was not designed or enacted to deal with the issue. We thus conclude that the [Act] does not authorize regulation to address concerns about global climate change.

Id. at 52928.

290. *Id.* at 52929. It added that the provision in Section 202 "authorizing regulation of motor vehicle emissions does not impose a mandatory duty on the Administrator to exercise her judgment," rather it "provides the Administrator with discretionary authority to address

yielded that it would continue to follow President Bush's policy of pursuing "near-term voluntary actions and incentives along with programs aimed at reducing scientific uncertainties and encouraging technological development so that the government may effectively and efficiently address the climate change issue over the long term."[291]

The Coalition will likely center the Section 202 appeal on its initial claim that the EPA shirked its mandatory duty to regulate carbon dioxide emissions.[292] The States, however, are likely to proceed with a different argument against the petition denial—that the EPA's statement that it lacks authority under the Clean Air Act is legally untrue, and that "the lack of authority reasoning is not valid law."[293] Briefs in support of the petition for review should be forthcoming by June 1, 2004.[294]

C. The Claims' Likelihood of Success

While the arguments supporting both sets of future carbon dioxide requirements appear to be the same, some commentators suggest that procedure-based claims like those in the Section 202 appeal are more likely to succeed than those "concerning the substance of environmental laws."[295] As one legal scholar noted, "The underlying legal arguments have a lot of problems because they assume the E.P.A. has the authority and the obligation to dramatically expand the regulation of emissions without Congressional approval."[296] The Senate's present unwillingness to act on international carbon dioxide reduction initiatives lends support to this tactical attitude.[297] Another comment suggests that "Congress can most effectively regulate the

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emissions." *Id.* EPA responded to the Coalition's reliance on the mandatory statutory language of Section 202:

> While [S]ection 202(a)(1) uses the word 'shall,' it does not require the Administrator to act by a specified deadline and it conditions authority to act on a discretionary exercise of the Administrator's judgment regarding whether motor vehicle emissions cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.

Id.

291. *See* § 202 Petition Denial, *supra* note 253, at 52930. EPA noted, "[b]y contrast, establishing GHG emission standards for U.S. motor vehicles at this time would require EPA to make scientific and technical judgments without the benefit of the studies being developed to reduce uncertainties and advance technologies." *Id.* at 52931. It added that it "would decline the petitioners' request to regulate motor vehicle GHG emission even if it had authority to promulgate such regulations." *Id.*

292. *See* Reid Interview, *supra* note 275.

293. *Id.*

294. *Id.*

295. Jennifer 8. Lee, *7 States to Sue E.P.A. Over Standards on Air Pollution*, N.Y. TIMES, Feb. 21, 2003, at A25.

296. *Id.*

297. *See* Bugnion & Reiner, *supra* note 13, at 525.

causes of climate change by amending the Clean Air Act," much as it did with acid rain and ozone in the 1990 amendments.[298]

However, the strict language of Section 108 and the District of Columbia Circuit's ruling in *Train* leave little justification for courts to avoid compelling the EPA to list carbon dioxide as a criteria pollutant.[299] To issue a writ of mandamus pursuant to either the Section 109 or the Section 202 challenge, a court must find that the States' evidence shows: (a) the EPA has deemed carbon dioxide an air pollutant, under Section 302(g); (b) climate change threatens either public health or public welfare; and (c) carbon dioxide is emitted by numerous or diverse, mobile or stationary sources.[300] Moreover, the court must make these findings in light of the language in Section 111, which urges the Administrator to use "his judgment" to determine if a pollutant "may reasonably be anticipated to endanger public health or welfare."[301]

The States face a difficult challenge in their effort to force the EPA to institute motor vehicle emissions standards for carbon dioxide under Section 202, and could easily lose the war if a court defers to the EPA's discretion to keep carbon dioxide out of the new regulations.[302] Petitioners challenging an agency's action or inaction, must satisfy the test laid out by the U.S. Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[303] To succeed under *Chevron,* petitioners must show that an agency impermissibly interpreted an ambiguous statute.[304] However, the Court later clarified that "[d]eference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[305]

The U.S. Supreme Court has held that regulation of "an industry [that] constitut[es] a significant portion of the American economy" may require more from Congress than an ambiguous delegation of authority, from which an agency may initiate rulemaking—especially where Congress has "created a distinct regulatory scheme," and has "repeatedly acted to preclude any

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298. *Id.* The authors suggest this is so because "the evidence of [carbon dioxide's] impacts on public health or on other living things, which would justify establishing either a primary NAAQS standard or a hazardous air pollutant standard, is weak and speculative." *Id.*

299. *See* 42 U.S.C. § 7408(a). *See also* Natural Res. Def. Council, Inc. v. Train, 545 F.2d 320, 328 (2d Cir. 1976).

