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ARTICLES

NOTES

INTERNATIONAL LAW AND THE EXTRAORDINARY INTERACTION BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE REPUBLIC OF CHINA ON TAIWAN

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INTRODUCTION

Since 1987, the relationship between the People's Republic of China (PRC)[1] and the Republic of China (ROC)[2] has defied existing categories of cross-border interaction. This Article examines major aspects of the PRC-ROC relationship, contrasts this relationship with state-based and nongovernmental cross-border interactions, and discusses the implications of this complex and unique relationship for international legal scholarship.

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1. The problems between the PRC and ROC are often referred to as "cross-straits" problems, both because these entities are separated by the Taiwan Strait and because the term "cross-straits" avoids allusion to their sovereignty dispute. The translations of the Chinese and Taiwanese materials that appear in this project are my own. Chinese and English are two very different languages with different sentence structures, nouns, verbs, etc. Sometimes there is no corresponding translation in English. Sometimes two Chinese words have to be translated as a full English sentence. I have tried to find the best English translations for Chinese terms. As readers will discover shortly, I offer both Romanization and translation for many Chinese terms and titles, because only using English to discuss PRC and ROC law written in Chinese may cause potentially important information to be lost in translation. Romanization may also help readers and researchers find the original materials.

2. Although some of the materials about the ROC on Taiwan are of only remote relevance to this study, they provide a background for readers who are not familiar with it. *See, e.g.*, CONSTITUTIONAL REFORM AND THE FUTURE OF THE REPUBLIC OF CHINA (Harvey J. Feldman ed., 1991); THOMAS E. STOLPER, CHINA, TAIWAN, AND THE OFFSHORE ISLANDS (1985); CONTENDING APPROACHES TO THE POLITICAL ECONOMY OF TAIWAN (Edwin A. Winckler & Susan Greenhalgh eds., 1988); ALAN M. WACHMAN, TAIWAN: NATIONAL IDENTITY AND DEMOCRATIZATION (M.E. Sharpe, Inc. 1994); THOMAS B. GOLD, STATE AND SOCIETY IN THE TAIWAN MIRACLE (Douglas Merwin ed., 1997); TAIWAN: BEYOND THE ECONOMIC MIRACLE (Denis Fred Simon & Michael Ying-mao Kau eds., 1997); Yun-han Chu, *Surviving the East Asian Financial Storm: The Political Foundation of Taiwan's Economic Resilience, in* THE POLITICS OF THE ASIAN ECONOMIC CRISIS 184 (T.J. Pempel ed., Cornell U. Press 1999). A general introduction to the ROC legal system can be found in Tay-sheng Wang, *Taiwan, in* ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA 124 (Poh-ling Tan ed., 1997), and in Tsung-fu Chen, *The Rule of Law in Taiwan: Culture, Ideology, and Social Change, in* UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 374-409 (C. Stephen Hsu ed., N.Y.U. Press 2003). A general introduction to the PRC legal system can be found in ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (3d ed. 2004).

To proponents of the state-based perpsective, the state is the most powerful social form of political organization in the contemporary world,[3] and state-based interaction is the backbone of the contemporary world order. Adherents of the traditional state-based perspective point out that the United Nations, the most influential international organization, admits only sovereign states as members. Some scholars of the PRC-ROC relationship have emphasized that the ROC should enjoy greater participation in international organizations, or even that the ROC should be considered a separate state, rather than part of the Chinese state.[4] Other scholars have emphasized the extent to which Chinese history and the Westphalian concept of sovereignty constrain the choices that the contemporary PRC and ROC governments may make.[5]

An alternative perspective posits that nongovernmental cross-border interaction is playing an increasingly important role in the world.[6] Scholars of the PRC-ROC relationship have studied the economic exchanges[7] and have

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3. Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325, 325-47 (1996). Finnemore is a political scientist who teaches at The George Washington University.

4. *See, e.g.*, Y. Frank Chiang, *State, Sovereignty, and Taiwan*, 23 FORDHAM INT'L L.J. 959, 960 (2000). The idea that the ROC should enjoy greater participation in international organizations enjoys wide support in the ROC. In contrast, the Democratic Progressive Party (DPP) supports the idea that the ROC should be a state separate from the PRC, but Kuomintang argues that the ROC is only one part of the Chinese state, the rest of which is currently ruled by the PRC.

5. *See, e.g.*, Michel Oksenberg, *The Issue of Sovereignty in the Asian Historical Context*, *in* PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL RESPONSIBILITIES 83, 83-104 (Stephen D. Krasner ed., Columbia U. Press 2001). I acknowledge that the Westphalian concept of sovereignty may itself be an idea constructed by successive diplomats and scholars. *See, e.g.*, STEPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF THE INTERNATIONAL LAW: THE WORD SOVEREIGNTY IN BODIN AND VATTEL AND THE MYTH OF WESTPHALIA (2004); JANNE ELISABETH NUMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW (Cambridge U. Press 2004); DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS (Princeton U. Press 2001); Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 2, 251-87 (2001). I also acknowledge that the concept of sovereignty has been evolving and is not monolithic. *See, e.g.*, JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY (Steve Smith et al. eds., Cambridge U. Press 1995); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (Princeton U. Press 1999). What I seek to convey in the text is the general agreement among scholars of Chinese history and politics that the Westphalian concept of sovereignty is influential among the political elites of the PRC and ROC, even though it was not introduced to the Chinese world until the late nineteenth century. *See, e.g.*, IMMANUEL C. Y. HSÜ, CHINA'S ENTRANCE INTO THE FAMILY OF NATIONS: THE DIPLOMATIC PHASE 1858-1880 (Harvard U. Press 1960).

6. *See, e.g.*, SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY (Steve Smith et al. eds., Cambridge U. Press 1996); CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875 (John Boli & George M. Thomas eds., Stanford U. Press 1999); Ann Marie Clark et al., *The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women*, 51:1 WORLD POL. 1, 1-35 (1998).

7. *See, e.g.*, T.J. Cheng, *China-Taiwan Economic Linkage: Between Insulation and*

highlighted such social phenomena as migration and marriage[8] to lend support for this perspective. As an example, analysts have pointed out that since 2003, the PRC has been the largest market for exports from the ROC,[9] while citizens and companies from the ROC have become the fifth largest source of foreign direct investment in the PRC.[10]

My thesis is that the current PRC-ROC relationship cannot be categorized according to the traditional categories of cross-border interaction. The relationship is not state-based for several reasons. First, to say that the PRC-ROC relationship is unequivocally state-based is to ignore the official attitudes of the PRC and the ROC. The PRC has always vehemently contended that its relationship with the ROC is not state-based, while the ROC's attitude is more ambiguous.[11] Several indicators of the ROC's attitude, which changes in tandem with changes in its administration, present mixed signals. Second, several mechanisms of enormous importance in the PRC-ROC relationship have intentionally been made to appear nongovernmental.[12] Third, activities such as marriage, trade, investment, and crime have been undertaken with little, if any, regard for government-to-government diplomacy.

While the current PRC-ROC relationship cannot be characterized as state-based, neither can it be characterized as composed of purely nongovernmental interaction of the type that has informed the basis of much current scholarly writing regarding informal government networks.[13] First, PRC and ROC courts, which are governmental in nature, adjudicate and resolve a variety of conflicts that arise out of nongovernmental interaction. Second, the efforts to make several mechanisms of enormous importance in the PRC-ROC relationship appear nongovernmental underscore that they are, or at least initially were, governmental mechanisms. Third, even though activities such as marriage, trade, investment, and crime have been pursued with little or no regard for government-to-government diplomacy, they have been undertaken with the legal rules established by governments in mind. Human traffickers and smugglers, for example, know they are violating either PRC or ROC laws.

Superconductivity, *in* DANGEROUS STRAIT: THE U.S.-TAIWAN-CHINA CRISIS 93 (Nancy Bernkopf Tucker ed., Columbia U. Press 2005).

8. *See* RICHARD C. BUSH, UNTYING THE KNOT: MAKING PEACE IN THE TAIWAN STRAIT 142 (Brookings Inst. Press 2005).

9. Chinabiz.org, Cross-Strait Economic Statistics Monthly, http://www.chinabiz.org.tw/maz/Eco-Month/home.htm (last visited March 25, 2003).

10. Mainland China Foreign Capital Inflow by Country (Area), http://www.mac.gov.tw/big5/statistic/em/162/29.pdf (last visited May 9, 2009). The four largest sources of foreign direct investment in the PRC are Hong Kong, Japan, the United States, and the British Virgin Islands. Just as the British Virgin Islands is a legal fiction for some sources of investment, such may be the case for the PRC and the ROC as well.

11. *See infra* Part I.

12. *See infra* Parts I, III.

13. *See, e.g.*, ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton U. Press 2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA J. INT'L L. 1, 1-92 (2002).

This Article supports my thesis by examining conflict-of-law rules[14] and cross-border crime control[15] within the PRC-ROC relationship. To date, these issues have not received adequate scholarly examination. Part I describes the historical background of the PRC-ROC relationship, lays out the official positions of the PRC and ROC on the nature of their bilateral relationship, and chronicles major events in their relationship. Part I further explains the distinction between state-based and nongovernmental cross-border interaction by examining the nature of informal government networks and discussing Paragraph 125 of the 1971 Namibia advisory opinion of the International Court of Justice (ICJ).[16] It is within this advisory opinion that the ICJ acknowledged that the registration of births, deaths, and marriages of an unrecognized regime is a public or state-based act, and, upon this acknowledgement, ruled that the registration of such matters should not be invalid simply because a regime is not accorded diplomatic recognition.[17]

Parts II and III examine the interaction between the civil and criminal justice systems and related institutions of the PRC and ROC with the purposes of demonstrating these mechanisms' nongovernmental appearance and the efforts behind creating such an appearance. As stated earlier, this nongovernmental semblance and the attempts to create it are critical to the conclusion that the current PRC-ROC relationship defies existing categories of cross-border interaction. Parts II and III will additionally detail the instances in which PRC and ROC courts have met the challenges that were created by the extensive interaction between the two entities. It should be noted that throughout Parts II and III, the dates on which various events occurred will be provided whenever possible. Viewing these dates alongside the chronology of the major events in the PRC-ROC relationship supports the conclusion that activities such as marriage, trade, investment, and crime have been undertaken with little or no regard for government-to-government diplomacy.

Parts II and III present PRC and ROC court decisions as a useful lens through which observers may examine the PRC-ROC relationship. Most studies of this relationship have rarely discussed court decisions. However, this Article demonstrates that lawyers and judges have paid much heed to these materials, which reflect the efforts of the PRC and ROC to come to grips with the challenges created by their extensive interaction. Court judgments illustrate the real-world impact of the application of legal rules—one party loses while the other party wins—as well as the extent to which extralegal motivations are

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14. *See infra* Part II; *see also* Chi Chung, *Conflict of Law Rules Between China and Taiwan and Their Significance*, 22 ST. JOHN'S J. LEGAL COMMENT. 559 (2008).

15. *See infra* Part III.

16. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Req. for Advisory Op.) (Order of Jan. 26, 1971), *available at* http://www.icj-cij.org/docket/files/53/11457.pdf?PHPSESSID=7b48b5d09529372114dbe1773ebf2303 [hereinafter Namibia Advisory Opinion].

17. *Id.*

translated into legal arguments.[18] This Article contends that anyone wishing to gain an understanding of the PRC-ROC relationship cannot ignore these court decisions.[19]

Certainly, a focus on adjudication can lead to misunderstandings. Readers must understand that court cases present only a snapshot. Some corporations and individuals may choose to settle outside of court, and estimating the number of disputes resolved in this manner is difficult.[20] Furthermore, while court cases and settlements arise from disputes, not all PRC-ROC interactions, such as marriages or transactions, end in disputes, nor can PRC and ROC police catch every criminal. In addition, the PRC does not yet have a centralized database that systematically reports cases in its court system.[21] Therefore, although court decisions present a valuable opportunity to understand the PRC-ROC relationship, they are still only part of the complicated relationship.

The Conclusion of this Article discusses the stability of PRC-ROC interaction and its implications for international legal scholarship. The unique nature of the PRC-ROC interaction may lead to questions regarding its stability, an issue which I shall do my best to address. Beyond the immediate consequences in the region, the PRC-ROC interaction has implications for international legal scholarship. The PRC-ROC interaction suggests the need

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18. In order to succeed in courts, both state policies and profit motives must be stated in legal terms, which is what I mean by "the extent to which extralegal motivations are translated into legal arguments."

19. It should be noted that both the PRC and the ROC are civil law jurisdictions where court judgments do not have the precedential value as they do in common law jurisdictions. On the other hand, it would be inaccurate to state that the PRC and ROC judges do not read court judgments previously made by other judges at all. For more information on the effects of previous judgments on adjudication in civil law jurisdictions, see, e.g., MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (U. Chicago Press 1986). Neither Shapiro nor I suggest that the PRC and the ROC judges behave the same as the judges in other civil law jurisdictions do. It may be tempting to find commonalities between adjudication in the PRC and the ROC and adjudication in other civil law jurisdictions, as they indeed share some characteristics. However, readers must understand that the legal development of each jurisdiction is unique in important aspects; therefore, the process of adjudication in one jurisdiction should not be assumed to be the same as the process of adjudication in another jurisdiction. For more discussion on the issue of "comparability," see, e.g., STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (Stanford U. Press 1999); William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. 945, 954 (1986); Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533 (2007) (explaining the adjudication process in the PRC).

20. To some extent, court judgments may also shape the nature of dispute resolution outside of the courts; as Robert H. Mnookin, a Harvard Law School professor, has demonstrated, law may dictate the default rules affecting the bargaining that occurs outside of the courts. *See* Robert H. Mnookin et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

21. The ROC has a centralized database that systematically reports judgments rendered by its courts. *See infra* Appendix I.

for more focus on the *substance* of the international law, and the focus on the substance of international law will also have implications for the PRC-ROC interaction.

Before further discussion, a note on terminology is in order. The ROC government now controls Taiwan, Penghu, Kinmen, Matsu, and their neighboring islands, with Taiwan being the largest land mass under its control. The language of the PRC law refers to the PRC as the Mainland Area, (*dalu diqu*; 大陸地區) or heartland (內地), and the ROC as the Taiwan Area (*Taiwan diqu*; 台灣地區). The language of the ROC law refers to the PRC as the Mainland Area and to the ROC as the Taiwan Area. Renminbi (RMB$), or the Chinese Yuan, is the currency issued by the PRC. On average, in June 2009, a U.S. dollar could have been exchanged for RMB$6.8339. The New Taiwan Dollar (NT$) is the currency issued by the ROC. On average, in June 2009, a U.S. dollar could have been exchanged for NT$32.792. When describing the statutory and case law of the PRC and the ROC, I use the language of the government that made the laws to maintain the greatest possible accuracy. In general, I translate *jumin* as residents, *renmin* as people or person,[22] *dalu* as Mainland, and *dalu diqu* as Mainland Area.

I. THE CONTEXT

Part I aims to fulfill three goals. First, it aims to provide background information on the PRC-ROC relationship and chronicle major events in their history of interaction. Second, it aims to lay out the official positions of the PRC and ROC on the nature of their bilateral relationship. As stated earlier, examination of their official positions aids in explaining why their relationship defies existing categories of cross-border interaction. Third, it aims to explain the nature of state-based and nongovernmental cross-border interaction in greater detail.

A. The PRC-ROC Relationship

1. Historical Background

The Republic of China (ROC, *zhonghua minguo*, or 中華民國) was founded in 1911. Chiang Kai-shek rose to power when he became the Commander-in-Chief of the National Revolutionary Army in 1925. Chiang and his political party, Kuomintang (KMT), continued to rule China through the Second World War until 1949, when they lost the Chinese Civil War to the Chinese Communist Party (CCP) led by Mao Zedong. In 1949, the CCP proclaimed the establishment of the People's Republic of China (PRC,

22. Based on the cases and statutes I have reviewed, I believe that *jumin* and *renmin*, as well as *dalu* and *dalu diqu*, can be used interchangeably.

zhonghua renmin gonghe guo, or 中華人民共和國) as Chiang Kai-shek and his forces retreated to Taiwan, Penghu, Kinmen, Matsu, and other neighboring islands.

The islands to which Chiang and the KMT retreated do not share the same historical background. Kinmen and Matsu, outlying islands off the shore of China, had always been part of China. However, during Chiang's rise to power and throughout the Second World War, Taiwan and Penghu were not part of China; the Qing Dynasty of China had ceded Taiwan and Penghu to Japan in the Treaty of Shimonoseki in 1895.[23] When Japan surrendered at the end of the Second World War, ROC troops accepted Japan's surrender of Taiwan and Penghu on behalf of the Allied Command on October 25, 1945. Some have argued that because Japan surrendered Taiwan and Penghu to the Allied Command and that ROC troops were merely agents of the Allied Command, the ROC did not assume sovereignty over Taiwan and Penghu. The Treaty of San Francisco, which concluded the Pacific War, stated that Japan must surrender its sovereignty over Taiwan and Penghu but left unspecified to whom Japan must surrender the sovereignty.

The government formed and led by Chiang in Taiwan, Penghu, Kinmen, Matsu, and their neighboring islands has continued to exist to this day under the official name of the Republic of China (ROC or *zhonghua minguo*). The continued use of the term ROC, coupled with the consequences of international relations during the Cold War, may have impacted the diplomacy and participation of the PRC and the ROC in international organizations throughout their history. For example, the PRC did not successfully take the ROC's seat in the United Nations until 1971,[24] and until 1978, the ROC was the only Chinese government recognized by the United States.[25] In their ongoing diplomatic dispute, both the PRC, ruled by the CCP, and the ROC, ruled by the KMT, have maintained a so-called one-China policy, according to which there is only one Chinese state. Such a stance has led the PRC and the ROC to argue that each has the true authority to rule and internationally represent the combined territory of the PRC and the ROC.

Military confrontations between the PRC and ROC continued until 1958. Between 1949 and 1987, all forms of transportation, communication, and mail

23. Treaty of Shimonoseki, Apr. 17, 1895, China-Japan, *available at* http://www.taiwandocuments.org/shimonoseki01.htm (last visited Mar. 9, 2009).

24. *See, e.g.*, SAMUEL S. KIM, CHINA, THE UNITED NATIONS AND WORLD ORDER 8 (Princeton U. Press 1979).

25. *See, e.g.*, ROBERT S. ROSS, NEGOTIATING COOPERATION: THE UNITED STATES AND CHINA, 1969-1989 (Stanford U. Press 1995); PATRICK TYLER, A GREAT WALL: SIX PRESIDENTS AND CHINA: AN INVESTIGATIVE HISTORY (Pub. Aff. 1999); JAMES MANN, ABOUT FACE: A HISTORY OF AMERICA'S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON (Vintage Books 1998); CHINA'S CROSS TALK: THE AMERICAN DEBATE OVER CHINA POLICY SINCE NORMALIZATION: A READER (Scott Kennedy ed., Rowman & Littlefield 2003); ROBERT L. SUETTINGER, BEYOND TIANAMEN: THE POLITICS OF U.S.-CHINA RELATIONS 1989-2000 (Brookings Inst. Press 2003).

between the PRC and the ROC were prohibited by both entities. Although the PRC had signaled its willingness to lift its restrictions on travel before 1987, the ROC did not allow even family visits until 1987. The gradual lifting of restrictions on travel since 1987 caused a wide variety of legal issues that are examined by this Article.

In the early 1990s, much optimism prevailed that the PRC and the ROC would negotiate their unification. This optimism reached its pinnacle in 1992[26] when a series of negotiations resulted in the two entities signing several agreements in Singapore through their government-organized non-governmental organizations.[27] However, the bilateral relationship soon became increasingly fraught with tension as the ROC sought greater participation in international organizations, something the PRC opposed for fear of implying that the PRC accepted a separate state status for the ROC.[28] One key event that led to significant consequences was ROC's President Lee Teng-hui's visit to his alma mater, Cornell University, in June 1995.[29] In protest of Lee's visit, the PRC conducted war games and tested fire missiles in waters near Taiwan in 1995 and 1996.[30] Although the tension decreased shortly thereafter, the tension

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26. The CCP and the KMT later refer to the circumstances of 1992 as the "1992 Consensus." *See, e.g.*, *Backgrounder: "1992 Consensus" on "one-China" Principle*, People's Daily Online, http://english.people.com.cn/200410/13/eng20041013_160081.html (last visited May 31, 2009); Ko Shu-Ling et al., *Presidential Office Defends Ma*, TAIPEI TIMES, September 5, 2008, http://www.taipeitimes.com/News/taiwan/archives/2008/09/05/2003422339 (last visited May 31, 2009); Ambassador Stephen S. F. Chen, The Foreign and Cross-Strait Policies of the New Administration In the Republic of China, A Speech Delivered at the Chatham House, London, December 8, 2008, http://www.kmt.org.tw/english/page.aspx?type=article&mnum=115&anum=5669 (last visited June 1, 2009) ("For the purpose of a preliminary meeting, the two proxy organizations sent delegations to Hong Kong for a first-ever meeting in October 1992. They immediately hit snags over the definition of "One China." For [the ROC], it is the Republic of China, and both Taiwan and the mainland constitute China. For [the PRC], it is the People's Republic of China, and Taiwan is part of China. Finally, both sides agreed that, having respectively stated their interpretations, they should shelve the issue and proceed to the formal business talks in the future. That in essence was the "Consensus of 1992." Indeed, the principals of the two organizations, C. F. Koo and Wang Taohan, were able to meet for talks in April 1993 in Singapore.").

27. How can organizations be both government-organized and non-governmental? This apparent paradox is exactly why it is important to understand their complex nature. Suffice it to say that the PRC and ROC governments have organized, by donations and staffing, certain non-governmental organizations specifically for the purpose of addressing certain issues within the PRC-ROC relationship. *See infra* Parts II, III; *see also*, Steven M. Goldstein, *Terms of Engagement: Taiwan's Mainland Policy, in* ENGAGING CHINA: THE MANAGEMENT OF AN EMERGING POWER 57, 70-71 (Alastair Iain Johnston & Robert S. Ross eds., Routledge 1999).

28. The PRC opposes the idea that the ROC has a separate state status because it claims the true authority to rule and internationally represent the combined territory of the PRC and the ROC. *See also*, Chung, *supra* note 14, at 569-70. The ROC still pursues greater participation in international organizations. *See infra* Conclusion.

29. *See e.g.*, Robert Ross, *The 1995-96 Taiwan Strait Confrontation: Coercion, Credibility, and Use of Force, in* THE UNITED STATES AND COERCIVE DIPLOMACY 225 (Robert J. Art & Patrick M. Cronin eds., US Institute of Peace Press 2003).

30. *Id.*

escalated once more after Lee stated in an interview on July 9, 1999 that the PRC-ROC relationship should be regarded as a special state-to-state relationship.[31]

On May 20, 2000, Chen Shui-bian succeeded Lee as President of the ROC. Before winning the presidential election, Chen's Democratic Progressive Party (DPP) had not adopted the one-China policy, as both the CCP and the KMT had. Instead, the DPP developed its own policies towards the PRC-ROC problem. Article 1 of the DPP's Platform (黨綱), as revised in October 1991, stated that one of the DPP's primary goals was "to establish the Republic of Taiwan with independent sovereignty."[32] However, in 1999, the National Assembly of Party Members (全國黨員代表大會), the same DPP body that had developed and later revised the Platform, passed the Resolution on Taiwan's Future (臺灣前途決議文) (the "Resolution"), the preface (前言) of which asserted that the goal of establishing Taiwan's sovereignty had already been achieved: "The congressional election in 1992, direct presidential election in 1996, and constitutional amendment in 1997 made Taiwan a *de facto* democratic and independent state."[33] The DPP's National Assembly of Party Members made this bold assertion even though there was no Republic of Taiwan and the ROC had not formally declared its independence. The Resolution makes seven assertions (主張): First, "Taiwan is an independent sovereign state; any change of the status quo—independence—must be determined by a referendum of all inhabitants in Taiwan."[34] Second, "Taiwan does not belong to the People's Republic of China; 'one-China Principle' and 'one-country-two-systems' are China's unilateral assertions and do not fit Taiwan."[35] Third, "Taiwan should widely participate in international society and seek international recognition and membership in the United Nations and other international organizations."[36] Fourth, "Taiwan should abandon the one-China idea to avoid confusion in international society that may be an excuse for China to swallow Taiwan."[37] Fifth, "Taiwan should legislate a Referendum

31. Office of the President, Republic of China (Taiwan), http://www.president.gov.tw/php-bin/prez/shownews.php4?issueDate=&issueY (last visited May 19, 2009).

32. Democratic Progressive Party, http://www.dpp.org.tw/ (last visited May 19, 2009). The Romanization of the quoted text is as follows: *jianli zhuquan duli zizhu de Taiwan gonghe guo.*

33. *Id.* The Romanization of the quoted text is as follows: *yi jiu jiu er nian de guohui quanmian gaixuan yi jiu jiu liu nian de zongtong zhijie minxuan yiji xiuxian feisheng deng zhengzhi gaizao gongcheng yi shi Taiwan shishi shang chengwei minzhu duli guojia.*

34. *Id.* The Romanization of the quoted text is as follows: *Taiwan shi yi zhuquan duli guojia renhe youguan duli xianzhuang de gengdong bixu jingyou Taiwan quanti zhumin yi gongmin toupiao de fangshi jueding.*

35. *Id.* The Romanization of the quoted text is as follows: *Taiwan bingbu shuyu zhonghua renmin gonghe guo zhongguo pianmian zhuzhang de yige zhongguo yuanze yu yiguo liangzhi genben bu shiyong yu Taiwan.*

36. *Id.* The Romanization of the quoted text is as follows: *Taiwan ying guangfan canyu guoji shehui bing yi xunqiu guoji chengren jiaru lianheguo ji qita guoji zuzhi wei fendou nuli de mubiao.*

37. *Id.* The Romanization of the quoted text is as follows: *Taiwan ying yang qi yige zhongguo de zhuzhang yi bimian guoji shehui de renzhi hunyao shouyu zhongguo bingtun de*

Act as soon as possible to realize direct democracy and, when necessary, form a national consensus and express national will."[38] Sixth, "in order to counter China's bullying and ambitions, all political parties in Taiwan should form a consensus and make the most efficient use of the limited resources on foreign policy."[39] Seventh, "Taiwan and China should, through comprehensive dialogue, seek deep mutual understanding and reciprocal economic cooperation, and establish a peaceful framework for long-term stability and peace for both sides."[40]

These policy statements sent mixed signals to the world community. Although Taiwanese independence is listed as the first and foremost goal in the DPP platform, above even "the legal and political order with democracy and liberty" (民主自由的法政秩序), the DPP's Resolution on Taiwan's Future claimed that Taiwan was already a *de facto* independent state and pledged that any change in the status quo should be determined by a referendum in the ROC. Although the PRC might share the goal of maintaining the status quo, it was disturbed by both the DPP's pursuit of Taiwanese independence and the DPP's characterization of the status quo as independence. Therefore, the DPP's electoral victory in 2000 greatly concerned the PRC. To reassure both the PRC and the United States, in his inaugural speech on May 20, 2000, Chen promised:

> As long as the CCP regime [of the PRC] has no intention of using military force against Taiwan, we will not declare independence; will not change the official name of the state; will not seek to amend the Constitution to describe the cross-strait relationship as a state-to-state one; will not seek to hold a unification/independence referendum to change the status quo; and will not abolish the National Unification Council or the Guidelines for National Unification.[41]

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jiekou.

38. *Id.* The Romanization of the quoted text is as follows: *Taiwan ying jinsu wancheng gongmin toupiao de fazhi hua gongcheng yi luoshi zhijie minquan bing yu biyao shi jieyi ningju guomin gongshi biaoda quanmin yizhi.*

39. *Id.* The Romanization of the quoted text is as follows: *Taiwan chaoye gejie ying bufen dangpai zai duiwai zhengce shang jianli gongshi zhenghe youxian ziyuan yi miandui zhongguo de daya ji yexin.*

40. *Id.* The Romanization of the quoted text is as follows: *Taiwan yu zhongguo ying touguo quan fangwei duihua xunqiu shenqie huxiang liaojie yu jingmao huhui hezuo jianli heping jiagou yiqi dacheng shuangfang zhangqi de wending yu heping.*

41. Office of the President, Republic of China (Taiwan), http://www.president.gov.tw/php-bin/prez/shownews.php4?issueDate=&issueYY=89&issueMM=5&issueDD=20&title=&content=&_section=3&_pieceLen=50&_orderBy=issueDate%2Crid&_desc=1&_recNo=7 (last visited June 22, 2009). The Romanization of the quoted text is as follows: *zhiyao zhonggong wuyi duitai dongwu benren baozheng zai renqi zhinei buhui xuanbu duli buhui genggai guohao buhui tuidong liangguolun ruxian buhui tuidong gaibian xianzhuang de tongdu gongtou ye meiyou feichu guotong gangling yu guotonghui de wenti. See also* TAIWAN'S PRESIDENTIAL POLITICS: DEMOCRATIZATION AND CROSS-STRAIT RELATIONS IN THE TWENTY-FIRST CENTURY (Muthiah Alagappa ed., M.E. Sharpe Inc.

That notwithstanding, between 2000 and 2008, the period in which Chen served as the ROC's President, having been re-elected for a second term in 2004, the PRC-ROC relationship was fraught with tension.

On March 22, 2008, the ROC elected Ma Ying-jeou as President for the 2008-2012 term.[42] Ma was sworn into office on May 20, 2008.[43] Maintaining a different perspective on the one-China principle than that held by the Chen administration, Ma and the KMT, his political party, do not seek a complete agreement with the CCP over the nature of the PRC-ROC relationship.[44] Whereas the CCP maintains that there is one China and that the PRC represents it, Ma and the KMT maintain that there is one China and that the ROC represents it.[45] Thus, both agree that there is one China but differ on which entity represents it. Observers of Asia expect that the CCP and the KMT will continue to focus on their agreement that there is one China while keeping unresolved the question regarding which entity represents it.[46] Not surprisingly, Ma stated in an interview on September 3, 2008 that the cross-strait relationship is a special relationship but not a state-to-state one.[47] As President of the ROC, Ma has substantial influence. Ma has the power to appoint and remove the President of the Executive Yuan and thereby influence the executive branch. In addition, his party enjoyed a landslide electoral victory and now maintains a majority in the Legislative Yuan, through which its policy initiatives are likely to become law.[48]

2. Official Positions on the Nature of the Bilateral Relationship

The PRC government has always vehemently contended that its relationship with the ROC is not state-based.[49] It reacted furiously to Lee Teng-

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2001) (examining the 2000 election).

42. Office of the President, Republic of China (Taiwan), http://www.president.gov.tw/en/ (follow "President" hyperlink; then follow "Biography" hyperlink) (last visited May 31, 2009).

43. *Id.*

44. *See, e.g.*, Chen, *supra* note 26.

45. Chen's administration sent mixed signals. In general, Chen's administration and the DPP, the ruling party between 2000 and 2008, oppose the idea that the ROC represents the Chinese state and, instead, want a Taiwanese state separate from the Chinese state represented by the PRC. *See infra* Part I.A.

46. *See, e.g.*, Chen, *supra* note 26 ("[Both the PRC and the ROC] agreed that, having respectively stated their interpretations [of what China is], they should shelve the issue and proceed to the formal business talks in the future.").

47. Office of the President, Republic of China (Taiwan), http://www.president.gov.tw/php-bin/prez/shownews.php4?_section=3&_recNo=2 (last visited May 19, 2009).

48. *See, e.g.*, Shelley Rigger, *Needed: A Newish U.S. Policy for a Newish Taiwan Strait*, March 2009, *available at* http://www.fpri.org/enotes/200903.rigger.newishtaiwanstrait.html (last visited May 31, 2009) ("In May 2008 Chen [Shui-bian] handed over the presidency to Ma Ying-jeou, who came into office with a strong popular mandate. He won the presidency with 58 percent of the vote, and his party (the Kuomintang, or KMT) was just shy of a three-fourths majority in Taiwan's legislature.").

49. *See, e.g.*, Embassy of the People's Republic of China in the United States of America, *The One-China Principle and the Taiwan Issue*, http://www.china-embassy.org/eng/zt/twwt/White%20Papers/t36705.htm (last visited May 19, 2009).

hui's special state-to-state characterization in 1999 and Chen Shui-bian's one-side-one-country characterization in 2002.[50] According to the one-country-two-systems formula offered by former PRC leader Deng Xiaoping, the ROC may collect and keep its own tax revenue, operate its own legal system, and even maintain its own military—the PRC may not send even a single soldier to the ROC if the ROC so requests—but the ROC must remain a part of the Chinese state, of which the PRC government in Beijing is the central government.[51] PRC leaders who have succeeded Deng have not altered this one-country-two-systems policy. Under this policy, the PRC will not seek to fully integrate the ROC into the PRC and will allow the ROC to enjoy a high degree of autonomy. While the PRC government opposes the notion that an international border exists between the PRC and the ROC, it acknowledges that the ROC should be allowed to develop its own policies.

In contrast, the ROC's position is more complex. First, as stated earlier, the ROC's attitude changes in tandem with changes in its administration, as demonstrated by the change in attitude when Ma succeeded Chen as President. Although it may appear unusual to casual observers that successive executive leaders could maintain such fundamentally different positions, long-time observers are not surprised that Chen and Ma differ so radically regarding the nature of the PRC-ROC relationship.[52]

Secondly, the ROC's policy is not based on an affirmative or negative response to one question but rather its ambiguous attitude demonstrated by a combination of several factors. In my opinion, the best examples of these factors are listed in Chen's inaugural speech in 2000.[53] During his terms as the President of the ROC, Chen kept the first three of his five promises: (1) not to declare independence, (2) not to change the official name of the state, and (3) not to amend the Constitution to describe the PRC-ROC relationship as a state-to-state relationship. However, Chen sought to hold a highly controversial referendum in March 2004; although Chen argued that it was not a referendum on unification or independence, the United States and the PRC disagreed.[54]

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50. Office of the President, Republic of China (Taiwan), http://www.president.gov.tw/php-bin/prez/shownews.php4?issueDate=&issueYY=91&issueMM=8&issueDD=3&title=&content=&_section=3&_pieceLen=50&_orderBy=issueDate%2Crid&_desc=0&_recNo=0 (last visited May 19, 2009). On August 3, 2002, Chen publicly stated that "Taiwan is a sovereign state" and that "[t]he two sides of the Taiwan Strait are two states." *Id.* The Romanization of the quoted text is as follows: *Taiwan shi yige zhuquan de guojia Taiwan gen duian zhongguo yibian yiguo.*

51. The one-country-two-systems policy now applies to Hong Kong and Macau, though Hong Kong and Macau do not have their own military forces. *See, e.g.*, THE HONG KONG READER: PASSAGE TO CHINESE SOVEREIGNTY: AN INTERDISCIPLINARY READER 5 (Ming K. Chan & Gerard A. Postiglione eds., M.E. Sharpe, Inc. 1996).

52. Successive executive leaders maintain such fundamentally different positions because their electorate does. *See e.g.*, Tahirih V. Lee, *Democracy and Federalism in Greater China*, 48 ORBIS 275 (2004).

53. *See* former President Chen's inaugural speech, *supra* note 41.

54. For an early assessment of the referendum in 2004, see Jih-wen Lin, *Taiwan's*

Reneging on his promise not to "abolish" the National Unification Council or the Guidelines for National Unification, on January 29, 2006, Chen argued, "[t]he time to seriously consider their [the National Unification Council and the Guidelines for National Unification] abolition (廢除) has come."[55] After stirring intense controversy, Chen backed off on February 27, 2006, by declaring that the National Unification Council "ceased (終止) to function" and the Guidelines for National Unification "ceased to apply."[56] While some scholars believe that to abolish something is different than making it cease to apply, others believe Chen simply played a game of words.

During Chen's tenure, he stopped short of declaring independence or changing the official name of the ROC, but asserted opinions and performed actions that indicated a change in the ROC's position on the PRC-ROC relationship.

3. Travel, Marriage, Trade, and Investment

An introduction to the relationship between the PRC and ROC would be incomplete if it did not provide for a basic understanding of the travel, marriage, trade, and investment that occurs between their people.

As stated earlier, there was no contact between the people of the PRC and the people of the ROC between 1949 and 1987.[57] A policy shift occurred within the PRC when, during its Third Plenary Meeting on December 22, 1978, the Eleventh Central Committee of the Chinese Communist Party[58] replaced its goal of the "liberation" (解放) of Taiwan with the more abstract and potentially friendly goal of "unification with the ROC by urging Taiwan to come to the embrace of the motherland."[59] However, the ROC responded on April 4, 1979 by announcing its refusal to negotiate with the PRC.[60] The ROC later indicated a change in its position when, on November 2, 1987, it lifted its ban on travel to allow its inhabitants[61] to visit relatives in the PRC. Travel between the PRC and the ROC increased over the following years to become the basis for their

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Referendum Act and the Stability of the Status Quo, ACADEMIA SENICA, *available at* http://www.ipsas.sinica.edu.tw/image/speech/24/1.pdf.

55. The Romanization of the quoted text is as follows: *muqian shi renzhen sikao feichu guotonghui ji guotong gangling de shidang shiji.*

56. Office of the President, Republic of China (Taiwan), http://www.president.gov.tw/php-bin/prez/shownews.php4?issueDate=&issueYY=95&issueMM=2&issueDD=27&title=&content=&_section=3&_pieceLen=50&_orderBy=issueDate%2Crid&_desc=1&_recNo=0 (last visited June 22, 2009).

57. *See supra* Part I.A.1.

58. The Romanization of the title is as follows: *zhongguo gongchandang di shi yi jie zhongyang weiyuanhui di san ci quanti huiyi.*

59. The Romanization of the quoted text is as follows: *taiwan huidao zuguo huaibao shixian tongyi daye.*

60. Mainland Affairs Council, Republic of China (Taiwan), http://www.mac.gov.tw/english/index1-e.htm (follow "Dialogue and Negotiation" hyperlink; then follow "Major Events across The Taiwan Straits" hyperlink) (last visited June 22, 2009).

61. I use the word "inhabitant" instead of "citizen" because the word "citizen" has special implications in the PRC-ROC relationship. *See infra* Part II.

increasingly important bilateral relationship.

As previously stated, the PRC has been the largest market for exports from the ROC since 2003 and ROC citizens and companies are the fifth largest source of foreign direct investment in the PRC.[62] Not only are their economies closely connected, but the societies of both entities are as well. According to Dai Xiaofeng, head of the Cultural Exchange Bureau (交流局), Taiwan Affairs Office, State Council, PRC, as of the end of September 2007, about 270,000 marriages had occurred between Taiwan and Mainland residents. In addition, roughly 400,000 Taiwan residents were living on the Mainland for work or study and about 18,000 Taiwan residents permanently resided on the Mainland.[63] Furthermore, in 2006, about five million pieces of mail were sent from the ROC to the PRC and about six million pieces of mail were sent from the PRC to the ROC.[64] Also in 2006, about 350 million telephone calls were made from the ROC to the PRC and about 358 million telephone calls were made from the PRC to the ROC.[65] If it is assumed that each person in the ROC makes and receives the same number of telephone calls each year, then each person in the ROC makes 15.2 calls to the PRC and receives 15.5 calls from the PRC per year.

Travel between the PRC and ROC has remained brisk since restrictions were lifted. Between 1987 and December 2006, ROC inhabitants made 42.41 million trips to the PRC[66] and PRC inhabitants made 1.54 million trips to the ROC.[67] In 2006 alone, ROC inhabitants made 4.41 million trips to the PRC[68] and PRC inhabitants made 243,200 trips to the ROC.[69] Of the trips made by ROC inhabitants to the PRC in 2006, 26,400 were made to engage in economic activities and 98,600 to engage in sightseeing.[70]

The terms "Chinese people" and "Taiwanese people" are legally and politically ambiguous. According to the PRC and the ROC the term "Chinese citizens" (中國公民) encompasses residents of both the Mainland Area and the Taiwan Area.[71] All citizens[72] of the ROC are citizens of the PRC according to

62. *See supra* Introduction.

63. Taiwan Affairs Office of the State Council, http://www.gwytb.gov.cn/jlwl/lajl0.asp?lajl_m_id=1054 (last visited May 19, 2009). The reliability of this statistic is bolstered by the fact that it came from a PRC official at the Taiwan Affairs Office of the State Council. However, there may be a slight chance of exaggeration as Dai Xiaofeng was in charge of both regulating the travel of Mainland residents to Taiwan and promoting cultural exchanges between the Mainland and Taiwan. His goal of promoting cultural exchanges might have affected the accuracy of the statistics that he provided.

64. CROSS-STRAIT ECONOMIC STATISTICS MONTHLY, NO. 169, at 17, http://www.mac.gov.tw/english/english/csexchan/rpt/index.htm (follow "No. 169" hyperlink; then follow "Brief Summary" hyperlink) (last visited May 19, 2009) [hereinafter ECON. STAT.].

65. *Id.*

66. ECON. STAT., *supra* note 64, at 17.

67. ECON. STAT., *supra* note 64, at 17.

68. *Id.*

69. *Id.*

70. *Id.*

71. In the 1950s and 1960s, the Chinese Communist Party and the Kuomintang on Taiwan

PRC law. The rule that comes closest to providing a definition of citizenship is found in Article 2 of the PRC *Regulations of the Travel of Chinese Citizens to and from the Taiwan Area*,[73] promulgated by the State Council (國務院) on December 17, 1991 and effective since May 1, 1992.[74] It defines "Mainland residents" (大陸居民) as those PRC citizens (中國公民) residing on the Mainland (居住在大陸) and "Taiwan residents" (台灣居民) as those PRC citizens residing on Taiwan (居住在台灣), thereby catergorizing both Mainland and Taiwan residents as PRC citizens.[75] Two vital statutes, the *Law Protecting Investments by Taiwan Compatriots*[76] and the *Anti-Secession Law* (反分裂國家法),[77] refer to ROC citizens as "Taiwan compatriots" (台灣同胞). Whereas the former statute uses the phrase "Taiwan compatriots" without defining it, the *Anti-Secession Law* defines "Taiwan compatriots" in Article 2, providing that "[t]here is only one China in the world;"[78] "[b]oth the mainland and Taiwan belong to one China;"[79] "China's sovereignty and territorial integrity brook no division;"[80] and "[s]afeguarding China's sovereignty and territorial integrity is the common obligation of all Chinese people, the Taiwan compatriots included[.]"[81]

Although Article 2 of the *Anti-Secession Law* does not look like a definition per se, it unambiguously states the phrase "all Chinese people, the Taiwan compatriots included," which embodies the PRC policy that Taiwan compatriots are Chinese people.[82] In addition, Article 9 of the *Anti-Secession*

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fought over who should rule and represent all of China (the combined territory of the PRC and the ROC).

72. I understand that some scholars distinguish nationality from citizenship. In the text I use the word "citizen" because it is usually translated as *gongmin* in Chinese and is closest to the term used in Article 2 of the PRC *Regulations of the Travel of Chinese Citizens to and from the Taiwan Area*, as discussed in the text.

73. Taiwan Affairs Office of the State Council, *Regulations of the Travel of Chinese Citizens to and from the Taiwan Area*, http://www.gwytb.gov.cn/flfg/flfg0.asp?flgf_m_id=4 (last visited May 19, 2009). The Romanization of its title is as follows: *zhongguo gongmin wanglai Taiwan diqu guanli banfa*.

74. *Id.*

75. *Id.* at art. 2.

76. Taiwan Affairs Office of the State Council, *Law Protecting Investments by Taiwan Compatriots*, http://www.gwytb.gov.cn/flfg/tbf.htm (last visited May 29, 2009). The Romanization of its title is as follows: *zhonghua renmin gonghe guo Taiwan tongbao touzi baohu fa*. The statute has been valid since March 5, 1994.

77. Anti-Secession Law (promulgated by the Third Session of the Tenth National People's Congress, Mar. 14, 2005, effective Mar. 14, 2005) 2005 *available at* http://english.peopledaily.com.cn/200503/14/eng20050314_176746.html [hereinafter Anti-Secession Law]. It has been valid since March 14, 2005. *Id.*

78. *Id.* at art. 2. The Romanization of the quoted text is as follows: *shijie shang zhiyou yige zhongguo*.

79. *Id.* The Romanization of the quoted text is as follows: *dalu he Taiwan tongshu yige zhongguo*.

80. *Id.* The Romanization of the quoted text is as follows: *zhongguo de zhuquan he lingtu wanzheng burong fenge*.

81. *Id.* The Romanization of the quoted text is as follows: *weihu guojia zhuquan he lingtu wanzheng shi baogua Taiwan tongbao zainei de quan zhongguo renmin de gongtong yiwu*.

82. *Id.*

Law states that the PRC shall protect the "legitimate interests" (正當權益) of both the ordinary people (平民) and foreigners (外國人) in Taiwan, which implies the PRC policy that Taiwanese people are not foreigners.[83]

ROC law is similarly complicated. According to ROC law, citizens of the PRC are citizens of the ROC. Article 2 of the ROC's Nationality Law (國籍法) provides that anyone whose father or mother is a national (國民)[84] of the ROC is an ROC national,[85] and that anyone "born in the territory of the ROC,"[86] whose father or mother is not known (不可考) or who has no nationality, is an ROC national.[87] As will be explained in more detail in the discussion of criminal convictions in ROC courts,[88] ROC law considers all the territory of the PRC to be part of the ROC, and, therefore, considers citizens of the PRC to be citizens of the ROC as well.

However, ROC law distinguishes between ROC citizens that live in the PRC and ROC citizens that live on Taiwan.[89] This distinction was authorized by the Preface of the Amendments to the ROC Constitution[90] and the Eleventh Constitutional Amendment,[91] which have been effective since May 1, 1991.[92] As stated in the Preface, one purpose of these constitutional amendments is "to meet the needs of the time before our country is unified."[93] Specifically, the Eleventh Amendment states that "[t]he rights, responsibilities, and other affairs between the people of the free area and the people of the Mainland Area, can be governed by special legislations."[94] Most importantly, the Eleventh Amendment authorizes the ROC Legislative Yuan to enact the *Act Governing Relations Between Peoples of the Taiwan Area and the Mainland Area* (the

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83. *Id.* at art. 9.

84. I use the word "national" here because it is the word usually translated as *guomin* in Chinese and closest to the usage in Article 2 of the ROC Nationality Law, as discussed in the text.

85. Nationality Law of the Peopie's Republic of China (promulgated by Order No.8 of the Chairman of the Standing Committee of the National People's Congress, Sept. 10, 1980, effective Sept. 10, 1980) 1980, *available at* http://www.china.org.cn/english/LivinginChina/184710.htm [hereinafter PRC Nationality Law].

86. *Id.* The Romanization of the quoted text is as follows: *chusheng yu zhonghua minguo lingyu nei.*

87. *Id.* For the purposes of this paragraph, the word "citizen" (*gongmin*; 公民) is interchangeable with the word "national" (*guomin*; 國民).

88. *See infra* Part III.

89. *See infra* note 90.

90. Preface of the ROC Constitutional Amendments. The Romanization of its title is as follows: *zhonghua minguo xianfa zengxiu tiaowen.*

91. Eleventh Constitutional Amendment [hereinafter Eleventh Constitutional Amendment]. The Eleventh Amendment was the Tenth Amendment before July 21, 1997.

92. Government Information Office of the ROC, http://www.gio.gov.tw/info/news/additional.htm (last visited June 1, 2009).

93. Preface of the ROC Constitutional Amendments, *supra* note 90. The Romanization of the quoted text is as follows: *wei yinying guojia tongyi qian zhi xuyao.*

94. Eleventh Constitutional Amendment, *supra* note 91. The term "free area" indiciated the ROC's self-perception shortly after the end of the Cold War that the ROC was part of the free world.

"Act").[95] The Act, valid since July 31, 1991, is the ROC's most important legislation on the PRC-ROC relationship. Article 2 of the Act provides the following definitions: the "Taiwan Area" is the area currently governed by the ROC government, and the "Mainland Area" is the remaining territory of the Republic of China.[96] The "people of the Taiwan Area" are "the people who register their residence in the Taiwan Area with the government of the Taiwan Area."[97] The "people of the Mainland Area" are "the people who register their residence in the Mainland Area with the government of the Mainland Area."[98]

In conclusion, the PRC distinguishes between Taiwan residents and Mainland residents while the ROC distinguishes between people of the Taiwan Area and people of the Mainland Area. Although they differ in terminology, they both make distinctions between those whom they regard as their citizens—Chinese citizens. Taiwan residents are often also people of the Taiwan Area and Mainland residents are often also people of the Mainland Area, but not always. The status of a particular person ultimately depends upon the specific issue that person faces under the particular PRC or ROC government.

It should be noted that under both PRC and ROC law, the status of a person as either a Taiwan resident or a Mainland resident, or as either a person of the Taiwan Area or a person of the Mainland Area does not signify nationality (國籍).[99] Both the PRC and the ROC hold that the nationality of their people is that of the Chinese state, even though the PRC and the ROC differ on whether the Chinese state is the PRC or the ROC. The concept of nationality is closely intertwined with that of sovereignty, the historical root cause of the PRC-ROC conflict.[100] Therefore, as long as the PRC-ROC conflict remains unsettled, I forecast that the distinction between Taiwan residents and Mainland residents and that between people of the Taiwan Area and people of the Mainland Area will remain a separate consideration from the concept of nationality.

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95. Act Governing Relations Between Peoples of the Taiwan Area and the Mainland Area, *available at* http://www.mac.gov.tw/english/english/law/law1.pdf [hereinafter Act Governing Relations]. The Romanization of its title is as follows: *Taiwan diqu yu dalu diqu renmin guanxi tiaoli*. English translations of this statute can be found at Ada Koon Hang Tse, *The Statute Governing Relations Between People of the Areas of Taiwan and Mainland China*, 6 J. CHINESE L. 179 (1992); *see also* ROC Mainland Affairs Council, http://www.mac.gov.tw (last visited May. 29, 2009); *see also* Chung, *supra* note 14.

96. Act Governing Relations, *supra* note 95 at art. 2.

97. Koon Hang Tse, *supra* note 95, at 179. The Romanization of the quoted text is as follows: *zai Taiwan diqu sheyou huji zhi renmin*.

98. *Id.* The Romanization of the quoted text is as follows: *zai dalu diqu sheyou huji zhi renmin*.

99. Shelley Rigger, a political scientist teaching at Davidson College, analyzes the issue of ROC citizenship from the perspective of nationalism. *See* Shelley Rigger, *Nationalism Versus Citizenship in the Republic of China on Taiwan, in* CHANGING MEANINGS OF CITIZENSHIP IN MODERN CHINA 353 (Merle Goldman & Elizabeth J. Perry eds., Harvard Univ. Press 2002).

100. *See, e.g.*, Chung, *supra* note 14.

4. Conclusion

There is frequent interaction between PRC and ROC, as the existence of travel, marriage, trade, and investment shows. However, it remains difficult to identify and describe the precise nature of this relationship. As discussed in this section, the PRC has always vehemently contended that its relationship with the ROC is not state-based, while the ROC's attitude is more complicated. As I stated in the Introduction, my thesis is that the current PRC-ROC relationship defies existing categories of cross-border interaction, a term upon which I elaborate in the following section.

B. Existing Categories of Cross-border Interaction

Cross-border interaction is conventionally divided into two categories: state-based interaction and nongovernmental interaction. State-based cross-border interaction refers to cross-border interaction whose format and content is determined by states (國家); it is an example of the oldest form of diplomacy. During such interactions, the representatives of heads of state convey messages, exchange information, and negotiate with one another. Underscoring the contemporary prominence of this type of diplomacy, the United Nations, the most influential international organization, admits only sovereign states as members.[101]

Nongovernmental cross-border interaction refers to cross-border interaction, the format and content of which are determined by non-state actors. As pointed out by Susan Strange, an international political economy scholar, organized crime, the insurance industry, and multinational accounting firms are examples of nongovernmental entities which hold tremendous power across international lines in the contemporary world.[102] Aside from these specific sectors, multinational enterprises in general exert strong influence and engage in important forms of nongovernmental cross-border interaction.[103] Nonprofit

101. It should be noted that the World Trade Organization (WTO) may be no less influential than the United Nations. The WTO admits not only sovereign states but also separate customs territories. The ROC is a member of the WTO under the title of "the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu." *See, e.g.*, Lori Fisler Damrosch, *GATT Membership in a Changing World Order: Taiwan, China and the Former Soviet Republics*, 1992 COLUM. BUS. L. REV. 19, 23 (1992). Given the prominence of the WTO, the fact that the ROC is a member of the WTO is not a trivial matter. On the other hand, the ROC continues to be denied membership in such organizations as the World Health Organization as they are considered organizations affiliated with the United Nations. *See, e.g.*, World Health Organization, *Summary Records of Meetings of Committees*, available at http://apps.who.int gb/ebwha/pdf_files/WHA60-REC3/A60_REC3-en2.pdf (last visited June 22, 2009).

102. *See* STRANGE, *supra* note 6.

103. *See, e.g.*, The Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, ¶¶ 20, 21, A/HRC/4/35 (Feb. 19, 2007); *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights* ¶ 3, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 2003 (2003).

organizations also form advocacy networks that are nongovernmental, cross-border in scope, and play an important role in some international organizations.[104]

The distinction between state-based and nongovernmental cross-border interactions may seem simple, but it is not. In addressing this complexity, this section discusses government networks and the inhabitant-welfare exception to nonrecognition.

1. Government Networks

The direct foreign contact made among government officials who work outside of foreign ministries will be discussed first.[105] Some legal scholars describe such direct foreign contact as "government networks,"[106] while other scholars specializing in diplomacy use the word "paradiplomacy."[107] Regardless of the nomenclature, this form of interaction is neither track-two nor multi-track diplomacy, which denotes the informal interaction between members of adversarial entities that is intended to be a complement to traditional diplomacy.[108] The "informal" nature of track-two and multi-track diplomacy leads it to differ from the formal interaction which serves as the hallmark of traditional diplomacy. Indeed, track-two or multi-track diplomacy is specifically "designed" by states to be informal in order to complement traditional diplomacy.[109] Informal interaction may serve as a litmus test before engaging in formal diplomacy, which decreases the likelihood of embarrassment should negotiations fail. The primary contexts in which scholars and politicians use track-two or multi-track diplomacy have been those of protracted conflict.[110] Given that the informal quality of these types of diplomacy is designed or authorized by traditional diplomats, this diplomacy

104. *See, e.g.*, Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 348-72 (2006); *see* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 6 (Cornell Univ. Press 1998); *see* Clark et al., *supra* note 6.

105. Paul W. Meerts, *The Changing Nature of Diplomatic Negotiation, in* INNOVATION IN DIPLOMATIC PRACTICE 79 (Jan Melissen ed., St Martin's Press Inc., 1999).

106. *See, e.g.*, SLAUGHTER, *supra* note 13; Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1-92 (2002).

107. *See e.g.*, Meerts, *supra* note 105; Jan Melissen, *Introduction, in* INNOVATION IN DIPLOMATIC PRACTICE at xiv (Jan Melissen ed., St Martin's Press Inc., 1999).

108. *See* John W. McDonald, *Further Exploration of Track Two Diplomacy, in* TIMING THE DE-ESCALATION OF INTERNATIONAL CONFLICTS 201 (Louis Kriesberg & Stuart J. Thorson eds., Syracuse Univ. Press 1991); Joseph V. Montville, *Transnationalism and the Role of Track Two Diplomacy, in* APPROACHES TO PEACE: AN INTELLECTUAL MAP 255, 255 (W. Scott Thompson & Kenneth M. Jensen eds., U.S. Institute of Peace Press 1991); Nadim N. Rouhana, *Unofficial Intervention: Potential Contributions to Resolving Ethno-national Conflicts, in* INNOVATION IN DIPLOMATIC PRACTICE 111, 113-14 (Jan Melissen ed., St Martin's Press Inc., 1999).

109. *Id.*

110. *Id.*

should not be confused with forms of purely nongovernmental cross-border interaction.

While track-two or multi-track diplomacy is designed by states in protracted conflicts to decrease the likelihood of embarrassment, government networks exist primarily in liberal states that already have an extensive relationship. Government networks "grow out of various 'reinventing government' projects"[111] that "focus on the many ways in which private actors now can and do perform government functions, from providing expertise to monitoring compliance with regulations to negotiating the substance of those regulations, both domestically and internationally."[112]

The role of private actors at the center of a definition of government networks presents a paradox that makes it difficult to categorize government networks as either state-based or nongovernmental. In response, the following pages discuss government networks in more detail and examine their characteristics.

Government officials who are not employed in foreign ministries make direct foreign contact in various forms of communication. Although this contact may occur through avenues as formal as an international organization, the contact more often occurs during informal visits[113] and conversations during breaks in formal meetings.[114] These officials constitute a large group of functionaries with widely different roles. According to Anne-Marie Slaughter, a pioneer in the analysis of government networks and Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University, regulators, judges, and even legislators network or engage in direct foreign contact with their foreign counterparts.[115]

After analyzing dozens of examples of such government networks, in her book *A New World Order*, Slaughter concludes that direct foreign contact by these government officials serves three functions: (1) exchanging information and ideas, (2) enhancing cooperation among themselves to enforce existing national laws and rules, and (3) adopting international standards that are a compromise between the regulatory standards of two or more countries.[116]

First, government officials may exchange information regarding their various regulatory procedures and their competence, integrity, and professionalism.[117] Through such exchanges of information, government officials can enhance their country's reputation and learn about other countries' policy successes and failures.

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111. SLAUGHTER, A NEW WORLD ORDER, *supra* note 13, at 9.

112. *Id.*

113. *Id.* at 36.

114. *Id.* at 52 ("As an hour in any big convention hotel will attest, participants go to panels on new developments and techniques in their profession, hold roundtable discussions sharing experiences, and network furiously in the lobbies.").

115. *Id.*

116. *Id.* at 52-61.

117. *Id.* at 52-55.

Second, government officials—law enforcement officials in particular—can share their intelligence regarding specific cases through organizations and initiatives such as the International Police Organization (Interpol).[118] In addition to sharing intelligence regarding specific cases, law enforcement officials from various countries can exchange and learn from each other's experiences in a process called "capacity building."[119]

Third, government officials may work together either to adjust regulatory standards, such as product-safety standards, or to promote "mutual recognition by two countries of each other's regulatory standards and decisions on specific cases."[120] Slaughter points out the International Network for Environmental Compliance and Enforcement[121] and the International Competition Network[122] as organizations that promote this type of contact.

Slaughter stresses the informal quality of these networking activities among these government officials. She explains, "[w]e need more government on a global and a regional scale, but we don't want the centralization of decision-making power and coercive authority so far from the people actually to be governed."[123] On the one hand, these networks among government officials of different states may help them resolve cross-border problems more efficiently and effectively. On the other hand, they may ease the need of establishing more formal international treaties and organizations that some analysts criticize for infringing on state sovereignty.[124]

The significant and growing scholarship on government networks may be summarized as follows: If government officials do not wield enormous power in their respective states, then their meetings and conversations are simply meetings and conversations among citizens of their respective states. However, while the fact that they are government officials itself does not prevent them from meeting and engaging in conversation, their meetings and conversations carry more importance than those among ordinary citizens. Examining the importance of these meetings and conversations is a major contribution of the scholarship regarding government networks.

These government networks are not the predominant driving force affecting people's lives within the PRC-ROC relationship. PRC and ROC government officials do meet and engage in conversation with each other, and these face-to-face interactions may play a role in the PRC-ROC relationship. However, as this Article will demonstrate, the government mechanisms

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118. *Id.* at 55.

119. *Id.* at 52, 58.

120. *Id.* at 59.

121. International Network for Environmental Compliance and Enforcement Home Page, http://www.inece.org/ (last visited May 10, 2009).

122. *Id.*

123. SLAUGHTER, A NEW WORLD ORDER, *supra* note 13, at 8.

124. *See, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (Oxford Univ. Press, 2005); JEREMY A. RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES (Princeton Univ. Press, 2007).

between the PRC and the ROC are made to appear nongovernmental to avoid the adverse consequences of the entities' mutual non-recognition, and therefore they differ from the government networks that are driven by the networking activities of government officials.

2. *Inhabitant Welfare as an Exception to Nonrecognition*

The inhabitant-welfare exception presents another situation where the distinction between state-based and nongovernmental interaction is complicated. The inhabitant-welfare exception was created by the ICJ's 1971 Namibia Advisory Opinion.[125] It stipulated that the registrations of births, deaths, and marriages of an unrecognized regime, even though they were public acts, should still be deemed valid by other states because doing otherwise would adversely affect the welfare of the inhabitants living under that unrecognized regime.[126] Although giving effect to the public acts of an unrecognized regime is a government act, it is not a form of diplomacy. As interaction based upon the inhabitant-welfare exception is the type of cross-border interaction the examination of which helps one best understand the nature of the PRC-ROC relationship, it is described and analyzed in detail in this Article.

The inhabitant-welfare exception should be put into its context: using non-recognition as a punishment. Speaking at the 1933 American Society of International Law symposium, Frederick A. Middlebush, professor of political science and public law at the University of Missouri, explained: "State practice of withholding and delaying recognition of revolutionary or illegitimate governments, of new states and territorial acquisitions, and treaties affecting third parties, as a measure of coercion is not at all new in the history of international relations."[127] Middlebush cited the Serbian regicide government of 1903 and the Huerta régime in Mexico as examples in which international recognition of new governments was withheld or delayed in order to express international disapproval of the commission of atrocious crimes and the use of unconstitutional processes.[128] According to Middlebush, nonrecognition of revolutionary governments has "been frequently objected to as unsound in principle and of evil effect in practice. Judge John Bassett Moore is 'of the opinion that this practice has tended to give an undue emphasis to the question of formal recognition.'"[129]

The use of nonrecognition as a sanction is also known as the Hoover-Stimson doctrine[130] or the Stimson Doctrine,[131] named for its chief proponent,

125. Namibia Advisory Opinion, *supra* note 16.

126. *Id.*

127. Frederick A. Middlebush, *Non-recognition as a Sanction of International Law*, 27 AM. SOC'Y INT'L L. PROC. 40, 40 (1933).

128. *Id.*

129. *Id.* at 44.

130. *Id.*

Henry L. Stimson. Stimson was serving as U.S. Secretary of State when the Empire of Japan installed Manchukuo, Japan's puppet regime, in the Northeast region of China.[132] On January 7, 1932, Stimson sent the following message to both China and Japan:

> In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between these governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the Open Door Policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties.[133]

On March 11, 1932, two months after Stimson had delivered his message, the Assembly of the League of Nations, with the abstention of China and Japan, resolved "not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris."[134] A thoughtful analysis of the Stimson Doctrine was provided in 1933 by Arnold D. McNair.[135] Two parts of McNair's analysis are particularly relevant to the current relationship between the PRC and ROC, even though phrases such as "the newly annexed territory" and "the annexing state" are no longer applicable.[136]

First, addressing the issue of commercial treaties, McNair asserted:

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131. Arnold D. McNair, *The Stimson Doctrine of Nonrecognition: A Note on Its Legal Aspects*, 14 BRIT. Y.B. INT'L L. 65 (1933); John Trone, Note, *The Stimson Doctrine of Nonrecognition of Territorial Conquest*, 19 U. QUEENSLAND L.J. 160 (1996); David Turns, *The Stimson Doctrine of Nonrecognition: Its Historical Genesis and Influence on Contemporary International Law*, 2 CHINESE J. INT'L L. 105 (2003).

132. See PRASENJIT DUARA, SOVEREIGNTY AND AUTHENTICITY: MANCHUKUO AND THE EAST ASIAN MODERN (Lanham: Rowman and Littlefield, 2003) for more information on Manchuckuo.

133. McNair, *supra* note 131, at 65.

134. *Id.*

135. McNair was Reader in Public International Law at the University of Cambridge, and later a judge of the ICJ from 1946 to 1955, and President of the European Court of Human Rights from 1959 to 1965.

136. McNair, *supra* note 131, at 65.

> Suppose that a non-recognizing state declines to regard commercial treaties with the annexing state as applicable to the newly annexed territory. The inhabitants of that territory will be denied the benefits of those treaties and their commerce will to that extent be restricted. *Per contra*, the commerce of the non-recognizing state will be similarly restricted. Theoretically it is perhaps conceivable that commerce might continue on the basis of any former commercial treaties applicable to the annexed territory, but that is unlikely when the territory is no longer under the control of the government which made the treaties.[137]

McNair's reasoning is that because nonrecognition between two entities makes previous treaties inapplicable and new treaties impossible, it severely restricts commerce. While McNair was insightful in pointing out the link between nonrecognition and commerce, if he were alive today, he would be surprised by the extent of the commerce between the PRC and the ROC, two entities that do not recognize each other. In other words, McNair's reasoning and the PRC-ROC relationship are incompatible and lead one to ask: how could extensive commerce have developed between two entities that do not recognize each other? The answer I offer at the conclusion of this Article is that even though the PRC and the ROC do not recognize each other, they have developed a relationship that, because it is neither state-based nor purely nongovernmental, enables their citizens to engage in commerce.

Regarding the effect of nonrecognition on extradition treaties, McNair elaborated:

> [A] refusal by a non-recognizing state to regard extradition treaties with the annexing state as applicable to the newly annexed territory merely means that the non-recognizing state will not extradite to the annexing state fugitive criminals alleged to have committed crimes on the newly annexed territory, and will not demand from the annexing state alleged criminals who have found refuge on that territory. *The only persons likely to benefit are the alleged criminals.*[138]

McNair's assertion that "[t]he only persons likely to benefit are the alleged criminals"[139] is the most powerful statement on the effect of nonrecognition I have yet encountered. Perhaps precisely because the "only persons likely to benefit are the alleged criminals,"[140] the PRC and the ROC

137. *Id.*
138. *Id.* (emphasis added).
139. *Id.*
140. *Id.*

have developed an extradition-like mechanism.[141] Overall, McNair was skeptical of the efficacy of the policy of nonrecognition without the application of other sanctions because he believed "[i]t is difficult to see how such a policy can do more harm to the wrongdoing state than to the non-recognizing states."[142]

Despite the efforts of the League of Nations, eight states—Japan, El Salvador, Italy, Spain, Germany, Poland, Hungary, and Finland—recognized Manchukuo as a state[143] until the conclusion of the Second World War, when Manchukuo ceased to exist. Since the establishment of the United Nations, nonrecognition has been used several times as a sanction against a wrongdoer.[144]

The Stimson Doctrine may even have become customary international law. According to the Restatement (Third) of Foreign Relations Law of the United States, "[a] state has an obligation not to recognize or treat as a state an entity that has attained the qualification for statehood as a result of a threat or use of armed force in violation of the United Nations Charter"[145] as well as "an obligation not to recognize or treat a regime as the government of another state if the control has been effected by the threat or use of armed force in violation of the United Nations Charter."[146]

In most situations, nonrecognition was simply declared, as it was in the Manchukuo situation. However, in Paragraph 125 of the Namibia Advisory Opinion, the ICJ states that inhabitant interests should be protected even if recognition is denied.[147] South West Africa, a former German colony, had been

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141. *See infra* Part III.

142. McNair, *supra* note 131, at 73.

143. Trone, *supra* note 131, at 163.

144. On November 12, 1965, the Security Council decided to "condemn the unilateral declaration of independence made by the racist minority in Southern Rhodesia and to call upon all states not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime." S.C. Res. 216 U.N. Doc. S/RES/216 (Nov. 12, 1965). *See also* Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1-19 (1968). Between 1976 and 1982, the South African Parliament created four entities administered by black South Africans and subsequently encouraged black South Africans to live in these entities, leaving South Africa to white South Africans. The General Assembly declared this action illegal and called upon all States to deny any form of recognition to these four entities and refrain from having any dealings with them. G.A. Res. 1514 (1966). On November 18, 1983, the Security Council resolved that the declaration of independence by the Turkish Republic of Northern Cyprus (TRNC) was invalid and called upon "all States not to recognize any Cypriot State other than the Republic of Cyprus." S.C. Res. 541 U.N. Doc. S/RES/541 (Nov. 18, 1983). On August 6, 1990, the Security Council responded to the Iraqi invasion of Kuwait by calling upon all States "not to recognize any régime set up by the occupying Power." S.C. Res. 661 U.N. Doc. S/RES/0661 (Aug. 6, 1990).

145. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 202.2 (1986).

146. *Id.* at § 203. The Restatement also offers additional examples in which nonrecognition was used as a sanction.

147. Nambia Advisory Opinion, *supra* note 16.

under South African administration as a Mandate before the United Nations replaced the League of Nations.[148] When the Trusteeship system of the United Nations replaced the Mandate system of the League of Nations, South Africa refused to comply with the Trusteeship system.[149] In 1966, the General Assembly of the United Nations responded by resolving to terminate the South African Mandate in South West Africa.[150]

In 1970, the Security Council declared South Africa's continued presence in South West Africa illegal and called upon all States "to refrain from any dealings with the Government of South Africa."[151] Further, the Security Council asked the ICJ for an advisory opinion on "the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)."[152] By a thirteen-to-two vote, the ICJ was of the opinion "(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory."[153] By an eleven-to-four vote, the ICJ was of the opinion:

> (2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration [and] (3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.[154]

After clarifying the consequences of the nonrecognition of the South African administration, the ICJ asserted in Paragraph 125:

> In general, the nonrecognition of South Africa's administration of the Territory *should not result in depriving the people of Namibia of any advantages derived from international co-operation.* In particular, while *official acts* performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are

148. *Id.*
149. *Id.*
150. G.A. Res. 2145 (Oct. 27, 1966).
151. S.C. Res. 276 (Jan. 30, 1970).
152. Namibia Advisory Opinion, *supra* note 16, at 58.
153. *Id.*
154. *Id.*

> *illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.*[155]

Although the ICJ did not issue any further statements more specific than those cited above, it is laudable that the ICJ created an inhabitant-welfare exception to the use of nonrecognition as punishment. In so doing, the ICJ recognized that the negative consequences for the unrecognized government of an unrecognized entity should not result in negative consequences for its inhabitants, thus stressing the continued importance of protecting inhabitant welfare even during nonrecognition. Implicit in Paragraph 125 is the understanding that nonrecognition has punitive consequences for inhabitants; otherwise, the ICJ would not have needed to create the inhabitant-welfare exception.

As demonstrated by the events discussed above, the ICJ's creation of an inhabitant-welfare exception demonstrated its acknowledgement that nonrecognition leads to punitive consequences for the wrongdoing regime as well as the inhabitants under its control. Nonrecognition could have, as the ICJ noted, deprived the people of Namibia of advantages derived from international cooperation. In creating the exception, the ICJ sought to mitigate the unintended effects of earlier instances of nonrecognition.

However, the contexts of the Namibia Advisory Opinion and the PRC-ROC relationship are quite different; the mutual nonrecognition that exists between the PRC and the ROC is not intended as a form of punishment for either entity. Unlike situations in which nonrecognition was used as a sanction against wrongdoing, the mutual nonrecognition between the PRC and ROC has its origin in war, specifically the Chinese Civil War and the Cold War.[156] The PRC was established in 1949 but, as a result of the outbreak of the Korean War and the subsequent Cold War, the United States did not recognize it until 1979.[157] Neither the nonrecognition of the PRC by the United Nations before 1971, nor the nonrecognition of the ROC by the United States after 1979, was intended as a sanction against wrongdoing.[158] The enactment of the Taiwan Relations Act[159] by the United States, which gave Taiwan the right to sue in

155. *Id.* at 56 (emphasis added).

156. JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY (Harvard University Press, 1994).

157. *See, e.g.*, NORMALIZATION OF U.S.-CHINA RELATIONS: AN INTERNATIONAL HISTORY (William C. Kirby et al. eds., Harvard University Asia Center, 2005).

158. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. f (1986) ("A state derecognizes a regime when it recognizes another regime as the government. Thus, the United States, in recognizing the People's Republic of China as the government of China in 1979, derecognized the regime on Taiwan, 'the Republic of China,' previously recognized as the government of China.").

159. Taiwan Relations Act 22 U.S.C. §§ 3301-16.

U.S. courts, own property in the United States, and hold a position in the U.S. legal system as if Taiwan were a state, clearly indicated that the United States did not intend nonrecognition as a sanction.[160]

Nonetheless, the inhabitant-welfare exception created by the Namibia Advisory Opinion is relevant in the context of the PRC-ROC relationship because some politicians and scholars have called for similar exceptions to nonrecognition, but based upon a different reasoning. As stated earlier, the ICJ created the inhabitant-welfare exception for public acts that were comparable to the registration of births, deaths, and marriages. The underlying assumption of the inhabitant-welfare exception is that the registration of births, deaths, and marriages are public acts. Had the ICJ not created the inhabitant-welfare exception, the public acts of an unrecognized regime would have to be deemed invalid under international law.

However, as will be demonstrated in this Article, whether an act is, or appears, public or state-based determines whether the PRC and the ROC may put aside their mutual nonrecognition. Within the context of the PRC-ROC relationship, the registration of births, deaths, and marriages must have been considered, or have been made to appear, nongovernmental by the PRC and the ROC to be considered an exception to their mutual nonrecognition.[161] The ICJ, in contrast, does not deny that the registration of births, deaths, and marriages is public or state-based. Under the ICJ's approach—the inhabitant-welfare exception to nonrecognition—there is no need to make state-based interaction appear nongovernmental. Instead, the key consideration under the ICJ's approach is determining whether inhabitant welfare would be adversely affected by nonrecognition.

Gaining understanding of the inhabitant-welfare exception, therefore, helps one appreciate the motives underlying the PRC's and the ROC's efforts to make state-based interaction appear nongovernmental. As nonrecognition adversely affects trade and other forms of exchange between the PRC and the ROC, both entities may have, perhaps reluctantly, chosen to make their state-based interaction appear nongovernmental, instead of adopting the ICJ's approach that is based upon inhabitant welfare. This partly explains why the PRC-ROC relationship has defied the existing categories of cross-border interaction; by endeavoring to make their state-based interaction appear nongovernmental, the PRC and the ROC have invented their own cross-border interaction with little or no regard for the existing categories.[162] With this thesis

160. *See, e.g.*, CHINA CROSS TALK: THE AMERICAN DEBATE OVER CHINA POLICY SINCE NORMALIZATION: A READER (Scott Kennedy ed., Rowman & Littlefield, 2002).

161. This is because nongovernmental appearance is currently the most important factor in determining whether any exceptions should be made to the mutual nonrecognition in the PRC-ROC relationship.

162. Some situations elsewhere may seem similar to the PRC-ROC interaction. First, some people may find the PRC-ROC interaction pertinent to the literature on conflict management, an example of which is a book written by Gabriella Blum of Harvard Law School in 2007, discussing the various agreements that were reached in the conflicts between India and Pakistan,

in mind, Part II and Part III further examine the PRC-ROC relationship to determine the extent to which it differs from the existing categories of cross-border interaction.

II. CIVIL JUSTICE: CONFLICT OF LAWS

Part II aims to achieve two goals: (1) to demonstrate an important mechanism that has been made to appear nongovernmental but still reflects strong state preference and involvement; and (2) to describe activities that have been undertaken with little regard for government-to-government diplomacy but with attention to legal rules established by governments.[163] By fulfilling these two goals, Part II aids in supporting the thesis that the PRC-ROC relationship defies the existing categories of cross-border interaction.

A. Choice of Law Issues

1. Cases in PRC Courts

Several rules and cases in the PRC address choice of law issues in the

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Greece and Turkey (and Cyprus), and Israel and Lebanon (and Syria). GABRIELLA BLUM, ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES (Harvard Univ. Press 2007). Discussing the range of agreements reached between India and Pakistan, Blum even made a statement that in my opinion is equally applicable in the PRC-ROC context: "Many of the provisions of these islands of agreement were unique in the sense that they were not provided for in existing international agreements or treaties but were tailor-made, designed by the parties themselves to meet the specific needs and conditions of their situation. Indeed, anything else would have been impossible given the degree of interdependence existing between the populations." *Id.* at 79; *see also* G.R. BERRIDGE, TALKING TO THE ENEMY: HOW STATES WITHOUT 'DIPLOMATIC RELATIONS' COMMUNICATE (Palgrave Macmillan 1994). However, in none of the contexts discussed by Blum and Berridge has the distinction between governmental and nongovernmental been used or manipulated for a period of time as long as it has been in the PRC-ROC interaction. Neither did nongovernmental organizations established by governments figure prominently in Blum's and Berridge's books. Secondly, there are situations where nongovernmental organizations perform government functions. Nongovernmental organizations, for example, play an important role in the food crisis in the Democratic People's Republic of Korea (DPRK or North Korea). *See e.g.*, Hazel Smith, *Overcoming Humanitarian Dilemmas in the DPRK (North Korea)*, UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT NO. 90 (July 2002), *available at* http://www.usip.org/pubs/specialreports/sr90.html. Some private for-profit companies even perform military functions for governments. *See e.g.*, PETER W. SINGER, CORPORATE WARRIORS: THE RISE OF PRIVATIZED MILITARY INDUSTRY (Cornell Univ. Press, updated ed., 2007). However, it is still correct to state that, by endeavoring to make their state-based interaction appear nongovernmental, the PRC and the ROC have invented their own cross-border interaction with little or no regard for the existing categories. The PRC and the ROC have not made efforts to justify their SEF-ARATS mechanism and repatriation process by systematically studying foreign examples. *See infra* Parts II, III.

163. Several scholars have previously examined the conflict of law rules between the PRC and the ROC. For a brief summary and discussion of the scholarship on the conflict of law rules between the PRC and the ROC, *see* Chung, *supra* note 14. Part II contributes to the scholarship by examining the conflict of law cases as a way to test their generalizations. *See infra* Part II.

context of the commercial world within the PRC-ROC relationship. PRC law permits private parties to designate their choice of law at the time of contracting or when a dispute arises.[164] If private parties fail to agree on the choice of applicable law, PRC courts should apply the law of the place with the closest connection to the contract.[165] When PRC courts conduct the choice of law analysis applying the law of the place with the closest connection, courts have determined, without exception, that the PRC had the closest connection and that the PRC law should be the applicable law.[166] The following material demonstrates the manner in which PRC courts adjudicate cases that are "Taiwan-related."

Zheng Lianyu v. Zhao Wenzheng is a typical commercial dispute.[167] Zheng Lianyu lived in the Mazhang District of Zhanjiang City, Guangdong Province, the PRC, while Zhao Wenzheng was a Taiwanese man whose "common place of residence in the Mainland" (內地經常居住地) was also in the Mazhang District.[168] Zheng sued Zhao for payment of RMB$17,850 while Zhao countersued (反訴) Zheng for payment of RMB$7,850.[169] Zheng and Zhao had signed a contract on January 28, 2003, in which Zhao offered seeds and skills in exchange for Zheng's land and labor.[170] Zheng argued that he had fulfilled his obligations as prescribed in the contract, but Zhao argued that the products Zheng had produced failed to meet the required specifications.[171] The People's Court of the Mazhang District rendered a judgment,[172] but it was later rescinded (撤銷) by the Intermediate People's Court of Zhanjiang City. The Intermediate People's Court reversed because the People's Court of the Mazhang District lacked jurisdiction over "Taiwan-related civil and commercial cases" (涉臺民商事案件).[173] The Intermediate People's Court of Zhanjiang City subsequently transferred the entire case to the Intermediate People's Court of Guangzhou City, Guangdong Province.[174] The court stated that it had jurisdiction over this case because the case involved "a dispute arising out of a contract related to Taiwan" (涉臺合同糾紛) and because Zhao was "a resident of the Taiwan Area of 'our country'" (我國臺灣地區居民). The court stated

164. General Provisions of the PRC Civil Code, art. 145, http://www.people.com.cn/GB/shehui/8217/39932/2944727.html (last visited June 30, 2009).

165. *Id.*

166. *Id.* I derive my observation from the cases that I find.

167. Zhan Ma Fa Min Chu Zi No. 201 [Zheng Lianyu v. Zhao Wenzheng] (People's Ct., Mazhang Dist., Zhanjiang City, Guangdong Province, 2004), found at Sui Zhong Fa Min San Chu Zi No. 17 (Intermediate People's Court of Guangzhou City, Guangdong Province, June 7, 2005) (P.R.C.) LAWYEE, http://www.lawyee.net (last visited June 27, 2009).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Zhan Zhong Fa Min Er Zhong No. 65 (Intermediate People's Ct., Zhanjiang City, 2004), found at Sui Zhong Fa Min San Chu Zi No. 17.

174. Sui Zhong Fa Min San Chu Zi No. 17.

that this Taiwan-related dispute "could be adjudicated in the way a foreign-related case would be adjudicated" (可參照涉外案件審理).[175]

Both the place of performing contractual obligations (履行地) and Zhao's common place of residence were in Zhanjiang City.[176] With reference to Article 24 of the PRC *Civil Procedure Law*[177] and *Regulations on Several Problems of the Jurisdiction to Adjudicate Foreign-Related Civil and Commercial Cases*,[178] promulgated by the Supreme People's Court, the court concluded that it had jurisdiction to adjudicate this case.[179]

The court then addressed the choice of law issue, noting that the parties had not chosen the law governing the disputes arising from their contract.[180] Article 126, Section 1 of the PRC *Contract Law* (中華人民共和國合同法)[181] provides that "[w]here parties to the foreign related contract failed to select the applicable law, the contract shall be governed by the law of the country with the closest connection thereto."[182] The court concluded that "the law of the PRC Mainland"[183] should govern this dispute because both the place where the contract was signed and the place of performing contractual obligations (履行地) were in the PRC Mainland (我國內地).[184] Applying the PRC *Contract Law*, the court concluded that Zhao had neither inspected the products that Zheng produced nor notified Zheng of any defects within a reasonable period of time.[185] Based upon this conclusion, the court ruled that Zhao should

175. *Id.*

176. *Id.*

177. Civil Procedure Law of the People's Republic of China (promulgated by the Order No 44 of the President of the People's Republic of China, Apr. 9, 1991, effective Apr. 9, 1991) *available at* http://www.unhcr.org/refworld/type,LEGISLATION,,CHN,3ddbca094,0.html [hereinafter PRC Civil Procedure Law]. The Romanization of the title is as follows: *zhonghua renmin gonghe guo minshi susong fa.*

178. Regulations on Several Problems of the Jurisdiction to Adjudicate Foreign-Related Civil and Commercial Cases. The Romanization of the title is as follows: *guanyu shewai min shang shi anjian susong guanxia ruogan wenti de guiding.*

179. Sui Zhong Fa Min San Chu Zi No. 17.

180. *Id.*

181. Contract Law of the People's Republic of China (promulgated by the Second Session of the Ninth National People's Congress, Mar. 15, 1999, effective Mar. 15, 1999) art. 126, §1, *available at* http://www.novexcn.com/contract_law_99.html [hereinafter PRC Contract Law].

182. *Id.* at art. 126, §1. The Romanization of the quoted text is as follows: *shewai hetong de dangshiren meiyou xuanze de shiyong yu hetong you zui miqie lianshi de guojia de falu.* Article 126, Section 1 is similar to Restatement (Second) of Conflict of Laws § 188.1 (1971), which states that, in absence of effective choice by the parties, "[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188.1 (1971). I choose the phrase "the closest connection" over the phrase "the most significant relationship" because "the closest connection" is closer to the Chinese words used in Article 126, Section 1.

183. Sui Zhong Fa Min San Chu Zi No. 17. The Romanization of the quoted text is as follows: *zhonghua renmin gonghe guo neidi falu.*

184. *Id.*

185. *Id.*

pay Zheng RMB$17,850 and dismissed Zhao's countersuit against Zheng.[186]

Scholars of international law versed in the PRC-ROC relationship may have noted that the PRC court concluded that "the law of the *PRC Mainland*"[187] should be applied when a PRC court was directed by PRC law to "apply the law of the *country* that had the closest connection to the contract."[188] Clearly, the "PRC Mainland" is not a country, nor does the PRC government ever assert as much. However, given the PRC's official position that the ROC may have its own legal system but must remain part of the Chinese state represented by the PRC government, the "PRC Mainland" is an inventive method of expression utilized by the court.

Following the same basic analysis, the Intermediate People's Court of Foshan City of Guangdong Province asserted jurisdiction and applied the "law of the Mainland" (內地法律)[189] to adjudicate a dispute between Deng Huasheng, a sole proprietor (個體工商戶) from the PRC, and Tailong Textile Company, a business located in the PRC but wholly owned by a Taiwanese man.[190] Tailong Textile Company was ordered by the court to pay Deng RMB$60,900 plus interest accrued from "the date on which the suit commenced" (原告起訴之日) at the "Rate for Defaulted Loans" (逾期貸款利率) set by the People's Bank of China.[191]

Ideally, a judgment should be structured so that a jurisdictional analysis is followed by a choice of law analysis,[192] as the judgments discussed above and a number of others were.[193] However, in some cases, PRC courts did not analyze jurisdiction or choice of law at all. One such case was a 2005 case between a Taiwanese man and a PRC woman regarding living expenses for their illegitimate daughter.[194] Xu Weizhe, a Taiwanese man, had been married when, in 1994, he began living with Wei Jia, a woman of the PRC.[195] Their

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186. *Id.*

187. *Id.* (emphasis added). The Romanization of the quoted text is as follows: *zhonghua renmin gonghe guo neidi falu.*

188. PRC Contract Law, *supra* note 181 (emphasis added). The Romanization of the quoted text is as follows: *shiyong yu hetong you zui miqie lianshi de guojia de falu.*

189. Scholars of international law who pay attention to the use of names in the PRC-ROC relationship may be surprised to see another method of expression, "the law of the Mainland." As stated earlier, there is no such a country as the "Mainland."

