# SELF-DETERMINATION OF THE PEOPLES OF QUEBEC UNDER INTERNATIONAL LAW

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## I. INTRODUCTION

There are currently several hundred secessionist movements that are active in the group-conscious communities of the world. The secessionists almost invariably claim legitimacy for their cause on the basis of the international law principle proclaiming the right to self-determination of peoples. They have it all wrong.

This article will show that the right to self-determination over the years has acquired different shades of meaning, determined by the contingencies that prompted emphasis of that right at a given time and particularly, by the nature of the "peoples" claiming the right. The right to self-determination has thus been invoked to sanction the competence of national states within the world empires of yester-year in their demand for sovereignty as independent states, to legitimize the political independence of nations subject to colonial rule or foreign domination, and to affirm the right of peoples subject to racist regimes to participate in the political structures of their countries. Currently, the emphasis has shifted to the entitlement of national, ethnic, religious, or linguistic societies within a political community to live according to the customs and traditions of their kind.

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The right to self-determination does not authorize the secession of sections of a nation from an existing state. After all, the right to self-determination is almost always proclaimed in conjunction with the territorial integrity of states. The right to self-determination furthermore belongs to a people whereas secession attaches to a territorial region. International law does, in exceptional circumstances, sanction the redrafting of national borders. State practice indicates that those exceptional circumstances are exclusively confined to general support of a political society, and secondly, to the redrafting of national frontiers as a condition of peace following an armed conflict. It should be emphasized at the outset that "general support" in this context denotes the support of a cross-section of the entire political community and not only of inhabitants of the region to be afforded separate statehood. The "right" to secession in these limited circumstances — it would perhaps be better to speak of international acquiescence in the emergence of a new state — is not a component of the right to self-determination but instead constitutes a distinct norm of international law.

This in turn raises the question as to the *essentialia* of statehood in international law. In this regard, it will be argued that statehood for the purposes of international law does not always coincide with statehood as a matter of (internal) constitutional reality; and secondly, that the theories of statehood subscribed to by the leading publicists — the declaratory theory and the constitutive theory — do not adequately account for the *de facto* exercise of sovereignty by the maverick states of the world. It will be argued that, within the confines of the constitutive theory, state practice has shifted the emphasis from recognition as a *sine qua non* of statehood in international law to collective non-recognition as the death knell of a newly established political entity claiming to be a state in international relations.

Moreover, a distinction should be drawn between the two kinds of relationships which a political entity might seek to establish with other states. In its inter-individual relations, a political entity might be recognized and treated as a state for certain purposes (for example, for the purpose of liability in tort) but not for others, or a political entity not generally recognized as a state might nevertheless establish inter-individual relations (for example, diplomatic exchanges or treaty arrangements) with a limited number of other states. On this inter-individual level, the conduct of the maverick

state is governed by rules of international law and it does, therefore, within those limited confines, function as a state.

But to become a member of the international community of states — and therefore be eligible for membership in an international organization and to be counted when the emergence of a rule of customary international law is at issue (here, one could speak of community relations of a state) — is another cup of tea. Here, collective non-recognition, signified mostly by refusal of United Nations membership, would be fatal.

These issues were recently put to the test in an opinion of the Supreme Court of Canada regarding the feasibility under Canadian constitutional law, and in virtue of the right to self-determination under international law, of the secession of the province of Quebec — providing the electorate of that province express themselves in favor of breaking their political ties with the Canadian federation.[1] A critical analysis of that judgment will serve to make the points summarized above.

In Part II, the judgment will be placed in its proper historical context. Part III briefly touches upon the constitutional issues pertinent to the secession of Quebec from Canada. Although a clear majority of the electorate of Quebec in favor of secession would not be enough to authorize the establishment of an independent state, it would place a duty on the other provinces to enter into negotiations with Quebec regarding the constitutional future of the federation. In Part IV, the secessionist policy of the dominant political party in Quebec will be evaluated in view of the right to self-determination as sanctioned by international law. It will be shown that the inhabitants of Quebec do not constitute a "people" for purposes of the right to self-determination, and that the right to self-determination, in any event, does not sanction territorial secession from an existing state. Part V considers the rules of international law pertaining to secession and how those rules might play themselves out in the case of Quebec. It will become evident that the prevailing circumstances in Quebec are far removed from those that would trigger a "right" to secession under international law. Part VI contains a brief outline of the requirements of statehood in international law viewed in consideration of the Canadian case and the conditions which Quebec will have to satisfy if it is to become an independent sovereign state. Unilateral secession of Quebec from Canada would make general recognition of the new political entity highly unlikely, and Quebec

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1. *See* Reference Re Secession of Quebec [1998] 2 S.C.R. 217.

might then find that, absent such recognition, its international status would remain confined to the realm of isolated inter-individual relations.