300. *See* Jan. Notice, *supra* note 256, at 2; *see also* Citizens' Petition, *supra* note 246, at 9.

301. 42 U.S.C. § 7411(b)(1)(A) (1995).

302. *See generally* Citizens' Petition, *supra* note 246. *See also* Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000). .

303. 467 U.S. 837 (1984).

304. *Chevron,* 467 U.S. at 843. Courts will defer to an agency's construction, so long as it is reasonable, and not "arbitrary, capricious or manifestly contrary to the statute." *Id.*

305. *Brown & Williamson,* 529 U.S. at 159.

agency from exercising significant policymaking authority in the area."[306] A court may be swayed by the EPA's contention that any potential regulation of carbon dioxide would have "far greater economic and political implications than FDA's attempt to regulate tobacco," which the Supreme Court shot down in *Brown & Williamson*.[307]

Yet, the EPA's lockstep application of *Brown & Williamson*'s holding to the context of carbon dioxide regulation has its detractors.[308] Gary S. Guzy, former EPA general counsel under President Clinton, expressed skepticism about the relevance of *Brown & Williamson* in his response to a May 2000 inquiry from Rep. David M. McIntosh (R-Ind.).[309] Focusing on tobacco as an object of regulation, Guzy noted that Congress "persistently acted to preclude a meaningful role for any administrative agency in making policy on the subject of tobacco and health."[310] Guzy contrasted Congress' relationship with potential carbon dioxide regulation, noting, "Congress has not established any broad-based requirements specifically to address climate change, much less created a distinct alternative regulatory scheme for emissions of CO_2. Nor has Congress acted to preclude administrative agencies from making policy on the topic of climate change."[311]

Guzy added that Congress' history of voting down carbon dioxide regulatory legislation does not dovetail with any holding in *Brown &*

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306. *Id.* at 159, 160. The Court announced, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160

307. § 202 Petition Denial, *supra* note 253, at 52928. EPA added:

> It is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change. Virtually every sector of the U.S. economy is either directly or indirectly a source of GHG emissions, and the countries of the world are involved in scientific, technical, and political-level discussions about climate change.

Id.

308. *See* Brian Stempeck, *Climate Change: States' Suit Against EPA Hinges on Supreme Court Tobacco Decision—Experts*, GREENWIRE, Nov. 3, 2003.

309. *See* Memorandum from Gary S. Guzy, General Counsel, to Honorable David M. McIntosh, Chairman, Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives (July 11, 2000) (on file with author) [hereinafter Guzy Memorandum].

310. *Id.* at Question 1. Guzy quoted the Court's opinion in *Brown & Williamson*, noting:

> Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the [Food, Drug and Cosmetics Act] to regulate tobacco products. Congress has created a distinct regulatory scheme to address the problem of tobacco and health, and that scheme, as presently constructed, precludes any role for the FDA.

Id.

311. *Id.* He added, "To the contrary, with Congressional authorization and appropriations, EPA has been working intensively on climate change issues for many years now, in areas such as international negotiations, policy evaluation, scientific and economic research, and establishing voluntary programs to reduce greenhouse gas emissions . . . ." *Id.*

Williamson to preclude the EPA from affirmatively acting to regulate carbon dioxide.[312] He observed that "the Court [in *Brown & Williamson*] explicitly *disavows* as a basis for its decision Congress' rejection of legislation that would have explicitly [given] FDA authority to regulate tobacco as customarily marketed."[313] As a result, he posited that

> the *Brown & Williamson* decision does not undermine, and arguably implicitly supports, the view that failure to enact a statutory provision specifically directed at climate change has no effect on general CAA provisions authorizing EPA to identify and regulate any air pollutants meeting the statutory criteria relating to endangerment of health or welfare.[314]

Nonetheless, the D.C. Circuit's ruling in *Train* provides the states a stronger likelihood to succeed on their criteria pollutant challenge.[315] However, the states' case rests on their ability to convince a court that global warming meets the *Ethyl Corp. v. EPA* "demonstrable harm" requirement[316] and is an actual threat to public health or welfare.[317] To succeed, the states must present evidence in support of their public health and welfare claims that will overcome the EPA's likely retort—that the science of global warming impacts is inconclusive and more study is required before regulations are warranted.[318] As one set of commentators suggests, this is not an insurmountable goal.[319] The commentators note, "[c]urrent scientific findings, though uncertain, suggest some degree of human interference with the

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312. *Id.* at Question 3.