190. Fo Zhong Fa Min Si Chu Zi No. 179 (Intermediate People's Ct., Guangdong Province, Foshan City, November 21, 2005) LAWYEE, http://www.lawyee.net (last visited June 27, 2009) (P.R.C.).

191. *Id.*

192. SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL (2d ed. 2003).

193. *See, e.g.*, Sui Zhong Fa Min San Chu Zi No. 293 (Intermediate People's Court, Guangzhou City, Guangdong Province, October 9, 2007) LAWYEE, http://www.lawyee.net (last visited June 27, 2009) (P.R.C.).

194. Fo Zhong Fa Min Yi Zhong Chu Zi No. 137 (Intermediate People's Court of Fosan City, Guangdong Province, April 1, 2005) LAWYEE, http://www.lawyee.net (last visited June 27, 2009) (P.R.C.).

195. *Id.*

illegitimate daughter was born on April 23, 1997.[196] On July 1, 2004, Xu's daughter sued him[197] for living expenses in the People's Court of the Nanhai District, Foshan City, Guangdong Province. The court charged the Forensic Medicine Center of the Sun Yat-sen University[198] with determining whether the plaintiff was truly the defendant's daughter.[199] The Forsensic Medicine Center found that the plaintiff indeed was the defendant's daughter.[200] The People's Court of the Nanhai District ordered Xu to pay his daughter RMB$219,294.79 within ten days of the judgment's effective date, an amount that would provide for her living expenses until her eighteenth birthday.[201] Both the plaintiff and the defendant appealed to the Intermediate People's Court of Foshan City.[202] The Intermediate People's Court instead ordered Xu to pay his daughter RMB$193,500 within ten days of the judgment's effective date, an amount calculated to cover her living expenses until her eighteenth birthday.[203]

2. Cases in ROC Courts

The ROC choice-of-law rules for cases between the PRC and the ROC can be found between Article 41 and Article 73 of the Act. As these rules are mainly facsimiles of rules in the ROC Act on the Application of Law in Foreign-Related Civil Disputes ("Foreign-Related Civil Disputes Act")[204], I will not discuss them one by one. Rather, I will focus upon adoption rules and cases.

People should have the right to adopt children, but society as a whole has an interest in preventing fraud and abuse. As with similar issues, a balance must be struck between the competing policy objectives that are involved in adoption. I choose to focus upon adoption to highlight the societal interests involved in regulating adoption and their irrelevance to the government-to-government diplomacy between the PRC and the ROC.

Three articles of the Foreign-Related Civil Disputes Act pertain to adoption. First, Article 55 states that the law of the place where the father and child register their residence determines the requirements for adopting illegitimate children (認領), and that the law of the place where the father

196. *Id.*

197. Even though Xu's illegitimate daughter was only seven years old, it was her right to demand living expenses from her father. Her custodian may help her participate in legal proceedings.

198. The Romanization of its name is as follows: *zhongshan daxue fayi jianding zhongxin.*

199. Fo Zhong Fa Min Yi Zhong Chu Zi No. 137.

200. *Id.*

201. Nan Min Yi Chu Zi No. 1577 (People's Ct. of Nanhai Dist., Fosan City, Guangdong Province, 2004) (P.R.C.). *Id.*

202. *Id.* The plaintiff appealed because she was not satisfied with the amount of money the court ordered the defendant to pay her.

203. *Id.*

204. Act on the Application of Law in Foreign-Related Civil Disputes [hereinafter Foreign-Related Civil Disputes Act].

registers his residence determines the legal effects of such adoption.[205] Second, Article 56 provides that the law of the place where the adoptive parents and adopted child register their residence governs the formation and termination of an adoptive relationship (收養), and that the law of the place where the adoptive parents register their residence determines the legal effects of adoption.[206] Third, Article 65 prohibits the people of the Taiwan Area from adopting children of the Mainland Area under three circumstances: (1) they have had children or have adopted other children; (2) they have adopted two children of the Mainland Area simultaneously; or (3) the Taiwan government or private organizations authorized by the Taiwan government have not certified the specific circumstances.[207]

Article 1079, section 4 of the ROC Civil Code "requires adoptive relationships to be recognized by ROC courts."[208] For example, on October 31, 2007, the Taipei District Court[209] recognized an adoptive relationship between adoptive parents and an adopted daughter as having been valid since June 18, 2007.[210] The court described the adopted daughter, born on September 25, 2005, as "a person of the Mainland Area" (大陸地區人士).[211] The adoptive parents and adopted child were required to pay a procedure fee of NT$1,000.[212]

A 2001 case in Taiwan High Court illustrates the application of the three articles of the Foreign-Related Civil Disputes Act that pertain to adoption.[213] An ROC man[214] wanted to adopt Lee Weiyang, born on November 17, 1990, as his child.[215] Lee Weiyang's mother, Li Aiping, had married the ROC man in 1996.[216] In 1998, Li Aiping gave birth to a daughter, Chen Wanyu.[217] In 2001, the ROC man applied to the Banqiao District Court, seeking recognition of the adoptive relationship between him and Lee Weiyang, his wife's son.[218] However, the Banqiao District Court ruled against him because he had a daughter and was therefore prohibited by Article 65 of the Foreign-Related

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205. *Id.* at art. 55.

206. *Id.* at art. 56.

207. *Id.* at art. 65.

208. ROC Civil Code, at art. 1079, §4 [hereinafter ROC Civil Code]. The Romanization of the quoted text is as follows: *shouyang zinu ying shengqing fayuan renke.*

209. A District Court (*difang fayuan*; 地方法院) in the ROC is a trial court at the lowest level of the court system.

210. Yang Sheng Zi Caiding, Judgment No. 197, The Judicial Yuan of the Republic of China Law and Regulations Retrieving System, http://jirs.judicial.gov.tw/Index.htm [hereinafter The Judicial Yuan Database] (District Ct., Taipei District, October 31, 2007). *See infra* Appendix 1.

211. *Id.*

212. *Id.*

213. Jia Kang Zi Caiding, Judgment No. 364, The Judicial Yuan Database (Taiwan High Ct., November 29, 2001).

214. Reports in the database did not disclose the names of the parties due to privacy concerns. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

Civil Disputes Act from adopting his wife's son.[219]

An adoption case in 2005 highlighted the willingness of the ROC judiciary to apply PRC law after it had determined that PRC law should be the applicable law.[220] Daniel,[221] a person of the Taiwan Area, and Patrick, a person of the Mainland Area, applied to the Taoyuan District Court to recognize the adoptive relationship (聲請認可收養) between them, but the Taoyuan District Court dismissed (駁回) the application.[222] Both applicants appealed (抗告) to the Taiwan High Court, but their application was again dismissed.[223]

The analysis of the Taiwan High Court was as follows: (1) Article 56, Section 1 of the Foreign-Related Civil Disputes Act states that "the law of the place where the adoptive parents and adopted child register their residence"[224] governs "the formation and termination of an adoptive relationship."[225] (2) Considering the law of the Mainland Area,[226] the court noted that Article 2 of the *Adoption Law* (收養法) states that only minors can be adopted.[227] (3) The court then noted that Article 14 of the *Adoption Law* states that when a single parent marries another person, that person may adopt the spouse's children with the permission from the biological parents of the children regardless of the restrictions that a person may adopt only one person, and that an adoptee must be at least fourteen years old.[228] (4) The court then noted that even though Article 14 of the *Adoption Law* lifts some restrictions, it does not supersede Article 2, and therefore that the spouse of a single parent may not adopt the parent's adult child.[229] As Patrick had been born on May 3, 1974 and was more than twenty-nine years old when Daniel had attempt to adopt him on November 7, 2003, Article 2 was applicable.[230] (5) The Taiwan High Court therefore affirmed the Taoyuan District Court's decision and, applying the *Adoption Law* of the Mainland Area, dismissed the application.[231]

Both applicants appealed to the Supreme Court, which repealed the Taiwan High Court's decision and remanded the case to the Taiwan High Court.[232] The Supreme Court stated that the following two issues should have

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219. *Id.*; Foreign-Related Civil Disputes Act, *supra* note 204, at art. 65.

220. Tai Kang Zi Judgment No. 81, The Judicial Yuan Database (Sup. Ct. of the ROC, January 25, 2005).

221. The database did not disclose the names of the applicants. *Id.*

222. *Id.*

223. *Id.*

224. Foreign-Related Civil Disputes Act, *supra* note 204, at art. 56, § 1. The Romanization of the quoted text is as follows: *gegai shouyangzhe bei shouyang zhe sheji diqu zhi guiding.*

225. *Id.* The Romanization of the quoted text is as follows: *shouyang zhi chengli ji zhongzhi.*

226. The court used the Chinese translation of the phrase "Mainland Area," rather than the Chinese translation of "the PRC."

227. Adoption Law at art. 2.

228. *Id.* at art. 14.

229. Jia Kang Geng Yi Zi Caiding, Judgment No. 3.

230. *Id.*

231. *Id.*

232. *Id.*

been investigated: (1) when Article 14 is applied in the Mainland Area, does it prohibit an adult from being adopted; and (2) if so, why did the Bureau of Civil Affairs of the Chongqing City register the adoptive relationship between Daniel and Patrick?[233] The Supreme Court stated that the Taiwan High Court should apply the *Adoption Law* according to the court precedents (判例) and customs (習慣) of the Mainland Area instead of the Taiwan High Court's interpretation of the *Adoption Law* of the Mainland Area.[234] Although it would be highly interesting to observe how the Taiwan High Court complied with the Supreme Court's directive, the report was not available.

In addition to the choice of substantive law, procedural issues such as jurisdiction and recognition of foreign judgments are also important aspects of the corpus of conflict of law, and they will therefore be discussed in the following section.

B. Procedural Issues

Procedural issues can be divided into the two categories: (1) jurisdiction, and (2) recognition and enforcement of foreign[235] judgments and arbitral awards. Central to both categories are the interface mechanisms between the PRC and the ROC. Acting as the interface between the PRC and ROC governments for procedural issues are the Association for Relations across Taiwan Strait ("ARATS")[236] in the PRC and the Strait Exchange Foundation ("SEF") [237] in the ROC, both of which were established as private organizations with government funding.[238] These organizations are intentionally made to appear nongovernmental in nature.[239]

The ARATS/SEF mechanism is important to the PRC-ROC relationship. When an ROC court needs to serve process on a defendant in the PRC, the ROC court sends the SEF a letter requesting assistance and a request that process be served.[240] The SEF then sends the process to be served as well as

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233. *Id.*

234. *Id.*

235. The word "foreign" here means "non-native" (非本地的).

236. Taiwan Affairs Office of the State Council Home Page, www.gwytb.gov.cn (last visited May 23, 2009) (containing the most authoritative information on ARATS).

237. Straight Exchange Foundation Home Page, www.sef.org.tw (last visited May 23, 2009).

238. *See supra* notes 236 and 237.

239. *Id.*

240. I find no formal rules governing this procedure until the signing of *Haixia liangan gongtong daji fanzui ji sifa huzhu xieyi* [Agreement on Fighting Crimes and Judicial Assistance across the Taiwan Straits] (海峽兩岸共同打擊犯罪及司法互助協議) on April 26, 2009, *available at* http://www.mac.gov.tw/big5/cc3/ag3-1.pdf (last visited June 29, 2009). These rules formalized the pre-existing practice, according to the ROC government. *See, e.g.*, Press Release of the ROC Ministry of Justice, *Haixia liangan gongtong daji fanzui ji sifa huzhu xieyi bushe zhiding ji xiuzheng falu* [The Agreement on Fighting Crimes and Judicial Assistance across the Taiwan Straits Does not Necessitate Enactment or Revision of Any Law], *available at* http://www.mac.gov.tw/big5/gov/980505d.htm (last visited June 29, 2009).

another letter written by the SEF to the ARATS, which then sends its own letter and the process to be served to the appropriate PRC court.[241] The PRC court then serves process on the defendant in the PRC, and the defendant is thereby notified of the commencement of the suit.[242] PRC courts serve processes on defendants in the ROC in the same manner, but in the reverse direction.[243]

This process, called document authentication (文書驗證), is used not only for the distribution of court processes, but also for a wide variety of government documents, including court judgments, as stipulated by the *Agreement on the Use and Verification of Certificates of Authentication across the Taiwan Straits* (兩岸公證書使用查證協議) signed by the SEF and the ARATS on April 29, 1993.[244] This process is resilient and stable, having weathered turbulence in the political relationship between the PRC and the ROC. After the former ROC President Lee Teng-hui announced the special state-to-state theory in 1999, the talks between the ARATS and the SEF did not resume until 2008 when Ma became President of the ROC.[245] However, the SEF-ARATS channel continues to operate. Between June 1991 and November 2005, a total of 34,705 document authentications occurred through the SEF-ARATS channel between the PRC and the ROC.[246]

In addition, the institution of notary most resembles the technical character of "registration" that the 1971 Namibia Advisory Opinion referred to in identifying the "registration" of births, deaths, and marriages as exemplary of the detrimental effects of nonrecognition upon inhabitants. The institution of notary makes it possible for Mainland residents to use the certificates issued by the PRC government in the ROC and vice versa. The process is as follows: When a person in the ROC wants to use in the PRC a certificate issued by the ROC government, he or she must first go to the SEF. The SEF photocopies the certificates to be authenticated and then issues a formal letter to the applicant. Meanwhile, the SEF sends a letter directly to the ARATS. The applicant then travels to the PRC with both the formal letter issued by the SEF and the government certificate, and submits them to the appropriate PRC government

241. *Id.*

242. *Id.*

243. *Id.*

244. Agreement on the Use and Verification of Certificates of Authentication across the Taiwan Straits, http://www.sef.org.tw/ct.asp?xItem=48904&ctNode=4384&mp=300 (last visted June 29, 2009).

245. This was because the PRC conditioned the resumption of the negotiations between the ARATS and the SEF on the acceptance of its one-China principle by the ROC. In fact, the PRC argued that the simultaneous acceptance of the one-China principle by both the PRC and the ROC was what actually made all the SEF-ARATS negotiations possible. In the negotiations regarding the charter flights during the Lunar New Year in 2003, 2005, and 2006, the PRC made public that it would not negotiate with the staff of the SEF unless the SEF, namely the ROC government, accepted the one-China principle. As the SEF did not submit to the demands of the PRC, the standoff continued until Ma Ying-jeou became the ROC's President on May 20, 2008. *See supra* Parts I, IV.

246. http://www.sef.org.tw/xls/statist/st14.xls (last visited May 23, 2009).

office. The PRC government office verifies with the ARATS whether the SEF truly verified the authenticity of the certificate provided to the PRC government office. As can be observed, while the PRC and ROC do not have embassies in the other's area[247] that can verify the authenticity of documents, they do have functional equivalents that facilitate transactions between the PRC and the ROC.

The inventive nature of this process of document authentication is a major reason why the PRC-ROC relationship defies the existing categories of cross-border interaction. There is no question that the ARATS and the SEF are private associations or foundations. The PRC and ROC governments deliberately made the ARATS and the SEF nongovernmental in nature, and their efforts underscore these organizations' nature, or at least their nature had there been no such efforts, as governmental mechanisms. The ARATS/SEF mechanism solves the problem of nonrecognition by manipulating the distinction between state-based and nongovernmental interaction, and has become the foundation for the economic and social interaction between the PRC and the ROC, alleviating some of the inconveniences of nonrecognition discussed in Part I.[248] Nonetheless, it must be remembered why the ARATS/SEF mechanism was needed and therefore created. The ARATS and the SEF are not simply nongovernmental organizations; as two organizations entrusted with the task of document authentication, the ARATS and the SEF carry out an important government function and have a monopoly in performing the task of document authentication between the PRC and the ROC.

The remainder of this section discusses the legal rules pursuant to which the PRC and ROC courts have addressed the procedural issues relating to civil litigation that have arisen from the ongoing interaction between the PRC and the ROC.

1. Jurisdiction

Jurisdiction, the power of a court to adjudicate a case, is determined prior to the deliberation of substantive issues in litigation. Therefore, if a court is found to have no jurisdiction, it cannot proceed to determine choice of law for a case. The issue of jurisdiction arises within the context of the PRC-ROC relationship in a number of different forms.

a. Jurisdiction and Residence

The residence of the parties to litigation may determine whether a court has jurisdiction over their case. A good example of this is a 2007 case in which an ROC court ruled that it lacked jurisdiction because the plaintiff should have

247. I avoid the word "territory" because the PRC and the ROC reserve the word "territory" for the territory of the Chinese state. *See supra* Part I.

248. *See supra* Part I.

brought the suit in a PRC court.[249] The plaintiff was a father who brought suit against his child, arguing that he was not the biological father of the child.[250] The court cited Article 249, Section 1, Paragraph 2 of the *Civil Procedure Law*, which states that a suit to deny the parent-child relationship (否認子女之訴) "should be adjudicated in the court at the place where the child resides or, if the child has died, where the child resided at death, and nowhere else."[251] The court also cited Article 589 of the *Civil Procedure Law*, which states that a court should dismiss (駁回) the suit by a decision (裁定) "if the suit should not be adjudicated in the court and the court cannot transfer the suit to a court with jurisdiction."[252] The court noted that the place where the plaintiff's child resided (子女住所地) was in the Guangxi Province of the Mainland Area, and therefore that this suit violated Article 249, Section 1, Paragraph 2 of the *Civil Procedure Law*.[253] At the same time, the court noted that it was impossible to transfer the suit to a court in the Guangxi Province of the Mainland Area, and therefore, pursuant to Article 589 of the *Civil Procedure Law*, the court dismissed the suit.[254]

PRC courts address the jurisdiction issue pursuant to Article V of the *Regulation on the Problems of Jurisdiction of Foreign-Related Civil and Commercial Litigation* ("Regulation"), promulgated by the PRC Supreme People's Court and valid since March 1, 2002.[255] Article V states that the remainder of the Regulation governs jurisdiction in civil and commercial litigation involving private parties who are from Hong Kong, Macau Special Administrative Regions, and the Taiwan Area.[256]

The case between Lin Chong and Zhang Jianzhen demonstrates an application of the PRC jurisdictional rule based on residence.[257] Even though both Lin and Zhang were Taiwan residents, a PRC court asserted its jurisdiction over their case.[258] Zhang had borrowed NT$6,200,000 from Lin in Taiwan in

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249. Qin Zi Judgment No. 102, The Judicial Yuan Database (Dist. Ct., Taipei Dist., October 17, 2007).

250. *Id.*

251. *Id.*; ROC Civil Procedure Law, *available at* The Laws and Regulations Database of The Republic of China, http://law.moj.gov.tw/Scripts/Query4B.asp?FullDoc=&Lcode =B0010001 (last visited June 30, 2009). The Romanization of the quoted text is as follows: *zhuanshu zinu zhusuo di huo qi siwang shi zhusuo di zhi fayuan guanxia.*

252. *Id.* The Romanization of the quoted text is as follows: *susong shijian bu shu shousu fayuan guanxia er buneng yi caiding yisong yu qi guanxia fayuan.*

253. *Id.*

254. *Id.*

255. *Zuigao renmin fayuan guanyu shewai minshangshi anjian susong guanxia ruogan wenti de guiding* [Regulation on the Problems of Jurisdiction of Foreign-Related Civil and Commercial Litigation] (最高人民法院關於涉外民商事案件訴訟管轄若干問題的規定), *available at* http://www.law-lib.com/law/law_view.asp?id=17055 (last visited June 30, 2009).

256. *Id.*

257. Lin Chong (林沖) v. Zhang Jianzhen (張劍珍), *see* LAWYEE, http://www.lawyee.net (last visited June 27, 2009) (P.R.C.). The detailed citation of this case is not available from the database.

258. *Id.*

1995 but later defaulted.[259] The two negotiated another contract (借據) in Xiamen City, Fujian Province, the PRC, on August 26, 1998.[260] This contract stated that after Zhang had transferred to Lin his ownership of two apartments, the total amount owed by Zhang to Lin would become RMB$1,124,000.[261] As Zhang had paid Lin nothing since August 26, 1998, Lin sued Zhang in the People's Court of Huli District, Xiamen City, Fujian Province, the PRC, on September 1, 2000.[262]

Zhang objected to the jurisdiction (提出管轄權異議) of the People's Court of the Huli District on October 9, 2000, though he should have done so within fifteen days of September 1, as required by the PRC law.[263] Zhang argued the following: (1) that both plaintiff and defendant were Taiwan residents; (2) that the domiciles (*juzhu di*; 居住地) of both parties were in Taiwan; (3) that "both parties had identity cards issued by Taiwan;"[264] (4) that the transaction had been carried out in Taiwan in the denomination of the New Taiwan dollar; (5) that the contract made on August 26, 1998, did not require adjudication in Mainland China (*zhongguo dalu*; 中國大陸); and (6) that the parties had not designated in writing Mainland courts (大陸法院) as the forum to resolve any future disputes.[265] The People's Court of the Huli District ruled against Zhang.[266] The court stated that when a defendant's domicile (*zhusuo di*; 住所地) and his common place of residence (*jingchang juzhu di*; 經常居住地) were different, the People's Court of the defendant's common place of residence had jurisdiction.[267] The court found the common place of residence of Zhang, the defendant, to be in the Huli District.[268] In addition, the court noted that Zhang did not object to the court's jurisdiction within fifteen days after receiving a copy of the complaint submitted by the plaintiff to the court.[269]

Zhang appealed to the Intermediate People's Court of Xiamen City, but his appeal was dismissed on December 9, 2000.[270] The court ruled that Zhang had not lost the right to raise jurisdictional objection because the People's Court of the Huli District did not notify Zhang that any jurisdictional objection had to be raised within fifteen days.[271] However, the court ruled that even though Zhang could still raise his jurisdictional objection, his objection should

259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* The Romanization of the quoted text is as follows: *shuangfang de shenfen zheng douwei Taiwan.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*

be dismissed.[272] The court stated that even though Zhang was a "resident (*jumin*; 居民) of the Taiwan Province," Zhang had lived in the Huli District since 1995 and therefore Zhang's common place of residence was the Huli District, which gave the People's Court of the Huli District the jurisdiction to adjudicate this case.

b. Forum-Selection Clauses

The parties to a contract may select the court in which disputes between them will be adjudicated by inserting a so-called "forum selection clause" into the contract, which may also affect the determination of jurisdiction. An example of the application of such clauses is seen in a 1996 case decided by the ROC Supreme Court.[273] In 1993, Shilin Construction Company ("Shilin") sold Qiaomao Electronics Company ("Qiaomao") a tract of land numbered B-17 and the industrial buildings on it in the Huizhou Industrial Park in the PRC.[274] Shilin later asked Qiaomao to accept the tract of land numbered C-9 instead of B-17 because the PRC government did not allow buildings on the tract of land numbered B-17.[275] Qiaomao refused to accept this change and notified Shilin of its intent to rescind the contract (解除契約).[276] Shilin's most important defense was that the "ROC courts" (中華民國法院) had no jurisdiction because the contract between Shilin and Qiaomao specified the "Huizhou People's Court,"[277] a PRC court, as the only court that could adjudicate disputes arising out of that contract.[278] On October 26, 1995, the Taiwan High Court ruled against Shilin's jurisdictional objection, because "our country" (我國) and the Mainland Area are still divided and governed separately (分裂分治), and because the parties could not limit the jurisdiction of "our country" by choosing a forum outside "the area that the civil procedure law of 'our country' actually governed."[279]

However, on August 29, 1996, the ROC Supreme Court overturned the Taiwan High Court's judgment and stated that if the courts of the Taiwan Area did not have exclusive jurisdiction over this case under ROC law and the courts of the Mainland Area allowed people of the Taiwan Area to choose a forum in the Mainland Area by contractual agreement, the contractual agreement in question was effective.[280]

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272. *Id.*

273. Tai Shang Zi Judgment No. 1880, The Judicial Yuan Database (Supreme Ct., August 29, 1996).

274. *Id.*

275. *Id.*

276. *Id.*

277. The Romanization of the quoted text is as follows: *huizhou renmin difang fayuan.*

278. Tai Shang Zi Judgment No. 1880.

279. Shang Zi Judgment No. 873, The Judicial Yuan Database (Taiwan High Ct., October 26, 1995). The Romanization of the quoted text is as follows: *woguo minshi susong fa shishi shang suode guifan zhi diqu.*

280. Tai Shang Zi Judgment No. 1880.

The ROC Supreme Court additionally held that, if the contractual agreement was effective and exclusive (排他性) and one of the parties used it as a defense, then the courts of the Taiwan Area had no jurisdiction.[281] The ROC Supreme Court remanded the case to the Taiwan High Court[282] to investigate whether the courts of the Taiwan Area had exclusive jurisdiction over this case under ROC law, whether the courts of the Mainland Area could allow the parties (兩造) to choose a forum in the Mainland Area by contractual agreement, and whether the contractual agreement in question was exclusive in nature.[283]

c. The Effect of Arbitration Clauses in PRC Courts

Parties to a contract may elect to arbitrate, rather than litigate, their disputes through a so-called "arbitration clause" inserted into the contract. These clauses may also affect the determination of jurisdiction. In addition to conforming to other requirements for valid contractual clauses, an arbitration clause must be sufficiently specific regarding the place of arbitration and the method of forming an arbitration panel. If an arbitration clause is found to be valid, the court should dismiss the suit. If an arbitration clause is found to be invalid, the court may entertain the suit. The following section discusses one case that exemplifies each category.

In a 2005 case concerning the effect of an arbitration clause on the jurisdiction of a PRC Court, the court found the arbitration clause in question to be invalid.[284] The Zhenhua Trading Company,[285] a Hong Kong[286] company, and the Underground Space Development Company (the "USDC"),[287] incorporated in Harbin City, Heilongjiang Province, the PRC, signed a contract entitled "On the Joint Venture of the Zhenhua Trading Company in Harbin" on July 18, 1993, with the purpose of developing an underground business center at the Harbin City train station.[288] Article 42 of the contract stated the law of the PRC governed "the formation, efficient interpretation, performance of the

281. *Id.*

282. The ROC Supreme Court does not itself investigate facts. It only reviews issues of law and remands a case to lower courts if there are issues of fact requiring investigation.

283. Tai Shang Zi, Judgment No. 1880. In dictum, the ROC Supreme Court stated that if the Huizhou Court of the Mainland Area had jurisdiction, then the Taipei District Court should have dismissed Qiaomao's suit at the district level because, in this circumstance, the Taipei District Court had no jurisdiction and could not transfer the case to the Huizhou Court of the Mainland Area "where our legal power did not reach" (我法權所不及). *Id.*

284. Min Si Zhong Zi No. 13 (Sup. People's Ct., April 25, 2005) LAWYEE, http://www.lawyee.net (last visited June 27, 2009) (P.R.C.).

285. The Romanization of its title is as follows: *zhenhua maoyi youxian gongsi.*

286. This case itself did not involve any party from Taiwan, but the legal rules that the PRC Supreme People's Court used to reach its conclusion have implications for Taiwan-related cases. More details are provided in later sections.

287. The Romanization of its title is as follows: *dixia kongjian kaifa jianshe gongsi.*

288. Min Si Zhong Zi No. 13.

contract, and the resolution of any disputes."[289] Article 43 stated that "all disputes arising out of the performance of, or related to, this contract"[290] "should be resolved by friendly negotiation"[291] but "if negotiation fails, should be submitted to arbitration institutions"[292] whose "arbitral awards would be final and binding on both parties."[293] On August 20, 1993, the Planning Committee (計劃委員會) of Harbin City permitted the joint venture, named the Zhenhua Infrastructure Company,[294] to do business for thirty years.[295] On May 22, 1995, the Bureau Managing Foreign Capital (外資管理局) of Harbin City allowed the Zhenhua Infrastructure Company to change its name to Yonghua Infrastructure Inc. ("YII").[296] On September 16, 1998, the Bureau Managing Foreign Capital of Harbin City permitted Underground Construction Inc. ("UCI"),[297] incorporated in Harbin City, Heilongjiang Province, the PRC, to replace the USDC as an investor in YII.[298] On April 20, 1999, the Zhenhua Trading Company transferred its investment in YII to the Yonghua Investment Company ("YIC"),[299] incorporated in the Hong Kong Special Administrative Region.[300]

On January 17, 2004, the YIC sued the USDC and YII in the High People's Court (高級人民法院) of Heilongjiang Province.[301] The YIC complained that the USDC had not invested the full amount of money it should have invested in YII.[302] The YIC sought to have the court liquidate (進行清算) the assets of YII, confirm the YIC's right to make important decisions for YII, convene YII's shareholder meetings, access YII information, and order the defendants to compensate the YIC for the loss of RMB$30 million.[303] On March 8, 2004, YII objected to the jurisdiction of the High People's Court of

289. *Id.* The Romanization of the quoted text is as follows: *ben hetong de dingli xiaolu jieshi luxing he zhengyi de jiejue.*

290. *Id.* Romanization of the quoted text is as follows: *fan yin zhixing ben hetong suo fasheng de huo yu ben hetong youguan de yiqie.*

291. *Id.* The Romanization of the quoted text is as follows: *shuangfang ying tongguo youhao xieshang jiejue.*

292. *Id.* The Romanization of the quoted text is as follows: *ruguo xieshang buneng jiejue ying tijiao zhongcai jigou de zhongcai chengxu jinxing.*

293. *Id.* The Romanization of the quoted text is as follows: *zhongcai caijue shi zhongju de dui shuangfang dou you jushu li.*

294. *Id.* The Romanization of its title is as follows: *zhenhua gonggong sheshi youxian gongsi.*

295. *Id.*

296. *Id.* The Romanization of its title is as follows: *yonghua gonggong sheshi youxian gongsi.*

297. *Id.* The Romanization of its title is as follows: *dixia jianzhu gongcheng gongsi.*

298. *Id.*

299. *Id.* The Romanization of its title is as follows: *yonghua touzi youxian gongsi.*

300. *Id.* Hong Kong has been a Special Administrative Region of the People's Republic of China since after 1997.

301. Hei Gao Shang Chu Zi Caiding No. 4-2, (High People's Ct. of Heilongjiang Province, 2004), found at Min Si Zhong Zi No. 13.

302. *Id.*

303. *Id.*

Heilongjiang Province, arguing that the contract signed on July 18, 1993 required that parties submit their disputes to arbitration institutions.[304] The High People's Court dismissed the jurisdictional objection,[305] and the Supreme People's Court dismissed the resulting appeal on September 8, 2004.[306]

On December 16, 2004, the YIC requested the court to change the defendant from the USDC to UCI because, on September 16, 1998, the Bureau Managing Foreign Capital of Harbin City permitted UCI to take the place of the USDC as an investor in YII.[307] After the High People's Court of Heilongjiang Province served process (送達訴狀) on UCI, UCI objected to the jurisdiction of the court, arguing that the contract signed on July 18, 1993, required that the parties submit their disputes to arbitration institutions.[308] The High People's Court of Heilongjiang Province dismissed the objection, stating that "Chinese law should be applied" (應當適用中國法律) in such a "Hong Kong related case arising out of the performance of a contract of a Chinese-foreign joint venture";[309] that Article 43 of the contract signed on July 18, 1993, specified neither the place of arbitration (仲裁地點) nor the arbitration panel (仲裁委員會);[310] that the parties had reached no additional agreements regarding the place of arbitration or the formation of an arbitration panel;[311] and that therefore Article 43 was invalid under Article 16 and Article 18 of the *Arbitration Law* of "our country" (*wo guo*; 我國).[312]

In another case, the court found the arbitration clause in question to be valid, and therefore that the dispute should be resolved through arbitration

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304. *Id.*

305. *Id.*

306. Min Si Zhong Zi Caiding No. 7, (Sup. People's Ct., September 8, 2004), found at Min Si Zhong Zi No. 13.

307. Min Si Zhong Zi No. 13.

308. Hei Gao Shang Chu Zi Caiding No. 4-4 (High People's Ct. of Heilongjiang Province, 2004) (P.R.C), found at Min Si Zhong Zi No. 13.

309. Min Si Zhong Zi No. 13. The Romanization of the quoted text is as follows: *yin luxing zhongwai hezuo jingying qiye hetong fasheng de she gang jiufen anjian.*

310. *Id.*

311. *Id.*

312. *Id.*; PRC Arbitration Law, LAWINFOCHINA (last visited June 30, 2009). Later, UCI appealed to the Supreme People's Court, arguing that the High People's Court of Heilongjiang Province should have reported its decision to adjudicate the case to the Supreme People's Court before it had served process on UCI. UCI cited Article 1 of the *Notice on Problems of Foreign-Related Arbitration* (處理與涉外仲裁事項有關問題的通知) issued by the Supreme People's Court, Fa Fa No. 18 (1995). Article 1 requires People's Courts to report their decisions to adjudicate cases to the Supreme People's Court when People's Courts find the arbitration clause or agreement between the parties to be invalid or unable to be enforced due to lack of specificity before People's Courts begin to adjudicate the cases. The Supreme People's Court ruled against UCI, stating that Article 1 of the *Notice on Problems of Foreign-Related Arbitration* only applied when all the parties in a suit agreed to the arbitration clause or agreement; that YII, the joint venture, did not consent to the arbitration clause in the contract signed on July 18, 1993; and, therefore, the High People's Court of Heilongjiang Province had rightfully served the process on UCI.

rather than adjudication.[313] The Fuyuan Company ("Fuyuan"),[314] incorporated in Taiwan, sued the Weige Wood Product Company ("Weige"),[315] incorporated in Xiamen City, Fujian Province, the PRC, in the People's Court of Kaiyuan District (區), Xiamen City.[316] Fuyuan signed a contract with Weige on April 25, 1995, agreeing to buy 600 cubic meters of Fokiena hodginsii (福建柏木), a kind of wood used for buildings, furniture, and sculptures, at the price of US$96,000.[317] The contract between Fuyuan and Weige specified the quality of Fokiena hodginsii required and the method of testing for quality (驗貨方式).[318] Article 7 of the contract provided that disputes should be resolved "by friendly negotiations or arbitration by the International Chamber of Commerce."[319] Fuyuan issued a letter of credit in the amount of US$96,000; claimed that Weige had failed to meet its contractual obligations;[320] and sought to have the court order that Weige return US$31,180, compensate for the loss of US$27,520, and pay the testing fees (驗貨費用) of HK$98,000 and notary fees (公證費) of HK$3,000.[321] Weige argued that Article 7 of the contract in question required arbitration and requested the court dismiss the suit for lack of jurisdiction.[322]

On October 27, 1995, the People's Court of Kaiyuan District (區) dismissed Weige's jurisdictional objection, finding that Article 7 failed to specify a concrete arbitration panel or institution.[323] However, when Weige appealed to the Intermediate People's Court of Xiamen City, Fujian Province, the Intermediate People's Court ruled against Fuyuan, stating that the specification of the International Chamber of Commerce as the arbitrator in Article 7 was sufficiently specific and that Article 7 was therefore valid.[324]

d. Jurisdiction and Location of Debtor's Assets

Whether a court has jurisdiction over an action that seeks to enforce a judgment against a debtor may be determined by whether the court has jursidction over any of the debtor's assets. If a debtor has assets in the area

313. Kai Jing Chu Zi Caiding No. 364 (People's Ct. of Kaiyuan Dist. (*qu*), Xiamen City, Fujian Province, October 27, 1995) (P.R.C.), aff'd, Xia Jing Kao Zi Caiding No. 18 (Interm. People's Ct. of Xiamen City, Fujian Province, July 2, 1996) (P.R.C.).

314. The Romanization of its title is as follows: *fuyuan qiye youxian gongsi.*

315. The Romanization of its title is as follows: *weige mu zhipin youxian gongsi.*

316. Kai Jing Chu Zi Caiding No. 364.

317. *Id.*

318. *Id.*

319. *Id.* The Romanization of the quoted text is as follows: *shuangfang jinxing youhao xieshang jiejue huo yi guoji shanghui zhongcai wei.*

320. Reports in the database did not specify the reason why Fuyuan claimed that Weige had failed to meet its contractual obligations. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. Xia Jing Kao Zi Caiding No. 18.

over which the court has jurisdiction, then his or her creditor may bring an action in that court to enforce a judgment against the debtor. If a debtor has no assets in the area, then his or her creditor must rely on other jurisdictional bases, such as the debtor's residence; otherwise, the creditor may not bring an action to enforce a judgment against the debtor in that court.

For example, in a 2004 case, a PRC court analyzed the issue of jurisdiction before determining whether to recognize and enforce an "order to pay" (支付命令) rendered by an ROC court.[325] The Huangqi Information Corporation ("Huangqi")[326] owed Hamburgishche Landesbank-Girozentrale US$7,411,305.59.[327] Huangqi and its chairman, Huang Rongchuan, were ordered by the Banqiao District Court to pay that amount plus interest at an annual rate of five percent and a court fee of NT$147 within twenty days of receiving the "order to pay."[328] As neither Huangqi nor Huang objected to the "order to pay" within twenty days of receipt, the court order to pay, per ROC law, became enforceable.[329] On July 4, 2003, the Banqiao District Court issued a certificate (證明書) for the enforceability of the "order to pay."[330] On June 2, 2003, Hamburgishche Landesbank-Girozentrale merged with Landesbank Schleswig-Holstein Girozentrale to become HSH Nordbank AD ("Nordbank").[331] Nordbank applied to the Intermediate People's Court of Dongguan City, Guangdong Province, the PRC, on June 17, 2004, for recognition and enforcement of the "order to pay" that had been issued by the "Banqiao District Court of the Taiwan Area"[332] against Huangqi.[333]

The court dismissed the case for lack of jurisdiction.[334] According to a document (批復) issued by the Supreme People's Court, People's Courts should consider the "orders to pay" and the certificates of their enforceability in accordance with the *Regulation on the People's Courts' Recognition of the Civil Judgments Made by the Relevant Courts in the Taiwan Area*, promulgated by the Supreme People's Court and valid since May 26, 1998.[335] Specifically,

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325. Dong Zhong Fa Min Si Chu Ren Zi Caiding No. 1(Interm. People's Ct., Dongguan City, Guangdong Province, December 4, 2006) (P.R.C.), *available at* http://www.dgcourt.gov.cn/sitemag/shownews.asp?id=760 (last visited June 30, 2009).

326. The Romanization of its title is as follows: *huang qi zixun gufen youxian gongsi.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* The Romanization of the quoted text is: *Taiwan diqu Banqiao difang fayuan.* I use the quotation to present the phrase as used by the Intermediate People's Court of Dongguang City.

333. *Id.*

334. *Id.*

335. *Id.*; *Zuigao renmin fayuan guanyu renmin fayuan renke Taiwan diqu youguan fayuan minshi panjue de guiding* [Regulation on People's Courts' Recognition of the Civil Judgments Made by the Relevant Courts in the Taiwan Area] (Sup. People's Ct., May 22, 1998, effective May 26, 1998) (P.R.C.) [hereinafter Regulation on Recognition of Civil Judgments], *available at* Taiwan Affairs Office of the State Council (P.R.C.), http://www.gwytb.gov.cn/flfg/

as Huangqi's domicile (住所地) and common place of residence (經常居住地) were not in the Mainland Area (中國大陸), the key question was whether Huangqi owned "properties Nordbank might enforce against" (可供執行的財產) in the area over which the court had jurisdiction.[336] If there were such properties in the area over which the court had jurisdiction, the court would have jurisdiction to recognize the "order to pay" issued by the Banqiao District Court.[337]

Huangqi was the sole shareholder of the Yongye Technology Corporation ("Yongye"), incorporated in the British Virgin Islands, which wholly owned the Huangjia Electronic Technology Corporation ("Huangjia"), incorporated in Dongguan City, Guangdong Province, the PRC.[338] The court stated that each of these three corporations was "a legal person independent from one another" (相互獨立的法人企業) and that Nordbank had rights enforceable against Huangqi's properties, including Huangqi's ownership of all the shares of Yongye, but not against Yongye's properties, including Yongye's ownership of all the shares of the Huangjia.[339] As a result, the court concluded that Huangqi owned no properties Nordbank might enforce against in Dongguan City, and dismissed the case for lack of jurisdiction.[340]

2. *Recognition of Foreign Judgments and Arbitral Awards*

The recognition (認可) and enforcement of judgments is another procedural issue treated differently by the PRC and the ROC. The PRC rule recognizing and enforcing civil judgments rendered by ROC courts is the *Regulation on People's Courts' Recognition of the Civil Judgments Made by the Relevant Courts in the Taiwan Area* ("Regulation") promulgated by the PRC Supreme People's Court and valid since May 26, 1998.[341] Article 2 of the Regulation states that parties to the civil judgments rendered by relevant courts in the Taiwan Area may apply for recognition and enforcement in People's Courts, provided that the parties' domicile or place of usual residence is in the PRC, or that the place where the debtor's property is located is in the PRC.[342]

In the ROC, Article 74 of the Act governs recognition and enforcement of judgments and arbitral awards.[343] Section 1 provides that "to the extent that a final civil ruling, judgment, or arbitral award rendered in the Mainland Area is not contrary to the public order and good morals of the Taiwan Area, an

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flfg0.asp?flgf_m_id=59 (last visited June 30, 2009).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. Regulation on Recognition of Civil Judgments, *supra* note 335. The Romanization of its title is as follows: *zuigao renmin fayuan guanyu renmin fayuan renke Taiwan diqu youguan fayuan minshi panjue de guiding.*

342. Regulation on Recognition of Civil Judgments, *supra* note 335, at art. 2.

343. Act Governing Relations, *supra* note 95, at art. 74; Ada Koon Hang Tse, *supra* note 95.

application may be filed with an [ROC] court for a ruling to recognize it."[344] Section 2 provides that any ruling, judgment, or award that requires parties' performance, after being recognized by an [ROC] court's ruling pursuant to Section 1, may serve as a "basis for government enforcement" (執行名義) in the ROC.[345] Section 3 provides that "Section 1 and Section 2 shall not apply until the time when final civil rulings, judgments, or arbitral awards rendered in the Taiwan Area may be recognized and enforced by courts of the Mainland Area."[346] On July 28, 1998, the Taiwan High Court announced that the reciprocity requirement was satisfied by the aforementioned *Regulation on People's Courts' Recognition of the Civil Judgments Made by the Relevant Courts in the Taiwan Area.* These rules are explained in greater detail by reference to actual cases in the following pages.

In one case, the Taiwan High Court refused to recognize a PRC judgment due to the PRC court's failure to notify the defendant of the litigation.[347] In that case, one spouse (the plaintiff-spouse) sued the other spouse (the defendant-spouse) for divorce in the People's Court of Fuqing City, Fujian Province, the PRC, and claimed that there was no way to notify the defendant-spouse of the suit.[348] The People's Court was convinced, put a notice of the suit in the newspaper (公示送達), and later granted divorce to the plaintiff-spouse.[349] When the plaintiff-spouse sought to have the Taipei District Court recognize the divorce judgment, the Taipei District Court ruled against the plaintiff-spouse,[350] and, on appeal, the Taiwan High Court affirmed the decision of the Taipei District Court.[351] According to the Taiwan High Court, the phrase "the public order or good morals of the Taiwan Area" in Article 74 of the Act was meant to protect an ROC person (中華民國人民) who, because of improper service of process, could not defend himself or herself in litigation in the Mainland Area.[352] The plaintiff-spouse knew that the domicile of the defendant-spouse was in Taipei, but had lied to the People's Court of Fuqing City that he did not know.[353] In addition, the Taiwan High Court stated that there was no possibility the defendant-spouse could have learned of the suit from public notice in the Mainland Area.[354] Therefore, pursuant to Article 74 of the Act, the divorce judgment was not recognized.[355]

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344. Act Governing Relations, *supra* note 95, at art. 74, § 1.

345. *Id.* at art. 74, § 2.

346. *Id.* at art. 74, § 3.

347. Jia Sheng Zi Judgment No. 195, The Judicial Yuan Database (Taipei Dist. Ct., September 27, 2002), *aff'd*, Jia Kang Zi Judgment No. 366, The Judicial Yuan Database (Taiwan High Ct., November 13, 2002).

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*; Act Governing Relations, *supra* note 95, at art. 74.

353. Jia Kang Zi Judgment No. 366.

354. *Id.*

355. *Id.*; Act Governing Relations, *supra* note 95, at art. 74.

Once a judicial proceeding in the PRC satisfies procedural requirements, the ROC judiciary is ready to recognize and enforce PRC judgments. The ROC judiciary's unwillingness to adjudicate a case that has been adequately litigated in PRC courts is exemplified by the case between the Liquidation Committee (清算委員會) of Taiqun Technology Company ("CTTC")[356] and United Integrated Services Company ("UIS").[357] CTTC won a judgment against UIS in the Second Intermediate People's Court of Beijing City, the PRC,[358] and another judgment against UIS in the High People's Court of Beijing, the PRC.[359] CTTC then applied to the Taipei District Court to recognize and enforce both judgments in the ROC.[360] When the Taipei District Court recognized both judgments,[361] UIS appealed (抗告).[362] When its appeal was dismissed,[363] UIS brought another legal action seeking reconsideration (再審) of the decision, but the action was still dismissed.[364]

The Taipei District Court described the facts of the case as follows: Taiqun Technology Company ("TTC"), incorporated in Taiwan, signed a contract (投資協議書) with a Taiwanese investor[365] on August 5, 2001 to establish a joint venture, the Beijing Taiqun Technology Company ("Beijing Taiqun").[366] The articles of incorporation (公司章程) of Beijing Taiqun, enacted on July 23, 2001, stipulated that each investor should be responsible for half of the total registered capital (註冊資本) of US$1,500,000 (US$750,000 per investor).[367] The articles of incorporation also required each investor to submit to Beijing Taiqun fifteen percent of his share of the registered capital within three months of the date when the business license (營業執照) would be issued, and the balance of its share of the registered capital within two years of the date when the business license would be issued.[368] After Beijing Taiqun has been issued its business license on September 18, 2001, TTC failed to meet

356. Sheng Zi Caiding No. 2507, The Judicial Yuan Database (Taipei Dist. Ct., August 30, 2005). The Romanization of its title is as follows: *taiqun keji gufen youxian gongsi qingsuan weiyuanhui.*

357. The Romanization of its title is as follows: *hantang jicheng gufen youxian gongsi. Id.*

358. Er Zhong Min Chu Zi Judgment No. 8635 (Second Interm. People's Ct. of Beijing City, December 20, 2004) LAWYEE, http://www.lawyee.net (last visited June 27, 2009) (P.R.C.).

359. Gao Min Zhong Zi Judgment No. 580 (High People's Ct. of Beijing, 2005) (P.R.C.), found at Sheng Zi Caiding No. 2507.

360. Sheng Zi Caiding No. 2507.

361. *Id.*

362. Kang Zi Caiding No. 98, The Judicial Yuan Database (Taipei Dist. Ct., December 16, 2005).

363. *Id.*

364. Sheng Zai Zi Caiding No. 15, The Judicial Yuan Database (Taipei Dist. Ct., September 5, 2006).

365. Reports in the database did not disclose the name of the investor due to privacy concerns.

366. Sheng Zi Caiding No. 2507.

367. *Id.*

368. *Id.*

its obligations.[369] As of September 16, 2003, the capital actually received (實收資本) by Beijing Taiqun was US$952,484, of which US$750,000 was paid by the Taiwanese investor and only US$202,484 by TTC.[370] The first meeting of the board of directors on April 27, 2004, resolved to dissolve the corporation.[371] On May 11, 2004, the board of directors was granted permission by the Foreign Economy and Trade Commission (對外經濟貿易委員會) of the Chaoyang District to terminate (終止) Beijing Taiqun's articles of incorporation.[372] At the second meeting of the board of directors on May 23, 2004, the board resolved to establish a Liquidation Committee (CTTC) and elected the Taiwanese investor to be CTTC's director (主任).[373] CTTC referred to Article 25 of the *Corporation Law of the People's Republic of China*[374] which "requires each shareholder to pay in full the subscribed amount of capital stipulated in the articles of incorporation,"[375] and Article 31, Section 1 of the *Regulations Implementing Foreign Enterprise Law* of *the People's Republic of China*,[376] which requires foreign investors to punctually pay all the installments of the subscribed amount of capital.[377] In addition, the board of directors's resolution to terminate and liquidate the corporation was consistent with Article 3 of the *Regulations on Liquidating Foreign Enterprises* (外商投資企業清算辦法).[378] Moreover, "Taiwan's Ministry of Economic Affairs" (臺灣經濟部)[379] had approved UIS's acquisition of TTC on September 18, 2003.[380]

UIS appealed (抗告) the decision of the Taipei District Court and argued that "its contract with the Taiwanese investor was falsified"[381] by the Taiwanese

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369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. The Romanization of the quoted text is as follows: *zhonghua renmin gonghe guo gongsi fa.* The Taipei District Court used the term "People's Republic of China" (*zhonghua renmin gonhe guo*) instead of "Mainland Area" (*dalu diqu*).

375. Corporation Law of the People's Republic of China at art. 25. The Romanization of the quoted text is as follows: *gudong yingdang zu e jiaona gongsi zhangcheng zhong guiding zhi gezi renjiao chuzi e.*

376. Regulations Implementing Foreign Enterprise Law of the People's Republic of China at art. 31, § 1. The Romanization of its title is as follows: *zhonghua renmin gonghe guo waizi qiye fa shishi xize.* The Taipei District Court used the term "People's Republic of China" instead of "Mainland Area."

377. Sheng Zi Caiding No. 2507 (Taipai Dist. Ct., 2005). The Romanization of the quoted text is as follows: *diyi qi chuzi hou de qita geqi chuzi waiguo touzi zhe rengying ruqi.*

378. *Id.* Regulations on Liquidating Foreign Enterprises, at art. 3.

379. I translated this term from the Taipei District Court's summary of the two judgments rendered by courts of the Mainland Area (*dalu diqu fayuan*). I added quotation marks because the courts of the Mainland Area used the phrase "Taiwan's Ministry of Economic Affairs" in their judgments, according to the Taipei District Court.

380. Sheng Zi Caiding No. 2507.

381. The Romanization of the quoted text is as follows: *tongmou er wei zhi xuwei yisi biaoshi.*

investor and Lin Cangmin, the former chairman (董事長), and that the Second Intermediate People's Court of Beijing City and the High People's Court of Beijing, due to their bias, had ignored both important evidence and UIS's requests for further investigation.[382] A three-judge panel at the Taipei District Court dismissed the appeal because the procedure used to recognize a PRC or foreign judgment was not litigious in nature (非訟事件) and the court "could not adjudicate the legal relationship between the parties again."[383]

The UIS then brought another legal action seeking reconsideration (再審) of the decision (裁定).[384] The UIS argued that since the Beijing Taiqun had provided falsified documents to the Foreign Economy and Trade Commission of the Chaoyang District and the two People's Courts in the Mainland Area, and the two PRC judgments in question were inconsistent with public order and good morals (違反公序良俗) of the Taiwan Area, neither judgment should have been recognized by the Taipei District Court.[385] Another three-judge panel at the Taipei District Court dismissed the action[386] because a legal action seeking reconsideration of a decision that had become final (確定) was only allowed in litigation, which was governed by the *Civil Procedure Law* (民事訴訟法).[387] The procedure that is not litigious in nature is governed by the *Law on Non-Litigation* (非訟事件法).[388]

The Taiqun Committee v. the UIS is not the only case in which an ROC court has recognized a PRC judgment. For example, in 2004 the Taoyuan District Court[389] recognized a judgment rendered by the High People's Court of Shanghai City[390] for a dispute between the Zhejiang Textile Company and the Evergreen International Storage and Transport Company.

3. *Conclusion*

Part II examines the rules and cases pertaining to civil justice within the PRC-ROC relationship. In so doing, it demonstrates that the PRC-ROC relationship consists of neither purely state-based interaction nor purely nongovernmental interaction. On the one hand, each case in Part II demonstrates that disputes that arise during the course of civil and commercial

382. Kang Zi Caiding No. 98.

383. *Id.* The Romanization of the quoted text is as follows: *bude jiu dangshi ren jian zhi falu guanxi zhong wei panduan.*

384. Sheng Zai Zi Caiding No. 15.

385. *Id.*

386. *Id.*

387. *Id.*

388. Law on Non-Litigation, The Laws and Regulations Database of The Republic of China, http://law.moj.gov.tw/Scripts/Query4B.asp?FullDoc=所有條文&Lcode=B0010008 (last visited June 30, 2009).

389. Sheng Zi Caiding No. 1032, The Judicial Yuan Database (Taoyuan Dist. Ct., August 11, 2004) (Taiwan).

390. Hu Gao Min Shi Hai Zhong Zi Judgment No. 39 (High People's Ct. of Shanghai City, September 4, 2003) (P.R.C.), found at Sheng Zi Caiding No. 1032.

relationships are resolved by the legal rules established by the PRC and ROC governments. Although civil and commercial relationships may originate with mutual consent, a wide variety of legal rules exist to resolve the disputes that arise out of civil and commercial relationships.

On the other hand, Part II demonstrates that activities such as investing and conducting other transactions are often undertaken with little regard for government-to-government diplomacy. Government diplomacy does not appear to be a consideration in the judgments rendered by PRC and ROC courts. While it would be naïve to think that the Communist Party has no influence over PRC courts,[391] the PRC and ROC judgments discussed in Part II do not appear to have been influenced by any form of government diplomacy. Even during periods when the PRC-ROC relationship was particularly fraught with tension, courts continued to adjudicate the cases before them.

Part II also describes the ARATS/SEF mechanism that has served as the interface between the PRC and the ROC for more than a decade. Entrusted with the function of authenticating government documents, but organized as a nongovernmental channel, the ARATS/SEF mechanism is an important aspect of the PRC-ROC relationship that defies existing categories of cross-border interaction.

III. CRIMINAL JUSTICE

Part III has two goals: (1) to demonstrate an important mechanism that has intentionally been made to appear nongovernmental—the repatriation of illegal immigrants and criminal suspects; and (2) to describe activities that have been undertaken with little regard for government-to-government diplomacy but with attention to legal rules established by governments. These analyses will provide further evidence supporting the thesis that the PRC-ROC relationship defies the existing categories of cross-border interaction.

This project contributes to the literature by examining criminal justice more extensively than previous studies. Before beginning this examination, the lack of attention to criminal justice in previous studies warrants some explanation. Some analysts characterize the relationship between the PRC and the ROC as dualistic, with conflict in the political sphere, but cooperation within the economic sphere.[392] Within this political-economic divide, politicians, scholars, and analysts generally consider criminal justice to be encompassed within the political sphere.[393] Many agree with Ralph N. Clough, a former U.S. diplomat, who commented in 1999 that, "[t]he signing of

391. Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533 (2007).

392. *See, e.g.*, T.J. Cheng, *China-Taiwan Economic Linkage: Between Insulation and Superconductivity, in* DANGEROUS STRAIT: THE U.S.-TAIWAN-CHINA CRISIS 93 (Nancy Bernkopf Tucker ed., 2005); RICHARD C. BUSH, UNTYING THE KNOT: MAKING PEACE IN THE TAIWAN STRAIT 27-35 (2005).

393. *See infra* note 376.

agreements [between the PRC and the ROC] on handling crime is difficult because it raises questions related to the conflicting views on the extent of Taiwan's jurisdiction and the authority of its courts—issues that ultimately bring up the issue of sovereignty."[394]

However, both the PRC and the ROC recognize that the difficulty involved in ratifying agreements pertaining to criminal justice should not cause either entity to neglect fighting cross-border crime. The pressing need to fight crime is supported by the fact that both entities have been forced to address crimes that involve the residents of the other entity. The purpose of Part III is to provide an understanding of both criminal justice systems through the analysis of cases that demonstrate the importance of this issue and raise questions that cannot be easily answered by a sole focus upon the conventional divide between the political and economic spheres.

Before examining PRC and ROC court cases, it is necessary to gain a basic understanding of the mechanism through which the PRC and the ROC repatriate (*qianfan*; 遣返) illegal immigrants and wanted criminal suspects; this mechanism has intentionally been made to appear nongovernmental in nature.

The PRC has no explicit rules for the repatriation process,[395] whereas the ROC maintains extensive rules described in several sections of Article 18 of the Act.[396] Section 1 states that, in any of the following five situations, any person of the Mainland Area who enters the Taiwan Area may be deported by the police authorities, with prior approval obtained from the judicial authorities if a judicial proceeding is pending: (1) the person entered the Taiwan Area without permission; (2) the person entered the Taiwan Area with permission but

394. RALPH N. CLOUGH, COOPERATION OR CONFLICT IN THE TAIWAN STRAIT? 63-64 (1999).

395. Although the PRC has no explicit rules for the repatriation process, it should be noted that a number of sources in the PRC include the Kinmen Accord (*Jinmen xieyi*) reached by the PRC and ROC as a source of law. For example, the website of the Taiwan Affairs Office of the State Council (*guowuyuan Taiwan shiwu bangong shi*) listed the Agreement on Repatriation Reached in Kinmen by the Red Cross Societies of Both Sides of the Taiwan Strait (*haixia liangan hong shizi hui zuzhi zai Jinmen shangtan dacheng youguan haishang qianfan xieyi*) as one of the legal norms (*falu guifan*). Taiwan Affairs Office of the State Council, http://www.gwytb.gov.cn/flfg/flfg0.asp?flgf_m_id=114 (last visited May 27, 2009).

396. *See* Act Governing Relations, *supra* note 95, at art. 18. Section 4 states that when any person of the Mainland Area who, after having entered the Taiwan Area, commits a crime, is remanded to an accommodation center for custody (as referred to in Section 2), and is subsequently found guilty by an irrevocable court judgment, then any single custody day may be counted as an imprisonment or detention day. *Id.* at art. 18, § 4. The single custody day may also be converted into an amount by which to decrease a find as prescribed by the decision referred to in Article 42, Section 4 of the Criminal Code. ROC Criminal Code, [hereinafter ROC Criminal Code]. Section 5 states that the provisions of the preceding four sections shall apply to any of the people of the Mainland Area who entered the Taiwan Area before this Act took effect. Act Governing Relations, *supra* note 95, at art. 18, § 5. Section 6 authorizes the MOI to promulgate rules governing the administration of deportation referred to in Section 1 and the establishment and administration of the accommodation centers for custody referred to in Section 2. *Id.* at art. 18, § 6. These rules became effective after the Executive Yuan approved them.

remained or resided in the Taiwan Area beyond the authorized duration; (3) the person has engaged in any activity or employment inconsistent with the reason for which he or she had been granted permission to enter the Taiwan Area; (4) there exists sufficient evidence to establish that the person has committed a crime; and (5) there exists sufficient evidence to establish that the person poses a threat to national security or social stability.[397]

Section 2 states that any person of the Mainland Area conforming to any of the situations referred to in Section 1 may be placed in temporary custody before deportation and ordered to perform labor services.[398] Section 3 states that any person of the Mainland Area referred to in Section 1 who breaches the Law Maintaining Social Order (社會秩序維護法), but is not involved in any other criminal offense, may be deported directly by the police authorities after investigation without being transferred to a summary court for ruling.[399]

The process of repatriation from the ROC to the PRC operates as follows: An ROC policeperson arrests an illegal immigrant, sends that person to one of three detention centers specifically for illegal immigrants from the PRC, and then sends a report to the ROC Immigration Office of the National Police Agency of the Ministry of the Interior ("MOI").[400] The Immigration Office then sends a report to the ROC Red Cross, which then faxes a report to the PRC Red Cross.[401] The PRC Red Cross then sends a letter to the provincial police offices to verify whether such persons are actually missing from the PRC.[402] The PRC government then selects a time for the repatriation process before asking the PRC Red Cross to fax the ROC Red Cross the date and time of repatriation and the list of illegal immigrants that the PRC wants repatriated from the ROC.[403] After receiving the fax from the PRC Red Cross, the ROC Red Cross passes the information to the ROC Immigration Office.[404] The ROC Immigration Office then follows the procedure agreed to in the Kinmen Accord and sends the illegal immigrants to Kinmen.[405] On the seashore near a port in Kinmen, PRC and ROC plain-clothes police officers exchange control of the illegal immigrants as employees of the two Red Cross societies "witness" (見證) the entire process of repatriation.[406] When there are ROC repatriates who are wanted criminal suspects in the PRC, the process occurs in the opposite direction, with the PRC and ROC Red Cross societies continuing to

397. Act Governing Relations, *supra* note 95, at art. 18, § 1.

398. *Id.* at art. 18, § 2.

399. *Id.* at art. 18, § 3.

400. The Red Cross Society of The Republic of China, http://web.redcross.org.tw/human4.aspx (last visited June 30, 2009).

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id. See also infra* Appendix 2.

act as the intermediaries.[407]

As demonstrated by Appendix 2, the entire process of exchanging illegal immigrants and wanted criminals involves both private and public agents. Red Cross societies play a significant role, but they are not police entities. Throughout the process, the PRC and ROC police are responsible for controlling the freedom of movement of illegal immigrants and wanted criminals.[408]

Clough's and other scholars' misunderstanding of the roles that Red Cross societies play reinforces the idea that criminal justice disputes between the PRC and the ROC largely arise from their sovereignty dispute. The reality is that the PRC and ROC have cooperated on the issue of criminal justice for almost two decades. Between June 1991 and November 2005,[409] 168 Taiwan residents suspected of committing crimes in the ROC were arrested and repatriated from the PRC to the ROC, and thirty-one Mainland residents suspected of committing crimes in the PRC were arrested and repatriated from the ROC to the PRC.[410] Between January 1987 and April 2006, the ROC arrested and repatriated 48,797 illegal immigrants to the PRC, pursuant to the Kinmen Accord.[411] On August 14, 2007, the PRC repatriated fourteen wanted criminal suspects to the ROC, while the ROC repatriated two criminals to the PRC.[412]

Apart from records regarding repatriation, little information exists on the extent of collaboration between the PRC and ROC police. The PRC and ROC police may have a normal (常態性的) mechanism of coordination to exchange information helpful in combating phone fraud, kidnapping, murder, and white-collar crime. In an interview with a news agency, Hou You-yi, the ROC police chief in charge of criminal investigations, stated that as long as: (1) the PRC police know the whereabouts in the PRC of criminal suspects fleeing from the ROC, (2) those criminal suspects are involved in criminal activities in the PRC, and (3) the PRC police receive requests from the ROC police; the PRC police would transfer such criminal suspects to the ROC police, either through the Macau model,[413] or, according to the Kinmen Accord, between the PRC and the

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407. *Id.*

408. *Id.*

409. Taiwan Affairs Office of the State Council, http://www.sef.org.tw/xls/statist/st14.xls (last visited May 27, 2009).

410. *Id.*

411. *Id.*

412. *See* Taiwan Affairs Office of the State Council, http://www.gwytb.gov.cn/gzyw/gzyw1.asp?offset=50&gzyw_m_id=1340 (last visited May 27, 2009); Taiwan Affairs office of the State Council, http://www.gwytb.gov.cn/gzyw/gzyw1.asp?offset=50&gzyw_m_id=1341 (last visited May 27, 2009).

413. On March 31, 2003, the PRC police turned over a criminal suspect to the ROC police at the Macau airport. *See* Kong Ling-qi, *Qiang wu heibai dieduidie taiyang hui chengyuan ji jiuren xinghao jingfang kuai yibu* [*Both Police and Gangsters Pursue Wu Tong-tan, a Wanted Criminal and the Senior Leader of a Gang*], UNITED EVENING NEWS (*lianhe wanbao*), Apr. 1, 2003, at 5.

ROC.[414]

The process of repatriation between the PRC and the ROC has not received the scholarly attention it deserves. While certainly not as institutionalized as procedures authorized by the International Criminal Police Organization ("INTERPOL")[415] or the European Arrest Warrant,[416] the process, which has been in place since June 1991, is not a purely *ad hoc* process.[417] Even though Red Cross Societies serve as the interface, the process of repatriation is not entirely at the discretion of the nonprofit sector, as the PRC and ROC police play important roles throughout the process. The process of repatriation and the efforts behind its creation prove that the PRC-ROC relationship defies the existing categories of cross-border interaction.

A. Cases in PRC Courts

In the pursuit of criminal justice across boundaries, the process of repatriation is important, but not always necessary, because the PRC police may arrest Taiwan residents when they are physically in the PRC. Examining cases that were adjudicated by PRC courts yields another perspective of criminal justice within the PRC-ROC relationship. Past cases in PRC courts show the intensity of the interaction between the PRC and ROC societies and the pressing need to fight cross-border crime. On the one hand, the criminal activities described in the following pages were undertaken with little regard for the diplomacy between the PRC and the ROC. On the other hand, these criminals did know that they were violating criminal laws, and PRC and ROC law enforcement officials did their part to bring these criminals to justice.

Several cases concern "the crime of transporting other people across borders without permission."[418] The case of Cai Yonghui illustrates the commission of this crime by fishing boat, which is a common means of committing this crime.[419] Cai was paid RMB$2,000 to transport illegal immigrants from the PRC to the ROC in a fishing boat that he owned.[420] At 1:00 a.m. on December 11, 1995, he left Qiao-wei-an Port, Xiangzhi Town, Shishi City, the PRC, with thirty-four people of the PRC on his fishing boat.[421]

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414. Mainland News Center, *Hou You-yi: liangan jingfang lianxi guandao duo daji fanzui shi gongshi Taiwan zhua zhapian luren an dalu bangzhu duo pan liangan hufang miqie* [*You-Yi Hou States that Chinese and Taiwanese Police Have Multiple Contacts Urges Closer Cooperation*], UNITED DAILY (*lianhe bao*), Feb. 18, 2006, at A13.

415. INTERPOL, http://www.interpol.int (last visited May 27, 2009).

416. European Arrest Warrant Project, http://www.eurowarrant.net (last visited May 27, 2009).

417. There should be no established procedure in a purely *ad hoc* process.

418. The Romanization of the quoted text is as follows: *yunsong taren touyue guojing huo bianjing zui.*

419. My observation is based on my review of the court judgments.

420. Shi Shin Chu Zi Judgment No. 529, (People's Ct. of the Shishi City, Fujian Province, December 23, 1996) LAWYEE, http://www.lawyee.net (last visited June 27, 2009) (P.R.C.).

421. *Id.*

At 10:00 a.m. on December 12, he drove his fishing boat to 23°10 N, 119°30' East, the location where the thirty-four people of the PRC were supposed to be transferred to his counterparts in Taiwan.[422] While waiting for his counterparts, he was arrested by "Taiwan's coastal guard"[423] and subsequently repatriated to the PRC by the ROC on May 10, 1996.[424] The People's Court of the Shishi City, Fujian Province, convicted him of the crime of transporting other people across borders without permission, sentenced him to six years in prison, and ordered him to pay a fine of RMB$1,000.[425] Cai was also forced to forfeit to the court the RMB$2,000 that he had received in exchange for transporting the illegal immigrants.[426]

Another manner of committing the crime of transporting other people across borders without permission is by exploiting weaknesses in the security of the air transportation system. In one case, a Taiwanese man hired an American and a Macau Special Administrative Region man to commit the crime of transporting other people across borders without permission.[427] Yang Chongxian was a Taiwanese man living in Taipei; Tom Tung was a resident of California who held a U.S. passport; and Yang Caijie was "a man of the Macau Special Administrative Region"[428] who held a Portuguese passport.[429] At 9:00 p.m. on December 12, 1999, Yang Chongxian borrowed three VIP cards issued by the National Capital Airport (首都機場) that would enable Chen Dengsong, Lin Shangyao, both men of the Fujian Province in the PRC, and himself to enter the waiting area of the National Capital Airport.[430] Shortly thereafter, Tom Tung and Yang Caijie entered the waiting area by showing their own American and Portuguese passports.[431] After entering the waiting area, Tom Tung and Yang Caijie exchanged their boarding passes and airplane tickets with the VIP cards that Chen and Lin had shown the police enabling them to enter the waiting area.[432] The Japanese police arrested Chen as he was changing flights in Japan on his way to the United States and subsequently repatriated him to the PRC on December 13.[433] Lin, Yang Chongxian, Tom Tung, and Yang Caijie were arrested when they attempted to board a flight to the United Kingdom.[434] The Second Intermediate People's Court of Beijing

422. *Id.*

423. The Romanization of the quoted text is as follows: *Taiwan bao an jingcha diqi zongdui.*

424. Shi Shin Chu Zi Judgment No. 529.

425. *Id.*

426. *Id.*

427. Gao Shin Zhong Zi Judgment No. 655, (The Second Interm. People's Ct. of Beijing City, April 23, 2001) (P.R.C.) LAWYEE, http://www.lawyee.net (last visited June 27, 2009).

428. The Romanization of the quoted text is as follows: *aomen tebie xingzheng qu ren.*

429. Gao Shin Zhong Zi Judgment No. 655.

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

City convicted all three of the crime of transporting other people across borders without permission.[435] Yang Chongxian was sentenced to three years in prison and ordered to pay a fine of RMB$30,000.[436] Tom Tung was sentenced to two years in prison, ordered to pay a fine of RMB$20;000, and expelled from the PRC.[437] Yang Caijie was sentenced to eighteen months in prison and ordered to pay a fine of RMB$15,000.[438]

A related crime is crossing borders without permission. In one prominent case, a PRC court imprisoned a PRC judge for traveling to the ROC without permission.[439] In February 1997, Zheng Chunteng, an assistant judge (助理審判員) at a PRC court in Fujian Province, approached several people to inquire whether they would drive him to Wu-qiu Isle.[440] At 2 a.m. on April 13, 1997, he hired a captain and a seaman to drive him to Wu-qiu Isle.[441] Soon after arriving at 6 a.m., Zheng was discovered and arrested by the ROC army stationed on Wu-qiu Isle.[442] He was sent to the Processing Center of the People of the Mainland Area in Hsinchu (大陸地區人民新竹處理中心) on April 25, to the Matsu Repatriation Center (馬祖遣返站) on June 23, and then to the PRC police by the ROC police on November 28.[443] The People's Court of Putian County, Fujian Province, convicted Zheng of "the crime of crossing borders without permission" (偷越國境或邊境罪).[444] Having determined that Zheng clearly knew (明知) that Wu-qiu Isle was "under Taiwan's jurisdiction" (台灣轄區) but had still decided to go, the court determined that Zheng indeed "left the PRC illegally" (實施了非法出境行爲).[445] In addition, the court stated that the offense was serious (情節嚴重) because the arrest of Zheng, an assistant judge (法院幹部), had been "widely publicized by Taiwan,"[446] and therefore "the image and reputation of the People's Courts were adversely affected."[447] Zheng was sentenced to one year in prison and ordered to pay a fine of RMB$5,000.[448] Zheng appealed to the Intermediate People's Court of Putian City of Fujian Province, but the court upheld his conviction and sentence.[449]

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435. *Id.*
436. *Id.*
437. *Id.*
438. *Id.*
439. Pu Xing Chu Zi Judgment No. 154 (People's Ct. of Putian County, Fujian Province, July 16, 1998) (P.R.C.) LAWYEE, http://www.lawyee.net (last visited June 27, 2009).
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.* The Romanization of the quoted text is as follows: *touyue guojing huo bianjing zui.*
445. *Id.*
446. *Id.* The Romanization of the quoted text is as follows: *Taiwan fangmian dasi xuanchuan.*
447. *Id.* The Romanization of the quoted text is as follows: *baihuai le renmin fayuan de xingxiang he shengyu.*
448. *Id.*
449. Pu Zhong Xing Zhong Zi No. 101 (Interm. People's Ct. of Putian City, Fujian

A 1995 case involved the crime of providing falsified or altered identification documents for the purpose of crossing a border.[450] Chen Shunlai was originally a person of "the Nan County of the Fujian Province,"[451] but later became "a national of the Philippines Republic"[452] who resided in Manila, the Philippines.[453] Together with Gao Chaozong, a Taiwanese man residing in Taipei, Taiwan, Chen conspired to sell fake Philippine passports for profit.[454] According to their plan, Gao was responsible for identifying PRC nationals in need of Philippine passports and collecting their photographs, while Chen was responsible for manufacturing the fake Philippine passports.[455] Between August 1994 and April 1995, Chen and Gao collected RMB$85,400, HK$1,000, and US$700 for selling four fake passports.[456] Chen received RMB$29,000, HK$5,000, and US$1,200 while Gao received RMB$41,481.95. The Intermediate People's Court of Xiamen City, Fujian Province, convicted both men of "the crime of offering fake or altered identification documents for crossing borders."[457] Chen was sentenced to two years in prison, ordered to pay a fine of RMB$10,000, and expelled from the PRC (驅逐出境).[458] Gao was sentenced to eight months in prison and ordered to pay a fine of RMB$10,000.[459] In addition, Chen was ordered to forfeit RMB$29,000, HK$5,000, and US$1,200 while Gao was ordered to forfeit RMB$41,481.95.[460]

A single case may encompass crimes that involve crossing borders and crimes that do not, as criminals may attempt to cross borders to escape justice for crimes committed in the PRC. One 2000 case clearly illustrates such a scenario.[461] Beginning in June 1997, Cao Yufei, a Taiwanese man, paid Gao Zhenyu, a PRC man and general manager (負責人) of the Beijing branch (北京營業部) of the Shandong Zhonghui Futures Brokerage Corporation ("Zhonghui"),[462] RMB$200,000 a month in exchange for Zhonghui's corporate seals that were in Gao's custody.[463] In September 1997, Cao incorporated

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Province, September 3, 1998) (P.R.C.) LAWYEE, http://www.lawyee.net (last visited June 27, 2009).

450. Xia Shin Chu Zi No. 97 (Interm. People's Ct. of Xiamen City, Fujian Province, December 13, 1995) (P.R.C.).

451. The Romanization of the quoted text is as follows: *yuan ji fu jian sheng nan xian.*

452. The Romanization of the quoted text is as follows: *feilubin gonghe guo ren.*

453. Xia Shin Chu Zi No. 97.

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.* The Romanization of the quoted text is as follows: *tigong weizao bianzao churu jing zhengjian zui.*

458. Xia Shin Chu Zi No. 97.

459. *Id.*

460. *Id.*

461. Xing Zhong Zi Judgment No. 207 (High People's Ct., Beijing City, December 14, 2000) (P.R.C.) LAWYEE, http://www.lawyee.net (last visited June 27, 2009).

462. *Id.* The Romanization of its title is as follows: *shandong zhonghui qihuo jingji youxian gongsi.*

463. *Id.*

Beijing Jindeng Petroleum Chemical Corporation ("Jindeng").[464] In December 1997, Cao bought the Shinguoda Futures Brokerage Corporation ("Shinguoda") without the approval of the China Securities Regulatory Commission of the PRC.[465] Cao then hired Gong Congying, a PRC woman, to take charge of the finances of Zhonghui, Jindeng, and Shinguoda.[466] The Second Intermediate People's Court convicted Cao, Gao, and Gong of the crime of "fraud by fundraising" (集資詐騙罪), finding that they had defrauded more than 4,100 people of more than RMB$500 million.[467] Cao, Gao, and Gong appealed to the High People's Court of Beijing City, but the court affirmed the lower court's judgment.[468]

Cao was also convicted of the crime of bribery.[469] Between March and July 1998, Cao paid Guo Lienzhang, chief executive officer (總經理) of the Yanxing Beijing Corporation ("Yanxing"), RMB$500,000 to pretend that Yanxing had acquired Shinguoda for RMB$3,800,000, when Yanxing applied for approval from the China Securities Regulatory Commission.[470] In fact, Cao, not Yanxing, paid the RMB$3,800,000.[471]

In the same judgment, the Second Intermediate People's Court convicted Chen Huifang, Zheng Zihua and Li Feili of the crime of organizing other people to cross borders without permission, (組織他人偷越國境罪) and convicted Zhou Bugang and Cheng Zhonghan of "the crime of transporting other people crossing borders without permission."[472] Gong Congying, a PRC woman hired by Cao, hired Chen Huifang and Zheng Zihua between December 1997 and July 1998 to falsify personal identification documents (身分證件) so that Gong could immigrate to the Philippines. Later, Cao hired Chen and Zheng to falsify personal identification documents for Cao, Gao Zhenyu, and Gong. On August 1, 1998, Cao, Gao, Gong, Chen, and Zheng attempted to leave the PRC from Guilin City, Autonomous Region of the Zhuang Race (壯族自治區), Guangxi Province, but were unable to do so. After Cao, Gao, and Gong fled to Shanghai, Chen and Zheng introduced Xu Haiping to Cao Yufei. They planned that Xu would apply for diplomatic passports (外交護照) for the Republic of Guinea-Bissau and support Cao, Gao, and Gong after Chen and Zheng had transported them to Thailand. Chen and Zheng asked Li to help plan crossing the PRC border without permission. Li asked Zhou Bugang and Cheng Zhonghan to help transport Cao, Gao, and Gong from the PRC across

464. *Id.* The Romanization of its title is as follows: *beijing jing deng shiyou huagong youxian gongsi.*
465. *Id.*
466. *Id.*
467. *Id.*
468. *Id.*
469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.* The Romanization of the quoted text is as follows: *yunsong taren touyue guojing zui.*

the border between the PRC and Burma. When Chen, Zheng, Li, Zhou, and Cheng went to Jinghong City, Yunnan Province, to test their plan to cross the PRC-Burma border without permission, the PRC police arrested them. Cao, Gong, Gao, Chen, Zheng, Li, Zhou, and Cheng were convicted of the various crimes they committed by High People's Court, Beijing City, the PRC.[473] The case was sufficiently prominent to have been picked up by the American media, with *The New York Times* reporting, "China executed a Taiwanese businessman for his role in a big investment scam . . . . Cao Yufei was manager of a brokerage firm that collapsed in 1998, taking about $39 million in investors' money with it. The collapse led to protests in Beijing and embarrassed many government leaders who had been photographed in Mr. Cao's company."[474]

The fact pattern of this case is powerful evidence of the creativity of criminals in evading state control when conducting cross-border travel. Many criminals do not confine their illegal activities within the PRC-ROC relationship; for example, the criminals of this case considered illegal entry into the Philippines, the Republic of Guinea-Bissau, Thailand, and Burma. This creativity of criminals suggests a need for governments to cooperate more extensively to control crime.

A noteworthy 2003 case concerned a Taiwanese man operating a business in the PRC that infringed upon the trademarks of cell-phone companies.[475] In August 2002, Wang Minghui, a Taiwanese man, established the Sanli Electronics Factory ("Sanli")[476] with RMB$200,000 to manufacture the outside covers for cell phones (手機外殼) and hired Wang Hua, a man born and living

473. *Id.* Cao was sentenced to death, deprived of political rights for life, and ordered to forfeit all his personal property for the crime of "fraud by fundraising," although the court found that he deserved eight years in prison for the crime of bribery. *Id.* Gong was sentenced to death, deprived of political rights for life, and ordered to forfeit all personal property, but the court delayed the enforcement of her death sentence for two years (*huanqi ernian zhixing*) for the crime of fraud by fundraising. *Id.* Gao was sentenced to life imprisonment, deprived of political rights for life, and ordered to forfeit all his personal property, but the court delayed the enforcement of his death sentence for two years for the crime of fraud by fundraising. *Id.* Chen was sentenced to eight years in prison, deprived of political rights for one year, and ordered to pay a fine of RMB$100,000 for organizing other people to cross borders without permission. *Id.* Zheng was sentenced to eight years in prison, deprived of political rights for one year, and ordered to pay a fine of RMB$100,000 for organizing other people to cross borders without permission. *Id.* Li, born and residing in Singapore, was sentenced to four years in prison, ordered to pay a fine of RMB$40,000, and expelled from the PRC (*quzhu chujing*) for organizing other people to cross borders without permission. *Id.* Zhou was sentenced to two years in prison and ordered to pay a fine of RMB$20,000 for transporting other people across borders without permission. *Id.* Cheng, "whose nationality was unclear" (*guoji bumin*), was sentenced to two years in prison and ordered to pay a fine of RMB$20,000 for transporting other people across borders without permission. *Id.*

474. Craig S. Smith, *World Briefing Asia: China: Taiwan Businessman Executed*, N.Y. TIMES, May 30, 2001, at A10.

475. Huang Xing Chu Zi Judgment No. 248 (People's Ct. of Huang-pu Dist., Guangzhou City, Guangdong Province, September 28, 2003) (P.R.C.) LAWYEE, http://www.lawyee.net (last visited June 27, 2009).

476. The Romanization of its title is as follows: *sanli dianzi chang.*

in Hengyang City, Hunan Province, the PRC, as his production manager.[477] Wang Minghui neither registered Sanli with the PRC government nor obtained the permission of the trademark owners—Nokia, Motorola, Siemens, Philips, Panasonic, and Alcatel—to use their trademarks in connection with the cell phone covers.[478] Between its establishment and December 18, 2002, Sanli sold 79,639 cell phone covers worth a total of RMB$400,256.[479] On December 23, 2002, the PRC police searched Sanli and found production equipment, finished products, partially finished products, and wrapping materials together valued at RMB$12,710,727.50.[480] Wang Minghui argued that he was merely an investor (投資者) and had not participated in trademark infringement while Wang Hua argued that he was merely a worker and had not known that what Wang Minghui was doing was illegal.[481]

The People's Court of Huangpu District, Guangzhou City, Guangdong Province, the PRC, was not persuaded by these arguments because witnesses had testified that Wang Minghui often brought clients to see Sanli, sometimes at night, and because the witnesses' testimony and Wang Minghui's statement agreed on the fact that Wang Hua was authorized to manage all aspects of Sanli, a factory without a license from the PRC.[482] Both Wang Minghui and Wang Hua were convicted of "the crime of trademark infringement" (假冒註冊商標罪).[483] Wang Minghui was sentenced to five years in prison and ordered to pay a fine of RMB$100,000, while Wang Hua was sentenced to two years and six months in prison and ordered to pay a fine of RMB$2,000.[484] The court also ordered the police to seize and destroy the production equipment (作案工具), finished products, partially finished products, and wrapping materials.[485]

In a 2003 case, a Taiwanese man and four men of the PRC were convicted of "the crime of producing and selling fake or inferior products."[486] In March 2002, Wang Zhengmei, a Taiwanese man, persuaded Zhang Weiming and Zhang Weicheng, both men of the PRC, to help produce ostensibly brand-name cigarettes in the PRC for sale in Taiwan.[487] Wang was responsible for contacting clients in Taiwan and notifying Zhang Weiming of the brands and volume desired by the clients.[488] Zhang Weiming was responsible for

477. *Id.*
478. *Id.*
479. *Id.*
480. *Id.*
481. *Id.*
482. Huang Xing Chu Zi Judgment No. 248.
483. *Id.*
484. *Id.*
485. *Id.*
486. Zhang Xing Chu Zi Judgment No. 25 (Interm. People's Ct. of Zhangzhou City, Fujian Province, June 9, 2003) (P.R.C.). The Romanization of the quoted text is as follows: *shengchan xiaoshou weilie chanpin zui.*
487. *Id.*
488. *Id.*

conveying such information to Zhang Weicheng and receiving payment from the clients in Taiwan via a bank account registered under his name.[489] Zhang Weicheng was responsible for producing fake cigarettes, buying additional fake cigarettes, and for transporting the fake cigarettes to the designated locations.[490] After receiving orders from Wang and Zhang Weiming, Zhang Weicheng ordered Xie Yongwen, another defendant and a man of the PRC, to transport 700 packs of fake Seven Stars (七星) and 200 packs of fake Big Brothers (大哥大) brand-name cigarettes, worth a total of RMB$2,300,000, in four installments to Jinjiang Weitou and Nan-an Shuitou, both places in Fujian Province, the PRC, between March and June 2002.[491] Of the 700 packs of fake Seven Stars cigarettes, 150 were packaged by workers hired by Tang Rongjiang, another PRC defendant, as instructed by Zhang Weicheng.[492] In May 2002, Zhang Weicheng ordered Xie to hide 174 packs of fake Seven Stars cigarettes, not yet sold, worth RMB$1,131,278 at friends' places in the Zhangpu County, Fujian Province, the PRC. The Intermediate People's Court of Zhangzhou City, Fujian Province, the PRC, convicted all the defendants of the crime of producing and selling fake or inferior products.[493]

B. Cases in ROC Courts

The intensity of the interaction between the PRC and ROC societies and the pressing need to fight cross-border crime are revealed by an examination of cases both in PRC courts and ROC courts. Criminal cases tried in ROC courts have generally concerned smuggling and "helping people of Mainland Area enter the Taiwan Area illegally,"[494] as well as crimes that did not involve the crossing of a border.

The crime of smuggling can be divided into two categories. The first category, smuggling by sea, and the related issue of "territory," is best illustrated by a 2003 case.[495] Li Shiyin and Zhuang Jiapeng, captain and chief engineer (輪機長), respectively, of a fishing boat registered at Kaohsiung City, Taiwan, left Donggang, Pintong County, Taiwan, at 11:50 a.m. on May 29,

489. *Id.*
490. *Id.*
491. *Id.*
492. *Id.*
493. *Id.* Zhang Weicheng was sentenced to life imprisonment, deprived of political rights for life, and ordered to pay a fine of RMB$3,450,000. *Id.* Wang Zhengmei was sentenced to fourteen years in prison and ordered to pay a fine of RMB$2 million. *Id.* Zhang Weiming was sentenced to thirteen years in prison and ordered to pay a fine of RMB$1,800,000. *Id.* Xie Yongwen was sentenced to thirteen years in prison and ordered to pay a fine of RMB$3 million. *Id.* Tang RongJiang was sentenced to one year and ten months in prison and ordered to pay a fine of RMB$200,000. *Id.*
494. The Romanization of the quoted text is as follows: *shi dalu diqu renmin feifa jinru Taiwan diqu.*
495. Shang Su Zi Judgment No. 1163, The Judicial Yuan Database (Kaohsiung Branch of Taiwan High Ct., August 26, 2003).