## II. HISTORICAL PERSPECTIVE

In November 1976, the *Parti Québécois* was elected into office in the province of Quebec. For the first time in the contemporary history of Canada, a provincial government advocating secession from the Canadian federation took (regional) political control in the country. In years gone by — indeed shortly after the enactment of the Constitution Act of 1867, which marked the birth of the Canadian federation — there was an attempt by Nova Scotia to sever its links with the federation.[2] The first Dominion elections of September 1867 resulted in an overwhelming victory in Nova Scotia for those in the province opposed to confederation (18 of the 19 seats in the federal legislature, and 36 of the 38 seats in the provincial legislature).[3] Premier Joseph Howe of Nova Scotia thereupon led a delegation to London with instructions from his constituents to seek withdrawal of the province from the confederation, but the delegation's plea was rejected by the Colonial Office.[4]

More recently, the *Parti Québécois* led by Premier René Lévesque aspired toward full sovereignty for Quebec, combined with economic association with Canada. On May 20, 1980, the sovereignty-association option was put to the test in a referendum within the province. The question posed in the referendum was as follows:

> The government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its own laws, administer its taxes and establish relations abroad, in other words, sovereignty and at the same time, to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will be submitted to the people

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2. *See id*. at 243-44. *See also* H. Wade MacLauchlan, *Accounting for Democracy and the Rule of Law in the Quebec Secession Reference*, 76 CAN. B. REV. 155, 168 (1997).
3. *See* Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 243.
4. *See id*.

> through a referendum; on these terms, do you agree to give the government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada? Yes/No.[5]

Sixty percent of the electorate of Quebec voted against it.[6]

The *Parti Québécois* was then defeated in the elections of 1985. The new provincial regime under Premier Bourassa followed a policy of reconciliation with the rest of Canada. The Constitution Act of 1982 had, in the mean time, been enacted by the British Parliament.[7] This Act put Canada on its current constitutional course of securing full independence from the British legislature and subjecting the Canadian (federal and provincial) legislatures and governments to the supreme governance of a bill of rights. This consequently revived questions pertaining to the autonomy of Quebec.

Peter Hogg reminds that "Quebec, with its French language and culture, its civil law, and its distinctive institutions, is not a province like the others."[8] Additionally, there was a time when religious considerations, involving tensions between a predominant Roman Catholic community in Quebec and a vast Protestant-*cum*-secular majority in the rest of Canada, also contributed to parochial sentiments in Quebec.[9] Nevertheless, Hogg shows that throughout the constitutional history of Canada "accommodation of Quebec within Canada has always been the driving force behind the various constitutional arrangements of the settlements of the St. Lawrence valley."[10]

Of all the provinces constituting the Canadian federation, Quebec had been the only dissenter to the Constitution Act of 1982. Its government actually contested the legality of the new Constitution. But having been deprived — by that very Constitution — of its right of veto of the constitutional amendments at issue, its action failed.[11]

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5. Pierre Bienvenu, *Secession by Constitutional Means: Decision of the Supreme Court of Canada in the Quebec Secession Reference*, 21 HAMLINE J. PUB. L. & POL'Y 1, 3 (1999).

6. *Id.*

7. *See* Canada Act, 1982, ch. 11 (U.K.); CAN. CONST. (Constitution Act, 1982) (The Constitution Act, 1982 is contained in a schedule to the former British Act).

8. Peter W. Hogg, *The Difficulty of Amending the Constitution of Canada*, 31 OSGOODE HALL L.J. 41, 45 (1993).

9. *See* Gilles Bourque, *Quebec Nationalism and the Struggle for Sovereignty in French Canada, in* THE NATIONAL QUESTION: NATIONALISM, ETHNIC CONFLICT, AND SELF-DETERMINATION IN THE 20TH CENTURY 199, 205-05 (Berch Berberoglu ed. 1995).