313. Guzy Memorandum, *supra* note 309, at Question 3. He quoted the Court's reasoning that, "We do not rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority—in reaching [the] conclusion [that the 'actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulation tobacco products.'" *Id.* He added, "The Court instead focuses on Congress' affirmative actions in enacting several statutes 'creating a distinct regulatory scheme for cigarettes and smokeless tobacco." *Id.*

314. *Id.*

315. *See* Natural Res. Def. Council, Inc. v. Train, 545 F.2d 320, 328 (2d Cir. 1976).

316. *See* Ethyl Corp. v. EPA, 541 F.2d 1, 15 (D.C. Cir. 1976).

317. *Id.*

318. *See id. See also* § 202 Petition Denial, *supra* note 253, at 52931. Even with respect to the § 108 challenge, EPA is likely to stand by its argument that, "[u]ntil more is understood about the causes, extent and significance of climate change and the potential options for addressing it, EPA believes it is inappropriate to regulate GHG emissions." *Id.*

319. *See* Bugnion & Reiner, *supra* note 13, at 503. The authors recognized that "[t]he statutory language also suggests that the [Clean Air Act] does not require EPA to know the precise health and welfare effects that a pollutant causes in order to justify adding that pollutant to the list." *Id.* at 504. They pointed to the court's holding in *Ethyl Corp.*, which "acknowledged that some of the questions involved in the promulgation of environmental regulations are 'on the frontiers of scientific knowledge' and therefore require decisions based more on judgment than 'purely factual analyses.'" *Id.*

climate," and that the result under *Ethyl Corp.* "would support the regulation of greenhouse gases as a policy decision if, in EPA's judgment, human interference translates into endangerment."[320]

VI. A COMPARISON BETWEEN PREDICTED U.S. RESULTS UNDER THE KYOTO PROTOCOL AND UNDER FORCED REGULATION PURSUANT TO THE NORTHEAST STATES' LAWSUITS

Conditions in the United States—both atmospheric and socio-political—could assume a range of forms, depending on the regulatory system instituted to address carbon dioxide emissions reductions. In coming years Congress could end its standstill and enact a statutory gridwork to stabilize and cut carbon dioxide volumes. That gridwork could include a cap and trade system, such as the one at the heart of the 2003 McCain-Lieberman legislation, or some other regulatory mechanism yet to be crafted.[321] On the other hand, the legislative impasse could continue and the United States could remain uncommitted to any course of action.[322]

Congress was unable to break through the impasse when it considered enabling legislation to address the problem of atmospheric lead pollution.[323] The EPA in turn declined the opportunity to promulgate NAAQS for lead, and proponents turned to the courts.[324] Some commentators suggest that regulation of carbon dioxide under the NAAQS may not achieve success the way lead NAAQS arguably have in the wake of *NRDC v. Train*.[325] As regulation under Section 202 requires the same threshold requirements as Section 108, any impediments to regulation would arise under either

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320. *Id.* The authors added, "For climate change, the scientific evidence, albeit contested, supports a finding that action should be taken." *Id.* Despite the scientific dispute, "the precautionary mandate of the [Clean Air Act] has been consistently upheld, and contradictory claims, many of which have not been peer reviewed, should not affect the deference that courts grant to agency judgments based on scientific findings." *Id.*

321. *See generally* McCain-Lieberman Debate, *supra* note 197.

322. *See id.* at S13487.

323. *See* Natural Res. Def. Council, Inc. v. Train, 411 F. Supp. 864, 867 (S.D.N.Y. 1976).