2001, and sailed to 23°50' N, 118° East, a place in the "sea territory of the Mainland Area" (大陸地區海域), 8.5 nautical miles away from Baijiao, Fujian Province, the PRC.[496] There, Li and Zhuang bought 3,200 kilograms of paphia amabilis, a kind of seafood, and 990 kilograms of Ruditapes variegates, another kind of seafood, from a person whose name was unknown to the Taiwan High Court.[497] When Li and Zhuang entered the Kaohsiung Port, 3,200 kilograms of paphia amabilis and 990 kilograms of ruditapes variegates were found on their boat and confiscated.[498] Li and Zhuang were subsequently convicted of "importing controlled goods in excess of the permitted amount without permission."[499]

Li and Zhuang appealed to the ROC Supreme Court, arguing that the Taiwan High Court had failed to explicitly explain its finding that the place where they bought 3,200 kilograms of paphia amabilis and 990 kilograms of ruditapes variegates was located in the "sea territory of the Mainland Area."[500] In addition, they argued that they had caught some of the paphia amabilis themselves, which was lawful because the ROC Executive Yuan had declared an Exclusive Economic Zone (EEZ) of two hundred nautical miles in September 1979.[501] However, the ROC Supreme Court affirmed the judgment of the Taiwan High Court.[502] It determined that Article 12 of the *Law Punishing Smuggling* (懲治走私條例), as revised in 1992, stated that "shipping goods from the Mainland Area to the Taiwan Area without permission"[503] or "shipping goods from the Taiwan Area to the Mainland Area without permission"[504] "is importing and exporting without permission"[505] and "should be punished by this Law."[506] The court added that the phrases "Taiwan Area" and "Mainland Area" had been defined by the Legislative Reason (立法理由)[507] to include "Taiwan, Penghu, Kinmen, Matsu, and other areas

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496. *Id.*

497. *Id.*

498. *Id.*

499. *Id.* The Romanization of the quoted text is as follows: *siyun guanzhi wupin jinkou yu gonggao shu e.*

500. Tai Shang Zi Judgment No. 6315, The Judicial Yuan Database (Sup. Ct. of the ROC, November 13, 2003) (Taiwan).

501. *Id.*

502. *Id.*

503. The Romanization of the quoted text is as follows: *zi dalu diqu siyun wupin jinru Taiwan diqu.*

504. The Romanization of the quoted text is as follows: *zi Taiwan diqu siyun wupin qianwang dalu diqu zhe.*

505. The Romanization of the quoted text is as follows: *yi siyun wupin jinkou chukou lun.*

506. Tai Shang Zi Judgment No. 6315; Law Punishing Smuggling, art. 12 [hereinafter Law Punishing Smuggling] *available at* The Laws and Regulations Database of The Republic of China, http://law.moj.gov.tw/Scripts/Query4A.asp?FullDoc=all&Fcode=C0000006 (last visited June 30, 2009). The Romanization of the quoted text is as follows: *shiyong ben tiaoli guiding chuduan.*

507. The Legislative Reason is a column in draft statutes that are submitted by ROC administrative offices to the ROC Legislative Yuan for deliberation purposes.

governed by the government"[508] and "the territory of the Republic of China other than the Taiwan Area;"[509] therefore, the place where the defendants had bought 3,200 kilograms of paphia amabilis and 990 kilograms of ruditapes variegates was "in the Mainland Area" (屬於大陸地區).[510] Regarding whether Li and Zhuang had caught some of the paphia amabilis and ruditapes variegates themselves, the ROC Supreme Court cited the finding of the Taiwan High Court that the Kinmen Seafood Experiment Institute (金門水產實驗所) could not find any paphia amabilis and ruditapes variegates in the waters near Dongdian Isle, adding that the Taiwan High Court had not abused its investigative power when making this discovery.[511]

Scholars of international law may be intrigued by the phrase "sea territory of the Mainland Area (大陸地區海域)," and debate whether it constitutes a formal declaration of Taiwanese independence. Although it is a valuable perspective, I urge that more attention be paid to the consequences of the current manner in which these kinds of cases are handled. As stated earlier, the PRC-ROC sovereignty dispute may not possibly be resolved in the short term, but smuggling by sea is a real threat that must be addressed now. In my view, the current manner in which ROC courts handle these kinds of cases deserves scholarly examination in and of itself.

Another type of the crime of smuggling is that of making untrue statements about the origin of imported goods, which is best illustrated by a 2004 case.[512] The defendant, a Taiwanese man,[513] bought 75,262 kilograms of apples from the Mainland Area in the name of Yiyu Trade Inc., and hired Hansheng Transportation Inc. and the Evergreen International Company,[514] both unaware of the defendant's intent to smuggle goods, to ship 75,262 kilograms of apples worth NT$2,372,121, in four containers controlled for temperature (冷凍貨櫃) from Dalian Port, the Mainland Area, to Busan Port, South Korea.[515] The defendant then hired the ship Uni Forward, the captain and owner of which were also unaware of the defendant's intent to smuggle goods, to ship 75,262 kilograms of apples in four containers controlled for temperature from Busan Port, South Korea, to Keelung Port, Taiwan.[516] Uni Forward arrived at Keelung Port, Taiwan, on February 4, 2003.[517] When these

508. The Romanization of the quoted text is as follows: *taiwan penghu jinmen mazu ji zhengfu tongzhi quan suoji zhi qita diqu.*

509. The Romanization of the quoted text is as follows: *taiwan diqu yiwai zhi zhonghua minguo lingtu.*

510. Tai Shang Zi Judgment No. 6315.

511. *Id.*

512. Su Zi Judgment No. 699, The Judicial Yuan Database (Taiwan Keelung Dist. Ct., June 6, 2005).

513. Reports in the database did not disclose the name of the defendant due to privacy concerns.

514. The Romanization of its title is as follows: *zhangrong guoji gufen youxian gongsi.*

515. Su Zi Judgment No. 699.

516. *Id.*

517. *Id.*

four containers were reported to ROC customs, the Custom Office of Keelung Port (基隆關稅局) found them suspicious and asked the Representative Office of the ROC in Korea (我韓國駐外代表處) to help investigate.[518] The defendant argued that he had bought the apples from the Due Bvone Company, a Korean corporation, and did not know why the Due Bvone Company had sold him apples from the Mainland Area.[519] The court asked the Representative Office of the ROC in South Korea to ask the Due Bvone Company whether it had sold apples to the defendant.[520] The Due Bvone Company replied that it had not.[521] Article 2, Section 4 of the *Law Punishing Smuggling* authorized the ROC Executive Yuan to promulgate the *Item and Amount of Controlled Goods*[522] prosecuting the crime of importing controlled goods as listed between the first and eighth chapters of the *Customs Schedule of Imported Goods* (海關進口稅則) in an amount exceeding 1,000 kilograms or worth more than NT$100,000.[523] In this case, apples were listed in the eighth chapter of the *Customs Schedule of Imported Goods* and the defendant had imported 75,262 kilograms of apples without permission.[524] Therefore, the court convicted the defendant of the crime of importing controlled goods in excess of the amount permitted and sentenced him to ten months in prison.[525]

Another important type of cross-border crime in ROC courts is the crime of helping Mainland residents enter the Taiwan Area illegally, which has resulted in dozens of cases.[526] Article 79, Section 1 of the ROC Act prescribes criminal penalties for violations of Article 15, Section 1 of the Act, which prohibits any person from helping any person of the Mainland Area enter the Taiwan Area illegally.[527] Violators may be imprisoned for a period of between one and seven years and fined up to NT$1 million.[528] Article 79, Section 2 prescribes imprisonment of a period between three and ten years, and a fine up to NT$5 million for people who violate Article 15, Section 1 of the same Act with the intent to make profits (意圖營利).[529]

While Article 79, Section 1 of the Act imposes penalties for anyone helping any person of the Mainland Area enter the Taiwan Area illegally, it does not impose penalties for the person of the Mainland Area who enters the Taiwan Area illegally.[530] Instead, it is the *National Security Law* (國家安全法)

518. *Id.*
519. *Id.*
520. *Id.*
521. *Id.*
522. The Romanization of its title is as follows: *guanzhi wupin xiangmu ji qi shu e.* It is an administrative regulation promulgated by the ROC Executive Yuan.
523. Law Punishing Smuggling, *supra* note 506, at art. 2, § 4.
524. Su Zi Judgment No. 699; Customs Schedule of Imported Goods, ch. 8.
525. Su Zi Judgment No. 699.
526. The Judicial Yuan Database. *See infra* Appendix 1.
527. Act Governing Relations, *supra* note 95, at art. 79, § 1 & art. 15, § 1.
528. *Id.*
529. *Id.* at art. 79, § 2 & art. 15, § 1.
530. *Id.* at art. 79, § 1.

of the ROC that imposes penalties for the person of the Mainland Area who enters the Taiwan Area illegally.[531] Article 3, Section 1 of the *National Security Law* provides that "any person who enters or exits the border should apply for permission from the National Immigration Agency, an office under the Police Bureau of the MOI"[532] and that "any person shall not enter or exit the border without permission" (未經許可者,不得入出境).[533] Article 6, Section 1 of the *National Security Law* punishes violations of Article 3, Section 1 by less than three years of imprisonment and a fine of less than NT$90,000, which may be imposed independently or in conjunction with imprisonment.[534]

A manner of violating Article 15, Section 1 of the Act and Article 3, Section 1 of the *National Security Law* is transporting people of the Mainland Area into the Taiwan Area by sea.[535] Dozens of cases resulting from this violation share the same basic fact pattern.[536] The violators usually work in groups that include both Mainland residents and Taiwan residents.[537] The Mainland residents lure other Mainland residents to work in Taiwan illegally, while the Taiwan residents persuade employers to hire Mainland residents that had been transported to Taiwan. A captain and crew would drive Mainland residents from a place in the Mainland Area to an appointed area in the middle of the Taiwan Strait to meet a captain and crew from the Taiwan Area, who would transport these Mainland residents to Taiwan.

An illustrative case is one decided by the Taiwan High Court on March 22, 2007, in which four people of the Taiwan Area persuaded and later helped a captain of the Taiwan Area transport twelve people of the Mainland Area from the Mainland Area to the Taiwan Area by sea.[538] Defendant A,[539] one of the four defendants, had served an earlier sentence of one year and ten months in prison for transporting twelve people of the Mainland Area to the Taiwan Area by sea.[540] After being released on probation (假釋) on May 11, 2005, Defendant A prepared to commit the same crime again.[541] Defendant A

531. National Security Law, [hereinafter National Security Law] available at The Laws and Regulations Database of the Republic of China, http://law.moj.gov.tw (last visited June 28, 2009).

532. The Romanization of the quoted text is as follows: *renmin ruchujing yingxiang neizhengbu jingzhengshu ruchujing guanliju shenqing xuke.*

533. National Security Law, *supra* note 531, at art. 3, § 1.

534. *Id.* at art. 6, § 1.

535. *See* Act Governing Relations, *supra* note 95, at art. 15, § 1; National Security Law, *supra* note 531, at art. 3, § 1.

536. *See, e.g., infra* note 538.

537. *Id.*

538. Shang Su Zi Judgment No. 4650, The Judicial Yuan Database (Taiwan High Ct., March 22, 2007).

539. Reports in the database did not disclose the names of the defendants due to privacy concerns.

540. Shang Su Zi Judgment No. 1907, The Judicial Yuan Database (Taiwan High Ct., August 14, 2003), aff'd, Tai Shang Zi Judgment No. 6865, The Judicial Yuan Database (Sup. Ct., December 4, 2003) (Taiwan).

541. *Id.*

persuaded Defendant B to help him, Defendant B persuaded Defendant C to help, Defendant C persuaded Defendant D to help, and Defendant D persuaded a captain of the Taiwan Area to transport people of the Mainland Area from the middle of the Taiwan Strait (24°15'N, 119°45'East) to Taiwan.[542] Their plan was discovered due to the information gathered through eavesdropping permitted by a prosecutor at the Procuracy for Keelung District Court.[543] Therefore, at midnight on April 1, 2006, when the ship transporting twelve people of the Mainland Area went "illegally into the sea territory of our country"[544] and was at 24° N, 120°13' East, about five nautical miles away from Fangyuan Town in the Changhwa County of Taiwan, the captain of the Taiwan Area and the twelve people of the Mainland Area were arrested by the police.[545] The captain, who was sentenced by the Changhwa District Court[546] to three years and six months in prison, appealed to the Taichung Branch of the Taiwan High Court.[547] The Procuracy for the Changhwa District Court decided not to prosecute the twelve people of the Mainland Area.[548] Defendants A, B, C, and D were convicted and sentenced by the Taiwan High Court.[549]

A number of cases concern the commercial dealings between PRC and ROC corporations and individuals. A recurring theme in these cases is the question of whether ROC courts have jurisdiction over crimes that have been committed in the PRC. ROC courts have concluded that they have jurisdiction over crimes that have been committed in the PRC.

For example, in one significant case, a Taiwanese man was initially acquitted because a district court of the ROC found itself lacking jurisdiction over the case,[550] but he was ultimately convicted by an appellate court of the

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542. *Id.*

543. *Id.*

544. The Romanization of the quoted text is as follows: *feifa jinru woguo linghai.* The Taiwan High Court used the phrase "our country." Shang Su Zi Judgment No. 4650.

545. *Id.*

546. Su Zi Judgment No. 791, The Judicial Yuan Database (Taiwan Changhwa Dist. Ct., November 28, 2006).

547. *Id.*

548. *Id.*

549. Shang Su Zi Judgment No. 4650. Defendant A was sentenced to four years and six months in prison because he had committed this crime after he had just finished a sentence for the same offense and because he was secretly transporting (*toudu*) as many as twelve people. *Id.* Defendant B was sentenced to three years and six months in prison because he had previously been convicted of the crime of gambling and because he was secretly transporting as many as twelve people. *Id.* Defendant C was sentenced to three years and four months in prison because he had previously violated the National Security Law and committed burglary (*qiedao*) and battery (*shanghai*) before, and because he was secretly transporting as many as twelve people. *Id.* Defendant D was sentenced to three years and two months in prison because he had previously been convicted of the crimes of hurting family (*fanghai jiating*), of "forging securities (*weizao youjia zhengquan*)" had violated the *Act Controlling Gun, Ammunition, and Killer Knife* (*qiangpao tanyao daoxie guanzhi tiaoli*); and because he was secretly transporting as many as twelve people. *Id.*

550. Reports in the database did not disclose the name of the defendant due to privacy concerns.

crime of disloyalty (背信) and sentenced to six months in prison, a sentence that could be commuted to a fine at the rate of NT$900 a day.[551] Guangjian Corporation ("Guangjian"), based in Kaohsiung City, Taiwan, established Guangjian Electronics Factory in Dongguan City, Guangdong Province, the Mainland Area.[552] The defendant, a consultant to Guangjian Electronics Factory,[553] was responsible for brokering business deals between companies and clients.[554] In 2000 and 2001, the defendant successfully brokered sales contracts between Guangjian and its clients, Cha-si-te Information Inc. ("Cha-si-te"), Songsen Electronics Factory ("Songsen"), and Fenglin Electronics Inc. ("Fenglin").[555] On June 15, 2001, Guangjian asked the defendant to go to Fenglin's headquarters in Shenchou City, Guangdong Province, the Mainland Area, to negotiate the payment of the HK$354,000 that Fenglin owed Guangjian under the sales contract brokered by the defendant.[556] Without authorization from Guangjian, the defendant accepted a cash payment of HK$174,000 from Lin Bi-yang, the chairman (負責人) of Fenglin, and signed an agreement (協議書) with Lin, stating that Fenglin had transferred the debt of HK$150,000 owed by Cha-si-te and the debt of HK$30,000 owed by the defendant, to Guangjian, which, in combination with a cash payment of HK$174,000, satisfied all of Fenglin's monetary obligations to Guangjian.[557] When the defendant did not return the cash payment of HK$174,000 to Guangjian, Guangjian asked a prosecutor in Kaohsiung, Taiwan, to prosecute the defendant for business embezzlement.[558]

Although the Kaohsiung District Court acquitted the defendant because "the act was committed outside the territory of our country" (在我國領域外犯罪),[559] the Taiwan High Court Kaohsiung Branch Court repealed the judgment of the Kaohsiung District Court because "the Mainland Area was still the territory of our country" (大陸地區猶屬我國領域) and because "the defendant, a person of our country" (被告爲我國人民) "should stand trial for the crimes committed in the territory of our country."[560] In support of its view, the Taiwan High Court Kaohsiung Branch Court cited (1)

551. Shang Yi Zi Judgment no. 341, The Judicial Yuan Database (Kaohsiung Branch of Taiwan High Ct., September 21, 2004).

552. *Id.*

553. The judgment did not clearly distinguish between the Guangjian Corporation and the Guangjian Electronics Factory. It appears that the Guangjian Corporation wholly owned the Guangjian Electronics Factory. *Id.*

554. *Id.*

555. *Id.*

556. *Id.*

557. *Id.*

558. *Id.*

559. Yi Zi Judgment No. 299, The Judicial Yuan Database (Taiwan Kaohsiung Dist. Ct., April 26, 2004). I add quotation marks here because I want to make the English translation of the phrases used by the court as close to its Chinese version as possible.

560. Shang Yi Zi Judgment No. 341. The Romanization of the quoted text is as follows: *zai woguo lingyu nei fanzui zi ying shou woguo falu zhi shenpan.*

Article 4 of the ROC Constitution; (2) the Eleventh Amendment to the ROC Constitution; (3) Article 2, Section 2, and Article 75 of the Act; and (4) the Tai Fei Zi Judgment No. 94 issued by the ROC Supreme Court in 2000.[561]

The court then explained that it had convicted the defendant of the crime of business embezzlement because, although the defendant had argued that the loan of HK$30,000 had been between Guangjian and Fenglin, the court was convinced by the testimony by Wang Weifeng, chairman of Guangjian, and Lin Bi-yang, chairman of Fenglin, that the loan of HK$30,000 had been between Fenglin and the defendant.[562] In addition, the court noted that the defendant had testified during interrogation by a prosecutor that he had returned HK$174,000 to Wang Weifeng's wife.[563] After Wang Weifeng's wife testified during the trial that she had not received any money from the defendant, the defendant instead testified that he had returned HK$174,000 to a woman whose family name was Jiang.[564] The defendant's inconsistent testimony led the court to find it unreliable.[565] The court found that the defendant had been "an agent who managed business for Guangjian,"[566] that he had "acted contrary to his mission" (爲違背其任務之行爲)[567] with "the intent to enrich himself illegally" (意圖爲自己不法之利益), and that his act had "caused a loss of Guangjian's assets."[568] Although the prosecutor for this case argued that the defendant had committed the crime of embezzlement, the court found that the defendant had committed the crime of disloyalty (背信), prohibited and punished by Article 342, Section 1 of the ROC Criminal Code.[569]

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561. Shang Yi Zi Judgment No. 341.

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.*

566. The Romanization of the quoted text is as follows: *wei guangjian gongsi chuli shiwu zhi ren.*

567. The Romanization of the quoted text is as follows: *wei weibei qi renwu zhi xingwei*

568. Shang Yi Zi Judgment No. 341. The Romanization of the quoted text is as follows: *zhi sheng sunhai yu Guangjian gongsizhi caichan.*

569. *Id.*; ROC Criminal Code, *supra* note 396, art. 342, § 1. The prosecutor for this case argued that the defendant had committed the crime of disloyalty separately because, in the prosecutor's view, the defendant had persuaded Guangjian to sign sales contracts with Cha-si-te, Songsen, and Fenglin, even though the defendant had known that these three companies had poor credit histories. Shang Yi Zi Judgment No. 341. After Guangjian had shipped its products, none of the three companies had paid Guangjian in a timely manner, and Cha-si-te and Songsen subsequently went bankrupt. *Id.* However, the court was convinced by the defendant's testimony that Wang Weifeng, Guangjian's chairman, had the final authority to decide whether to sign any sales contract; that the defendant had not known that these three companies had bad credit history; and that the defendant had had no intention of misrepresenting his company because his commission had been conditioned on payment by these three companies to Guangjian. *Id.* In addition, the court noted that Cha-si-te had gone bankrupt on June 26, 2001, and that Songsen had gone bankrupt sixty days after Guangjian shipped its products; that there was no evidence that the defendant had known that these three companies had bad credit history at the time that he brokered the sales contracts; and that the fact of subsequent bankruptcies alone could not prove that the defendant could have foreseen their occurrence at the time that he

A 2007 case concerned a popular type of fraud scheme that involved both people of the Taiwan Area and people of the Mainland Area.[570] A group of criminals (詐騙集團)[571] called a Taiwanese person (the "victim")[572] by telephone on September 2, 2006, to tell the victim that they had insider tips (內線消息) about professional baseball in Taiwan (中華職棒) and that they could help the victim win when gambling on professional baseball (簽賭職棒).[573] The criminals called the victim again on September 18, 2006, to abet his gambling on professional baseball, gave the victim the information about a bank account registered in the name of the defendant, and instructed the victim that gambling on professional baseball would require him to transfer a setup fee of NT$30,000 to the designated bank account.[574] The next day, September 19, the victim went to an automatic teller machine and transferred NT$30,000 to the designated bank account.[575] Then the group of criminals ordered the defendant to withdraw NT$30,000 from his account on September 22, 2006 and give the cash of NT$30,000 to the group of criminals by traveling to Fujian Province, the Mainland Area on September 27, 2006.[576] When the victim could not later contact the group of criminals, he reported this case to the ROC police on October 25, 2006.[577] The bank account was in the defendant's name only and the names of the other criminals are unknown.[578]

The defendant denied any wrongdoing, arguing that he had simply helped his friend in the Mainland Area collect transferred funds from his friend's clients in Taiwan and that he had not known that "funds in Taiwan could be wire transferred to the Mainland Area."[579] However, the Keelung District Court noted that the defendant had testified during police interrogation that he had promised to wire transfer funds in his account to his friend in the Mainland Area and that a witness, a banker, had testified at the trial that "the defendant had once asked him whether the bank for which the witness worked was

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had brokered the sales contracts. *Id.* Although the court "found no proof of crime for the prosecution of brokering sales contracts with Cha-si-te, Songsen, and Fenglin," (*ci bufen shang buneng zhengming beigao fanzui*) the court "did not acquit the defendant separately" (*bu ling wei wuzui zhi yuzhi*) because both the crime discussed earlier and the crime of which he was accused occurred within the period when the defendant was a consultant to Guangjian. *Id.* If there had been enough evidence for the crime of which he was accused (如成立犯罪), the crime discussed earlier and the crime of which he was accused would be "one single crime in trial for their continuity." (即有連續犯之裁判上一罪關係). *Id.*

570. Yi Zi Judgment No. 423, The Judicial Yuan Database (Taiwan Keelung Dist. Ct., October 23, 2007).

571. The judgment referred to the defendants by the phrase "a group of criminals" (詐騙集團). *Id.* They have yet to be identified. *Id.*

572. Reports in the database did not disclose the victim's name due to privacy concerns.

573. Yi Zi Judgment No. 423. Gambling is illegal in the ROC.

574. *Id.*

575. *Id.*

576. *Id.*

577. *Id.*

578. *Id.*

579. *Id.* The Romanization of the quoted text is as follows: *Taiwan kuanxiang keyi zhijie huizhi dalu diqu.*

permitted to wire transfer funds to the Mainland Area."[580] In addition, the court cited a relevant judgment issued by the ROC Supreme Court[581] and stated that, in the face of "widespread instances of fraud in society"[582] "repeatedly covered by newspaper, magazines, and other news media,"[583] everyone with common sense (常識) knew that the act of "using other people's bank accounts" (徵求他人提供帳戶) was "an attempt to hide the true flow of funds and the true identity of actors."[584] The court found that the defendant had intended to help the group of criminals defraud the victim (幫助詐欺取財); that "the aforementioned bank account had always been in the defendant's custody;"[585] and that the defendant had given the group of criminals the funds that the victim had transferred to his bank account.[586] The defendant had received (收受) funds from the victim, and the act of receiving the funds itself was part of the crime.[587] The court convicted the defendant of fraud (詐欺取財罪), prohibited and punished by Article 339, Section 1 of the Criminal Code, and sentenced him to six months in prison, commutable (易科罰金) to a fine at the rate of NT$1,000 a day.[588] Pursuant to the *2007 Act Reducing Criminal Sentence*, the court reduced the sentence to three months in prison, commutable to a fine at the rate of NT$1,000 a day.[589]

C. Conclusion

As previously discussed, the process of repatriation defies the existing categories of cross-border interaction. On the one hand, when compared with experiences elsewhere in the world, the process of repatriation is surely not the most institutionalized channel of cross-border police cooperation. On the other hand, even though Red Cross Societies are the interface, the process of repatriation is not entirely a matter confined to the nonprofit sector. The PRC and ROC police play important roles throughout the process; they make arrests, maintain custody of, transport, and exchange criminal suspects and illegal immigrants. Even though the Red Cross societies transmit information between the PRC and ROC police and witness their exchange of criminal suspects and

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580. *Id.* The Romanization of the quoted text is as follows: *beigao you zhi yi fuwu zhi yinhang xunwen youwu congshi huikuan zhi dalu yewu.*

581. Tai Shang Zi Judgment No. 31, The Judicial Yuan Database (Sup. Ct. of the ROC, January 8, 2004).

582. The Romanization of the quoted text is as follows: *zai shehui shang cengchu buqiong.*

583. The Romanization of the quoted text is as follows: *lujing baozhang zazhi ji qita xinwen meiti zaisan pilou.*

584. The Romanization of the quoted text is as follows: *youyi yinman qi liucheng ji xingweiren shenfen puguang.*

585. The Romanization of the quoted text is as follows: *shangshu yinhang zhang huzi shizhi zhong jun zai beigao zhi chiyou zhanling zhong.*

586. Yi Zi Judgment No. 423.

587. *Id.*

588. *Id.*

589. *Id.*

illegal immigrants, they do not have the power to restrain a person's freedom of movement, not even that of a criminal suspect or an illegal immigrant.[590] The PRC and ROC governments invented this process of repatriation, defying existing categories of cross-border interaction.

In addition, cross-border criminal activities and their punishment by the PRC and ROC courts demonstrate that these activities have been undertaken with little regard for government-to-government diplomacy. As Arnold D. McNair, Reader in Public International Law at the University of Cambridge, stated in 1933, "[t]he only persons likely to benefit [from nonrecognition] are the alleged criminals."[591] Criminals have little or no consideration for government-to-government diplomacy; they care only for their ability to garner illegal profits. Therefore, an understanding of the PRC-ROC relationship is incomplete without understanding the activities of these criminals and the threats they present to PRC and ROC societies.

CONCLUSION

By describing the PRC's and the ROC's official policies and attitudes, their efforts to make governmental mechanisms appear nongovernmental, and actual court cases, I have attempted to demonstrate that the PRC-ROC interaction differs from state-based and nongovernmental cross-border interaction as these terms are typically understood in literature. I recognize that the PRC-ROC interaction may resemble state-based or nongovernmental cross-border interaction in some ways. However, mere resemblance is not precise enough.

The PRC-ROC relationship is not state-based for three reasons. First, to say that the PRC-ROC relationship is unambiguously state-based is to ignore the official attitudes of the PRC and the ROC. The PRC has always vehemently contended that its relationship with the ROC is not state-based, while the ROC's attitude is more ambiguous.[592] Several indicators of the ROC's attitude, which change in tandem with changes in its administration, present mixed signals. Second, several mechanisms of enormous importance in the PRC-ROC relationship have intentionally been made to appear nongovernmental. Third, activities such as marriage, trade, investment, and even crime have been undertaken with little, if any, regard for government-to-government diplomacy.

While the current PRC-ROC relationship cannot be characterized as state-based, neither can it be characterized as composed of purely nongovernmental interaction of the type that has informed the basis of much current scholarly writing regarding informal government networks. First, PRC

590. Neither PRC law nor ROC law authorizes Red Cross societies to restrain a person's freedom of movement.

591. McNair, *supra* note 131, at 72.

592. *See infra* Part I.

and ROC courts, which are clearly governmental in nature, adjudicate and resolve a variety of conflicts that arise out of nongovernmental interaction. Second, the efforts to make several mechanisms of enormous importance in the PRC-ROC relationship appear nongovernmental underscores that they are indeed, or were initially, governmental mechanisms. Third, even though activities such as marriage, trade, investment, and crime have been pursued with little or no regard for government-to-government diplomacy, they have been undertaken with the legal rules established with governments in mind.

A. Long-term Stability

Some may doubt the stability of the current mode of PRC-ROC interaction in the long run. Whereas the unique mechanisms have allowed the PRC and the ROC to interact for over a decade, the centuries-old institution of state-to-state diplomacy is clearly more time-tested. The stability of the current mode of PRC-ROC interaction is difficult to assess. On the one hand, the fact that the SEF/ARATS and Kinmen Accord mechanisms have weathered political turbulence for years suggests some stability. For instance, even though the PRC-ROC relationship worsened between 1996 and 2008[593] the SEF-ARATS and Kinmen Accord mechanisms continue to work to this day. In addition, no serious proposal has been set forth in either the PRC or the ROC that would fundamentally alter either the SEF/ARATS or the Kinmen Accord mechanism. Such a lack of competing alternatives tends to suggest that the SEF/ARATS and the Kinmen Accord mechanisms are stable. At the same time, the root causes of the unique nature of the PRC-ROC interaction—the sovereignty dispute and the ensuing mutual nonrecognition—remain seemingly unshakable.[594] As long as the PRC and the ROC continue to refuse to recognize each other, it is likely that their cross-border interaction will continue to be neither state-based nor purely nongovernmental.

On the other hand, this does not mean that the PRC-ROC cross-border interaction will be as stable as other contexts of cross-border interaction. Some influential scholars consider the uniqueness of the PRC-ROC interaction a "deviation" from the more readily accepted categories of state-based and nongovernmental cross-border interaction.[595] An even more widely shared

593. *See infra* Part I.

594. The PRC and the ROC engaged in extensive negotiations through the SEF/ARATS mechanism in November 2008. Although these extensive negotiations are significant, they have not shaken the sovereignty dispute and the ensuing mutual nonrecognition. Later I will discuss the development in November 2008 in more detail. *See* Straits Exchange Foundation, http://www.sef.org.tw/ (last visited May 27, 2009) or the Web site maintained by the Taiwan Affairs Office under the PRC's State Council, http://www.gwytb.gov.cn/ (last visited May 27, 2009).

595. *See, e.g.*, Jau-yuan Hwang, *The Evolution of the Legal Nature of the Cross-Strait Relationship in Taiwan's Domestic Law* (兩岸關係法律定位的演變(1987-2007): 台灣觀點), *in* THE DEVELOPMENT OF THE CROSS-STRAIT RELATIONSHIP IN THE PAST TWENTY YEARS

belief is that the current PRC-ROC cross-border interaction is only a transitional arrangement that awaits a more fundamental and permanent solution to the PRC-ROC dispute.[596] These ideas can be easily reconciled with recent studies on the effects of socialization on international law and politics,[597] which suggest that an outlier state faces pressure to conform to widely shared behavioral or organizational norms. To the extent that the PRC and the ROC feel pressured to conform to the existing categories of cross-border interaction, as studies of the effects of socialization on international law and politics would predict, the PRC-ROC cross-border interaction will be less stable than other contexts of cross-border interaction.

B. Two Implications

Two implications are suggested by the uneasy relationship between the PRC-ROC interaction and the contemporary scholarship on (non-) compliance with international law.[598] First, for scholars and analysts who consider, at least

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(近二十年兩岸關係的發展與變遷) 67 (You Yin-rong ed., 2008); Tay-sheng Wang, *The Taiwanization of the Law of the Republic of China* (中華民國法體制的台灣化), *in* TAY-SHENG WANG, THE BREAK AND CONTINUITY OF TAIWAN LAW (台灣法的斷裂與連續) 147 (2002).

596. *See, e.g.*, Biography of President Ma Ying-jeou, *supra* note 42 ("Regarding cross-Strait relations, Ma Ying-jeou has been promoting the policy of "no unification, no independence, and no use of force." In particular, he advocates the maintenance of the status quo under the framework of the ROC constitution and the resumption of mainland negotiations based on the "92 Consensus." Ma calls for Taiwan and the mainland to reconcile their differences in cross-Strait relations and in the international community so that both sides can pursue win-win strategies that will contribute to the peaceful development of the region."); Platform of the Democratic Progressive Party, http://www.dpp.org.tw/index_en/ (follow "The Party" hyperlink; then follow "Platform" hyperlink) (last visited June 27, 2009) ("According to this reality of sovereignty and independence, Taiwan should draw up a constitution and establish a nation. Only then is it possible to guarantee respect and security for Taiwanese society and for individual citizens, and to offer the people the opportunity to pursue freedom, democracy, prosperity, justice and self-realization."); Embassy of the People's Republic of China in the United States of America, *White Paper--The One-China Principle and the Taiwan Issue*, http://www.china-embassy.org/eng/zt/999999999/White%20Papers/t36705.htm (last visited June 27, 2009) ("As the Chinese government has successively resumed the exercise of sovereignty over Hong Kong and Macao, the people of the whole of China are eager to resolve the Taiwan issue as early as possible and realize the total reunification of the country. They cannot allow the resolution of the Taiwan issue to be postponed indefinitely. We firmly believe that the total reunification of China will be achieved through the joint efforts of the entire Chinese people including compatriots on both sides of the Taiwan Straits and those living overseas.").

597. *See, e.g.*, ALASTAIR IAIN JOHNSON, SOCIAL STATES: CHINA IN INTERNATIONAL INSTITUTIONS, 1980-2000 (Princeton Univ. Press 2007); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181-207 (1996); Finnemore, *supra* note 3.

598. For a survey of the "compliance" scholarship, see, e.g., Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance, in* HANBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes, Thomas Risse, and Beth A. Simmons eds., SAGE Publications, 2002).

implicitly or inadvertently, existing international legal rules and compliance with them to be an unqualified good, the PRC-ROC interaction sounds a cautionary note. Second, for scholars and analysts who stress the limits of international law and cross-border coordination, the PRC-ROC interaction is a cause for optimism. Taken together, these two implications suggest that there should be more focus on the substance of the international law. Moreover, an additional focus on the substance of the international law may, in the longer term, have implications for the PRC-ROC context.

By offering rationales that explain states' obedience to or compliance with international law in general terms,[599] scholars may have inadvertently implied that existing international legal rules and compliance with them are an unqualified good. In reaction to critics who have argued that international law is merely morality or rhetoric,[600] defenders have offered various rationales explaining why states obey or comply with international law. Both critics and defenders have supported their theories by offering historical and contemporary examples, but their efforts at theorizing by the application of such theories as socialization theory[601] or rational choice theory[602] have said relatively little about the specific content of international legal rules. The defenders' omission implies that whenever a rule can become international law through treaty-making, customary law, or the decisions of international organizations, that rule should be obeyed.[603] For example, if states comply with international law because they participate in state socialization or are concerned with maintaining their reputation in order to engage in subsequent cross-border interaction, what occurs when a state believes that it should not comply with specific international legal rules but it is unable to change those legal rules? As state socialization and reputational considerations are the process through which states are brought into compliance with international law, the same reason why state socialization and reputational considerations ensure states' compliance with international law also forces a state to comply with the specific

599. *See, e.g.*, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS (Oona A. Hathaway & Harold Hongju Koh eds., Foundation Press 2005); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (Oxford Univ. Press 2008).

600. Realists in international relations scholarship since Hans Morgenthau and Edward Hallett Carr have put forward the idea that international law is merely morality or rhetoric. More recently, some legal scholars have reached nearly the same conclusion by applying rational choice theory. *See, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (Oxford Univ. Press 2005). *Cf.* George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005), (employing rational choice theory but reaching a conclusion different from that of Goldsmith and Posner).

601. *See, e.g.*, Goodman & Jinks, *supra* note 599.

602. *See, e.g.*, GUZMAN, *supra* note 599; GOLDSMITH & POSNER, *supra* note 600; Norman & Trachtman, *supra* note 600.

603. The critics' insufficient discussion about the specific content of international legal rules will be discussed *infra*.

international legal rules when it believes that it should not be forced to do so. The insufficient discussion regarding the specific content of international legal rules implies that if specific international legal rules should be changed, they can be changed through the international law-making process, and that if the proposed changes have yet to proceed through the international law-making process, the pre-existing international legal rules must have been functioning relatively well.

For the optimism regarding existing international legal rules and compliance with them, the PRC-ROC interaction sounds a cautionary note for two reasons. First, the application of current international legal rules has not helped resolve the PRC-ROC dispute. James Crawford, a professor of law at the University of Cambridge and a former member of the International Law Commission, provided a thoughtful analysis of the relevant legal rules in 2006, where he asserted, "The conclusion must be that Taiwan is not a State because it still has not unequivocally asserted its separation from China and is not recognized as a State distinct from China."[604] Although Crawford's knowledge of international law in general and of state creation in particular lends his legal analysis enormous weight, it has not contributed to resolving the PRC-ROC dispute. First of all, Crawford's conclusion that Taiwan is not a state has persuaded neither ROC politicians nor average ROC citizens to abandon their bid to join the United Nations and its affiliated organizations such as the World Health Organization. Based on theoretical and empirical reasons listed earlier when discussing the stability of the PRC-ROC interaction, it would indeed be surprising if ROC politicians and citizens abandoned their bid to join international organizations. Theories of and empirical studies on the effects of socialization on international law and politics have demonstrated the potential strength of the will to join international organizations and become part of the world order. If ROC politicians and citizens abandon their bid to join international organizations, that fact would fly in the face of these theories and empirical studies. At the same time, I acknowledge that mere theories and

604. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 219 (2d ed., Oxford Univ. Press 2006). Crawford explained his analysis in more detail on page 211:
The point is that there is even now widespread agreement that Taiwan is not a State but part of a larger China. China takes this view, other States take this view and Taiwan itself has by no means rejected it. The ROC and the PRC have long both insisted that there is only one Chinese State; and, notwithstanding the more ambiguous position communicated from time to time by officers of the Taiwanese government, that view has been acquiesced in, or even explicitly recognized, by all or almost all other international actors. As [Daniel Patrick] O'Connell pointed out in 1956, 'a government is only recognized for what it claims to be.' Statehood is a claim of right. Claims to statehood are not to be inferred from statements or actions short of explicit declaration; and in the apparent absence of any claim to secede the status of Taiwan can only be that of a part of the State of China under separate administration. *Id.* at 211. Crawford cites Daniel Patrick O'Connell, *The Status of Formosa and the Chinese Recognition Problem*, 50 AM. J. INT'L L. 405, 415 (1956). In a footnote, Crawford adds that "[t]he contrary proposition is not of course true: a government may be recognized for *less* than it claims" (emphasis in original).

empirical studies regarding socialization outside the PRC-ROC context cannot perfectly forecast what will actually occur within the PRC-ROC context. However, the development in the ROC to this point has demonstrated the unlikelihood of ROC politicians and citizens abandoning their bid to join international organizations. For example, Ma Ying-jeou, the ROC's President from 2008 to 2012, has not abandoned his government's bid to join international organizations, even though his government and political party are widely considered to desire better relations with the PRC.[605]

In addition, some prominent international legal scholars in the ROC interpret Crawford's statement that "Taiwan is not a State because it still has not unequivocally asserted its separation from China" as a warning that urges Taiwan to unequivocally assert its separation from China soon.[606] However, the United States and the PRC oppose a formal declaration of Taiwanese independence and have pressured the ROC not to make such a declaration. To be sure, these prominent scholars may have misinterpreted Crawford. When Crawford quotes Daniel Patrick O'Connell, a late Australian professor of international law, regarding the proposition that "a government is only recognized for what it claims to be,"[607] Crawford adds in a footnote that "[t]he contrary proposition is not of course true: a government may be recognized for *less* than it claims."[608] By drawing a conceptual distinction between necessary conditions and sufficient conditions, Crawford has not explicitly urged Taiwan to unequivocally assert its separation from China at this point in time.[609] The possibility that prominent scholars may have misinterpreted Crawford does not provide much comfort. As of 2008, scholars and policymakers of all interested entities disagreed significantly over the application of international legal rules to the PRC-ROC relationship. The disagreement seems to be at odds with the optimism toward current international legal rules and their compliance.

The PRC-ROC interaction sounds an additional cautionary note for the optimism because, if scholars and policymakers are obsessed with compliance, they may lack the kind of creativity that has been crucial in making the PRC-ROC interaction as it currently is. If the PRC and the ROC had been obsessed with conforming to the existing categories of cross-border interaction, they would not have invented their own distinct interaction. I am not arguing that the PRC and the ROC have violated international law by inventing their own cross-border interaction, as this is clearly not the case. However, as I have demonstrated, the PRC-ROC interaction defies existing categories of cross-

605. *See, e.g.*, Rigger, *supra* note 48.

606. *ee, e.g.*, Lung-chu Chen, *James Crawford Warns Taiwan*, LIBERTY TIMES, November 19, 2006, *available at* http://www.libertytimes.com.tw/2006/new/nov/19/today-o7.htm (last visited May 27, 2009).

607. CRAWFORD, *supra* note 604, at 211.

608. *Id.* at 211.

609. Crawford's text and footnote imply that Taiwan's declaration of independence is a necessary condition for its independence, yet Taiwan's declaration of independence may possibly be insufficient for Taiwan's independence.

border interaction. International lawyers who approach every problem with the question, "Does it comply with international law?" may lose sight of opportunities to develop a unique type of cross-border interaction or fail to appreciate the functionality of a particular situation.

The failure to appreciate the uniqueness of a particular situation is a particularly serious problem. Even when researchers are not preoccupied with the question, "Are the entities in question complying with international law?" it is not easy to gain understanding of a foreign legal system, particularly as outside observers tend to view it through the lens of their own value system rather than that of those whom they observe. Professor William P. Alford of Harvard Law School insightfully cautioned scholars of comparative law to be flexible and tentative in framing an initial inquiry into foreign, especially non-Western, legal systems.[610] Alford urged scholars to distinguish the stage of framing the initial inquiry from the stage of evaluating the data collected.[611] If an initial inquiry into foreign, especially non-Western, legal systems is framed in universal terms or terms not sensitive to local contexts, Alford cautioned that scholars may risk failing to truly understand the foreign legal systems.[612]

When researchers are preoccupied with the question, "Are the states in question complying with international law?" they have greater tendency to frame their inquiry in universal terms or terms not sensitive to local contexts, and thereby misunderstand a foreign legal system. Admittedly, to some extent the question must be framed in universal terms; the same international legal rule cannot have different meanings for different entities. However, compliance may not always be determined by simply answering "yes" or "no" to the question, "Is the state complying with international law?" As the PRC-ROC interaction has demonstrated, the process in which governments adjust local circumstances to conform to the more readily accepted categories of cross-border interaction is too important to be ignored. As discussed earlier, the SEF/ARATS and Kinmen Accord mechanisms have intentionally been made to appear nongovernmental.[613] If researchers only examine the end result—the nongovernmental appearance of the mechanisms—they lose sight of the PRC's and ROC's efforts to make them appear nongovernmental. Indeed, the very fact that efforts had to be expended to make the SEF/ARATS and Kinmen Accord mechanisms appear nongovernmental underscores the fact that they were, at least initially, government mechanisms. In terms of the end result—their nongovernmental appearance—the SEF/ARATS and Kinmen Accord mechanisms may appear to differ little from other contexts of nongovernmental interaction. However, a narrow focus on the end result leads one to lose sight of the efforts that created the end result. Ignoring these efforts is unfortunate, as it leads one to misunderstand the past and current situation and, by

610. Alford, *supra* note 19, at 950.
611. *Id.*
612. *Id.*
613. *See supra* Part II.B.

extension, fail to grasp opportunities to make improvements in the future.

Indeed, a better understanding of the efforts to make governmental mechanisms appear nongovernmental may help policymakers grasp opportunities to make improvements in the future. The benefits and limits of the current PRC-ROC interaction are evident in the development of the PRC-ROC relationship in November 2008. As stated in Part I, observers of Asia expect that the PRC government and the KMT-led ROC government improve their bilateral relationship by focusing on their agreement that there is one China while remaining ambiguous regarding which entity represents one China.[614] Ambiguity, achieved by the use of the SEF/ARATS mechanism, played a key but underappreciated role in the development of the PRC-ROC relationship in November 2008. According to the Xinhua News Agency, the PRC's official state news agency, Chen Yunlin, Chief (會長) of the ARATS, met "Taiwan leader" Ma Ying-jeou in Taipei, Taiwan, on November 6, 2008.[615] Foreign news media, however, see Chen Yunlin's status very differently. For example, *The Economist* describes Chen Yunlin as "the most senior mainland official to [visit Taiwan] since 1949."[616] *The New York Times* describes the meeting between Chen and Ma as "one of the highest-level exchanges between officials from mainland China and Taiwan since 1949."[617] Both the Xinhua News Agency and foreign news media see only part of the whole picture. Foreign news media are accurate as to the so-called "historic" nature of Chen Yunlin's visit to Taiwan and his meeting with the ROC's President Ma Ying-jeou. If the organization led by Chen Yunlin—the ARATS—were an ordinary people's association in the PRC, either he would not be able to meet Ma or their meeting would not have generated such a buzz. Nonetheless, the Xinhua News Agency is also accurate in avoiding the word "official" in its coverage, probably deliberately, as the SEF/ARATS mechanism has to keep its nongovernmental appearance. The benefits of the SEF/ARATS mechanism are obvious, as it allows the PRC and the ROC to develop their cross-border interaction despite their unresolved sovereignty dispute. The limits of the SEF/ARATS mechanism are also obvious, as even when the PRC-ROC relationship is as good as it now is, the PRC-ROC relationship has to be centered upon the SEF-ARATS mechanism.

I do not intend to criticize the SEF/ARATS mechanism, but its benefits and limits have not been adequately understood. Running the risk of stating it too boldly, the SEF/ARATS and Kinmen Accord mechanisms have been built upon the fiction that nongovernmental interface may be built to cloak government interaction in the PRC-ROC relationship. The word "fiction" is

614. *See supra* Part I.

615. ChinaView.cn, Taiwan Leader Ma Ying-jzou Meets ARATS Chief, http://news.xinhuanet.com/english/2008-11/06/content_10316005.htm (last visited November 16, 2008).

616. *The World This Week*, ECONOMIST, November 8th-14th, 2008.

617. Edward Wong, *Taiwan's Leader Meets Chinese envoy*, November 6, 2008, N.Y. TIMES.

chosen not to diminish the genius of inventing such an idea, but to allude to the wise words written in 1967 by Lon L. Fuller, a renowned legal philosopher: "A fiction taken seriously, i.e., believed, becomes dangerous and loses its utility . . . . A fiction becomes wholly safe only when it is used with complete consciousness of its falsity."[618] As demonstrated earlier, the nongovernmental appearance of government interaction in the PRC-ROC relationship is a fiction, created and maintained by the PRC and ROC governments. It is a useful fiction as it has been the foundation of the PRC-ROC cross-border interaction for more than a decade. It loses its utility and may even become dangerous, however, if people get confused by the state-based/nongovernmental vocabulary and take the vocabulary more seriously than it deserves. Just as nongovernmental appearance enables PRC-ROC interaction, the idea that government interaction must be cloaked by nongovernmental appearance in the PRC-ROC relationship also limits its development.

For example, Chen Yunlin did not address Ma Ying-jeou as the ROC's President. According to Edward Wong of *The New York Times*, addressing Ma as the ROC's President "would have implied that the mainland [PRC] recognizes Taiwan's de facto independent status,"[619] and "[some] Taiwanese were irate . . . after learning that Mr. Chen avoided using Mr. Ma's formal title."[620] Avoiding formal, official title is consistent with the nongovernmental appearance put up by the PRC and ROC governments, but it also accentuates the widely shared belief that the current PRC-ROC interaction is only a transitional arrangement that awaits a more fundamental and permanent solution. Although a transitional arrangement is better than a fiercely fought dispute, the sense of awaiting a more fundamental and permanent solution may easily translate into a sense of rejection and perhaps a sense of insecurity. Chen's avoidance of Ma's formal title may be taken by some people as evidence of the PRC's intention to deprive the ROC of its President and democracy in the future. Just as it was predictable that Chen would avoid the use of Ma's formal title, it was also predictable that some ROC citizens would be "irate"[621] because of its omission and even engage in violent protests.[622] Although the nongovernmental appearance of government interaction has been helpful in the PRC-ROC relationship, it is not sufficient.

According to Fuller, the key to making a fiction safe is to be conscious of

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618. LON L. FULLER, LEGAL FICTION 9-10 (1967). It should be noted that Fuller urges "complete consciousness" of the falsity of legal fictions. *Id.* However, the extent to which a person can be "completely" "conscious" of one thing is debatable. For example, some scholars have examined issues of sensibility and imagination. See, for example, Richard D. Parker, *"Here, the People Rule": A Constitutional Populist Manifesto*, 27 VALPARAISO U. L. REV. 531-584 (1993), which was later revised to become the book RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (Harvard U. Press, 1994).

619. Edward Wong, *supra* note 617.

620. *Id.*

621. *Id.*

622. *Id.*

its falsity.[623] In the PRC-ROC interaction, the fiction is the distinction between state-based and nongovernmental interaction. As demonstrated earlier, the PRC-ROC interaction suggests that while activities such as marriage, trade, investment, and even crime may be undertaken with little, if any, regard for government-to-government diplomacy, they are still undertaken with the legal rules established by governments in mind.[624] The prevailing scholarship on the PRC-ROC relationship characterizes the relationship between the PRC and the ROC as dualistic,[625] with conflict within the public (political) sphere but cooperation within the private (economic and social) sphere. The dualistic characterization is accurate, but its underlying assumption regarding the separation between state and society is misguided. Although conflict and cooperation do paradoxically co-exist in the PRC-ROC context, state and society are actually inseparable. It is useful to compare Part II and Part III with a thoughtful paragraph written by Alford in 1987 when considering the treatment of "nonmarket economy" in the antidumping and countervailing duty laws of the United States:

> Adam Smith notwithstanding, there are no major segments of any national economy here [in the United States] or abroad operating as pure markets, wholly responsive only to supply and demand. Nor have there ever been any, for that matter, either at the time that Smith wrote or at any point prior to or since then. The simplest of national markets envisioned by Smith presumes a massive degree of government involvement in such things as maintaining national security and domestic tranquility, establishing a physical infrastructure of roads, harbors, sewers, and the like, issuing and regulating currency, protecting property rights, and providing a mechanism for the peaceful resolution of disputes that arise in that market. Without these, the forces of supply and demand—and, indeed, society itself—would not operate as they do now in the United States or anywhere else. To this skeleton, we [the United States] and other modern welfare states have added a vast array of government activities that clearly impinge upon the free operation of the forces of supply and demand including, among other things, the mandating of primary and secondary education, the operation of public schools and universities, the provision of certain basic health services, the regulation of use of the airwaves, the outlawing of prostitution and slavery, and the establishment and enforcement of worker, consumer, and

623. FULLER, *supra* note 618, at 9-10.
624. *See supra* Parts I, III.
625. *See, e.g.*, Cheng, *supra* note 7; BUSH, *supra* note 8.

environmental safety measures.[626]

The parallels between Alford's paragraph and Part II and Part III are obvious. In the criminal justice cases in Part III and domestic violence cases in Part II, the PRC and ROC governments maintain domestic tranquility. In Part II and Part III, the PRC and ROC courts are the mechanism for the peaceful resolution of disputes that arise in market and society. Although this article does not explicitly touch upon the outlawing of prostitution and slavery, Part III discusses illegal immigration. The parallels are both shocking and unsurprising. They are shocking because the two contexts are very different but indeed demonstrate some parallels. They are unsurprising because the economic and social interaction between the PRC and the ROC requires legal foundations, as pointed out by Alford and even earlier by American Legal Realism.[627] The nongovernmental appearance of governmental mechanisms is a fiction, created by the PRC and ROC governments to facilitate the social and economic exchanges between their people.

Although the word "fiction" carries negative connotations, nongovernmental appearance of governmental mechanisms has been a useful fiction. Nongovernmental appearance has allowed the PRC-ROC interaction to develop despite their mutual nonrecognition. The PRC-ROC context is by no means the first or the only context where the idea "nongovernmental" plays a role in cross-border politics. As discussed in Part I, for the purpose of avoiding embarrassment, track-two or multi-track diplomacy is designed by scholars and politicians to appear nongovernmental.[628] Compared with track-two or multi-track diplomacy, government networks are more "genuinely" nongovernmental as they denote the networking activities of government officials. Indeed, the "nongovernmental" quality of these networking activities is a major reason why Slaughter sees government networks as a viable proposal to improve global governance while avoiding a world government.[629] However, the enormous importance of purely unregulated networking activities may cause problems to democratic accountability, and Slaughter thoughtfully devotes a chapter of her book to this issue.[630] The need for democratic accountability and the proposed solutions such as greater transparency suggest that these networking activities are not as "nongovernmental" as they may seem.

After appreciating the falsity of the fiction, the next question is how to

626. William P. Alford, *When Is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and Other "Nonmarket Economy" Nations*, 61 S. CAL. L. REV. 79, 108-09 (1987) (citing KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1975)).

627. *See, e.g.*, AMERICAN LEGAL REALISM (William W. Fisher, Morton J. Horwitz, and Thomas A. Reed eds., Oxford U. Press 1993).

628. *See supra* Part I.A.

629. *See* SLAUGHTER, *supra* note 13.

630. SLAUGHTER, *supra* note 13, at 216-60; *see also* Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2000-2001).

move forward. There are several options. First, the PRC and the ROC may do well to apply the inhabitant-welfare approach used by the ICJ in the 1971 Namibia Advisory Opinion, as the inhabitant-welfare approach does not require nongovernmental appearance of governmental mechanisms.[631] Second, based upon their unique needs, the PRC and the ROC may attempt to negotiate a unique formula for their bilateral relationship. As long as the PRC and the ROC do not violate international human rights and respect third-party rights, hardly any state would object to a peaceful resolution of the PRC-ROC dispute. The key obstacle, of course, is that the PRC and the ROC have failed to resolve their sovereignty dispute for decades. The pessimism is found not only in the PRC-ROC context but also more broadly in international legal scholarship.

Perhaps surprisingly, the PRC-ROC interaction presents no less of a challenge to pessimistic scholars and analysts who have stressed the limits of international law and cross-border coordination. They assert that it is dangerously naïve to think that international law can truly regulate international affairs. The tense diplomatic relationship between the PRC and the ROC may appear to support the pessimistic perception that international law can hardly regulate interstate relations.[632] However, the development of the SEF/ARATS and Kinmen Accord mechanisms, discussed in Part II and Part III, demonstrates the efforts that have been made by the PRC and the ROC to pursue their mutual goals regarding civil and criminal justice.[633] Although the SEF/ARATS and Kinmen Accord mechanisms are not "international law" as the term is usually understood, they demonstrate that cross-border coordination is possible even under the trying conditions created by the unresolved sovereignty dispute between the PRC and the ROC.

Although criticism of international law or cross-border interaction provides valuable insights into the nature of international politics, such criticism may become more persuasive if more focus is put on the substance of the international law. Although analysis of international law has had little relevance to the development of the PRC-ROC interaction since 1987, some kind of cross-border coordination still develops in the PRC-ROC context. In addition, on some issues, such as combating cross-border crime, cross-border coordination is clearly a desirable outcome. Therefore, the PRC-ROC interaction suggests that the substance of international law or cross-border interaction is important in the consideration of the best approach to particular cross-border issues.[634]

When criticizing international law or cross-border interaction, critics have

631. *See supra* Part I.B.2.

632. *See supra* Part I.

633. *See supra* Parts II, III.

634. Gabriella Blum, a professor at Harvard Law School, develops a similar theme when examining conflict management in the contexts of protracted armed conflicts. *See* GABRIELLA BLUM, ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES (Harvard U. Press 2007).

not always been selective with the substance of international law. To be sure, critics have insightfully pointed out problems with some specific international legal rules,[635] and I admire the courage and wisdom to point out problems with international legal rules that are popular. In fact, their courage and analysis inspires me to urge more focus on the substance of international law. However, some criticisms of international law and cross-border interaction may be too general to be fair. For example, in their influential book *The Limits of International Law*, Jack L. Goldsmith of Harvard Law School and Eric A. Posner of University of Chicago Law School cite Adolf Hitler's Nazi Germany as a prime example of an entity that used international law as rhetoric to "mislead his enemies, avoid alienating neutrals, and pacify domestic opposition."[636] Indeed, Goldsmith and Posner's invocation of the Nazi Germany experience powerfully proves that it is possible for the language of international law to be abused and that failing to recognize such abuse can be enormously and tragically dangerous. However, not every use of international law is an abuse. If it is acknowledged that international law can be harnessed for both positive and negative purposes, it is useful to attempt to distinguish between such purposes. Moreover, if it is acknowledged that international law can achieve desirable goals in some contexts, it is useful to attempt to distinguish such contexts from others.

While critics may argue that it is a futile endeavor to attempt to distinguish positive from negative uses of international law, I respectfully disagree. Distinguishing between positive and negative uses is admittedly difficult, but to dismiss all uses of international law as abusive may amount to throwing out the baby with the bathwater. As demonstrated by the PRC-ROC interaction, cross-border activities—migration, marriage, crime, trade, and investment, to name just a few—have a variety of attributes and require a variety of government responses. While the debate continues regarding whether cross-border trade and migration are beneficial or harmful, few would think that cross-border crime should not be prohibited and punished. In addition, it would be difficult to identify a scholar who could sensibly argue that human trafficking is not a cross-border crime. In order to regulate these various cross-border activities, cross-border coordination among governments seems a beneficial, if not sufficient, governmental response.

As long as there is cross-border coordination among governments, entities make promises, have expectations, and perhaps sign documents through their representatives. As demonstrated earlier, the SEF/ARATS and Kinmen Accord mechanisms both involve documents signed by the representatives of the PRC and ROC governments.[637] Certainly, I appreciate the distance between, on the

635. *See, e.g.*, Jack Landman Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003).

636. JACK L. GOLDSMITH & ERIC A POSNER, THE LIMITS OF INTERNATIONAL LAW 168 (Oxford U. Press 2005).

637. *See supra* Part II.B.

one hand, current international legal rules and, on the other hand, merely promises, expectations, and documents signed by government representatives. Still, are they not evidence of cross-border coordination between the PRC and the ROC? In addition, the fact that the PRC-ROC relationship has been fraught with tension tends to support a more optimistic attitude. More specifically, the fact that the PRC and the ROC have been able to maintain cross-border coordination for more than two decades despite their sovereignty dispute appears to call for optimism regarding the future of cross-border interaction and the international legal rules that foster it.

Taken together, the two implications suggest that there should be more focus on the substance of international law and promises, expectations, and documents that do not readily enjoy the "classification" as international law. As discussed above, international law should adapt to contemporary challenges as they change over time.[638] On the one hand, critics of international law may need to recognize or account for the undeniable need for international law, or more broadly, cross-border coordination. On the other hand, proponents of international law may need to recognize or account for the fact that the current international legal rules may have to be reformed to fit contemporary needs. Policymakers and scholars should ask, "Are the specific international legal rules just or unjust? Do they enhance welfare or not?" The answers to these kinds of questions regarding the specific content of international legal rules can further enrich international legal scholarship.

In the longer term, enriched international legal scholarship may steer the PRC-ROC context toward a different, and potentially better, direction. Sovereignty is an important factor in the PRC-ROC dispute and, as a result, the PRC-ROC context may change if the importance of the sovereign state norm in international law changes. If scholars place an additional focus upon the substantive goals that international law should achieve, the PRC-ROC context may move in a different direction, which, to be sure, is only a very remote possibility. However, after examining the implications of the PRC-ROC interaction for international legal scholarship, it would be interesting to speculate about the implications that an enriched international legal scholarship may have for the PRC-ROC context.

Placing an additional focus upon the substantive goals that international law should achieve may lead to a re-examination of the importance of the sovereign state norm in international law.[639] According to some sociologists, the sovereign state norm prevails in the modern and contemporary eras not because—or at least not primarily because—it achieves more substantive goals than do other competing norms, but rather because entities emulate one another

638. *See supra* Part IV.

639. Some scholars have done admirable research on this issue. *See, e.g.*, PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES (Stephen D. Krasner ed., Columbia U. Press, 2001). Their work should gain more attention and attract more scholars to conduct further research.

and put pressure upon those that do not yet conform to the prevailing social norm. A particularly apt explanation of such organizational behavior was provided by Martha Finnemore, a political scientist at the George Washington University, when she described the lessons that political scientists may draw from sociologists:

> The modern bureaucratic state has become the sole legitimate form of political organization in the world; virtually all others have been eliminated. Empires, colonies, feudal arrangements, and a variety of other forms have become extinct and, perhaps more important, unimaginable in contemporary politics. This is not a functional result. . . . Extreme valuation on statehood as the only legitimate form of political organization makes many kinds of political conflict difficult to resolve. It means that self-determination requires having a state. If you are not a state, you are nobody in world politics, and national liberation groups understand this. This creates an all-or-nothing dynamic in many conflicts that might be more easily resolved if other organizational forms were available.[640]

Finnemore made an overstatement but might indeed capture the psychological dynamic underlying sovereignty-related disputes. Clearly, Finnemore's nobody-in-world-politics metaphor does not reconcile with either the PRC-ROC interaction examined in this article or the fact that the ROC is a member of the World Trade Organization and some other international organizations. On the other hand, some people (for instance, the protesters in Taiwan in November 2008) seem to hold the view that "[i]f you are not a state, you are nobody in world politics." Therefore, placing an additional focus upon the substantive goals that international law should achieve would lead to a thorough examination of Finnemore's observation that the dominance of the sovereign state norm in international law and politics "creates an all-or-nothing dynamic in many conflicts that might be more easily resolved if other organizational forms were available."[641] If such an examination confirms Finnemore's finding, then scholars of international law who care about the substantive goals of international law should be concerned with and attempt to ameliorate the all-or-nothing dynamic that makes cross-border conflicts difficult to resolve.

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640. Finnemore, *supra* note 3, at 332. In support of her argument, Finnemore cites John W. Meyer, *The World Polity and the Authority of the Nation-State, in* STUDIES OF THE MODERN WORLD-SYSTEM (Albert Bergesen ed., Academic Press 1980) and David Strang, *From Dependency to Sovereignty: An Event-History Analysis of Decolonization*, 55 AM. SOC. REV. 846-60 (1990).

641. *Id.*

For example, in 1992, Lori Fisler Damrosch, a professor at Columbia Law School and Co-Editor-in-Chief of American Journal of International Law since 2003, attempted, albeit implicitly, to ameliorate the all-or-nothing dynamic that might arise from the importance of the sovereign state norm in international law when she wrote:

> GATT's framers were prescient in devising formulas for participation going beyond 'states' or 'governments' in the classic sense. What motivated them in 1947 was the concern to provide for a workable approach to decolonization, but their pragmatic solution, focusing on functional autonomy rather than formalistic legal constructs, fits well with the realities of Taiwan's situation today. Other international agreements and organizations, based on more rigid formulations, can be expected to come under pressure for change as the state system itself changes. The GATT model is not the only one, but it has much to recommend it.[642]

As discussed earlier, both the PRC and the ROC are now members of the WTO (the progeny of the GATT) although the ROC is listed as "the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu" rather than "the Republic of China" in WTO records.[643] More attempts to ameliorate the all-or-nothing dynamic, such as that made by Damrosch in 1992, could potentially lead to a more fundamental change of the status of the sovereign state norm, and in turn affect the dynamic of the PRC-ROC context and other contexts similarly perplexed by the all-or-nothing dynamic. Of course, it is exceedingly difficult or unimaginable to change an international legal norm as fundamental as the sovereign state norm. However, the international legal rules that comprise the sovereign state norm are "not unassailable and immutable rules of science that dictate particular actions, but human constructs that can be manipulated."[644] If, over the longer term, governments around the world can put less emphasis upon their status or sovereignty and greater emphasis upon regulating and facilitating their cross-border interaction, many cross-border conflicts, including the PRC-ROC dispute, would take a very different shape.

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642. Lori Fisler Damrosch, *GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics*, 1992 COLUM. BUS. L. REV. 19, 38 (1992).

643. *See supra* note 101.

644. Alford, *supra* note at 19. What Alford describes with the quoted text are economic principles, not the international legal rules that comprise the sovereign state norm. I use the quoted text because it conveys the message I want to convey. *See also* STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas J. Biersteker & Cynthia Weber eds., Cambridge U. Press 1996).

APPENDIX I: SOURCES OF MATERIALS

The materials used by this project come from a variety of sources. This Appendix discusses the sources and method of my research.

Both the PRC and ROC maintain a fairly useful and up-to-date catalog of laws and regulations. On the PRC side, the most useful source is the website for the Taiwan Affairs Office of the State Council (*guowu yuan Taiwan shiwu bangong shi*).[645] On the ROC side, two websites are useful: (1) the website for the Mainland Affairs Council of the Executive Yuan (*xingzhengyuan dalu weiyuanhui*);[646] and (2) the website for the Straits Exchange Foundation (*caituan faren haixia jiaoliu jijinhui*).[647]

This Article relied on two online databases for the PRC and ROC case law. The PRC has no centralized reporting system for court cases. In my experience, Lawyee,[648] a database for the law of the PRC, renders more cases for each search inquiry than other databases do. On the ROC side, the Judicial Yuan, the judicial department of the ROC government, maintains a centralized reporting system for court cases.[649] Both databases are in the Chinese language.

The way I did my research is both modern and old-fashioned. I relied on the online databases to search for relevant case law. I used "Taiwan" as my keyword in the Lawyee database and "mainland" (*dalu*) as my keyword in the database maintained by the Judicial Yuan. Both databases rendered hundreds of cases for my search inquiries. Then I read each case to determine its relevance.

645. Taiwan Affairs Office of the State Council, http://www.gwytb.gov.cn/ (last visited May 27, 2009).

646. Mainland Affairs Council, http://www.mac.gov.tw/ (last visited May 27, 2009).

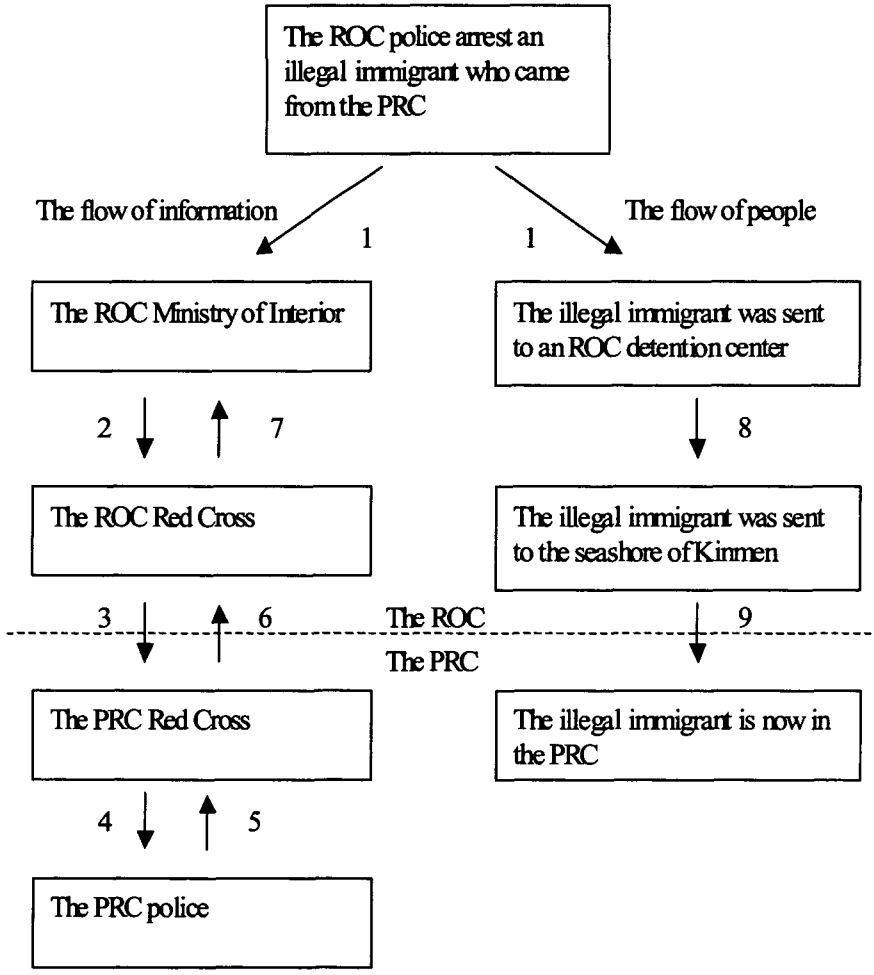
647. Straits Exchange Foundation, http://www.sef.org.tw/ (last visited May 27, 2009).

648. Lawyee.net, http://www.lawyee.net/ (last visited May 27, 2009).

649. The Judicial Yuan of the Republic of China Law and Regulations Retrieving System, http://jirs.judicial.gov.tw/Index.htm (last visited May 27, 2009).

APPENDIX II: THE PROCESS OF REPATRIATION

The numbers beside the arrows indicate the sequence of events.



ONE TEXT, TWO TALES:

WHEN EXECUTIVE/JUDICIAL BALANCES DIVERGED IN ARGENTINA AND THE UNITED STATES

Mitchell Gordon*

INTRODUCTION

Liberal democracy is hard work. Today we are quicker to spot the fallacy of electoralism, the "faith that merely holding elections will channel political action into peaceful contests among elites and accord public legitimacy to the winners. . . ."[1] Experience has taught us that democratic transition and consolidation depend on other institutions of liberal constitutionalism, including free and independent courts.[2] We are still learning, however, that there is often a wide difference between what a constitution provides and how it operates. "The gap between rules and practices highlights the need to focus on informal patterns of power."[3]

In evaluating judicial independence, for instance, "an analysis of formal institutions – such as the text of the national constitution or the law on the books, . . . – might suggest independence, but how political actors apply and work around those formal institutions appears to be a much more important

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1. Christopher J. Walker, *Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law*, 18 FLA. J. INT'L L. 745, 752 (2006) (quoting TERRY LYNN KARL, IMPOSING CONSENT? ELECTORALISM VERSUS DEMOCRATIZATION IN EL SALVADOR, IN ELECTIONS AND DEMOCRATIZATION IN LATIN AMERICA 34 (Paul W. Drake & Eduardo Silva eds., 1986)).

2. *See generally* Mark Freeman, *Constitutional Frameworks and Fragile Democracies: Choosing Between Parliamentarianism, Presidentialism and Semi-Presidentialism*, 12 PACE INT'L L. REV. 253 (2000); William Maley, *Democratic Governance and Post-Conflict Transitions*, 6 CHI. J. INT'L L. 683 (2006); Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 750-65.

3. Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 763 (quoting REBECCA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA 23 (2004)).

indicator[.]"[4] To evaluate whether a nation's highest court is independent, "formal independence is a singularly unhelpful construct," particularly in evaluating nations in Latin America, where formal rules and informal rules are often separated by a wide gap.[5] As Rebecca Bill Chavez has noted, "[I]nformal institutions and practices that allow Latin American presidents to control the courts are often stronger than the formal constitutional guarantees of judicial independence."[6]

Although the constitution of Argentina was heavily borrowed from the U.S. Constitution, those constitutions operated in entirely different ways in the 1930s and 1940s, when each of those nations' presidents directly challenged the autonomy and independence of their national supreme court. In the twentieth century, Argentina, unlike the United States, experienced military coups, dictatorships, human rights abuses, and corruption – all of which departed from the Argentine constitution's written text.[7] "To understand the role of the judiciary in Argentina, the constitutional text does not tell the entire story. One has to look at how the text was applied and how the courts responded."[8]

In this Article, I shall consider Argentina's experience with growing executive power after the military coup of 1930 (Part 1), and the U.S. experience during the rise and fall of Franklin Roosevelt's ill-fated Court-packing proposal in 1937 (Part 2). In Part 3, I shall say more about the very different outcomes of both episodes, with some thoughts on the wide variation between these nations' constitutional histories. It is fascinating to consider those histories at the same time because, taken together, they demonstrate the severe limitations of the explanatory value of constitutional text. I shall close with a few thoughts on the limitations of text and the importance of understanding constitutional culture in seeking to understand how constitutions actually operate.

I. ARGENTINA: THE DE FACTO DOCTRINE AND IMPEACHMENT

The men who drafted Argentina's original Constitution of 1853 borrowed heavily from the Constitution of the United States, in the hope that copying the

4. Christopher J. Walker, *Judicial Independence and the Rule of Law: Lessons From Post-Menem Argentina*, 14 SW. J. L. & TRADE AM. 89, 114 (2007); Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 763.

5. *See* Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?* 40 TEX. INT'L L.J. 595, 597-98 (2005); Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 5-7 (2006).

6. Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 764-65 (citing CHAVEZ, *supra* note 3, at 23-24).

7. Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 95-96; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 765.

8. Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 749.

U.S. constitutional system would help Argentina copy U.S. prosperity.[9] The father of Argentine constitutionalism, Juan Bautista Alberdi, argued in *Bases y puntos de partida para la organización política de la República Argentina (Bases and Points of Departure for the Political Organization of the Argentine Republic)* that adopting the political liberties of the U.S. system would lead to similar economic prosperity.[10] Alberdi and others in his intellectual circle, known as the Generation of '37, embraced the cause of emulating the United States.[11] Most of the delegates to the 1853 constitutional convention approved of Alberdi's vision of a new Argentina patterned after the United States.[12]

As a result, the 1853 constitution borrowed heavily from the U.S. Constitution of 1787.[13] Like the U.S. Constitution, the Argentine constitution established a republican and federalist form of government, designed according to the separation-of-powers principle, with power divided between a judiciary, a president, and a bicameral congress.[14] In the words of one of the convention's most prominent delegates, José Benjamin Gorostiaga, the Constitution of Argentina was "cast in the mold of the Constitution of the United States, the only model of a true federation which exists in the world. . . ."[15] Indeed, the textual similarities were so close that many courts and commentators believed later that the framers had adopted by implication U.S. constitutional jurisprudence, thereby giving decisions of the U.S. Supreme Court the status of

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9. *See* Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. U. L. REV. 1483, 1492, 1502-03 (1997); *see also* Raul Alfonsín, *Address on the Occasion of the Bicentennial of the United States Constitution: June 19, 1987*, 60 TEMP. L.Q. 971, 973 (1987).

10. Miller, *The Authority of a Foreign Talisman*, *supra* note 9, at 1501-03 (citing Juan Bautista Alberdi, *Bases y puntos de partida para la organización política de la República Argentina*, *in* 3 OBRAS COMPLETAS DE JUAN BAUTISTA ALBERDI 371, 409, 426-38, 449-52, 456, 527 (Buenos Aires, La Tribuna Nacional 1886)); *see also* Alfonsín, *supra* note 9, at 973.

11. *See* NICOLAS SHUMWAY, THE INVENTION OF ARGENTINA 126-32 (1991); *see generally* JEREMY ADELMAN, REPUBLIC OF CAPITAL: BUENOS AIRES AND THE LEGAL TRANSFORMATION OF THE ATLANTIC WORLD (1999).

12. Miller, *The Authority of a Foreign Talisman*, *supra* note 9, at 1512; *see also* Jonathan M. Miller, *Courts and the Creation of a "Spirit of Moderation": Judicial Protection of Revolutionaries in Argentina, 1863-1929*, 20 HASTINGS INT'L & COMP. L. REV. 231, 239 (1997).

13. *See* Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891, 892 (1988); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 270-71 (2003); Horacio Spector, *Constitutional Transplants and the Mutation Effect*, 83 CHI.-KENT L. REV. 129, 132-33 (2008); Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 767-68; *see also* William C. Banks & Alejandro D. Carrio, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1, 12-13 (1993).

14. Banks & Carrio, *supra* note 13, at 12-13 (citing CONST. ARG. arts. 1-35); Manuel José García-Mansilla, *Separation of Powers Crisis: The Case of Argentina*, 32 GA. J. INT'L & COMP. L. 307, 310 (2004) (citing CONST. ARG. art. 1); Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 767-68 (citing CONST. ARG. art. 2).

15. Rosenkrantz, *supra* note 13, at 270.

controlling authority in Argentine constitutional cases.[16]

Argentina's embrace of U.S. constitutional law and practice accomplished many of its early goals: from 1860 to 1930, Argentina enjoyed spectacular economic growth and unbroken constitutional rule – an impressive record, particularly for a Latin American nation.[17] Notwithstanding this constitutional stability and economic success, Argentina struggled to establish broad-based democratic institutions and a culture of political participation.[18]

The balance of executive/judicial power in Argentina began to change in the 1930s, in part because of the Supreme Court's recognition of de facto executive authority.[19] Argentina's seven decades of unbroken constitutional rule ended on September 6, 1930, when the government of President Hipolito Yrigoyen was brought down in a military coup.[20] The leader of the coup, retired General José F. Uriburu, after declaring himself president and promising "respect for the Constitution and basic laws in force," sent a message to the Supreme Court, informing its members that he had established a provisional government and seeking recognition of that government's de facto authority.[21]

The military regime's bid for legitimacy presented the Supreme Court with a dilemma. In the words of William Banks and Alejandro Carrio:

> If [the Court] declared the new government unconstitutional, there was no mechanism to assure that its decree would be obeyed. Nor was there any protection for the justices' independence or, for that matter, their tenure. The Court could risk losing whatever ability it had retained to control the excesses of the military government. On the other hand, if it upheld the government, it would legitimate an unconstitutional seizure of power and thereby lessen the Court's independence

16. Barker, *supra* note 13, at 908 (citing Segundo V. Linares Quintana, *Comparison of the Constitutional Basis of the United States and Argentine Political Systems*, 97 U. PA. L. REV. 641 (1948-49)).

17. Thomas H. Hill, *Introduction to Law and Economic Development in Latin America: A Comparative Approach to Legal Reform*, 83 CHI.-KENT L. REV. 3, 21 (2008) (citing Spector, *supra* note 13, at 132-34); Edward C. Snyder, *The Menem Revolution in Argentina: Progress Toward a Hemispheric Free Trade Area*, 29 TEX. INT'L L.J. 95 (1994) (citing DANIEL PONEMAN, ARGENTINA: DEMOCRACY ON TRIAL 155 (1987)).

18. Emilio Mignone, *The Role of Private Parties and the Media in Creating Accountability*, 12 B.C. THIRD WORLD L.J. 317, 337-38 (1992).

19. *See* Banks & Carrio, *supra* note 13, at 28-29; Tim Dockery, *The Rule of Law Over the Law of Rulers: The Treatment of De Facto Laws in Argentina*, 19 FORDHAM INT'L L.J. 1578, 1594-98 (1996); García-Mansilla, *supra* note 14, at 348-52.

20. *See* Banks & Carrio, *supra* note 13, at 25-27 (citing generally ROBERT D. CRASSWELLER, PERÓN AND THE ENIGMAS OF ARGENTINA, ch. 3 (1988)); García-Mansilla, *supra* note 14, at 349-50; Mignone, *supra* note 18, at 338-39.

21. Banks & Carrio, *supra* note 13, at 25 (quoting ROBERT POTASH, THE ARMY AND POLITICS IN ARGENTINA, *1928-1945*, at 58 (1969)); García-Mansilla, *supra* note 14, at 349.

and the integrity of the legal system.[22]

Faced with this dilemma, the Court chose the path of institutional self-preservation, opting to grant constitutional authority to the military regime. Four days after the coup, the Court issued a brief opinion, signed by all of the Court's members, announcing that it would consider the new government to possess de facto authority, beyond the power of courts to question.[23]

The Court's logic was not elaborate. The justices noted the longstanding principle that the people have a right to revolution or insurrection.[24] They reasoned that the regime enjoyed de facto authority because it possessed the power and will to secure national peace and order; it had vowed to maintain the supremacy of the constitution; and it was in a position to protect life, liberty, and property.[25] The Court justified recognizing the regime's de facto authority due to "necessity," "public policy," and for the purpose of "protecting the citizens, whose interests could be affected because it is not now possible for them to question the legality of those now in power."[26] By adopting the de facto doctrine, the Court held that a de facto government can provisionally exercise all national power as a result of its successful revolution against an existing de jure authority.[27]

Whatever the merits of the Court's reasoning, the effect of the de facto doctrine was apparent. As one commentator has written, "[T]he obvious purpose [of the de facto doctrine was] . . . to give the new government a semblance of regularity and legality . . . to invest, in other words, the government with a *colorable title* to office, a *plausible investiture* and an appearance of general acceptance by and support of the people."[28] At the same time, it allowed the Court to avoid hearing challenges to the constitutional legitimacy of the military authorities.

In light of these purposes, recognizing the de facto doctrine allowed the Court to accomplish its goals in the short term: the Court was able to preserve itself as an institution – the military regime did not remove the justices from office – and the Court continued to rule on the constitutionality of government

22. Banks & Carrio, *supra* note 13, at 27; *see also* García-Mansilla, *supra* note 14, at 349-50; Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 98-99.

23. Decree of Sept. 10, 1930, 158 Fallos 290-91 (Arg.); *see* Dockery, *supra* note 19, at 1617; García-Mansilla, *supra* note 14, at 349-50; Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 98-99.

24. *See* Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 773; *see also* Decree of Sept. 10, 1930, *supra* note 23.

25. *See* Dockery, *supra* note 19, at 1596, 1609-10 (citing Decree of Sept. 10, 1930, *supra* note 23, at 290).

26. Banks & Carrio, *supra* note 13, at 27-28 (citing Decree of Sept. 10, 1930, *supra* note 23, at 291).

27. Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 98-99 (citing García-Mansilla, *supra* note 14, at 350-51); *see also* Dockery, *supra* note 19, at 1596-98.

28. J. Irizarry y Puente, *The Nature and Powers of a "De Facto" Government in Latin America*, 30 TUL. L. REV. 15, 33 (1955).

action (although not on the constitutionality of the government itself).[29] But while the Court was able to accomplish these short-term goals, in the long run it paid a heavy price for departing from the established rules. "[O]nce the Court started down that path, it gradually lost the ability to say 'no' to the Executive in an authoritative fashion," Jonathan Miller wrote.[30] "[I]t never developed the authority to design new constitutional restrictions on executive authority."[31]

In the de facto doctrine are "the origins of the decline of legal thought in Argentina and the initial path to continuous destruction of separation of powers by both action of the executive and omission by the Legislative and judicial branches."[32] In 1930, the new government was itself illegitimate, having asserted its right to rule without the benefit of elections and constitutional processes. "The Supreme Court simply abdicated its responsibility to measure official conduct against legal norms."[33]

Whether or not the Court had foreseen all of these long-term consequences, in the 1930s and 1940s it did make several attempts to limit the scope of the de facto doctrine.[34] Its recognition of the de facto doctrine in 1930 had recognized only the constitutional legitimacy of the military government as a whole; it had not addressed the constitutional validity of specific exercises of the de facto government's powers. The Court therefore continued to assert its own role as the final arbiter of de facto authority.[35]

For instance, the Court initially maintained that the authority of a de facto executive afforded no basis for powers that belonged rightfully to Congress or to the courts.[36] (The Court later modified this position.)[37] Moreover, the Court held generally that a de facto law might have temporary legitimacy if it arose from necessity and urgency, but that the de facto law would lose that legitimacy later upon the return of democratic rule.[38] This theory, known as *caducidad*, was followed by the Court between 1933 and 1947, with some modifications in 1945. Taking the position that de facto authority was limited essentially to acts required to keep the government operating, the Court was willing to strike down many of the executive decrees issued by de facto governments.[39]

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29. *See* GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA 63 (2005).

30. Jonathan M. Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and Its Collapse in Argentina*, 21 HASTINGS INT'L & COMP. L. REV. 77, 176 (1997).

31. *Id.* at 176.

32. García-Mansilla, *supra* note 14, at 350 (citing Banks & Carrio, *supra* note 13, at 28-29).

33. Banks & Carrio, *supra* note 13, at 28; *see also* García-Mansilla, *supra* note 14, at 349-50.

34. García-Mansilla, *supra* note 14, at 350.

35. *Id.* at 351.

36. *Id.* at 350-51; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 773-74.

37. Dockery, *supra* note 19, at 1617-18; Irizarry y Puente, *supra* note 28, at 42-44; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 773-74.

38. *See* Dockery, *supra* note 19, at 1610.

39. *Id.*; García-Mansilla, *supra* note 14, at 351.

An example of the Court's attempts to limit the scope of the de facto doctrine was its decision in *Administracion de Impuestos Internos v. Malmonge Nebreda*, decided in 1935.[40] In *Malmonge Nebreda*, the Court reaffirmed the position it had taken since 1930, that the Uriburu government had replaced only the executive branch, not the entire national government; and that any de facto authority exercised by that regime or its successors was therefore limited to executive authority, and did not extend to legislative or judicial powers.[41]

But the Court also acknowledged that in instances of extraordinary necessity, and when Congress was itself absent, a de facto executive might be compelled to issue emergency decrees that amounted to de facto legislative enactments. However, this was only permissible in cases of extreme urgency, and such de facto laws would become ineffective upon the return of Congress (unless Congress chose to ratify them).[42] By striking such balances between legitimacy and exigency, the Court sought to close the "Pandora's Box" it had opened in the wake of the 1930 coup.

While the Court in *Malmonge Nebreda* and other cases sought to limit the scope of the de facto doctrine, the health of Argentine politics continued to flag. As presidents began to rely more and more on emergency executive decrees, Congress and the political parties failed to object, essentially acquiescing in a dramatic shift of legislative power to the executive branch. Rather than performing their constitutional functions as a check against the abuse of executive powers, Congress and the courts largely stood aside.[43] In the words of a contemporary commentary in *La Nación*:

> The facts reveal that Congress is planning its own ruin in consenting to the usurpation of its privileges by the Executive Power. Not only does it fail to stop the advance, but it does not adopt measures designed to avoid it in the future. In its indifference toward the alteration of the constitutional balance, the chambers are permitting themselves to be despoiled even of the traditional prerogatives of parliaments.[44]

Congressional acquiescence in the expansion of executive authority thus was altering the traditional balance of power even before the advent of Perónism. The failure of the political parties – what Manuel García-Mansilla has called "the lack of seriousness of political parties" during this period – made matters worse. Widespread electoral fraud and the corruption of the political parties had been contributing factors in the 1930 coup, and democratic

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40. Corte Suprema de Justicia [CSJN],1935, "Administracion de Impuestos Internos v. Malmonge Nebreda," Fallos (1935-172- 365) (Arg.).