10. Hogg, *supra* note 8, at 45.

11. Re Objection by Quebec to a Resolution to Amend the Constitution [1982] 2 S.C.R. 793, 817-18.

The government of Premier Bourassa agreed to accept the Constitution Act provided, inter alia, that (a) Quebec is recognized as a separate entity; (b) the province is afforded a greater say in matters of immigration; (c) the province is given the power to participate in the election of judges to the Supreme Court of Canada; (d) limitations are imposed on federal spending powers; and (e) Quebec is given a veto in respect to constitutional amendments.[12] These concerns were addressed in the Meech Lake Accord of 1987.[13] But in the end the Accord came to naught, as the Constitutional amendment to give effect to the provisions of the Accord required ratification by Parliament and all the provinces.[14] Therefore, even though approved by the Senate and the House of Commons as well as eight of the ten provinces, the proposed constitutional amendments could not become law.

A further attempt to address the national sentiments of Quebec through extension of provincial autonomy was pursued under the Charlottetown Accord of August 28, 1992.[15] A Constitutional amendment to give effect to the Accord was submitted by referendum on October 26, 1992, and was decisively defeated by the voters. The negative lobby gained a majority in six of the ten provinces, including Quebec.[16]

In January 1995, while Jacques Parizeau was Premier of Quebec, a Bill was published for presentation to the Parliament of Quebec. [17] If enacted, the Bill would proclaim the sovereignty of Quebec and authorize the government of the newly established state to formulate an agreement with Canada to maintain an economic and political association between Quebec and the Canadian federation.[18] The Bill further provided that this Act may not come into force without the affirmative consent of a majority of votes cast by the electors in a referendum.[19] A referendum was accordingly held in Quebec on October 30, 1995 posing the following question:

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12. *See* Meech Lake Communique of April 30, 1987, 1987 Constitutional Accord, and Constitutional Amendments 1987, *reprinted* in PETER W. HOGG, MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED 56-85 (1988). *See also* COMPETING CONSTITUTIONAL VISIONS: THE MEECH LAKE ACCORD, 315-28 (Katherine E. Swinton & Carol J. Rogerson eds., 1988).

13. *See* HOGG, *supra* note 12, at 56-60.

14. *See Can. Const*. (Constitution Act, 1982), §41.

15. *See Consensus Report on the Constitution and the Draft Legal Text, reprinted in* The CHARLOTTETOWN ACCORD, THE REFERENDUM AND THE FUTURE OF CANADA, 279-361 (Kenneth McRoberts & Patrick Monahan eds., 1993).

16. *See* REFERENDUM 92: OFFICIAL VOTING RESULTS (Chief Electoral Officer of Canada, 1992).

17. The Sovereignty Bill, art. 1 (1995), *available at* <http://www.ccu-cuc.ca/en /library /referendum/95ref_bill.html>.

18. *See id*. art. 3.

19. *See id*. art. 17.

> Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?[20]

The agreement cited in the referendum question was an election pact conducted between certain political groupings in Quebec, namely the *Parti Québécois*, the *Bloc Québécois* and the *Action Démocratique du Québec*. In this agreement, the parties pledged:

> To join forces and to coordinate our efforts so that in the Fall 1995 referendum, Quebecers can vote for a real change; to achieve sovereignty for Quebec and a formal proposal for a new economic and political partnership with Canada, aimed, among other things, at consolidating the existing economic space.[21]

The secessionist endeavor was narrowly defeated with 50.56% voting "No" and 49.44% voting "Yes",[22] according to the official results. Given the narrow margin of defeat and the continued resolve of the Party that remained in political control of Quebec to establish full sovereignty for the province, the secessionist ideology has still not gone away and seems unlikely to be soon abandoned.

On September 30, 1996, the Governor in Council of Canada referred questions pertinent to the secessionist policy of Quebec's ruling Party to the Supreme Court of Canada for their opinion.[23] First, under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? Second, does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature, or government

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20. Quebec 1995 Referendum, *available at* <http://www.ccu-cuc.ca/en/library/referendum/1995referendum.html>.

21. Agreement between the *Parti Québécois*, the *Bloc Québécois*, and the *Action Démocratique du Québec*, ratified at Québec City, June 12, 1995 by Jacques Parizeau, Lucien Bouchard, & Mario Dumont, *available a*t <http://www.ccu-cuc.ca/en/library/referendum/ 95ref_agreement.html>.