324. *See id.*

325. *See* Denee A. Diluigi, *Kyoto's So-Called "Fatal Flaws": A Potential Springboard for Domestic Greenhouse Gas Regulation*, 32 GOLDEN GATE U. L. REV. 693, 725 (2002). The author recognized that the scientific community closely linked lead exposure to seizures, mental retardation and behavioral disorders, and could be easily tied to lead content in gasoline. *See id.* at 747. With carbon dioxide, "the ability to regulate . . . is debatable." *Id.* at 726. "The limiting factor . . . is the 'reasonably endanger' factor, which is ultimately at the discretion of the regulating agency." *Id.* at 725-26. "[T]he specific scientific data to convince the EPA that GHGs reasonably endanger public health or welfare may not be available. The connection between the data and environmental impacts is likely too attenuated to warrant GHG regulation under NAAQS." *Id.* at 726.

mechanism.[326] As discussed, these considerations will likely be left to a federal court to decide.[327]

With this in mind, prudence suggests that stakeholders might ask how regulation under the domestic program would look if a court rules in favor of the petitioners. Would the rules feature workable guidelines, through which regulators and polluters could achieve tangible carbon dioxide emissions reductions? Moreover, how would the results of such regulation compare with the hypothetical reductions which would result if the United States ratified the Kyoto Protocol?

The United States' commitment under the Protocol is to reduce its 1990 carbon dioxide emissions levels by seven percent by 2010.[328] In 1990 the United States' total greenhouse gas emissions were 6,038.2 teragrams of carbon dioxide equivalents (Tg CO_2 Eq.),[329] of which, carbon dioxide comprised eighty-one percent.[330] Under its Protocol commitment, the United States would have to reduce it total GHG emissions by 422.7 Tg CO_2 Eq. below its 1990 figure by 2010.[331] Yet, the United States' aggregate GHG emissions increased between 1990 and 1999 by eleven percent,[332] with carbon dioxide emissions increasing by 13.1 percent.[333] These figures neglect the use of sinks,[334] which accounted for 990.4 Tg CO_2 Eq. in 1999, but this neglect has little effect on any reductions the United States would have to undertake because reported sinks actually dropped between 1990 and 1999.[335] Therefore, using 1999 figures, the United States would have to reduce its total

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326. *See* 42 U.S.C. § 7521.

327. *See* § 108 Appeal, *supra* note 247. *See also* § 202 Appeal, *supra* note 247.

328. *See* Guide, *supra* note 45, at 22.

329. Climate Action Report, *supra* note 262, at 29. In its periodic reports to the COP, the United States presents "global warming potential-weighted emissions of all direct greenhouse gases . . . in terms of equivalent emissions of carbon dioxide" using the measure of Tg CO_2 Eq. *Id.* at 27. One teragram equals one million metric tons (106 metric tons), which equals 109 kilograms. *See id.*

330. *Id.* at 29. This represents 4,913.0 Tg CO_2 Eq. More than ninety-eight percent of all carbon dioxide emissions in 1990 was derived from fossil fuel consumption, totaling 4,835.7 Tg CO_2 Eq. *See id.* Cement manufacture, waste combustion, lime manufacture, natural gas flaring, limestone and dolomite use, soda ash manufacture and consumption, and carbon dioxide combustion account for the remaining emissions included in the total. *See id.* Methane, nitrous oxides, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride account for the remainder of total GHGs reported. *See* Climate Action Report *supra* note 262, at 29.

331. *See id.*

332. 707.9 Tg CO_2 Eq.

333. *Id.* This represents 645.1 Tg CO_2 Eq. Total United States GHG emissions topped out at 6,746.0 Tg CO_2 Eq. in 1999, more than eighty-two percent of which was carbon dioxide.(5,558.1 Tg CO_2 Eq.). *Id.*

334. The term "sink" refers to any practice or physical phenomenon, such as a change in land-use or a forest, that absorbs carbon dioxide. *See generally id.*

335. *Id.* The United States reported 1,059.9 Tg CO_2 Eq. in 1990. *Id.*

GHG emissions by nearly seventeen percent[336] before 2010 to meet its Protocol target.[337]

Quantifying predicted results under Section 108 and Section 202 regulation, however, presents a greater challenge because the EPA would first need to resolve lingering questions about climate change science.[338] First, the agency would be required to establish firm findings as to the limits, comparable to those effected for other pollutants, at which carbon dioxide "cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare."[339] Criteria pollutant NAAQS require decisive action, where the EPA sets limits measured in acute terms, generally equivalent to parts per million, or p.p.m.[340] The EPA would be required to establish comparable air quality standards for carbon dioxide, pursuant to Section 109,[341] "based on such criteria . . . requisite to protect the public health" and "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of air pollutants in the ambient air."[342]

To accomplish this goal, the states in turn would bear the burden of targeting primary carbon dioxide emission sources—power plants, motor vehicles, and land use changes. States bear discretion in crafting their SIPs to attain their air quality standards.[343] States may do so through imposition of hard emissions caps on individual sources alone, or combined with use of one or more tools comparable to the flexibility mechanisms the Protocol provides.[344] If the EPA sets NAAQS for carbon dioxide, they may coincide with QELROs, applied by the Protocol, if the EPA's public health and welfare determinations coincide with the reduction targets approved by COP.[345]

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336. 1,130 Tg CO_2 Eq.