41. *See* Dockery, *supra* note 19, at 1610-11.

42. *See* García-Mansilla, *supra* note 14, at 350-51.

43. *Id.* at 356; Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 176.

44. *See* García-Mansilla, *supra* note 14, at 377 (citing Linares Quintana, *supra* note 16, at 656).

dysfunction made it harder to prevent the post-1930 expansion of executive power.[45] As members of both the Radical and Conservative blocs increasingly lost faith in the democratic process and sought instead to enlist the support from outside the system, the military deepened its involvement in the nation's politics.[46]

These pressures on the Argentine political system, combined with the military's continuing role in national politics, led to a second coup in June 1943.[47] The leaders of the new military regime, unlike those of the previous coup, suspended constitutional rule; but the Supreme Court faced essentially the same question as in 1930: whether to recognize the new government's de facto authority in exchange for its own survival.[48] Predictably, the Court made the same choice, recognizing the new regime's authority in a resolution that was an exact replica of the one the Court had issued in 1930.[49]

But the Court also sought to preserve its independence during the next few years: it continued to maintain its previous limitations on de facto authority, and struck down enactments it deemed to exceed those limitations.[50] Thus, while the justices had again conferred constitutional legitimacy on a regime that had gained power through extra-constitutional means, they were nevertheless unafraid to collide with that regime on specific questions arising under the constitution.

In the mid-1940s the Court found itself increasingly at odds with the person who – though he officially held the title of Vice President – was in fact the military regime's most powerful figure: Colonel Juan Perón.[51] Perón's popularity and influence steadily grew; in February 1946 he won the presidency in a democratic election and began to return the government to a civilian footing.[52] Meanwhile, the Court was growing increasingly unpopular, both for its opposition to Perón's social and economic programs and for its perceived favoritism toward the Argentine oligarchy.[53]

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45. *See* García-Mansilla, *supra* note 14, at 377-79.

46. ROBERT A. POTASH, THE ARMY AND POLITICS IN ARGENTINA, 1928-1945 74, 94, 283-85 (1969); DAVID ROCK, ARGENTINA: 1516-1987 FROM SPANISH COLONIZATION TO ALFONSÍN 214-17 (1987); Mugambi Jouet, *The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History*, 39 U. MIAMI INTER-AM. L. REV. 409, 421-22 (2008).

47. *See* Dockery, *supra* note 19, at 1597-98; Jouet, *supra* note 46, at 421-22.

48. *See* Banks & Carrio, *supra* note 13, at 27-28, 28 n.138; Dockery, *supra* note 19, at 1598; Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 159-60; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 774.

49. *Compare* decree of June 1943, 196 Fallos 5 (1943) *with* decree of Sept. 10, 1930, 158 Fallos 290-91 (Arg.).

50. *See* García-Mansilla, *supra* note 14, at 351.

51. POTASH, *supra* note 46, at 209-16, 227-28, 238-82; García-Mansilla, *supra* note 14, at 351-52; Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 153-62.

52. ROCK, *supra* note 46, at 262-63; Ramiro Salvochea, *Clientelism in Argentina: Piqueteros and Relief Payment Plans for the Unemployed – Misunderstanding the Role of Civil Society*, 43 TEX. INT'L L.J. 287, 293 (2008).

53. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History*

The Court responded to these challenges by rolling back some of its earlier controls on de facto authority. Between 1945 and 1947, without overruling the underlying doctrine of *caducidad*, the Court altered its stance on the legislative powers of de facto regimes. The Court broadly held that de facto governments require certain powers to function, and may therefore legitimately exercise those powers if they also maintain a proper respect for the rights and guarantees provided by the constitution. Under the existing doctrine of *caducidad*, however, the Court held that de facto executives were barred from enacting laws on criminal matters; interfering with the courts; or repealing, suspending, or changing other laws that had been enacted constitutionally.[54] Yet neither the Court's new leniency toward de facto authority, nor Perón's efforts to return Argentina to civilian rule, alleviated the growing rift between Perón and the Court.

The Court suffered its most serious blow from 1946-47, when Perón and his supporters successfully sought to impeach and remove all but one of the Court's members.[55] An ultimate showdown between Perón and the Court was probably inevitable, as Perón and the Court had already found themselves at cross purposes in 1945 and early 1946, before Perón's election as president.[56] One of the essential elements of the Perónist movement, organized labor, had also been battling with the Court particularly since its decision in the *Dock Sud* case in early 1946, a ruling that Perón had openly attacked as part of his presidential campaign.[57] (In *Dock Sud*, the Court struck down one of the military regime's key programs, the Argentine version of the National Labor Relations Board.)[58] It was therefore unsurprising that Perón moved against the Court during the first months of his presidency.

While it was perhaps unavoidable that Perón would challenge the Court directly in some way, his decision to do so through the particular process of impeachment proceedings was not a foregone conclusion. He appears to have contemplated at least two other options. First, Perón considered and rejected the alternative of simply increasing the number of justices on the Court, thereby allowing his government to name additional members who were sympathetic with his political agenda – an Argentine version of Roosevelt's Court-packing plan in the United States. It has been suggested that Perón rejected this course

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and Argentine Examples to Explain the Transplant Process, 51 AM. J. COMP. L. 839, 870 (2003).

54. *See* Corte Suprema de Justicia [CSJN], 1945, "Municipalidad de la Ciudad de Buenos Aires v. Mayer," Fallos (1945-209-272) (Arg.); Dockery, *supra* note 19, at 1611; Irizarry y Puente, *supra* note 28, at 41-43.

55. *See* Dockery, *supra* note 19, at 1598-99; Becky L. Jacobs, *Pesification and Economic Crisis in Argentina: The Moral Hazard Posed by a Politicized Supreme Court*, 34 U. MIAMI INTER-AM. L. REV. 391, 407 (2003); Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 80, 166-72.

56. Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 157, 157 n.385.

57. Corte Suprema de Justicia [CSJN], 1946, "Cía. Dock Sud de Buenos Aires Ltda." Fallos(1946-204- 23) (Arg.); Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 157-58, 161-62.

58. *See* Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 775.

because he sought to provoke a national debate about the Court's role, a goal that was better served by the impeachment process.[59]

A second option was to ignore the constitution and to simply replace the justices themselves, without putting the nation through the ordeal of a formal impeachment.[60] Although such a step was unquestionably authoritarian, it would have been characteristic in light of actions Perón had already taken by this time. Again, he may have rejected this option and chosen impeachment instead to incite controversy over the Court's past actions.[61] Moreover, Perón did not operate in a political vacuum: surely he would have paid a price had he attempted simply to work outside the constitution in his confrontation with the Court.

Indeed, even the decision to formally impeach the Court – a step squarely within the constitution's letter, if not its spirit – drew vigorous opposition. Perón of course faced the ire of his traditional political adversaries, who included socialists, liberals, and some in the press. More interesting were the complex crosswinds within his own coalition, particularly from the Catholic Church. As Jonathan Miller has written, contemporary evidence suggests that Catholics, a key segment of Perón's base, were unenthusiastic about the decision to impeach. Perón might have settled on the formal impeachment route because replacing the justices informally, or extra-constitutionally, would have compounded his troubles with the organized church.[62]

On Monday, July 8, 1946, the head of the Perónist bloc, Rodolfo Decker, introduced in the House of Deputies a bill to impeach most of the members of the Argentine Supreme Court.[63] Broadly speaking, the charges against the Court fell into two categories.[64] First, the Court was accused of overstepping the limits of its judicial role and of acting instead in a political role.[65] Ironically, two of the incidents cited to show that the Court had improperly assumed a political role were its decisions to recognize the de facto regimes that had come to power as a result of the 1930 and 1943 coups.[66] The Court stood accused of "mixing into political issues through the Pronouncements of 1930 and 1943, legitimizing the de facto governments," and was specifically admonished for not enforcing the existing requirements for succession to the presidency.[67]

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59. Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 159.

60. *Id.* Perón could have argued, for instance, that all constitutional appointments, including judicial appointments, take on de facto status when a de facto government takes over the executive and legislative branches – thus subjecting the justices to removal. *Id.* at 159 n.393.

61. *Id.* at 159.

62. *Id.*

63. *Id.* at 158.

64. *See* HELMKE, *supra* note 29, at 64.

65. *Id.*

66. Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 159-61.

67. *Id.* Augmenting the irony, in both instances it had been the Court's own chief justice who was constitutionally entitled to assume the presidency. *Id.*

Besides being improperly "political" in initially recognizing the de facto regimes of 1930 and 1943, the Court was also admonished for its efforts to limit the scope of those governments' authority.[68] That is, in reviewing the constitutionality of the acts of the de facto governments, the Court had "assumed political powers outside of the judicial function by controlling and impeding fulfillment of the social goals of the revolution of 1943 and writing judgments with political designs."[69] It had been overly political, for example, for the Court to adhere to the position that the authority of a de facto government was limited to necessary executive functions, and did not include the power to issue legislative enactments with lasting effect.

The second set of charges accused the Court of demonstrating unfair and improper prejudice against organized labor. Although the bill of impeachment does mention several specific rulings, the real complaint against the Court was not the inner workings of its jurisprudence; it was the Court's overall approach to Perón's social and economic agenda. The floor debates concerned mainly whether the justices were in step with the times, that is, whether it "had been sufficiently socially progressive during the 1930s and willing to reinterpret the constitution in light of new social needs," in Miller's words.[70]

Thus, on one hand, the Court was accused of having been improperly political when it recognized the de facto authority of the military governments in the first place; but on the other hand, it was also accused of being improperly political when it tried later to delineate the limits of what those governments could constitutionally do. Moreover, as Miller has noted, it is hard to reconcile the political charges with the labor charges: the Court was accused of being too political in recognizing and shaping de facto authority, but in a sense it was also accused of not being political enough, since it had neglected to consider social and economic needs in its reading of the constitution.[71] Put charitably, the charges against the Court seem to come from different directions.

The impeachment proceedings lasted for more than nine months and consumed the calendars of both houses of Congress. No less than thirty sessions of the Senate were devoted at least in part to hearing the charges and evidence against the Court, although the eventual outcome was beyond doubt.[72] Few were surprised when, on Wednesday, April 30, 1947, Congress took the unprecedented step of removing four of the five justices of the Argentine Supreme Court.[73]

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68. *Id.* at 161-62.

69. *Id.* at 160 (quoting Impeachment Proceedings, at 12 (House of Deputies accusation presented to the Senate)).

70. Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 161.

71. *Id.* at 162.

72. *Id.* at 156. Perónists controlled every seat in the Senate and two-thirds of the House of Deputies.

73. *Id.*

II. UNITED STATES: ROOSEVELT AND THE COURT-PACKING PLAN

In the United States, although many observers had expected the New Deal regulatory agenda to run aground upon reaching the U.S. Supreme Court, the Court's decisions were more mixed and at times even encouraging for New Deal partisans until 1935.[74] Especially encouraging were two cases in 1934 involving state legislative decisions, *Home Building & Loan Association v. Blaisdell*[75] and *Nebbia v. New York*.[76] *Blaisdell, Nebbia*, and other early decisions suggested that the Court might be willing to afford the New Deal a wide berth in deference to dramatic changes in the economy and society.[77] Moreover, the Court's initial treatment of the New Deal programs themselves was either favorable or at least unalarming.[78]

But in May 1935, the Court appeared to start down a very different path. The first sign of trouble was the Court's invalidation of the Railroad Retirement Act on May 6, raising doubts about another program that was similar but far more consequential: Social Security.[79] The rail pension decision "sent shock waves through the White House and the New Deal agencies [and] . . . created deep fissures between the executive branch and the Supreme Court," in the words of a preeminent historian of the era, William Leuchtenburg.[80]

Any remaining hopes of avoiding a collision between Roosevelt's program and the Court were erased on May 27, 1935, a day that would be remembered as Black Monday.[81] In a series of decisions announced that day,

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74. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 988 (2000); Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 280 (2000); *see also* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, *1789-1889* 26 (1985); ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT 175-77 (1960).

75. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (upholding a Minnesota statute allowing foreclosure delays for debtors in distress).

76. Nebbia v. New York, 291 U.S. 502 (1934) (upholding a state regulatory law regulating the price of milk).

77. *See* Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 989; *see also* Charles M. Freeland, *The Political Process as Final Solution*, 68 IND. L.J. 525, 539-42, 569 (1993).

78. *See generally* United States v. Bankers Trust Co., 294 U.S. 240 (1935) (permitting the government to repudiate "gold clauses" in private contracts, though not in public ones). In *Panama Refining v. Ryan*, 293 U.S. 388 (1935), although the Court struck down a portion of the National Industrial Recovery Act authorizing the president to prohibit the interstate transport of "hot oil," the Roosevelt administration thought the decision an anomaly, and was encouraged by language in the opinion reaffirming that executive agencies were entitled to flexibility and deference. *See* Stephen O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?* 30 MCGEORGE L. REV. 863, 875-76 (1999).

79. *See* R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 360 (1935); Kline, *supra* note 78, at 879.

80. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 27 (1995).

81. *See* Alfred C. Aman, Jr., *Symposium: Bowsher v. Synar*, 72 CORNELL L. REV. 421, 421-36 (1987); Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 245-

the Court restricted the President's power to remove members of independent regulatory commissions;[82] struck down the Frazier-Lemke Farm Mortgage Act of 1934, which had placed a moratorium on farm mortgage payments;[83] and held a portion of the National Industrial Recovery Act unconstitutional for giving the President excessive discretion.[84] New Dealers were stunned by the Black Monday decisions: a few days later the President told reporters that the Court had relegated the nation to the "horse-and-buggy" definition of interstate commerce.[85] Organized labor was highly critical of the decisions, Congress temporarily stopped work on New Deal legislation, and numerous proposals were introduced in Congress to curb the power of the Court.[86]

The anti-Court animus that formed after Black Monday was aggravated further the following January when the Court's *Butler* decision struck down the crop-control provisions of the Agricultural Adjustment Act (AAA).[87] The AAA was a popular New Deal measure, and *Butler* became something of a rallying cry -- the beginning of more organized efforts to "do something" to fix whatever was the matter with the Court.[88] In Congress, more than a hundred bills were introduced that proposed in some fashion to contain the Court's power.[89] A flood of mail poured into the White House and the halls of Congress, castigating the Supreme Court; many of the denunciations proposed that the Court be brought into the twentieth century by requiring the justices to retire upon reaching 65 or 70.[90] Near Ames, Iowa, six of the justices were hanged in effigy by a group of Iowa State students.[91]

Any doubts about where the Court stood seemed to vanish completely in the spring of 1936. In a two-week period, the Court repudiated the administrative policies of the Securities and Exchange Commission;[92] struck down the Bituminous Coal Conservation Act of 1935, known as the Guffey-

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46 (1996) (reviewing WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995)); Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 731 (1984).

82. Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

83. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

84. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

85. LEUCHTENBURG, *supra* note 80, at 90; Devins, *supra* note 81, at 247 n.54; Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1932-33 (1994); William E. Leuchtenburg, *Charles Evans Hughes: The Center Holds*, 83 N.C. L. REV. 1187, 1193 (2005).

86. *See* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 210 (1994); Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 991-92; Kline, *supra* note 78, at 884.

87. United States v. Butler, 297 U.S. 1 (1936); *see* ARTHUR M. SCHLESINGER, THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL 488 (1960); Kline, *supra* note 78, at 886-89.

88. *See* Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 993-94, 993 n.88; Kline, *supra* note 78, at 889; *but see* Cushman, *supra* note 86, at 242-43.

89. *See* Cushman, *supra* note 86, at 210.

90. *See* LEUCHTENBURG, *supra* note 80, at 96-98.

91. *See* SCHLESINGER, *supra* note 87, at 488; *but see* Cushman, *supra* note 86, at 274.

92. Jones v. Sec. and Exch. Comm'n, 298 U.S. 1 (1936). The Court, speaking through Justice Sutherland, compared the actions of the SEC with those of the Star Chamber in Stuart England. *Id.*

Snyder Act (the so-called "little NLRA" that aimed to stabilize the coal industry);[93] invalidated the Municipal Bankruptcy Act;[94] and struck down New York's state minimum wage for women.[95] Even conservative defenders of the Court were shocked by these decisions, which taken together looked like a massive assault on the New Deal; the combination of all of them, especially the minimum-wage case, galvanized popular resentment toward the Court.[96] "Never before had the Court so severely frustrated an Administration's political agenda during such a short time period," as William Ross has noted.[97] Roosevelt had his own reasons for protesting that the Court had fallen behind the times, but the American people agreed with his position.[98]

Roosevelt avoided attacking the Court as he campaigned for reelection in the summer of 1936 against his Republican opponent, Governor Alf Landon of Kansas.[99] By any measure, Roosevelt's victory at the polls that November was breathtaking: he received more than sixty percent of the popular vote and carried the Electoral College by a margin of 523 to 8, winning every state but Maine and Vermont.[100] The President's reelection mandate also seemed to embrace the new congressional majorities. In the House of Representatives, Democrats now outnumbered Republicans 328 to 127; in the Senate, 77 to 19.[101] The magnitude of these gains understandably led Roosevelt to conclude that most Americans favored his legislative program and would join him in now opposing any obstacles to its speedy enactment.[102]

Although his announcement of the Court-packing plan surprised almost everyone in the country, Roosevelt had in fact been pondering such action against the Court at least as early as 1935.[103] Early on, he had concluded that

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93. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

94. Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U.S. 513 (1936).

95. Morehead v. New York *ex rel. Tipaldo*, 298 U.S. 587 (1936).

96. William G. Ross, *When Did the "Switch in Time" Actually Occur? Re-Discovering the Supreme Court's "Forgotten" Decisions of 1936-1937*, 37 ARIZ. ST. L.J. 1153, 1159-60 (2005).

97. *Id.* at 1159 (but adding that "no previous Administration had so quickly generated laws that so fundamentally altered the nation's social and economic system").

98. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 19 (1998). In 1936 Roosevelt was especially frustrated to be the only 20th-century president to complete his first four-year term without receiving a single opportunity to appoint a justice to the Supreme Court. *Id. See* Kline, *supra* note 78, at 950.

99. *See* William E. Leuchtenburg, *When the People Spoke, What Did They Say? The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077, 2085-87 (1999); William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 419 (2002).

100. Geoffrey D. Berman, *A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s*, 80 VA. L. REV. 291, 310-11 (1994); Cushman, *supra* note 86, at 228-29.

101. Kline, *supra* note 78, at 897.

102. *See* Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1023.

103. *Id.* at 1022-23; Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 248-49 (2007) (citing JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX (1956)); *see also* Drew D. Hansen, *The Sit-Down*

the problem had nothing to do with the Constitution, which Roosevelt maintained was capacious enough to accommodate modern exigencies. Roosevelt was convinced that the problem was the justices themselves and their reactionary, almost cramped view of the world.[104]

Roosevelt was also reminded of a constitutional crisis in Britain in 1911, a situation that the President thought was analogous. As Roosevelt recalled the case, the House of Lords had repeatedly refused to approve legislation that had been forwarded by the House of Commons. Lloyd George, seeking to pass the bill for Irish autonomy, broke the stalemate by announcing that if the Lords rejected the bill again, the King would create several hundred additional peers, enough to outvote the present House of Lords. Lloyd George's gambit had succeeded, and in Roosevelt's mind was a handy analogue that presaged his own eventual Court-packing plan.[105]

Several of Roosevelt's advisors, reflecting similar views in Congress and the country, favored bold action against the Court but disfavored taking such a step through statutory means; they thought a constitutional amendment more appropriate to the task, perhaps one that amended the Constitution to expand congressional authority in particular regulatory areas.[106] But Roosevelt and his attorney general, Homer Cummings, ultimately rejected such a course as impractical. The process of amending the Constitution was (and still is) complex, cumbersome, and time-consuming, and at any rate Roosevelt concluded that it would be difficult, if not impossible, to craft a single amendment that would anticipate all of the constitutional challenges that might be brought against New Deal programs.[107]

Practical considerations aside, Roosevelt, though bored by questions of theory, did have a more philosophical objection to the amendment route.

Strikes and the Switch in Time, 46 WAYNE L. REV. 49, 68 (2000).

104. *See* Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 978, 1022-23.

105. Kline, *supra* note 78, at 905. Roosevelt's secretary of the interior, Harold Ickes, recorded in his diary:

> The President's mind went back to the difficulty in England, where the House of Lords repeatedly refused to adopt legislation sent up from the House of Commons. He recalled that when Lloyd George came into power some years ago under Edward VII, he went to the King and asked his consent to announce that if the Lords refused again to accept the bill for Irish autonomy, which had been pressed upon them several times since the days of Gladstone, he would create several hundred new peers, enough to out-vote the existing House of Lords. With this threat confronting them, the bill passed the Lords.

Id. at 905 (quoting 1 HAROLD L. ICKES, THE SECRET DIARY OF HAROLD L. ICKES, THE FIRST THOUSAND DAYS 1933-1936, at 468 (1953)). Roosevelt repeated the analogy at a Cabinet meeting on December 27, and earlier in the year had recounted a similar story (this one involving Gladstone and Queen Victoria) over lunch with Paul Block, the publisher of the Toledo *Blade*. *Id.* at 905. Roosevelt's memory was inaccurate: he seems to have confused the fight over the Irish home rule bill with Asquith's attempt to force the Lords to accept Lloyd George's budget. LEUCHTENBURG, *supra* note 80, at 94-95.

106. *See* Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1024-25.

107. *Id.*

Because he believed that the Constitution was already flexible enough to meet the complicated needs of a modern industrial society, Roosevelt thought it entirely unnecessary to change the Constitution in any way; he may even have resisted pursuing an amendment because doing so could be taken as a tacit acknowledgment that the Constitution was indeed inadequate to the present age.[108]

Moreover, as Roosevelt and his advisors knew well, the final word rested with the Court itself; even a well-crafted and swiftly enacted amendment would ultimately be at the mercy of the justices' own interpretation.[109] For all of these reasons, Roosevelt dismissed any proposal that depended on changing the Constitution itself. By the end of January, 1937, he had developed a radical alternative that he believed could preserve the New Deal not by rewriting the Constitution but by remaking the Court.[110]

Because Roosevelt had (uncharacteristically) consulted only a few close advisers before announcing his plan, he shocked almost everyone else when he did so in a message to Congress on February 5, 1937.[111] Specifically, Roosevelt proposed allowing the President to name an additional judge for each federal judge who declined to retire upon reaching the age of seventy. Applied to the Supreme Court, this would have let Roosevelt name up to six more justices.[112]

The President did not help the plan's cause when he disingenuously mischaracterized the motivations that had led him to propose it. One of Roosevelt's more sagacious advisors, Robert Jackson (who, like most, had been unaware of the plan before it was announced),[113] wrote later that the plan at first lacked "the simplicity and clarity which was the President's genius."[114]

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108. *Id.* at 1025.

109. *Id.* at 1025-26. As Roosevelt told the nation in his March 9 Fireside Chat:

> Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court bench. An amendment, like the rest of the Constitution, is what the Justices say it is rather than what its framers or you might hope it is.

Id. (noting Robert Jackson's statements to Congress that "[j]udges who resort to a tortured construction of the Constitution may torture an amendment" and that "[e]xperience has shown that it is difficult to amend a constitution to make it say what it already says").

110. *See* Kline, *supra* note 78, at 908.

111. *See* Neumann, *supra* note 103, at 248-49.

112. *See* Devins, *supra* note 81, at 246; Daniel A. Farber, *Who Killed Lochner?* 90 GEO. L.J. 985, 990-91 (2002) (reviewing G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000)); G. Edward White, *Cabining the Constitutional History of the New Deal in Time*, 94 MICH. L. REV. 1392, 1400 (1996) (reviewing WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995)).

113. Jackson first learned of the plan when he read about it in the newspaper. Stephen R. Alton, *Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D. Roosevelt's Battle With the Supreme Court*, 5 WM. & MARY BILL RTS. J. 527, 543 (1997).

114. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 189 (1941).

Some might say, less charitably, that it was too clever for its own good.

Earlier that year Roosevelt had sent Congress a proposal to reorganize and streamline the executive branch, and in his February 5, 1937 message he first tried to present the Court-packing plan as simply a judicial version of his executive streamlining proposal. Next, he claimed that it was primarily a measure to alleviate the heavy workload of the Court. He cited the increase in federal litigation and suggested that the Court was unable to keep pace with its present docket of cases, largely because of the justices' advanced age.[115] Because it was widely recognized that the President's true purpose had nothing to do with the Court's workload but was aimed instead to reduce or undo the damage being done to the New Deal, Roosevelt gave his proposal a needlessly poor launch.[116]

Roosevelt would later be more candid as to his real purpose, stating that the plan would "bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances."[117] The idea that the proposal had been motivated by the justices' advanced age was a misdirection suggested by the Attorney General, Homer Cummings; of the few others who knew of the plan, most urged candor about the plan's true aim.[118] Lawyers at the Department of Justice had uncovered a similar age-based proposal made a quarter-century earlier in 1913 by Woodrow Wilson's first Attorney General. That the current Attorney General was Justice James McReynolds – arguably the Court's most reactionary member – delighted Roosevelt to no end.[119]

Before judging the "age canard" too harshly, it is worth remembering that this rationale was entirely in line with popular sentiment. In Friedman's words, "no one expected the Justices to approve all [New Deal] legislation, but the popular perception was that the current occupants of the highest bench were particularly hostile to the needs of changing times, in no small part because of their age."[120] Within a month, however, Roosevelt admitted what everyone already knew: his real goal was to appoint new justices who would give a fair hearing to the social and economic regulatory programs at the center of the New

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115. LEUCHTENBURG, *supra* note 80, at 133; Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1023-24.

116. LEUCHTENBURG, *supra* note 80, at 138; Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1163-64 (2006).

117. Franklin D. Roosevelt, Fireside Chat of March 9, 1937, *in* PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT 128 (1937). Among those offended by the administration's claims about the justices' age was the Court's oldest member, Louis Brandeis. *See* C. Herman Pritchett, Book Review, 130 U. PA. L. REV. 1281, 1285 (1982) (reviewing BRUCE ALLEN MURPHY, THE BRANDEIS / FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982)).

118. *See* FRANK FREIDEL, ROOSEVELT: A RENDEZVOUS WITH DESTINY 227 (1990); Alton, *supra* note 113, at 540-41; Kline, *supra* note 78, at 909.

119. *See* Alton, *supra* note 113, at 541; Neumann, *supra* note 103, at 239-40.

120. *See* Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1022.

Deal.

Roosevelt's proposal immediately drew a wave of sharp attacks.[121] Many members of Congress quickly announced that they would oppose the plan: within a few days, every Republican in Congress, and more than a few conservative Democrats, had come out against the plan.[122] The press coverage was almost uniformly negative; editorial after editorial denounced the plan and the highhanded way in which it had been announced.[123] The plan was called a threat to civil liberties and judicial independence by civic groups, political groups, and religious groups – notably the Catholic Church.[124] Several state legislatures debated resolutions opposing the plan, and the plan was opposed by professional associations, including the American Bar Association.[125] Even the nation's law professors, who had historically avoided tangling openly in partisan controversies, came out in large numbers to oppose Court-packing.[126] Notwithstanding Roosevelt's huge mandate the previous November (the President repeatedly insisted that "the people are with me"), and despite Americans' continuing dissatisfaction with the Court's own direction, contemporary polls suggested that most opposed the President's plan.[127]

Hostility from Roosevelt's longstanding political foes was unsurprising, but the plan also drew unexpected fire from among the President's political friends; few New Dealers or old-fashioned progressives embraced the plan.[128] Some of Roosevelt's closest advisors and allies were genuinely angry that the President had neglected to consult them concerning such a monumental reform proposal.[129] Some in Congress proposed alternatives to the President's plan, many in the form of constitutional amendments.[130]

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121. *See* Devins, *supra* note 81, at 246-47; John M. Lawlor, *Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. PA. L. REV. 967, 974-75 (1986).

122. *See* Cushman, *supra* note 86, at 213.

123. *Id.* at 210-11; Devins, *supra* note 81, at 247.

124. *See* Cushman, *supra* note 86, at 210-11; Kline, *supra* note 78, at 917.

125. *See* Cushman, *supra* note 86, at 210-11.

126. *See generally* Kyle Graham, *A Moment in the Times: Law Professors and the Court-Packing Plan*, 52 J. LEGAL EDUC. 151 (2002).

127. *See* Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 194 (2003) ("Despite Roosevelt's popularity and the Supreme Court's unpopularity, the Court-packing plan lacked majority public approval, had the support of surprisingly few Court critics, and received a tepid welcome in Congress."). One exception was a special election in Texas occasioned by the death of Congressman James P. Buchanan (D-Brenham) in February 1937; the special election, held in April, was the only congressional election to take place during the Court-packing controversy. The surprising winner, an outspoken supporter both of Roosevelt and of Court-packing, was a 28-year-old named Lyndon Johnson. *See generally* ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER 389-436 (1982).

128. *See* Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1049.

129. *See* Cushman, *supra* note 86, at 213. Among those the President had left out were congressional leaders, Democratic Party officials, and almost everyone in his own Cabinet.

130. *See* Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at

Among the many New Dealers who had openly criticized the Supreme Court but who nevertheless broke with the President over Court-packing, no voice was more surprising, or more effective, than that of Senator Burton Wheeler of Montana. Wheeler was a liberal Democrat who had been outspoken in his criticism of the Court. His decision to oppose the President placed him at the forefront of the anti-Court-packing forces in Congress.[131]

When Wheeler spoke forcefully against the plan in testimony before the House Judiciary Committee in March, he dealt the President an astonishing *coup de grace* by invoking the assistance of the Court itself: Wheeler released an open letter from Chief Justice Charles Evans Hughes, offering a detailed refutation of many of the claims the President had made in his February 5, 1937, message to Congress.[132] The Supreme Court was fully abreast of its work, the Chief Justice informed the committee: "There is no congestion of cases upon our calendar.... This gratifying condition has obtained for several years."[133] Adding new justices, moreover,

> would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned.[134]

Wheeler's release of the Chief Justice's letter terribly damaged the Court-packing plan's prospects for passage; and those prospects grew even dimmer the following week, when the Court announced several decisions that seemed to make the plan unnecessary. On March 29, exactly one week after the release of the Hughes letter, the Court upheld Washington State's minimum-wage law;[135] unanimously overruled its 1935 decision invalidating the Frazier-Lemke Federal Farm Bankruptcy Act;[136] and upheld the 1934 Railway Labor Act, which gave Congress broad powers to regulate railroads in matters affecting interstate commerce.[137] The rationale for Court-packing then crumpled further on April 12, when the Court upheld one of the New Deal's legislative gems – the Wagner Act[138] – in several decisions, notably *National Labor Relations*

1024.

131. *See* Cushman, *supra* note 86, at 216; Brian M. Feldman, *Evaluating Public Endorsement of the Weak and Strong Forms of Judicial Supremacy*, 89 VA. L. REV. 979, 1029-31 (2003).

132. *See* Cushman, *supra* note 86, at 218-21.

133. *Id.* at 219.

134. *Id.* at 219-20.

135. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

136. Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440 (1937).

137. Va. R.R. Co. v. Sys. Fed'n No. 40, 300 U.S. 515 (1937).

138. Wagner Act of 1935, ch. 372, 49 Stat. 449 (1935).

Board v. Jones & Laughlin Steel Corp.[139]

When the Senate Judiciary Committee ended its hearings in late April, the President's proposal, at least in its present form, faced sure defeat. In its report, the committee minced no words in expressing the majority view of the bill: "This is far from the independence intended for the courts by the framers of the Constitution. This is an unwarranted influence accorded the appointing agency, contrary to the spirit of the Constitution":

> Today it may be the Court which is charged with forgetting its constitutional duties. Tomorrow it may be the Congress. The next day it may be the Executive. If we yield to temptation now to lay the lash upon the Court, we are only teaching others how to apply it to ourselves and to the people when the occasion seems to warrant. Manifestly, if we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another and a different interpretation and one which may not sound so pleasant in our ears as that for which we now contend.[140]

The committee ended its report with a rebuke that must rank among the starkest messages ever sent to a President by a Congress of his own party, calling the proposal:

> a needless, futile and utterly dangerous abandonment of constitutional principle . . . without precedent or justification. . . . It would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights. . . . It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy. Under the form of the Constitution it seeks to do that which is unconstitutional. Its ultimate operation would be to make this Government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is[,] an interpretation to be changed with change of administration. It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free

139. Nat'l Labor Relations Bd. v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).
140. Kline, *supra* note 78, at 943-44 (quoting S. Rep. No. 75-711, at 9-10, 15 (1937)).

representatives of the free people of America.[141]

In July came the sad end. After Justice Van Devanter announced his retirement in May, removing yet another argument that the plan was needed, the legislative leader of the pro-Court-packing forces, Senate Majority Leader Joe Robinson of Arkansas, began working toward a compromise.[142] In early July, Robinson was securing votes for a watered-down version of the Court-packing bill, a version that might actually have passed.[143] At first, Robinson's efforts seemed to be succeeding; his proposed compromise appeared that it might pass. But on July 14, after an especially heated legislative debate, and at the height of an especially hot summer, Joe Robinson went back to his Washington apartment and suffered a fatal heart attack.[144]

On July 20, returning to Washington from Robinson's funeral, Vice President Jack Garner, who had never liked the Court-packing plan, informed Roosevelt that the proposal was doomed. "You're licked, Cap'n," he told the President. "You haven't got the votes."[145] Roosevelt finally abandoned the plan. Two days later the Court-packing bill was sent back to committee to be buried forever.[146]

III. THE WORD IS NOT ENOUGH

In less than twenty years, the constitutional realities in Argentina and the United States developed in two very different directions, directions not reflected in the written texts of those nations' constitutions. In Argentina, the Court that emerged from the impeachment fight – or, more accurately, the Court that supplanted the earlier one – was in every respect the Perón Court.[147] From the impeachment proceedings of 1947 until the end of Perón's term in 1955, the Court did not invalidate a single act taken by the Perón government – despite Perón's increasingly authoritarian uses of executive decrees to punish political opponents and repress dissent.[148]

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141. Kline, *supra* note 78, at 945 (quoting S. Rep. No. 75-711, at 23).

142. *Difficulty*, *supra* note 74, at 1053. Privately, Robinson thought Roosevelt should withdraw the proposal while declaring victory.

143. Kline, *supra* note 78, at 946. The compromise would have allowed the President to appoint no more than one additional justice per year.

144. *Id.; but see* Robert A. Schapiro, *Must Joe Robinson Die? Reflections on the "Success" of Court-Packing*, 16 CONST. COMMENT. 561 (1991).

145. Kline, *supra* note 78, at 948.

146. *Id.* at 948.

147. *See* Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 775 ("The Perón Court was exactly that; it did little to challenge Perón's use of power even when used to harass political opponents or to rule by presidential decree.").

148. *See* Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 150-51; *see also* Jouet, *supra* note 46, at 434-35; Salvochea, *supra* note 52, at 293-94 (citing DAVID ROCK, AUTHORITARIAN ARGENTINA: THE NATIONALIST MOVEMENT, ITS HISTORY AND ITS IMPACT (1993)).

Within a few months, moreover, the new Court rendered one of its most far-reaching decisions when it rolled back the remaining controls on the scope of the de facto doctrine. In *Ziella v. Smiriglio*, decided in October 1947, the Court announced a new "plenary authority" doctrine, holding that a de facto government enjoys all legislative powers that are necessary to govern.[149] In essence, the Court removed virtually all remaining limitations on a de facto government's legislative authority; the only surviving limitation was that de facto executives were prohibited from enacting laws that were unconstitutional.[150] In other words, the Court held that de facto laws passed by the executive had the same effect and legitimacy as laws passed by Congress, and could only be undone by future legislation.[151]

Perón's impeachment of the Court not only led to the pliant new approach to de facto authority, it set a precedent for "court-swapping" (and much shorter judicial tenures) that plagued the nation for decades to come.[152] After 1947, when a President found a particular judge unsatisfactory, the judge was simply replaced.[153] Virtually every incoming civilian President has exercised the informal authority to name the majority of Supreme Court justices, either by removing the justices that an earlier government had named, or by "packing" the Court, that is, increasing the Court's size to create additional seats for docile judges.[154] The new balance of power between President and Court also dramatically shortened the average judge's time on the bench: during the eighty-five years of Argentine history before the Court was impeached, only thirty-five men had served on the Court, averaging roughly eleven years in office. In contrast, during the fifty years following the impeachment, fifty-seven justices had served, and their average tenure was less than five years.[155]

The doctrinal shifts and informal power arrangements after 1947 transformed the Court into a subservient body, completely dependent upon (and deferential to) the executive branch. The Court became, in Christopher Walker's words, "at best, a dependent, weak institution that did little to challenge the ruler or uphold the rule of law; at worst, it was a servant and accomplice of an authoritarian regime that reinforced unconstitutional policies and practices."[156] Notwithstanding the written text of the constitution, after 1947 the Court barely resembled its former self and resembled the U.S.

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149. "Ziella v. Smiriglio Hnos," Fallos (1947-209-27) (Arg.); *see* Dockery, *supra* note 19, at 1611-12; *see also* Irizarry y Puente, *supra* note 28, at 44-45.

150. *See* Dockery, *supra* note 19, at 1611-12.

151. *Id.*; García-Mansilla, *supra* note 14, at 351-52; Linares Quintana, *supra* note 16, at 664.

152. *See* HELMKE, *supra* note 29, at 65 n.4; García-Mansilla, *supra* note 14, at 352; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 775.

153. *See* Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 99-100.

154. *Id.* at 99-100; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 783-84.

155. Walker, *Toward Democratic Consolidation?*, *supra* note 1 at 775 (citing Helmke, *supra* note 29, at 65-68, tbls. 4.1 & 4.2).

156. Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 775.

Supreme Court even less. Having ceded its autonomy and independence to the executive branch, the Court had stopped functioning as a genuine check on the power of other constitutional actors.[157] The Court's deterioration after 1947 also demolished the people's confidence in the judiciary and diminished respect for the rule of law.[158]

Not incidentally, after 1947 the President effectively controlled the Court in both procedural and substantive matters. The Court stopped blocking presidential efforts to regulate the economy.[159] Perón grew more authoritarian and his government took more drastic steps to repress or punish his political opponents.[160] The Constitution of 1949, initiated by the Perón-controlled Congress, permitted Perón to run for a second term; and Perón further expanded his power by declaring an emergency "state of siege" shortly before his overwhelming reelection victory in 1952 (amid charges of widespread fraud).[161] Perón maintained his unparalleled position until 1955, when he himself was brought down in a coup, but that is another story.[162]

In the United States, considering that Roosevelt was seeking a far more modest change than Perón's decision to impeach most of the Court, the Court-packing episode is puzzling. Roosevelt was a masterful politician, at the height of his political power to judge from the size of his own reelection margins and the level of support he enjoyed in Congress. Moreover, the public was genuinely angry at the Court's repeated obstruction of New Deal programs.[163] Why was the outcome of this constitutional crisis such a stinging defeat for such a strong executive?

Roosevelt badly misjudged how most people would see his plan, in part because he misjudged how most people saw the Supreme Court. From the outset the President was forced to defend the plan against charges that it would undermine the Court's ability to protect civil liberties.[164] Certainly the Court's

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157. *Id.* at 804-05; *see also* García-Mansilla, *supra* note 14, at 389.

158. García-Mansilla, *supra* note 14, at 351; Jacobs, *supra* note 55, at 428-29; Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 97-98.

159. *See* Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 149-50 & 149 n.354.

160. *See* ARTHUR P. WHITAKER, ARGENTINA 139-43(1965); Dockery, *supra* note 19, at 1599-1600.

161. Const. Arg. (1949); *see* ROBERT A. POTASH, THE ARMY AND POLITICS IN ARGENTINA, 1945 -1962 (1980); ROCK, *supra* note 46, at 306; *see generally* JOSÉPH PAGE, PERÓN: A BIOGRAPHY 200-18 (1983).

162. *See* FELIX LUNA, A SHORT HISTORY OF THE ARGENTINIANS (Cynthia Mansfield & Ian Barnett trans., 2000); ROCK, *supra* note 46, at 306-18. Perón returned to power again briefly in 1973.

163. *See* Barry Friedman, *Attacks on Judges: Why They Fail*, 13 ME. B.J. 124, 127 (1998) ("FDR, elected in one of history's largest popular mandates, fell quickly to his lowest approval when he proposed the Court-packing plan."); *see also* Kline, *supra* note 78, at 865.

164. *See* Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1038; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 46 (1996); William G. Ross, *The Role of Religion in the Defeat of the 1937 Court-Packing Plan*, 23 J.L. & RELIGION 629, 633-34 (2007-08).

role as a defender of religious liberty was a concern for the religious organizations that contributed to the defeat of the Court-packing proposal.[165] Roosevelt also found himself defending the plan against charges that it would seriously threaten judicial independence.[166]

Besides overlooking how much the public valued both the Court's independence and its role as a protector of civil liberties, Roosevelt committed a more serious error: he failed to fathom the people's authentic fears of nascent dictatorship.[167] The chair of the Senate Judiciary Committee, Henry Fountain Ashurst, who supported the President's plan, confided to his diary that "[e]ven many persons who believe in President Roosevelt opposed his bill because they [are] haunted by the terrible fear that some future President might, by suddenly enlarging the Supreme Court, suppress free speech, free assembly and invade other Constitutional guarantees of citizens."[168] Such fears seemed reasonable in light of the rise of totalitarian governments abroad, even for those who had staunchly supported the Roosevelt program.[169] It was widely believed that any diminution of judicial independence could be the first step on a downward path to tyranny.[170] Concerns about executive power were the one common belief that united Roosevelt's traditional foes with his longtime allies.[171]

Finally, while I do not propose to take sides in the historical controversy over whether the Court did indeed "switch" in response to the Court-packing plan, it is worth mentioning the "switch in time" here for a simple reason: the public thought it happened, as did their elected representatives. Whether the Court's change in direction had actually been foreordained months earlier, or whether they were in any way influenced by the President's actions, is

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165. For a fine discussion of the role of religion in defeating the plan, see generally Ross, *The Role of Religion in the Defeat of the 1937 Court-Packing Plan*, *supra* note 164.

166. *See* Friedman, *The History of the Countermajoritarian Difficulty*, note 74, at 1038-44; Ross, *The Role of Religion in the Defeat of the 1937 Court-Packing Plan*, *supra* note 164, at 670-71; *see also* JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 232, 262 (1938); JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS, *1933-1939* 87 (1967); *see generally* Kline, *supra* note 78.

167. *See* LEUCHTENBURG, *supra* note 80, at 137; George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1581 (1996).

168. LEONARD BAKER, BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT 47-48 (1967).

169. *See* Ross, *The Role of Religion in the Defeat of the 1937 Court-Packing Plan*, *supra* note 164, at 663-64; *see also* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1293 n.17 (1982); *see generally* Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 75-95 (2000).

170. *See* David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L. J. 741, 746-52 (1981); Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1037 n.302; Vermeule, *supra* note 116, at 1166; *see also* Matthew Perry, *Justice Stone and Footnote 4*, 6 GEO. MASON U. CIV. RTS. L.J. 35, 53-54 (1996).

171. *See* Devins, *supra* note 81, at 255; Feldman, *supra* note 131, at 1024-33.

immaterial to why the public responded as it did. Clearly, contemporary observers suspected a causal connection, and that suspicion did as much as anything else to sink the President's proposal.[172]

Roosevelt himself claimed that the "switch in time" was not one of his greatest political setbacks, but rather a great victory.[173] As a purely political matter, it is hard not to see the plan's defeat as an unmitigated disaster.[174] On the other hand, although Roosevelt's lost-the-battle/won-the-war version of history is unquestionably self-serving, it is nevertheless undeniable that virtually all of the plan's aims were realized within a few years of its defeat: the membership of the Court itself changed, Roosevelt ultimately appointed more Supreme Court justices than any other President except George Washington, and the Court's jurisprudence inexorably moved in far more Rooseveltian directions.[175]

CONCLUDING THOUGHTS

On paper, Roosevelt and Perón operated under constitutions that formally were much the same; what differed dramatically were not the formal structures. but the informal practices and environment of informal institutions. The written word simply does not suffice to explain their true constitutions, because words insufficiently describe the gap between formal institutions and informal practices. As Avner Greif has written, "To study the impact of a legal system, we must therefore also examine the rules, belief, and norms that generate behavior among members of its constituting organizations and between them and others."[176]

The gap between formal and informal institutions is a gap not of structure but of culture, of constitutional culture. Simply put, a constitutional democracy

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172. *See* LEUCHTENBURG, *supra* note 80, at 143.

173. *See id.* at 157-61; Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 665 n.226 (1994).

174. *See* LEUCHTENBURG, *supra* note 80, at 157-61. Among other things, the struggle over the Court "helped blunt the most important drive for social reform in American history," squandering any advantage of Roosevelt's reelection triumph in 1936; deeply divided the Democratic Party, leading conservative Democrats to join with Republicans in opposing the New Deal; and alienated many middle-class voters who had been strong supporters of the President. *Id.* Henry Wallace, a leading New Dealer and Roosevelt's vice president from 1941 to 1945, thought "[t]he whole New Deal really went up in smoke as a result of the Supreme Court fight." *Id.*

175. *See* LEUCHTENBURG, *supra* note 80, at 156; David E. Kyvig, *The Road Not Taken: FDR, the Supreme Court, and Constitutional Amendment*, 104 POL. SCI. Q. 463, 466 (1989); William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 595 (2004). In his second term, Roosevelt named justices to succeed Van Devanter (Hugo Black); Sutherland (Stanley Reed); and Butler (Frank Murphy); he also named justices to succeed Cardozo (Felix Frankfurter) and Brandeis (William O. Douglas). In his third term, he named three more justices, and elevated Stone to chief justice.

176. AVNER GREIF, INSTITUTIONS AND THE PATH TO ECONOMIC MODERNITY: LESSONS FROM MEDIEVAL TRADE 31 (2006).

is in perpetual jeopardy in the absence of a supportive surrounding culture.[177] In Argentina, it seems clear in retrospect that the Supreme Court and its "U.S.-style" constitution was insufficiently rooted in Argentine society and history, and that unfortunate choices by judicial and political actors, in the face of growing presidential influence, placed the judiciary at the mercy of the executive branch.[178] Compare this history with that of the United States, where even the severe strains of the Great Depression and the Second World War did not persuade the Court to overlook constitutional limits on executive authority.[179]

Without a sense of a nation's constitutional culture, it is impossible to fully understand the relationship between that nation's judges and the choices they make as democratic actors. By what they say and do, or refrain from saying and doing, judges reflect the norms of the constitutional culture of which they are a part; at the same time, they are also those norms' arbiters or enforcers. If the constitutions of nations are illuminated at all by Oliver Wendell Holmes's view of law as "[t]he prophecies of what the courts will do in fact, and nothing more pretentious,"[180] then those constitutions' full meaning will be forever beyond our grasp if we never reach beyond their mere words. A people's true constitution can never be wholly committed to parchment.

177. *See* Chavez v. Martinez, 538 U.S. 760, 794 (2003) (Kennedy, J., concurring in part and dissenting in part) ("A Constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles."). On constitutionalism and constitutional culture generally, see Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT'L & COMP. L. 1 (2000).

178. Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 771.

179. Cass R. Sunstein, *An Eighteenth-Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 13-14 (1994).

180. OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 173 (1920); *see also* KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 3 (1930) ("What these officials do about disputes is, to my mind, the law itself.").

MELTING ICE CAUSING THE ARCTIC TO BOIL OVER:

AN ANALYSIS OF POSSIBLE SOLUTIONS TO A HEATED PROBLEM

Julie A. Paulson*

INTRODUCTION AND OVERVIEW

"Though force can protect in emergency, only justice, fairness, consideration and cooperation can finally lead men to the dawn of eternal peace." -United States President Dwight D. Eisenhower.[1]

A. Brief Summary of the Issue

The Arctic ice cap is shrinking at an unprecedented rate, making billions of dollars worth of resources obtainable that were previously inaccessible due to the ice.[2] This potential availability of resources has triggered an international race to claim areas in the Arctic.[3] There are currently five countries competing for territory claims in the Arctic: Russia, Norway, Canada, the United States, and Denmark (through its control of Greenland).[4]

The United Nations Convention on the Law of the Sea (UNCLOS),[5] the international convention that currently controls territory disputes in the Arctic, is an ineffective way of dealing with both the current and potential future disputes regarding territorial claims in the area.[6] Due to the uniquely circular way in which the Arctic nations surround the ocean, the potential extended claims of the nations overlap with one another.[7] UNCLOS does not provide a

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1. Embassy of the United States, Democracy Quotes, http://nicaragua.usembassy.gov/quotes.html (last visited Apr. 2, 2009).

2. *See generally* Colin Woodard, *Who Resolves Arctic Oil Disputes? Antarctica Provides a Model for Settling Competing Claims,* THE CHRISTIAN SCI. MONITOR, Aug. 20, 2007, *available at* http://www.csmonitor.com/2007/0820/p01s02-woeu.html?page=1.

3. Clifford Krauss et. al., *As Polar Ice Turns to Water, Dreams of Treasure Abound,* N.Y. TIMES, Oct. 10, 2005, at A1, *available at* http://www.nytimes.com/2005/10/10/science/10arctic.html.

4. Woodard, *supra* note 2. The states at issue (Russia, Norway, Canada, the United States, and Denmark) are referred to collectively in this Note as the Arctic states.

5. United Nations Convention on the Law of the Sea, Dec. 10 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

6. *See infra* notes 64-125 and accompanying text.

7. *See* Woodard, *supra* note 2.

framework for dealing with overlapping claims and in fact leaves the states to work out the disputes themselves.[8] In addition, not all of the Arctic states are signatories to the convention, which means that they are outside the scope of the Convention for all purposes.[9]

Because of the ineffective manner in which UNCLOS provides dispute resolution for the Arctic states, the states should consider negotiating a mutually beneficial agreement amongst them that is outside UNCLOS. This would require the cooperation of all of the Arctic states that have potential interests.[10]

This Note will provide information regarding the issues between the five Arctic states; analyze solutions that have already been proposed to solve the territorial disputes in the Arctic; and evaluate prior territorial disputes to determine if a viable solution can be derived. This Note will conclude with what the author believes to be the most practicable solution to the problem of overlapping territorial claims in the Arctic: the Arctic states need to cooperate with each other and should consider negotiating a mutually beneficial agreement outside the sphere of UNCLOS that will resolve current disputes and provide a framework for analyzing future claims.

Part I will introduce the issues affecting the Arctic states, provide an overview of the changing climate conditions in the Arctic, and detail the resources that may become available as Arctic ice melts further.[11] Part II will address the legal framework that currently governs the Arctic, including the background and history of the United Nations Convention on the Law of the Sea[12] and the Convention's application to the Arctic.[13] Part II will also examine why the United States is not a party to the Convention[14] and explain the ineffectiveness of the dispute settlement mechanisms in UNCLOS in relation to the Arctic.[15] Part III will discuss the current disputes over areas of the Arctic, including the dispute over the Northwest Passage,[16] Russia's claims against the other Arctic states,[17] and the dispute over Hans Island (between Denmark and Canada).[18] Part IV analyzes previously proposed models of solutions for the Arctic, including the Antarctica Model,[19] an environmental model,[20] and the model that would result if all the Arctic states were to ratify UNCLOS.[21] Part

8. *See* UNCLOS, *supra* note 5.
9. *See infra* notes 126-55 and accompanying text.
10. *See infra* notes 329-30 and accompanying text.
11. *See supra* notes 1-9 and accompanying text; *see infra* notes 25-52 and accompanying text.
12. *See infra* notes 53-63 and accompanying text.
13. *See infra* notes 64-125 and accompanying text.
14. *See infra* notes 126-55 and accompanying text.
15. *See infra* notes 156-78 and accompanying text.
16. *See infra* notes 183-98 and accompanying text.
17. *See infra* notes 199-218 and accompanying text.
18. *See infra* notes 219-25 and accompanying text.
19. *See infra* notes 228-46 and accompanying text.
20. *See infra* notes 247-64 and accompanying text.
21. *See infra* notes 265-75 and accompanying text.

V will examine potential solutions derived from previous territorial disputes between other nations, including the joint submission to the Commission on Continental Shelf Limits by France, Ireland, Spain, and the United Kingdom[22] and the Australia and East Timor maritime boundary dispute.[23] Finally, Part VI will offer conclusions and recommendations regarding the most practical solutions for the Arctic states in order to mitigate potential future disputes, including the cooperation of the Arctic states and the possibility of negotiating a mutually beneficial agreement among the Arctic states outside of UNCLOS.[24]

B. Overview of Arctic Climate Change

The current and potential future territorial disputes in the Arctic center around the recent drastic change in the Arctic climate. In 2007, the Arctic ice cap's loss through melting was ten times the recent annual average.[25] "Over all, the floating ice dwindled to an extent unparalleled in a century or more . . . ."[26] The summer of 2007 was the first time in recorded history that the Northwest Passage was completely free of ice.[27] Some experts predict that the ice retreats will continue to expand because the winter freeze is beginning from an enormous ice deficit.[28] "At least one researcher . . . projects a blue Arctic Ocean in the summers by 2013."[29]

However, there are experts who do not believe that the warming of the Arctic merits concern.[30] It is unclear what share of the recent thawing can be "attributed to natural cycles and how much to [the phenomenon of] heat-trapping pollution linked to recent global warming."[31]

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22. *See infra* notes 282-309 and accompanying text.

23. *See infra* notes 310-27 and accompanying text.

24. *See infra* notes 328-33 and accompanying text.

25. James Graff, *Fight for the Top of the World*, TIME, Oct. 1, 2007, at 28. The article notes that the area of the melted ice is greater than the area of Texas and New Mexico combined. *Id.*

26. Andrew C. Revkin, *Arctic Melt Unnerves the Experts*, N.Y. TIMES, Oct. 2, 2007, at F1 [hereinafter *Arctic Melt*].

27. Graff, *supra* note 25.

28. *Arctic Melt*, *supra* note 26.

29. *Id.*

30. Krauss et al., *supra* note 3.

31. *Id. See also Arctic Melt*, *supra* note 26. "[S]ome scientists and government officials, particularly in Russia, are dismissive of assertions that a permanent change is at hand." Krauss et al., *supra* note 3. *See also* John McCaslin, *Inside the Beltway*, WASH. TIMES, Aug. 14, 2007, *available at* http://www.washingtontimes.com/article/20070814/NATION02/108140063. The article notes that a headline from the November 2, 1922 Washington Post read "Arctic Ocean Getting Warm, Seals Vanish and Icebergs Melt." *Id.* According to NASA estimates, four of the ten hottest years in the United States were actually in the 1930s, with 1934 the hottest of all. *Id.* In addition, Drake Bennett notes that fifty-five million years ago the average temperature in the Arctic was in the mid-70s and there were palm trees, crocodiles, and mosquitoes present. Drake Bennett, *Northern Exposure: As the Arctic Melts, Vast Deposits of Oil and Gas May be Opened up for Exploration. Will an Arctic Without Ice Only Prolong our Dependence on Fossil Fuels?*, THE BOSTON GLOBE, Feb. 18, 2007, *available at* http://www.boston.com/news/globe/ideas/articles/2007/02/18/northern_exposure/.

While scientists disagree about the forces behind the Arctic melt, currently, the ice is nevertheless steadily melting.[32] Any amount of ice that melts results in an exponential loss of additional ice.[33] This is because ice reflects most of the solar energy of the sun, striking it back into space so that it does not warm the oceans.[34] Instead of reflecting solar energy, water absorbs most of the solar energy of the sun, which results in an increase of water temperature.[35] As a result, each area of ocean exposed by melting ice soaks up more heat, which melts more ice, which exposes more sea, which soaks up even more heat, etc., until there is no more ice left to melt.[36]

A warmer Arctic region would have many additional environmental effects.[37] "Since more than half of the Arctic region consists of oceans, climatic variations will have a large impact on marine environments and marine-related activity."[38] Such impacts could potentially include elevated sea levels; changes in ocean salinity, which could strongly affect regional climate; and the decline or extinction of marine species due to habitat loss.[39]

C. Available Resources Uncovered by the Melt

As the Arctic ice melts, many resources will become available.[40] The resources were not accessible prior to the melting ice because it was logistically difficult or impossible to reach them.[41] "Drilling operations in the far north

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32. *See generally Arctic Melt*, *supra* note 26.

33. *See* Andrew C. Revkin, *No Escape: Thaw Gains Momentum*, N.Y. TIMES, Oct. 25, 2005, at F1 [hereinafter *No Escape*] (discussing how climate changes in the Arctic move faster than in other regions).

34. *Id.*

35. *Id.*

36. *Id.*

37. *See generally* Barry Hart Dubner, *On the Basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean*, 13 MO. ENVTL. L. & POL'Y REV. 1 (2005) (discussing the effects of a warmer arctic region).

38. *Id.* at 4.

39. *Id.* One of the species that many experts are particularly concerned about is the polar bear. Laura Navarro, *What About the Polar Bears? The Future of the Polar Bears as Predicted by a Survey of Success Under the Endangered Species Act*, 19 VILL. ENVTL. L.J. 169, 182 (2008). This is because sea ice is an integral part of the polar bears' habitat and when the increasing global temperatures cause the sea ice to recede, the polar bears' habitat is compromised. *Id.* The relationship between the polar bears and sea ice is one of dependence: the sea ice (1) serves as a place on which the polar bears can hunt and eat; (2) allows them to travel to other areas for maternity denning; and (3) serves as a location for such denning. *Id.* at 183. This has led to the consideration of listing the polar bear under the Endangered Species Act. *Id.* at 170; *see also* 16 U.S.C. §§1531-36 (2000) (containing the text of the Endangered Species Act). See generally Randall S. Abate, *Climate Change, The United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A STAN. J. INT'L L. 3 (2007) for additional discussion regarding the loss of habitat of bears, seals, and reindeer, on which Inuit people depend for subsistence and cultural identity.

40. *See generally* Krauss et al., *supra* note 3.

41. Bennett, *supra* note 31.

have to deal with subzero temperatures, marauding ice floes [sic], violent seas, and the logistical difficulties that come with transporting oil and gas from remote, often offshore locations."[42] The most sought-after resource in the Arctic is the potential oil and gas reserves that are predicted to lie under the ocean floor.[43] According to the United States Geological Survey, the region may contain 25% of the world's remaining oil and gas reserves.[44] The resources that will become accessible are estimated to be worth trillions of dollars.[45] Russia estimates the value of the potential minerals in its Arctic claim to be around $2 trillion.[46] A conservative estimate values the oil, gas, and other resources in the area that the United States could claim at $1.3 trillion.[47] In addition to oil and gas reserves, the polar thaw will also begin to unlock new cruise ship destinations and important commercial fisheries.[48]

The melting of the Arctic ice will also open up various new shipping routes, the most important being the Northwest Passage.[49] The Northwest Passage connects the Atlantic and Pacific oceans and continues through the remote islands of Canada's northern archipelago.[50] The passage could reduce the sea-route for cargo from Europe to Asia by about 4,000 miles.[51]

Although the melting of Arctic ice significantly improves access to previously unobtainable resources, other characteristics unique to the Arctic will continue to make resource extraction challenging:

> [E]xploitation of the Arctic's natural resources meets with numerous obstacles: adverse conditions [such as] cold,

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42. *Id.*

43. *See* Woodard, *supra* note 2.

44. *Id.*; *see also* Steve Hargreaves, *The Arctic: Oil's Last Frontier*, CNNMONEY.COM, Oct. 25, 2006, http://money.cnn.com/2006/09/27/news/economy/arctic_drilling/index.htm. "That number could be even higher as the study didn't take into account unexplored regions, which most of the Arctic is." *Id.*

45. *See* Stefan Anitei, *Ice Melting has Triggered the War for Arctic Riches*, SOFTPEDIA, Mar. 26, 2007, http://news.softpedia.com/newsPDF/Ice-Melting-Has-Triggered-the-Race-for-Arctic-Riches-50275.pdf.

46. *Id.* British Petroleum has signed a $17 billion exploration agreement with Russia. Hargreaves, *supra* note 44.

47. Geoffrey Gagnon, *Foreigners Keep Out! High Tech Mapping Starts to Redefine International Borders*, WIRED MAGAZINE, Jan. 18, 2008, http://www.wired.com/science/planetearth/magazine/16-02/mf_continentalshelf.

48. Krauss et al., *supra* note 3. *But see* Anitei, *supra* note 45 (discussing how fishing stocks [that] are crucial to some regions are moving northward because of the warming, into another country's fishing grounds causing many territorial issues).

49. James Stairs, *Melting Ice Heats Up Canada/US Arctic Dispute*, MONSTERSANDCRITICS.COM, Nov. 22, 2006, http://www.monstersandcritics.com/news/americas/features/article_1224906.php/melting_ice_heats_up_Canada_US_Arctic_dispute; *see also* Woodard, *supra* note 2.

50. Stairs, *supra* note 49.

51. Mark Jarashow et al., Note, *UNCLOS and the Arctic: The Path of Least Resistance*, 30 FORDHAM INT'L L.J. 1587, 1592 (2007). Currently, ships are routed through the Panama Canal. *Id.*

> darkness, [and] remoteness make work extremely difficult and demanding and lead to high capital costs; the lack of infrastructure requires additional investment; offshore operations face additional threats such as damage of the equipment by sea ice or icebergs, which need extra precautionary measures; [and] long risky transport routes narrow the profit margin for operations in the Arctic.[52]

I. LEGAL FRAMEWORK GOVERNING THE ARCTIC

The area of the Arctic at issue is governed by the United Nations Convention on the Law of the Sea (UNCLOS). The Convention is the product of ongoing international negotiations that began in 1930.[53] Currently, the Convention has many intricate Articles that relate to the dispute between the Arctic states; however, the Convention does not adequately resolve potential disputes in the Arctic and has been a source of criticism among many scholars who question its effectiveness.[54] In addition, not all of the Arctic states that could potentially be involved in territorial disputes are parties to the Convention, which also has consequences with regard to Arctic disputes.[55]

A. Background/History of United Nations Convention on the Law of the Sea

Beginning in the seventeenth century, oceans had long been subject to the freedom-of-the-seas doctrine; the principle essentially limited national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation's coast.[56] The remainder of the sea was proclaimed to be "free to all and belonging to none."[57] By the 1960s, the oceans were being exploited as never before and were generating a multitude of claims and sovereignty disputes.[58] In November of 1967, Malta's Ambassador to the United Nations asked the leaders of the world to open their eyes to the looming conflict over the world's oceans and the potentially devastating effects that such a conflict could have on

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52. Dubner, *supra* note 37, at 6.

53. Candace L. Bates, *U.S. Ratification of the U.N. Convention on the Law of the Sea: Passive Acceptance is not Enough to Protect U.S. Property Interests*, 31 N.C.J. INT'L L. & COM. REG. 745, 747-50 (2006); *see generally* DONAT PHARAND, THE LAW OF THE SEA OF THE ARCTIC WITH SPECIAL REFERENCE TO CANADA (University of Ottawa Press 1973).

54. *See infra* notes 109-23 and accompanying text.

55. *See infra* notes 126-55 and accompanying text.

56. UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A HISTORICAL PERSPECTIVE (1998), *available at* http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm [hereinafter UNCLOS HISTORICAL PERSPECTIVE].

57. *Id.*

58. *Id.*

the world.[59] In response to the Ambassador's comments, the Third United Nations Conference of the Law of the Sea convened.[60] Its objective was to write a comprehensive treaty for the oceans.[61] The Conference convened in New York in 1973 and ended nine years later in 1982 with the adoption "of a constitution for the seas – the United Nations Convention on the Law of the Sea."[62] "[T]he Convention is an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring a stable order to mankind's very source of life."[63]

B. UNCLOS Application to the Arctic

Under UNCLOS, every nation is entitled to an exclusive economic zone up to 200 miles from its shoreline.[64] However, the rules governing territorial claims beyond 200 miles of the shoreline remain controversial and ineffective.[65]

The most significant aspect of UNCLOS's application to the Arctic is Article 76 which codifies a legal definition of "continental shelf,"[66] relying on

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59. *Id.*

60. *Id.*

61. *Id.* The Conference:

> devised new ways of conducting, and making decisions at, international gatherings, and became a model for other large assemblages of countries seeking to deal with complex problems. Its aim was to bring order and law where none existed or where customs were no longer respected and countries had begun to squabble. It dealt with such traditional and relatively straightforward matters as piracy, smuggling, and freedom of navigation on the high seas, on which there was little disagreement; and with hotly disputed ones, like the demarcation between the high seas and national waters, free passage through straits and through the waters of archipelagoes, pollution from ships passing a country's shores, and custody over resources, including food supplies and energy.

Peter Prows, *Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (And What is to be Done About It)*, 42 TEX. INT'L L.J. 241, 262 (2007).

62. UNCLOS HISTORICAL PERSPECTIVE, *supra* note 56. "UNCLOS attempted to establish true erga omnes property rules for ocean space in which the bargained spatial delineations would be agreed to and respected by concomitant strong consensus." Prows, *supra* note 61, at 266.

63. UNCLOS HISTORICAL PERSPECTIVE, *supra* note 56.

> Navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, a marine research regime and, a more unique feature, a binding procedure for settlement of disputes between States – these are among the important features of the treaty.

Id.

64. Adam Wolfe, *Russian Claims to Pole Foreshadow More Arctic Disputes to Come*, WORLD POL. REV., Aug. 13, 2007, http://www.worldpoliticsreview.com/article.aspx?id=1019.

65. *Id.*

66. The physical description of the continental shelf is described as follows:

> The seabed adjacent to the land territory of a coastal State typically (but not always) consists of three sections. The first, which might be described as the continental shelf proper, is a gradually sloping section from the low-water line. It

scientific and technical determinations of distance, geomorphology, and geology.[67] UNCLOS defines "continental shelf" as "comprising the seabed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of the land territory to the continental margin's outer edge."[68] If that natural prolongation falls short of 200 nautical miles from the baselines, the legal continental shelf is regarded as continuing 200 nautical miles from the baselines.[69] If the natural prolongation exceeds 200 nautical miles from the baselines, the coastal state's legal continental shelf continues until the natural prolongation ends, but under no circumstances may the continental shelf exceed either: (1) 350 nautical miles from the baselines or (2) 100 nautical miles beyond the 2,500 meter isobath.[70]

The Arctic states have considerable interest in extending their claims beyond the 200 nautical miles because, under UNCLOS, they have the right to exploration and exploitation of the natural resources contained in the extended territory.[71] Under Article 77 of UNCLOS, coastal states exercise sobering rights over their continental shelf for the purpose of exploring it and exploiting its natural resources.[72] The right is exclusive "in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without express consent of the coastal state."[73] The resources that Article 77 refers to are "mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species . . . ."[74] This definition clearly includes oil and gas reserves, which are a major economic interest to the Arctic states.[75] Thus, in order for the Arctic states to maximize the area that they are entitled to explore and exploit, they must make submissions to the Commission on the Limits of the Continental Shelf (CLCS) that would extend their continental

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> is the part of the seabed adjacent to the continent forming a large submerged terrace that dips gently seaward. The second, called the continental slope, drops away more steeply from the shelf into greater depth. It extends from the shelf edge to the top of the continental rise, or to the top of the deep ocean floor where no rise exists. The third, the continental rise (where it exists), lies beyond the slope and again falls away more gradually to the deep ocean floor. The shelf and the slope normally have geological characteristics typical of continental crust, often overlain by thick layers of sedimentary rock, the sediments having been washed down from the continent. . . . The three sections together are commonly known as the continental margin, but are referred to in UNCLOS also as the continental shelf.

Huw Llewellyn, *The Commission on the Limits of the Continental Shelf: Joint Submission by France, Ireland, Spain, and the United Kingdom*, 56 INT'L & COMP. L.Q. 677, 679 (2007).

67. UNCLOS, *supra* note 5, art. 76; Prows, *supra* note 61, at 271.

68. Sean D. Murphy, *U.S. Reaction to Russian Continental Shelf Claim*, 96 AM. J. INT'L L. 969, 969 (2002).

69. *Id.*

70. *Id.* The isobath is a line which connects the depth of 2,500 meters. *Id.*

71. UNCLOS, *supra* note 5, art.77; Llewellyn, *supra* note 66, at 679-80.

72. UNCLOS, *supra* note 5, art. 77(1).

73. UNCLOS, *supra* note 5, art. 77(2).

74. UNCLOS, *supra* note 5, art.77 (4).

75. Llewellyn, *supra* note 66, at 680.

shelf to the maximum limit permitted.[76]

In order to claim territory beyond the 200 mile area that every nation is entitled to, states must engage in a delineation process.[77] There are three stages of the delineation process: submission preparation, review by CLCS,[78] and delineation deposit.[79] During the submission preparation phase, states must acquire and interpret data before a submission can be prepared for review.[80] After submission, CLCS is "to consider, make recommendations, and provide requested scientific and technical advice regarding coastal States' continental shelf submissions on the basis of its Scientific and Technical Guidelines and Rules of Procedure."[81]

CLCS will then review the information and make a recommendation to the coastal state regarding the delineation of the continental shelf.[82] "If the coastal state establishes its continental shelf on the basis of those recommendations, then the recommendations are 'final and binding.'"[83]

Article 76 also establishes the CLCS,[84] which is made up of twenty-one individuals.[85] CLCS's purpose is to assess each nation's claim to extend territorial claims beyond 200 miles.[86] CLCS plays a unique role in international law.[87] It is not an adversarial or adjudicatory body with the ability to prescribe binding bilateral boundaries.[88] It is also unlike legal non-compliance

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76. *See generally id.* (discussing the benefits of extending the States' continental shelf beyond 200 nautical miles).

77. UNCLOS, *supra* note 5, art. 76.

78. Also referred to in this Note as the Commission.

79. Prows, *supra* note 61, at 273.

80. *Id.* at 274. See *id.* at 273-74 for a detailed discussion of the scientific research involved in data acquisition and interpretation.

81. *Id.* at 274; UNCLOS, *supra* note 5, art.76 (8); *see also* CLCS, *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf*, para. 1.7, U.N. Doc. CLCS/11 (May 13, 1999); CLCS, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, 17-19, U.N. Doc. CLCS/40 (July 2, 2004).

82. Murphy, *supra* note 68, at 969.

83. *Id.*

84. The members serve a five year term and are then eligible for re-election. The current term began in 2007 and will continue through 2012. The current members of the Commission are from Brazil, Argentina, Nigeria, Norway, Mexico, Trinidad and Tobago, Ireland, Mauritius, Romania, Malaysia, Georgia, Cameroon, Russia, China, Ghana, Korea, Portugal, India, Seychelles, Australia, and Japan. UNITED NATIONAL OCEANS AND LAW OF THE SEA, COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF (CLCS) MEMBERS OF THE COMMISSION (2007), *available at* http://www.un.org/Depts/los/clcs_new/commission_members.htm#Members.

85. UNCLOS, *supra* note 5, art.76.

86. Andrew King, Note, *Thawing a Frozen Treaty: Protecting United States Interests in the Arctic with a Congressional – Executive Agreement of the Law of the Sea*, 34 HASTINGS CONST. L.Q. 329, 333 (2007).

87. Prows, *supra* note 61, at 275. "It has been characterized variously as a 'canary in the mineshaft,' 'policeman,' 'watchdog,' and 'legitimator' of would be extended continental shelf claims." *Id.*; *see also* Ted L. McDorman, *The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World*, 17 INT'L MARINE & COASTAL L. 301, 319-21 (2002).

88. Robert W. Smith & George Taft, *Legal Aspects of the Continental Shelf, in*

mechanisms engaged in corrective or punitive measures when international commitments are not satisfied.[89]

CLCS is a science-based body composed of members who are "experts in the field of geology, geophysics or hydrography."[90] In fact, none of the CLCS members have any legal training.[91] The decision to rely on science was intended to depoliticize delineation; however, the process is still dependent on the biases of the scientists involved.[92]

The fact that CLCS lacks legal expertise has been subject to some criticism.[93] However, this fact is mitigated because the Commission can ask the Legal Counsel of the United Nations for legal advice.[94]

> [T]he primary competence to interpret Article 76 must rest with the UNCLOS State Parties, the view has been expressed that the Commission should in general accept the interpretation made by the submitting coastal State; and that only if the Commission considers that that interpretation departs from what can reasonably be considered to be in accordance with the Convention should it reject it.[95]

It is very difficult to determine the effectiveness of CLCS in the delineation process because the method of formulating recommendations is obscure. CLCS sessions are closed to all parties except the state whose submission is being evaluated.[96] CLCS is bound by states' requests to keep their submission information confidential.[97] This results in a lack of details of the CLCS's deliberations.[98] CLCS also refuses to consider interventions from states that are not opposite from or adjacent to the submitting state.[99] "Without

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CONTINENTAL SHELF LIMITS: THE SCIENTIFIC AND LEGAL INTERFACE (Peter J. Cook & Chris M. Carleton eds., 2000); Prows, *supra* note 61, at 275.

89. *See generally* Marti Kiskenniemi, *Breach of Treaty of Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 123 (1992).

90. UNCLOS, *supra* note 5, annex II, art. 2(1).

91. Prows, *supra* note 61, at 275.

92. *Id.*

93. Llewellyn, *supra* note 66, at 683.

94. *See* Letter Dated 98/03/11 From the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, Addressed to the Commissions on the Limits of the Continental Shelf: Legal Opinion on the Applicability of the Convention on the Privileges and Immunities of the United Nations to the Members of the Commission, Mar. 11, 1998, CLCS/5, *available at* http://documents.un.org/mother.asp; *see also* Llewellyn, *supra* note 66, at 683.

95. Llewellyn, *supra* note 66, at 683.

96. CLCS, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, 17-19, U.N. Doc. CLCS/40, rules 23, 52 (July 2, 2004).

97. *Id.* annex II.

98. Prows, *supra* note 61, at 275-76.

99. CLCS, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, para. 17, U.N. Doc. CLCS/42 (Sept. 14, 2004). "These policies only make it more difficult for other States to contribute to and learn from others' submissions about how the best science should be brought to bear in support of different types of claims." Prows, *supra* note 61, at 276.

more practice and transparency, it is similarly difficult to assess the efficiency of the CLCS in interpreting and applying international law."[100]

Article 76(4) provides the methods for calculating the outer edge of the continental margin, which includes two alternate formulas.[101] Article 76(4) provides that:

> 4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
>
> (i) a line delineated . . . by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 percent of the shortest distance from such point to the foot of the continental shelf; or
>
> (ii) a line delineated . . . by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
>
> (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.[102]

The Irish formula, contained in Article 76(4)(i), places the outer limits out to a point where hydrocarbon-rich sedimentary rocks have settled down the continental margin in detectable thickness.[103] The Hedberg formula, contained in Article 76(4)(ii), calculates the outer limit as sixty miles from the foot of the continental slope, "which itself is an estimate of where the land mass begins its rise from the deep ocean floor."[104] The maximum width for the extended continental shelf under either formula is 350 miles from shore, or for non-ridge claims, 100 miles beyond the 2,500 meter isobath.[105]

When the continental shelf extends past 200 nautical miles, the coastal state is supposed to delineate the outer limits of the continental shelf.[106] The Convention requires that no later than ten years after a coastal state becomes a

100. Prows, *supra* note 61, at 276.
101. UNCLOS, *supra* note 5, art.76 (4); Prows, *supra* note 61, at 272.
102. UNCLOS, *supra* note 5, art. 76 (4).
103. Prows, *supra* note 61, at 272; *see* UNCLOS, *supra* note 5, art. 76 (4)(i).
104. Prows, *supra* note 61, at 272; *see* UNCLOS, *supra* note 5, art. 76 (4)(ii).
105. Prows, *supra* note 61, at 272.
106. Murphy, *supra* note 68, at 969.

party to the Convention that it submit oceanographic information relevant to the limits of its continental shelf to the CLCS.[107] "The first continental shelf claim submission deadline faced by the 129 early-adopter States Parties is May 13, 2009."[108]

However, there are concerns about the effectiveness of Article 76. "Given that approximately twenty-five percent of the sea-bed is potentially claimable as a continental shelf, it is reasonable to expect . . . difficulties as Article 76 is implemented."[109] The full Article 76 mechanism has yet to be tested by any state that has deposited its final and binding delineation with the United Nations Secretary-General, or by exercising its jurisdiction in a claimed extended continental shelf area.[110] There are also many uncertain situations created by Article 76 that remain to be determined.[111] Conflict over the uncertain situations has the potential to "fragment and undermine the whole continental shelf outer limit regime."[112]

Another point of contention regarding Article 76 comes during the "final and binding" continental shelf outer limit delineation on the basis of CLCS's recommendations.[113] No state has deposited its CLCS delineation with the United Nations Secretary-General, so it is difficult to evaluate the success of Article 76.[114] "It is foreseeable . . . that conflict could arise where a coastal State and its opposite, adjacent, and distant-water colleagues disagree over whether the delineation is appropriately based on the CLCS recommendations and thus undoubtedly 'final and binding.'"[115]

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107. *Id.* At the 2001 annual State Parties meeting, the parties agreed to extend the time allowed for coastal states to prepare and make extended continental shelf submissions. The Parties took this action because the CLCS had not adopted the Scientific and Technical Guidelines on which submissions would be reviewed until May 1999, which made the original 2004 deadline unreasonable. Prows, *supra* note 61, at 268.

108. Prows, *supra* note 61, at 270. Of more than sixty countries that could claim a continental shelf, only seven submissions have been made to CLCS. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 270-71. Some of the unanswered questions that are outside the scope of this Note include the following:

> If, for example, a State misses the 2009 deadline, does it prejudice any claim to an extended continental shelf in favor of a more general interest in the seabed common heritage? What if the scientists who compose the CLCS make a legal interpretation of Article 76 that prejudices a coastal State's asserted rights and obligations under UNCLOS? And, if in the meantime an oil well is prospected in a marginal area that may or may not be claimed as legal shelf, would drilling fall under UNCLOS Part VI or Part XI?

Id.

112. *Id.* at 271.

113. *See id.* at 276.

114. *Id.*

115. *Id.* at 276-77; see also UNCLOS, *supra* note 5, art. 76 (8) which states that "[t]he Commission shall make recommendations to coastal states on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."

There are several problems with the method of delineation of territory set out in Article 76 of UNCLOS. First, the Arctic region is a very unique place; it is the only place in the world where a number of countries form a circle around an enclosed ocean.[116] This means that there is a lot of overlap in territorial claims.[117] The overlap is of particular concern because CLCS is prohibited from making recommendations regarding territory that is claimed by more than one state.[118] The states with competing claims are supposed to work it out amongst themselves.[119] The second problem with the method is that ocean mapping systems are not very accurate.[120] "Overall, maps of Mars are about 250 times better than maps of the earth's ocean floor."[121] This also contributes to competing claims, as it is difficult for a state to determine the precise delineation of the continental shelf without accurate data.[122] "The critical task of delineating a true outer limit to the continental shelf is now a matter of implementing the delicate balance between applied science and supervised unilateral claims embodied in Article 76 of UNCLOS."[123]

Thus, while UNCLOS appeared to be an ideal method of governing the world's oceans at the time of its adoption, there are many problems with it regarding Arctic territory claims.[124] The uncertainty of Article 76 regarding claims to the Arctic is of particular importance. The uncertainty of UNCLOS may lead to additional disputes over Arctic territory. Therefore, "[a]lthough UNCLOS as a political bargain and legal regime may aspire to universality, it is undoubtedly an imperfect and incomplete instrument."[125]

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116. King, *supra* note 86, at 335.

117. *Id.* The boundaries of the five nations "converge the way sections of an orange meet at the stem." Krauss et al., *supra* note 3.

118. UNCLOS, *supra* note 5, art. 83 (1); Woodard, *supra* note 2. "Delimitation between opposite or adjacent States is . . . left to 'equitable agreement on the basis of international law.'" Prows, *supra* note 61, at 271.

119. Prows, *supra* note 61, at 271.

120. Robert Lee Hotz, *U.S. Draws Map of Rich Arctic Floor Ahead of Big Melt*, WALL ST. J., Aug. 31, 2007, at B1.

121. *Id.*

122. *See id.* It is also very difficult to determine the exact points of a slope's beginning. *See* Gagnon, *supra* note 47.

> Think of a continent as a big rock sitting in a bathtub, and imagine that a chunk of it rises out of the water. The question for scientists is, where does the rock end and the acrylic tub begin? It sounds simple enough, but imagine . . . that [the] tub is also made of rock, and that smaller rocks are piled up all over the place.

Id.

123. Prows, *supra* note 61, at 241. "The stated scientific criteria - - despite the attempt to make the criteria definitive- remain vague and ambiguous, in addition to suffering from the uncertainties inherent in any nascent scientific endeavor." *Id.*

124. *See supra* notes 64-133 and accompanying text.

125. Prows, *supra* note 61, at 245.

C. Signatories to UNCLOS- Why is the United States not on the List?

As of 2007, there were 155 signatories to UNCLOS.[126] The most recent signatories added in 2007 were Moldova, Morocco, and Lesotho.[127] All of the Arctic states have ratified the treaty, except for the United States.[128]

Many are concerned that until the United States[129] ratifies UNCLOS, it will be left out of any claims for Arctic territory.[130] Although President Bill Clinton signed the amended UNCLOS on July, 29, 1994, and, on October 7, 1994, submitted it to the United States Senate as required under Article II, Section 2 of the Constitution, the Senate still has not ratified it by the required two-thirds majority.[131] As of 2007, the Bush Administration was still trying to get Senate approval for UNCLOS.[132] On February 7, 2002, President Bush designated UNCLOS as one of five treaties in urgent need of Senate approval.[133] Senator Richard Lugar (R-Ind.), who became chairman of the Senate Foreign Relations Committee in 2003, held hearings on the Convention both in 2003 and 2004.[134] On February 25, 2004, the Committee voted to recommend ratification of the treaty and submitted it to the full Senate for approval.[135]

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126. UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA: CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AND RELATED AGREEMENTS AS OF 26 OCTOBER 2007, *available at* http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm [hereinafter UNCLOS SIGNATORY LIST].

127. *Id.*

128. *Id.* Denmark became a signatory on November 16, 2004. Canada became a signatory on November 7, 2004. The Russian Federation became a signatory on March 12, 1997. Norway became a signatory on June 24, 1996. *Id.*

129. Even though the United States has not ratified the treaty, in some cases the treaty has been treated as international law. The courts in the following cases have reached the conclusion that despite the submission of UNCLOS to ratification and failure by the Senate to ratify it, UNCLOS reflects international common law: United States v. Alaska, 503 U.S. 569 (1992); United States v. Kun Yun Jho, 465 F. Supp.2d 618 (E.D. Tex. 2006); and United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp.2d 1358 (S.D. Fla. 1998). The courts in the following cases, relying in part on the Restatement Third, Foreign Relations Law §312(3) and international conventions, ruled that upon submission of the UNCLOS to the Senate by the President, even though Congress did not ratify the treaty, UNCLOS carried the weight of law and the United States was obliged to refrain from acts that would defeat the object and purpose of the agreement, or the like: Mayaguezanos por la Salud y el Ambiente v. United States, 198 F.3d 297 (1st Cir. 1999) and Mansel v. Baker Hughes, Inc., 203 F. Supp.2d 745 (S.D. Tex. 2002). There is also case law expressly noting that since UNCLOS was submitted for Senate ratification but it was not ratified, it did not have the force of law: United States v. Best, 304 F.3d 308 (3d Cir. 2002). Jay M. Zitter, *Construction and Application of United Nations Convention of the Law of the Sea - - Global Cases*, 21 A.L.R. FED. 2D 109 (2007).

130. *See generally* King, *supra* note 86. Estimates suggest that the United States could claim at least 386,000 square miles of territory. Gagnon, *supra* note 47.