22. *Highlights of the Second Annual CRIC Survey on National Unity (2)*, DIRECTION, Dec. 17, 1998, *available at* <http://www.cric.ca/cuc/en/dir/v3n45.html>.

23. Order in Council C.P. 1996-1497, Sept. 30, 1996.

of Quebec the right to effect secession of Quebec from Canada unilaterally? Third, in the event of a conflict between domestic and international law on the right of the National Assembly, legislature, or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada? Only the second of these questions will be fully discussed in this note.

## III. THE CONSTITUTIONAL ISSUE

The Supreme Court handed down its opinion on August 20, 1998.[24] The opinion disposed of objections raised *in limine* as to the jurisdiction of the Supreme Court to give the opinion sought by the Governor in Council and the justiciability of the questions submitted to the Court. The opinion also touched upon important matters of history[25] and constitutional law that fall outside the scope of this article. A brief reference to some of those issues must therefore suffice.

It was, for example, argued that the Court, being a municipal tribunal, lacked jurisdiction to respond to the second (international law) question. Not so, responded the judgment. The Court would not be acting as an international tribunal or purport to bind other states or transform international law, though the international law position is relevant to legal questions pertaining to the future of the Canadian federation.[26] On the constitutional front, it is to be noted that the Canadian Constitution does not authorize the unilateral secession of any constituent region of the federation as did, for example, the constitutions of the Soviet Union,[27] Czechoslovakia[28] and the former Republic of Yugoslavia.[29] This feature of the

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24. Reference Re Secession of Quebec [1998] 2 S.C.R. 217.

25. *See* Marc Chevrier, CANADIAN FEDERALISM AND THE AUTONOMY OF QUEBEC: A HISTORICAL VIEWPOINT (1996); Bourque, *supra* note 9.

26. *See* Reference Re Secession of Quebec [1998] 2 S.C.R. 271, 234; *see also* Bourque, *supra* note 9 at 235.

27. Art. 72, KONST. USSR (1990), *reprinted in* XVIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1993).

28. *See* Constitution Act No. 143/1968 Sb., enacted Oct. 27, 1968, Const. Czech Fed'n, Preamble ("recognizing the inalienable right of self-determination even to the point of separation, and respecting the sovereignty of every nation and its right to determine freely the manner and form of its life as a nation and state"); *see also* Constitution Act No. 327/1991 Sb., enacted July 18, 1991, about Referendum, art. 1(2) (creating a provision citing a referendum as "the only way the proposal for secession of the Czech Republic or the Slovak Republic may be decided"). Decisions in a referendum are taken by majority vote. *See id*. art. 5(2). Furthermore, a decision in favor of secession approved only in one of the two republics would suffice to authorize disbanding the federation. *See id*. art. 6(2).

29. CONST. FED. PEOPLE'S REPUBLIC YUGO., 1946, art. 1 (depicting Yugoslavia as "a community of peoples equal in right, who on the basis of the right to self-determination, including the right of separation, have expressed their will to live together in a federative state. . . ."); *see also* CONST. FED. PEOPLE'S REPUBLIC YUGO., 1963, para. 1 Introductory Part (Basic Principles) (depicting Yugoslavia as "a federal republic of free and equal peoples and nationalities" united "on the basis of the right to self-

Canadian Constitution, however, did not conclude the matter. The Court went on to construct an opinion based on certain basic principles that underpin the Canadian Constitution — in particular the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.[30] The Court was not requested to address how secession of a province could be achieved in a constitutional manner, and consequently refrained from expressing an opinion in that regard.[31] The Court's opinion was confined to the question posed: Can the National Assembly, legislature, or government of Quebec, in terms of the Canadian Constitution, unilaterally effect the secession of Quebec from Canada? "Unilateral" secession was defined by the Court as "the right to effectuate secession without prior negotiations with the other provinces and the federal government."[32] The Constitution is indeed silent as to the competence of a province to secede from the federation. However, this much is clear: secession would require an amendment of the Constitution,[33] which evidently must occur in conformity with the amendment procedure prescribed by the Constitution.[34]

This does not mean that the expression of the will of "a clear majority on a clear question"[35] in Quebec in favor of secession can simply be ignored or discarded by Canadians from other parts of the country. The principle of democracy includes the constitutional right of each constituent part of the Canadian federation to initiate constitutional change.[36] This right, the Court held, "imposes a corresponding duty on the participants in [the] Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces."[37] Again, "[t]he corollary of a legitimate attempt by one

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determination, including the right to secession"); *see also* CONST. SOCIALIST FED. REPUBLIC YUGO., 1974 Introductory Part (Basic Principles) (referring to "the right of every nation to self-determination" and "the brotherhood and unity of the nations and nationalities"). The right to secede belonged to "nations" only and not to "nationalities" as defined in the constitutional law of Yugoslavia.