337. *See* Climate Action Report, *supra* note 262, at 29.

338. *See* Bugnion and Reiner, *supra* note 13, at 504-06.

339. 42 U.S.C. § 7408(a)(1)(A).

340. *See, e.g.*, National Primary and Secondary Ambient Air Quality Standards for Carbon Monoxide, 40 C.F.R. § 50.8 (2003). EPA set the current NAAQS for carbon monoxide as "9 [ppm] (10 [mg/m3]) for an 8-hour average concentration not to be exceeded more than once per year and (2) 35 [ppm] (40 [mg/m3]) for a 1-hour average concentration not to be exceeded more than once per year." *Id. See also*, National Primary and Secondary Ambient Air Quality Standards for Lead, 40 C.F.R. § 50.12 (2003). "National primary and secondary ambient air quality standards for lead and its compounds, measured as elemental lead by a reference method based on appendix G to this part, or by an equivalent method, are: 1.5 micrograms per cubic meter, maximum arithmetic mean over a calendar year." *Id.* 1.5 microgram per cubic meter (mg/m3) equals .015 p.p.m. *See* Technical Information, Conversion Table, *available at* http://www.spexcsp.com/crmmain/technical/convers.htm (last visited Mar. 29, 2004).

341. 42 U.S.C. § 7409(a)(2).

342. 42 U.S.C. § 7409(b)(1), (2).

343. *See* 42 U.S.C. § 7410

344. *See generally* Protocol, *supra* note 5.

345. *See* Breidenich, Magraw, Rowley & Rubin, *supra* note 81, at 319. For example, EPA may determine that public health concerns require primary NAAQS for carbon dioxide to be set at a level that coincides with the seven percent reduction from 1990 levels, which the Protocol

Some key differences between Kyoto compliance and institution of a domestic emissions reduction program stand out. For instance, a domestic program would likely not include the international emissions trading mechanism, which would be central to the United States ability to comply with the treaty.[346] With no domestic political squabbles around negotiations with foreign powers, the EPA could implement a court-ordered emissions reduction program more easily than it could amidst congressional sparring over questions of international diplomacy.[347]

The Protocol does not stipulate the means through which Parties must attain their QELROs, but reduction of motor vehicle emissions would be necessary to any meaningful carbon dioxide reduction project enacted in the United States.[348] Section 202 presents a different set of variables, but their application would likely reach a similar result to that attained under carbon dioxide NAAQS.[349] The idea of reducing atmospheric carbon dioxide volumes by targeting motor vehicle emissions is neither new nor novel.[350] By adapting automobiles to run on hydrogen fuel cells, solar power, or carbon fuels from biomass sources, manufacturers could drastically reduce carbon dioxide emissions released into the atmosphere.[351] However, scientists believe that significant reductions can be attained merely by improving the gas mileage of the standard internal combustion engine.[352] The National Academy of Sciences released a study in 1991, which proposed that "mileage standards should rise to about 48 miles per gallon (m.p.g.) for private vehicles and 40 m.p.g. for heavy trucks."[353] Yet, studies indicate that society must do more than improve fuel economy of existing form internal combustion engines if it expects to undertake meaningful reductions in atmospheric carbon dioxide

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assigns to the U.S., or requiring a reduction in carbon dioxide emission to 5,615.54 Tg CO_2 Eq. *See id.*

346. *See* Protocol, *supra* note 5, at 40.

347. *See* Peter J. Wilcoxen, *What's Wrong With the Kyoto Protocol? There is a Better Policy for Addressing Global Climate Change*, *in* GLOBAL WARMING AND THE KYOTO ACCORD: WHAT IS TO BE DONE? 79, 83 (David J. Eaton, ed., 2001). Wilcoxen notes that the international trading regime, while "well intended," would force the United States to "buy a lot of permits from elsewhere," likely "China or Russia." *Id.* "So, now the Senate would likely raise the issue that we might be sending large chunks of wealth to controversial countries." *Id.*

348. *See* JOHANSEN, *supra* note 21, at 263.