131. King, *supra* note 86, at 336.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

Despite the apparent support for UNCLOS, the Senate has still not ratified the treaty.[136] In 2006, Senate Majority Leader Bill Frist refused to schedule a floor vote on the Convention.[137] Senator Frist claims that there is an inadequate understanding of what the Law of the Sea Treaty actually is and what it does.[138] "Ratification of the treaty has long been opposed by conservatives, who consider it a shackle on US sovereignty . . . ."[139]

During the current push for ratification many organizations have testified in support of UNCLOS, including the Department of State, Office of the Secretary of Defense, the U.S. Navy, the U.S. Coast Guard, and the Commerce Department.[140] Additionally, in the private sector, "every major ocean industry, including shipping, fishing, oil and natural gas, drilling contractors, ship builders, and telecommunications companies that use underwater cables, support U.S. accession to the Law of the Sea and are lobbying in favor of it."[141] Many prominent environmental institutions, including the Natural Resource Defense Council and the Ocean Conservancy, have also joined with the oil and gas companies in support of UNCLOS because of the environmental provisions in the Treaty.[142] "Many proponents of the treaty, including the Pentagon, the American Petroleum Institute and Senator John McCain . . . say [that failure to ratify the treaty] leaves the United States on the sidelines while others carve up an ocean."[143]

The United States must ratify UNCLOS in the near future in order to protect its Arctic claims:

> To maintain its economic dominance in the [international] community, the United States must join the Convention on the Law of the Sea. It is in the best economic, military, and environmental interests for the United States to join the Convention, and adherence to its guidelines would encourage others to join, resulting in more stability in the laws governing the ocean.[144]

If the United States fails to ratify UNCLOS, its claims would be

136. *Id.* at 338.
137. *Id.* at 337.
138. *Id.*
139. Graff, *supra* note 25.
140. *Id;* John Norton Moore, United States Adherence to the Law of the Sea Convention: A Compelling National Interest, Prepared Testimony Before the House Committee on International Relations (May 12, 2004), *available at* http://www.virginia.edu/colp/pdf/house-testimony.pdf.
141. Senator Richard G. Lugar, Chairman, Senate Comm. on Foreign Relations, The Law of the Sea Convention: The Case for Senate Action, Address at Brookings Institution (May 4, 2004) (transcript available at http://www.brookings.edu/comm/events/20040504lugar.htm).
142. *Id.*
143. Krauss et al., *supra* note 3.
144. Bates, *supra* note 53, at 791-92.

subordinate to any country claiming competing territory, as CLCS will not evaluate the claims of states that are not parties to the treaty.[145] Senator Lugar has commented that CLCS

> will soon begin making decisions on claims to continental shelf areas that could impact the United States' own claims in the area and resources of our broad continental margin. Russia is already making excessive claims in the Arctic. Unless we are party to the Convention, we will not be able to protect our national interest in these discussions.[146]

In response to the need for UNCLOS to be ratified, and the refusal of a few Senate members to present the treaty, some advocates have proposed that the President should "withdraw the treaty from the Senate and work with both Houses of Congress to foster a Congressional-Executive agreement . . . ."[147] In a Congressional-Executive Agreement "the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution."[148] Those who support a Congressional-Executive Agreement think that it would create "fresh political impetus to get the Convention approved."[149] "The Convention powerfully serves our security interests and *no* United States oceans interest is better served by non-adherence."[150]

Even though the United States has not yet ratified UNCLOS, it is taking measures to ensure that if it ever ratifies the Convention its interests will be protected. In August 2007, the United States launched the $1 million Healy expedition to map the ocean floor of the Arctic.[151] The Healy expedition is the United States' third seafloor mapping venture of the Arctic since 2003.[152] "The Healy's voyage is part of a broader U.S. effort to extend its undersea zone of military and economic authority should it adopt the 25-year-old U.N. accord."[153]

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145. *See* King, *supra* note 86, at 338-40.

146. Lugar, *supra* note 141.

147. *See* King, *supra* note 86, at 330; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 (1987).

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 (1987). "It is within the [P]resident's prerogative to decide whether to submit an international agreement as an Article II treaty or an Article I Congressional-Executive agreement . . . . It is not an unconstitutional leap to say that the president can also withdraw an Article II treaty from consideration in the Senate and resubmit it to Congress as a Congressional-Executive agreement." King, *supra* note 86, at 353.

149. King, *supra* note 86, at 352. Resubmitting the Convention could generate new media coverage and momentum in the House of Representatives. *Id.*

150. Moore, *supra* note 140, at 5.

151. Hotz, *supra* note 120.

152. *Id.*

153. *Id.*

Hence, in order for the United States to protect its interests in both the Arctic and other areas of the world's oceans, it is imperative that it become a signatory to UNCLOS.[154] Even in the event that the Arctic states attempt to negotiate an agreement outside of UNCLOS, becoming a signatory will be beneficial to the United States because it will be able to protect its interests in areas outside of the Arctic.[155]

D. Dispute Settlement Mechanisms Contained within UNCLOS

While UNCLOS contains provisions for dispute resolution under the Convention, the prescribed methods will likely be ineffective at quelling disputes in the Arctic.[156] Under Article 287 of UNCLOS, a party to the convention can choose, through a written declaration, one or more of the following means for the settlement of disputes concerning interpretation or application of the Convention: the International Tribunal for the Law of the Sea;[157] the International Court of Justice; an arbitral tribunal constituted in accordance with Annex VII of UNCLOS; and/or a special arbitral tribunal constituted in accordance with Annex VIII[158] for one or more categories of disputes specified.[159] If the parties to a dispute have selected the same procedure, they may only use that procedure, unless they agree otherwise.[160] If the parties to a dispute have not agreed upon the same procedure, the dispute may only be submitted to arbitration under Annex VII of UNCLOS.[161]

The four Arctic states that are parties to UNCLOS have not all selected the same method for dispute resolution.[162] Canada has selected submission to either the International Tribunal for the Law of the Sea or an arbitral tribunal in accordance with UNCLOS Annex VII.[163] Denmark and Norway have both

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154. *See* King, *supra* note 86, at 336-40.

155. *See generally* Bates, *supra* note 53, at 771-92.

156. *See* UNCLOS, *supra* note 5, art. 287.

157. Established in accordance with UNCLOS, *supra* note 5, annex VI. See International Tribunal for the Law of the Sea, General Information-Overview, http://www.itlos.org/start2_en.html (last visited Apr. 3, 2009) for additional information regarding the International Tribunal for the Law of the Sea.

158. The categories of disputes eligible for special arbitration are those relating to: fisheries, protection and preservation of the marine environment, marine scientific research, and navigation, including: pollution from vessels and by dumping. UNCLOS, *supra* note 5, annex VIII art. 1.

159. UNCLOS, *supra* note 5, art. 287(1). Any declarations made pursuant to this article remain in force until three months after a notice of revocation is deposited with the Secretary-General of the United Nations. *Id.* at art. 287(6).

160. *Id.* at art. 287(4).

161. *Id.* at art. 287(5).

162. DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA: SETTLEMENT OF DISPUTES MECHANISM (2007), *available at* http://www.unorg./Depts/los/settlement_of_disputes/choice_procedure.htm [hereinafter SETTLEMENT OF DISPUTES MECHANISM].

163. *Id.*

chosen submission to the International Court of Justice.[164] Russia has elected three methods: submission to the International Tribunal for the Law of the Sea for matters relating to detained vessels and crews; submission to a special arbitral tribunal for matters that are in accordance with UNCLOS Annex VIII;[165] and submission to arbitration in accordance with UNCLOS Annex VII for all other matters.[166] Thus, because most of the states have selected different dispute resolution mechanisms, any dispute between the states would likely be arbitrated in accordance with UNCLOS Annex VII, unless the parties agree otherwise.[167]

However, under UNCLOS Article 298, states may declare in writing that they do not accept one or more of the procedures they have selected under Article 287 for several types of disputes.[168] Specifically, states can declare that they do not accept the dispute procedures they have selected for disputes concerning UNCLOS Article 83, which involves the delineation of continental shelves between states with opposite or adjacent coasts.[169] Denmark and Norway will not accept an arbitral tribunal in accordance with Annex VII for disputes under Article 83 of UNCLOS.[170] Canada and Russia have also declared that they will not accept their selected methods of dispute under Article 287 regarding UNCLOS Article 83.[171]

As a result, if Denmark or Norway were engaged in a dispute regarding UNCLOS Article 83 with a state that had not selected the same dispute mechanism under UNCLOS Article 287, instead of appearing before an arbitral tribunal under Annex VII, the dispute resolution would be pursuant to Article 298.[172] Under UNCLOS Article 298, if the parties do not reach an agreement as to a method of dispute in a reasonable period of time, at the request of any of the parties the matter can be submitted to conciliation under UNCLOS Annex V, Section 2.[173] In conciliation, a conciliation commission simply makes non-binding proposals to the parties with a view of reaching an amicable settlement.[174] In addition, if Canada and Russia have a dispute with any state regarding delimitation of continental shelves under UNCLOS Article 83 they will also be subject to conciliation if they cannot reach an agreement in a reasonable amount of time.[175]

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164. *Id.*

165. *Id. See also* UNCLOS, *supra* note 5, annex VII.

166. SETTLEMENT OF DISPUTES MECHANISM, *supra* note 162.

167. UNCLOS, *supra* note 5, art. 287 (5).

168. *Id.* at art. 298.

169. *Id.* at arts. 83, 298(1)(a)(i). See UNCLOS, *supra* note 5, art. 298 for a listing of all types of disputes where states can elect not to accept the declared dispute resolution mechanisms under UNCLOS Article 287.

170. SETTLEMENT OF DISPUTE MECHANISMS, *supra* note 162.

171. *Id.*

172. UNCLOS, *supra* note 5, arts. 83, 287 & 298.

173. UNCLOS, *supra* note 5, art. 298.

174. UNCLOS, *supra* note 5, annex v, art. 6.

175. UNCLOS, *supra* note 5, art. 298.

Because of the lack of binding dispute resolution mechanisms available to the Arctic states regarding UNCLOS Article 83, it will be very difficult to settle any disputes that may arise under the current dispute resolution framework of UNCLOS. The insufficiency of the dispute resolution mechanisms under UNCLOS, specifically regarding UNCLOS Article 83, basically means that the Arctic states will be left to their own devices, with only the help of a non-binding conciliation committee, if a dispute should arise regarding the delimitation of continental shelves.[176]

The foregoing summary of the legal framework governing territorial disputes in the Arctic Ocean indicates several observations regarding the current situation in the Arctic. First, UNCLOS has many pitfalls in its methods of delimitating the extended continental shelves of the Arctic states.[177] The Arctic states should consider whether UNCLOS is adequate to ensure their potential claims to Arctic territory. Perhaps it would be beneficial for the Arctic states to negotiate a mutually beneficial agreement regarding the delimitation of the Arctic, outside of UNCLOS. An agreement outside of UNCLOS could eliminate all of the inefficient and ineffective terms that are contained within UNCLOS. Second, even if an agreement is made outside of UNCLOS regarding the Arctic, the United States should become a signatory to UNCLOS. This would ensure that all of the United State's ocean interests are protected, even those outside of the Arctic.[178]

II. AREAS IN DISPUTE

While the most potentially heated part of the dispute between the Arctic states will likely come from submissions to CLCS that overlap one another,[179] there are also several other ongoing disputes between some of the five Arctic states. The current disputes include a disagreement between the United States and Canada regarding the Northwest Passage,[180] tensions between Russia and all of the other Arctic states following several aggressive actions Russia has taken in the Arctic,[181] and contention between Canada and Denmark regarding Hans Island.[182]

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176. *See supra* notes 172-75 and accompanying text.

177. *See supra* notes 64-125 and accompanying text.

178. *See generally* Bates, *supra* note 53, at 771-92 (discussing why passive acceptance of UNCLOS is not enough to protect the United States' property interests).

179. Woodard, *supra* note 2.

180. *See generally* Christopher Mark Macneill, *Gaining Command & Control of the Northwest Passage: Strait Talk on Sovereignty*, 34 TRANSP. L.J. 355 (2007) (discussing the ongoing dispute over the Northwest Passage).

181. *See generally* Woodard, *supra* note 2 (discussing Russia's recent actions in the Arctic).

182. *See generally* Christopher Stevenson, *Hans Off!: The Struggle for Hans Island and the Potential Ramifications for International Border Dispute Resolution*, 30 B.C. INT'L & COMP. L. REV. 263, 267 (discussing the history of the dispute over Hans Island and the reasons for the heated dispute over the small island).

A. United States and Canada - The Northwest Passage

The melting of the Arctic ice has reignited a longstanding feud between Canada and the United States over who controls the Northwest Passage.[183] The United States has long claimed that the Northwest Passage is an international strait through which it has transit passage.[184] The United States has "continually refus[ed] to acknowledge Canadian Sovereignty over the Arctic Archipelago, and thus, the Northwest Passage."[185] Canada claims that it has internal jurisdiction over the waterway.[186] The Canadian claim is founded on the International Court of Justice's decision in the Norwegian Fisheries Case.[187] Canada's claims stem from the argument that the "straits composing the Northwest Passage amount to inland seas, and therefore are subject to Canadian sovereignty, just as the United States controls Lake Michigan. The United States replies that these straits are part of the high seas, and thus anyone can enter them without obtaining Canada's consent."[188] The United States' claim is supported by the Corfu Channel case.[189]

While Canada may not have a valid argument that it has sovereignty over the Northwest Passage, it may be in the best interest of the rest of the world that it does, even if it will reap the greatest profit and have the formal power to keep the rest of the world out.[190] "Canada has an interest in protecting the passage and exploiting its resources, which the rest of the world can purchase."[191] This

183. *See generally* Jarashow et al., *supra* note 51 (discussing the dispute over the Northwest Passage); Michael A. Becker, *International Law of the Sea*, 41 INT'L L. 671 (2007) (discussing the renewed tensions surrounding the Northwest Passage); Macneill, *supra* note 180 (discussing the Northwest Passage).

184. Jarashow et al., *supra* note 51, at 1592.

185. *Id.* The European Union, led by the influence of the United Kingdom, in recognizing its own economic interest, has supported the United States' position that the Northwest Passage is an international strait; Russia has expressed its support for Canada's claim on complete control. Macneill, *supra* note 180, at 366.

186. Jarashow et al., *supra* note 51, at 1592.

187. Macneill, *supra* note 180, at 382; *see also* Fisheries Case (U.K. v Nor.), 1951 I.C.J. 116 (Dec. 18) (establishing elements of straight baseline test).

188. Eric Posner, *The New Race for the Arctic*, WALL ST. J., Aug. 3, 2007, at A8. If the United States were to acquiesce that the Northwest Passage is Canadian internal waters, the United States would exclusively qualify as a neighboring land-locked state with a right of traffic in transit, as a transit state under UNCLOS Article 124(1)(b). Macneill, *supra* note 180, at 368-69. UNCLOS Article 124 provides that: "transit State means a State, with or without a sea-coast, situated between a land-locked State and the sea, through whose territory traffic in transit passes." UNCLOS, *supra* note 5, art. 124(1)(b). "Alaska is effectively land-locked from convenient and effective land based access to the continental [United States], and therefore, stands to benefit from transit passes through the Canadian Arctic coastline." Macneill, *supra* note 180, at 369.

189. Macneill, *supra* note 180, at 382; *see also* Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) (defining innocent passage and other associated rights).

190. Posner, *supra* note 188.

191. *Id.*

is because common areas of the ocean are subject to exploitation.[192] Overfishing has commonly been the predictable consequence of uncontrolled oceans.[193] Common areas of the ocean are also subject to increased environmental harm, as there is no one nation that enforces environmental protection laws.[194] "If no one can control the oceans, then the problem cannot be solved by giving a country nominal title to them."[195] However, many speculate that because of its military weakness, Canada cannot control the Northwest Passage without the support of the United States.[196] One proposal posits that if the United States supports Canada's claim to the Northwest Passage in return for some sort of guarantee of United States military and civilian access, the two countries may strengthen their claims against Russia.[197] "As the world heats up, the two countries need to prepare themselves for the re-emergence of old rivalries, and in the battle over control of the Arctic, the U.S. and Canada are natural allies."[198]

B. Russia and all Other Arctic Nations

Russia is the Arctic nation that is most aggressively trying to claim as much Arctic territory as it can.[199] On August 2, 2007, two Russian submarines traveled over two miles under the Arctic Ocean and planted a titanium Russian flag on the seafloor of the North Pole, claiming the underwater territory for Russia.[200] While the flag planting does not have any legal effect towards UNCLOS claims, it signaled Russia's seriousness regarding the Arctic territory.[201] Further, in spite of its legal insignificance, the Russian flag-planting mission generated backlash from most of the Arctic countries, especially Canada.[202] Canada's Foreign Minister Peter McKay dismissed the Russian effort as show.[203] "This isn't the 15th century . . . [y]ou can't go around the world and just plant flags and say 'we're claiming this territory.'"[204] In Washington, Ariel Cohen of the Heritage Foundation said of the flag-planting

192. *Id.*
193. *Id.*
194. *See generally* Shi-Ling Hsu & Austen L. Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48 VA. J. INT'L L. 1 (2007).
195. Posner, *supra* note 188.
196. Macneill, *supra* note 180, at 382.
197. *Id.*
198. Posner, *supra* note 188.
199. *See generally* Wolfe, *supra* note 64.
200. *Id.*
201. Woodard, *supra* note 2. "Russia really meant something when it planted that flag: that it is taking the Arctic carve-up very seriously." *Id.* "[I]t gave the Russians as much legal claim to the undersea Arctic as the US got to the moon when Armstrong and Aldrin put up the Stars and Stripes in the Sea of Tranquility." Gagnon, *supra* note 47.
202. Graff, *supra* note 25.
203. *Id.*
204. *Id.*

incident, "Russia's attempted grab is a cause for concern," and called on the United States government to "formulate a strong response."[205]

Russia is the only Arctic nation thus far to submit a claim regarding its continental shelf to CLCS.[206] On December 20, 2001, the Russian Federation proposed the outer limits of its continental shelf.[207] The Russian claim was for 1.2 million square kilometers of territory, including the North Pole- nearly half of the Arctic Ocean.[208] In June 2002, CLCS ruled that there was not sufficient data to support the assertion.[209] CLCS asked the Russian Federation to make a revised submission with respect to its extended continental shelf.[210] Russia has until 2009 to prove its claim, in order to fall within the ten-year time period mandated by CLCS.[211] Russia is still in the process of verifying the claim it submitted in 2001.[212]

The 2007 Russian flag-planting mission was also aimed at proving that the seabed beneath the North Pole, known as the Lomonsov Ridge, is an extension of the Eurasian continental shelf, and thus falls under Russian control.[213] Countering Russia's claim, Canada and Denmark are pursuing scientific proof that Lomonsov Ridge is connected to Ellesmere Island[214] and Greenland respectively.[215] Both Denmark and Canada have coordinated research missions designed to counter the Russian claim to the Lomonosov Ridge.[216]

Russia is currently regarded as the dominant force in the Arctic. The Russian flag-planting mission, along with its significant claim to the Arctic in 2001, is just one of the ways that Russia is attempting to assert its dominance and intent to exert control over the Arctic.[217] Russia is also a dominant force in the Arctic because "it has the world's largest fleet of icebreakers and long experience developing its icy Northern coastline."[218]

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205. *Id.*
206. Murphy, *supra* note 68.
207. *Id.*
208. Jarashow et al., *supra* note 51, at 1595.
209. Wolfe, *supra* note 64.
210. Murphy, *supra* note 68.
211. Wolfe, *supra* note 64.
212. *Id.*
213. *Id.*
214. Ellesmere Island is the third largest island in Canada and the most northerly island in the Arctic Archipelago. TheCanadianEncyclopedia.com, Ellesmere Island, http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0002578 (last visited Apr. 3, 2009).
215. Wolfe, *supra* note 64.
216. *Id.*
217. *See* Posner, *supra* note 188.
218. Graff, *supra* note 25.

C. *Denmark and Canada - Hans Island*

Denmark and Canada are disputing the sovereignty of Hans Island, "a half-square-mile rock, 13% the size of New York's Central Park," which is located between Canada's Ellesmere Island and Danish Greenland.[219] The island has been a subject of silent conflict for more than twenty years.[220] The island is important for several reasons, including: "(1) the possible oil reserves lying beneath it[221] and (2) its location at the center of the Kennedy Channel, a potentially important shipping lane."[222] The resolution of the dispute between Canada and Denmark over the island may have implications for determining each country's continental shelf boundaries under UNCLOS.[223] Also, if Canada subordinates its claim regarding Hans Island, it might lose any leverage it holds with regard to the rest of the Arctic region, including the Northwest Passage.[224]

The preceding disputes are only examples of the disputes that are currently ongoing between the Arctic states. The disputes with the most potential to become extremely heated will likely develop due to the lack of an effective and efficient terms resolution mechanism in UNCLOS.[225]

III. ANALYSIS OF PREVIOUSLY PROPOSED SOLUTION MODELS

There have been several different proposed models that purport to offer a solution to the potential Arctic disputes.[226] None of the proposed solutions are perfect, and each has pros and cons.[227] This Part provides an analysis of several of the previously proposed models.

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219. Anitei, *supra* note 45.

220. *Id.*

221. "While there are no known deposits of oil, natural gas, gold, or other minerals on Hans Island, there is speculation that the seafloor under the surrounding waters could contain such natural resources." Stevenson, *supra* note 182, at 267. *See generally* Anne McIlroy, *Hans off My Island*, GUARDIAN UNLIMITED, Aug. 30, 2005, *available at* http://guardian.co.uk/world/2005/aug/30/arctic.

222. Jarashow et al., *supra* note 51, at 1593-94.

223. *Id.* at 1594. See Stevenson, *supra* note 182, at 268-75 for a discussion and analysis of the possible outcome of the dispute if presented to the International Court of Justice. *See also* Jarashow et al., *supra* note 51, at 1624-30 (discussing the territorial dispute and ramifications of possible outcomes).

224. *Id.; see also* Hans Island the Tip of Iceberg in Arctic Claims, CTV.ca News Staff, July 31, 2005, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050731/hans_island_QP_050731?s_name=&no_ads (describing statements of Canada's Defense Minister that if Canada is not firm with the sovereignty of Hans Island, it would be setting a terrible precedent for other issues of Canadian Arctic Sovereignty).

225. *See* Woodard, *supra* note 2.

226. *See infra* notes 229-78 and accompanying text.

227. *See infra* notes 229-78 and accompanying text.

A. Antarctica Model

One of the proposed solutions regarding territory disputes in the Arctic is to implement a treaty between the five countries that is similar to the Antarctic Treaty.[228] The two polar areas are similar in many ways.[229] "Both have extreme climatic conditions, receiving less radiation from the sun than other parts of the globe, and the ecosystems have had to adapt to very cold and dark environments with short light-filled growing seasons."[230] The two areas also have many differences.[231] "[T]he Arctic consists of ocean surrounded by continents, whereas the Antarctic is a continent surrounded by ocean; the Antarctic has no permanent human habitation, while the Arctic is inhabited by indigenous peoples and other local communities."[232]

The Antarctic Treaty was created in 1959 after the United States invited twelve nations with claims to Antarctica to a conference in Washington D.C.[233] The Treaty included key provisions that addressed competing territorial claims.[234] Article IV of the Antarctic Treaty includes a clause that states that nothing contained in the Treaty will be interpreted as a renunciation by any Party of a claim to territorial sovereignty in Antarctica.[235] Article IV also states that no activities that take place while the Treaty is in force will constitute a basis for asserting, supporting, or denying a claim to territorial sovereignty in Antarctica, or create any right to sovereignty.[236] No new claims or enlargement of existing claims can be made while the Treaty is in force.[237]

The actual effect of this language is unclear, but it is important because it allowed the nations to look past any territorial disputes and focus on other important problems facing the continent, such as pollution control, natural resource exploitation, and scientific exploration.[238] No new sovereignty disputes have arisen in Antarctica for more than forty-five years, mainly due to Article IV.[239]

Some scholars believe that because there are many piecemeal treaties that do not completely cover all the concerns of the Arctic, a single treaty modeled

228. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

229. Timo Koivurova, *Environmental Protection in the Arctic and Antarctic: Can the Polar Regimes Learn from Each Other?*, 33 INT'L J. LEGAL INFO. 204, 204 (2005).

230. *Id.* "In such conditions, the ecosystems are simple, containing only a few key species, and are thus more vulnerable to human-induced pollution than those of more temperate areas." *Id.* "[T]he two polar regions have four issues in common: science, territorial sovereignty, national security, and environment." Dubner, *supra* note 37, at 13 (internal quotations omitted).

231. Koivurova, *supra* note 229, at 204.

232. *Id.*

233. Jarashow et al., *supra* note 51, at 1637.

234. *Id.*

235. Antarctic Treaty, *supra* note 228, art. IV.

236. *Id.*

237. *Id.*

238. Jarashow et al., *supra* note 51, at 1638.

239. *Id.*

after the Antarctic treaty would be more effective.[240] Specifically, it has been noted that there is a need for a "single treaty [that] offers the protection necessary to guard the environment from . . . various pollutants . . . ."[241] This is because environmental protection in the Antarctic has been regulated by international law due to the lack of sovereignty in the area, meaning there are no territorial sovereigns whose environmental protection systems would govern.[242] In the Arctic, national environmental laws apply to most areas.[243]

However, the Antarctic Model will most likely not be effective in the Arctic region for several reasons. "[S]cientific interests rather than political, economic, or military concerns dominated the expeditions sent to Antarctica after World War II."[244] In contrast, the motivations behind territory claims in the Arctic are based solely on political, economic, and military concerns.[245] "While such a treaty would solve many of the environmental issues in the region, it might not have a strong enough effect on the territorial disputes, and so it might not satisfy all States, some of whom are more concerned with their sovereignty claims than environmental issues."[246]

B. Environmental Model

There are many different environmental occurrences that would be detrimental to the Arctic region, and the world as a whole, which may be triggered by both the increased temperatures in the Arctic and the increased activity which the area will probably be subject to if temperatures continue to rise.[247] The major concern is that oil exploration in the area will subject the environment to potentially massive oil spills.[248] Common oil rigs, such as the ones in the Gulf of Mexico, are not strong enough to withstand Arctic ice.[249] Therefore, reinforced rigs will be necessary.[250] "Whether even the reinforced rigs survive is a concern for environmentalists, who fear the ice could cause a spill by damaging equipment and make a cleanup next to impossible."[251]

One possible solution that has been proposed in order to reduce the

240. Dubner, *supra* note 37, at 17.
241. *Id.*
242. Koivurova, *supra* note 229, at 213.
243. *Id.*
244. Antarctic Treaty, *supra* note 228.
245. *See generally* Woodard, *supra* note 2.
246. Jarashow et al., *supra* note 51, at 1650.
247. *See generally* Abate, *supra* note 39; Dubner, *supra* note 37. "The Arctic is generally considered to be vulnerable to oil spills due to slow recovery of cold, highly seasonal ecosystems, and the difficulty of clean up in remote, cold regions, especially in waters where sea ice is present." Hargreaves, *supra* note 44.
248. *See* Hargreaves, *supra* note 44.
249. *Id.*
250. *Id.*
251. *Id.* "[T]here's also a feeling that drilling in the Arctic, made possible largely by global warming at least partially caused by burning fossil fuels, is perverse." *Id.*

negative effects on the environment in the Arctic region is to create an international park system encompassing the Arctic Ocean through a comprehensive treaty or other instrument.[252] Currently, there are many international world parks which are controlled by more than one state.[253] These parks include: Pico de Neblina,[254] Glacier National Park[255] and adjacent Waterton Lakes National Park,[256] and Great Limpopo Transfrontier Park.[257] "As part of the Arctic transnational park, the countries bordering the Arctic Ocean could impose a moratorium on resource extrication or development in the ocean . . . ."[258] "[T]he international park zone could either parallel the type of arrangement found in the Antarctic or could create an 'authority' to prevent despoliation or development of the Arctic Ocean."[259]

However, many people have noted that an overriding problem with an international transboundary park is that environmental damage was not a major consideration of the UNCLOS drafters.[260] There is not an effective enforcement mechanism within the treaty to prevent environmental degradation.[261] One author claims that an "effective way to achieve the needed enforcement mechanisms is to create an international park."[262]

This proposed solution model would also require the cooperation of most, if not all, of the five Arctic states.[263] While this is probably the best solution proposed to preserve the Arctic environment from degradation, many of the involved states may not be able to look past the significant potential gains that will likely come from exploration and exploitation of the Arctic's available

252. Dubner, *supra* note 37, at 11.

253. *Id.*

254. A mountain range located in the Amazonian national forest that extends both into Venezuela and Brazil. *Id.* The two countries created the park to protect virgin forest. *Id.*

255. Glacier National Park is located in Montana. National Park Service, Glacier National Park, http://www.nps.gov/glac/index.htm (last visited Apr. 3, 2009).

256. Waterton Lakes National Park is located in Canada. National Park Service, Glacier National Park, History & Culture, http://www.nps.gov/glac/historyculture/index.htm (last visited Apr. 3, 2009). "In 1931, members of the Rotary Clubs of Alberta and Montana suggested joining the two parks as a symbol of the peace and friendship between our two countries. In 1932, the United States and Canadian governments voted to designate the parks as Waterton-Glacier International Peace Park, the world's first." *Id.*

257. Dubner, *supra* note 37, at 12. The Great Limpopo Transfrontier Park is a joint initiative between Mozambique, South Africa and Zimbabwe. South African National Parks, Great Limpopo Transfrontier Park, http://www.sanparks.org/conservation/transfrontier/great_limpopo.php (last visited Apr. 3, 2009). The establishment of the Great Limpopo Transfrontier Park is a process that will link the Limpopo National Park in Mozambique, Kruger National Park in South Africa, Gonarezhou National Park, Manjinji Pan Sanctuary and Malipati Safari Area in Zimbabwe, as well as two areas between Kruger and Gonarezhou, namely the Sengwe communal land in Zimbabwe and the Makuleke region in South Africa. *Id.*

258. Dubner, *supra* note 37, at 12.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *See generally id.*

natural resources. Some of the Arctic states are "more concerned with their sovereignty claims than environmental issues."[264]

C. *All Nations Ratify UNCLOS*

Another proposed resolution to solve Arctic problems is that all involved states ratify UNCLOS.[265] While this solution may aid some of the disputes in the region, it is not an adequate resolution in of itself.[266]

With 155 signatories, UNCLOS is one of the most adhered-to conventions in the world.[267] The only Arctic state at issue that has not yet ratified the treaty is the United States.[268] Thus, because all of the Arctic states besides the United States are signatories to the treaty, there is little resolution that will come from this that does not currently exist.

The only major benefit regarding the Arctic dispute that may result from the United States becoming a signatory to the treaty would be a possible resolution to the Northwest Passage dispute.[269] "The UNCLOS transit passage regime, in conjunction with Article 234 provides Canada ample jurisdiction to enforce stringent environmental standards commensurate with the risks that exist in Arctic waters."[270] Becoming a signatory to UNCLOS would provide the United States guaranteed freedom of navigation through the Northwest Passage.[271] "[C]ommercial shipping of the Northwest Passage can consequently be developed without the fear that every transit would be considered a threat to Canadian national security and sovereignty."[272]

It is advisable for the United States to become a signatory to UNCLOS in order to extend its continental shelf.[273] It will also help to ensure that the United States will be able to navigate through the Northwest Passage as allowed by Article 234 of UNCLOS.[274] Although U.S. accession to UNCLOS would be beneficial for protecting U.S. interests, accession will not provide a complete resolution of all issues in the area because of the previously outlined uncertainties surrounding CLCS and UNCLOS.[275]

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264. Jarashow et al., *supra* note 51, at 1650.

265. *See id.* at 1640-42.

266. *See infra* notes 269-75 and accompanying text.

267. UNCLOS SIGNATORY LIST, *supra* note 126; *see also* Andrew S. Williams, *The Interception of Civil Aircraft over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73, 92 (2007) (discussing the signatory status of UNCLOS).

268. UNCLOS SIGNATORY LIST, *supra* note 126. See *supra* notes 126-55 and accompanying text for a discussion of why the United States has not yet ratified UNCLOS.

269. Jarashow et al., *supra* note 51, at 1650-51. See *supra* notes 183-98 and accompanying text for a discussion of the dispute over the Northwest Passage.

270. Jarashow et al., *supra* note 51, at 1651.

271. *Id.*

272. *Id.*

273. *See supra* notes 145-46 and accompanying text.

274. *See supra* notes 270-71 and accompanying text.

275. *See supra* notes 64-125 and accompanying text.

All of the previously proposed solutions examined in this Part have one thing in common.[276] All of the solutions require varying degrees of cooperation between the Arctic states.[277] Therefore, the main reason that these solutions may not be feasible is because the Arctic states have yet to show that they are willing to cooperate in order to come up with a viable solution.[278]

IV. POSSIBLE SOLUTIONS THROUGH PREVIOUS TERRITORIAL DISPUTES

Another possible source of solutions to the Arctic issue is to look at how other countries have handled previous territorial disputes. An examination of resolutions employed by other countries in territorial disputes is particularly useful for identifying any potential negative aspects in order to avoid such aspects in the Arctic.[279] Such solutions also show that in the past, states have been able to come together to reach mutually-negotiated settlements.[280] This Part will examine two potential resolutions to the Arctic dispute based on prior territorial disputes.[281] The resolutions are based on the joint submission to CLCS by France, Ireland, Spain, and the United Kingdom and the dispute over oil in the Timor Sea between East Timor and Australia.

A. Joint Submission to CLCS

To resolve the disputes in the Arctic, some or all of the Arctic states could band together and submit a joint submission to CLCS. On May 19, 2006, France, Ireland, Spain, and the United Kingdom deposited a joint submission[282] to the CLCS regarding the continental shelf extending into the Bay of Biscay[283] and the Celtic Sea.[284] The four nations began collaborative legal, technical, and

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276. *See supra* notes 226-72 and accompanying text.

277. *See supra* notes 226-72 and accompanying text.

278. Woodard, *supra* note 2. *See supra* notes 227-72 and accompanying text.

279. Woodard, *supra* note 2.

280. *Id.*

281. The Antarctica Model, which was discussed previously, would also fit into this Part. *See supra* notes 229-46 and accompanying text.

282. "Very few shelf area[s] beyond 200 nautical miles worldwide form the natural prolongation of only one coastal State. A 1998 inventory identified 29 shelf areas, 22 of which involve more than one state, and only seven of which involve just one State." Llewellyn, *supra* note 66, at 683. See *id.* at 687-93 for the details of the substance of the Joint Submission. *See also* Woodard, *supra* note 2.

283. *See generally* Encyclopedia Britannica Online, Bay of Biscay, http://www.britannica.com/eb/article-9015398/Bay-of-Biscay (last visited Apr. 3, 2009) (discussing background information regarding the Bay of Biscay).

284. UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF (CLCS) OUTER LIMITS OF THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES FROM THE BASELINES: SUBMISSIONS TO THE COMMISSION: JOINT SUBMISSION BY FRANCE, IRELAND, SPAIN, AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (2007), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/submission_frgbires.htm [hereinafter JOINT SUBMISSION].

scientific work on the limits of the continental shelf in 2003.[285] The reason the four states opted for a joint submission was that they determined a joint submission would "permit the sharing of human and technical resources, and costs."[286] This approach also reduces the workload of CLCS because it only has to examine one submission rather than four closely related ones.[287]

While UNCLOS does not mention joint submissions, the CLCS Rules mention such submissions in sections dealing with disputes between coastal states.[288] The states involved must agree to the joint submission.[289] The joint submission also cannot request delimitation of boundaries between the parties.[290] CLCS makes recommendations based on the submission as a whole, and it is up to the parties involved to delimit individual boundaries between themselves.[291]

No disputes existed among the parties to the joint submission regarding the extension of the continental shelf into the Bay of Biscay and the Celtic Sea.[292] However, there were unresolved boundaries.[293] The states have asked the Commission to make recommendations on the outer limits of the shelf in the area of convergence first, and propose to subsequently delimit the boundaries among themselves.[294] "Amicable agreement is . . . the expectation in relation to delimitation among France, Ireland, Spain, and the United Kingdom following the Commission's recommendations on their joint submission."[295]

"Further joint submissions by groups of coastal States would help [CLCS] to keep its increasing workload to a minimum, and encourage the cooperative conditions and mutual[] understanding among neighbouring [sic] coastal States conducive [sic] to subsequent amicable shelf boundary delimitation."[296] Greater certainty in the outer limits of Continental Shelves is in the interest of all parties to such disputes and could help to reduce points of contention between them.[297] "The lengthy, close and detailed cooperation required of neighbouring [sic] coastal States in making such joint submissions could also help to avoid possible outer shelf delimitation disputes arising or crystallizing."[298]

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285. Llewellyn, *supra* note 66, at 678.
286. *Id.*
287. *Id.*
288. CLCS, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, 17-19, U.N. Doc. CLCS/40, annex. 1, para. 4 (July 2, 2004).
289. Llewellyn, *supra* note 66, at 683.
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* at 692-93.
296. *Id.* at 683-84.
297. *Id.* at 692.
298. *Id.*

Utilizing this potential model, some or all of the Arctic states could band together and jointly submit their requests to CLCS. This would allow the states to save considerable resources in the expensive exploration of the ocean floor.[299] A joint submission would permit the sharing of human and technical resources and costs among all the parties to the joint submission.[300] Because preparation of a submission to CLCS is a complex, detailed, and time-consuming venture, the teams preparing the joint submission will likely develop a strong cooperative spirit and common understandings of the issues and challenges involved in the region.[301] Hopefully, the spirit and understanding would carry beyond the submission preparation to a stage where the states discuss delimitation of the boundaries among themselves.[302]

However, there are also potential problems with states collaborating around a joint submission. First, because Russia has already submitted a claim to CLCS, it will have to make a new or revised claim to CLCS.[303] Also, Russia's demonstrated intent to exert a high degree of control over the Arctic may preclude reaching a solution via joint submission that would be satisfactory to all parties.[304] Additionally, because the most significant aspect of the Arctic dispute relates to territory that can be claimed by more than one of the States in their extended continental shelf, if any area of the joint submission and Russia's submission overlap, there will still be a dispute regarding the overlapping territory.[305] Moreover, this method will also require the cooperation of the parties involved because the CLCS would not provide the delimitation between the states in the joint submission.[306] It would only delimit the joint submission as a whole.[307] Thus, the parties would still have to agree on their individual boundaries among themselves.[308] As mentioned previously, it is speculative whether the Arctic states will be able to cooperate regarding a solution to the potential disputes.[309]

B. Australia and Timor-Leste Maritime Boundary Dispute

In 2006, the governments of Australia and East Timor[310] took steps in the

299. *See id.*
300. *Id.* at 678.
301. *See id.*
302. *See id.*
303. Murphy, *supra* note 68, at 970; *see also supra* notes 206-11 and accompanying text.
304. *See supra* notes 199-218 and accompanying text.
305. *See supra* notes 290-91 and accompanying text.
306. *See supra* notes 290-91 and accompanying text.
307. *See supra* notes 289-98 and accompanying text.
308. *See supra* notes 290-91 and accompanying text.
309. Woodard, *supra* note 2. *See supra* notes 227-72 and accompanying text.
310. East Timor and Timor-Leste are used interchangeably to refer to the same nation. Timor-Leste is the Portuguese name for East Timor, a former Portuguese colony. National Geographic.com, Timor-Leste (East Timor) Facts, http://www3.nationalgeographic.com/places/countries/country_timorleste.html (last visited Apr. 3, 2009). The country is the poorest in Asia;

direction of resolving the long-running dispute[311] over control of undersea oil and gas fields that are positioned between the two countries in the Timor Sea.[312] On January 12, 2006, the countries signed the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS Treaty), which allocates oil and gas revenue from the disputed area.[313] The key terms under the CMATS Treaty are:

> (1) The two earlier treaties[314] would continue and the [International Unitization Agreement] would be implemented concurrently with *CMATS Treaty*; (2) [N]either country would pursue a maritime boundary claim against the other for 50 years;[315] (3) Australia will continue to regulate and authorize [sic] petroleum activities outside the [Joint Petroleum Development Area] to the south of the 1972 Australia-Indonesia seabed boundary;[316] (4) [East] Timor [] will exercise . . . fisheries jurisdiction in the [Joint Petroleum Development

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oil in the Timor Sea promises future revenue, however. *Id.*

311. The background of part of the dispute is that:

> the two countries agreed on the Joint Petroleum Development Area in the *Timor Sea Treaty* 2002, which is to run for thirty years and under which . . . Timor-Leste is to have 90% of the government revenue rights from oil or gas production. The issue then moved to the huge Greater Sunrise oil and gas field that lies on the eastern boundary of the [Joint Petroleum Development Area]. To resolve how this was to be exploited the two countries agreed on the *2003 International Unitisation Agreement*. Under the two agreements about 20% of the Greater Sunrise field was deemed within the [Joint Petroleum Development Area] and the balancing 80% part outside it. The position was that the 80% was just to the south of the sea-bed boundary that Australia had agreed with Indonesia in 1972 and under this Australia had the revenue rights to 100% of the Greater Sunrise field outside the [Joint Petroleum Development Area.]
>
> Timor[] did not agree to the Australian-Indonesian boundary and pressed for the median line maritime boundary, which would have put the 80% of the Greater Sunrise entirely within its jurisdiction.

Michael White & Craig Forrest, *Australian Maritime Law Update: 2005*, 37 J. MAR. L. & COM. 299, 304 (2006). "The issue in 'unitization' is how the resources should be shared when an oil or gas field crosses a boundary and lies partly within and partly without any particular area." *Id.* at n.25. *See* Timor Sea Treaty, Austl. – E. Timor, May 20, 2002, *available at* http://www.laohamutuk.org/Oil/Boundary/TST%20text.pdf for the 2002 treaty text. See Unitisation of the Sunrise and Troubador Fields, Austl. – E. Timor, March 6, 2003, *available at* http://www.laohanutuk.org/Oil/Boundary/IUA.pdf for the 2003 treaty text.

312. Becker, *supra* note 183, at 679.

313. *Id.*; *see* Treaty on Certain Maritime Arrangements in the Timor Sea, Austl.-E. Timor, Jan. 12, 2006, *available at* http://laohamutuk.org/Oil/Boundary/CMATStext.htm.

314. *See supra* note 311 (describing the two earlier treaties).

315. White and Forest note that the fifty-year period is reasonable because it is anticipated that most of the oil and gas deposits would have been exhausted by then. White & Forrest, *supra* note 311, at n.26.

316. *See generally* Margaret Hanlon, Australia-Indonesia Maritime Boundaries (unpublished Ph.D dissertation, University of Wollongong), *available at* http://arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/international-relations/hanlon.pdf (last visited Apr. 3, 2009) (discussing the maritime boundaries between Australia and Indonesia).

> Area]; [and] (5) Organisational [sic] structures will be established for the orderly management of the area.[317]

"The principal aim of the treaty is to allow the exploitation of the Greater Sunrise gas reservoirs to proceed while suspending maritime boundary claims for a significant period [50 years] and maintaining the other treaty arrangements in place."[318] The Treaty also means that most of the gas and oil deposits will be exhausted by the time the moratorium expires.[319]

This type of treaty delays a decision on the maritime boundaries for a significant period of time while resources are extracted. This is something the Arctic states could consider. A treaty of this type would give each state its own agreed upon area for exploration and resource extraction.[320]

On its face, this type of treaty may seem like an ideal solution for the Arctic states; however, there are several potential problems in the execution of an agreement like this. First, there are groups that contend that East Timor received an unfair deal in the Treaty.[321] These groups claim that the Australian government is taking advantage of a poor, undeveloped nation and is profiting off of unfair bargaining power.[322] Unlike East Timor and Australia, all of the Arctic states have similar bargaining powers, so it is unlikely that any of the states would agree to an agreement that was unfair.[323] In addition, such an agreement would require the cooperation of all five states.[324] As demonstrated above, because of the vast amount of resources involved, it is unlikely that all five of the states will agree on a mutually beneficial agreement similar to Australia and East Timor.[325] An agreement such as the one between Australia and East Timor does not take into account environmental factors, which are a concern for many people.[326] Thus, while on its face this agreement may look like an ideal solution, in reality it is probably infeasible taking into account the nature of the Arctic environment and the nature of the dispute in the area.

The potential solutions based on previous territory disputes provide some useful insight for the Arctic states regarding a solution to the issue. However, neither of the solutions offers a completely effective manner that would provide

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317. White & Forrest, *supra* note 311, at 305.

318. DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, FACT SHEET: AUSTRALIA-EAST TIMOR MARITIME ARRANGEMENTS, http://www.dfat.gov.au/geo/east_timor/fs_maritime_arrangements.html (last visited Feb. 20, 2009).

319. Becker, *supra* note 183, at 679.

320. *See generally* White & Forrest, *supra* note 311, at 304-06 (discussing the percentage breakdown of petroleum and gas between Australia and East Timor).

321. East Timor and Indonesia Action Network, *Reported Australia/Timor-Leste Oil Deal "Cheats" East Timorese*, May 17, 2005, http://etan.org/news /2005/05cheat.htm.

322. *Id.; see also supra*, note 310 (discussing the economic status of East Timor).

323. *See generally* Jarashow et. al., *supra* note 51.

324. *See generally* Becker, *supra* note 183, at 679.

325. Woodard, *supra* note 2; *see supra* notes 227-72 and accompanying text.

326. *See supra* notes 247-64 and accompanying text.

for satisfactory resolution of all of the issues involved.[327]

CONCLUSIONS AND RECOMMENDATIONS

As this Note has demonstrated, it is essential that the Arctic states find a solution to the current and potentially forthcoming disputes before the situation escalates. One overarching principle that emerges from all of the solutions discussed in this Note is that the Arctic nations must cooperate and work together to craft a solution that benefits all of the parties.[328] If the Arctic states are able to reach a mutual agreement, it will likely prevent what are currently inevitable disputes. Also, if the states cooperate with each other, the cooperation will make it possible to implement systems to protect the fragile Arctic environment from degradation, something that would be nearly impossible to achieve without the full cooperation of most if not all of the five Arctic states.[329]

It may be beneficial for the Arctic states to negotiate an agreement between themselves that is independent of UNCLOS. As this Note has shown, UNCLOS does not provide an effective method for dispute resolution between the Arctic states.[330]

In addition, the United States should ratify UNCLOS. If UNCLOS continues to govern Arctic disputes, the United States must ratify the Convention so it may be a party to any potential solutions and secure any potential claim for an extended continental shelf to CLCS.[331] Even if the Arctic states negotiate an agreement outside of UNCLOS, the United States' ratification of UNCLOS will still protect its oceanic interests in other areas.[332]

In summary, in order to avoid a long and heated battle over territory, the Arctic states must learn to cooperate with one another and reach a mutual agreement regarding the use of the Arctic area. The ineffectiveness of UNCLOS makes cooperation between the Arctic states necessary.[333] A new agreement outside of UNCLOS would be the most effective way for the Arctic states to develop a mutually beneficial solution for all. To reach this solution, the states must balance the economic interests involved in the claims to territory with the environmental and sovereignty concerns.

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327. *See supra* notes 282-326 and accompanying text.
328. *See supra* notes 226-326 and accompanying text.
329. *See supra* notes 247-64 and accompanying text.
330. *See supra* notes 64-125 and accompanying text.
331. *See supra* notes 126-55 and accompanying text.
332. *See* Bates, *supra* note 53, at 771-92.
333. *See supra* notes 124-25, 177-78 and accompanying text.

COMMISSION IMPOSSIBLE:

THE COMMISSION OF THE EUROPEAN COMMUNITIES' ATTEMPT TO REFORM THE COMMON MARKET ORGANIZATION FOR WINE

Tim Iannettoni*

INTRODUCTION

"Blood will flow if Nicolas Sarkozy does not act fast to raise the price of wine."[1] Such violent ultimatums are more commonly associated with religious fundamentalists than with vintners, but this statement came from a group of seven militant vintners wearing ski-masks and demonstrates the dire situation the European wine sector is facing.[2] This group, called the Crav, has already vandalized local supermarkets and hijacked and destroyed a truck carrying foreign wine.[3] The problem facing these and other vintners throughout Europe is that European wines are losing their competitive edge to new world wines resulting in a crippling loss in demand.[4] This loss in demand is exacerbated by a record-setting wine over-production of almost 12.8 million hectoliters, or 743.6 million gallons, per year, resulting in an inconsumable wine surplus.[5] Both of these factors have driven the price of wine through the floor, resulting

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1. Caroline Wyatt, *French Wine-Growers Go Guerrilla*, BBC NEWS, ¶ 14 (June 17, 2007), *available at* http://news.bbc.co.uk/2/hi/europe/6759953.stm.

2. *Id.*

3. *Id.* at ¶¶ 16.

4. *Staff Working Document Accompanying Document to the Commission Proposal for a Council Regulation on the Common Organisation of the Market in Wine and Amending Certain Regulations*, EUR. PARL. DOC. (SEC 89) 4 (2007) at 4 [hereinafter *Staff Working Document*]. It should be noted that the trend of declining consumption and loss in demand only concerns table wine and not quality wine produced in specific regions. *Id.* Table wines are wines that are not produced in specific regions and therefore do not contain a geographic indicator. *Id.* For example, a *Chateau Lafite Rothschild Pauillac* would be a type of quality wine because it contains the geographic indicator of Pauillac, which is located in Bordeaux. Table wines are usually considered to be lower quality wines because they are produced in large quantities and come from various regions and therefore lack a strong sense of *terroir*. *See generally* Matt Kramer, *Terroir Matters*, WINE SPECTATOR MAG., June 15, 2006, at 3, *available at* http://www.winespectator.com/Wine/Archives/Show_Article/0,1275,5510,00.html.

5. *Staff Working Document, supra* note 4, at 12. 1hl = 100 liters = 26 gallons. *See* on-line conversion calculator, http://www.onlineconversion.com/volume.htm (last visited Apr. 1, 2009).

in record losses for vintners.[6]

In an effort to remedy this grim state of affairs, the Commission of the European Communities ("the Commission") proposed, on July 4, 2007, a Council Regulation to reform the common organization for the market in wine.[7] The proposal aims to "increase the competitiveness of . . . EU . . . wine, strengthen the reputation of EU. . . wine[,] . . . recover old markets and win new ones in the EU[,] . . . create a wine regime that operates through clear simple rules[,] . . . [and] preserve . . . the best traditions of EU wine production."[8] This proposal was created in response to five systemic problems facing the EU wine sector: (1) steady decline in consumption, (2) loss of competitiveness, (3) severe market imbalance, (4) complex wine policies, and (5) environmental concerns.[9] These problems have helped bring the struggling European wine sector to its knees. While some of these problems can be attributed to external forces, namely the increase in quality of new world wines and the globalization of the wine trade, the majority of the problems faced by the European Community are self-imposed and represent a culmination of years of protectionist, inefficient agricultural policies.

Part II of this Note provides a brief overview of the origins of the European Union's Common Agricultural Policy ("CAP" or "the policy"), examining its basic political and legal structure. Part III begins by explaining the historical importance of the European wine sector and moves into a more contemporary analysis of the wine market between the years of 1987 and 2003. Part IV provides an overview of the current problems facing the European wine sector, and Part V discusses the various reforms considered by the Commission designed to alleviate the wine sector's problems. Finally, Part VI presents the Commission's chosen reform policy and engages in an evaluation of the Commission's reforms in light of its stated goals.

This Note will demonstrate that the majority of the current regulatory reforms proposed by the Commission are based upon prior successful reforms employed during the 1987-1996 reform period.[10] Furthermore, this Note will

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6. Wyatt, *supra* note 1, 28.

7. This Note was written prior to the enactment of Council Reg. (EC) No. 479. EUR. PARL. & COUNCIL REG. 479/2008, 2008 O.J. (L 128/1) (EC). Therefore, the analysis contained herein is based exclusively upon the Commission's Proposal and the Council Political Agreement made on December 21, 2007. However, since the recent Council Regulation essentially codified the regulations contained in the Commission Proposal and the Council Political Agreement, much of the analysis remains unchanged. While a comparative analysis of the Council Regulation to the original Commission Proposal, identifying measures that were cut from the final regulations as well as measures or concessions that were added based upon political and social pressures from the wine industry, would be interesting, that is beyond the scope of this Note.

8. Commission Proposal for a Council Regulation on the Common Organisation of the Market in Wine and Amending Certain Regulations, EUR. PARL. DOC. (COM 372/2007) at 4 [hereinafter Commission Proposal].

9. Commission Proposal, *supra* note 8.

10. It should be noted that this Note does not address all of the regulatory reforms

demonstrate that even though the effectiveness of these current reforms has been tempered by political concessions, employment of these tempered measures in conjunction with the elimination of other inefficient measures will allow the European Union to repair its crippling market imbalance and restore a sustainable and prosperous wine sector.

I. THE HISTORY OF THE COMMON AGRICULTURAL POLICY

A. Background

The CAP is a "domestically oriented farm policy based on three major principals: (1) a unified market in which there is a free flow of agricultural commodities within the EU; (2) product preference in the internal market over foreign imports through common customs tariffs; (3) financial solidarity through common financing of agricultural programs."[11] CAP seeks to create a free market of agricultural goods among the members of the European Union akin to that in place among the several states in the United States. To analogize, it is the Agricultural Commerce Clause of the European Union.

B. Origins

The CAP originated in post-World War II Europe. World War II left Europe's agricultural sector in shambles resulting in wide-spread food shortages, famine, and high levels of unemployment.[12] With the aim of providing affordable food supplies, stabilizing food prices, and attaining self-sufficiency in the agricultural sector, the administrations of the original six EU nations provided for the creation of the CAP in the Treaty of Rome.[13] The following five objectives of the CAP were enumerated in this treaty: (1) to increase agricultural productivity by promoting and ensuring the optimum use of the factors of production, in particular labor; (2) to ensure a fair standard of living of farmers; (3) to stabilize markets; (4) to assure the availability of

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embodied in both the Commission proposal and the recent political agreement. This Note focuses on those reforms that will have the biggest impact on reviving the wine sector.

11. UNITED STATES DEPARTMENT OF AGRICULTURE: ECONOMIC RESEARCH SERVICE, COMMON AGRICULTURAL POLICY (CAP), ¶ 2, http://www.ers.usda.gov/Briefing/EuropeanUnion/policy.htm (last visited . 1, 2009).

12. ANTHONY BATTY & CAMERON CARSWELL, GLOBALIZATION INST. GREEN AND PLEASANT LAND: BRITAIN'S COUNTRYSIDE AFTER THE COMMON AGRICULTURAL POLICY 5 (2005), http://www.emediawire.com/prfiles/2005/09/08/282969/greenandpleasantland.pdf (last visited Mar. 1, 2009).

13. EUGENE LEGUEN DE LACROIX, E.C. DIR. GEN. FOR AGRIC., THE COMMON AGRICULTURAL POLICY EXPLAINED 6 (2004), http://ec.europa.eu/agriculture/publi/capexplained/cap_en.pdf (last visited Mar. 1, 2009). The Treaty of Rome was signed on March 25, 1957. *Id.* The original six EU countries were France, West Germany, Italy, Belgium, The Netherlands, and Luxembourg. *Id.*

supplies; and (5) to ensure reasonable prices for consumers.[14]

The CAP sought to achieve these goals by artificially inflating the price of European-produced agricultural goods while simultaneously placing steep tariffs on foreign agricultural goods, thus eliminating the ability of imports to exploit unusually high domestic prices.[15] The inflated prices paid by European consumers translated into subsidies for struggling European farmers allowing them to stay in business and revitalize the European agricultural sector.[16]

CAP's price fixing system found support in the unique nature of the European agricultural identity. First, the agricultural sector in the late 1950's and early 1960's accounted for nearly twelve percent of the GNP of the original six EU countries, and twenty percent of these countries' workforce was employed in the agricultural sector.[17] Moreover, influential national unions formed powerful lobbies and advocated for steep agricultural subsidies.[18] Second, agriculture was a key "trade-off" for both France and Germany during the negotiation of the European Union, with France deeply concerned that the common market would disproportionately benefit industrialized Germany and hurt agrarian France.[19] Finally, the volatile nature of the agricultural sector, specifically in terms of its price fluctuations, was viewed by officials as an economic threat which could be neutralized by the implementation of subsidies.[20] Taken together, these economic, social, and political interests paved the way for the creation of the CAP.

The creation of this subsidy-based program in turn necessitated the creation of the European Agricultural Guidance and Guarantee Fund ("EAGGF"), which is responsible for collecting and allocating CAP funds.[21] The EAGGF collects funds from Member States based upon their economic status, not their population, and then redistributes the funds into two pillars: one for direct market support measures, or direct producer subsidies, and the other for rural development programs.[22] Under the first pillar, funds are paid directly to the farmers. Under the second pillar, funds are collected in a community pot and allocated toward the community goals of improving environmental standards or general agricultural conditions.[23]

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14. BATTY & CARSWELL, *supra* note 12, at 5.

15. Jess Phelps, Note, *Much Ado About Decoupling: Evaluating the Environmental Impact of Recent European Union Agricultural Reform*, 31 HARV. ENVTL. L. REV. 279, 281 (2007).

16. BATTY AND CARSWELL, *supra* note 12 at 5.

17. JOHN MCCORMICK, UNDERSTANDING THE EUROPEAN UNION 188 (Neil Nugent, William E. Patterson & Vincent Wright eds., 4th ed. 2005).

18. *Id.*

19. *Id.*

20. *Id.*

21. Phelps, *supra* note 15, at 282.

22. *Id.* Phelps argues that this collection scheme results in industrialized nations paying for the modernization of other Member States. *Id.*

23. *Id.*

C. Legal Framework

The three primary actors in the CAP are the European Commission, the Council of Ministers, and the European Parliament.[24] The European Commission performs three vital roles: (1) implementation of treaty provisions and legislative measures; (2) "propos[ing] potential reforms to the European Parliament and Council and implement[ing] legislative enactment"; and (3) "administer[ing] money appropriated for [European Community] operations, including the EAGGF."[25] The European Commission has proposed the current reform, which is the subject of this Note.[26]

The Council of Ministers is the "major decision-making" branch of the European Community and has the authority to amend and ultimately approve proposals made by the Commission.[27] Unlike the Commission, which is somewhat shielded from national interests, the Council of Ministers is influenced by its own national political interests and these interests often guide it in its decisions to accept, reject, or amend certain proposals.[28]

The European Parliament plays an indirect role in the approval of proposed regulatory reforms, as well as an advisory role over the European Commission and the Council of Ministers.[29]

While there is no doubt that the CAP was successful in revitalizing Europe's agricultural sector,[30] its enduring presence continues to be both costly and burdensome to European and foreign consumers.[31] Today, Europe's agricultural sector is among the largest and most productively efficient sectors in the world; however, the price-setting nature of the CAP hampers economic efficiency at a significant cost to the EU taxpayer.[32] This Note will not address in depth the problems posed by maintenance of the CAP, as other scholarly articles have.[33] Rather, this Note will focus on the relationship between the

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24. *Id.* at 284.

25. *Id.*

26. *See* Commission Proposal, *supra* note 8.

27. MCCORMICK, *supra* note 17, at 89. The Council of Ministers is made up or representatives from Member States, similar to Senators in the United States.

28. *Id.* at 82-84, 93-94.

29. Phelps, *supra* note 15, at 284-85.

30. LEGUEN DE LACROIX, *supra* note 13, at 6-7.

31. *See* BBC News, *Q&A: Common Agricultural Policy, w Much Does It Cost?* (Dec. 2, 2005), http://news.bbc.co.uk/2/hi/europe/4407792.stm (last visited Mar. 1, 2009) (stating that the budget for 2005 was around 49 billion Euros, or 46% of the EU's budget).

32. MCCORMICK, *supra* note 17, at 190 ("The EU is the world's largest exporter of sugar, eggs, poultry, and dairy products, and accounts for nearly 20 percent of the world food exports.").

33. *See generally*, Phelps, *supra* note 15; Dianel Bianchi, Essay, *Cross Compliance: The New Frontier In Granting Subsidies to the Agricultural Sector in the European Union*, 19 GEO. INT'L ENVTL. L. REV. 817, 825 (2007) (discussing the impacts of cross-compliance on the environment); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Analysis of the 2003 CAP Reform* 6 (2004), http://www.oecd.org/dataoecd/62/42/32039793.pdf (last visited

CAP and the European wine sector.

II. THE WINE MARKET OF THE PAST

A. The Wine Market from 1957-1987

1. Overview

Wine is one of the agricultural markets governed by the CAP. Like many other agricultural markets under the CAP, the wine market has ebbed and flowed over the years from times of loose regulation, causing periods of extremely wasteful surpluses, to periods of strict regulation, resulting in near market equilibrium.[34] In order to understand this cyclical nature of the wine market, it helps to first understand the history of the European wine sector and the historical significance of wine to Europeans.

2. History of Wine in Europe

Wine carries with it a strong cultural and sociological significance for the European citizenry.[35] This cultural importance can be seen through the "mythology, painting, sculpture, poetry, customs, eating habits, trade, medicine, even religion, . . . of the European Mediterranean peoples."[36] While the importance of wine has remained constant, its production has often fluctuated along with major historical periods.[37] The wine market is currently experiencing a period of resurgence in both Europe and other rising new world markets.[38] This recent wine resurgence in Europe has coincided with the creation and rise of the European Community, and the interplay between the two has been critical.

Prior to the signing of the Treaty of Rome in 1957 and the creation of the CAP, the wine market in Europe could be characterized as a set of independent protectionist national markets.[39] Individual countries placed high tariffs on

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Mar. 1, 2009).

34. *See* EUROPEAN COMM'N AGRIC. AND RURAL DEV., COUNCIL POLITICAL AGREEMENT ON THE COMMISSION PROPOSAL, 5 (Dec. 19, 2007), http://ec.europa.eu/agriculture/capreform/wine/presentation_191207/pres191207.pdf [hereinafter COUNCIL POLITICAL AGREEMENT]. "Market equilibrium" equates to times of reduced surpluses. *Id.*

35. ANTONIO NIEDERBACHER, WINE IN THE EUROPEAN COMMUNITIES 5 (European Communities 2nd ed. 1987).

36. *Id.*

37. *Id.* at 15 (discussing the impacts of the fall of the Roman Empire and the Dark Ages in Europe and their negative impact on wine production).

38. *Id.* (illustrating the steady increase of wine production since the 1950s).

39. EUROPEAN COMMISSION – DG AGRICULTURE, EX-POST EVALUATION OF THE COMMON MARKET ORGANIZATION FOR WINE, FINAL REPORT, 6, 42, (2002) *available at* http://ec.europa.eu/agriculture/eval/reports/wine/fullrep_en.pdf. [hereinafter EX-POST REPORT].

foreign wines, thereby restricting importation, while they simultaneously tried to find foreign markets for their domestic wines.[40] This protectionist approach is best illustrated by the reciprocal ban on the importation of wine between France and Italy in the late 1970s and early 80s.[41]

These strong nationalistic sentiments did not dissipate immediately following the signing of the Treaty of Rome. It would take over twelve years, and a series of proposals and concessions for the Common Organization for the Wine Market, ("CMO for wine"), to come into force.[42] One of the most important steps toward the deregulation and standardization of the wine market was the creation of the Common Customs Tariffs, ("CCT"), which came into force in 1959. The CCT applied the principle of "Community Preference," essentially adopting a more expansive continental form of protectionist policies in place of the old nationalistic ones.[43] Despite these fundamental alterations to the nature of the European wine market, change did not come quickly. It was not until the 1970s, thirteen years after the signing of the Treaty of Rome and eight years after publication of the first legal texts, that the CMO for wine became operational.[44] Since its creation, the CMO for wine has been subject to numerous regulatory revisions and amendments.[45]

3. Overproduction and the Regulatory Response in the 1980 Wine Market

The European wine market of the early 1980s was significantly different from that of the early 1960s. During the years of 1979 and 1980, the European Wine market was suffering from a relatively new type of crisis – overproduction.[46] The CMO for wine proved, like many other agricultural markets, to be highly successful due to its abolishment of national trade barriers, imposition of foreign tariffs, and use of technology in procuring "extraordinarily abundant harvests."[47] However, overproduction was placing a strain on the relations between Member States, specifically between Italy and France. These two nations engaged in "wine wars" in which cargo ships and

40. NIEDERBACHER, *supra* note 35, at 44.

41. *See id.* at 49-50; *see also id* at 46-47 (discussing the difficulties of uniting the French and Italian wine sectors).

42. *Id.* at 47.

43. *Id.* at 48. Community preference allowed for almost unrestricted trade among the Member States, while imposing large tariffs on non-Member producers. *Id.*

44. EX-POST REPORT, *supra* note 39, at 42. The wine market was the last important agricultural product that was still subject to national rule. *Id.*

45. *See* NIEDERBACHER, *supra* note 35, at 48-66 (discussing the various amendments and regulatory changes to the CMO in wine from 1960-1980).

46. *Id.* at 66 (characterizing overproduction as a relatively new problem because it had occurred in the early 1970s, but noting that the community was able to rebound). *See also* COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 5.

47. NIEDERBACHER, *supra* note 35, at 66.

trucks carrying wine were attacked and their cargo destroyed.[48]

In order to curb this problem of overproduction and stem the violence, the CMO for wine introduced three controversial regulatory measures which currently remain in some form to this day. These measures include: (1) Control of Planting Rights, which prohibited new plantings of vineyards and offered subsidies for conversion of vineyards to other agricultural products, also known as "grubbing up"; (2) Aid for Private Storage, which offered vintners subsidies to store excess grape juice in years of overproduction; and (3) Distillation Measures, which offered subsidies to vintners and distillers for converting excess wine into other forms of alcohol.[49] By 1987, these regulations constituted the CMO's primary arsenal in its fight against over production and market imbalance.[50]

B. Regulatory Measures Explained and Evaluated

Understanding these regulations is the key to understanding the CMO's current proposals for wine. Many of the measures adopted in the current proposal were forged from the failures or successes of these past measures. This section will provide an overview of these three regulatory measures and provide an analysis of their efficacy between the periods of 1987 and 2003 based upon an empirical study published by the European Commission in 2004.[51]

1. Planting Rights

The regulation on planting rights was the first regulation implemented by the CMO for wine to curb over-production.[52] This regulation is comprised of two subparts: the first bans the planting of new vineyards and the second allocates payments for permanent and temporary conversion of vineyards into other crops, also known as "grubbing up."[53] Both of these regulations seek to control production through limiting vineyard area.[54]

The ban on planting new vineyards controls production by stopping vintners from expanding their individual vineyards.[55] Bans were initially introduced for only a two-year period, but have been continually extended for the past thirty-three years.[56] The current proposal extends the ban for an additional seven years at the EU level, and another ten years at the Member

48. *Id.*
49. EX-POST REPORT, *supra* note 39, at 6, 42.
50. *Id.* at 46.
51. *See generally id.* at 39.
52. NIEDERBACHER, *supra* note 35, at 59.
53. *Id.*
54. EX-POST REPORT *supra* note 39, at 61.
55. *Id.* at 70.
56. *Id.*

State level.[57] The second policy of permanent and temporary abandonment seeks to limit vineyard areas by offering payments to vintners for grubbing-up or destroying their vineyards.[58] The premium for permanent abandonment is financed through the EAGGF.[59] During the period between 1989 and 1997, this policy comprised twenty-five percent of the CMO for wine budget.[60]

Generally, when followed, planting rights regulations are successful. Between the years of 1987 and 1996 the wine market saw a decrease in the structural surplus[61] of the wine sector when planting rights regulations were strictly enforced.[62] However, between the years of 1996 and 2001, the planting rights regulations were either relaxed or repealed altogether and the annual increase in structural surplus returned.[63] In 1996, the European Council passed an amendment which led to the relaxation and eventual elimination of the planting rights measures.[64] While the Commission was able to obtain a two-year extension of the successful planting rights measures, the European Council under-cut this measure by "introduc[ing] a clause that enabled Member States to exclude . . . part or the totality of their areas [eligible for grubbing-up]."[65] The inclusion of this amendment was a direct result of strong national political pressure placed upon the Council of Ministers by their Member States and constituents, causing them to step in and put an end to this rather successful regulatory measure.[66] Providing Member States with this discretionary power severely hampered the planting rights measure because it provided Member States with the opportunity to defect from this politically unpopular, yet successful, measure.[67]

A detailed study of the CMO for wine prepared for the European Commission DG of Agriculture in 2004 (the "2004 Ex-Post Report") "conclud[ed] that measures related to planting rights limitation and premium for definitive abandonment[,] though not fully effective in controlling

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57. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 8.

58. NIEDERBACHER, *supra* note 35, at 63-64. *See also* Commission Regulation 1163/76, 1976 (EC), *and* Commission Regulation 777/85, 1985 (EC).

59. NIEDERBACHER, *supra* note 35, at 63-64.

60. EX-POST REPORT, *supra* note 39, at 74.

61. One item worth noting is that the term "structural surplus" refers to overproduction of wine due to the man-made characteristics of the wine market, and not the naturally occurring large harvests ("bumper harvests").[61] In other words, the European report found that the overproduction problems that have plagued and continue to plague the European wine sector were not caused by bumper harvests, but were rather a result of regulatory measures and market intervention on the part of the CMO for wine. *See* EX-POST REPORT, *supra* note 39, at 6, 42.

62. *Id.* at 65.

63. *Id.*

64. EUROPEAN COMMISSION – DG AGRICULTURE, ANNEX TO EX-POST EVALUATION OF THE COMMON MARKET ORGANIZATION FOR WINE, FINAL REPORT 6, at 71 [hereinafter ANNEX TO EX-POST].

65. *Id.*

66. *Id.*

67. *Id.*

production levels nor preventing continuing surpluses, have helped rather than hindered adjustment."[68] Specifically, the Commission found that premiums for permanent abandonment were effective in reducing the area of low quality vineyards and promoting adaptation by vintners to changing consumer demands.[69]

The 2004 Ex-Post Report further found that the cost-effectiveness of the planting rights program could be boosted through more careful administration.[70] It noted that often table-grape vineyards were being paid subsidies for permanent abandonment instead of wine-grape vineyards, resulting in misappropriation of over fifteen percent of planting rights funds.[71] The 2004 Ex-Post Report also found that recordation was an area plagues with inefficiency.[72] The Report concluded that the major problem associated with implementation of the planting rights scheme was the unreliability of the vineyard data.[73] This lack of reliable data combined with the lack of a coherent recordation scheme allowed for dishonest vintners to claim subsidies for permanent abandonment, and then simply replant their vineyards.[74] It cautioned that "[w]ithout an effective market management information system efficiency will be severely hampered by dishonest vintners."[75]

2. Distillation Measures

Distillation measures were first initiated in 1980 as a temporary measure to control bumper harvests.[76] In 1982, this temporary status was shed and distillation measures became the fundamental instrument for regulating the wine market and eliminating surpluses.[77] While there are many different distillation measures, such as preventative distillation, obligatory distillation, and crisis distillation, the basic idea is that the CMO for wine sets a price for excess wine stocks, buys the surplus from vintners, and then sells this surplus at a discount to alcohol distillers, internalizing any losses.[78] Excess wine stocks are then distilled into other forms of alcohol and sold.[79] This process is paid for by the CMO for wine through the EAGGF.[80] Three different costs are

68. EX-POST REPORT, *supra* note 39, at 71.

69. *Id.* at 78.

70. *Id.* at 74.

71. *Id.* Table-grape vineyards are vineyards used for producing grapes meant to be eaten, whereas wine grape vineyards are vineyards used specifically for the production of wine. *Id.*

72. *Id.* at 75.

73. *Id.*

74. *Id.* at 76.

75. NIEDERBACHER, *supra* note 35, at 64-65.

76. EX-POST REPORT, *supra* note 39, at 42.

77. NIEDERBACHER, *supra* note 35, at 67.

78. *Id.* at 69-71; *see also* EX-POST REPORT, *supra* note 39, at 80.

79. *Id.*

80. *Annexes to 29th Financial Report on the European Agricultural Guidance and Guarantee Fund (E.A.G.G.F.) – Guarantee Section*, at 10-12 (1999), COM (2000) 882 final

associated with the process of distillation: (1) payments made to distillers to recoup their losses; (2) costs to the vintners, including shipping costs and documentation; and (3) costs associated with disrupting the distilled alcohol markets.[81] In 1999 the total cost of wine distillation measures was 247.7 million Euros.[82]

In contrast to planting rights, distillation measures, as studied during the years of 1987-2003, were largely inefficient in their attempts to decrease structural surpluses.[83] The fundamental problem with distillation measures is that "[i]t is inefficient to transfer market disturbances from the wine market to the alcohol market, or to accept monetary losses, without ensuring a reduction in production."[84] Distillation of wine into alcohol is a more costly process than distillation of wheat or barley.[85] Therefore, the process of distilling excess wine stocks into usable alcohol imposes additional costs on the alcohol market, thereby lowering efficiency.[86]

Moreover, distillation measures do not ex-ante reduce the overall quantity of wine in the market; rather, these measures merely create an artificial outlet or demand for wine.[87] Imposition of this artificial demand leads to an artificial increase in wine prices, which benefits both domestic and foreign vintners at the expense of the European taxpayers who are left to shoulder the financial burden of the distillation measures.[88]

In addition to taxpayers footing the bill for distillation measures, constant use of this measure as an ex-post means of controlling overproduction has reinforced inefficient growing practices and led to a race to the bottom for many poor-quality vintners.[89] Poor-quality producers have exploited distillation subsidies by growing very low-quality wine with high alcoholic content specifically intended for alcohol distillation.[90] In this case, the distillation measures have created a new market for wine distillation that would otherwise not exist in the absence of heavy subsidization. Continuous use of these distillation measures has influenced wine-maker behavior by leading them to expect and rely on distillation measures, resulting in a new industry of wine produced specifically for distillation.[91] This new industry exists at an estimated cost of five-hundred million Euros per year.[92]

(Dec. 27, 2000), *available at* http://ec.europa.eu/agriculture/fin/finrep99/index_en.htm [hereinafter *29th Financial Report*].

81. EX-POST REPORT, *supra* note 39, at 83.

82. *See 29th Financial Report*, *supra* note 82, at 10.

83. EX-POST REPORT, *supra* note 39, at 93. Distillation of wine was not found to be an efficient measure in the elimination of structural surpluses. *Id.* at 97.

84. *Id.* at 98.

85. *Id.* at 12.

86. *Id.*

87. *Id.* at 95.

88. *Id.* at 97.

89. *Id.* at 96.

90. *Id.*

91. *Id.*

92. Finfacts Team, *European Commission Proposes Reform of Wine Industry in EU25*,

3. Aid for Private Storage

As with many other crops, grape harvests vary from year to year. In order to provide vintners with security against years of abundant (bumper) harvests, the CMO for wine instituted aid for storage measures in 1988.[93] During years of bumper harvests, vintners were able to enter into storage contracts financed by the CMO for wine to store portions of their stock, thereby curbing market surplus and supporting market price stabilization by reducing supply.[94] The stored wine was then sold during subsequent years of low wine production.[95] Storage measures account for roughly five percent of the annual CMO for wine budget, and seventy-five percent of the wine put into storage is table wine.[96]

Between the years of 1988 and 2003, aid for private storage was viewed as a relatively successful measure having "met the [policy] objectives for which it was conceived."[97] The 2004 Ex-Post Report found that vintners did not use this measure to store poor quality wine with plans on distilling the wine in subsequent years.[98] Rather, the vintners stored wine stocks that they planned to eventually sell in the wine market.[99] Efficiency was maximized under this program because surplus production was not transferred into another market, but was merely set aside for sale in years when supply was low, demand was high, and producer profits were maximized.[100] Given the cost of this measure, and the opportunity it provided vintners in maximizing potential profits, the report found this regulatory measure to be efficient in meeting its objective at a reasonable cost to the European Community.[101]

4. Aid for Must

One of the most controversial regulatory measures employed by the CMO for wine was the issuance of subsidies to vintners who chaptalized their wines. Chaptalization is the process of adding sucrose or wine musts to grape juice which artificially increases the alcoholic strength and quality of lower quality wines.[102] There are three methods of chaptalization: (1) adding sugar or sucrose to wine; (2) adding concentrated grape must (CM); or (3) adding

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June 22, 2006, *available at* http://www.finfacts.com/irelandbusinessnews/publish/article_10006317.shtml [hereinafter *EU25*].

93. NIEDERBACHER, *supra* note 35, at 68.

94. *EU25*, *supra* note 94.

95. EX-POST REPORT, *supra* note 39, at 116. 90% of the stored wine is sold on the market the following year. *Id.*

96. *Id.* at 102-04. See *supra* note 4 of this Note for an explanation of the difference between table and quality wine.

97. *Id.* at 117.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Wine Spectator Online, *Inside Wine: Chapatalization*, Mar. 31, 2002, *available at* http://www.winespectator.com/Wine/Archives/Show_Article/0,1275,3567,00.html.

rectified concentrated grape musts (RCM).[103] Using CM and RCM is more expensive than using simple sugar because the wine-maker must have large quantities of leftover musts, or grape by-products such as skins to use either method.[104] In the past, the CMO for wine offered subsidies to vintners who used either of the two latter methods in wine-making in order to level the playing field and eliminate the incentive to use simple sugar.[105]

The 2004 Ex-Post Report found that the aid for the use of CM and RCM was "an effective measure to ensure the competitiveness of different methods of enrichment."[106] Supporting producers who used RCM and CM to increase the alcoholic strength of their wine led to higher quality wines than wines strengthened in alcohol content through the use of simple sugar.[107] Furthermore, the use of grape musts provided an alternative outlet for wine grapes, which led to an overall reduction in supply.[108]

III. CURRENT PROBLEMS IN THE WINE SECTOR

Understanding the background of these various regulatory measures in the European wine market makes it possible to analyze the current problem facing the wine sector and the proposal set forth by the CMO for wine. The Commission's proposal highlights five problems that are currently crippling the European wine sector: (1) structural imbalance; (2) decline in consumption; (3) increased competition; (4) environmental concerns; and (5) complex wine policies.

A. Structural Imbalance

The first and most fundamental problem facing the current wine sector is the continued presence of a structural surplus in the wine market.[109] Even with the various regulatory measures implemented by the Commission over the past thirty years, overproduction and structural surpluses have continued to increase year after year, and the situation is getting worse.[110] The Commission forecasts a surplus of just under fourteen percent for the end of 2011, compared to a surplus of just under seven percent in wine year 2005-06.[111] Considering that the current level of overproduction costs the EU around a half a billion Euros

103. EX-POST REPORT, *supra* note 39, at 119.

104. *Id.* at 123-24.

105. *Id.*

106. *Id.* at 125.

107. *Europe Launches Wine Reform by Proposing a New Council Regulation*, http://www.thewineblog.net/wine/archives/2007/07/13/europe_launches_wine.html#more (last visited Apr. 1, 2009) [hereinafter *Wine Blog*].

108. EX-POST REPORT, *supra* note 39, at 125.

109. *Staff Working Document*, *supra* note 4, at 5.

110. *Id.*; *see also* Commission Proposal, *supra* note 8, at 13.

111. *Staff Working Document*, *supra* note 4, at 43.

per year, this forecasted doubling of surplus could cost the EU well over one billion Euros per year beginning in 2011.[112]

B. Decline in Consumption

The second problem, possibly the most offensive to European vintners, is the continued decline in consumption of table wine within the European community.[113] Research demonstrates that European consumption of red table wine has been falling around a half a percent per year, and has fallen eleven percent over the last twenty years.[114] The largest decline has occurred in the highest wine-consuming nations of France and Italy, while consumption is on the rise in the United States and, especially, Australia.[115] The outlook for the table wine sector continues to look grim with the Commission forecasting a drop of more than 400,000 hl per year over the next five years.[116]

C. Increased Competition

In addition to this steady drop in consumption, European wines have continued to lose their competitive edge over their new world rivals, thus facing increased competition in an already shrinking market.[117] New world wines, a common term for wines originating in Australia, New Zealand, and the Americas, have been steadily increasing in popularity and quality over the past ten years.[118] As a result, new world producers have slowly been taking over foreign markets that previously belonged almost exclusively to European table wines, even elbowing their way into the European market itself.[119] This increase in competition, coupled with the domestic decline in consumption, is narrowing the consumer pool and forcing European producers to either exceed consumer expectations by producing a higher quality wine or risk going out of business.

D. Environmental Concerns

Finally, environmental issues impact the wine sector. Common problems among all agricultural markets are the intensification of farming practices, the fundamental focus on quantity over quality, and the use of "agro-

112. *Id.* at 4.
113. *Id.*
114. *Id.*
115. *Per-Capita Wine Consumption Declines Worldwide*, WINE SPECTATOR, http://www.winespectator.com/Wine/Free/0,3739,87,00.html (last visited Apr. 1, 2009). Australia "reached an all-time high of 21.7 liters per person in 2004." *Id.*
116. *Staff Working Document, supra* note 4, at 4.
117. *Staff Working Document, supra* note 4, at 4.
118. *See id.*
119. *See id.*

chemical[s]."[120] Under the 2003 CAP reform, the European Commission tied Community subsidies to environmental reforms through a process called cross-compliance.[121] Cross-compliance implicitly requires environmental reforms by conditioning subsidy payments on compliance with environmental reforms.[122] The 2003 reform, however, did not apply to the wine market and presently there continues to be no "environmental baseline" for a large portion of the wine sector.[123]

Many of the aforementioned problems are not new. Two of the fundamental problems, the structural imbalance and the decline in consumption, have been present in wine markets since the early 1980s.[124] It appears, however, that the Commission has recognized its past mistakes and is currently taking steps to correct them.

IV. FOUR DIFFERENT PROPOSALS

In a 2006 communication, the European Commission concluded that:

> [A] fundamental reform of the [CMO] for wine is necessary in order to replace cost-inefficient policy tools by a more sustainable and coherent legal framework. The aim is to ensure a better value for money using the current budget allocated (around EUR 1.3 billion), which is about 3% of the total for agriculture.[125]

The European Commission adopted this proposal on July 4, 2007, hoping to pass it through the European Parliament and Council of the European Union by the end of the year.[126] The proposal chosen, titled the "profound reform" option, was one of four distinct options the Commission considered.[127] In addition to the "profound reform" option, the Commission considered the following options: (1) a status quo option with limited adjustments; (2) complete deregulation of the wine market; and (3) full integration of the wine sector into

120. Thilo W. Glebe, *The Environmental Impact of European Farming: How Legitimate Are Agri-Environmental Payments?*, 29 REV.OF AGRIC.ECON.No. 1, 87, 94, *available at* http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1467-9353.2006.00331.x.

121. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ANALYSIS OF THE 2003 CAP REFORM 13 (2004), http://www.oecd.org/dataoecd/62/42/32039793.pdf [hereinafter ANALYSIS OF 2003 REFORM].

122. *Id.*

123. *Staff Working Document, supra* note 4, at 5.

124. *See generally,* NIEDERBACHER, *supra* note 35, at 64-68.

125. Commission Proposal, *supra* note 8, at 2.

126. European Commission, *Reform of the Wine Sector: Commission Proposal* (July 4, 2007) http://ec.europa.eu/agriculture/capreform/wine/index3_en.htm (last visited Apr. 1, 2009). The reform passed April 29, 2008. *Id.*

127. *Staff Working Document, supra* note 4, at 8.

the 2003 reform framework.[128] While four policy options were considered by the Commission, only two, the "profound reform" and "full integration" options, were given any real consideration. The full integration into the 2003 CAP reform option was considered at length by the Commission, but was passed over in the end.[129]

The major highlight of the third option was its quick and effective means of decoupling producer subsidies from production through the Single Farm Payment scheme.[130] The Single Farm Payment would have replaced past production-based subsidies in favor of a single yearly allotment of subsidies, providing farmers with the choice of how to best allocate their subsidy thereby eliminating incentives to overproduce.[131] The 2003 Reform encompassed many agricultural markets but did not apply to the wine market, leaving producer subsides tied to production.[132] Incorporation of the wine market into the 2003 reform would have severed this subsidy-production tie and resulted in long-term benefits of market stabilization and enhanced environmental protection through the process of cross-compliance.[133]

A major shortcoming with incorporating the wine market into the 2003 CAP reform, however, was the inability of the Single Farm Payment to meet the short term needs of the wine market.[134] Use of the Single Farm Payment would have no immediate effect on correcting the structural imbalance in the wine sector.[135] Under the Single Farm Payment, lump sum payments would be made to wine producers who would use that money to meet their own needs, whether it be hiring more labor for harvest, or improving cellaring conditions. The money would not be focused on rapidly improving the market balance by providing help with structural adjustments.[136] Since the wine market's most imminent threat was the presence of a profound structural imbalance, it was more efficient for the Commission to focus monetary resources on correcting this structural imbalance, rather than relying on individual farmers to fix the structural imbalance after having ensured their own economic prosperity.[137]

Another reason the Commission did not adopt the 2003 CAP reform for the wine market was because of its inability to meet the financial needs of smaller vintners.[138] As stated earlier, the continued use of distillation measures

128. *Id.* at 7-9.

129. *Id.* at 8.

130. ANALYSIS OF THE 2003 REFORM, *supra* note 124, at 10-11.

131. *Id.*

132. *Staff Working Document, supra* note 4, at 5.

133. *Id.* at 8; *see generally* Daniel Bianchi, Essay, *Cross Compliance: The New Frontier in Granting Subsidies to the Agricultural Sector in the European Union*, 19 GEO. INT'L ENVTL. L. REV. 817 (2007) (providing a detailed discussion on the cross-compliance program).

134. *Staff Working Document, supra* note 4, at 8.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

has created a new industry of wine makers focused on producing large amounts of poor quality wine with high alcoholic content destined for distillation.[139] Abolition of production-based subsides under the Single Farm Payment would immediately eliminate the need for many of these distillation measures and force many of these producers out of business.[140] The profound reform proposal provides for a more gradual elimination of these distillation measures thereby allowing producers the time to adapt to their eventual elimination.[141]

Additionally, vintners would not be the only ones hurt by strict adherence to a Single Farm Payment. In the 2004 Ex-Post Report, Dr. Dieter Hoffmann, Dr. Karal-Heinz Bock, and Dr. Jana Seidemann noted that due to many years of employing distillation measures, a substantial part of the distillation infrastructure has come to rely on the wine market. As a result, any political decision to abandon distillation measures would require a certain political responsibility to help distillers adapt to the new situation.[142] Rejection of the Single Farm Payment might have signified the Commission's acknowledgement of this political responsibility and represented a conscious decision to help the distillation industry.

V. THE PROFOUND REFORM

For the forgoing reasons the Commission decided to adopt the "profound reform" option and to repeal the current wine regulation.[143] The "profound reform" option intends to achieve stabilization of the wine market through a two-step process:[144] first, the reform will concentrate all of its budgetary resources on the economic issue of market imbalance;[145] and second, it will work to build improved competitiveness through implementing or modifying existing regulatory measures.[146] Thus, the difference between phase one and phase two of the reform is the distinction between the goals of the regulatory measures.[147] Phase one will implement or abolish measures with the goal of restoring market balance, while phase two will modify or implement regulatory measures with the goal of improving the competitiveness of EU wines.[148]

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139. EX-POST REPORT, *supra* note 39, at 96.