30. *See* Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, 247-74; *see also* Robert Howse & Alissa Malkin, *Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession*, 76 CAN. B. REV. 186, 196-211 (1997) (describing these principles as "foundational norms" that structure and govern constitutional change in Canada).

31. *See* Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 273-74.

32. *Id*. at 264.

33. *See id*. at 263.

34. *See* CAN. CONST. (Constitution Act, 1982), § 52(3).

35. Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 268.

36. *See* CAN. CONST. (Constitution Act, 1982), § 46(1); *see also* Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 257.

37. Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 257.

participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table."[38] Although a referendum in itself cannot bring about unilateral secession, "the democratic will of the people of a province carries weight," provided the demands of a "clear" majority on a "clear" question have been satisfied and the expression of the democratic will of the people of the province is thus "free of ambiguity both in terms of the question asked and in terms of the support it achieves."[39]

The duty of other provinces to negotiate with the one seeking secession by virtue of a clear majority of its constituency does not entail an obligation to concede secession.[40] On the other hand, they will not comply with their obligation to negotiate by "an absolute denial of Quebec's rights,"[41] or by "unreasonable intransigence."[42] The negotiations would be governed by the same constitutional principles that dictate the duty to negotiate — which include "federalism, democracy, constitutionalism and the rule of law, and the protection of minorities."[43] Though the duty of the other provinces to respect and respond to the legitimate aspirations of their counterpart seeking secession is a matter of constitutional obligation, the final outcome of the negotiations would be a political decision beyond the jurisdiction of the courts.[44]

The Court emphasized — and rightly so — that secession of one province implicates the rights and interests of all Canadians, as "[n]obody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec."[45] Secession, therefore, requires "clear" majorities on two fronts; a clear majority of the population of Quebec that would set the negotiations pertaining to secession in motion, and a clear majority of Canada as a whole that would sanction the constitutional change required to effect secession.[46]

The Court concluded as follows:

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38. *Id*. at 266.
39. *Id*. at 264.
40. *See id*. at 267.
41. *Id*. at 268.
42. *Id*. at 272.
43. *See id*. at 266.
44. *See id*. at 271-72.
45. *Id*. at 269; *see also id*. at 292-93.
46. *See id*. at 268, 294.

> [T]he secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.[47]

## IV. THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW

The reasoning of the Court on the second question can be summarized as follows. The right to self-determination of peoples as proclaimed in various international instruments includes two distinct components: *internal* self-determination, which signifies "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state"[48]; and *external* self-determination, which amounts to "a right to unilateral secession."[49] Since the right to self-determination is often mentioned in conjunction with "respect for the territorial integrity of existing states,"[50] it must be taken not to include a right to secession . . . except in very special circumstances.[51] The Court limited the

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47. *Id*. at 273.
48. *Id*. at 282.
49. *Id*.
50. *Id.; see also id*. at 277-78, 280.
51. *See id*. at 280-81.

categories of peoples finding themselves in the special circumstances that would warrant secession to three groups: (a) those under colonial domination or foreign occupation;[52] (b) peoples subject to "alien subjugation, domination or exploitation outside a colonial context;"[53] and, possibly, (c) a people "blocked from the meaningful exercise of its right to self-determination internally."[54] The Court concluded as follows:

> Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples",[55] nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.[56]

The conclusion of the Court cannot be faulted. The Courts exposition of the right to self-determination of peoples is, however, not free from anomalies. That is indeed also true of most political, and indeed academic, discourses on the right to self-determination.[57] For example, if the right to self-determination is to be reconciled with the sanctity of national borders and the territorial integrity of states, then self-determination and secession cannot possibly be accommodated under a common denominator. The concept of external *self-determination* to denote secession, or depicting secession as "an offensive exercise of self-determination,"[58] is therefore a contradiction in terms. Again, if the right to self-determination of oppressed or disenfranchised peoples simply entails their entitlement to equal freedom within, or the right to participate in the political structures of the country of, their nationality, then surely