349. *See* 42 U.S.C. § 7521.

350. *See* JOHANSEN, *supra* note 21, at 263.

351. *See id.* DiamlerChrysler has been working on an experimental car called the NECAR4, which would run on a hydrogen fuel cell, "emitting only water vapor from its exhaust pipe. *Id.* The car, modeled on a Mercedes sedan, with room for five people and their luggage, would expend less than 20 percent of the energy used by a typical "economy car." *Id.*

352. *See id.*

353. *Id.* The Sierra Club recommends that the government impose gas mileage standards of 45 m.p.g. for cars and 34 m.p.g. for light trucks, and states that such standards would be "the biggest single step the U.S. can take to curb global warming and reduce our dependence on oil. JOHANSEN, *supra* note 21, at 264.

levels.[354] Because the number of cars used worldwide is increasing, the sheer number of new mobile sources contributing to global atmospheric carbon dioxide volumes would offset any reductions exacted by improved gas mileage.[355] To achieve meaningful reduction or stabilization of GHGs, "fundamental changes in transportation technology will be required."[356]

VII. CONCLUSION

The near future may vindicate President Bush for presciently predicting the death of the Kyoto Protocol.[357] Without ratification by either Russia or the United States, the treaty will fall short of the threshold set for it to take effect.[358] Nonetheless, pressure from courts as well as community leaders leaves government little opportunity to continue its avoidance of the global warming phenomenon as time goes by.[359]

Government and community stakeholders have begun to adjust their operations because of global climate change in spite of inaction by the federal government. In October 2002, a Connecticut task force outlined a strategy for undertaking near and long term solutions to climate change problems within that state.[360] One author connected with the task force recognized that, while local decisions can impact the problem, American society must alter its thinking4 before meaningful GHG reductions are achieved:

> The only way to reduce greenhouse gases and other pollution while achieving expected economic growth is to bring about a wholesale transformation in the technologies that dominate manufacturing, energy, transportation, and agriculture. We must rapidly abandon the 20th century technologies that have contributed so abundantly to today's problems and replace them with 21st century technologies designed with environmental sustainability in mind.[361]

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354. *Id.* at 264-65.

355. *Id.* at 265. The author notes that the "world fleet or automobiles and light trucks was 53 million in 1950 and 400 million by 1990," and that "[a]nnual production was 10 million in 1950 and 50 million in 1990." *Id.*

356. *Id.*

357. *See* Shillinger, *supra* note 8.

358. *See* Glasser, *supra* note 8.

359. *See* § 108 Appeal, *supra* note 247. *See also* § 202 Appeal, *supra* note 247. *See also Leading By Example: Connecticut Collaborates to Reduce Greenhouse Gas Emissions, Pocantico Paper No. 6*, The Pocantico Conference Center of the Rockerfeller Brothers Fund, Oct. 4, 2002, *available at* http://www.rbf.org/pdf/leading%20by%20example.pdf (last visited Mar. 29, 2004).

360. *Id.* at 5.

361. *Id.* at 7.

The means of achieving that change in public thinking need not include ratification of the Kyoto Protocol. Failure to ratify may damage the United States' bargaining position in world politics and generally undermine the integrity of international environmental protection. However, the United States may still take meaningful steps toward mitigating the effects of global warming without accepting the Protocol's limitations.

A court may order the EPA to institute such a mechanism, but either the agency or Congress can avoid such a mandate by taking affirmative steps to regulate carbon dioxide emissions. If the EPA re-acknowledges carbon dioxide's status as an air pollutant, thereby repudiating the Fabricant Memorandum, the agency could regulate the gas under one or more sections of the Clean Air Act.[362] Moreover, Congress could enact new enabling legislation, such as that proposed in the Climate Stewardship Act of 2003,[363] which would provide the EPA with an unequivocal foundation to work upon the mitigation of global warming effects.[364]

Scientists have come to predict harmful consequences of global warming with increasing regularity and with a decreasing amount of dissent.[365] If society seeks to avoid those consequences yet maintain its skepticism about adhering to the international framework, it bears no other option than establishment of a domestic mechanism that will reduce atmospheric carbon dioxide levels.

362. *See generally* Diluigi, *supra* note 325.
363. *See generally* McCain-Lieberman Debate, *supra* note 197.
364. *See generally id.*
365. *See generally id.*