140. *Staff Working Document, supra* note 4, at 8 (discussing the loss of market support for many growers).

141. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 8.

142. EX-POST REPORT, *supra* note 39, at 98 n.82.

143. Commission Proposal, *supra* note 8, at 14.

144. *Staff Working Document, supra* note 4, at 9.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

A. Phase One: Restoration of Market Balance 2008-2013[149]

Many of the regulatory measures employed during the first step of the wine reform conscript recommendations proposed in the 2004 Ex-Post Report.[150] The only new measure in the first phase of the regulatory reform is the use of national envelopes.[151]

1. National Envelopes

The national envelope measure is similar to an allowance given by the CMO for wine to each nation, providing each Member State with the opportunity to decide how much of their allowance they wish to direct towards an array of regulatory measures.[152] The goal of the national envelope measure is to increase efficient expenditure of community funds by allowing Member States to decide the amount of money they wish to spend on an array of different regulatory measures.[153] Acceptable measures fund allocation include: "new support for promotion in the third countries; the vineyard restructuring/conversion scheme; new support for green harvest; [and] new crisis management measures, i.e. insurance against natural disasters and administrative costs of setting up a sector-specific mutual fund."[154] The Commission will maintain oversight of national expenditures through "common rules," which ensure compliance with environmental standards,[155] as well as by requiring nations to submit their specific national support program to the Commission.[156]

Adoption of the national envelope measure delegates responsibility and control to the individual Member States, allowing them to tailor regulatory measures to their own unique situations.[157] This measure recognizes the problems faced by the Commission in trying to create overarching regulations that fail to address the unique characteristics of Europe's wine-producing regions. The Commission hopes that increased subsidiarity will result in more efficient expenditure of funds.[158]

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149. Commission Proposal, *supra* note 8, at 5.

150. *See* EX-POST REPORT, *supra* note 39 (discusses the use of planting rights scheme, green harvesting, and abolition of distillation measures); *see also* COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 9.

151. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 9.

152. *See id.*

153. *See id.*

154. Commission Proposal, *supra* note 8, at 7. *See* Europa – The EU at a glance – Eurojargon, "Third Country," *available at* http://europa.eu/abc/eurojargon/index_en.htm (third countries include countries outside the EU, not third-world countries in particular).

155. Commission Proposal, *supra* note 8, at 7.

156. *Id.* at 17.

157. European Commission, Agriculture and Rural Development: *Reform of the EU Wine Market*, http://ec.europa.eu/agriculture/capreform/wine/index_en.htm (last visited Apr. 1, 2009).

158. COUNCIL POLITICAL AGREEMENT, *supra* note 34. The principle of subsidiarity "is

Use of the national envelope measure does raise issues concerning the responsible use of funds, especially in relation to program favoritism. For instance, it is unlikely for nations to focus a large portion of their national envelope budget on measures targeted outside their own country, like promotion in Third-World countries.[159] This might lead to the effective elimination of certain measures through a conscious lack of funding.[160] Another potential problem associated with the national envelope measure is the inadequate management or misappropriation of funds. The 2004 Ex-Post Report noted that the majority of the European wine nations had very weak administrative frameworks for the reporting and management of regulatory measures.[161] It concluded that:

> A significant problem is that, whilst Member States are obliged to collect and submit to the European Commission a wide range of information relevant to policy issues, a number of Member States have been rather dilatory and inconsistent in supplying this data. The data collection process was further burdened by the lack of an appropriately organized reporting process at the national level. In fact, some national statistical agencies do not seem to have a complete overview of data available in their country . . . what is needed is renewed co-operation on CMO data monitoring and reporting between existing Member States and the Commission.[162]

These reporting problems indicate that many of the nations will face a difficult task of simply registering and accounting for vineyards within their nations.[163] Giving Member States a collective budget of over half a billion dollars per year could result in serious misappropriation of Commission resources.[164] Therefore, Commission oversight must be a fundamental part of the national envelope initiative, not just in terms of approving national programs and ensuring compliance with environmental standards, but in terms of administration as well. If Member States cannot successfully manage the administration of community funds, it is likely that the national envelope program will suffer from the same inefficiency problems as the former planting

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defined in Article 5 of the Treaty establishing the European Community. It is intended to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made as to whether action at Community level is justified in the light of the possibilities available at national, regional or local level." EUROPA Glossary, Subsidiarity, http://europa.eu/scadplus/glossary/subsidiarity_en.htm (last visited Apr. 1, 2009).

159. *See infra* Part VI.B.2 for further discussion on possible use of publicity measures.

160. *Id.*

161. EX-POST REPORT, *supra* note 39, at 76 & 193.

162. *Id.* at 193.

163. *Id.*

164. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 25 (stating that the agreement allocates seventy-eight percent of the 1.4 billion Euro budget to the national envelope measure).

rights regulations.[165] However, if the Commission and the Member States can find a successful and efficient administrative process, the potential gains realized from tailoring Commission funds to the specific needs of the individual Member States could far outweigh those seen during the previous eras of the union-wide management of funds.

2. Grubbing Up

The second measure the Commission proposes to help restore market balance is the revitalization of the controversial grubbing-up measure.[166] Parameters for the grubbing-up measure are set forth in Chapter two, Articles 88 through 98 of the Commission Proposal.[167] Eligible vintners who choose "the complet[e] elimination of all [of] [their] vine stocks on a parcel planted with vines" shall be eligible for compensation.[168] Areas that are grubbed up will be immediately eligible for the Singe Farm Payment, meaning that cross-compliance with environmental regulations will be compulsory.[169] Payments will be made on a declining scale, with vintners who choose to grub up in the first year receiving the highest payments, and those grubbing-up during the last, or fifth year, receiving the least amount per acre.[170] This measure will restore market balance by "helping those who cannot compete . . . leave the sector with dignity."[171] The Commission believes that revitalization of the grubbing-up scheme will lead to a reduction of 2.3 million hectoliters of surplus in the first year of the reform, and a subsequent reduction of 1.9 million hectoliters in the second year.[172]

From a strictly economic standpoint, grubbing-up is not the most efficient process. Imposition of a free market that eliminates artificial demand and producer-based subsidies, thereby forcing inefficient vintners out of the market, would result in market balance at a minimal cost to the CMO for wine.[173] However, this solution is not possible because of social considerations. It

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165. See *supra* Part III.B.2 of this Note for a discussion of the problems associated with administering the planting rights measures due to the lack of a reliable market management information system during the years of 1988-2003. *See also* EX-POST REPORT, *supra* note 39, at 193.

166. *See* Commission Proposal, *supra* note 8, at 62.

167. *Id.* at 62-65.

168. *Id.* at 62-64.

169. *Id.* at 9.

170. *Id.*

171. *Id.* at 5.

172. *Staff Working Document, supra* note 4, at 16. These surplus reduction figures came from the original proposal and will likely be significantly reduced after the recent political agreement because the area eligible for grubbing-up was reduced from 400,000 hectares to 175,000 hectares. *See* COUNCIL POLITICAL AGREEMENT, *supra* note 34.

173. *See* EX-POST REPORT, *supra* note 39, at 55. It should be noted, however, that bankruptcy and unemployment might shift the cost onto the EU taxpayers through other means, namely social programs.

would be socially irresponsible for the Commission to let market forces drive producers out of business when it is the very regulations of the Commission itself that are responsible for this market's existence in the first place. Furthermore, the Commission must abide by the objectives of the CAP provided for in the Treaty of Rome, specifically that the Commission must ensure a fair standard of living for farmers.[174] Forcing numerous producers out of an agricultural sector where they have worked for decades would violate this provision.

In contrast to a free market option, the regulatory measure of grubbing-up is consistent with the objectives set forth in the Treaty of Rome in that grubbing-up provides a dignified option for inefficient vintners to leave the market with a sizeable severance package.[175] Therefore, this measure attempts to provide "a fair standard of living for farmers", though not necessarily in the wine market, and embodies the best way of achieving the intrinsically contradictory goals of the CAP.[176]

However, many do not see this regulatory measure as a socially acceptable option.[177] Instead, many vintners interpret this measure as the Commission forcing them to give up their livelihoods and exit the wine market.[178] The Commission has even received threats of violence from small vintners vowing to shed blood before they would grub up their vineyards.[179] In response to this contentious reaction, the Commission has conceded to some of the demands from the top wine producing nations by scaling back the total number of acres originally allotted for the grubbing-up scheme, from 400,000 to 175,000 hectares over three years.[180] It has also increased the percentage of land exempted for environmental reasons, as well as placing a cap on the total percentage of land allowable for grubbing up.[181]

In the end, grubbing-up is the most economically efficient and socially acceptable way of achieving market balance in the wine sector. The success of this measure has been demonstrated by expert analysis of the planting rights scheme during the 1987-1996 period, which has concluded that grubbing-up was the best possible way to achieve market balance.[182] The 2004 Ex-Post Report noted that the use of permanent abandonment "had a positive impact on

174. BATTY & CARSWELL, *supra* note 12, at 5.

175. Commission Proposal, *supra* note 8, at 62.

176. BATTY & CARSWELL, *supra* note 12, at 5 (discussing author's opinion that the CAP's goals are inherently contradictory).

177. *See generally* Constand Brand, *Germany, France Lead Appeal for Changes to EU Wine Reform Plans*, BEVERAGE WORLD, July 16, 2007, *available at* http://www.beverageworld.com/index2.php?option=com_content&do_pdf=1&id=33420; *see also* Wyatt, *supra* note 1 (discussing the social and political opposition to this regulatory measure).

178. *See* Brand, *supra* note 182.

179. Wyatt, *supra* note 1.

180. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 8.

181. *Id.* at 15.

182. *See* EX-POST REPORT, *supra* note 39, at 77-78.

the adaptation to market requirements," and that "[t]he area of low quality vineyards decreased significantly."[183] The result was not only a reduction in the overall surplus of wine, but a reduction in primarily low-quality wine.[184] Given that the demand for quality wine is on the rise, this prospective measure will cause a concentrated reduction in the supply of the less desirable table wine while maintaining the supply of the more desirable quality wine. This represents another advantage of the grubbing-up scheme. In sum, grubbing-up represents both a surplus management measure and a quality measure, thus accomplishing two of the stated goals of the wine reform.[185]

The only drawback to the employment of the grubbing-up scheme is the lack of attention paid to environmental concerns in the Commission's proposal. Paying farmers to destroy vineyards raises concerns regarding the methods that will be employed to eliminate their crops and the corresponding impact that wide-spread destruction of vineyards could have on the countryside.

The first area of concern is Article 94 of the proposal which affords Member States the opportunity to limit the prospective areas eligible for grubbing-up based on environmental concerns.[186] For example, vineyards on hillsides and other mountainous terrain, which could be prone to mudslides from the loss of vital root systems, may be exempted from the grubbing-up scheme.[187] Article 94(3), however, limits these environmentally protected areas to only two percent of a nations total vine planted area, meaning that if a country has more than two percent of its countryside covered with vineyards then it cannot apply the environmental protection afforded in clause three to those areas exceeding this two percent cap.[188] This leaves the door open for environmental disasters in many countries with mountainous vineyards.

Another environmental issue concerning the proposal is the lack of procedural guidelines for the grubbing-up measure. The proposal does not set forth any environmental standards for the practice of grubbing up, except stating that "a minimum environmental requirement will be attached to the grubbing-up premium to avoid land degradation . . . ."[189] Article 98 states that "[d]etailed rules for the implementation of this Chapter shall be adopted in accordance with the procedure referred to in Article 104(1)," which effectively defers environmental concerns regarding the implementation of the grubbing-up scheme to the Management Committee.[190] There continues to be a lot of

183. *Id.* at 78.

184. *Id.*

185. Commission Proposal, *supra* note 8, at 4. ("[O]bjectives of this reform are to: increase the competitiveness of the EU's wine producers . . . [and] create a wine regime that operates through clear, simple rules – effective rules that balance supply and demand . . . "). *Id.*

186. *Id.* at 64.

187. *Id.*

188. *Id. See also* COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 15 (which increased the area protected from two percent to three percent).

189. Commission Proposal, *supra* note 8, at 9.

190. *See id.* at 65-66.

rhetoric concerning the imposition of "strict environmental restrictions on grubbing up," but there has yet to be any written standards announced.[191]

It is disconcerting that the Commission would enumerate environmental regulations for some aspects of the grubbing-up scheme but defer others to the Management Committee, especially an aspect as important as the procedure for grubbing up. The Commission should have enumerated environmentally acceptable procedures for the act of grubbing-up in its proposal from the outset, thereby foreclosing the opportunity for later conflict and the possibility of bargaining-down environmental standards to "minimum environmental requirement[s]."[192] It will be important for the Commission and the Member States to give these environmental concerns proper attention in order to ensure that economic efficiency does not come at the cost of environmental degradation.

3. Green Harvesting

Another interesting regulatory measure is green harvesting. Article 11 of the reform defines green harvesting as "the total destruction or removal of grape bunches while still in their immature stage, thereby reducing the yield of the relevant parcel to zero."[193] Through this process the Commission intends to maintain market balance by engaging in an ex-ante elimination of supply in years that are forecasted to large harvests.[194]

Green harvesting, known in French as *vendange en vert*, is an old technique where vintners remove a portion of the immature grapes on the vines in order to produce higher quality wines with the remaining grapes.[195] The idea is that the vines will be able to put more resources into the few remaining grapes on the vine resulting in higher quality grapes for wine-making.[196]

It appears that the Commission again has paid deference to the 2004 Ex-Post Report in adopting this regulatory measure. Green harvesting was one of the recommendations made in the 2004 Ex-Post Report to control occasional surpluses.[197] It proposed the use of premiums for green harvesting as a way to reduce surplus production before it was made into wine.[198] Its strengths were explained as follows:

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191. European Commission: Agriculture and Rural Development, *The Reform of the EU's Wine Sector: Unleashing Its Potential* 5 (2007), *available at* http://ec.europa.eu/agriculture/capreform/wine/potential/leaflet_en.pdf.

192. Commission Proposal, *supra* note 8, at 9.

193. *Id.* at 28.

194. *See Staff Working Document*, *supra* note 4, at 15.

195. James Laube, *Making The Cut*, WINE SPECTATOR MAG., Sept. 30, 2000, *available at* http://www.winespectator.com/Wine/Archives/Show_Article/0,1275,2854,00.html.

196. *Id.*

197. EX-POST REPORT, *supra* note 39, at 99.

198. *Id.*

> First, unlike distillation measures for crisis situations, which tend, according to our analyses and expert interviews, to have a lagged impact on the market situation, green harvest of grapes fights against surpluses in advance, at the very early stage of probably high yield vintages. Second, the quality of the wine may be improved by reducing the quantity of production. Third, the harvested green grapes may remain or be brought back to the producer's vineyard as green fertilizer and no alcohol produced, which would have to be sold later with monetary loses. Fourth, the producer may do the work of green harvesting himself, and the aid paid for the measure would completely support his income.[199]

The only problem with the Commission's adoption of the green harvesting measure is that Article 11 of the reform calls for "reducing the yield of the relevant parcel to zero" leaving no grapes behind for wine-making.[200] This legal definition frustrates the purpose of the green harvesting method and results in an inefficient and wasteful policy.[201] If the Commission is concerned with producing higher quality wines while simultaneously reducing supply, then adoption of the traditional method of green harvesting successfully accomplishes these two goals.[202] However, the Commission's definition tackles only one side of the wine problem, the supply side, by completely eliminating a wine-maker's crop. It is perplexing why the Commission would adopt a policy that only accomplishes one of its stated goals when there is another traditional policy that would clearly accomplish both of its stated goals.

Traditional green harvesting is an effective means of eliminating surplus while simultaneously improving wine quality.[203] The Commission should eliminate the last clause of Article 11 which states, "thereby reducing the yield of the relevant parcel to zero," in order to enact a more successful and efficient regulatory measure.[204]

4. Distillation, Aid for Must Enrichment, and Private Storage Contracts

In the past, wine-producers have been enticed to overproduce because of market measures like support for distillation and aid for private storage.[205] The original Commission proposal stated that it would "[abolish] from day one, all

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199. *Id.*

200. Commission Proposal, *supra* note 8, at 28.

201. *Wine Blog*, *supra* note 109.

202. Commission Proposal, *supra* note 8, at 4 (stating that two of the goals of the reform are to increase the quality of EU wines and reduce the occurrence of overproduction).

203. EX-POST REPORT, *supra* note 39, at 99.

204. Commission Proposal, *supra* note 8, at 28.

205. *See supra* Part IV.B.3.

the measures which have proved to be inefficient, namely support for by-product distillation, potable alcohol and dual-purpose grape distillation as well as private storage support and export refunds."[206] These proposed regulatory measures reinforce the Commission's conclusion that "market . . . measures, such as crisis distillation, have proved cost-inefficient to the extent that they have encouraged structural surpluses without requiring improvement in the relevant competitive structures."[207]

This move marks a drastic shift in policy for the Commission, but, similar to the green harvesting and grubbing-up measures, it is not a new concept.[208] Since the early 1980s, support for distillation and aid for private storage have been in place in one form or another.[209] Years of reliance on these measures have proved to be very expensive, costing the European Community around a half a billion Euros per year, and these measures are projected to increase in cost[210] as they become more commonplace.[211] Today these measures are entrenched in the market to the point that suppliers are consistently using them, with some even exploiting them.[212]

a. Phasing Out Distillation Measures

The 2004 Ex-Post Report concluded that distillation measures were both superfluous and costly, and recommended that the Commission ban their use.[213] It appears that the Commission agrees with this conclusion, calling for the phasing out of distillation measures.[214] However, as with the controversial scheme of grubbing up, strong political and economic interests seem to have influenced the Commission into tempering its complete ban on distillation measures.[215] In a recent political agreement the Commission was successful in upholding the ban on distillation measures on a union-wide level, but allowed for optional use of distillation measures on the Member State level.[216] While this is not as successful as a complete elimination of all distillation measures, forcing Member States to finance these measures will hopefully lead them to the same conclusion reached by the experts in the Ex-Post Report and the

206. Commission Proposal, *supra* note 8, at 5.

207. *Id.* at 13.

208. *See* EX-POST REPORT, *supra* note 39, at 97-99 (arguing that distillation measures, especially crisis distillation, should be abandoned).

209. NIEDERBACHER, *supra* note 35, at 65 (discussing the use of distillation measures used in the 1980s to combat the market surplus).

210. *EU Reform of the Wine Sector*, EUBUSINESS, July 4, 2007, *available at* http://www.eubusiness.com/Agri/wine-reform-guide/.

211. EX-POST REPORT, *supra* note 39, at 84.

212. *Id.* at 96.

213. *Id.* at 98.

214. *See* COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 9.

215. *See id.*

216. *See id.*

Commission – that distillation measures must go.

b. Banning Private Storage Contracts

In contrast to the maintenance of distillation measures, the Commission was successful in upholding the complete ban on the use of aid for private storage at the EU level with an eventual ban at the Member State level set to take effect in 2015.[217] Unfortunately, the Commission might have bargained for the wrong measure. Aid for private storage, unlike the distillation measures, was not considered a complete failure by the 2004 Ex-Post Report.[218] Instead, the Report determined that aid for private storage met the policy objectives of removing surplus from the market with rather high efficiency.[219] Therefore, the Commission has departed from the conclusions in the 2004 Ex-Post Report by banning this practice.

On the other hand, since private storage contracts do nothing more than temporarily withdraw production from the market ex-post,[220] successful elimination of the structural surplus ex-ante might eliminate the need for private storage contracts in the first place. Therefore, the Commission has ultimately taken the more sensible path in regards to this market measure by addressing the fundamental problem of structural surpluses instead of trying to deal with the problem after it has already occurred.

c. Phasing Out Aid for Must Enrichment

Another area where the Commission has departed from the recommendations in the 2004 Ex-Post Report is in the area of aid for must enrichment.[221] The Report concluded that the aid for must enrichment was helpful in leveling the playing field for those producers who wanted to use must enrichment for boosting the alcohol content of their wine, and that it also led to a small decrease in the annual surplus through use of grapes instead of sugar.[222] The recent political agreement has abolished the aid for must enrichment measure at the EU level with the eventual phasing out of the subsidy at the Member State level, but unfortunately, the agreement did not uphold the ban on the use of sugar as a method of chaptalization.[223]

Allowing chaptalization by means of sugar enrichment increases the attractiveness of the less efficient and inferior means of boosting the alcohol

217. *Id.* at 9-11.

218. EX-POST REPORT, *supra* note 39, at 117.

219. *Id.*

220. *See id.* at 101.

221. *See supra* Part III.B.4.

222. EX-POST REPORT, *supra* note 39, at 125.

223. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 8 (continuing the use of sugar enrichment in reduced amounts). *See infra* Part VI.B.2 (discussing in greater detail the decision to continue to use the method of sugar enrichment as an oenological practice).

content of wine.[224] This decision is inconsistent with both the Commission's goals of increasing quality and decreasing structural surplus.[225] The same reasoning used in relation to private storage contracts, namely that ex-ante elimination of structural surplus will eliminate the need for storage contracts, does not render the same result in relation to the aid for must enrichment measure. Use of must enrichment is more of a quality-boosting tool than a production-based tool; therefore, elimination of an ex-ante structural surplus does not mean that vintners will no longer want to artificially increase the quality of their wine.[226] In other words, because private storage contracts are one-dimensional and strictly quantity driven, and must enrichment is two-dimensional, driven by goals of quality and quantity, elimination of structural surpluses will not inevitably lead to the abandonment of must enrichment. Vintners will continue to boost the quality of their wine regardless of the quantity they produce. All the Commission has done by eliminating the aid for must enrichment and retaining the use of sugar enrichment is to ensure that the vast majority of vintners will use cheaper, inefficient, and substandard practices to enrich their wine.

B. Phase Two: Improved Competitiveness

The second stage of the profound reform focuses on improving European wine's competitive edge in the world market.[227] Ideally, increased competitiveness will be achieved through renewed, simplified, and more straightforward regulatory measures, as well as strong publicity campaigns promoting European wines.[228] Some of the regulatory measures employed in phase two of the proposal are closely related to the regulatory measures stated above in phase one, specifically modifications to oenological practices and the allowance of chaptalization.[229] However, measures in phase two of the proposal focus primarily on improving competition and are less concerned with restoring market balance.[230]

The Commission seeks to increase competitiveness through the simplification of three existing regulatory measures: (1) oenological practices;

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224. See *supra* Part III.B.4 for a discussion of how RM and RCM were found to be superior methods of enriching wine.

225. Commission Proposal, *supra* note 8, at 4 (stating that two of the goals of the reform are to increase the quality of EU wines and reduce the occurrence of overproduction).

226. EX-POST REPORT, *supra* note 39, at 125.

227. Commission Proposal, *supra* note 8, at 5.

228. *Id.* at 5-8. The publicity campaign is included in the national envelope measure under the new political agreement. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 9. However, this Note will discuss the publicity campaign in the section titled Onelogical Practices and Exportation, *infra* Part VI.B.2.

229. See *supra* Part VI.A.1.c for a discussion of the elimination of the aid for must enrichment measure and its implications on producer decisions.

230. Commission Proposal, *supra* note 8, at 5.

(2) geographic indications (GIs) or quality policies;[231] and (3) labeling.[232] The regulatory measures relating to geographic indicators and labeling implicate long-standing issues of intellectual property as well as world trade law and have spawned numerous publications.[233] Because these two measures implicate diverse political and legal frameworks, this Note will not address these issues.[234] Rather, this Note will consider only the regulatory changes concerning oenological practices.

1. Oenological Practices and Chaptalisation

Changes in oenological practices aim to create "clearer, simpler, and more transparent rules" by allowing more flexible wine-making practices and reduced limits for enrichment.[235] Perhaps the most controversial change to oenological practices will be the reduced limits for enrichment.[236] As stated earlier, the original proposal by the Commission called for the complete ban on the use of sugar as a method of chaptalization,[237] but the recent political agreement rejected this ban, opting instead for a mere reduction in the total amount of wine allowed to be enriched.[238]

Similar to the grubbing-up and distillation measures, this proposal was the subject of heavy debate among wine interests.[239] The first, and probably most influential, criticism came from France and Germany, two of the top wine-producing nations.[240] Because northern European countries have significantly less sunshine, wines derived from grapes grown in these countries are usually subjected to sugar enrichment in order to boost their alcohol content, making this method of chaptalization a common occurrence.[241] Additionally, foreign

231. Quality policies are referring to the specific policies of quality wines produced in specific regions, not to the overall quality of European wine.

232. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 10.

233. *See generally* Eva Guterrez, *Geographical Indicators: A Unique European Perspective on Intellectual Property*, 29 HASTINGS INT'L & COMP. L. REV. 29 (2005) (discussing the unique nature of European geographic indicators). *See also* Michelle Agdomar, Note, *Removing the Greek From Feta and Adding Korbel to Champagne: The Paradox of Geographical Indicators in International Law*, 18 FORDAHM INTELL. PROP. MEDIA & ENT. L.J. 541 (2008).

234. It will be interesting to see how the changes to the geographic indicators and the labeling formats impact intellectual property and international trade law.

235. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 18.

236. *See generally* Brand, *supra* note 182 (discussing how countries see themselves subject to a double standard of not being able to engage in chaptalisation, while their new world competitors regularly employ this technique to artificially improve their wines).

237. Commission Proposal, *supra* note 8, at 5.

238. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 18.

239. Brand, *supra* note 182.

240. *Id.*

241. Lucia Kubosova, *Brussels Could Give on Wine Reform*, BUS.WK., Sept. 28, 2007, *available at* http://www.businessweek.com/globalbiz/content/sep2007/gb20070928_190686.htm.

competitors, like the United States, consistently use sugar enrichment in their own wine production.[242] These facts left a sour taste in the mouths of Agricultural Ministers like Horst Seehofer, who wondered why this previously acceptable technique would now be off limits to European producers, but would still be employed by overseas competitors.[243]

This proposed ban was not only seen as a technical barrier to competition, but it also sparked a strong social debate regarding viticulture in Europe. France's Agricultural Minister Michel Barnier believes the prohibition on the use of sugar, along with the allowance of New World practices, "will directly lead to a loss of identity and authenticity of Europe's viticulture. . . . The strength of this viticulture is the quality, the color, the taste."[244] Minister Barnier, along with many others, saw this change in oenological practices as a cultural attack, illustrating the inextricable bond between Europeans and wine.[245]

While some wine producers viewed the proposed ban as both an economic and social barrier, wine advocates attacked from the opposite direction arguing that in their view the Commission did not go far enough.[246] Their argument was that while the initial proposal sought to ban the use of sugar in the enrichment process, it did not put an end to the enrichment process altogether.[247] Under Section 19 of the original proposal, "the politically sensitive areas of enrichment and acidification" were allocated to the Council, while the Commission controlled all of the other aspects of oenological procedures.[248] Annexes IV and V of the original proposal permitted the process of enrichment and acidification, allowing nations to enrich their wines through the use of RM and RCM but not through the use of sucrose.[249] Wine advocates contended that "quality wines made from healthy grapes do not need acidification or enrichment, and inferior wines do not become better wines through such corrections."[250] Wine advocates wondered why "the higher body, the Council, ha[d] entrenched the practice of allowing inferior or defective or unbalanced wines to be corrected."[251] These advocates lobbied for the complete elimination of the wine enrichment program, and initially were met

242. Brand, *supra* note 182.

243. *Id.*

244. *Id.* Other oenological practices included use of adding woodchips to the distillation process. *Id.*

245. NIEDERBACHER, *supra* note 35, at 5.

246. *Wine Blog*, *supra* note 109.

247. *Id.*

248. *Id.*

249. Commission Proposal, *supra* note 8, at 15 & 81; *but see* COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 8-9 (allowing the use of sucrose to enrich wines but lowering the amount allowed).

250. *Wine Blog*, *supra* note 109.

251. *Id.*

half way with the ban on chaptalization by means of sugar enrichment.[252] In the end, however, wine advocates lost when the political agreement allowed for all methods of chaptalization.[253]These competing social interests were merely placated by the 2004 Ex-Post Report's economic analysis. The 2004 Ex-Post Report gave little deference to these social considerations and approached the issue of oenological practices from an economic standpoint, stating that "in the interests of competitiveness, all the methods used in third countries[254] should be allowed in the EU if they are both completely harmless to consumer health and are accepted by consumers.[255] The Report essentially gave the power to decide issues regarding oenological practices to the consumer.[256]

While this position might make sense from an economic standpoint, it does not adequately address the quality goals of the proposal.[257] Allowing vintners to adopt sub-par oenological practices so long as they are acceptable to consumers and meet basic health requirements will hardly result in a dramatic improvement in the quality of European wines. Furthermore, the cultural implications of wine and its traditions will not allow vintners to abandon traditional winemaking techniques in exchange for a small increase in profits.[258]

Instead of "dumbing down" their standards, the EU should maintain them and support further innovation that does not negatively impact quality or tradition. The complete ban on chaptalization would have represented a step in the right direction because it would have eliminated a cheap and easy way for vintners to artificially improve the "quality" of their wines. In addition to an improvement in quality, the ban on chaptalization would have represented a market-balancing tool. Changing the definition of wine to exclude the practice of adding sugar to wine would force vintners to use wine musts and other wine byproducts to increase their alcohol content.[259] This would incorporate the use of more grapes in the wine making process thereby further reducing production surpluses by an estimated 3.7 million hectoliters.[260]

Regulations attempting to ban or permit long-standing oenological practices will always solicit heavy scrutiny. In the present case, scrutiny by various Member States has led to the elimination of the ban on chaptalization.[261] Intense bargaining has resulted in merely a reduction in the

252. Commission Proposal, *supra* note 8, at 5.

253. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 8-9.

254. EX-POST REPORT, *supra* note 39, at 133.

255. *Id.*

256. *See id.*

257. Commission Proposal, *supra* note 8, at 4 (stating that one of the goals of the reform is to increase the quality of EU wines).

258. *See* NIEDERBACHER, *supra* note 35, at 5 (discussing how the traditions of winemaking are central to the European identity).

259. *See* Commission Proposal, *supra* note 8, at 81.

260. *Staff Working Document*, *supra* note 4, at 15.

261. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 8.

amount of wine permitted to be chaptalized.[262] The Commission's attempts to improve the quality of European wines have been sidelined by political and social interests. While the current political agreement still reduces the total amount of sugar enriched wines, it fails to make any significant strides in the area of competition because it permits, and even encourages,[263] a low quality measure of enrichment.

2. Oenological Practices and Exportation

The ban on chaptalization is not the only oenological practice augmented by the proposal. Article 21 of the original proposal provides for an unsettling loophole in regards to the exportation of European wines.[264] The second goal of the Commission in adopting this proposal is to "strengthen the reputation of the EU quality wine as the best in the world; [and] recover old markets and win new ones."[265] Article 21 states that "oenological practices and restrictions recognised by the International Organization of Vine and Wine (OIV), and not the authorised Community oenological practices and restrictions, shall apply to products covered by this Regulation which are produced for export."[266] This statement creates a loophole for exportation of European wines, allowing wineries to defect from the Community's oenological practices when exporting wines, and frustrating the Commission's goal of strengthening the reputation of EU wines.[267]

Allowing wineries to use shortcuts when making wines for export will result in substandard European wines in foreign markets and will not result in the recapture of any lost markets. As one wine enthusiast aptly put it, "[t]his [provision] would appear to be a double-standard whereby [the] health concerns and expectations of [non-]European consumers can be waived in order to help European vintners do business outside the EU."[268] The Commission should require that all wine produced within the EU be subject to the same oenological standards and restrictions.[269]

The Commission also plans to increase competition both within the EU and abroad by engaging in a substantial publicity and informational campaign.[270] Article 9 of the proposal sets forth the various publicity and promotional campaigns the European Community would engage in to improve

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262. *Id.*

263. The elimination of the aid for must enrichment will induce vintners to use the cheaper and easier method of sugar enrichment. *See supra* Part VI.B.1.

264. *See* Commission Proposal, *supra* note 8, at 4.

265. *Id.*

266. *Id.* at 33.

267. *See Wine Blog*, *supra* note 109.

268. *Id.*

269. Commission Proposal, *supra* note 8, at 33.

270. *See id.* at 27.

their competitiveness in foreign and domestic countries.[271] The goal of these campaigns is to stimulate consumers into buying European wines and to dissuade them from buying new world wines.[272]

On the domestic front, the Commission believes that an "internal information scheme [can] contribute to informing EU consumers about the domestic wine quality policy, which might reasonably persuade them to turn their preferences increasingly to domestic European wines rather than to competing wines."[273] The Commission has borrowed the idea for a publicity campaign from new-world wine producers, acknowledging that "new-world wines have shown that a strong promotional policy is the key for successful marketing of wines worldwide."[274] The adoption of this internal domestic informational campaign brings the EU up to par with the rest of its competition, and will could increase market share within the EU, the extent of which is yet unknown.

In regards to the publicity campaign, Article 9 of the proposal originally allocated 120 million Euros for "promotion measures concerning Community wines in third countries."[275] The proposal went on to state that "[f]unds . . . reserved [in Annex II for promotion of measures in third countries] shall not be available for other measures," ensuring that countries would spend money on promotion in third countries.[276] The newly revised campaign, however, fundamentally changed the foreign publicity campaign, eliminating its 120 million Euro budget.[277] Instead, promotion in third markets is now placed entirely within the national envelope expenditure,[278] which essentially eliminates the previous goal of mandating promotion in third countries.[279]

By subsuming both the foreign and domestic publicity campaigns into the national envelope measure, nations now have the choice on how much they are willing to contribute to both domestic and foreign promotional campaigns.[280] Publicity campaigns will now have to compete with other domestic concerns like vineyard restructuring, conversion, modernization of the production chain, innovation, support for green harvest, and new crisis management measures.[281] It is unlikely that nations will spend millions of dollars of taxpayer money on

271. *Id.*
272. *See id.* at 13.
273. *Staff Working Document*, *supra* note 4, at 13.
274. *Id.*
275. Commission Proposal, *supra* note 8, at 27.
276. *Id.*
277. *See* COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 8.
278. *See id.* at 21.
279. *See* European Commission: Agriculture and Rural Development: *Reform of the EU Wine Market*, http://ec.europa.eu/agriculture/capreform/wine/index_en.htm (last visited Apr. 2, 2008) (national envelopes are yearly stipends that will allow Member States to "adapt measures . . . to their particular situation.").
280. *See id.*
281. *See* COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 17.

promotional campaigns, especially in foreign nations when there are potentially more pressing domestic issues at hand. Political accountability will likely deter national officials from spending money on promotional campaigns, especially foreign campaigns. It appears that this change embodied in the Council's Political Agreement might have effectively written out the foreign publicity campaign measure from the proposal.[282]

Assuming *arguendo* that nations were to engage in strong promotional campaigns in third markets, there would still be a fundamental inconsistency between the publicity section and other sections of the proposal. Article 9, section 3(a) states that publicity measures will be used "in particular [to] highlight . . . the advantages of the Community products, especially in terms of quality, food safety, or environmental friendliness."[283] The problem is that this goal is contradicted by Article 21 of the proposal where exporters of European wines are exempted from rigorous oenological standards applied within the community.[284] Foreign consumers are left to wonder if the Commission is simply trying to trick them into thinking that they are buying a higher quality wine because it came from the EU when these exported wines are not subject to the same rigorous quality control standards applied within the Community.

While there is no inherent problem with subsidizing a publicity campaign in order to boost sales, such a campaign cannot be considered "responsible" if it seeks to deceive consumers into buying a lower-quality product.[285] Clause 5 of Article 21 should be eliminated from the proposal, and all wines produced within the EU should be subject to the same Community oenological standards and restrictions.[286] By doing this, any increase in markets will truly be the result of an increase in the competitive nature of EU wines and not the result of a promotional trick.

CONCLUSION

The above-mentioned regulatory measures compromise a substantial part of the Commission's new arsenal in eliminating the structural surplus and improving the overall character of the European wine sector.[287] Built into every measure is a delicate balance between various economic, social, and environmental interests. As a result of these competing interests, compromise has forged a more tempered and socially acceptable proposal. While the political agreement reached in December 2007 diluted the Commission's

282. *See id.* at 8.

283. Commission Proposal, *supra* note 8, at 27.

284. *See id.* at 33.

285. *See id.*

286. *See id.*

287. This Note did not address all of the aspects of the Commission's revised proposal. Furthermore, there have been even more changes to the Commission's proposal since the adoption of the Council Regulations (EC) No 479/2008 by the Council of Ministers in April of 2008. However, this Note did not conduct an analysis of this new legislation.

original proposal, the agreement still embodies the overarching goals of "economic viability, social acceptability, and environmental integrity."[288] Often, however, economic interests have been tempered, and even undermined, by social interests. Sadly, the environmental interests have come in a distant third to either of the other two interests.

Revitalization of the controversial grubbing-up scheme has pitted potential economic gains against strong social interests. In order to reach a socially acceptable compromise, the economic gains of the grubbing-up scheme have been hampered through limitations on eligible areas from an original 400,000 hectares to only 175,000 hectares along with more expansive national exemptions.[289] Even with this reduction, this measure embodies the most viable regulatory measure in achieving the diminution and eventual elimination of the structural surplus in the wine market. Grubbing-up will maximize efficiency by inducing ineffective vintners to move out of the wine sector and pursue more robust ventures. The measure satisfies social concerns by providing vintners an honorable means of exiting the wine sector to those who are currently struggling to maintain a living within it.[290] National limitations provide environmental integrity,[291] but procedural matters remain a concern because delegation to alternative agencies has left the door open to later environmental problems.[292]

Elimination of distillation subsidies at the EU level represents the Commission's determination that these measures are not only inefficient for the wine and alcohol industries, but also, and perhaps more importantly, that they are ineffective in eliminating the structural surplus. This shift in policy represents a fundamental change in policy for the Commission and will be integral in achieving economic viability by eliminating the most expensive and inefficient crutch in the wine sector. However, social discord has tempered the economic viability of this measure by retaining the possibility of distillation measures at the Member State level.[293] In the end, support for distillation among Member States will likely fade as they realize the shortcomings of distillation measures and eventually eliminate these measures altogether. Environmental integrity will benefit from the elimination of distillation because vintners will likely employ less intensive farming practices as they focus more on quality than quantity.

Similar to elimination of distillation measures, the ending of support for private storage contracts will aid in achieving economic viability by inducing vintners to produce only those quantities they can sell in a particular year. The implications for this measure will not be as far-reaching as the measures for

288. COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 2.
289. *See id.* at 8; *but cf. Staff Working Document*, *supra* note 4 at 11.
290. *See* Commission Proposal, *supra* note 8, at 9.
291. *Id.* at 9 (discussing the national exemption for hillsides and steep terrain).
292. *Id.* at 66.
293. *See* COUNCIL POLITICAL AGREEMENT, *supra* note 34, at 9.

grubbing-up or phasing-out of distillation measures because of the limited use of this measure.[294] Similarly, due to its limited use, support for this measure will not be as contentious.[295] Environmental integrity will benefit from this measure because the loss of this safety net will induce vintners to focus more on quality than quantity and employ less intensive farming practices.

Elimination of aid for must enrichment will achieve economic viability only by eliminating subsidy payments. This small improvement in viability comes at a high cost to quality though, because vintners will have an even bigger incentive to use lower quality means of sugar enrichment. Social interests seem to have won out over the more economically sound measure of a complete ban on chaptalization. Further, there appears to be no significant environmental benefits to the ban on aid for must enrichment, which suggests the shortcomings of this regulation.

Support for green harvesting will have a positive impact on the elimination of the structural surplus by fighting against the structural surplus ex-ante.[296] This measure also contains environmental advantages because vintners can use the green harvested grapes as green fertilizer on their own vines,[297] eliminating the need to purchase additional artificial alternatives.[298] The only drawback to this measure is the poorly worded definition supplied in the proposal. The Commission should eliminate the last clause of Article 11, thereby allowing for the traditional method of green harvesting.[299]

Creation of national envelopes will likely achieve economic viability only if the proper administrative oversight and implementation is employed. Unlike other regulatory measures, there is no pedigree for this venture.[300] The Commission and the Member States should learn from the lessons of the past, specifically in regard to the inadequacies of planting rights registries,[301] and create strong administrative frameworks for the recordation and management of national envelope funds. Failure to do so could lead to widespread misappropriation and inefficient management of community funds.

It is unlikely that the sector will see any major improvements in competitiveness through the current changes to oenological practices or publicity campaigns.[302] Failure to retain the ban on the practice of

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294. *See* EX-POST REPORT, *supra* note 39, at 116. A national average of only eight percent of table wine was put into private storage contracts during the years of 1985-2003. *Id.*

295. *See id.*

296. *Id.* at 99.

297. *Id.*

298. *See generally* Glebe, *supra* note 123 (discussing the use of pesticides and other non-organic fertilizers in European agriculture).

299. Commission Proposal, *supra* note 8, at 28.

300. This measure was not part of previous wine reforms and therefore has not been analyzed for efficiency by the 2004 Ex-Post Report. *See generally* EX-POST REPORT, *supra* note 39.

301. *See supra* Part III.B.1.

302. It should be noted that this Note did not analyze all of the Commission's proposed measures.

chaptalization, coupled with the elimination of aid for must enrichment, will likely lead to the increased use of sugar enrichment. This, consequently, will result in a degradation of quality and a missed opportunity for reducing the overall surplus. Additionally, the commitment of the foreign publicity campaign inside the national envelope measure will likely have the affect of writing out the measure entirely. For those Member States that do engage in publicity campaigns in third markets, the contradiction between Article 21 and Article 9 will likely impede any large increase in market share.[303] The only promotional measure that will likely have any impact on improving competition will be the internal informational campaigns.

Taken together, the most important result of the original proposal and the recent political agreement is not the success or strength of one measure in particular, but the Commission's overall shift in policy. The Commission's adoption of many of the Ex-Post's Report's recommendations into its original regulatory proposal evidences its willingness to put an end to the structural surplus and increase both efficiency and quality of European wines. The Commission seems to have learned from its past mistakes and is currently taking appropriate steps to correct them. Progression towards this goal would not be possible without the driving force of the Commission.

Wine is and always will be deeply rooted in European culture, and because of this, any regulatory changes to its production will elicit strong sentiments. The current reform is no exception. Proponents of the reform should not be discouraged by the recent agreement. Major reform does not happen quickly, and this agreement, while tempered, demonstrates a fundamental step towards a more sustainable and prosperous wine sector.

303. *See* Commission Proposal, *supra* note 8, at 27 & 33 (comparing how Article 9 allows for nations to engage in publicity campaigns, but Article 21 allows for nations to depart from the normal oenological standards when selling outside the European Union).

BLUE MORNING-GLORIES IN THE SKY:

CORRECTING SANCTIONS TO ENFORCE NUCLEAR NONPROLIFERATION IN IRAN

Cody Coombs

INTRODUCTION

> I noticed the flashing light. It was not really a big flash. But still it drew my attention. In a few seconds, the heat wave arrived. After I noticed the flash, white clouds spread over the blue sky. It was amazing. It was as if blue morning-glories had suddenly bloomed up in the sky . . . [w]hen I looked down on the town from the top of that hill, I could see that the city was completely lost. The city turned into a yellow sand. It turned yellow, the color of the yellow desert.[1]

Over the past several decades, Iran has vigorously pursued nuclear technology under the pretense of its need for nuclear energy.[2] However, increasing amounts of evidence have surfaced that suggests that Iran's nuclear program has not been entirely based on peaceful purposes.[3] The International Atomic Energy Agency (IAEA), the enforcement agency behind the Nuclear Nonproliferation Treaty (NPT), has attempted to enforce the NPT provisions of nonproliferation through the use of various sanctions.[4] So far, Iran has refused to comply with NPT provisions.[5] Iran's refusal to comply with the provisions of the NPT, despite IAEA sanctions, has become a reoccurring theme among nuclear threat nations.[6]

Various approaches have been proposed to deal with the Iranian nuclear

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1. Isao Kita, Testimony of Isao Ktia, http://www.inicom.com/hibakusha/isao.html (last visited Jun 12, 2009). Mr. Isao Kita was a survivor of the nuclear attack by the United States on Hiroshima. *Id.* He was thirty-three and "[h]e was working for the Hiroshima District Weather Bureau 3.7 km from the hypocenter. He was the chief weather man and his shift fell on August 5 to 6. He kept observing the weather even after he was exposed." *Id.*

2. *See* ROGER HOWARD, IRAN IN CRISIS?: NUCLEAR AMBITIONS AND THE AMERICAN RESPONSE 92-97 (Zed Books Ltd. 2004).

3. *Chief of U.N. Nuclear Agency to Meet with Iran's Leaders*, N.Y. TIMES, Jan. 8, 2008, at A4, *available at* 2008 WLNR 380490 [hereinafter *Chief of U.N.*].

4. *See infra* part IV.

5. Sharon Squassoni, *Looking Back: The 1978 Nuclear Nonproliferation Act*, ARMS CONT. TODAY, Dec. 1, 2008, at 64, *available at* 2008 WLNR 25134531.

6. *See infra* Part IV.

threat, which range anywhere from disbelieving the evidence,[7] becoming more understanding of Iran,[8] to heightened sanctions.[9] Despite a general disagreement among the international community and critics on an effective approach to the Iranian nuclear threat, Iran's noncompliance and pursuit of nuclear weapons remains unchecked. Although the various asserted approaches each contain positives and negatives, an effective solution will require more than one or two sets of sanctions before Iran will comply with international nonproliferation policy.[10] However, Iran must comply at some point; the dangers of a nuclear Iran pose too great a threat.[11]

This Note will focus on the reasons why sanctions have not worked against various nuclear threats, and how those issues may be resolved. The evaluation will include a study of the broad concerns facing both Iran and other nuclear threat nations and how the NPT has affected those concerns. Part II will give a brief overview of the NPT, how and why it was formed, and its goals and various provisions. Part III will examine the Iranian nuclear program, including the evidence that points to Iran's pursuit of nuclear weapons and why Iran has determined that nuclear weapons are a necessity. Part IV will give a brief overview of sanctions that have been enforced on Iran and other nuclear threat nations. Part V will examine past sanctions and their effectiveness. Part VI will examine a few proposals that have been put forward as possible resolutions to the Iranian nuclear threat. Finally, Part VII will examine various solutions to make future sanctions upon Iran more effective. In consideration of the various problems and issues that have been presented through past

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7. *See* Demetri Sevastopulo, *Iran Retains Nuclear Plans, Says US Intelligence Chief*, FIN. TIMES, June 2, 2008, *available at* http://iran-focus.co.cc/2008/06/iran-retains-nuclear-plans-says-us-intelligence-chief.

8. *See* Mehrzad Boroujerdi & Todd Fine, Symposium, *A Nuclear Iran: The Legal Implications of a Preemptive National Security Strategy*, 57 SYRACUSE L. REV. 619, 635 (2007).

9. Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337, 429-30 (2007).

10. *See infra* Part VI.

11. *See* Allan S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 417-19 (2006); Jonathan Granoff, *The Nuclear Nonproliferation Treaty and its 2005 Review Conference: A Legal and Political Analysis*, 39 N.Y.U. J. INT'L L. & POL. 995, n.23 (2007).

> Tens, if not hundreds, of thousands of people would perish in an instant, and many more would die from exposure to radiation. The global impact would also be grave. The attention of world leaders would be riveted on this existential threat. Carefully nurtured collective security mechanisms could be discredited. Hard-won freedoms and human rights could be compromised. The sharing of nuclear technology for peaceful uses could halt. Resources for development would likely dwindle. And world financial markets, trade and transportation could be hit hard, with major economic consequences. This could drive millions of people in poor countries into deeper deprivation and suffering.

Kofi Annan, U.N. Secretary-General, Address to the Nuclear Non-Proliferation Treaty Review Conference 1 (May 2, 2005), *available at* http://vienna.usmission.gov/np_annan.html; *see also* Louis Beres & Isaac Ben-Israel, *The Limits of Deterrence Israel Faces Genocidal Assault*, WASH. TIMES (Nov. 21, 2007), at A21, *available at* 2007 WLNR 23061347.

sanctions, the final section will conclude with a recommendation of what steps should be taken to force Iran to comply with international nonproliferation policy.

I. NUCLEAR NONPROLIFERATION TREATY

The NPT, a United Nations treaty,[12] came into existence in 1970[13] after undergoing "several years of negotiations."[14] Prior to 1965, the unwillingness of the United States to agree to nuclear restrictions during the heart of the Cold War left the world with four nuclear powers and no effective international safeguards.[15] However, the addition of China into the nuclear family changed the international nuclear equation. China's acquiescence of nuclear weapons caused the United States and the Soviet Union to submit proposals to the Eighteen-Nation Disarmament Committee on Nuclear Nonproliferation.[16] The adopted proposal called for the IAEA safeguards on nuclear weapons to only apply to Non-nuclear Weapon States (NNWS).[17] Nuclear Weapon States (NWS) included the United States, Great Britain, France, Russia, and China.[18] To calm the fears of the NNWS, the "United States and United Kingdom volunteered to have IAEA safeguards apply to all their nuclear facilities except those with direct national security significance."[19] In addition, the United States, Great Britain, and the Soviet Union agreed to "provide assistance to any NNWS party to the NPT that was subject to a nuclear attack or threat of a nuclear attack."[20]

The NPT opened for signature in 1968, and went into effect in 1970 after obtaining the signatures of ninety-seven countries, and ratification by forty-seven countries; however, two nuclear states-China and France-did not sign the

12. Sarah J. Diehl & James Clay Moltz, Nuclear Weapons and Nonproliferation 185 (2002).

13. NPT, Brief Background, http://www.un.org/Depts/dda/WMD/treaty/ (last visited Oct. 13, 2007). [hereinafter NPT, Brief Background].

14. Diehl & Moltz, *supra* note 12, at 184.

15. *See id.* at 184-85.

16. *Id.* at 18. This committee was "[s]ponsored by the United Nations in 1962, the Conference of the Eighteen-Nation Committee on Disarmament [ENCD] attempted to establish a dialogue between the United States and the Soviet Union at the height of the Cold War." University of Michigan Digital Library, Eighteen Nation Committee on Disarmament, http://quod.lib.umich.edu/e/endc/ (last visited Jun. 12, 2009).

17. Diehl & Moltz, *supra* note 12, at 185. States that, prior to January 1, 1967, had "manufactured and detonated a nuclear weapon," were known as Nuclear Weapon States (NWS). Michael Spies, *Iran and the Limits of the Nuclear Non-Proliferation Regime*, 22 AM. U. INT'L L. REV. 401, 402 (2007). "In July 1957, 18 states ratified the statute that created the International Atomic Energy Agency as an independent organization under the United Nations." Diehl & Moltz, *supra* note 12, at 260-61.

18. Diehl & Moltz, *supra* note 12, at 185.

19. *Id.* (emphasis omitted).

20. *Id. See also* Treaty on the Non-Proliferation of Nuclear Weapons art. V, Mar. 5, 1970, 21 U.S.T. 483, T.I.A.S. No. 6839 [hereinafter NPT].

NPT until 1992.[21] There are currently 187 members of the NPT,[22] including Iran.[23]

The main purpose behind the NPT is to "further the goal of non-proliferation."[24] In the proclamation portion of the NPT, United States President Richard Nixon proclaimed that the NPT was formed in consideration of "the devastation that would be visited upon all mankind by a nuclear war," and in belief that the "proliferation of nuclear weapons would seriously enhance the danger of nuclear war."[25] President Nixon also proclaimed that the NPT would "[u]ndertak[e] to cooperate in facilitating the application of [IAEA] safeguards on peaceful nuclear activities . . . ."[26] The NPT does not ban the use of peaceful nuclear technology; it encourages its use and development.[27]

The only mechanism that the NPT provides for monitoring member states is the IAEA,[28] an independent organization.[29] The IAEA Statute provides that

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21. Diehl & Moltz, *supra* note 12, at 185.

22. NPT, Brief Background, *supra* note 13.

23. NPT, *supra* note 20, at art. XI. Members of the NPT include: Afghanistan; Albania; Algeria; Andorra; Angola; Antigua and Barbuda; Argentina; Armenia; Australia; Austria; Azerbaijan; Bahamas; Bahrain; Bangladesh; Barbados; Belarus; Belgium; Belize; Benin; Bhutan; Bolivia; Bosnia Herzegovina; Botswana; Brazil; Brunei Darussalam; Bulgaria; Burkina Faso; Burundi; Cambodia; Cameroon; Canada; Cape Verde; Central African Republic; Chad; Chile; China; Colombia; Comoros; Congo; Democratic Republic of Congo; Cook Islands; Cost Rica; Cote d'Ivoire; Croatia; Cuba; Cyprus; Czech Republic; Denmark; Djibouti; Dominica; Dominican Republic; Ecuador; Egypt; El Salvador; Equatorial Guinea; Eritrea; Estonia; Ethiopia; Fiji; Finland; France; Gabon; Gambia; Georgia; Germany; Ghana; Greece; Grenada; Guatemala; Guinea; Guinea-Bissau; Guyana; Haiti; Holy See; Honduras; Hungary; Iceland; India; Indonesia; Iran; Iraq; Ireland; Israel; Italy; Jamaica; Japan; Jordan; Kazakhstan; Kenya; Kiribati; Korea Democratic People's Republic of Korea; Republic of Korea; Kuwait; Kyrgyzstan; Lao; Latvia; Lebanon; Lesotho; Liberia; Libyan; Liechtenstein; Lithuania; Luxembourg; Macedonia; Madagascar; Malawi; Malaysia; Maldives; Malenegro; Mali; Malta; Marshall Islands; Mauritania; Mauritius; Mexico; Micronesia; Moldova; Monaco; Mongolia; Morocco; Mozambique; Myanmar; Namibia; Nauru; Nepal; Netherlands; New Zealand; Nicaragua; Niger; Nigeria; Norway; Oman; Pakistan; Palau; Panama; Papua New Guinea; Paraguay; Peru; Philippines; Poland; Portugal; Qatar; Romania; Russian Federation; Rwanda; Saint Kitts and Nevis; Saint Lucia; Saint Vincent; San Marino; Sao Tome and Principe; Saudi Arabia; Senegal; Serbia and Montenegro; Seychelles; Sierra Leone; Singapore; Slovakia; Slovenia; Solomon Islands; Somalia; South Africa; Spain; Sri Lanka; Sudan; Suriname; Swaziland; Sweden; Switzerland; Syrian Arab Republic; Tajikistan; Thailand; Timor-Leste; Togo; Tonga; Trinidad and Tobago; Tunisia; Turkey; Turkmenistan; Tuvalu; Uganda; Ukraine; United Arab Emirates; United Kingdom; United Republic of Tanzania; United States; Uruguay; Uzbekistan; Vanuatu; Venezuela; Viet Nam; Western Samoa; Yemen; Zambia; and Zimbabwe. United Nations, Status of Multilateral Arms Regulation and Disarmament Agreements, http://disarmament.un.org/TreatyStatus.nsf (follow "NPT" hyperlink on the left; then follow "Alphabetical Order" hyperlink under NPT link on the left) (last visited Jun. 14, 2009).

24. NPT, Brief Background, *supra* note 13.

25. NPT, *supra* note 20, at Proclamation.

26. *Id.*

27. *See id.*

28. Spies, *supra* note 17, at 403.

29. IAEA.org, The "Atoms for Peace" Agency, http://www.iaea.org/About/index.html (last visited Jun. 14, 2009) [hereinafter IAEA.org].

the IAEA is "to act as an intermediary for the purposes of securing the performance of services or the supplying of materials, equipment, or facilities . . . and to perform any operation or service useful in research on . . . atomic energy for peaceful purposes . . . ." [30] The bifurcated purpose of the IAEA and the NPT serves to provide NNWSs with nuclear material for the pursuit of peaceful nuclear technology.[31] Prior to facilitating the transfer of nuclear materials, the IAEA primarily requires that participating NNWS agree not to use nuclear materials for the proliferation of nuclear weapons.[32]

Iran signed the NPT in 1968 and later ratified it in 1970.[33] Iran has not been able to retain the level of commitment to the NPT that it had during the 1970's.[34] This is largely due to Iran's shift away from Western ideas in 1979.[35] Iran no longer sought nuclear assistance from the United States; instead, Iran sought assistance from communist Russia and China.[36] Iran's lack of commitment to the NPT was evidenced by Iran's reaction when, under IAEA scrutiny for NPT violations, Iran threatened to withdraw from the NPT in 2005.[37] Larijani, chief nuclear negotiator for the Iranian Supreme National Security Council, stated in 2005, "If [the IAEA] want[s] to use the language of threat, or send Iran's case to the Security Council, Iran will think twice about implementing the Additional Protocol [snap inspections] and will resume uranium enrichment."[38] The rocky relationship was further evidenced by the issuance of sanctions upon Iran by the IAEA in March 2007 when Manouchehr Mottaki, Iran's Foreign Minister, proclaimed that Iran would limit its cooperation with the IAEA.[39]

II. IRAN'S NUCLEAR PROGRAM

Since the 1950's, Iran has frantically sought nuclear capabilities along with other Middle Eastern nations.[40] However, Iran has pursued its nuclear

30. Statute of the International Atomic Energy Agency art. III, cl. 1, July 29, 2007, 8 U.S.T. 1093 [hereinafter The Statute].

31. *See id.*; NPT, *supra* note 20, at art. V.

32. The Statute, *supra* note 30, at art. XI.

33. Alireza Jafarzadeh, The Iran Threat: President Ahmadinejad and the Coming Nuclear Crisis 129-30 (2007).

34. *See infra* Part III.

35. *See* Jafarzadeh, *supra* note 33, at 191, 197; Daniel Schwartz, Note, *Just War Doctrine and Nuclear Weapons: A Case Study of a Proposed Attack on Iran's Nuclear Facilities from an American and Israeli Perspective*, 18 S. CAL. INTERDISC. L.J. 189, 214-16, (2008).

36. *See id. Can't use id. here, two sources in previous citation. Which source is this citing to?*

37. *Id.*

38. *Id.* (citing Nazila Fathi & David Sanger, *Iran Warns Against Referral of Nuclear Issue to the UN*, N.Y. TIMES, Sept. 21, 2005, at A12, *available at* 2005 WLNR 24286944).

39. Thom Shanker & William Broad, *Iran to Limit Cooperation with Nuclear Inspectors*, N.Y. TIMES, Mar. 26, 2007, at A6, *available at* 2007 WLNR 5640525.

40. PAUL K. KERR, IRAN'S NUCLEAR PROGRAM: STATUS, CRS REPORT FOR CONGRESS 1 (Nov. 20, 2008), *available at* http://www.fas.org/sgp/crs/nuke/RL34544.pdf.

program to the extent that Iran's "ambitions create a feeling that a nuclear race is underway."[41] Iran obtained possession of its first nuclear reactor after receiving a small five-megawatt thermal reactor in the 1960's that the United States gave to it.[42] Iran took another major step in its nuclear pursuit in 1974 by forming the Atomic Energy Organization of Iran (AEOI).[43] Along with the formation of this organization, the Shah, Mohammed Reza Pahlavi,[44] announced plans to build twenty-two reactors over a twenty-year span to meet Iran's energy needs.[45] Once again, Iran left the world with the impression that, as a State with no shortage in oil,[46] it was in a nuclear technology race.

Prior to the overthrow of the Shah in 1979,[47] Iran entered into an agreement with the United States to exchange nuclear technology and practice nuclear safety.[48] In addition to this new agreement, Iran contracted with West Germany to build two nuclear reactors at Bushehr.[49] The Shah believed that the nuclear reactors at Bushehr would create the infrastructure that was necessary

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41. *Atomic Power Growth*, APS DIPLOMAT NEWS SERV., June 11, 2007, *available at* 2007 WLNR 10928882 [hereinafter *Atomic Power Growth*].

42. Joseph Cirincione, *Controlling Iran's Nuclear Program*, ISSUES SCI. & TECH., April 1, 2006, *available at* 2006 WLNR 5784586. The five-megawatt reactor was "installed at the Tehran Nuclear Research Center (TNRC) at Tehran University." Jafarzadeh, *supra* note 33, at 129. The United States provided Iran with the five-megawatt reactor as "part of the U.S. 'Atoms for Peace' program, in which nuclear technology was given to nations throughout the world in exchange for those countries' commitments not to develop nuclear weapons." *Id.*

43. Jafarzadeh, *supra* note 33, at 130.

44. FRANK BARNABY, HOW NUCLEAR WEAPONS SPREAD: NUCLEAR-WEAPON PROLIFERATION IN THE 1990S 114 (1993).

45. Jafarzadeh, *supra* note 33, at 130.

46. United States officials have been unconvinced by Iran's claim that nuclear technology was necessary to meet energy requirements, because "Iran has no need for nuclear energy because the country is superbly endowed with natural resources of oil and gas that are significantly cheaper to develop. Howard, *supra* note 2, at 97. According to Whitehouse Spokesman Ari Fleischer:

> Such facilities are simply not justified by the needs that Iran has for their civilian nuclear programme. Our assessment when we look at Iran is that there is no economic gain for a country rich in oil and gas like Iran to build costly indigenous nuclear fuel cycle facilities. Iran flares ("burns") off more gas every year than the equivalent power that it hopes to produce with these reactors.

Id. at 97-98.

47. Cirincione, *supra* note 42.

48. JAFARZADEH, *supra* note 33, at 130.

49. Cirincione, *supra* note 42, at (page number). The reactors at Bushehr were under construction to become two "1,200-1,300-megawatt electric (MWe) pressurized water nuclear reactors." FAS.org, Bushehr, http://www.fas.org/nuke/guide/iran/facility/bushehr.htm (last visited Nov. 15, 2007) [hereinafter FAS, Bushehr]. Light water reactors are "the most widespread power reactor type found in the world today. It uses low enriched (3%) uranium as fuel, which enhances its efficiency as an electricity generator by enabling the fuel to stay longer in the reactor." DIEHL & MOLTZ, *supra* note 12, at 201. The West Germans agreed to build two 1,200-1,300-megawatt nuclear power plants near Bushehr. *See* Cirincione, *supra* note 42. By 1979, "one of the 1,200-1,300-megawatt nuclear power plants was already eighty-five percent complete." JAFARZADEH, *supra* note 33, at 130. Additionally, the second 1,200-1,300-megawatt nuclear power plant was partially completed. FAS, Bushehr, *supra* note 49.

to industrialize Iran.[50] Two additional "930-megawatt reactors" were also scheduled to be constructed at Ahwaz.[51] Additionally, Iran was able to procure classified laser technology from the United States that could produce plutonium and "separate weapons-grade uranium from natural uranium."[52]

Iran's nuclear progression took a giant step backwards when Ayatollah Ruholla Khomeini, leader of the Islamic regime that overthrew the Shah in 1979, ended the construction of all nuclear reactors.[53] However, the temptation of nuclear capability was too great, and Iran eventually reinstated its nuclear program.[54] Prior to officially reinstating the program, Iran was able to first obtain assistance from China to build a new nuclear research facility at the Isfahan Nuclear Technology Center (INTC) in 1984.[55] Iran also began to mine for uranium from its uranium reserves at Saghand,[56] where there is an estimated 5,000 tons of "high-grade uranium ore."[57]

Iran was able to make significant advances in its pursuit of nuclear technology throughout the nineties. In 1995, Russia and Iran agreed to an $800 million contract for Russia to complete a 1,000-megawatt nuclear power reactor at Bushehr.[58] After nearly three decades of construction on the plant at Bushehr, Mottaki announced in February 2006 that "construction on the [Bushehr] plant was completed and that it would 'be soon ready to receive nuclear fuel, which Russia has pledged to supply.'"[59] According to a later announcement by Mottaki, as of September 2007, the plant at Bushehr was ninety-five percent ready for operation.[60]

Although Iran has claimed that its nuclear program is peaceful, there has been plenty of evidence to the contrary.[61] The true nature of the Iranian nuclear

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50. FAS, Bushehr, *supra* note 49.

51. JAFARZADEH, *supra* note 33, at 130.

52. *Id.*

53. Cirincione, *supra* note 42.

54. JAFARZADEH, *supra* note 33, at 131.

55. *Id.* ("China's impact on the development of the INTC in the 1980s included supplying a 'training reactor' in 1985, the first of four small research reactors that China would install at the research center over the next ten years.").

56. BARNABY, *supra* note 44, at 115.

57. *Id.*

58. MILTON M. SCHWARTZ, IRAN: POLITICAL ISSUES, NUCLEAR CAPABILITIES, AND MISSILE RANGE 84 (Milton Schwartz ed., Nova Science Publishers, Inc. 2006).

59. JAFARZADEH, *supra* note 33, at 137 (citing RIA Novosti, *Bushehr NPP to be Ready to Take Nuclear Fuel Soon - Iran*, http://en.rian.ru/russia/20060214/43532161.html (last visited Nov. 14, 2007)).

60. *Interfax Russia & CIS Diplomatic Panorama*, INTERFAX DIPLOMATIC PANORAMA, Sept. 12, 2007, *available at* 2007 WLNR 17979208.

61. *See* JAFARZADEH, *supra* note 33, at 138 (Despite the Iranian regime's bullying insistence that it is only pursuing nuclear technology for energy, the reality is that there are two nuclear programs in Iran. One, the Atomic Energy Organization of Iran (AEOI), presents a legitimate nuclear face to the IAEA and the rest of the world . . . [t]he second nuclear program in Iran is secret in every aspect, from its invisible budget to its military-command hierarchy and its operative direction from the highest levels of power in the regime).

program must be evaluated by its public accomplishments and ambitions, as well as its rather extravagant and unexplainable secret accomplishments.[62] Because the NPT allows States to peacefully acquire and develop nuclear technology so long as it is not used for military purposes, there is no reason for Iran to keep part of its program secret from the IAEA.[63] Yet, Iran has kept large portions of its nuclear program secret, e.g., Natanz, Arak, and dealings with Kahn.[64] The purpose for keeping the nuclear program a secret could not have been to hide Iran's energy capabilities from the international community, because development of peaceful nuclear technology is not a violation of the NPT.[65] Despite Iran's claim, experts have predicted that "Iran could potentially produce a nuclear bomb within the next few years."[66]

III. SANCTIONS IMPOSED UPON NUCLEAR THREAT NATIONS

Iran is just one of several nations that have presented themselves as nuclear threats in the international community. In order to understand how various sanctions might affect Iran, it is necessary to evaluate sanctions that have been imposed against various nations that have conducted nuclear tests, developed nuclear capacity, or pursued nuclear capability in defiance of the international community.

A. Iran

Sanctions upon Iran have been unsuccessful in convincing Iran to abandon its nuclear program. After recurring violations of the NPT; the Security Council, consisting of the United States, Great Britain, France, Russia and China; along with Germany, imposed sanctions on Iran in 2006.[67] The Security Council adopted Resolution 1737 against Iran after it failed to comply with the United Nations demand in July 2006 that required Iran to suspend all uranium-enrichment activities.[68] The sanctions called for a block on the

62. Maggie Farley, *Iran Said to Test an Advanced Centrifuge*, L.A. TIMES, Feb. 2, 2008, *available at* 2008 WLNR 2424153.

63. *See* The Statute, *supra* note 30, at art. III.

64. *See infra* Part V.

65. *See* NPT, *supra* note 20, at art. V.

66. Jamie Lang, Note, *International Sanctions: The Pressure on Iran to Abandon Nuclear Proliferation*, 6 J. INT'L BUS. & L. 141, 141 (2007).

67. Elissa Gootman, *Security Council Approves Sanctions Against Iran over Nuclear Program*, N.Y. TIMES, Dec. 24, 2006, at 18, *available at* 2006 WLNR 22452307.

68. *Iran Urged to Respond to Nuclear Proposals*, CHINA DAILY, July 17, 2006, *available at* 2006 WLNR 12307356. Uranium must be enriched prior to being used in certain types of reactors and weapons. DIEHL & MOLTZ, *supra* note 12, at 204.

> [T]he concentration of fissile U-235 must be increased by physical . . . means before it can be fabricated into fuel . . . [because] a concentration of 3 per cent is necessary . . . to sustain a chain reaction in an LWR . . . [and] 90 per cent enrichment is required before use in [High Temperature Gas Cooled Reactors] . . . or fission weapons.

"import or export of sensitive nuclear material and equipment and freezing the financial assets of persons or entities supporting its proliferation sensitive nuclear activities or the development of nuclear-weapon delivery systems."[69] The Security Council agreed that the sanctions would be lifted if Iran complied with the measures within sixty days.[70] Compliance required Iran to "suspend . . . all enrichment-related and reprocessing activities, including research and development; and work on all heavy-water related projects, including the construction of a research reactor moderated by heavy water."[71] The Resolution was far weaker than originally proposed due to Russia's unwillingness to accept more stringent sanctions.[72] China was equally unwilling to adopt more stringent sanctions.[73]

After Iran's failure to comply with Resolution 1737,[74] the Security Council imposed further sanctions on it by adopting Resolution 1747 in March 2007.[75] The Security Council called for the "banning . . . [of Iran's] arms exports and freezing the assets and restricting the travel of additional individuals engaged in the country's proliferation-sensitive nuclear activities."[76] The Resolution also required Iran to immediately "suspend all enrichment-related and reprocessing activities, including research and development."[77] Iranian officials once again refused to comply with the Resolution.[78] After

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Id.

69. Security Council, *Security Council Imposes Sanctions on Iran for Failure to Halt Uranium Enrichment*, Unanimously Adopting Resolution 1737 (2006), http://www.un.org/News/Press/docs/2006/sc8928.doc.htm (last visited Jan 8, 2009) [hereinafter Security Council].

70. *Id.*

71. *Id.*

72. Lang, *supra* note 66, at 144.

73. Syed Ali Zafar, *US and the Turmoil in Iran*, NATION, Feb. 6, 2008, *available at* 2008 WLNR 2468876.

74. Anna Mulrine et al., *Hello, I Must be Going . . . ; Deadlines Come, and Deadlines Go; Uneasy Talks for a Church Divided; A Place where Blogging is a Crime*, U.S. NEWS & WORLD REP., Mar. 5, 2007, *available at* 2007 WLNR 14230255; *see also* David Gollust, *VOA News: U.S. Hopes for Agreement on Elements of New Iran Resolution by March 1*, U.S. FED. NEWS, Feb. 26, 2007, *available at* 2007 WLNR 3752573 ("President Mahmoud Ahmadinejad said . . . there is no brake or reverse gear on his country's nuclear efforts.").

75. Security Council, *Security Council Toughens Sanctions Against Iran, Adds Arms Embargo*, With Unanimous Adoption of Resolution 1747 (2007), http://www.un.org/News/Press/docs/2007/sc8980.doc.htm (last visited Nov. 16, 2007) [hereinafter Adoption of Resolution 1747].

76. *Id.*

77. *Id.*

78. *See* George Jahn, *Queries Come Ahead of UN Report on Nukes*, CHI. TRIB., Nov. 15, 2007, at 16, *available at* 2007 WLNR 22589794 ("Iran's defiance of a UN Security Council demand to suspend uranium enrichment led to two rounds of UN sanctions, and the U.S. and its allies are urging a third set if Tehran doesn't clear up their suspicions."); *Iran Gives U.N. Watchdog Nuke-Program Blueprints*, ORLANDO SENTINEL, Nov. 14, 2007, at A10, *available at* 2007 WLNR 22495651 ("[t]he report, expected today or Thursday, is likely to show substantial but not full compliance by Iran with its pledges to come clean on past activities - - and confirm at the same time that Tehran continues enriching uranium in defiance of the U.N. Security Council").

Resolution 1747 was issued, alternate solutions were proposed.[79] Because Iran has not yet complied, a third Security Council Resolution appears to be imminent.[80]

B. North Korea

North Korea, a member of the NPT,[81] became a nuclear threat in 1992.[82] In 1994, after it was revealed that North Korea had a secret nuclear military facility,[83] the United States negotiated a buyout to dissuade North Korea from pursuing nuclear weapons.[84] President Clinton offered North Korea "$100 million worth of oil each year and [to] arrange with allies to build – free – a $4 billion light-water reactor. . . ."[85] Although the United States approached the North Korean nuclear threat through positive incentives,[86] it was revealed in

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79. *See A Special Report on Iran: Only Engage*, ECONOMIST, July 21, 2007, at 72, *available at* 2007 WLNR 13802682. In June 2006, members of the Security Council and eventually the United States, in return for Iran's nuclear compliance offered a series of incentives to Iran that remain available:

> These included the prospect of trade agreements with the European Union; Iran's acceptance into the World Trade Organization; the easing of American sanctions; the sale to Iran of a light-water reactor and guarantees of nuclear fuel; EU help to modernize Iran's oil and gas industries; support for a WMD-free zone in the Middle East; and the possibility of Iran being allowed to enrich uranium after all if it could show that this was for exclusively peaceful purposes.

Id.

80. *See* Quentin Peel, *Between the Lines – Quentin Peel: Russia and the West Face Slew of Deadlines*, FIN. TIMES ASIA, Nov. 8, 2007, at 3, *available at* http://www.ft.com/cms/s/0/41ea89d6-8d9e-11dc-a398-0000779fd2ac.html?nclick_check=1 ("[T]op diplomats of the permanent five members of the UN Security Council, plus Germany, will meet to consider whether further sanctions should be imposed on Tehran for lack of compliance with UN resolutions to stop uranium enrichment.").

81. *State of Compliance North Korea Works to Close its Nuclear Program*, PITT. POST-GAZETTE, June 26, 2007, at B6, *available at* 2007 WLNR 12021398.

82. *North Adds New Demand in Koreans' Nuclear Talks*, L.A. TIMES, Feb. 28, 1992, at 13, *available at* 1992 WLNR 4000526.

83. Paul Shin, *N. Korea Military Steps in to Head off Nuclear Inspection*, SEATTLE TIMES, Sep. 27, 1994, at A3, *available at* 1994 WLNR 1213541.

84. William Safire, *Clinton Caved in to North Korea*, TIMES-PICAYUNE, Oct. 25, 1994, at B7, *available at* 1994 WLNR 934278. In 1994, North Korea's 5MW(e) reactor core in Yŏngbyŏn-kun burned up. Because of this, spent fuel rods had to be stored. NTI, NORTH KOREA PROFILE, http://www.nti.org/e_research/profiles/NK/Nuclear/index_157.html (last visited Feb 10, 2009) [hereinafter NTI]. This created tracking problems for the IAEA, which led President Clinton to suggest economic sanctions, which North Korea considered an "an act of war." *Id.* The crisis was eventually settled by way of positive incentives. *Id.*

85. Safire, *supra* note 84, at B7. North Korea also signed the Joint Declaration on the Denuclearization of the Korean Peninsula with South Korea, that provides under the Joint Declaration, the Democratic People's Republic of Korea and the Republic of Korea agree "not to test, manufacture, produce, receive, possess, store, deploy, or use nuclear weapons"; to use nuclear energy solely for peaceful purposes; and not to possess facilities for nuclear reprocessing and uranium enrichment. NTI, *supra* note 84.

86. *See* George Perkovich, *U.S. Policy on N. Korea not Perfect, but Sound*, N.J. REC., Sep.

2001 that North Korea had, once again, been in pursuit of nuclear weapons.[87] According to a published report by the National Intelligence Council, North Korea produced at least one and possibly two nuclear weapons despite sanctions.[88] After discovering that North Korea had not complied with the prior agreement, President George W. Bush suspended delivery of promised heavy fuel oil.[89] Finally, in 2005, North Korea proclaimed to the world that it had produced a nuclear weapon.[90] In 2006, North Korea tested its first nuclear weapon.[91]

The United Nations imposed economic sanctions on North Korea in 2006 for its violation of the NPT.[92] The sanctions were unanimously adopted by the United Nations through Resolution 1718.[93] The Resolution restricted North Korea's use of "large-scale arms, nuclear technology and related training . . . as well as luxury goods."[94] These provisions were to be enforced by a committee of fifteen members that were required to report to the United Nations on compliance every ninety days.[95] The six parties developed a phase-by-phase denuclearization plan which North Korea accepted in October 2007.[96] Because a denuclearization plan could not be enforced by the military under previous

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30, 1994, at B11, *available at* 1994 WLNR 1671481.

87. Notra Trulock, *North Korea's Nuclear Threat*, INSIGHT ON NEWS, May 20, 2002, at 46, *available at* 2002 WLNR 5182829.

88. NATIONAL INTELLIGENCE COUNCIL, FOREIGN MISSILE DEVELOPMENTS AND THE BALLISTIC MISSILE THREAT, http://www.dni.gov/nic/PDF_GIF_otherprod/missilethreat2001.pdf (last visited Jan. 3, 2008).

89. NTI, *supra* note 84. President Bush wanted an "improved implementation of the Agreed Framework." *Id.* In 2003, in response, North Korea informed the IAEA of its plans to withdraw from the NPT. *Id.* The withdrawal was to be effective on the following day of notification; however, "[t]he treaty requires 90-day notice before a withdrawal, but North Korea claims this is not necessary since Pyongyang already declared its intention to withdraw in 1993, only to suspend its intention to withdraw 89 days later." *Id.*

90. *Id.*

91. James Lyons, *Global Condemnation as North Korea Tests a Nuclear Device*, DAILY RECORD, Oct. 10, 2006, at 6, *available at* 2006 WLNR 17495608 ("North Korean Scientists set off the bomb at 2.36am BST in a mine shaft in the north-east of the country. Russia said the blast was as strong as the one at Hiroshima in 1945.").

92. Security Council, Security *Council Condemns Nuclear Test by Democratic People's Republic of Korea*, Unanimously Adopting Resolution 1718 (2006), http://www.un.org/News/Press/docs/2006/sc8853.doc.htm. (last visited Jan. 9, 2008) [hereinafter Security Council Condemns].

93. *Id.* Resolution 1718 is a Chapter Seven Resolution. Larry King, *Interview with U.S. Secretary of State*, ANALYST WIRE, Oct. 31, 2006, *available at* 2006 WLNR 18906259. Chapter Seven Resolutions are mandatory and are considered to be in response of "threats to the peace, breaches of the peace, and acts of aggression." U.N. Charter ch. VII, available at http://www.un.org/aboutun/charter/chapter7.shtml [hereinafter Chapter VII].

94. Security Council Condemns, *supra* note 92.

95. *Id.*

96. Jayshree Bajoria, *North Korea After Kim*, http://www.cfr.org/publication/17322/ (last visited Mar. 30, 2009); *Differences Remain in N. Korea Nuke Talks, Joint Document Uncertain*, ASIAN POL. NEWS, Sept. 29, 2007, *available at* 2007 WLNR 24107296 [hereinafter Differences Remain].

sanctions,[97] the United States, once again, offered positive incentives for compliance.[98]

C. *India*

India's nuclear program began well before the formulation of the NPT with the formation of the India Atomic Energy Commission in 1944.[99] After India lost a war with China in 1962, India asserted that "nuclear science and technology was common intellectual property" and that the "use of atomic energy was purely a state's sovereign prerogative."[100] India achieved that success by testing its first nuclear weapon in 1974.[101]

After hearing testimony before the United States Senate Committee that India did not violate any United States agreement[102] and because India was not a signatory to the NPT,[103] the United States decided to "pressurize the Indian government not to pursue a vigorous nuclear policy."[104] Despite pressure from the United States, India began a series of five nuclear tests in 1998.[105]

On May 11, 1998, India completed three underground nuclear tests.[106]

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97. *See infra* Part V.

98. *See* Differences Remain, *supra* note 96. The agreement calls for North Korea to dismantle all of its nuclear facilities and provide a declaration of all of its nuclear programs. *See id.* In exchange, the United States will provide North Korea with 950,000 tons of heavy fuel oil. *See id.* During the first phase, North Korea closed its Yongbyon facility. *Disablement does not Equal Denuked N. Korea*, NIKKEI WKLY., Nov. 11, 2007, *available at* 2007 WLNR 22355378. As part of the second phase, North Korea allowed IAEA inspections in exchange for 50,000 tons of heavy fuel oil. Differences Remain, *supra* note 96.

99. ARPIT RAJAIN, NUCLEAR DETERRENCE IN SOUTHERN ASIA: CHINA, INDIA AND PAKISTAN 208 (2005).

100. *Id.* In 1961, the United States became aware that India's nuclear program had the potential to create a nuclear bomb. *Id.* at 209. It has been asserted that the United States was advised to aid India in obtaining nuclear weapons in order to counter communist China. *Id.* The idea was asserted by George C. McGhee, head of the State Department's Policy Planning Council. NATIONAL SECURITY ARCHIVE, ANTICIPATORY ACTION PENDING CHINESE COMMUNIST DEMONSTRATION OF NUCLEAR CAPABILITY, April 28,1995, http://www.gwu.edu/~nsarchiv/nsa/DOCUMENT/950428.htm (last visited March 6, 2009). McGhee claimed that "it would be desirable if a friendly Asian power beat Communist China to the punch," and that the United States "should depart from [its] stated policy that [the United States] is opposed to the further extension of national nuc. weapons capability." *Id.*

101. DIEHL & MOLTZ, *supra* note 12, at 15-16. "On May 18, India explode[d] a 12-kiloton plutonium bomb underground in the Rajasthan Desert near the town of Pkhran." *Id.* at 98.

102. RAJAIN, *supra* note 99, at 211.

103. *Trust is Key to India-China Relations*, CHINA POST, Jan. 30, 2008, *available at* 2008 WLNR 1717327. India had the opportunity to become a member of the NPT in 1995 when the NPT came up for its twenty-five year review. RAJAIN, *supra* note 99, at 219. India refused the opportunity, and even went so far as to attend the conference as an observer. *Id.*

104. RAJAN, *supra* note 99, at 211.

105. Mark Brennock, World Review '98 Diplomatic Away Win but Own-Goal Loss at Home Diplomatic Success Abroad, Undiplomatic Rows at Home, IR. TIMES, Dec. 31, 1998, *available at* 1998 WLNR 2904219.

106. *Tests Have U.S., Other Nations Uneasy Officials Express Concern on India-Pakistan*

India ran two more nuclear tests two days later.[107] In response, President Clinton imposed tough "unambiguous" sanctions.[108] The United States ended all assistance to India with the exception of humanitarian aid.[109] Additionally, the United States ended the "export of certain defense and technology material. . . , terminate[d] any foreign military financing, end[ed] U.S. credit and credit guarantees to India, and bar[red] American banks from making loans or extending credit to the government except for purchasing food."[110]

D. Pakistan

Pakistan began its nuclear program years before India tested its first nuclear weapon.[111] In 1987, Dr. A.Q. Khan announced that Pakistan had the ability to produce and had produced nuclear weapons.[112] In light of this information, the international community urged the United States to sanction Pakistan for its production of nuclear weapons.[113] The United States placed restrictions on its aid to Pakistan in hopes that Pakistan would cease its nuclear activities.[114] However, a Pakistani government official stated, "[n]o power on earth can deter Pakistan from pursuing its peaceful nuclear policy, no matter what difficulties Pakistan has to face and what sacrifices we have to undergo."[115]

On May 28, 1998, Pakistan tested five nuclear weapons in response to India's five nuclear tests that were conducted earlier that month.[116] Two days

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Tensions. Japan Calls for Cutoff of Aid, AKRON BEACON J., May 12, 1998, at A2, *available at* 1998 WLNR 1638162; Joseph Albright & Marcia Kunstel, *India Rejects Call to Slow Arms Race*, ATLANTA J. & CONST., June 29, 1998, *available at* 1998 WLNR 3393309. India conducted tests on a "fission device with a yield of about 12 kilotons, a thermonuclear device with a yield of about 43 kilotons, and a subkiloton device. DIEHL & MOLTZ, *supra* note 12, at 142.

107. *U.S. Hits India with Sanctions*, BUFF. NEWS, May 13, 1998, at A1, *available at* 1998 WLNR 1250683.

108. William M. McGlone & Timothy P. Trenkle, *International Sanctions and Export Controls*, 33 INT'L L. 257, 258 (1999); *India Tests Again – Clinton Orders Sanctions After Two Latest Nuc*, CHARLESTON GAZETTE & DAILY MAIL, May 13, 1998, at 1A, *available at* 1998 WLNR 709110 [hereinafter India Tests Again].

109. India Tests Again, *supra* note 108, at 1A.

110. *Id.*

111. RAJAIN, *supra* note 99, at 281.

112. *Id.* at 288.

113. Eric Lindeman, *Glenn Seeks Suspension of Aid to Pakistan but Perle Wants Cutoff to be Last Resort*, NUCLEAR FUEL, Mar. 9, 1987, at 1, *available at* 1987 WLNR 484766. "Sen[ator] John Glenn (D-Ohio) . . . [and] Richard Perle, the Department of Defense . . . assistant secretary of defense for international security policy, urged [President Reagan] to consider withholding . . . aid," to Pakistan. *Id.*

114. Marvin M. Miller, *Stemming the Spread of Nuclear Weapons*, TECH. REV., Aug. 1, 1987, at 68, *available at* 1987 WLNR 952157.