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52. *Id*. at 285.
53. *Id*.
54. *Id*.
55. The Court avoided a definition of "peoples" as the repositories of a right to self-determination under international law. *See id*. at 281-82, 295.
56. *Id*. at 287.
57. Hurst Hannum's comment is apposite in this regard: "Perhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination. Yet the meaning and content of that right remain as vague and imprecise as when they were enunciated by President Woodrow Wilson and others at Versailles." HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 27 (1990).
58. Karl Doehring, *Self-Determination, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 56, 65 (1994).

secession does not come into play at all. The classification of peoples proposed by the Court for purposes of the (exceptional) right to secession is furthermore not consistent with the nature of their entitlement in each instance: "colonial domination," "foreign occupation," and "alien subjugation, domination or exploitation" are indeed, for purposes of secession, birds of a feather. If the substance of varying manifestations of self-determination is to be our guide, then a people "blocked from meaningful exercise of its right to self-determination internally"[59] falls in a different category. It must be taken to include two quite distinct groups, namely those who are excluded from political processes that determine their status in society, and those who are deprived of the entitlement to live according to their own customs and traditions.

These logical anomalies can be avoided by recognizing that over time the concept of self-determination has taken on quite different shades of meaning, and that the special and distinct significance of the concept is determined in each instance by the nature and predicament of the peoples claiming that right. Additionally, it must be recognized that the right to self-determination and the right under international law to secession must be construed as two quite distinct entitlements, each with its own beneficiaries, constituent elements, conditions of legitimate application, and consequences.

I shall next venture to put these presuppositions in their proper perspective.

### *A. Historical Perspective*

The right to self-determination of peoples, alongside the equality of nations large and small, has been recognized as a basic norm of international law.[60] In terms of the International Covenant on Civil and Political Rights,[61] self-determination, as currently perceived, entails the following principle: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[62]

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59. Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 285.

60. U.N. CHARTER art. 1, *reprinted in* 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 U.N.Y.B. 1043; *see also id*. arts. 15, 73.

61. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 27, G.A. Res. 2200 (XXI), *reprinted in* 999 U.N.T.S. 171, 179; 6 I.L.M. 360, 375 (1967).

62. *See generally* Felix Ermacora, *The Protection of Minorities Before the United Nations, reprinted in* IV RECUEIL DES COURS 246 (1983).

Religious, ethnic and cultural minorities have come to be recognized in public international law as "peoples" that have a right to self-determination. Although states remain the main subjects of international law, social institutions other than the state have long been recognized as entities with standing in international relations.[63] "Peoples" have thus come to be repositories in international law of a right to self-determination.

For a proper understanding of the right to self-determination in international law, three presuppositions must constantly be borne in mind. First, the concept of self-determination has over the years acquired different shades of meaning that must be clearly distinguished. Second, the meaning to be attributed to self-determination in any particular instance will be determined by the identity of the "people" who have a claim to that right. Finally, current state practice does allow the legitimate secession of a territory from an existing state, but that right to secession stands on its own feet and should not be construed as a component of the right to self-determination.

The right to self-determination[64] was introduced as a norm of international relations during World War I through separate contributions of the socialist leaders Joseph Stalin and Vladimir Lenin,[65] and the American President, Woodrow Wilson.[66] Since then, the concept has from time to time changed its meaning — and has in fact developed through three clearly distinguishable stages.

In the first phase of its development, demarcated more or less by the two World Wars, self-determination as perceived by Western

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63. *See* REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS, 1949 I.C.J. 174, 179-80 (Apr. 11).

64. For a more complete account of the right to self-determination, see Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 395-416 (1991).

65. According to Antonio Cassese, "the first forceful proponent of the concept [of self-determination] at the international level was Lenin." ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 15 (1995). Earlier, in 1913, Joseph Stalin had written a detailed pamphlet on self-determination entitled *Marxism and the National Question*. *See id*. at 14. But, according to Cassese, Lenin's *Thesis on the Socialist Revolution and the Right of Nations to Self-Determination*, published in 1916, "contain[ed] the first compelling enunciation of the principle" of self-determination of peoples. *Id*. at 15.