115. *Id.*

116. DIEHL & MOLTZ, *supra* note 12, at 195. The tests occurred in the "Chagai Hills, each with an announced yield of 40-45 kilotons." *Id.*

later, Pakistan tested one more nuclear weapon.[117] The United States applied economic sanctions on Pakistan just as it had against India.[118] The sanctions included:

> termination of U.S. foreign assistance[;] . . . termination of U.S. government sales of defense articles and service[] . . . items; termination of foreign military financing; denial of most U.S. government-backed . . . financial assistance; U.S. opposition to loans . . . from any international financial institution; [and] prohibition on . . . exports of 'specific goods'. . . ."[119]

However, the economic sanctions imposed on Pakistan were eventually lifted following the terrorist attack on September 11, 2001, and Pakistan's nuclear program remains in place today.[120]

E. France

France has been a member of the international nuclear family since nearly the beginning of the nuclear age and was allowed to possess, manufacture, and test nuclear weapons; however, France still rendered itself a nuclear threat as recently as 1995.[121] France determined in 1995 that it was necessary to "maintain the credibility and reliability of French nuclear weaponry,"[122] because France needed to test its nuclear weapons prior to the enforcement of a nuclear test ban treaty.[123]

International pressure was applied to France hoping to persuade it to forgo plans to conduct a series of nuclear tests in 1995.[124] President Jacques Chirac pronounced that France would not alter its plans to test its nuclear weapons, and that France would "retaliate against any trade or diplomatic sanctions instigated by opponents of its nuclear tests."[125] On September 5,

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117. *Id.* This test was announced to have a yield of 15-18 kilotons. *Id.*

118. DIANNE E. RENNACK, INDIA AND PAKISTAN: CURRENT U.S. ECONOMIC SANCTIONS, CONGRESSIONAL RESEARCH SERVICE, (2001), *available at* http://fpc.state.gov/documents/organization/6202.pdf.

119. *Id.*

120. The White House, *President Waives Sanctions on India, Pakistan*, Sept. 22, 2001, http://www.whitehouse.gov/news/releases/2001/09/20010922-4.html (last visited ???).

121. *France to Complete Nuclear Tests Despite Outcry*, DALLAS MORNING NEWS, Sept. 7, 1995, at 9A, *available at* 1995 WLNR 5253927 [hereinafter France to Complete].

122. Wang Fang, *France Resumes Nuclear Test to Maintain Deterrence*, BEIJING REV., Oct. 30, 1995, at 21, *available at* 1995 WLNR 250714.

123. *China, France Rebuff Criticism of Nuclear Arms Tests*, SOUTH FLORIDA SUN-SENTINAL, Sept. 28, 1995, at 16A, *available at* 1995 WLNR 4816776.

124. *Paris Ignores Protests, Sets Off Nuclear Blast*, BALT. SUN, Sept. 6, 1995, at 3A, *available at* 1995 WLNR 961777.

125. France to Complete, *supra* note 121.

1995, France began the first of a series of six[126] nuclear tests at Mururoa Atoll.[127]

France's nuclear tests became a security threat to surrounding countries,[128] but France was not legally required to end its nuclear testing because France has the right to maintain and develop nuclear weapons as a NWS.[129] France conducted its tests on the Island of Mururoa Atoll located in a Polynesian region.[130] France forced the Polynesian people in Muroroa Atoll to bear the risk of potential nuclear fallout.[131] Following two French nuclear tests, photographs of Mururoa Atoll showed that the nuclear blast caused the island to crack and break apart while "spewing radioactivity into the water and air. . . ."[132] Despite the evidence of the possible danger to the Polynesian people, France completed four more nuclear tests.[133]

Despite international protests and objections from the United States and Southeastern countries, including Australia, Japan, New Zealand, and South Korea,[134] formal sanctions were not placed on France.[135] The United States responded by rebuking France's decision with a statement of "regret."[136] The South Pacific Forum severed diplomatic ties with France in retaliation to France's decision to continue nuclear testing.[137] Additionally, protesters worldwide called for a boycott of all French products.[138]

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126. *The Week*, DOMINION POST, Dec. 30, 1995, at 15, *available at* 1995 WLNR 2437345 [hereinafter The Week].

127. Christophe Marquand, *France Detonates Nuclear Test Blast Underground Explosion Somewhat Stronger than Bomb at Hiroshima – Seven More Tests are Planned,* AKRON BEACON J., Sept. 6, 1995, at A3, *available at* 1995 WLNR 1360782.

128. Eduardo Cue, *Paper Says Photos Show Nuke Tests Damaged Atoll*, CONTRA COSTA TIMES, Oct. 12, 1995, at B04, *available at* 1995 WLNR 1797247.

129. See NPT, *supra* note 20, at art. XI.

130. *More Controversy Over French Nuclear Tests Photos Reportedly Show Cracks in Atoll*, S.F. CHRON., Oct. 12, 1995, at A13, *available at* 1995 WLNR 3043704.

131. *See* Cue, *supra* note 128, at B04; William Drozdiak, *France Shrugs off Criticism Country to Continue with Nuclear Testing*, DENV. POST, Sept. 7, 1995, at A22, *available at* 1995 WLNR 471937.

132. Cue, *supra* note 128, at B04.

133. *See* The Week, *supra* note 126, at 15.

134. *South Pacific Forum Cuts Ties with France*, USA TODAY, Oct. 3, 1995, at 07A, *available at* 1995 WLNR 2553061.

135. *Id.*

136. *Id.*

137. *Id.* Editorial, *The South Pacific Forum is made up of sixteen countries in the South Pacific that adopted the South Pacific Nuclear-Free Zone Treaty*, DAILY YOMIURI, March 28, 1996, at 6, *available at* 1996 WLNR 1287517 [hereinafter Editorial]. Member countries include, Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu. Pacific Islands Forum Secretariat, Member Countries, http://www.forumsec.org.fj/pages.cfm/about-us/member-countries/ (last visited Jan. 8, 2009).

138. *France: Nuclear Critics Still Buying Our Goods*, CHI. TRIB., Dec. 31, 1995, at 15, *available at* 1995 WLNR 4501259 [hereinafter France: Nuclear Critics].

IV. WHY PAST SANCTIONS HAVE NOT WORKED

A. Inconsistent Rights

The structure of the NPT has become one of the main reasons that sanctions have not prevented nuclear proliferation.[139] This is largely because the NPT has created two categories of nations labeled as "haves" and "have nots."[140] The NWSs of the NPT are permitted to manufacture, develop, store, and test nuclear weapons, which has allowed them to become the "haves"[141] of the NPT.[142] NWSs are restricted from transferring nuclear weapons, and from "assist[ing], encourage[ing], or induce[ing] any [NNWS] to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control . . . such weapons or explosive devices."[143] The NNWSs of the NPT are not permitted to receive or exercise control over any nuclear explosive device, either directly or indirectly, which has caused these nations to become the "have nots"[144] of the NPT.[145] The United States, France, Great Britain, Russia and China have a legal right to control and manufacture nuclear devices; yet India, Pakistan, North Korea and Iran do not have that legal right.[146]

The creation of an exclusive weapons club[147] has been one of the prevailing complaints expressed by nuclear threat-nations.[148] The primary purpose behind giving nuclear rights to certain countries and not to others was to preserve the "exclusivity of a [nuclear] weapons club."[149] Iran raised this concern in a United Nations Report following its first set of NPT sanctions: Iran's representative told the Council that "confidence could only be built through respect for and non-discriminatory application of international law and international treaties."[150] Pakistan and India have also cited the inconsistent rights granted in the NPT as a reason why neither country will comply with the NPT.[151] As a result, neither Pakistan nor India is a signatory of the NPT, and

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139. *See* NPT, *supra* note 20.

140. Peggy Mason, *The Nato Alliance, No First Use, and Nuclear Non-Proliferation*, 31 CASE W. RES. J. INT'L L. 633, 642 (1999).

141. *Id.*

142. *See* NPT, *supra* note 20.

143. *Id.*, at art. I.

144. Mason, *supra* note 140, at 642.

145. *See* NPT, *supra* note 20, at art. I.

146. Vejay Lalla, *The Effectiveness of the Comprehensive Test Ban Treaty on Nuclear Weapons Proliferation: A Review of Nuclear Non-Proliferation Treaties and the Impact of the Indian and Pakistani Nuclear Tests on the Non-Proliferation Regime*, 8 CARDOZO J. INT'L & COMP. L. 103, 128 (2000).

147. WILLIAM LANGEWIESCHE, THE ATOMIC BAZAAR: THE RISE OF THE NUCLEAR POOR 14 (Farrar, Straus and Giroux 1st ed. 2007).

148. Mason, *supra* note 140, at 642.

149. LANGEWIESCHE, *supra* note 147, at 14.

150. Security Council, *supra* note 69.

151. Nobuyasu Abe, Note, *Existing and Emerging Legal Approaches to Nuclear Counter-*

both remain outside its restrictions.[152] Although Pakistan and India are not NPT members, and thus are not subject to the NPT, they have both been subjected to the NPT's nonproliferation standard by the international community.[153]

The NPT's granting of inconsistent rights has created an international standard that has undermined the effectiveness of sanctions. The NPT has created an international standard that has been applied to nonmembers of the NPT as if the standard were international law for all nations.[154] This may have created a sense of false security among the NWSs that a NNWS would forgo the opportunity to obtain nuclear weapons solely on the basis of an accepted international standard.[155] International law "generally derives from the practice of states and is accepted by them as legally binding."[156] The problem with relying on this generality is that not all nations have followed the international standard of nuclear nonproliferation; thus, the NPT has not been accepted as international law for all nations.[157]

NNWSs will not comply with sanctions and accept an international standard unless they have an incentive to adhere to the international standard. There are currently no incentives that would entice NNWSs into accepting an international standard.[158] However, it is easy to see why NWSs have adhered to the NPT international standard.[159] The ability to manufacture and use nuclear weapons can bring NWSs a sense of "[h]onor, prestige, and status . . . valued not because they induce some empty flattery but because they translate as influence when and where it counts."[160] On the other hand, NNWSs must rely on a lack of prestige and security as an enticement for adherence, which will continue to undermine the effectiveness of sanctions.[161]

The NPT's use of the words "inalienable right" when referring to the NWSs' and NNWSs' ability to use nuclear technology has also undermined the

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Proliferation in the Twenty-First Century, 39 N.Y.U. J. INT'L L. & POL. 929 (2007); *see also* Daniel C. Rislove, *Global Warming V. Non-Proliferation: The Time Has Come for Nations to Reassert Their Right to Peaceful Use of Nuclear Energy*, 24 WIS. INT'L L.J. 1069, 1077 (2007).

152. Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L.J. 131, 138 (2005).

153. Kittrie, *supra* note 9, at 394. *See also* Kevin M. Brew, *The Emergence of Nuclear Weapons as "The Coin of the Realm" and the Return of Nuclear Brinkmanship in South Asia: The Nuclear Sword of Damocles Still Hangs by a Thread*, 52 NAVAL L. REV. 177, 188 (2005).

154. Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 499 (1999).

155. Kittrie, *supra* note 9, at 348.

156. BLACK'S LAW DICTIONARY INTERNATIONAL LAW 835 (8th ed. 2004).

157. *See supra* Part IV.

158. LANGEWIESCHE, *supra* note 147, at 178.

159. *See* COLIN S. GRAY, THE SECOND NUCLEAR AGE 68 (1999).

160. *Id.*

161. *See* GABRIELLE HECHT, THE RADIANCE OF FRANCE: NUCLEAR POWER AND NATIONAL IDENTITY AFTER WORLD WAR II 2 (1998); Mason, *supra* note 140, at 642; *see also* Edwin J. Nazario, Note, *The Potential Role of Arbitration in the Nuclear Non-Proliferation Treaty Regime*, 10 AM. REV. INT'L ARB. 139, 152 (1999).

effectiveness of sanctions.[162] Article IV of the NPT refers to peaceful technology as an inalienable right that the NPT will not abridge.[163] Black's Law Dictionary defines inalienable right as "[a] right that cannot be transferred or surrendered; []a natural right such as the right to own property."[164] The acknowledgement by the NPT of an inalienable right to possess and develop nuclear technology has fostered much of the defiance of the NPT.[165]

Following the first round of NPT sanctions upon Iran, according to the United Nations report, "Iran's representative told the Council that . . . bringing Iran's peaceful nuclear programme to the Council . . . was not aimed at a solution, but at compelling Iran to abandon its *rights* under the NPT to peaceful nuclear technology . . . [h]e was here today because his country had not accepted that 'unlawful demand'. . . ."[166] Following the second round of NPT sanctions upon Iran, Mottaki had a scathing response.[167] According to the United Nations report, Mottaki said, "If certain countries had pinned their hopes that repeated resolutions would 'dent the resolve of the great Iranian nation,' they should have no doubt that they had 'once again faced catastrophic intelligence and analytical failure. . . .'"[168] Mottaki went on to say that "[e]ven the harshest political and economic sanctions were too weak to coerce the Iranian nation to retreat from their legal and legitimate demands . . . all those . . . 'resolution[s] are . . . aimed at depriving the Iranian people of their *inalienable rights*, rather than emanating from any so called proliferation concerns.'"[169]

North Korea also used the language of the NPT to justify its development of nuclear technology.[170] In 2002, North Korea claimed that it had a right to produce nuclear weapons.[171] North Korea used its right of self defense against a United States nuclear attack as justification for asserting a right to develop nuclear weapons.[172]

Additionally, both Pakistan and India have refused to join the NPT unless they are given the same rights as the NWSs.[173] In 1998, United States Secretary of State Madeline Albright, following the imposition of sanctions on Pakistan, stated that "the world community is united not just in outrage and dismay but in

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162. *See* NPT, *supra* note 20, at art. IV.

163. *Id.*

164. BLACK'S LAW DICTIONARY 1348 (8th ed. 2004).

165. Matthew Liles, *Did Kim Jong-Il Break the Law? A Case Study on How North Korea Highlights the Flaws of the Non-Proliferation Regime*, 33 N.C. J. INT'L & COM. REG. 103, 115 (2007); *see also* Lalla, *supra* note 146, 127-28.

166. Security Council, *supra* note 69 (emphasis added).

167. *See* Adoption of Resolution 1747, *supra* note 75.

168. *Id.*

169. *Id.* (emphasis added).

170. *See* Spies, *supra* note 17, at 403.

171. NTI, *supra* note 84.

172. W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 549 (2006).

173. Timothy McCormack, *From Solferino to Sarajevo: A Continuing Role for International Humanitarian Law?*, 21 MELB. U. L. REV. 621, 633 (1997).

action."[174] Secretary Albright's comments were ironic in that the inconsistency in NPT policy allowed both the United States and France to engage in nuclear testing while Pakistan and India were not allowed to test their nuclear weapons.[175] Until the NPT eliminates its inconsistency in granting rights, sanctions will continue to be ineffective.

B. Lack of Security

The perceived lack of security that the NPT provides NNWSs has created a large counterweight that sanctions must overcome before a nuclear threat nation will comply with nonproliferation. Although the NWSs pledged to provide a blanket of nuclear protection over each NNWS,[176] it is very doubtful that countries such as Iran and North Korea trust the NWSs to provide them with adequate protection.[177] This may be because the NPT originated to deter proliferation of nuclear weapons in states like West Germany and Japan, not Arab states and other areas of the world that were remote from the cold war.[178] The NPT was successful in safeguarding the world from nuclear proliferation in West Germany and Japan because " [it] accepted the U.S. and Soviet nuclear umbrellas."[179] Each of the five nuclear threat states discussed in this Note has expressed a concern over the lack of security under the NPT.[180]

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174. *U.S. Spurs Denial of India, Pakistan Loans*, BUFF. NEWS, June 12, 1998, at A3, *available at* 1998 WLNR 1280070.

175. Cue, *supra* note 128, at B04; United States Nuclear Tests - - By Date, http://www.fas.org/nuke/guide/usa/nuclear/s09chron.pdf (last visited Jan. 9, 2009). The United States and France enjoyed the ability to test nuclear technology and further nuclear weapons development without the fear of possible sanctions. *See* John Balsama, US has no Moral Force to Criticize India's N-Tests, BOSTON GLOBE, May 15, 1998, at A18, *available at* 1998 WLNR 2415462. This inconsistency of granted rights was in part a continuing reason why Pakistan has not become a signatory of the NPT. *See* RAJAIN, *supra* note 99, at 342.

> Pakistan has no real objections to being a part of the NPT per se . . . [b]ut it has the potential to ruin the NPT regime by selling nuclear technology, as it is not under any legal commitment to desist from assisting, encouraging or inducing any non-nuclear weapons state to manufacture or otherwise acquire nuclear weapons. . . . Pakistan is a *de facto* nuclear weapons state and can accede to the NPT, but only as a non-nuclear weapons state.

Id. at 341-42 (citations omitted).

176. DIEHL & MOLTZ, *supra* note 12.

177. *See id.*; BARNABY, *supra* note 44, at 115-16; RAJAIN, *supra* note 99, at 210, 281; NTI, *supra* note 84. One of the current NWSs, France, even created its nuclear program in response to a lack of security. *Id.* France gained its first success with nuclear technology in 1948 following its relatively quick defeat in World War II. HECHT, *supra* note 161, at 2. One French newspaper declared at the nuclear accomplishment, "a great achievement, French and peaceful, which strengthens our role in the defense of civilization." *Id.* France viewed its initial nuclear program as a way to regain its international prowess and increase its defenses. *Id.* The French referred to France's nuclear accomplishments as "the radiance of France," which became interchangeable with "the grandeur of France." *Id.*

178. LANGEWIESCHE, *supra* note 147, at 14.

179. *Id.*

180. *See* BARNABY, *supra* note 44, at 116; DIEHL & MOLTZ, *supra* note 12; RAJAIN, *supra*

Iran expressed its concern over security when it revived its nuclear program after claiming a need for heightened security. Iran's involvement and loss in the Iran-Iraq War was an important development in shaping its nuclear program.[181] Iran's nuclear program reemerged after Iran gained an understanding of its military capabilities following its failed attempt to gain control of Iraq.[182] Iran determined that it would need more powerful weapons, particularly nuclear weapons, in order to protect itself against its enemies.[183] Following the Iran-Iraq war, the Iranian Vice-President[184] stated that "because the enemy [Israel] has nuclear facilities, the Muslim states should be equipped with the same capacity."[185] Iran did not believe that it could defend itself against a nuclear capable Israel without such weapons if it could not even defeat Iraq, which did not have nuclear weapons capability.[186] Iranian President Hashemi Rafsanjani declared that Iran needed to "fully equip [itself] both in the offensive and defensive [through the] use of chemical, bacteriological and radiological weapons."[187]

Mid-Eastern nations have claimed that nuclear capable Israel is their primary security concern.[188] Israel has developed nuclear weapons and has claimed that nuclear weapons are necessary to deter neighboring Mideast nations from attack.[189] Similarly, Iran and Egypt have proclaimed that the "Middle East is threatened by the Israeli nuclear program," and that "[t]his policy of terror has . . . created a situation where many disarmament and arms control instruments have failed to receive the full support of regional countries."[190] Mid-Eastern nations do not believe that they will receive proper protection from NWSs against Israel.[191]

Iran has also claimed that it cannot rely on western NWSs for protection under the NPT. In 1979 the Iranian shah was overthrown and replaced by a

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note 99, at 210, 281; NTI, *supra* note 84.

181. *See* JAFARZADEH, *supra* note 33, at 132.

182. *See id.* Despite being three times larger in population than Iraq, Iran was unable to conquer Iraq as its first step to installing a Middle-Eastern Islamic government. *Id.*

183. *Id.* at 130.

184. Mohajerani was the Iranian Vice-President. BARNABY, *supra* note 44, at 115-16.

185. *Id.*

186. *See id.* "[T]he motivations by the . . . Middle East- - regional adversaries- - are consistent with realist concerns with anarchy and relative gains. States appear to react to the perceived threat of Israel, which is thought to have a well-developed nuclear program but has not ratified . . . the NPT. . . ." Sarah E. Kreps & Anthony C. Arend, *Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Regimes*, 16 DUKE J. COMP. & INT'L L. 331, 362-63 (2006).

187. *Arms*, N.Y. TIMES, Oct. 31, 1991, at A7, *available at* 1991 WLNR 3426997).

188. Kreps & Arend, *supra* note 186, at 362-63.

189. Louis Rene Beres, *Israel After Fifty: The Oslo Agreements, International Law and National Survival*, 14 CONN. J. INT'L L. 27, 55-57 (1999).

190. Dr. M. Javad Zarif, Deputy Foreign Minister of the Islamic Rep. of Iran, Statement to Mr. President at the Conference to Facilitate the Entry into Force of CTBT (Nov. 11, 2001) *available at* http://www.un.org/webcast/ctbt/statements/iranE.htm.

191. *See* Beres, *supra* note 189, at 55-57.

regime that was skeptical of the West.[192] The shah's rule was initially established through assistance from the United States assistance.[193] The post-shah regime believed that the "shah's nuclear program [was] a remnant of evil western influence."[194] Because the current Iranian regime is not favored by the United States, Iran does not believe that the United States will provide it with security against a nuclear attack.[195] It is also unlikely that the United States would trust Iran if the roles were reversed.[196]

North Korea also expressed a concern about security when it defied the NPT. Since the Korean War, the United States and North Korea have been viewed as "enemies."[197] North Korea has consistently claimed that it needs nuclear weapons to protect itself against a "nuclear threat from the United States."[198] North Korea's fear of nuclear attack initially stemmed from the United States' deployment of nuclear weapons to South Korea in 1958.[199]

Additionally, India's pursuit of nuclear weapons was a response to security concerns following the actions and inactions of the United States.[200] After China tested its first nuclear weapon in 1964, the United States did not provide India with any security assurances.[201] Furthermore, the United States sided with Pakistan during India's war with Pakistan in 1971.[202] India pursued nuclear weapons as an answer to the lack of security displayed by the United

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192. JAFARZADEH, *supra* note 33, at 131. Iran initially agreed to forgo its pursuit of nuclear weapons when it joined the NPT under the shah's rule. *Id.*

193. HOWARD, *supra* note 2, at 140.

194. JAFARZADEH, *supra* note 33, at 131. The Iranian government under the shah had been pro-west and received continuous aid from the United States. *See id.* at 129-31.

195. *See* HOWARD, *supra* note 2, at 140.

196. A Pakistan official said:

> The best way to fight proliferation is to pursue global disarmament. Fine, great, sure—if you expect that to happen. But you cannot have a world order in which you have five or eight nuclear-weapons states on the one hand, and the rest of the international community on the other. There are many places like Pakistan, poor countries which have legitimate security concerns—every bit as legitimate as yours. And yet you ask them to address those concerns without nuclear weapons, while you have nuclear weapons *and* you have everything else? It is not a question of what is fair, or right or wrong. It is simply not going to work.

LANGEWIESCHE, *supra* note 147, at 178.

197. *See* John Feffer, *North Korea No Longer an Enemy?*, http://www.fpif.org/fpiftxt/(last visited Feb. 10, 2009). The Korean War ended in an ended in an "[u]neasy [t]ruce." *Id.*

198. NTI, *supra* note 84.

199. *Id.* The nuclear weapons remained in South Korea until 1991. *Id.* President George Bush ordered their removal. *Id.*

200. *See* RAJAIN, *supra* note 99, at 210. "It is believed that Pakistan received the materials they used to construct their nuclear weapons from China, a previously declared nuclear State and a signatory to the NPT. Apparently, the United States knew of China's proliferation of nuclear materials to Pakistan but did nothing to prevent it." Darren Mitchell Baird, Note, *The Changing Posture of the International Community Regarding the Threat or Use of Nuclear Weapons*, 22 SUFFOLK TRANSNAT'L L. REV. 529, 542 (1999).

201. Baird, *supra* note 200, at 542.

202. *Id.*

States,[203] which initiated a chain reaction of security concerns between India and Pakistan, creating a nuclear arms race between the two countries.[204] The stated purpose for Pakistan's nuclear program was to "strengthen its forces to be used as a diplomatic bargaining chip and to reduce its dependence on military alliances."[205] After India's nuclear weapons test in 1974, Pakistan increased its efforts to acquire nuclear weapons capability.[206]

C. The Inconsistent Goals of the NPT

The inconsistent goals of the NPT have made it nearly impossible for the NPT to effectively monitor and enforce nuclear nonproliferation.[207] The NPT's main purpose is to ban the use of nuclear technology for war-related purposes, but the treaty also provides for the facilitation of nuclear technology.[208] Thus, the NPT encourages the use and development of nuclear technology.[209] Article IV of the NPT provides that "[n]othing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties . . . to develop research, production and use of nuclear energy for peaceful purposes."[210] The NPT considers nuclear technology as an inalienable right, and it provides that all NPT parties "shall . . . cooperate in contributing . . . to the further development of the applications of nuclear energy for peaceful purposes, *especially in the territories of non-nuclear-weapon States*. . . ."[211] This is a weakness of the NPT;[212] the NPT seeks to eliminate the development and use of nuclear

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203. DIEHL & MOLTZ, *supra* note 12, at 15-16.

204. Michael L. Feeley, Note, *Apocalypse Now? Resolving India's and Pakistan's Testing Crisis*, 23 SUFFOLK TRANSNAT'L L. REV. 777, 780 (2000) (citing Anthony Wanis St. John, *The Mediation Role in the Kashmir Dispute Between India and Pakistan*, 21 FLETCHER FORUM OF WORLD AFF. 174, 174 (1996)).

205. RAJAIN, *supra* note 99, at 281.

206. *Id.* at 285. Pakistan signed an agreement with France in 1976 to acquire a plutonium reprocessing plant. *Id.* Pakistan and India have indicated that they would be willing to undergo nuclear restraint; however, their decision to undergo restraint has not been in response to sanctions, but has been the result of an informal agreement between the two countries. *See id.*

207. Barry L. Rothberg, Note, *Averting Armageddon: Preventing Nuclear Terrorism in the United States*, 8 DUKE J. COMP. & INT'L L. 79, 117 (1997). *See also* Scott Barrett, *The Problem of Averting Global Catastrophe*, 6 CHI. J. INT'L L. 527, 532 (2006); Liles, *supra* note 165, at 112-18.

208. Thomas D. Lehrman, Note, *Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture*, 45 VA. J. INT'L L. 223, 237 (2004); Spies, *supra* note 17, at 403.

209. *See* NPT, *supra* note 20, at art. V.

210. *Id.* at art. IV.

211. *Id.* (emphasis added).

212. *See* Assia Dosseva, *North Korea and the Non-Proliferation Treaty*, 31 YALE J. INT'L L. 265, 268-69 (2006); Kittrie, *supra* note 9, at 351 ("The overlap between civilian and military nuclear technologies poses perhaps the most significant challenge facing the nuclear nonproliferation regime. . . ."); Spies, *supra* note 17, at 403 ("At the core of the crisis currently facing the nuclear non-proliferation regime, the NPT upholds the right of all states to develop nuclear technology for peaceful purposes without discrimination.").

weapons, but also declares the development and use of peaceful technology to be an inalienable right.[213] The NPT also encourages all nations to share their peaceful nuclear technology with other nations.[214]

The enforcement agency of the NPT suffers from the same inconsistent goals that have undermined the effectiveness of sanctions. The IAEA has "[t]hree main pillars – or areas of work – [that] underpin . . . [its] mission: Safety and Security; Science and Technology; and Safeguards and Verification."[215] As referenced in the IAEA's three-part mission, the IAEA suffers from the same bifurcated purpose as the NPT.[216] The IAEA statute provides that the IAEA is "to act as an intermediary for the purposes of securing the performance of services or the supplying of materials, equipment, or facilities . . . and to perform any operation or service useful in research on . . . atomic energy for peaceful purposes. . . ."[217] Paralleling the NPT, the IAEA is also authorized to "establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information . . . are not used in such a way as to further any military purpose. . . ."[218] This shows that the IAEA attempts to impede nuclear proliferation *and* facilitate nuclear technology.

The bifurcated purposes of both the IAEA and the NPT have served to provide NNWSs with nuclear material for the pursuit of peaceful nuclear technology, yet these states have used nuclear material for nuclear weapons production.[219] By facilitating the transfer of weapons-grade fissile material,[220] the IAEA fulfills its mission of "Science and Technology," but fails its mission of "Safety and Security."[221] Nations that seek nuclear weapons capability are

213. *See* Spies, *supra* note 17, at 403.

214. NPT, *supra* note 20, at art. V.

215. IAEA.org, *supra* note 29, at IAEA Mission & Programmes.

216. *See* The Statute, *supra* note 30, at art. III.

217. *Id.* at pt. A, 1.

218. *Id.* at 5.

219. Erik Raines, Note, *North Korea: Analyzing the "New" Nuclear Threat*, 12 CARDOZO J. INT'L & COMP. L. 349, n.72 (2004) (citing Helen Cousineau, *The Nuclear Non-Proliferation Treaty and Global Non-Proliferation Regime: A U.S. Policy Agenda*, 12 B.U. INT'L L.J. 407, 425-26 (1994)).

220. Fissile material consists of "[s]ubstances possessing nuclei with a greater tendency to give off electrons and energy when bombarded by neutrons, enabling them to sustain a chain reaction." DIEHL & MOLTZ, *supra* note 12, at 339. Weapons-grade fissile material "refers to purified fissile material that is most suitable for use in a nuclear weapon. A concentration of more than 90 percent is optimal for both uranium-235 and plutonium-239." Graham Allison, *Nuclear Terrorism: The Ultimate Preventable Catastraphe*, http://nuclearterror.org/faq.html #faq_4 (last visited Nov. 10, 2007).

221. *See* WILLIAM KINCADE, NUCLEAR WEAPONS GRADE FISSILE MATERIALS: THE MOST SERIOUS THREAT TO U.S. NATIONAL SECURITY TODAY? (1995), *available at* http://www.fas.org/irp/threat/ocp8.htm ("Limits on access to fissile materials are the primary technical barrier to acquisition of nuclear weapons capability in the world today. But once these materials are acquired, construction of nuclear weapons should be assumed to be relatively straightforward.").

able to procure most of the necessary nuclear technology and materials by disguising their purposes as being peaceful.[222]

For example, Iran received assistance from China in 1984, which allowed Iran to expand its facility at Isfahan from what had primarily been a research facility to a "uranium conversion facility."[223] Iran conducted secret experiments at Isfahan in uranium conversion and fuel production in violation of the NPT.[224] Iran also violated the NPT when it secretly imported uranium to the Isfahan facility in 1982.[225] Additionally, Iran entered into a contract with Russia for completion of one of its Bushehr plants, and engaged in a secret agreement to receive a "complete domestic fuel cycle" from Russia.[226]

The IAEA was also unable to detect the assistance Iran received for nearly two decades from Pakistan.[227] From approximately 1985 until 2004, Iran received nuclear assistance from one of the world's biggest nuclear black market dealers, Abdul Qadeer Kahn.[228] In 2003, Iran admitted to the IAEA that it had received "blueprints for centrifuge design" from Khan.[229] Additionally, Kahn sent Iran used centrifuges.[230]

Iran was also able to build two secret nuclear plants without the IAEA's

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222. *See* Jon L. Woodard, *International Legal Frameworks Relating to China's Nuclear Exports to Iran: Safeguarding the Transfer of Dual-Use Nuclear Technology*, 25 N.C. J. INT'L L. & COM. REG. 359, 368-69 (2000).

223. Cirincione, *supra* note 42. This facility provided the first evidence that Iran's nuclear program went beyond peaceful research alone. JAFARZADEH, *supra* note 33, at 131.

224. JAFARZADEH, *supra* note 33, at 130.

225. *Id.*

226. *Id.* at 137. The secret agreement for fuel was eventually abandoned. *Id.*

> Russia was ready to supply a large research reactor, plants for manufacturing nuclear fuel, and a centrifuge enrichment facility, but when U.S. intelligence uncovered the secret deal, President Clinton urged Russian president Boris Yeltsin to halt the covert program. Yeltsin agreed to scrap all nuclear assistance except construction at Bushehr. *Id.* Iran entered into a later agreement in 2005 that provided for Russia to deliver fuel for Iran's nearly completed reactor.

Id.

227. *See id.* at 133-35.

228. *Id.* Kahn was a scientist that was educated in the west, and he has been referred to as the "father of the Pakistani bomb." *Id.* at 133. As an employee of a Dutch company, Physics Dynamic Research Laboratory, Kahn was able to steal uranium centrifuge designs. *Id.* He was able to gather enough classified nuclear technology and contact information for Pakistan, that Pakistan's president, Zia ul-Haq, named Pakistan's nuclear lab after him, Khan Research Laboratories. *Id.* "In the late 1980s, Khan had an overflow of equipment to sell on the black market . . . . Khan's network went beneath the radar of international intelligence agencies for decades, and only after his criminal investigation is complete will a picture of his extensive involvement in various nuclear programs come to light." *Id.* In 2004, CIA director George Tenet stated: "Khan and his network had been unique in being able to offer one-stop shopping for enrichment technology and weapons design information." *Id.* (citing George J. Tenet, Director of Central Intelligence, Testimony Before the Senate Select Committee Intelligence, The Worldwide Threat 2004: Challenges in a Changing Global Context (Feb. 24, 2004), *available at* http://merln.ndu.edu/MERLN/PFIraq/archive/cia/dci_speech_02142004.pdf).

229. JAFARZADEH, *supra* note 33, at 134.

230. *Id.* at 130.

knowledge because the IAEA has not been able to effectively distinguish between peaceful nuclear technology and war-related nuclear technology. Iran admitted to the existence of two secret nuclear plants at Natanz[231] and Arak that the IAEA was unable to detect.[232] The IAEA was only able to discover the secret facilities after their location was disclosed by an Iranian opposition group in August 2002.[233] Natanz raised international concern because the plant "was a huge and 'extremely advanced' facility to house gas centrifuges that enrich uranium, 160 of which were already in operating order, ready to test and process the uranium hexafluoride gas that constitutes the raw materials of the enrichment process."[234] The plant at Arak was constructed to be a heavy water nuclear plant.[235] An IAEA report revealed that one of the Iranian facilities had trace elements of highly enriched uranium.[236]

North Korea was also able to develop its nuclear weapons program without detection by the IAEA. After agreeing to freeze its nuclear program in 1994, North Korea disabled the IAEA monitoring equipment in 2003, allowing North Korea to begin reprocessing spent fuel rods.[237] By September 2003, a North Korean Foreign Ministry spokesman announced that North Korea had reprocessed the spent fuel rods, giving North Korea enough plutonium for "four to six nuclear bombs."[238] North Korea also began work on its highly enriched uranium (HEU) program during this period, which the IEAE was unable to monitor.[239]

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231. HOWARD, *supra* note 2, at 98.

232. JAFARZADEH, *supra* note 33, at 141.

233. Atomic Power Growth, *supra* note 41. The Iranian opposition group that notified the IAEA of the violation was the National Council of Resistance of Iran. *Id.*

234. HOWARD, *supra* note 2, at 98 ("The site had the capacity for perhaps 50,000 more centrifuges, held in at least 1,000 specially designed machines, that could potentially feed a 1,000-MW reactor.").

235. Atomic Power Growth, *supra* note 41.

> In heavy water reactors, heavy water is used as both the moderator and coolant. Heavy water absorbs so few neutrons that it permits the use of natural uranium as fuel. . . . It is also a good producer of plutonium, and this type of reactor has been used in the United States without any turbo-generators attached to produce materials for weapon purposes. To produce Pu-239, rather than to minimize electricity generation costs, fuel re-loading takes place more frequently. Thus a distinction between civil and military use is the length of time the fuel remains in the reactor.

DIEHL & MOLTZ, *supra* note 12, at 201-02.

236. *Atomic Power Growth*, *supra* note 41.

237. NTI, *supra* note 83. North Korea began reprocessing approximately 8,000 spent fuel rods. *Id.* North Korea began reprocessing its spent fuel rods after claiming a need to produce energy following the United States' decision to suspend shipments of heavy fuel oil to North Korea after the IAEA discovered that North Korea was not in compliance with the NPT. *Id.*

238. *Id.*

239. *Id.* Highly enriched uranium is a "different path to produc[ing] fissile material for nuclear weapons." *Id.*

D. Lack of Uniformity

The lack of uniformity among NPT member nations has made it difficult to impose effective sanctions against nuclear threat nations.[240] It is extremely difficult to impose a set of sanctions under the NPT, which extends the time a nation will be able to remain in violation of the NPT.[241] The difficulty has stemmed from the inability of NPT members to agree upon sanctions.[242] NPT members have been unable to agree on sanctions because both Russia and China, members of the Security Council, generally only consider "the short-term cost . . . of such sanctions, even though the sanctions costs may be a good long-term investment for the international community as a whole."[243]

Russia has been a major roadblock in imposing tough sanctions against Iran. This is because Russia has been a primary producer of materials for Iran's nuclear program and continues to supply Iran with nuclear materials despite protests from NPT members.[244] As a result, the effectiveness of the NPT sanctions against Iran has been, and will likely continue to be, undermined by Russia's resistance to placing tough sanctions on Iran.[245] Because the NPT is unable to toughen sanctions against Iran, Iran has announced that it will continue uranium enrichment[246] in defiance of the NPT's second Resolution.[247]

The disunity among NPT nations also led to weaker sanctions against North Korea.[248] After North Korea withdrew from negotiations in 2006, neither

240. *See* Orde F. Kittrie, *Emboldened by Impunity: The History and Consequences of Failure to Enforce Iranian Violations of International Law*, 57 SYRACUSE L. REV. 519, 539 (2007) [hereinafter *Emboldened by Impunity*].

241. Kittrie, *supra* note 9, at 430.

242. *Id.*

243. *Id.*; *see also* Christian M. Henderson, *The 2006 National Security Strategy of the United States: The Pre-Emptive Use of Force and the Persistent Advocate*, 15 TULSA J. COMP. & INT'L L. 1, 21 (2007).

244. *Putin in Iran*, STATESMAN, Oct. 25, 2007, *available at* 2007 WLNR 20918187 ("In Teheran, Mr. Putin said that Iran should be permitted to pursue its peaceful nuclear programme.").

245. *See* Benjamin M. Greenblum, *The Iranian Nuclear Threat: Israel's Options Under International Law*, 29 HOUS. J. INT'L L. 55, 96 (2006); Lang, *supra* note 66, at 142; *Arab European Relations – Sept 12 – Russia Rejects Tougher Stance on Iran*, APS DIPLOMAT RECORDER, Sept. 15, 2007, *available at* 2007 WLNR 19249304 [hereinafter *Arab European Relations*] ("Russia gives a clear indication that it will not back any immediate toughening in the U.N. approach to Iran's nuclear programme. . . .").

246. *Iran to Continue Enrichment*, STATESMAN, Dec. 27, 2007, *available at* 2007 WLNR 25447324.

247. *Adoption of Resolution 1747*, *supra* note 75.

248. *See* Luis Ramirez, *US, China Urge North Korea to Return to Nuclear Disarmament Talks*, NEWS OF AMERICA, Oct. 20, 2006, *available at* http://www.voanews.com/burmese/archive/2006-10-20-voa5.cfm. [hereinafter *US and China*]; Mark Valencia, *The Proliferation Security Initiative: A Glass Half-Full*, ARMS. CONTROL. TODAY, June 1, 2007, at 12, *available at* 2007 WLNR 13208621 ("China was again the main obstacle to a more robust resolution. At China's and Russia's insistence, the authority to use military force was dropped from the draft resolution as was the requirement to check all cargo bound to or from North

South Korea nor China would initially agree to place economic sanctions on North Korea.[249] Eventually, China and North Korea agreed to economic sanctions, which led to further negotiations with North Korea.[250] Additionally, Resolution 1718 was initially created to authorize the use of force if necessary to enforce the provisions of the Resolution upon North Korea.[251] However, at the insistence of China and Russia, the provision allowing for the use of force was dropped,[252] and enforcement under U.N. Charter Chapter VII, Article 41 replaced the use of force provision.[253] U.N. Charter Chapter VII, Article 41 restricts the Security Council to "measures not involving the use of armed force. . . ."[254] The exclusion of the use of force has essentially left Resolution 1718 without any real consequences other than economic penalties should North Korea fail to comply.[255] The disunity among nations continues to be an area of weakness that NNWSs will continue to exploit in the future.[256]

V. SOLUTIONS

Sanctions will not be effective until the international community addresses the underlying concerns which nuclear threat nations have raised.[257] A few broad changes would greatly enhance the effectiveness of sanctions.[258]

A. Complete Nuclear Disarmament

One of the underlying tensions that has encouraged nations to resist nuclear compliance, despite sanctions, is that certain nations are granted the right to develop and manufacture nuclear weapons while others are refused that

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Korea . . . South Korea also demurred.").

249. *US and China*, *supra* note 248.

250. *See Bush Applauds China for Getting N Korea Back to Talks*, AUSTL. BROAD. CORP. NEWS, Oct. 31, 2006, *available at* 2006 WLNR 18905540.

251. Resolution 1718 was supposed to represent an international "codification" of President Bush's Proliferation Security Initiative (PSI). Eric J. Lobsinger, *Post-9/11 Security in a Post-WWII World: The Question of Compatibility of Maritime Security Efforts with Trade Rules and International Law*, 32 TUL. MAR. L.J. 61, 123-24, (2007). "PSI is the practical policy manifestation of the National Strategy To Combat Weapons of Mass Destruction issued in December 2002 . . . . Overall, over 70 countries . . . have committed to PSI with varying degrees of support." *Id.* at 118. PSI is not a codified set of international rules, instead, it is a formulation of an agreement among participating nations. *Id.* at 119. The purpose of PSI is to "[u]ndertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD[s], their delivery systems, and related materials to and from states and nonstate actors of proliferation concern." *Id.* at 120 (citing U.S. Department of State, The Proliferation Security Initiative: What is the Proliferation Security Initiative?, http://www.state.gov/t/isn/rls/fs/105217.htm (last visited Jan. 9, 2009)).

252. Valencia, *supra* note 248, at 12.

253. *Security Council Condemns*, *supra* note 92.

254. Chapter VII, *supra* note 93.

255. *See Security Council Condemns*, *supra* note 92.

256. *See* King, *supra* note 93.

257. *See supra* Part V.

258. *See supra* notes 133-46 and accompanying text.

right.[259] Complete disarmament by all countries is necessary before sanctions can be effective in enforcing nuclear nonproliferation.[260] Article VI of the NPT requires member states to "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament."[261] Despite this provision in the NPT, no timeframe has been adopted for complete disarmament.[262]

One concern that has been raised by both Iran and North Korea regarding sanctions is the discriminatory manner in which sanctions have been imposed.[263] Both of these nations have these concerns because of the inconsistent nuclear rights created by the NPT.[264] Certain states are given the inalienable right to manufacture nuclear weapons and develop peaceful nuclear technology, while other states are only given the inalienable right to develop peaceful nuclear technology.[265] If complete nuclear disarmament were achieved, these concerns would no longer be relevant.[266]

The security and discriminatory concerns that Iran has raised as a condition precedent to complying with nuclear nonproliferation would no longer be valid if all nations agreed to complete nuclear disarmament.[267] Iran's nuclear program only reemerged after its loss in the Iran-Iraq war.[268] Iran also believed that nuclear weapons were necessary to defend itself against a nuclear capable Israel.[269] If disarmament were adopted, Iran would no longer need nuclear weapons to defend itself against Israel's nuclear weapons, because Israel would no longer have nuclear weapons.[270]

The elimination of nuclear weapons by all parties would also eliminate Iran's need to gain international prestige as one of the few elite nuclear nations.[271] Iran believes that the acquisition of nuclear weapons would solidify

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259. *See* Chamudeeswari Kuppuswamy, *Is the Nuclear Non-Proliferation Treaty Shaking at its Foundations? Stock Taking After the 2005 NPT Review Conference*, 11 J. CONFLICT & SECURITY L. 141, 143 (2006); Hu Qian, *Chinese Practice in Public International Law: 2005(II)*, 5 CHINESE J. INT'L L. 761, 764-65 (2006); Zhang Xinjun, *The Riddle of "Inalienable Right" in Article IV of the Treaty on the Non-Proliferation of Nuclear Weapons: Intentional Ambiguity*, 5 CHINESE J. INT'L L. 647, 648-52 (2006).

260. *See* Xinjun, *supra* note 259, at 654-55; Qian, *supra* note 259, at 765.

261. Reaching Critical Will, International Law and the Nuclear Age, http://www.reachingcriticalwill.org/technical/factsheets/law.html (last visited Feb. 5, 2008) [hereinafter Reaching Critical Will].

262. Kuppuswamy, *supra* note 259.

263. *See supra* notes 155-175 and accompanying text.

264. *See* NPT, *supra* note 20, at art. V; *supra* Part V; notes 176-89 and accompanying text.

265. NPT, *supra* note 20.

266. *See* Security Council, *supra* note 69.

267. *See supra* Part V.

268. BARNABY, *supra* note 44, at 115-16.

269. *Id.*

270. *See* The Acronym Institute, *Disarmament Diplomacy: 8–State Call for New Nuclear Disarmament Agenda*, June 1998, http://www.acronym.org.uk/27state.htm (last visited Feb. 5, 2008).

271. GRAY, *supra* note 159, at 68.

its position as a regional power.[272] Iran specifically noted that the abilities of certain countries to maintain nuclear weapons legally under the NPT are discriminatory.[273] Complete disarmament would make Iran's claims of international discrimination unfounded.[274]

One of the primary reasons that nuclear capable nations have not agreed to complete disarmament is that nuclear weapons have a deterrent effect on enemy nations.[275] The use of nuclear weapons as a deterrent has been successful because it allows a nation to dramatically reduce the amount of time it would take to respond effectively to an attack.[276] However, the risk of nuclear holocaust is so great that the use of nuclear weapons as deterrents no longer justifies the means.[277] The availability of advanced military technology has made the possession of nuclear weapons for a quick and effective response no longer necessary.[278] For example, the United States has become less reliant upon the availability of nuclear weapons by "replacing its traditional Cold War 'Triad' of missiles, submarines, and bombers with a 'New Triad' that incorporates important non-nuclear elements (including missile defenses)."[279]

Disarmament must also be met with a certain measure of caution.[280] When nations undergo the process of complete nuclear disarmament, they should proceed through an agreement that would call for bilateral reductions.[281] A bilateral agreement based upon a sliding scale of reduction would avoid the potential problem of a single nation using its sole possession of all remaining nuclear weapons to its advantage.[282]

Complete disarmament will also bring the advantage of a more valid

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272. Boroujerdi & Fine, *supra* note 8, at 629-30.

273. Security Council, *supra* note 69.

274. *Id.*

275. Matthew Klapper, *The Bush Doctrine and North Korea*, 8 GONZ. J. INT'L L. 2, n.26 (unpaginated original) (2004-2005); Michael J. Matheson, *The Twelfth Waldemar A. Solf Lecture in International Law*, 161 MIL. L. REV. 181, 196 (1999).

276. Klapper, *supra* note 275, at n.26.

277. Nicholas Dixon, *Perilous Protection: A Reply to Kopel*, 12 ST. LOUIS U. PUB. L. REV. 361, 387 (1993).

278. *See* Christopher A. Ford, *The Nonproliferation Bestiary: A Typology and Analysis of Nonproliferation Regimes*, 39 N.Y.U. J. INT'L L. & POL. 937, 965 (2007).

279. *Id.*

280. *See* JAMES THOMPSON, PSYCHOLOGICAL ASPECTS OF NUCLEAR WAR 93-96 (1985).

281. *Id.*

282. *Id.* James Thompson, PH.D., of Middlesex Hospital, explained the following on how to effectively create sanctions to curb nuclear proliferation:

> (i) Initiatives must not leave one side with a monopoly of nuclear weapons. The aim should be reductions, but the final steps will require bilateral agreement. (ii) Initiatives must not cripple the capacity for conventional defence [sic]. (iii) Initiatives should be graduated in risk according to the response. The first move must be fairly large and dramatic, and an immediate response should not be expected. (iv) Initiatives must be diverse, publicly announced, and then carried through. Cultural as well as military issues could be included, the steps to be taken should be announced in advance, and then adhered to.

Id. at 94.

excuse for the use of force if Iran fails to comply with nuclear nonproliferation.[283] Under international law, a preemptive strike upon another nation must be preceded by an imminent threat.[284] Subject to interpretation, Iran's possession of nuclear weapons may be considered an imminent threat.[285] However, it would be difficult to claim that Iran's possession of nuclear weapons has created an imminent threat but the possession of nuclear weapons by the United States, Great Britain, France, Russia and China has not created an imminent threat.[286] Complete disarmament would eliminate the need to create a distinction between Iran's possession of nuclear weapons and the NWSs' possession of nuclear weapons.[287]

Currently, there are no plans for the five NWS and the other nuclear nations to enter into a treaty for complete disarmament.[288] At the 2005 NPT Review Conference, "[i]t was clear that nuclear weapons states were not going to agree on any disarmament commitments . . . at least not until 2010."[289] Although disarmament would likely take several years to complete, a step in that direction might eliminate Iran's claim of discrimination.[290]

B. Coercive Sanctions and the Use of Force

Sanctions must only be imposed after an evaluation is made of what type of sanctions will most effectively coerce the receiving nation into compliance. Each nuclear threat must be evaluated according to its unique circumstances in order to create effective sanctions.[291] For example, North Korea is an economically impoverished country starving for resources.[292] As a result, the United States provided positive incentives as a form of sanctions,[293] and the United Nations adopted Resolution 1718 as a form of economic sanctions.[294] Although these sanctions failed initially, they were crafted to address specific

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283. *See* Kelly J. Malone, Comment, *Preemptive Strikes and the Korean Nuclear Crisis: Legal and Political Limitations on the Use of Force*, 12 PAC. RIM L. & POL'Y J. 807, 828 (2003).

284. *Id.*

285. *See id.*

286. *See id.*

287. *See id.*

288. Kuppuswamy, *supra* note 259, at 146. There are currently four non-NWSs that have nuclear capability, including India; Pakistan; Israel; and North Korea. David S. Jonas, *The New U.S. Approach to the Fissile Material Cutoff Treaty: Will Deletion of a Verification Regime Provide a Way Out of the Wilderness?*, 18 FLA. J. INT'L L. 597, 642 (2006) (citing NTI.Org, Ending Further Production, Fissile Material Cutoff Treaty, http://www.nti.org/e_research/cnwm/ending/fmct.asp (last visited April 2, 2009)).

289. *Id.*

290. *See supra* notes 132-46 and accompanying text.

291. *See* Kittrie, *supra* note 9, at 356.

292. *See* Peter Sokgu Yuh, *Nuclear Diplomacy: Negotiating Peace on the Korean Peninsula*, 1 LOY. U. CHI. INT'L L. REV. 103, 106 (2004-2005).

293. *See* Perkovich, *supra* note 86.

294. *Security Council Condemns*, *supra* note 92.

issues in North Korea.[295] However, Iran is not a country that is lacking economic resources, nor does Iran have a need for energy resources, like North Korea.[296] Iran has the third largest oil reserves in the world;[297] thus, a sanction that provides Iran with additional energy to entice compliance would be unlikely to succeed.[298]

Sanctions must be stringent enough to impose actual harm to the receiving country.[299] "Sanctions contribute to the achievement of coercive foreign policy goals when the total costs imposed or threatened by the sanctioned activity are higher than the costs the target expects to incur from complying with the sender's demands."[300] The coercive effect is lost if the cost of defiance is less than the cost of compliance.[301]

It is also critical that sanctions only be imposed if the nation imposing them would be capable of enduring the sanctions itself.[302] The United States imposed sanctions on Pakistan and India in 1998 only after finding a way to exempt fertilizer from India's economic sanctions package[303] and wheat from Pakistan's economic sanctions package.[304] The United States was forced to consider that India was "the second-largest importer of American phosphate fertilizer" and that Pacific Northwest farmers would be unable to place a bid for a thirty-seven million dollar wheat order form Pakistan.[305] This left the economic sanctions without sufficient coercive effect and created the impression that the United States was unwilling to endure the effects of sanctions against India and Pakistan.[306]

It is necessary to evaluate what form of sanctions will actually have a coercive effect that will produce a cost of defiance greater than compliance.[307]

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295. *See id.*; Perkovich, *supra* note 86.

296. *See* Energy Information Administration, Iran, http://www.eia.doe.gov/emeu/cabs/Iran/Oil.html (last visited Feb. 2, 2008) [hereinafter Energy Information Administration].

297. *Id.* (It is estimated that Iran has 136.3 billion barrels of oil reserves).

298. *See* Catherine Altier, Note, *Putting the Cart Before the Horse: Barrier to Enforcing a Code of Ethics for Thoroughbred Auctions in the United States*, 72 BROOK. L. REV. 1061, 1091-92 (2007) (citing IAN FRECKELTON, Enforcement of ethics, in CODES OF ETHICS AND THE PROFESSIONS 130, 143-44 (Margaret Coady, & Sidney Bloch eds., 1996)).

299. *Emboldened By Impunity*, *supra* note 240, at 549.

300. Kittrie, *supra* note 9, at 356.

301. *Id.* at 356-57.

302. *France: Nuclear Critics*, *supra* note 138, at 15.

303. Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413, 451 (2001).

304. *Id.*

305. *Id.*

306. *See* Sridhar Krishnaswami Washington, *Senate Exempts U.S. Farm Sector From Sanctions*, HINDU, July 11, 1998, *available at* 1998 WLNR 4480281.

307. *See* Kittrie, *supra* note 9, at 356; *see also National CNN*, CNN LIVE TODAY NOON, Dec. 25, 2006, *available at* 2006 WLNR 22485000 ("[W]hy haven't the sanctions worked so far? In part because they cut off technical aid for Iran's nuclear program. Aid Iran might not need as it moves closer to nuclear self-sufi and iranians [sic] at every level believe the need to create nuclear energy outweighs the impact of these sanctions.").

Nations that have received sanctions as a result of nuclear noncompliance have typically been non-Western nations.[308] Assuming that coercive sanctions are based on the Western-oriented goals of depriving a nation of "economic prosperity and physical pleasure," these coercive sanctions may not raise the cost of defiance to an appropriate level.[309] Instead, "[a]lternate potential target state motivators, such as nationalism, religious conviction, and other ideologies that exalt martyrdom and suffering can raise the level of pain necessary to achieve coercion. . . ."[310]

It is often difficult to determine what form of sanction will be effective in coercing the defying nation into compliance. Iran is a nation that will be difficult to sanction because of its vast oil supply.[311] Because oil is in such a high demand, imposing sanctions based on Iran's oil exports would be unrealistic at best, and would likely prove to be more detrimental than it is worth.[312] This, coupled with the goals behind Iran's nuclear program, which are: prestige, influence, and security, require that the cost of defiance be high.[313] Because of this, it has been argued that coercive sanctions are largely ineffective.[314] One critic noted that "[e]conomic sanctions have two things in common: They have never worked, and they almost always harm those they are trying to help. But they do satisfy the emotions of those who want to 'do something.'"[315] For example, sanctions against Cuba have been in place since 1961, "without the slightest impact upon Fidel Castro's hold on power."[316]

When sanctions have been found to be ineffective, it is essential that the sending nations "up the ante."[317] The imposition of never ending sanctions only accomplishes two things: first, the sender learns that the sanctions aren't working and are likely to never succeed;[318] second, they allow the receiving country to remain in noncompliance.[319] Therefore, sanctions must include some form of deadline for compliance. An understanding of possible military

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308. Friends Committee on National Legislation, Issues: Nuclear Weapons, http://www.fcnl.org/issues/persp8_nuclear_map.htm (last visited Feb. 4, 2008).

309. Kittrie, *supra* note 9, at 357.

310. *Id.* at 356.

311. *See* Energy Information Administration, *supra* note 296.

312. *See* Robert D Blackwill, *The Three Rs: Rivalry, Russia, 'Ran*, NAT'L INT., Jan. 1, 2008, at 68, *available at* 2008 WLNR 1356042; *The Background & Future of the Fear Factor Driving Up Energy Prices*, APS REV. OIL MKT. TRENDS, Dec. 24, 2007, *available at* 2007 WLNR 25820374.

313. Kuppuswamy, *supra* note 259, at 150.

314. *Deterrent Sanctions in International Environmental Agreements*, 27 MICH. J. INT'L L. 1131, 1140-41 (2006).

315. Malcolm Wallop & John J. Tierney, Jr., *No More Sanctions*, J. COM., June 30, 1998, at 5A, *available at* 1998 WLNR 1017097.

316. *Id.*

317. Katherine Hughes, *Operation "Drive Out the Trash": The Case for Imposing Targeted United Nations Sanctions Against Zimbabwean Officials*, 76 FORDHAM L. REV. 323, 352 (2007).

318. *See* Lang, *supra* note 66, at 157.

319. *See* Brew, *supra* note 153, at 188-91.

attack must also be included with any set of coercive sanctions.[320] A series of sanctions that escalate the cost of defiance can be effective,[321] but there must still be some form of cutoff date for compliance.[322] It has generally been asserted that preemptive military action against Iran would be a violation of international law, and should only be used as "a last resort."[323]

Although military action should be used only as a last resort, it must be accepted that at some point military action may become a necessity. Economic sanctions in Iran can only be effective to a certain degree, and at some point Iran must either comply or be forced to comply.[324] The devastation that an Iranian nuclear attack could cause is far too great a risk to rely solely on diplomatic measures.[325] Diplomatic measures will only work with those nations that are willing to be persuaded through diplomatic means.[326] When considering the consequences of a purely diplomatic approach, it is important to remember which states bear the most risk. For example, as John F. Coverdaled stated, "No Frenchman goes to bed nervous about Great Britain's nuclear weapons . . . [e]very sane Israeli, Turk, or Bahraini, on the other hand, is deeply concerned about the possibility of an Iraq or Iran with nuclear weapons and medium-range ballistic missiles."[327]

The United Nations Security Council has not yet authorized the use of force against Iran.[328] Although the authorization has not yet been granted, past liberal interpretations of the United Nations Charter would likely justify the use of force against Iran should Iran fail to end its pursuit of nuclear weapons. For example, the United Nations Charter prohibits a nation from threatening to use unauthorized force against another country.[329] Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[330] Many commentators have suggested that the Article 2(4) is "dead" due to an international norm that has not been followed or enforced for decades.[331] These commentators suggest that violations of Article 2(4) have created a "one-way

320. *See* Cirincione, *supra* note 42.

321. Kittrie, *supra* note 9, at 358.

322. *See* John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, n.85 (2004).

323. Lang, *supra* note 66, at 166; *see also* Boroujerdi & Fine, *supra* note 8, at 634-35; Mary Ellen O'Connell & Maria Alevras-Chen, *The Ban on the Bomb- -And Bombing: Iran, the U.S., and the International Law of Self-Defense*, 57 SYRACUSE L. REV. 497, 513 (2007).

324. *See* Kittrie, *supra* note 9, at 356.

325. *See* LANGEWIESCHE, *supra* note 147, at 3-13.

326. *See* Coverdale, *supra* note 322, at 244-46.

327. *Id.* at n.85.

328. *See Adoption of Resolution 1747*, *supra* note 75.

329. *Id.*

330. *Id.*

331. *See generally* David Wippman, *The Nine Lives of Article 2(4)*, 16 MINN. J. INT'L L. 387 (2007).

ratchet, in which violations progressively undermine a norm with no room for recovery in between violations."[332] The inability or unwillingness to enforce Article 2(4) has been recognized by United States officials, many of whom have positions that "favor abandoning treaty obligations inconsistent with U.S. national interests."[333] Although Article 2(4) may not be considered as significant as Article 51--the article that allows the use of force under certain circumstances--the threat that a nuclear Iran could pose would lead the same U.S. officials to conclude that Article 51, like Article 2(4), is nothing more than "a paper constraint unsuited to the contemporary strategic environment and likely, if respected, only to hinder the U.S. exercise of power."[334]

Article 51 of the U.N. Charter provides for two exceptions to its prohibition against the use of force.[335] The Article provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . ."[336] One interpretation of Article 51 is that a Member State may only act in self-defense once an attack on that state has already occurred.[337] If Iran were allowed to attack the United States, Israel, or any other nation with a nuclear weapon, the attack would be far too great to justify this interpretation of Article 51.[338] However, there is an alternate interpretation that would allow a nation to exercise self-defense prior to an attack.[339] This interpretation stems from preexisting international law of self-defense, and according to most experts, would require the "existence of an imminent threat."[340]

The requirement that a threat be "imminent" before anticipatory action may be taken would allow the defending nation a little latitude when determining whether an "imminent" threat exists. President George W. Bush has suggested that the interpretation of "imminent," following 9-11, "had to be adapted in order to face the new threats of [Weapons of Mass Destruction] and terrorism."[341] This interpretation would allow the United States to preemptively strike against Iran, either shortly before Iran obtains nuclear weapons capability or shortly thereafter, to eliminate the "imminent" threat.[342] However, the

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332. *Id.* at 390.
333. *Id.*
334. *Id.*
335. Roxana Vatanparast, Note, *International Law Versus the Preemptive use of Force: Racing to Confront the Specter of a Nuclear Iran*, 31 HASTINGS INT'L & COMP. L. REV. 783, 788 (2008).
336. *Id.*
337. *Id.*
338. *See* A-Bomb WWW Project, A-Bomb WWW Museum, July 10, 2000, http://www.csi.ad.jp/ABOMB.
339. Vatanparast, *supra* note 335.
340. *Id.* at 788-89.
341. *Id.*
342. *Id.*

United Nations may view a preemptive attack on a nuclear capable Iran as a "preventive action" and not a "preemptive action."[343] The difference between a "preventive action" and a "preemptive action" is that a "preventive action" is an act "against a more distant perceived threat."[344] However small the distinction between a more distant threat and a more imminent threat may seem, the misinterpretation of what is preventive and what is preemptive will have a large legal significance in the international realm.[345] Yet President Bush has already begun to lay the framework for a defense should the United States determine that a nuclear capable or near nuclear capable Iran is close enough to an imminent threat to justify preemptive action.[346]

Additionally, any restrictions the United Nations may impose on the use of force will not hinder individual nations, or a coalition of nations, from using force outside the framework of the United Nations.[347] When a nation's well being is threatened, the decision-makers in that nation must act to protect the nation's well being.[348] "It is unlikely that any legal principle will be adhered to which runs counter to the instinctual urge to protect through preemption, no matter how the international community views anticipatory force."[349] International opinion and international law may perceive preemptive attacks as only justified under an imminent threat,[350] but "any such line-drawing may be illusory."[351]

For example, President Bush side-stepped the United Nations through legal interpretation when he decided to use preemptive military force against Iraq in 2003.[352] United States intelligence indicated that Iraq was amassing weapons of mass destruction in violation of U.N. Resolution 1441.[353] Iraq's buildup of weapons of mass destruction was viewed as a serious potential security threat against the United States, which required "anticipatory action to defend [them]selves."[354] Although the 2003 Iraq war is not considered as a

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343. Nobuyasu Abe, *supra* note 151, at 933.

344. *Id.*

345. *See id.*

346. Vatanparast, *supra* note 335, at 788-89.

347. *See* Rex J. Zedalis, *On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: "Star Wars" and Other Glimpses at the Future*, 18 N.Y.U. J. INT'L L. & POL. 73, 114-15 (1985).

348. *Id.* at 114.

349. *Id.* at 115.

350. *Id.*

351. *Id.* "A total ban on reprisals . . . presupposes a degree of global cohesion that simply does not exist, and the circumstances may clearly arise wherein the resort to reprisal as a form of self-help would be distinctly law enforcing." Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 508 (1999).

352. J M Spectar, *Beyond the Rubicon: Presidential Leadership, International Law & the Use of Force in the Long Hard Slog*, 22 CONN. J. INT'L. L. 47, 50 (2006).

353. Robert F. Blomquist, *American National Security Presiprudence*, 26 QLR 439, 460-61 (2008); William H. Taft IV, & Todd F. Buchwald, *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 557, 560 (2003).

354. Blomquist, *supra* note 353, at 461 ("The Bush Administration assembled a 'coalition of

preemptive self-defense action by United States officials, it is an example of the lengths the United States will go to justify a preemptive war when its security is threatened.[355] Many experts have suggested that the United States' reliance on Resolution 1441 was a "strained reading of the relevant Security Council resolutions," and that the "real motive [of the war] was a neoconservative push to transform the politics of the Middle East through regime change in Iraq."[356] The 2003 Iraq war is a perfect example that "any such line-drawing" between preventive action and preemptive action "may be illusory."[357]

C. Formation of a Nonproliferation Coalition

Before sanctions can be toughened, some form of consensus among the international community must exist.[358] The NPT has been unable to deter China and Russia from becoming major road blocks in creating effective sanctions against Iran.[359] The international demand for oil has strengthened Russia's oil market to the point where the demand has undercut the West's ability to leverage Russia into tougher sanctions on Iran.[360] Russia's assistance is important because "[t]he Russians probably know more about Iran's nuclear ambitions than anyone else – they're helping to build Iran's new nuclear power plant – and Russia must agree if the U.N. Security Council is to impose punishing sanctions."[361] The Security Council consists of the five NWSs, which not only retain nuclear weapons, but have the power to veto any action under the NPT.[362] The Security Council is not the "most appropriate body to be entrusted with the authority for oversight over non-proliferation or nuclear disarmament."[363]

Fixing the NPT before Iran is able to produce nuclear weapons may be unrealistic.[364] There are too many problems with the NPT and IAEA for the NPT to be the primary enforcement mechanism.[365] The loophole granting NNWSs an inalienable right to obtain peaceful nuclear technology would have to be amended along with an agreement on complete nuclear disarmament before any form of uniformity among the international community could be

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the willing' to press the war against Iraq, with the United States deploying 225,000 troops joined by only three other nations: Britain sending 45,000, Australia sending 2000, and Poland sending 200 troops.").

355. Wippman, *supra* note 331, at 400.

356. *Id.* at 399.

357. Zedalis, *supra* note 347, at 115.

358. *See* Kittrie, *supra* note 9, at 417.

359. *See Arab European Relations*, *supra* note 245; Kittrie, *supra* note 9, at 429-30; Lang, *supra* note 66, at 142.

360. Susan Taylor Martin, *Putin's Hard Line Takes Aim at West*, ST. PETERSBURG TIMES, Dec. 16, 2007, at 11A, *available at* 2007 WLNR 24835111.

361. *Id.* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 606, 607 (2004).

362. *Id.*

363. *Id.*

364. *See* Kittrie, *supra* note 9, at 419-20. *But see* Spies, *supra* note 17, at 441.

365. *See supra* Part V.

created.[366] "Many developing and Non-Aligned states, which have been generally more supportive of Iran's position, are wary of accepting additional constraints on the development of nuclear technology, absent demonstrable progress on nuclear disarmament issues."[367]

It is very unlikely that the NPT can be altered to create a level of uniformity before Iran is able to obtain nuclear capability. The NPT is only reviewed for changes every five years.[368] Any significant progress in the 2010 NPT Review Conference is unlikely to occur, given that it took the 2005 NPT Review Conference nearly two and a half weeks "just to agree on how it should refer to the 2000 Disarmament Obligations."[369]

The formation of a coalition outside the framework of the NPT that strives for complete nuclear disarmament is necessary to gain the required uniformity. Coalitions, such as the coalition formed during the Iraq war, have been instituted in the past to address similar international concerns.[370] The NPT may even support an approach that calls for a separate coalition, because the NPT recommends that a separate agreement be formed for complete nuclear disarmament.[371] There is also support among NNWSs and NWSs.[372] For example, China and France initially refused to join the NPT, because NNWSs would be unable to obtain proper security guarantees unless there was full nuclear disarmament by all parties.[373] As a consequence, "China and France did not sign the treaty until 1992."[374] Similarly, India and Pakistan refused to join the NPT for the same reasons.[375]

Nonproliferation coalitions that are currently in existence would become more effective if NWSs were to become members.[376] The Acronym Institute is a coalition of eight nations that call for complete nuclear disarmament.[377]

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366. *See* Kittrie, *supra* note 9, at 429-30; Mason, *supra* note 140, at 642; Spies, *supra* note 17, at 441.

367. Spies, *supra* note 17, at 442.

368. Kuppuswamy, *supra* note 259, at 143.

369. Spies, *supra* note 17, at 442.

370. Global Security.org, Iraq Coalition Troops--Feb. 2007, http://www.globalsecurity.org/military/ops/iraq_orbat_coalition.htm (last visited April 2, 2009).

371. Reaching Critical Will, *supra* note 261.

372. *See* DIEHL & MOLTZ, *supra* note 12, at 185.

373. *Id.*

374. *Id.*

375. Abe, *supra* note 151, at 929; Eric Young-Joong Lee, *Legal Analysis of the 2006 U.N. Security Council Resolutions Against North Korea's WMD Development*, 31 FORDHAM INT'L L.J. 1, 20 (2006).

376. *See Editorial*, *supra* note 137, at 6; The Acronym Institute, *supra* note 270; THE LAWYERS' COMMITTEE ON NUCLEAR POLICY INC., A NEW AGENDA FOR NUCLEAR DISARMAMENT: THE PIVOTAL ROLE OF MID-SIZE STATES (2001), http://www.lcnp.org/disarmament/NAndsept2.htm [hereinafter A NEW AGENDA].

377. The Acronym Institute, *supra* note 270. The eight member nations are: Brazil; Egypt; Ireland; Mexico; New Zealand; Slovenia; South Africa; and Sweden. *Id.* In its declaration, the Acronym Institute proclaimed that "[w]e can no longer remain complacent at the reluctance of the nuclear-weapon States and the three nuclear-weapons-capable States to take that

Additionally, a coalition of seven nations sponsored a U.N. resolution on nuclear disarmament in 1998 and 1999.[378] A coalition of NWSs and NNWSs with the same goals as the two referenced coalitions would bring the uniformity needed to impose heightened sanctions on Iran, because the primary goal of each nation would be to enforce complete nuclear disarmament and could provide the necessary military capabilities to enforce nuclear nonproliferation.[379]

VI. PROPOSAL

Iran's current governmental regime has consistently viewed the West with disdain since coming to power.[380] "From its first months in power to its latest dealings with the IAEA, the Iranian regime has related to the West with lies, deception, denial, and outright contempt."[381] Iran's past dealings with the IAEA illustrate that Iran is unwilling to undergo "honest, open relations with the international community."[382] Continuing on the current path, using the NPT and the IAEA through purely diplomatic means, will inevitably leave Iran with nuclear weapons capability.[383]

It has been repeatedly suggested that gaining a more broad understanding of Iran and what types of alternate policy options are available will make Iran more open to diplomatic measures.[384] As part of this proposal, the United States should become more engaging, which would, in effect, lessen Iran's fears that the goal of the United States is to topple the Iranian regime.[385] It has been asserted that these measures would allow the United States to have "a more reasonable image of Iran [so] that we can imagine their receptivity to offers of negotiation without assuming that their responses and intentions will always be hostile."[386] As optimistic as this proposal sounds, Iran has a horrible track record with the IAEA, which leaves "no justification for trusting it in any negotiation process."[387]

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fundamental and requisite step, namely a clear commitment to the speedy, final and total elimination of their nuclear weapons . . . and we urge them to take that step now." *Id.*

378. Patricia Hewitson, *Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 BERKELEY J. INT'L L. 405, 483-84 (2003). The seven nations were Brazil, Egypt, Ireland, Mexico, New Zealand, South Africa, and Sweden. *Id.* at n.422 (citing The Lawyers' Committee on Nuclear Policy Inc. A NEW AGENDA, *supra* note 376).

379. *See* Kittrie, *supra* note 9, at 419-20 "Russian and Chinese veto of serious sanctions against Iran may force the United States and Israel into a choice between a preventive strike or facing the risk of an Iranian nuclear arsenal." *Id.* at 425.

380. JAFARZADEH, *supra* note 33, at 219.

381. *Id.*

382. *Id.*

383. *Id.*

384. Boroujerdi & Fine, *supra* note 8, at 635; O'Connell & Alevras-Chen, *supra* note 323, at 517.

385. Boroujerdi & Fine, *supra* note 8, at 635.

386. *Id.*

387. JAFARZADEH, *supra* note 33, at 219.

Additionally, it has been proposed that the best means of forcing Iran to comply with the NPT is for the international community to reaffirm a commitment to peaceful means.[388] This requires the international community to re-invigorate the U.N. Charter Article 2(3) as a reminder that disputes are to be resolved through peaceful means.[389] This proposal further specifies the importance for the United States to form a greater commitment to "international law and . . . to the NPT."[390] As a result of these measures, the international community may re-invigorate the nonproliferation regime.[391] To re-emphasize, Iran's past dealings with the IAEA have led to "no justification for trusting it in any negotiation process."[392]

Another proposal involves heightening existing sanctions against Iran and strengthening the NPT.[393] The failure to impose sufficiently strong sanctions upon nuclear threats in the past has led to recent failures in nonproliferation enforcement.[394] Strengthening sanctions can circumvent this problem, because it will increase the level of coerciveness and will put more pressure on Iran to comply.[395] Also, the proposal parallels the weakness in sanctions with the weakness in the NPT.[396] To correct this problem, it has been proposed that the NPT should be amended to enhance "the IAEA's verification and monitoring authorities . . . through a U.N. Security Council resolution."[397] However, the possibility of an amendment to the NPT is unrealistic because of the lack of uniformity among the Security Council members.[398] This proposal also recognizes the lack of uniformity in the international community when it comes to sanctions.[399]

Although strengthening current sanctions and enhancing the NPT are important steps toward attaining Iranian compliance, further steps must also be taken. A coalition of nations that are committed to complete nuclear nonproliferation should be formed outside the framework of the NPT. There are too many problems for the NPT itself to successfully enforce nuclear nonproliferation. A separate coalition would have the necessary uniformity to enforce nuclear nonproliferation. Complete nuclear disarmament is a critical and necessary step towards the prevention of Iran and other nations from obtaining nuclear weapons.[400] Complete disarmament would resolve the concerns that Iran has cited as reasons for the development of its nuclear

388. O'Connell & Alevras-Chen, *supra* note 323, at 517.
389. *Id.*
390. *Id.*
391. *Id.*
392. *See* JAFARZADEH, *supra* note 33, at 219.
393. Kittrie, *supra* note 9, at 429.
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. *See Emboldened by Impunity*, *supra* note 240, at 539.
399. *Id.*
400. *See supra* notes 258-86 and accompanying text.

program; mainly, prestige, influence and security.[401] If no nation has nuclear weapons, Iran can no longer base its decision for noncompliance upon the discriminatory application of international law.[402] Furthermore, Iran may no longer feel it needs nuclear weapons to defend itself against other states with nuclear weapons.[403]

Along with complete nuclear disarmament, sanctions must be heightened and a cut-off date must be set. This note recommends a time period of three years for Iran to completely comply with the NPT. A three-year time period will allow Iran enough time to comply without creating a deadline that it could not possibly meet. This time period will also provide security to surrounding nations, because it is estimated that Iran will not able to produce nuclear weapons within three years.[404] Additionally, a series of goals or steps for complete compliance should be set and put in place in ninety day increments. A series of steps will ensure that Iran is on track to meet the three-year deadline. Along with a series of goals, a series of escalating sanctions should be developed and imposed on Iran every ninety days if Iran fails to comply with any ninety-day goal. For example, early sanctions could target the wealthy citizens of Iran by completely eliminating the import of luxury goods. In addition, a sanction that completely shuts off international travel of all Iranian governmental leaders could also be imposed. As the end of the three-year period draws closer, sanctions should be imposed that have an effect on the general Iranian population that could potentially lead to a regime change through Iranian resistance groups. At the end of three years, if Iran has not has not complied, military enforcement should be deployed.

The international community cannot let Iran resist compliance despite the use of sanctions as Cuba has been able to do.[405] Iran would create too great a threat if it were able to obtain nuclear capability.[406] Continuing ineffective sanctions will not coerce Iran into compliance. A cut-off date must be set and enforced, either through the NPT or through a separate coalition formed with the goal of complete nuclear disarmament.[407] It is time for nuclear nations to take the necessary steps towards complete nuclear disarmament.[408] As Mikhail Gorbachev once said, "A nuclear war cannot be won and must never be fought."[409]

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401. *See* Kuppuswamy, *supra* note 259, at 150.
402. *See* Security Council, *supra* note 69.
403. *See* BARNABY, *supra* note 44, at 115-16; The Acronym Institute, *supra* note 270, ¶ 2.
404. Spies, *supra* note 17, at 441.
405. *See* Wallop & Tierney, Jr., *supra* note 315, at para. 7.
406. *See* Kittrie, *supra* note 9, at 429-30.
407. *See supra* notes 291-348 and accompanying text.
408. *See Abolish Nukes Don't Impose Sanctions*, PALM BEACH POST, June 9, 1998, at para. 2, *available at* 1998 WLNR 1812621.
409. *Id.* at para. 3.

THE NAFTA SUPERHIGHWAY:

PAVING THE WAY TO A PROSPEROUS NORTH AMERICA AN IN-DEPTH ANALYSIS OF THE IMPACTS OF THE NAFTA SUPERHIGHWAY AND RECOMMENDATIONS FOR ITS IMPLEMENTATION

Aaron Cook*

INTRODUCTION

In 1996, Sears Kenmore washers and dryers spent an estimated twelve to fifteen days in transit from Columbus, Ohio to Mexico City, Mexico.[1] Even in the early periods of the North American Free Trade Agreement (NAFTA), trade jumped dramatically, causing long delays for trucks hauling cargo across the borders.[2] NAFTA has had a profound effect on North American trade, and "[a]bout 90 percent of U.S. trade by value with Canada and Mexico moves on land."[3] Our amount of trade by value nearly doubled in the first ten years of NAFTA.[4] Incoming commercial traffic has risen steadily since 1998[5] and will likely continue to rise. However, the United States has only had approximately a three and a half percent increase in total roadways since 1980.[6]

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1. Marsha Stopa, *Smart Highway Part of Pitch for NAFTA Route*, CRAIN'S DETROIT. BUS., May 6, 1996.

2. *Id.*

3. Public Briefing, *United States Department of Transportation, Surface Trade with Canada and Mexico Rose 12.0 Percent in November 2005 from November 2004* (Jan. 31, 2006), *available at* http://www.bts.gov/press_releases/2006/bts006_06/pdf/bts006_06.pdf (last visited Feb. 24, 2009) [hereinafter Surface Trade].

4. *Id.*

5. UNITED STATES DEPARTMENT OF TRANSPORTATION: FEDERAL HIGHWAY ADMINISTRATION, FREIGHT FACTS AND FIGURES 2006 INCOMING TRUCK CONTAINER CROSSINGS BY STATE U.S.-MEXICAN BORDER, *available at* http://ops.fhwa.dot.gov/freight/freight_analysis/nat_freight_stats/docs/06factsfigures/able2_9h.htm [hereinafter Container Crossings].

6. UNITED STATES DEPARTMENT OF TRANSPORTATION: FEDERAL HIGHWAY ADMINISTRATION, FREIGHT FACTS AND FIGURES 2006 MILES AND KILOMETERS OF INFRASTRUCTURE BY TRANSPORTATION MODE, available at http://ops.fhwa.dot.gov/freight/freight_analysis/nat_freight_stats/docs/06factsfigures/table3_1.htm (last visited Nov. 16, 2007)

The United States Department of Transportation has a bleak outlook for our current highway system's ability to cope with the increasing amounts of freight moving across the United States.[7] Due to inefficient and insufficient highways, the United States experiences "significant truck hours of delay, totaling upwards of 243 million hours annually. At a delay cost of $32.15 per hour, . . . the direct user cost of these bottlenecks is about $7.8 billion per year."[8] While this statistic is in relation to the United States as a whole, a large portion of it is entirely due to NAFTA transportation.[9] The solution to this problem: "an intelligent-highway system that would track trucks electronically and eliminate all border inspections and delays, saving days of transit time from Canada to Mexico."[10] Facilitating transportation of freight between the United States, Canada, and Mexico has the potential to dramatically improve the regional economy, reduce costs of doing business, reduce costs of goods for consumers, increase border security, and reduce illegal immigration.[11]

This Note discusses the economic and political benefits of implementing an active, efficient highway system to interconnect North America. It explores how the non-enforcement of NAFTA provisions has proven detrimental to Mexico's economy, which has adversely affected the United States.[12] Continued resistance to the economic and physical integration of the United States, Mexico, and Canada will only prolong and exacerbate the troubles currently facing these three countries in the areas of immigration,[13] inefficiency, and security.[14] Part I of this Note examines the history of NAFTA and the relationships between the signatory nations.[15] Part I also explores the inequality of treatment which plagued U.S.-Mexico relations prior to and during NAFTA.[16] Next, Part I examines the current political and trade situation between the NAFTA member nations, with specific emphasis on the difficulties

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[hereinafter Miles of Infrastructure].

7. REPORT, UNITED STATES DEPARTMENT OF TRANSPORTATION: FEDERAL HIGHWAY ADMINISTRATION, AN INITIAL ASSESSMENT OF FREIGHT BOTTLENECKS ON HIGHWAYS - 6.0, *available at* http://www.fhwa.dot.gov/policy/otps/bottlenecks/chap1.htm (last visited Feb., 24, 2009) [hereinafter *Freight Bottlenecks*]. "[T]he nation is entering the early stages of a capacity crisis." *Id.*

8. *Freight Bottlenecks*, *supra* note 7.

9. United States Department of Transportation: Federal Highway Administration, FHWA Freight Management and Operations – U.S.-Canada International Mobility and Trade Corridor (2002), http://ops.fhwa.dot.gov/freight/freight_news/us_canada/us_canada.htm [hereinafter U.S.-Canada Corridor] ("This growth in trade and commercial truck traffic has strained border crossing facilities and enforcement agencies. As a result, commercial vehicles are often delayed at the border, and long queues of trucks waiting to cross in either direction are a common sight. It has been estimated that $40 million in operating costs are lost annually due to border crossing delays at just the Blaine, WA, border facility.").

10. Stopa, *supra* note 1.

11. *See infra* Part III.

12. *See infra* Part I.b; *infra* Part III.c.

13. *See infra* Part III.c.

14. *See infra* Part III.d.

15. *See infra* Part I.

16. *See id.*

engendered on the U.S.-Mexican border.[17] Part II of this Note considers the various plans and proposals which take the name "NAFTA Superhighway" and explores how the project will be implemented and financed.[18]

Part III of this Note analyzes how the creation of an international superhighway system will benefit both the United States and Mexico, particularly in light of the hardships imposed upon Mexico by unequal participation economically with the United States.[19] Part III also proposes implementation of an integrated highway system, not only to create the economic benefit of increased trade, but also to increase border security by streamlining U.S.-Mexican ports.[20] Such a system will also decrease illegal immigration by creating economic opportunities in Mexico, thereby reducing the incentive to immigrate to the United States.[21]

Part IV of this Note analyzes the political backlash in the United States against the NAFTA Superhighway project.[22] Part IV dispels fears that a "North American Union" and a loss of United States sovereignty will result from the greater integration of transportation and economic trade with Mexico and Canada.[23] Further, Part IV examines the political and legal battles that currently rage across the United States over the implementation of an integrated highway system.[24] Finally, Part V of this Note sets out several proposals for the implementation of an integrated highway system designed to overcome the physical, financial, and political difficulties in harmonizing the United States with the Mexican economy.[25] Ultimately, such harmony will be vital for the United States to compete on a global level in the twenty-first century.

I. BACKGROUND OF NAFTA AND MEXICAN DISPARATE TREATMENT

A. NAFTA's History

"The negotiations for [NAFTA] started in Toronto in June 1992 . . . . [I]t was the first case of a developing country's accession to this type of agreement with developed states on a fully reciprocal basis."[26] To the Mexican government NAFTA represented a chance to catapult itself onto the world stage as an economic power by linking its fate with that of the United States and

17. *See id.*
18. *See infra* Part II.
19. *See infra* Part III.
20. *See id.*
21. *See id.; infra* Part V.
22. *See infra* Part IV.
23. *See infra* Part IV.a.
24. *See infra* Part IV.b.
25. *See infra* Part V.
26. Demetrius Andreas Floudas & Luis Fernando Rojas, *Some Thoughts on NAFTA and Trade Integration in the American Continent*, INT'L PROBLEMS – SELECTED ARTICLES VOL. IV, Dec. 2000, *available at* http://www.diplomacy.bg.ac.yu/mpro_sa00_4.htm.

Canada.[27] "NAFTA took effect on January 1, 1994, one year after the formal completion of the European Single Market."[28] For Mexico, NAFTA represented vast potential:

> On the one hand, NAFTA institutionalized the liberalization of the economy by clearly establishing the commercial strategy through which the country would definitely open itself to trade. It promoted foreign and domestic investment in a new business environment, which was characterized by greater certainty in the policy direction and the safety net of a binding economic link with the United States and Canada. On the other hand, NAFTA gave a valuable impulse to the manufacturing sector of the economy, which became an important growth engine through its exports.[29]

Recognizing the economic potential of such an agreement, Mexico prepared itself for NAFTA through its responses to several economic crises, such as the collapse of its economy in 1982.[30] "These measures included a substantial devaluation of the peso, joining and accepting the discipline of the GATT [General Agreement on Tariffs and Trade] in 1986, unilaterally reducing import impediments in order to make nonoil exports more competitive, and seeking out rather than reluctantly tolerating foreign district investment (FDI)."[31] Once these steps had been taken, and NAFTA had been signed, "trade barriers were progressively eliminated: from an average tax on imports of 9.7 percent in 1990, to 3.7 percent in 1995, and 2.2 percent in 2003."[32]

After NAFTA took effect, Mexico's economy underwent rapid changes; most notably it became synchronized with the U.S. economy, such that it experienced booms and recessions along with the United States.[33] NAFTA also started a very successful liberalization of international trade in Mexico.[34] As a result,

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27. JUAN CARLOS MORENO-BRID, JUAN CARLOS RIVAS VALDIVIA & JESUS SANTAMARIA, U.N. ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN[CEPAL], STUDIES AND PERSPECTIVES SERIES, SUB-REGION OF MEXICO, MEXICO: ECONOMIC GROWTH EXPORTS AND INDUSTRIAL PERFORMANCE AFTER NAFTA 7(2005) [hereinafter UN: MEXICO AFTER NAFTA].

28. Floudas & Rojas, *supra* note 26.

29. Alejandro M. Werner, Rodrigo Barros, & Jose F. Ursua, *The Mexican Economy: Transformation and Challenges, in* CHANGING THE STRUCTURE OF MEXICO: POLITICAL, SOCIAL, AND ECONOMIC PROSPECTS 67, 77 (Laura Randall, ed., M.E. Sharpe 2d ed. 2006).

30. Sidney Weintraub, *Mexico's Foreign Economic Policy, in* CHANGING THE STRUCTURE OF MEXICO: POLITICAL, SOCIAL, AND ECONOMIC PROSPECTS 58, 59 (Laura Randall, ed., M.E. Sharpe 2d ed. 2006).

31. *Id.*

32. Werner, Barros, & Ursua, *supra* note 29, at 77.

33. *Id.* at 82-83.

34. *Id.* at 77.

> Mexico became the eighth largest exporting economy in the world and its export sector evolved into the primary growth engine in the economy. Moreover, the liberalization also brought about a substantial increase of foreign direct investment flows directed toward the country, from levels of around 1 percent of GDP by 1980 to 2.6 percent in 1994 and more than 4 percent by 2001. Foreign direct investment complements domestic savings in the formation of infrastructure and implies a direct transfer of technology, which can in turn increase productivity.[35]

B. The Unfulfilled Promises of NAFTA

Unfortunately, as the United States, Canada, and Mexico entered the twenty-first century, many of NAFTA's promises remained unfulfilled.[36] This has resulted in a sharp decrease in U. S. public opinion of NAFTA and in the prevailing U.S. opinion of its true effects, as well as its potential economic impacts.[37] Such opinions are not limited to the United States; Mexican public opinion is also divided on NAFTA's actual economic effects.[38] In fact, one in two Mexican citizens believes that NAFTA had a negative effect on Mexico's economy.[39] However, "[g]iven the phenomenal rise in Mexican emports to the United States, the diverse character of these exports, and the dramatic increase in annual inflows of FDI, one has to ask why this denigration of NAFTA has occurred."[40] In fact, "[i]n 2002, intra-NAFTA trade accounted for 45 percent of the total trade of the three countries . . . ."[41]

Notwithstanding the successes in the manufacturing and exporting industries,[42] the NAFTA nations are facing serious hurdles because of the

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35. *Id.*

36. For example, the United States has not lifted the ban on Mexican from American highways. Press Release, Advocates for Highway and Auto Safety, Mexican Border and DOT Pilot Program Chronology (Sept. 10, 2007) *available at* http://www.saferoads.org/press/press2007/ MexDomTrucksChronology091107.pdf [hereinafter Mexican Truck Chronology]. In December of 1995, "President Clinton postpone[d] implementation of [a] NAFTA cross-border trucking provision based on safety and environmental concerns." *Id.* at 4. Additionally, Mexican unemployment rates initially decreased, but have fluctuated recently. Oscar F. Contreras, *Industrial Development and Technology Policy: The Case of the Maquiladoras, in* CHANGING THE STRUCTURE OF MEXICO: POLITICAL, SOCIAL, AND ECONOMIC PROSPECTS 267, 269 (Laura Randall, ed., M.E. Sharpe 2d ed. 2006).

37. *See* H.R. Con. Res. 40, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.CON.RES.40:.

38. Weintraub, *supra* note 30, at 60.

39. *Id.*

40. *Id.*

41. *Id.* at 59.

42. Contreras, *supra* note 36, at 269.

increasing crowding problems--both on the highways[43] and at border crossings,[44] and with increasing national security requirements,[45] political infighting,[46] and legal and illegal immigration.[47] In addition to the highway and border crossing problems discussed earlier,[48] the U.S. House of Representatives has expressed its opinion of the Bush Administration's policies toward Mexico and Canada with House Resolution 40 (HR 40).[49] HR 40 provides, "the sense of Congress that the United States should not engage in the construction of a North American Free Trade Agreement (NAFTA) Superhighway System or enter into a North American Union with Mexico and Canada."[50]

Despite this, within the U.S. government, only the Bush Administration has been working to expand the nation's relationship with the other NAFTA nations.[51] President Bush, Canadian Prime Minister Paul Martin and Mexican President Vicente Fox announced the establishment of the "Security and Prosperity Partnership of North America" in a March 23, 2005 joint statement.[52] The Security and Prosperity Partnership (SPP) "is committed to reach the highest results to advance the security and well-being of our people."[53] However, President Bush's efforts have been resisted by Congress.[54] Likewise, Mexican President Vincente Fox has faced much opposition from his own Congress when attempting to solve problems related to trade between the nations.[55]

Perhaps even more notably, especially to the American public, the problems facing NAFTA have become exacerbated by Mexican immigration to

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43. *Freight Bottlenecks*, *supra* note 7.

44. Stopa, *supra* note 1.

45. *See* Security and Prosperity Partnership: Myths vs. Facts, http://www.spp.gov/myths_vs_facts.asp (last visited Feb. 24, 2009) [hereinafter SPP Myths vs. Facts].

46. *See* H.R. Con. Res. 40, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.CON.RES.40: (Congress took the time to pass a resolution to express an opinion regarding the issue of the NAFTA Superhighway.); Weintraub, *supra* note 30, at 61 (Recent stagnation in Mexico results "mainly from the political inability of President Fox to reach legislative and structural agreements with a Congress dominated by opposition parties.").

47. Tamara M. Woroby, *North American Immigration: The Search for Positive-Sum Returns, in* REQUIEM OR REVIVAL? THE PROMISE OF NORTH AMERICAN INTEGRATION 247, 257-62 (Isabel Studer & Carol Wise, eds., 2007) (discussing the effects of Mexican-U.S. migration and possible solutions).

48. *See supra* Introduction.

49. H.R. Con. Res. 40, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.CON.RES.40:.

50. *Id.*

51. *See* SPP Myths vs. Facts, *supra* note 45.

52. Security and Prosperity Partnership of North America – Leaders' Statement: Security and Prosperity Partnership of North America Established, http://www.spp-psp.gc.ca/eic/site/spp-psp.nsf/eng/00057.html (last visited Feb. 11, 2009) [hereinafter SPP Leaders' Statement].

53. *Id.*

54. H.R. Con. Res. 40, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.CON.RES.40:.

55. Weintraub, *supra* note 30, at 61.

the United States, whether legal or illegal.[56] While NAFTA had a positive effect on Mexico's economy on a macroeconomic level,[57] the Mexican economy has not fully realized its growth potential.[58] For example, the wage gap between the United States and Mexico has become the largest disparity between any two contiguous countries.[59] Estimates place the average U.S. wage between four[60] and nine times the average Mexican wage.[61] This wage gap is cited by many as the primary cause of the inflow of immigrants from Mexico into the United States,[62] and it should be the primary consideration[63] when attempting to solve the problems that immigration places on both the American and Mexican economies.[64]

Thus, as the transportation promises of NAFTA remain unfulfilled,[65] and problems begin to arise with the transportation system,[66] political squabbling,[67] and immigration,[68] a solution must be found. The NAFTA Superhighway shows great potential to solve the problems currently facing the NAFTA signatory nations.[69] Properly implemented, the NAFTA Superhighway has the

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56. *See* Woroby, *supra* note 47, at 257-62.

57. Werner, Barros, & Ursua, *supra* note 29, at 77 ("The most important determinant of the structural transformation experienced by the Mexican economy during the last two decades was the liberalization of trade.").

58. *See supra* Part I.b.

59. Woroby, *supra* note 47, at 257.

60. *Id.*

61. Pia M. Orrenius, *Mexico-U.S. Migration: Economic Effects and Policy Impact, in* CHANGING THE STRUCTURE OF MEXICO: POLITICAL, SOCIAL, AND ECONOMIC PROSPECTS 454, 458 (Laura Randall, ed., M.E. Sharpe 2d ed. 2006).

62. *See* Woroby, *supra* note 47, at 257-62; Orrenius, *supra* note 61, at 458-60.

63. Woroby, *supra* note 47, at 262.

64. *Id.* at 257 (discussing the destructive effects out-migration has on the Mexican economy. It is believed that as much as ten percent of the Mexican workforce has emigrated to the United States, devastating many communities.). Orrenius, *supra* note 61, at 459 ("At very high rates of out-migration, communities lose their economic base along with their working-age populations, and can begin to decline or die out.").

65. NAFTA Trucking Access is Disputed by Teamsters and Sierra Club, CalforniaGreenSolutions.com, *available at* http://www.californiagreensolutions.com/cgi-bin/gt/tpl.h,content=893 (last visited March 4, 2009) ("NAFTA requires all roads in the United States, Mexico and Canada to be opened to carriers from all the three countries. Canadian trucking firms have full access to U.S. roads while Mexican trucks can only travel about 20 miles inside the country at certain border crossings like in San Diego and El Paso, Texas.") [hereinafter NAFTA Trucking Access].

66. *See Container Crossings*, *supra* note 5; *Miles of Infrastructure*, *supra* note 6; *Freight Bottlenecks*, *supra* note 7; and U.S.-Canada Corridor, *supra* note 9.

67. H.R. Con. Res. 40, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.CON.RES.40:; Weintraub, *supra* note 30, at 61.

68. *See* Woroby, *supra* note 47, at 257-62; Orrenius, *supra* note 61, at 458-60.

69. *See* About NASCO: The North American SuperCorridor Coalition Inc., *available at* http://www.libertyparkusafd.org/lp/Hamilton/Economic%20Integration%5CNorth%20America%27s%20Super%20Corridor%20Coalition,%20Inc.htm (last visited Feb. 24, 2009) [hereinafter About NASCO].

potential to create economic opportunities in all the NAFTA nations,[70] as well as to encourage foreign investment in Mexico by easing the access to Mexican markets.[71] This would stimulate Mexico's economy[72] and potentially alleviate the immigration problems facing the NAFTA nations.[73] Thus, this Note presents recommendations for the construction and operation of the NAFTA Superhighway, as well as recommendations for policymakers in the United States to solve some of the problems associated with its implementation.[74]

II. THE NAFTA SUPERHIGHWAY

A. What does "NAFTA Superhighway" mean?

The single largest obstacle facing the NAFTA Superhighway is confusion about the meaning of the phrase. Compounding this problem, opponents of the project point to certain less attractive aspects of the plan, take them out of context, and use them to erode support. For example, Jerome Corsi, a prominent conservative writer and opponent of the NAFTA Superhighway, paints a dismal picture of a "huge NAFTA Super Highway, four football-fields-wide, through the heart of the U.S. along Interstate 35, from the Mexican border at Laredo, Tex., to the Canadian border north of Duluth, Minn."[75] This view employs fear tactics rather than facing the reality of the situation.

In actuality, there are plans to construct new highway systems to better facilitate trade and travel internationally in North America; however most of the NAFTA Superhighway project will consist of upgrading and extending existing transportation routes to handle the increased burdens of increased surface trade.[76] North America's SuperCorridor Coalition (NASCO), the primary

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70. *See id.*

71. *See id.*

72. Rafael Tamayo-Flores, *NAFTA-Driven Changes in the Regional Pattern of Economic Growth in Mexico: Profile and Determinants, in* CHANGING THE STRUCTURE OF MEXICO: POLITICAL, SOCIAL, AND ECONOMIC PROSPECTS 119, 135-36 (Laura Randall, ed., M.E.Sharpe 2d ed. 2006).

73. Woroby, *supra* note 47, at 262.

74. *See infra* Part V.

75. Jerome Corsi, *Bush Administration Quietly Plans NAFTA Superhighway*, HUMANEVENTS, http://www.humanevents.com/article.php?print=yes&id=15497 (last visited Feb. 24, 2009) [hereinafter *Quietly*].

76. I69Info.com: Project Overview, http://www.i69info.com/overview.html (last visited Feb. 24, 2009) [hereinafter I69info Overview]. This includes the additions to Interstate 69 which were the subjects of debate in Indiana recently. "Well over 100,000 individual Hoosiers have signed petitions opposing a new terrain route for I-69. Fourteen newspapers in Indiana have editorialized in opposition to the new terrain route and/or in support of the US41/I-70 alternative. NBC's Tom Brokaw spotlighted the new terrain route as a 'Fleecing of America.'" SouthernIN.com, *I-69 Update –The I-69 Issue: Thoughts on the Evansville to Indianapolis Highway*, http://www.southernin.com/Pages/archives/february_01/i69.html (last visited Feb. 24, 2009).

lobbying entity for the project, prefers not to use the term "Superhighway," but rather "SuperCorridor" to emphasize that the scope of the project exceeds that of highways.[77] Citizens living in the primary lane of transport between the United States, Mexico, and Canada "have been referring to I-35 as the 'NAFTA Superhighway' for many years. . . . There are no plans to build a new NAFTA Superhighway - it exists today as I-35."[78] In its earliest stages of planning, the NAFTA Superhighway was objectively known as "a combination of streamlined governmental procedures and technological innovations along U.S. Interstate 35 and highway improvements in Mexico . . . ."[79] rather than any attempt to cut a swath through the heart of America and enable Mexican trucks to flood U.S. markets.[80]

While there are plans to construct new interstate highways[81] and railways[82] as part of the greater NAFTA Superhighway project, the likelihood of a single, quarter-mile wide roadway cutting its way from Mexico to Canada is very low. The NAFTA Superhighway encompasses many projects, but ultimately for the purposes of this Note, the term will be used to refer to innovative technological highway projects used to increase the efficiency and amount of land-based trade between the United States, Mexico, and Canada.

1. What are the proposed routes of the NAFTA Superhighway?

The NAFTA Superhighway would encompass many projects and expand across several regions of the United States, Canada, and Mexico. One primary route would connect all the members of the North American Inland Port Network (NAIPN). NAIPN is a network of port facilities which would be best served by an integrated overland transport network.[83] The network extends from Central Mexico (including Leon and San Luis Potosí), through Texas and the Central United States (including Dallas, Kansas City, and Des Moines), to Winnipeg, Canada.[84] Additionally, parallel to the NAIPN route along Interstate

77. About NASCO, *supra* note 69. ("NASCO uses the term 'SuperCorridor' to demonstrate we are more than just a highway coalition. NASCO works to develop key relationships along the EXISTING corridors we represent to maximize economic development opportunities along the NASCO Corridor, as well as coordinate the development of technology integration projects, inland ports, environmental initiatives, university research, and the sharing of 'best practices.'").

78. *Id.*

79. Paul B. Carroll, *'Nafta Superhighway' Sought for Trade – A Mexican-U.S. Coalition Pushes Ambitious Plan to Speed Truck Cargoes*, WALL ST. J., Sept. 19, 1995, at A19.

80. *See Quietly*, *supra* note 75.

81. I69info Overview, *supra* note 76 ("Approximately 1600 miles of freeway (including the 3 Texas branches) will be added to existing I-69 when it is complete.").

82. *See* Jerome R. Corsi, *Deal Creates Path for NAFTA Railway*, WORLDNETDAILY.COM, Sept. 18, 2007, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=57694.

83. NAIPN: North American Inland Ports Network – Introduction, http://www.nascocorridor.com/naipn/pages/about.html (last visited Feb. 24, 2009).

84. NAIPN: North American Inland Ports Network – Inland Ports Participants, http://www.nascocorridor.com/naipn/pages/participants.html (last visited Feb. 24, 2009)

35,[85] Interstate 69 in Texas is set to be expanded and improved by the Texas Department of Transportation (TxDOT) in order to connect Mexico to the Texas highway system.[86] Collectively, the improvement of road and rails along Interstates 35 and 69 in Texas is known as the Trans-Texas Corridor (TTC).[87]

Other U.S. states have also actively sought to improve Interstates 35 and 69 to extend the NAFTA Superhighway, including Indiana, Kentucky, Tennessee, Mississippi, Louisiana, and Arkansas.[88] Most of these projects either improve existing interstates or upgrade existing highways to interstates; however, there are several locations where entirely new routes for Interstate 69 are being proposed.[89] The construction of highways along both new and existing routes requires a large amount of planning and political and legal efforts.[90] In addition to the direct costs of constructing a highway, states must select routes,[91] prepare environmental impact statements, and acquire land from private owners, all before construction can begin.[92] In some cases, state authorities do not expect construction to be completed for nearly twenty-five or thirty years after the planning stages have begun.[93] Ultimately, however, the general routes (Interstates 35 and 69) have already been selected as the most beneficial to all three member nations.[94]

B. What makes the NAFTA Superhighway "Super"?

Ideally, there will be many differences between the NAFTA Superhighway route and the present interstates and railroads that criss-cross the United States, Canada, and Mexico. First and foremost, the NAFTA Superhighway is designed with international trade in mind,[95] rather than as a

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[hereinafter NAPIN Participants].

85. NAIPN: North American Inland Ports Network –Infrastructure Resources, http://www.nascocorridor.com/naipn/pages/alliance_infra.html (last visited Feb. 24, 2009).

86. Keep Texas Moving: Trans-Texas Corridor Frequently Asked Questions, http://www.keeptexasmoving.com/index.php/ttc_faq (last visited Feb. 11, 2009) [hereinafter TTC FAQ].

87. *Id.*

88. I69Info.com: State of the Interstate, http://www.i69info.com/state.html (last visited Nov. 16, 2007) [hereinafter *State of the Interstate*].

89. *Id.*

90. I69Info.com: Evansville-Indianapolis, http://www.i69info.com/eva-ind.html (last visited Feb. 19, 2008) (showing that often the route selection becomes a matter of debate for years.).

91. *Id.*

92. DEP'T OF COMMUNICATIONS, IND. DEP'T OF TRANSP., INTERSTATE 69 EVANSVILLE TO INDIANAPOLIS TIER 2 STUDIES: FREQUENTLY ASKED QUESTIONS (2007), http://www.i69indyevn/PDF/FAQ_2007.pdf [hereinafter I69 FAQ].

93. *State of the Interstate, supra* note 88.

94. I69 FAQ, *supra* note 92 ("As designated by Congress, the purpose of the National I-69 project is not simply to link two locations on the United States' border (Laredo, Texas and Port Huron, Michigan). Rather, the National I-69 project links major commercial and population centers in eight states with one another, as well as with trading partners in Canada and Mexico.").

95. *Id.*

means of national security.[96] Several methods will likely be employed to make the routes connecting the three countries into a super conduit of trade and transportation.[97] Mostly, these methods involve using technology to enable goods to be loaded, transported, cleared across borders, and delivered more quickly and efficiently.[98] Even one of the project's biggest opponents, Jerome Corsi, admits that the NAFTA Superhighway "will be the nation's most modern highway. . . ."[99]

In order to properly use an international highway system for the transportation of goods, several obstacles must be overcome, primarily including safety and security. Those implementing the NAFTA Superhighway projects intend to overcome these obstacles with sheer technological prowess.[100] The first step would be to secure any goods traveling internationally at inland ports, rather than at the borders.[101] For example, "[a]t these key points, customs inspectors from Canada, Mexico, and the United States simultaneously would clear cargo, seal it and equip it with an electronic monitor."[102] The sealed containers would allow quick clearance at customs stations[103] or at the borders, "as long as the information in their electronic monitors is consistent and the truck hasn't been unsealed."[104] Additionally, "[a] 'smart card' containing a computer chip . . . would then probably be put inside the trucks' windshields. . . . Such a card could also be used to automate the payment of fees or weight penalties owed to U.S. states traversed en route."[105] NAIPN is an organization comprised of the type of inland ports which would use this system of loading and inspection.[106] In the United States, the Kansas City Smart Port is already preparing to enter this new era of transportation technology.[107]

Secondly, to address concerns regarding road usage and the difficulty of tracking international trucking, "fiber-optic cable . . . would be buried in the existing freeway right of way [and] would be equipped with scanners every three miles that would relay information to customs officials in all three

96. Stopa, *supra* note 1 ("Virtually all U.S. roadways run east-west and were built to move the military – not trade or commerce – from coast to coast.").

97. *See* Stopa, *supra* note 1; Carroll *supra* note 79; *Quietly*, *supra* note 75.

98. Stopa, *supra* note 1.

99. *Quietly, supra* note 75.

100. *See* Stopa, *supra* note 1.

101. *Id.*

102. *Id.*

103. Carroll, *supra* note 79.

104. Stopa, *supra* note 1.

105. Carroll, *supra* note 79.

106. NAIPN: North American Inland Ports Network – NAIPN Introduction, http://www.nascocorridor.com/naipn/pages/about.html (last visited Feb. 11, 2009).

107. The Kansas City Smartport: About Smartport – America's Inland Port Solution, http://www.kcsmartport.com/sec_about/about.htm (last visited Feb. 11, 2009). "SmartPort has two main focuses in its mission: 1. To grow the Kansas City area's transportation industry by attracting businesses with significant transportation and logistics elements; and 2. To make it cheaper, faster, more efficient, and secure for companies to move goods into, from, and through the Kansas City area."

countries, allowing border-crossing points to anticipate heavy traffic."[108] This cable could also be used in conjunction with the computer chips implanted in the trucks to continuously track the whereabouts and exact routes traveled by trucks to ensure proper paths taken and fees paid.[109]

Just as the NAFTA Superhighway's roadways are years from completion, such a highly-integrated, and highly-technical system will probably not see widespread use in the immediate future. However, several projects designed to test the viability and utility of such systems are already in place, notably in the New York and New Jersey areas,[110] as well as in Washington State.[111] While smaller in scope, the projects initiated between Washington State and Canada are virtually identical to the global proposals advocated by this Note and are currently being field-tested in those areas.[112] Ultimately, a highly integrated superhighway system will integrate shipping between Canada, the United States, and Mexico with sophisticated tracking and inspection methods designed to reduce or eliminate wait times at the border.[113] With the implementation of such a highway system, all three nations stand to benefit from reduced costs in terms of both time and money, as well as increased amounts of trade.[114]

C. Who's paying for all of this?

With the large scale scope of the NAFTA Superhighway, it is not easy to answer the questions of funding. The breadth of the project (at least sixteen states and provinces across three countries)[115] complicates the question of

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108. Stopa, *supra* note 1; *see* Christopher Hayes, *The NAFTA Superhighway*, THE NATION, Aug. 27, 2007, *available at* http://www.thenation.com/doc/20070827/hayes.

109. Carroll, *supra* note 79.

110. FHWA Freight Management and Operations – Freight Information Real-time System for Transport (FIRST), http://ops.fhwa.dot.gov/freight/freight_news/first/first.htm (last visited Feb. 24, 2009). "[T]he FIRST Demonstration Project was funded and developed, in part, to provide unique solutions to freight transportation problems. . . . Designed by the intermodal freight industry, in cooperation with public sector partners, FIRST uses the Internet as a platform to data in a variety of formats to facilitate the safe, efficient, secure, and seamless movement of freight . . . ."

111. U.S.-Canada Corridor, *supra* note 9. "[P]ublic and private stakeholders in Washington State and British Columbia established the International Mobility and Trade Corridor (IMTC) partnership." *Id.*

112. *Id.*

113. The North American SuperCorridor Coalition Inc.: Logistics and Supply Chain Challenges, http://www.nascocorridor.com/commondetail.asp?id=2169 (last visited Feb. 24, 2009) [hereinafter NASCO Logistics]. "NASCO received $1.8 million in Congressional funding through the United States Department of Transportation (USDOT) for the development of a technology and cargo tracking . . . project. . . . NASCO believes . . . the deployment of a modern information system . . . will cut costs, improve efficiencies, reduce trade-related congestion, and enhance security of cross-border and corridor information, trade and traffic." *Id.*

114. Stopa, *supra* note 1.

115. *See* NAIPN Participants, *supra* note 84.

funding, even if the project had no opposition. In the United States and Canada, the nature of highway construction and technological innovation requires funding from multiple sources.[116] Primarily, these sources can be divided into three groups: federal government appropriations; state government plans and expenditures; and private investment.[117] In Mexico, the government is weaker economically, and reliance upon foreign and private investing will likely become the primary engine to fund the construction and implementation of their portion of the NAFTA Superhighway.[118] Each of these sources, federal, local, and private, will have a significant impact on the implementation of the NAFTA Superhighway project.

First, like any other highway project, the United States government lends assistance in the form of federal appropriations for the construction and maintenance of interstates and United States highways.[119] Additionally, Congress has the authority to authorize expenditures for highway programs and has done so since 1987.[120] The current appropriation is known as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).[121] Most notably, these appropriations have recently added provisions focused on aiding the construction of the NAFTA Superhighway.[122] Specifically, SAFETEA-LU provides for a National Corridor Planning and Development Program (NCPDP) and a Coordinated Border Infrastructure Program (CBIP).[123] The NCPDP provides "funding for planning, project development, construction and operation of projects that serve border regions near Mexico and Canada and high priority corridors throughout the United

116. *See* TONIA N. RAMIREZ, TEX. DEPT. OF TRANSP., THE UNRELIABILITY OF FEDERAL FINANCING 4 (2006), *available at* ftp://ftp.dot.state.tx.us/pub/txdot-info/library/ reports/gov/ federal_financing.pdf.

117. *See generally id.*

118. INDEPENDENT TASK FORCE OF COUNCIL ON FOREIGN RELATIONS, BUILDING A NORTH AMERICAN COMMUNITY 12 (2005), *available at* http://www.cfr.org/content/publications/ attachments/NorthAmerica_TF_final.pdf [hereinafter INDEPENDENT TASK FORCE REPORT]. NAFTA was designed to increase Mexico's economic power, bringing it closer to parity with the United States and Canada. However, the results have not been as hoped. "[T]he World Bank estimated in 2000 that $20 billion per year for a decade is needed for essential infrastructure and educational projects in Mexico." *Id.*

119. *See* 23 U.S.C. § 601 *et seq.*

120. Congress has passed and updated several statutes for transportation funding. Generally they have sunset provisions of a few years, and a replacement enacted. They are: The Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURRA), Pub. L. No. 100-17, 101 Stat. 132, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 1914, the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107; and the current version, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1144 (codified in scattered sections of 16, 18, 21, 23, 26, 42 and 49 U.S.C.).

121. SAFETEA-LU, Pub. L. No. 109-59, 119 Stat. 1144 (codified in scattered sections of 16, 18, 21, 23, 26, 42 and 49 U.S.C.).

122. *See Id.* at §§ 1118, 1302.

123. *Id.* at § 1118.

States."[124] The CBIP provides for a coordinated border infrastructure program under which the Secretary shall distribute funds to Border States to improve the safe movement of motor vehicles at or across the border between the United States and Canada and the border between the United States and Mexico.[125] These provisions have been included in part due to lobbying by advocates of the NAFTA Superhighway project, most notably NASCO.[126]

However, it is difficult to acquire federal funding for NAFTA Superhighway projects. Except for difficulties due to ancillary political conflicts that tend to manipulate highway funding allocation,[127] states arguably need only apply for funding and meet the applicable criteria for their highway projects to be granted federal aid.[128] The topic of political divisiveness and its effects upon the project will be discussed in more detail in Part IV of this Note.[129] Nevertheless, there is a growing view that even this method of acquiring funds is both insufficient to support the growing need for highway projects and difficult to accomplish.[130] Specifically, Texas, which has the largest intrastate portion of the NAFTA Superhighway to construct[131] and handles more land based trade than any other state,[132] is not optimistic about federal funding.[133] According to a report prepared for the TxDOT, "[t]he federal-aid highway and transit programs are becoming more and more unreliable as a means of significant funding to meet [Texas's] growing transportation and mobility means."[134] Further, the report concluded, "[t]he

124. CORBOR Program – Planning - FHWA, http://www.fhwa.dot.gov/planning/corbor/ (last visited June 29, 2009).

125. Coordinated Border Infrastructure Program – Planning – FHWA, http://www.fhwa.dot.gov/planning/cbipfacts.htm (last visited June 29, 2009).

126. *See Generally* NASCO Logistics, *supra* note 113. NASCO successfully lobbied for funding for the Interstate 35 corridor to be added to ISTEA, as well as adding the two categories (NCPDP and CBIP) to TEA-21. Because of those efforts, NCPDP and CBIP were reauthorized by SAFETEA-LU. SAFETEA-LU § 1144 *et seq.*

127. Many lobbyist groups against the NAFTA Superhighway use their influence to place conditions on spending which affect the way appropriations for NAFTA programs are spent. *See* Welcome to the Truck Safety Coalition: NAFTA / Mexican Trucks, http://www.trucksafety.org/NAFTA_and_Mexican_Trucks.php (last visited Jan. 30, 2009) (lobbyist group successfully lobbied for a prohibition of federal appropriations for a NAFTA pilot program to allow Mexican trucks to operate in the United States).

128. *See* RAMIREZ, *supra* note 116, at 4.

129. *See infra* Part IV.

130. *See e.g.* RAMIREZ, *supra* note 116, at 4.

131. *See* NAIPN: North American Inland Ports Network – Inland Ports Participants, http://www.nascocorridor.com/naipn/pages/participants.html (last visited Jan. 30, 2009) (three of the seven inland ports in the network spanning across the three NAFTA countries are based in Texas).

132. Texas handled 67.8 percent of the total commercial traffic entering the United States from Mexico in 2005. FED. MOTOR CARRIER SAFETY ADMIN., NAFTA SAFETY STATS, *available at* http://ai.fmcsa.dot.gov/international/border.asp?dvar=2&cvar=truck&sy=2005&redirect=Crossings.asp.

133. *See* RAMIREZ, *supra* note 116, at 17.

134. *Id.*

Federal Highway Trust Fund is precipitously close to reaching insolvency. Congress continues to earmark those limited federal transportation funds for projects that often conflict with state and local priorities."[135] Ultimately, this has forced Texas and other states to develop innovative strategies to compensate for lack of federal funding.[136]

The next major source for funding of a NAFTA Superhighway project comes from the States or local governments themselves. Texas, as the largest single body facing the challenges of the NAFTA Superhighway, has endeavored to lead the way in creating new ways to ensure that transportation construction gets the funding it needs with as little an impact on its citizens as possible.[137] To accomplish this daunting task, TxDOT has launched a campaign called "Keep Texas Moving," which is designed both to generate and implement these ideas and to keep the public informed of the project.[138] TxDOT is on its way to implementing four ways to finance the Trans-Texas Corridor: Comprehensive Development Agreements (CDA); Regional Mobility Authorities (RMA); pass-through financing; and tolling.[139]

CDAs "are a recent creative solution to the planning and completion of major public works in which [the government] may contract 'with a private entity to design, develop, finance, construct, maintain, repair, operate, extend, or expand' transportation projects such as the Trans-Texas Corridor."[140] CDAs are used to share risks and costs between a government and a private entity, thereby making the project more attractive to both and facilitating its quick and efficient implementation.[141] They also reduce costs by simplifying and shortening the highway construction process.[142]

RMAs work in much the same way as CDAs, but on a purely governmental level; typically they are formed between large metropolitan areas or bordering counties, rather than a government entity and a private consortium.[143] "An RMA can finance, design, construct, operate, maintain, acquire, expand or extend a project. By taking control of local transportation needs, an RMA can help a community loosen gridlock usually sooner than the state can."[144]

The third concept, pass-through financing, is an innovative solution for

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135. *Id.*

136. *Id.* at 4.

137. *See* TTC FAQ, *supra* note 86.

138. *Id.*

139. Keep Texas Moving: Project Funding Options, http://www.keeptexasmoving.com/index.php/project_funding_options (last visited Jan. 30, 2009) [hereinafter Project Funding Options].

140. Jason C. Petty, *The Trans-Texas Corridor Plan: Will "Best Value" Highway Contract Procurement under Comprehensive Development Agreements Leave the Lowest Competitive Bidder in the Dust?*, 39 ST. MARY'S L.J. 371, 381 (2007).

141. Project Funding Options, *supra* note 139.

142. Petty, *supra* note 140, at 391.

143. *See* Project Funding Options, *supra* note 139.

144. *Id.*

cost sharing between local and state authorities which "allow[s] local communities to fund upfront costs for building a state highway project. The state then partially reimburses the community over time by paying a fee for each vehicle that drives on the new highway."[145] The fourth solution, the toll road, is probably the most familiar to drivers, and allows the road to be built on the promise of revenue to be generated by the road's users after construction is complete.[146] Once the project is paid for, "the community can then choose to lower the toll and put the money toward maintaining the highway, or it can leave the toll the same and use the revenue for maintenance and construction of other needed transportation projects in the area."[147] These four funding options, if they prove successful in Texas, will likely be adopted in other states as they attempt to solve the same construction problems.

In addition to federal and local government funding, the third major source of funding for projects is private financing. Private financing is an attractive alternative to state or federal money because it does not depend upon political earmarking or pork-barrel spending.[148] The CDAs of TxDOT's campaign also rely upon private funding.[149] Due to Mexico's comparatively low economic standing in relation to the United States and Canada, private investment stands the best chance at integrating and upgrading Mexico's infrastructure.[150] Locally, private funding can be used to dramatically increase the speed of projects which might otherwise be mired in government delay. In Indiana in 2005, amid struggles with construction costs and delays of Interstate 69, "the Governor directed [the Indiana Department of Transportation] to pursue all steps necessary to accelerate the final alignment, identify state legislation necessary to create public-private partnerships and to research partnering options with companies experienced in financing, building and operating toll facilities."[151] Many projects benefit from private funding, because of the uncertain financial nature of these projects. Private entities, unlike public entities, have the courage and ability to take risks with financing and hope these risks pay off later. Government entities, which are responsible to their constituents, are far less likely to invest in a project with an uncertain outlook. Fortunately for the NAFTA Superhighway, many of its projects are vastly lucrative, and such projects can attract much private investment in hopes

145. *Id.*

146. *See id.*

147. *Id.*

148. *See* Press Release, State of Alaska, Governor, Gravina Access Project Redirected, (Sept. 21, 2007), *available at* http://www.gov.state.ak.us/archive.php?id=623&type=1 (last visited Jan. 30, 2009) (discussing the debate over an earmark of over $300 Million for a bridge to nowhere to connect an island in Alaska with a population of 50 to a nearby town).

149. Project Funding Options, *supra* note 139.

150. INDEPENDENT TASK FORCE REPORT, *supra* note 118, at 14.

151. Toll Road News, Indiana TR to Double Tolls & Privatize, Do I69 as Pike – Gov. Daniels, http://www.tollroadsnews.com/node/1270 (last visited Feb. 11, 2009).

of increasing efficiency and profits in the future.[152]

Funding for a project as large and as important as the NAFTA Superhighway will not be acquire. The national governments, state and local governments, and private sector businesses need to work together to ensure the implementation of what could be the most important economic endeavor that North America has ever undertaken. Without a NAFTA Superhighway to connect the three member countries, NAFTA's effectiveness is severely curtailed. Constructing the means to effectively and productively move goods across the nations' borders is essential to foster the powerful regional economy that will be necessary to meet the challenges of the twenty-first century.

III. ANALYSIS OF THE ECONOMIC IMPACTS OF THE NAFTA SUPERHIGHWAY

A. International and Economic Benefits of the NAFTA Superhighway

Construction of the NAFTA Superhighway would bring with it several direct economic benefits for the NAFTA countries, particularly between the United States and Mexico. As NASCO states, "the U.S. economy increasingly runs on trade and our trade runs on transportation. . . . Future economic growth and job creation in the U.S. require a constant effort to enhance our business climate, environment and transportation infrastructure to sustain our world-class leadership in world trade."[153] As the primary group supporting the Superhighway project, "NASCO's aim is to continuously, diligently upgrade the efficiency and security of our transportation systems to sharply increase the efficiency of our transportation infrastructure on the Corridor to drive down the cost of doing business and enhance our ability to do international trade in the central U.S."[154]

The NAFTA Superhighway would enable the United States, Mexico, and Canada to compete globally by creating economic benefits in North America in several ways, such as decreasing the time required to ship goods across North America.[155] Specifically, the average shipping time between Chicago and Mexico City could be reduced by as much as forty percent through the use of advanced customs procedures, highway improvements, and modern vehicle tracking devices.[156] A more conservative estimate states that the NAFTA Superhighway system would "save a minimum of two days' time on goods

152. *See, e.g.* U.S.-Canada Corridor, *supra* note 9 (Canadian-U.S. program jointly funded by private and public companies hoping to implement technology that would be widely accepted by the Customs agencies of both countries, reducing operating costs and increasing productivity).

153. About NASCO, *supra* note 69.

154. *Id.*

155. *See* Carroll, *supra* note 79.

156. *Id.*

traveling between Mexico City and Toronto," which takes as many as 15 days.[157] The magnitude of the economic impact that the NAFTA Superhighway would have on the United States, Mexico, and Canada is made readily apparent by the fact that nearly one trillion dollars a year is exchanged annually between the NAFTA nations.[158] Furthermore, "[a]ny reduction of more than 2 percent to 4 percent [of transportation time] will have an effect on production costs," thus affecting final consumer pricing.[159]

Moreover, decreased waiting times and more efficient transportation provide many other benefits that do not make themselves apparent at first glance but still can have major impacts on economic performance of NAFTA transportation.[160] For example, according to the Federal Highway Administration (FHWA), "[p]roductivity benefits cross functional lines, affecting empty-miles, maintenance, and indirectly even driver turnover."[161] In field tests, annual savings due to more efficient use of technology ranged from $7,866 to $15,222 per tractor.[162] Many other benefits inure to trucking companies in the form of "reduce[d] non-productive waiting time, emissions, and wasted fuel during idling."[163]

Additionally, the NAFTA Superhighway brings with it multiple investment opportunities to corporations, both in its construction[164] and by access to new markets.[165] According to NASCO, "[f]or every [dollar] invested in the NASCO Corridor, $5.70 is returned in economic benefits,"[166] and for every billion dollars spent on the NAFTA Superhighway, 47,500 jobs are created.[167] Once investment begins in new markets,[168] transportation and production costs will decrease,[169] employment levels will increase,[170] and the economic impacts of the NAFTA Superhighway will be readily apparent to virtually every citizen of the NAFTA nations through reduced costs of goods[171] and more positive economic performances.[172]

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157. Stopa, *supra* note 1.

158. About NASCO, *supra* note 69.

159. Stopa, *supra* note 1.

160. MICHAEL WOLFE & KENNETH TROUP, U.S. DEP'T OF TRANSP., THE FREIGHT TECHNOLOGY STORY: INTELLIGENT FREIGHT TECHNOLOGIES AND THEIR BENEFITS (2005), *available at* http://ops.fhwa.dot.gov/freight/intermodal/freight_tech_story/freight_tech_story.htm [hereinafter FREIGHT TECHNOLOGY BENEFITS].

161. *Id.*

162. *Id.*

163. *Id.*

164. Stopa, *supra* note 1 ("In addition, the privately built system would carry digital-information transmission lines . . . [which] private companies 'will be lining up' to bid.").

165. *See* Tamayo-Flores, *supra* note 72, at 135-36.

166. About NASCO, *supra* note 69.

167. *Id.*

168. *See* Tamayo-Flores, *supra* note 72, at 135-36.

169. Stopa, *supra* note 1.

170. *See* About NASCO, *supra* note 69.

171. *See* Stopa, *supra* note 1.

172. *See* Tamayo-Flores, *supra* note 72, at 135-36.

B. Consumer and Other Benefits of the NAFTA Superhighway

Consumers and citizens of the NAFTA nations will reap many other benefits from the implementation of the NAFTA Superhighway in a variety of different areas. According to the FHWA, in 2001 Americans alone "spent over $313 billion on goods and services that were transported over the Nation's highway system. Transportation accounts for a share of the final price of the product, ranging from 1 percent to 14 percent, depending on the commodity and distance moved."[173] The FHWA has determined that congestion on national and international highways has a serious impact on the economy, and consequently affects prices for consumer goods.[174] Hence, implementation of a highway system to reduce costs of transportation both nationally and internationally would result in savings to consumers, as well as increased availability of goods.[175]

The construction of the physical roads necessary to implement the NAFTA Superhighway would have additional benefits to non-commercial users of roads. Specifically, with respect to one part of the project (Interstate 69) many drivers would experience shorter, safer commutes across the country.[176] Currently, many parts of the country do not have readily available interstate access.[177] The construction of the proposed routes of Interstate 69 "would cut the corner on these circuitous routes and reduce travel distances and times substantially; it would also divert many medium-distance travelers from the overloaded airlines."[178] While this might increase the actual traffic flow along the interstate routes, "the total number of accidents is likely to decrease due to the better safety features of Interstate highways and better separation of local and long-distance travelers."[179]

Additionally, the NAFTA Superhighway would have significant positive effects on national security. On a typical day in 2008, U.S. Customs and Border Protection (CBP), the United States agency responsible for overseeing the entry of people and goods into the United States, processed nearly 1.1

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173. RHONDA YOUNG, ET AL., WYOMING FREIGHT MOVEMENT AND WIND VULNERABILITY 2 (2005), *available at* http://www.mountain-plains.org/pubs/pdf/MPC05-170.pdf.

174. FEDERAL HIGHWAY ADMINISTRATION, THE FREIGHT STORY: A NATIONAL PERSPECTIVE ON ENHANCING FREIGHT TRANSPORTATION 5, *available at* http://ops.fhwa.dot.gov/freight/publications/fhwaop03004/freight.pdf (last visited June 29, 2009). "Congestion . . . contributes to making transit times longer and more unpredictable. Unpredictability can hamper just-in-time inventory management and hinder some production processes. As a result, shippers and carriers assign a value to increases in travel time, ranging from $25 to almost $200 per hour, depending on the product carried." *Id.*

175. *See id.*

176. I69Info.com: Why Build It?, http://www.i69info.com/why.html (last visited June 29, 2009) [hereinafter Why Build it?].

177. *Id.*

178. *Id.*

179. *Id.*

million passengers and pedestrians and 70,451 truck, rail, and sea containers.[180] With such a large number of people and shipments moving through the borders, delays occur frequently, and inspections must be done quickly to move the volume of traffic through the ports.[181] The technological and physical improvements that comprise the NAFTA Superhighway system would greatly alleviate these problems by reducing the number of comprehensive and intrusive inspections that CBP would need to perform.[182] Additionally, to further aid security between the NAFTA nations, the United States, Canada, and Mexico have entered into the Security and Prosperity Partnership of North America (SPP).[183] The SPP in conjunction with the NAFTA Superhighway will greatly increase border security and efficiency of transportation of commercial goods across North American borders.[184] According to the SPP website, the SPP "will establish a common approach to security to protect North America from external threats, prevent and respond to threats within North America, and further streamline the secure and efficient movement of legitimate, low-risk traffic across our shared borders."[185] The FHWA divides international transportation security into two classes: "'[P]re-9/11' (protection against theft and traditional contraband, such as narcotics) and 'post-9/11' (protection against terrorism)."[186] The advanced tracking features that would comprise part of the NAFTA Superhighway would greatly increase security in the form of less theft and tampering, as well as promote quick responses to crimes in progress.[187]

C. The NAFTA Superhighway and Immigration

The implementation of a high-tech transportation corridor, and the intrinsic economic benefits for Mexico, could potentially have a major impact upon immigration from Mexico into the United States.[188] This expected impact

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180. Fact Sheet: A Typical Day for CBP in 2008, U.S. Customs and Border Protection *available at* http://www.cbp.gov/xp/cgov/about/accomplish/fy08_typical_day.xml (last visited Jan. 31, 2009).

181. *See* Stopa, *supra* note 1.

182. *See* SPP Myths vs. Facts, *supra* note 45 ("To speed cargo shipping, the three countries are developing uniform in-advance electronic exchange of cargo manifest data for maritime, railroad and motor carriers.").

183. *Id.*("The SPP is a White House-led initiative among the United States and the two nations it borders – Canada and Mexico – to increase security and to enhance prosperity among the three countries through greater cooperation. . . . The SPP provides a vehicle by which the United States, Canada, and Mexico can identify and resolve unnecessary obstacles to trade and it provides a means to improve our response to emergencies and increase security, thus benefiting and protecting Americans.").

184. *Id.*

185. SPP Leaders' Statement, *supra* note 52.

186. FREIGHT TECHNOLOGY BENEFITS, *supra* note 160.

187. *Id.*

188. *See* INDEPENDENT TASK FORCE REPORT, *supra* note 118, at 12; Orrenius, *supra* note 61, at 458-60 (discussing the causes and effects of migration into the United States from the

stems from the theory that Mexican immigration into the United States is primarily economic in nature[189] and would best be reduced by an economic solution.[190] Specifically, "[t]he gap in wages has led many Mexicans to travel north in search of higher incomes and better opportunities . . . . Mexico is also the leading source of unauthorized migration, with attendant economic and security problems in both countries and untold hardships for Mexican migrants."[191] While experts may differ about the extent of the wage differential,[192] many agree that the root cause is closely linked to it.[193] Unfortunately, much of current U.S. immigration policy is driven mostly by fear and misunderstanding in the wake of the September 11, 2001, attacks and does not attempt to solve the problem by addressing its causes.[194]

Experts believe that "deep-rooted economic and social factors drive this migration."[195] Ultimately, the migration has had serious impacts upon the Mexican economy, which then widen the wage gap and exacerbate the problem which caused the migration in the first place.[196] Pia Orrenius describes the problem in terms of the effects on the respective labor markets:

> While discussion typically focuses on immigration's economic impact on the United States, the impact of the out-migration of millions of Mexican workers and their families is felt in both home and host country. Mexico has lost over 10 percent of its prime working-age population to the U.S. labor market in just a few decades. Despite the fact that Mexican immigrants typically fall into the low end of the U.S. skill distribution, they are closer to the middle of the Mexican income distribution, meaning their absence translates into a loss of both human and physical capital.[197]

Furthermore, "[a]t very high rates of out-migration, communities lose their economic base along with their working-age populations, and can begin to decline or die out."[198] This negative spiral will continue until the cause of the

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Mexican perspective); Woroby, *supra* note 47, at 257-62 (discussing the effects of Mexican-U.S. migration and possible solutions).

189. INDEPENDENT TASK FORCE REPORT, *supra* note 118, at 12.

190. Woroby, *supra* note 47, at 260 ("The only permanent solution, therefore, is to address the underlying causes of such undocumented migration."); INDEPENDENT TASK FORCE REPORT, *supra* note 118, at 12 ("Over time, the best way to diminish these problems is by promoting better economic opportunities in Mexico.").

191. INDEPENDENT TASK FORCE REPORT, *supra* note 118, at 12.

192. *See* Orrenius, *supra* note 61, at 458; Woroby, *supra* note 47, at 257.

193. Orrenius, *supra* note 61, at 458; Woroby, *supra* note 47, at 257, INDEPENDENT TASK FORCE REPORT, *supra* note 118, at 12.

194. *See* Woroby, *supra* note 47, at 258-59.

195. Orrenius, *supra* note 61, at 458.

196. *See Id.* at 458-60.

197. *Id.* at 459.

198. *Id.*

problem is addressed. "Put simply, people will continue to come to the United States as long as they can obtain higher paying employment there. It is only by focusing on this fact that specific permanent solutions can be found."[199]

While many believe that immigration issues are rooted in economic theory,[200] unfortunately, this "is a reality that has not fully resonated with U.S. policymakers, who focus on strengthening barriers to entry and so avoid addressing the causes of undocumented migration."[201] This has manifested most recently in the Secure Border Initiative (SBI), which the Department of Homeland Security characterized as "a comprehensive multi-year plan to secure America's borders and reduce illegal migration."[202] The SBI involves an intense increase in border security in the United States to physically prevent illegal immigration, including more border agents, expanded detention facilities, and increased physical infrastructure at the border.[203] Additionally, the SBI will tighten enforcement of hiring undocumented workers.[204]

However, author Tamara Woroby states that, "While building walls at the border may seem to be an immediate solution to preventing further undocumented migration, such a policy will simply encourage other more creative ways to enter the United States."[205] This observation is supported by the great lengths to which illegal immigrants and smugglers have gone to circumvent the border controls of the United States, such as building tunnels under the border between the United States and Mexico.[206] Additionally, "[t]he stark reality is that there is no practical way for the United States to identify and deport 12 million people, and therefore one has to think about how best to manage this population."[207] In this light, the current U.S. policy and attitude toward Mexican immigrants will likely serve to exacerbate rather than alleviate the problem.[208]

Nevertheless, construction and implementation of the NAFTA Superhighway in the United States and Mexico would greatly ease the transition of the Mexican economy into one that would retain or even draw

199. Woroby, *supra* note 47, at 260-61.

200. *Id.* at 257.

201. *Id.* at 262.

202. Fact Sheet: Secure Border Initiative, U.S. Department of Homeland Security, *available at* http://www.dhs.gov/xnews/releases/press_release_0794.shtm (last visited Feb. 7, 2008) [hereinafter *SBI Initiative*].

203. *Id. But cf.* Woroby, *supra* note 47, at 261 ("While employer sanctions can significantly reduce the draw of U.S. jobs, policies that help create more and better jobs in the sending countries, particularly in Mexico, are also imperative.").

204. *SBI Initiative, supra* note 202.

205. Woroby, *supra* note 47, at 260.

206. Simply entering the word "tunnel" into a search at http://www.cbp.gov, yields several results of border patrol discoveries of illegal tunneling between the United States and Mexico. U.S. Customs and Border Protection, http://www.cbp.gov (last visited June 29, 2008).

207. Woroby, *supra* note 47, at 259.

208. *See id.* at 257-62; Orrenius, *supra* note 61, at 458-60.

workers back from the United States.[209] In fact, construction of an integrated transportation corridor using the aforementioned private interest financing methods would generate jobs for the actual construction of the roadways themselves.[210] Similarly, it would induce investment of companies that would potentially profit from the construction and control of such a corridor.[211] Additionally, the physical portions of the Mexican corridor itself would likely have to come from mostly foreign or local investment, since Mexico does not have the benefit of the U.S. federal financing.[212] The Mexican government is not equipped to handle large scale investment projects and is even privatizing many of the previously state-controlled industries to cut governmental costs.[213]

However, economists have shown that foreign direct investment (FDI) into Mexican economic sectors benefits those sectors greatly.[214] Sectors which have been well connected to the United States, such as the Northern Border and the Central Western regions have had their economies boosted by the inflow of FDI due to the increased competitive advantages from the ease of access between the United States and Mexico.[215] "Thus policymakers truly concerned with immigration should examine the questions of why the Mexican economy has not obtained the expected benefits of NAFTA and what can be done to deliver on the promise of NAFTA."[216]

D. Efficiency and Quality of Life Improvements

One last substantial benefit to citizens in NAFTA countries is the improved efficiency and quality of life gained from a technologically advanced highway system.[217] According to the FHWA,

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209. *See* About NASCO, *supra* note 69. "For every [dollar] invested in the NASCO Corridor, $5.70 is returned in economic benefits." *Id.* For every billion dollars spent on the NAFTA Superhighway, 47,500 jobs are created. *Id.*

210. *See id.*

211. *See* TTC FAQ, *supra* note 137.

212. *See supra* Part II.d.

213. *See* Werner, Barros & Ursua, *supra* note 29, at 72 ("The reduction of the public sector also included the sale of several enterprises previously owned and run by the state. There were several reasons to promote a large-scale privatization strategy. First of all, there was no reason for the government to own and run most of these enterprises, as they could work properly under a competitive market setting. Second, the privatization was aimed at increasing public revenues, redirecting public investment, and regaining the trust of the private sector in the government."). *Id.*

214. Tamayo-Flores, *supra* note 72, at 135.

215. *Id.*

216. Woroby, *supra* note 47, at 261. *See also* Susan M. Richter, J. Edward Taylor & Antonio Yunez-Naude, *Impacts of Policy Reforms on Labor Migration from Rural Mexico to the United States*, at 269 (Nat'l Bureau of Econ. Research, Working Paper No. 11428, 2005) (arguing, based on economic data collected, that NAFTA and the Immigration Reform and Control Act (IRCA) reduced the number of illegal immigrants into the United States, while increased border security actually increased their numbers.).

217. FREIGHT TECHNOLOGY BENEFITS, *supra* note 160.

> To the degree that intelligent freight technologies succeed in smoothing flows around major hubs like ports, border crossings, and intermodal terminals, tangible environmental and quality-of-life benefits will result. Reduced congestion means fewer trucks and other vehicles stuck in traffic, burning fuel and affecting air quality. It also means less stress on affected neighborhoods and less time wasted sitting in traffic.[218]

Thus, the NAFTA Superhighway will bring with it benefits to the economy (government, corporate, and personal), national security, immigration, and quality of life. While it is not free of drawbacks, such benefits should not be summarily discounted in the face of difficulties.[219]

E. Economic Drawbacks and Physical Dangers of the NAFTA Superhighway

Like any project of this scale, the NAFTA Superhighway is not without its criticisms.[220] First, many of the critics of NAFTA itself transfer that criticism to the NAFTA Superhighway,[221] and with good reason, as it enables the signatory nations to fully participate in the goals of NAFTA.[222] The U.S. House of Representatives, for instance, passed House Resolution 40, which is a commentary that the United States should not engage in SPP talks, nor build a NAFTA Superhighway, because "according to the Department of Commerce, United States trade deficits with Mexico and Canada have significantly increased since the implementation of the North American Free Trade Agreement."[223]

House Resolution 40 also commented on other perceived dangers which would befall the United States if the NAFTA Superhighway were implemented.[224] Specifically, the House feared that "future unrestricted foreign trucking into the United States can pose a safety hazard due to inadequate maintenance and inspection, and can act collaterally as a conduit for the entry into the United States of illegal drugs, illegal human smuggling, and terrorist

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218. *Id.*

219. *See supra* Part III.d.

220. This Part will focus primarily on the criticisms of the NAFTA Superhighway from a pragmatic or physical standpoint. For a discussion of the primarily political criticisms of the project, see *infra* Part IV.

221. *See* H.R. Con. Res. 40, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.CON.RES.40: (last visited Oct. 15, 2007).

222. *See* About NASCO, *supra* note 69.

223. H.R. Res. 40. This resolution is particularly ironic given the fact that the trade deficit with Mexico would probably be much less if Mexican trucks were allowed into the United States. *See id.*

224. *Id.*

activities."[225] However, this assertion seems to reflect the notion that the NAFTA Superhighway would simply be opening United States borders, and discounts the technological aspects of the project.[226] Further, the House warns that "it could be particularly difficult for Americans to collect insurance from Mexican companies which employ Mexican drivers involved in accidents in the United States, which would likely increase the insurance rates for American drivers."[227] Again, it seems that this is an assertion based on merely dissolving the current safeguards that the United States has in place to protect American motorists; safeguards which, incidentally, are contrary to NAFTA and should be dissolved in favor of policies more in line with the goals of NAFTA in the first place.[228]

Nevertheless, it is clear that there are significant hurdles to overcome before the NAFTA Superhighway can become a reality.[229] Rather than merely pointing out its flaws, the House of Representatives should be finding ways to alleviate the potential safety issues associated with an international highway system. Perhaps, similar to the prepaying of tolls for duties and highway use, insurance premiums could also be tracked electronically, thus eliminating the fear that they would not be collectable.[230] In any event, while there may be significant challenges to the implementation of the NAFTA Superhighway, such challenges should not deter the NAFTA nations from implementing the Superhighway project.

IV. THE POLITICAL BACKLASH OF THE NAFTA SUPERHIGHWAY

A. Public Misperceptions of the Project

Despite the scale and potential positive impacts of the NAFTA Superhighway, public understanding of the project is amazingly low. For example, many political pundits such as Jerome Corsi, head of the Swift Boat Veterans campaign against John Kerry in 2004,[231] have launched an assault on the NAFTA Superhighway, denouncing it for several reasons.[232] Chiefly, the critics of the NAFTA Superhighway attack the physical construction of the highway; they further assert that the project is the first leg in a hidden government conspiracy to unite the NAFTA nations into a "North American

225. *Id.*

226. *See supra* Part II.c.

227. H.R. Res. 40.

228. Mexican Truck Chronology, *supra* note 36. In December of 1995, "President Clinton postpone[d] implementation of NAFTA cross-border trucking provision based on safety and environmental concerns." *Id.*

229. *See* H.R. Res. 40.

230. *See* Carroll, *supra* note 79.

231. Shikha Dalmia & Leonard Gilroy, *The Conspiratorial Highway*, L.A. TIMES, Sept. 21, 2007, *available at* 2007 WLNR 18555053 [hereinafter *The Conspiratorial Highway*].

232. *Id.*

Union" (NAU) with its own currency, the "amero".[233] Also, Corsi and others insist that the SPP was the Bush Administration's attempt to cede United States sovereignty to NAFTA to form the NAU.[234] These fears are echoed in newspapers, editorials, and state legislatures across the country.[235] This Part will address each of these fears: the government conspiracy, the physical construction of the highway, the NAU, and the fears of loss U.S. sovereignty.

First, there seems to be a public outcry against the NAFTA Superhighway on the grounds that it is a conspiracy on the part of the Bush Administration to unite the NAFTA nations under one banner or one economy.[236] Corsi, who often leads the charge against the NAFTA Superhighway, focuses on all the potential negative impacts of the project and generally charges the Bush Administration with intending these negative outcomes.[237] Corsi believes, for instance, that President Bush's plan is to implement the NAFTA Superhighway solely to the detriment of American workers, apparently because importation of goods through Mexico bypasses all union workers in the United States.[238] According to Mr. Corsi, the Kansas City Smartport is being built exclusively for Mexico at the expense of American taxpayers.[239] Additionally, Phyllis Schlafly, a political pundit for EagleForum.org, speaks in similar doomsday language regarding the NAFTA Superhighway.[240] According to Ms. Schlafly, increasing productivity with competitive advantage is "globalist doubletalk which means producing U.S. goods with cheap foreign labor, thereby destroying the U.S. middle class."[241] With language like this being spread rampantly around the internet, and even on television through such personalities as Lou Dobbs, it is no wonder why many Americans fear the NAFTA Superhighway.[242]

These critical analyses of the situation, however, are flawed in their own right. Despite Mr. Corsi and Ms. Schlafly's accusations, the NAFTA Superhighway project has not been conducted in secret, and the project was not even designed or planned by the Bush Administration.[243] In fact, most of the proposals for the NAFTA Superhighway came before President Bush took

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233. *Id.*

234. *Id.*

235. *See, e.g.*, Editorial, *Amero Is a North American Union in Our Future?*, THE PADUCAH SUN, Oct. 12, 2007, *available at* 2007 WLNR 20042674 [hereinafter *NAU in Our Future*].

236. *The Conspiratorial Highway*, *supra* note 231.

237. *See Quietly*, *supra* note 75.

238. *Id.*

239. *Id.*

240. Phyllis Schlafly, *The NAFTA Superhighway*, EAGLEFORUM.ORG, Aug. 23, 2006, http://www.eagleforum.org/column/2006/aug06/06-08-23.html [hereinafter *The NAFTA Superhighway*].

241. *Id.*

242. *NAU in Our Future*, *supra* note 235. Lou Dobbs has used his influence as a CNN anchor to spread fears about the NAFTA Superhighway and the SPP. *Id.*

243. *See e.g.* Stopa, *supra* note 1; Carroll, *supra* note 79; *The Conspiratorial Highway*, *supra* note 231.

office.[244] Additionally, though President Bush took unprecedented steps to improve the integration of transportation systems between the countries, like with trucking pilot programs with Mexico,[245] NAFTA's provisions required the full allowance of Mexican trucks onto U.S. roadways.[246] Thus, with NAFTA's signing, a very public and pervasive integration of its signatory nations was initiated.[247]

In addition, the implementation of the NAFTA Superhighway has not been conducted "quietly but systematically"[248] by the Bush Administration as alleged. NASCO, North America's SuperCorridor Coalition, has a publicly available website.[249] The front page of the website begins with the quote, "For more than **13 years,** NASCO and its members have stood at the forefront of driving public and private sectors to unite to address strategically critical national and international trade, transportation, security and environmental issues."[250] Additionally, NASCO has been actively and successfully advocating in Congress – the same Congress that apparently has been hoodwinked by the Bush Administration according to Mr. Corsi[251] – for legislation and funding for the NAFTA Superhighway.[252] Accordingly, in light of NASCO's statistics and the actual legislation passed, it becomes exceedingly difficult to accept Mr. Corsi's view of a secret government conspiracy.[253]

The second great fear incited by the NAFTA Superhighway's critics is the NAU. Again, the American people have been bombarded by misinformation and mischaracterizations of the NAFTA Superhighway and the SPP.[254] The paradox is that these commentators prey upon and then exacerbate the ignorance of the American people by mischaracterizing statistics,[255] and then use the fact that most American do not know much about the project as

244. Stopa, *supra* note 1; Carroll, *supra* note 79.

245. Elizabeth White, *Allowing Mexican Trucks in U.S. Assailed,* THE SEATTLE TIMES, Sept. 7, 2007, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=trucks07&date=20070907.

246. NAFTA Trucking Access, *supra* note 65.

247. Tamayo-Flores, *supra* note 72, at 120.

248. *Quietly*, *supra* note 75.

249. About NASCO, *supra* note 69.

250. North America's SuperCoridor Coalition, Inc., http://www.nascocorridor.com/ (last visited Feb. 11, 2009)(emphasis added).

251. *See Quietly*, *supra* note 75 ("Highway planning that has been going on without any new congressional legislation directly authorizing the construction of the planned international corridor through the center of the country.").

252. NASCO Logistics, *supra* note 113.

253. *See supra* Part II.d.

254. *See The NAFTA Superhighway*, *supra* note 240; Phyllis Schlafly, *Scholars Explain Bush's SPP*, EAGLEFORUM.ORG, Oct. 10, 2007, http://www.eagleforum.org/column/2007/oct07/07-10-10.html (hereinafter *Scholars Explain*).

255. *See The Conspiratorial Highway*, *supra* note 231 ("Corsi has knitted disparate strands of each of these separate road projects to help convince fellow xenophobes such as Pat Buchanan, Phyllis Schlafly, Lou Dobbs and the John Birch Society that the corridor is the first leg of a secret federal project called the NAFTA Superhighway . . . .").

evidence that it is being planned secretly to undermine the sovereignty of the United States.[256] Specifically, Ms. Schlafly indicates that, "'[i]ntegration' with Mexico and Canada is exactly what a North American Union means, but there's a big problem with this goal. 'We the people' of the United States were never asked if we want to be 'integrated' with Mexico and Canada."[257] Ms. Schlafly is not alone in this mischaracterization. According to Lou Dobbs, economic integration with Mexico and Canada is "a very serious and unprecedented challenge to the sovereignty of this nation. And it's happening utterly without the knowledge and certainly without the approval of the American people or the consent of Congress."[258] Even former Republican Presidential Candidate Ron Paul, a U.S. Representative from Texas, adopts this line of logic.[259] According to Rep. Paul, "decisions that affect millions of Americans are not being made by those Americans themselves, or even by their elected representatives in Congress. Instead, a handful of elites use their government connections to bypass national legislatures and ignore our Constitution . . . ."[260]

Unfortunately for the critics, there is not much solid information behind the threats of the NAU and loss of American sovereignty.[261] The irony of these arguments, especially on the part of Representative Paul, is that they openly contend that the SPP and the NAFTA Superhighway are being plotted secretly[262] and without the knowledge or consent of the Congress,[263] of which Representative Paul himself is a member. In truth, the United States, Canada, and Mexico have been open and honest with regard to the SPP[264] and continuously announce the meetings of the heads of state of the NAFTA nations.[265] Further, President Bush has denounced the fears of the NAU as "political scare tactics."[266] President Bush further stated:

> "You know, there are some who would like to frighten our fellow citizens into believing that relations between us are

256. *See Scholars Explain*, *supra* note 254.

257. *Id.*

258. *NAU in Our Future*, *supra* note 235.

259. Ron Paul, *The NAFTA Superhighway*, RON PAUL'S TEXAS STRAIGHT TALK, Oct. 30, 2006, http://www.house.gov/paul/tst/tst2006/tst103006.htm.

260. *Id.*

261. *See* Bruce Ramsey, *Bet Your Bottom Amero that U.S. Sovereignty is Safe*, THE SEATTLE TIMES, Aug. 22, 2007, at B6.

262. *See Quietly*, *supra* note 75.

263. Paul, *supra* note 259.

264. *See* Security and Prosperity Partnership of North America, http://www.spp.gov/ (last visited Jan. 31, 2009).

265. President George W. Bush, State of the Union Address (Jan. 20, 2008), *available at* http://www.cnn.com/2008/POLITICS/01/28/sotu.transcript/. President Bush, in the 2008 State of the Union address, stated, "[t]onight I'm pleased to announce that in April we will host this year's North American Summit of Canada, Mexico, and the United States in the great city of New Orleans." *Id.*

266. Jim Landers, *Don't Fear that U.S., Canada, Mexico Will Merge*, THE DALLAS MORNING NEWS, Sept. 4, 2007, at 1D.

> harmful for our respective peoples. I just believe they're wrong. . . . I believe it's in our interest to trade; I believe it's in our interest to dialogue; I believe it's in our interest to work out common problems for the good of our people."[267]

Basic economic theory seems to agree with President Bush.[268] Additionally, it does not appear that exploring the option of fully and effectively implementing NAFTA will result in a loss of U.S. sovereignty, as there are many treaties in the past where the United States has agreed to forego some behavior.[269] Thus, "[s]overeignty, for the moment, is safe."[270]

B. The Mexican Pilot Program and the Political Resistance

In 2007, the United States and Mexico began to implement a pilot program that would allow up to 100 companies from each country to have free road access to the other country.[271] This pilot program has met much resistance from groups such as the Sierra Club, the Teamsters, and the Truck Safety Coalition.[272] This program is the most recent in a long series of developments regarding Mexican trucks and United States highways.[273]

In 1982, the United States issued a moratorium on all Mexican trucks and busses, banning them from U.S. highways.[274] Once NAFTA was signed, the moratorium should have been lifted according to NAFTA's provisions.[275] However, this was not the case, as President Clinton immediately renewed the moratorium on Mexican trucks, citing safety precautions.[276] However, Canadian trucks were (and still are) exempted from this moratorium[277] just as they were quickly released from the first moratorium.[278] In 2001, after Mexico

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267. *Id.*

268. Woroby, *supra* note 47, at 260-61.

269. Ramsey, *supra* note 261. For example, treaties regarding nonproliferation and torture give up rights of the United States. *Id.*

270. *Id.*

271. White, *supra* note 245; Mexican Truck Chronology, *supra* note 36, at 2.

272. NAFTA Trucking Access, *supra* note 65; Freight Teamsters, Mexican Truck Program 'Sucker-punches' U.S., http://freightteamsters.blogspot.com/2007/09/mexican-truck-program-sucker-punches-us.html (last visited, June 30, 2009) [hereinafter Sucker-punches]; Jesse J. Holland, *Teamsters Seek Injunction Against Mexican Trucks in U.S.*, THE SEATTLE TIMES, Aug. 30, 2007, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=mextrucks30&date=20070830 (last visited June 30, 2009).

273. Mexican Truck Chronology, *supra* note 36.

274. *Id.* at 4.

275. NAFTA Trucking Access, *supra* note 65 ("NAFTA requires all roads in the United States, Mexico and Canada to be opened to carriers from all the three countries. Canadian trucking firms have full access to U.S. roads while Mexican trucks can only travel about 20 miles inside the country at certain border crossings like in San Diego and El Paso, Texas.").

276. Mexican Truck Chronology, *supra* note 36.

277. NAFTA Trucking Access, *supra* note 65.

278. Mexican Truck Chronology, *supra* note 36.

challenged the ban on its vehicles pursuant to NAFTA guidelines, the Arbitration Panel ruled that the United States must allow Mexican trucks onto its highways, but with the provision that it could take time to establish safety standards for Mexican trucks.[279] In February 2007, the U.S. Department of Transportation announced that the United States and Mexico had reached an agreement for a pilot program allowing 100 companies unrestricted access to their respective highways.[280] This sparked a series of Congressional actions, ranging from expressing disapproval and concern for safety to attempts at blocking funding for the pilot program.[281] Eventually, lawsuits were filed in an attempt to stop the implementation of the program by requesting an injunction against the program until proper safety measures could be formulated.[282] Ultimately, the Ninth Circuit Court of Appeals denied the injunction.[283]

The pilot program's opponents mainly voice concerns over safety considerations,[284] but there are other concerns regarding illegal contraband and other impacts.[285] However, these arguments seem to ignore the regulations of the pilot program itself, which require that "Mexican-domiciled carriers and U.S. and Canadian carriers are governed by the same safety standards when operating in the U.S."[286] Further, the pilot program aims to correct the wildly inefficient system of transportation currently in place.[287] The Federal Motor Carrier Safety Administration (FMCSA) states that the pilot program "will benefit consumers by reducing the costly practice of requiring all cross-border shipments to be hauled by three separate trucks operated by three different drivers and provide U.S. trucking companies the opportunity to expand their business into our nation's third-largest trading partner."[288] There is also the idea that the opposition and lawsuits are directed less toward safety (since the rules of the program assure that Mexican trucks will actually have more rigorous precautions[289]) and more toward other political agendas, such as wages and

279. *Id.* at 3.

280. *Id.*at 2.

281. *Id.*

282. *Id.* at 1. White, *supra* note 245; NAFTA Trucking Access, *supra* note 65.

283. White, *supra* note 245.

284. NAFTA Trucking Access, *supra* note 65 ("The union, along with the Sierra Club and the nonprofit Public Citizen, argues that the administration plan would endanger public highways because safety issues have not been resolved.").

285. Sucker-punches, *supra* note 272 ("Hoffa [the Teamsters Union President] told the annual Teamsters Women's Conference at the Hilton Americas hotel that drugs could come in the U.S. across the border in the trucks. He said that although the Bush administration says it is concerned about national security, the program will threaten safety.").

286. United States Department of Transportation: Federal Motor Carrier Safety Administration, Federal Motor Carrier Safety Regulatory Guidance – Mexican Rules, http://www.fmcsa.dot.gov/rules-regulations/administration/nafta/NAFTA-Fact-Sheet.htm (last visited Feb. 8, 2007) [hereinafter Mexican Rules].

287. Holland, *supra* note 272.

288. *Id.*

289. Sucker-punches, *supra* note 272.

competition.[290] Given that the injunction was denied by the Ninth Circuit,[291] and the concerns about safety are directly addressed by the procedures in the pilot program,[292] this issue never gained much traction in the mainstream media.

Though the issue has not received much public notoriety since the Teamsters' injunction was denied,[293] it did resurface at least in part during the 2008 election.[294] Representative Paul, who was a Republican candidate for United States President, openly discussed his fears about the NAFTA Superhighway, and adopted the slippery slope argument toward the NAU.[295] Specifically, in his weekly column, "Texas Straight Talk," on October 30, 2006, Representative Paul commented on House Resolution 40:[296] "I wholeheartedly support this legislation, and predict that the superhighway will become a sleeper issue in the 2008 election."[297] Though the statement may have been partially accurate, the NAFTA Superhighway and NAFTA in general were not major issues in the election.

V. PROPOSALS AND POLICY RECOMMENDATIONS FOR THE NAFTA SUPERHIGHWAY

The final part of this Note explores exactly how and why the NAFTA Superhighway should be implemented. Subpart (a) examines the impacts of the NAFTA Superhighway on North America, particularly the United States and Mexico, and concludes that the NAFTA Superhighway will not only benefit these countries, but will also prove indispensible for the North American economy in the twenty-first century.[298] Subpart (b) sets out this Note's recommendations as to exactly what methods should be used to construct the NAFTA Superhighway.[299] Additionally, this subpart proposes solutions to the political problems that have plagued the project.[300]

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290. *Id.*

291. White, *supra* note 245.

292. Mexican Rules, *supra* note 286.

293. White, *supra* note 245.

294. *See Lou Dobbs Tonight: The Latest on Campaign '08 – Part 2* (CNN television broadcast Feb. 25, 2008) [hereinafter *Lou Dobbs Tonight*]. In the Ohio primary, both Clinton and Obama treated NAFTA as a "dirty word." *Id.*

295. Paul, *supra* note 259.

296. H.R. Con. Res. 40, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.CON.RES.40: (last visited Oct. 15, 2007) (Criticizing the SPP and expressing disapproval for a NAFTA Superhighway.).

297. Paul, *supra* note 259. As it turns out, Congressman Paul was at least partially right. *See Lou Dobbs Tonight*, *supra* note 294.

298. *See infra* Part V.a.

299. *See infra* Part V.b.

300. *Id.*

A. The NAFTA Superhighway Will Prepare North America to Compete in the Twenty-First Century

Construction and implementation of the NAFTA Superhighway project will ensure that the United States, Canada, and Mexico will compete in the global trade market in the twenty-first century. The NAFTA Superhighway project will bring with it increased economic,[301] immigration,[302] security,[303] and safety[304] benefits to North America.

First, the NAFTA Superhighway will bring benefits to the North American economy in several forms. The specialized routes, high tech tracking, and streamlined customs procedures will greatly decrease transportation times for goods, thereby reducing ultimate costs to the consumer.[305] Additionally, the amount of truck traffic between the NAFTA nations has drastically increased[306] (even without Mexican trucks having access to the United States[307]) and is likely to continue to increase throughout the next century.[308] Without the construction of an efficient method of transportation for this increase in trucks, not only will the benefits incident to the NAFTA Superhighway not be realized, but it is likely that costs of shipping freight over land would begin to increase, thus hurting the NAFTA nations' economies.[309]

Additionally, while some critics blame NAFTA for the excessive negative economic impact on the United States due to job loss,[310] these effects would likely be alleviated by the deepening of the relationships among the NAFTA nations.[311] This is because economic theory suggests that the labor market will stabilize in the most advantageous economic position once a market is more fully integrated (including the labor sector).[312] While this may cause short-term

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301. *See e.g.*, About NASCO, *supra* note 69.
302. *E.g.*, Woroby, *supra* note 47, at 257-62.
303. *E.g.*, Carroll, *supra* note 79.
304. *E.g.*, Why Build It?, *supra* note 176.
305. Stopa, *supra* note 1, at ¶ 7.
306. *Surface Trade*, *supra* note 3.
307. *See* Mexican Rules, *supra* note 286.
308. *Surface Trade*, *supra* note 3.
309. *See Miles of Infrastructure*, *supra* note 6, at tbl.3-1.
310. *See* H.R. Con. Res. 40, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.CON.RES.40: (last visited June 30, 2009). Mexicans also have a negative opinion of NAFTA. Weintraub, *supra* note 30, at 59.
311. Gregory Bowman, *Regional Trade Agreements: Broadening versus Deepening*, 19 IND. INT'L & COMP. L. REV. 497 (2009). Professor Bowman employs the term "deepening" in the context of trade agreements to mean a closer integration of the regional economies. *Id.* "Deepening" is contrasted to "broadening," which is the addition of new markets to a regional trade agreement. *Id.*
312. Symposium, *Assessing the Impact of Existing Bilateral and Multilateral U.S. Trade Agreements and Attempting Policy Recommendations for the Future*, 19 IND. INT'L & COMP. L. REV. 569 (2009). According to Professor Cherie Taylor of South Texas College of Law, part of the reason the NAFTA model faces criticism is due to its lack of provision allowing the movement of labor. *Id.*

job loss in certain geographical areas, the actual impact is that jobs are relocating for economic efficiency. This means previously inefficient labor is free to seek out new, more productive markets.[313]

A similar argument is raised against the problem of illegal immigration from Mexico into the United States. Pia Orrenius discusses the economic effect of immigration on wages and job competition, and demonstrates (at least for the labor sector) how economic efficiency works.[314] One cornerstone of her argument, which echoes the deepening argument advanced by Professors Bowman and Taylor,[315] is that as immigrants enter the country, they are largely unskilled and enter the lowest end of the labor market.[316] Additionally, "existing workers may respond to immigrant inflows by moving out of gateway labor markets, changing jobs, or going back to school to learn new skills."[317] Analogizing this to the broader concept of labor equalization in general yields that a deepening of the relationship between the NAFTA countries would be beneficial to all involved.[318] The NAFTA Superhighway represents a large step toward that deepening.

Closely tied to the economic benefits of the NAFTA Superhighway are the positive impacts it would have on immigration, primarily for the United States and Mexico.[319] Currently, Mexico has lost approximately ten percent of its labor force to immigration into the United States,[320] and this has had profound impacts on both nations.[321] Ultimately, however, the problems with both legal and illegal immigration are economic in nature.[322] Unfortunately, knowing the source of this problem does little to solve it. The large number of documented and undocumented Mexican citizens living and working in the United States presents a unique problem with no easy solution.[323] "The stark reality is that there is no practical way for the United States to identify and deport twelve million people. Therefore, one has to think about how best to manage this population."[324]

The NAFTA Superhighway presents a unique approach to solving this problem. Deeper integration of the economic markets through an integrated transport system would bring many economic opportunities to Mexico.[325]

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313. *See id.*
314. *See* Orrenius, *supra* note 61, at 460.
315. *See supra* text accompanying notes 310-11.
316. Orrenius, *supra* note 61, at 460.
317. *Id.*
318. *See supra* text accompanying notes 310-11; *see also* Weintraub, *supra* note 30, at 59-60.
319. *See* Woroby, *supra* note 47, at 257-61; Orrenius, *supra* note 61, at 458-60.
320. Woroby, *supra* note 47, at 257.
321. Orrenius, *supra* note 61, at 458-60.
322. Woroby, *supra* note 47, at 260-61.
323. *Id.* at 259.
324. *Id.*
325. *See* Tamayo-Flores, *supra* note 72, at 135-36; FREIGHT TECHNOLOGY BENEFITS, *supra* note 160, at ¶ Intelligent Freight Technology Benefits.

These economic opportunities in construction and the associated business investments would bring job opportunities to Mexico.[326] Once job opportunities are created, the flow of labor into the United States could be slowed or potentially reversed because an increase in job opportunities would increase demand for jobs in Mexico.[327] This would lead to narrowing the average wage gap, which is the one of the root causes of the immigration problem.[328] Once the NAFTA Superhighway becomes fully operational, it would bring benefits to Mexico which would likely go a long way to alleviating the labor shortages and other problems caused by out-migration into the United States.

The NAFTA Superhighway would also have great benefits for both the national security of the United States, as well as security for the entire North American continent. As stated earlier, U.S. Customs and Border Protection (CBP) processed over 1.13 million passengers and pedestrians, 82,800 shipments of goods, and 70,200 truck, rail, and sea containers per day in 2007.[329] However, inspection delays occur frequently and inspections must be done quickly in order to move the volume of traffic through the ports.[330] Reducing the number of comprehensive and intrusive inspections that would need to be performed at the ports would enable CBP to perform more thorough inspections at the borders, thus increasing the security of all three nations.[331] As a result, the NAFTA Superhighway could greatly increase border security and efficiency in transportation of commercial goods across North American borders.[332] The advanced tracking features would comprise part of the NAFTA Superhighway and greatly increase security in the form of less theft and tampering. It could also promote quick responses to crimes in progress.[333] In turn, this could potentially decrease the shipping of contraband or other illegal items across North American borders.[334]

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326. *See* About NASCO, *supra* note 69, at ¶ Benefits; Tamayo-Flores, *supra* note 72, at 135-36.

327. *See* Woroby, *supra* note 47, at 259.

328. *See id.* at 257.

329. Fact Sheet: A Typical Day for CBP in 2008, U.S. Customs and Border Protection, *available at* http://www.cbp.gov/xp/cgov/about/accomplish/fy08_typical_day.xml (last visited Feb. 24, 2009).

330. *See* Stopa, *supra* note 1, at ¶¶ 5, 7.

331. *See* SPP Myths vs. Facts, *supra* note 45, at ¶ 3 ("To speed cargo shipping, the three countries are developing uniform in-advance electronic exchange of cargo manifest data for maritime, railroad and motor carriers."). *See generally* The Kansas City Smartport, http://www.kcsmartport.com (last visited June 230, 2009).

332. SPP Myths vs. Facts, *supra* note 45.

333. FREIGHT TECHNOLOGY BENEFITS, *supra* note 160, at ¶ Intelligent Freight Technology Benefits.

334. *See id.*

B. Proposals for the Implementation of the NAFTA Superhighway

In order to complete a project of this magnitude, several obstacles must be surmounted. First and foremost is the fact that the construction of the physical aspect of the highway will take billions of dollars and thousands of man-hours of labor.[335] The best solution to this is to segment the project and this is exactly what has been proposed, with each segment being funded and constructed by local governmental authorities.[336] This solution has the potential to work extremely well in the United States, because of the nature of the funding framework between the U.S. federal government and the states.[337] However, Mexico presents a different challenge because it is a lesser developed country with much less ability both locally and nationally to fund infrastructure projects.[338]

For Mexico, foreign investment will be required in order to jump start the construction and implementation of the NAFTA Superhighway.[339] While in the United States, a mixture of the various funding options discussed in Part II.d of this Note will likely be employed to construct the NAFTA Superhighway, Mexico's weaker national and local governments make it less likely that methods such as CDA's and pass-through financing would be effective.[340] The best option is probably one similar to the tacks taken by Indiana with the Indiana Toll Road, and Illinois with the Chicago Skyway.[341] These two roads were leased to private companies, who then received rights to operate the roads, collect the revenues and become responsible for maintenance.[342]

A similar process could work in Mexico. Rather than leasing an existing road, however, the Mexican government could enter into agreements with companies to invest in construction of the roadway in exchange for the rights to operation. Much like the companies who operate the Indiana Toll Road and the Chicago Skyway, companies would invest in the construction of the roadway on the promise of the back end profits from collecting tolls.[343] Additionally,

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335. *See* About NASCO, *supra* note 69; *see also* Frequently Asked Questions, I-69 Tier 2 Studies: Evansville to Indianapolis, Indiana, http://www.i69indyevn.org/faq.html (last visited June 30, 2009) [hereinafter Indy-Evansville FAQ]. The cost of the segment of Interstate 69 in Indiana between Evansville and Indianapolis is slated to cost between $1.7 and $1.8 billion. *Id.*

336. *See* Project Funding Options, *supra* note 139, at ¶ 3. Texas has undertaken for itself the improvement of I-35 and other interstates running through that state. *Id.*; *see also Indy-Evansville FAQ*, *supra* note 334. The funding and planning for the Indiana section of Interstate 69 has been spearheaded by Indiana Governor Mitch Daniels. *Id.*

337. *See* RAMIREZ, *supra* note 116, at 17.

338. INDEPENDENT TASK FORCE REPORT, *supra* note 118, at 12.

339. *Id.*

340. *See* Project Funding Options, *supra* note 139, at ¶¶ 9, 11.

341. Amy Goldstein, *Privatization Backlash in Indiana: Plan to turn over toll road to foreign firms spawns political storm*, WASH. POST, at ¶¶ 3-4 (June 18, 2006), *available at* http://www.post-gazette.com/pg/06169/698927-84.stm.

342. *Id.*

343. *See* Project Funding Options, *supra* note 139, at ¶ 12.

with respect to the technological aspects of the NAFTA Superhighway, most of these projects are privately driven, even in the United States, so no major changes would need to be made to adapt the project to Mexico.[344] Further, the implementation of technological improvements stands to decrease in cost as implementation becomes more widespread, thus expanding into Mexico would become easier.[345]

The second major hurdle to overcome will be the political backlash and public misconceptions surrounding the project.[346] This is likely the biggest hurdle to the NAFTA Superhighway's implementation, because so long as the public believes that NAFTA is detrimental to the United States, members of Congress will continue to rail against it.[347] The ironic twist is that many of these same members of Congress are the ones who foster the negative public image of NAFTA and the NAFTA Superhighway.[348] In order for the NAFTA Superhighway project to be successfully implemented, the United States public perceptions of the project must be greatly changed. Perhaps the biggest concern to address is the loss of jobs that seems to be in the forefront of all criticisms of NAFTA,[349] followed closely by the fears of a North American Union with a common currency, the "amero".[350] Once intelligent discussion of these issues reaches the forefront of the media, and American, Mexican, and Canadian citizens become more aware of the actual benefits and drawbacks of the NAFTA Superhighway, North America will likely be one step closer to a more prosperous future.

CONCLUSION

Whether simply decreasing the time it takes for a washer or dryer to go from Columbus, Ohio to Mexico City,[351] or whether it ushers in a new age of global competition for North America,[352] the NAFTA Superhighway stands to benefit North America in ways no other economic development tool has. The

344. *See* U.S.-Canada Corridor, *supra* note 9, at ¶ 4.

345. *Id.* at ¶ 10.

346. *See supra* Part IV.

347. *See* H.R. Con. Res. 40, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.CON.RES.40: (last visited June 30, 2009).

348. Paul, *supra* note 259. In fact, where political gain appears promising through slandering NAFTA, both democratic presidential candidate Hillary Clinton and Barack Obama have disparaged NAFTA. *See Lou Dobbs Tonight, supra* note 294. In the Ohio primary, both Clinton and Obama treated NAFTA as a "dirty word." *Id.*

349. *See id.*; H.R. Con. Res. 40.

350. *See NAU in our future, supra* note 235. While it appears that many Americans (and politicians) fear the possibility of an NAU or the institution of the amero, this author finds those fears curious in light of the great strides Europe's economy has had since the adoption of the EU. While either eventuality is not likely in the near future, such a union or a single currency could likely strengthen the North American economy and create a more dominant force to contend in the global market. *See id.;* SPP Myths vs. Facts, *supra* note 45, at ¶ Myth vs. Fact.

351. Stopa, *supra* note 1, at ¶ 7.

352. *See supra* note 337 and accompanying text.

NAFTA Superhighway and its technological innovations will pave the way to the future of commercial transportation in North America. With the right policy reforms, it will also equalize the employment pools of the NAFTA countries and could potentially solve some of the biggest problems facing the United States and Mexico today.[353] Though the NAFTA Superhighway will not come without cost to all three countries,[354] the costs are far outweighed by the economic benefits it will bring to North America. The U.S. Presidential and Congressional elections in 2008 will play a major role in determining the future of the NAFTA Superhighway. However, despite many politicians' aversions to the subject, if North America is to survive as an economic competitor on a global scale in the twenty-first century against such economic powerhouses as the European Union and China, a deepening of the NAFTA relationship is ultimately necessary. Such a deepening is best and most efficiently accomplished through the physical linking of the countries through the NAFTA Superhighway.

353. *See supra* Part III.c.
354. *See supra* Part III.d.