66. The famous Fourteen Points Address delivered on January 8, 1918 to a joint session of Congress by President Wilson was, according to Robert Friedlander, seen as transforming self-determination into a universal right. *See* Robert A. Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1 DET. C.L. REV. 71, 73 (1975). President Wilson included, in the fifth of those points, an appeal for "[a] free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined." 1 THE PUBLIC PAPERS OF WOODROW WILSON: WAR AND PEACE, 155-59 (Ray Stannard Baker & William E. Dodd eds., 1927). *See a*lso VERNON VAN DYKE, HUMAN RIGHTS, THE UNITED STATES, AND WORLD COMMUNITY 86 (1970).

protagonists of the principle remained focused upon legitimizing the disintegration of the Ottoman, German, Russian and Austro-Hungarian empires.[67] The secession of "peoples" from those empires was the major consideration, and in this stage of its development, the right to self-determination could have been said to vest in "ethnic communities, nations or nationalities primarily defined by language or culture" whose right to disrupt existing states derived justification from its substantive directive.[68]

It should be noted, though, that even then secession from existing empires was not a right in itself. The advisory opinion of the International Committee of Jurists in the *Aaland Island Case* was, according to Nathaniel Berman, "one of the first extended legal discussions of self-determination."[69] It was pointed out that "the right of disposing of national territory" was essentially an attribute of sovereignty and that "Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation."[70] It was only when "the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by applying the normal rules of positive law" that "peoples" may either decide to form an independent state or choose between two existing ones.[71] In circumstances where sovereignty has been disrupted, "the principle of self-determination of peoples may be called into play."[72] New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization, may come to the surface and produce effects which must be taken into account in the interests of the internal and external peace of nations.[73]

In the second, post-World War II phase of its development, the right to self-determination acquired a distinctly anti-colonialism

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67. *See* ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 131-34 (1986); *see also* Rupert Emerson, *Self-Determination*, 65 AM. J INT'L L. 459, 463 (1971); Friedlander, *supra* note 63, at 71.

68. Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51, 86-87 (1988) (quoting Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 463 (1971)).

69. *Id*. at 72.

70. *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, LEAGUE OF NATIONS O.J. Supp. 3, at 5 (1920).

71. *Id*. at 6.

72. *Id*.

73. *See id*.

nuance. In the *Western Sahara* case, it was thus decided that the right to self-determination was to be applied "for the purpose of bringing all colonial situations to a speedy end."[74] In the 1971 *Namibia* case, the right to self-determination was said to be applicable to territories under colonial rule and that it "embraces all peoples and territories which 'have not yet attained independence.'"[75] Nathaniel Berman rightly concluded that (in this phase of its development) "self-determination is a right of peoples that do not govern themselves, particularly peoples dominated by geographically distant colonial powers."[76]

In the same phase of development, the right to self-determination was extended to also apply to peoples subject to racist regimes.[77] This development was probably prompted by the claim of South Africa that the establishment of independent tribal homelands as part of its apartheid policy constituted a manifestation of the right to self-determination of the different ethnic groups within the country's African population. Not so, responded the international community. The tribal homelands were a creation of the minority (white) regime and did not emerge from the wishes, or political self-determination, of the denationalized peoples themselves. In this context, self-determination signified the right of (disfranchised) persons subject to racist regimes to participate in the structures of government of their own countries which controlled their political status. It is important to note that the "self" in self-determination was no longer perceived to be sections of the population in multinational empires, but to be

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74. Advisory Opinion No. 61, Western Sahara, 1975 I.C.J. 12, 31 (Oct. 16).

75. Advisory Opinion No. 53, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 31 (June 21).

76. Berman, *supra* note 68, at 54. *See also* CASSESE, *supra* note 67, at 76; VAN DYKE, *supra* note 66, at 87; Lynn Berat, *The Evolution of Self-Determination in International Law: South Africa, Namibia, and the Case of Walvis Bay*, 4 EMORY INT'L L. REV. 251, 283 (1990) (referring to self-determination and the equal right of peoples as "twin aspects of decolonization"); Emerson, *supra* note 67, at 463; Oscar Schachter, *The United Nations and Internal Conflict*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD, 401, 406-07 (John Norton Moore ed., 1974); Gebre Hiwet Tesfagiorgis, Comment, *Self-Determination: Its Evolution and Practice by the United Nations and its Application to the Case of Eritrea*, 6 WIS. INT'L L.J. 75, 78-80 (1987).

77. The linkage within the confines of the right to self-determination of systems of institutionalized racism and colonialism or foreign domination may be traced to the United Nations General Assembly's *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty* of 1965, in which the United Nations called on all states to respect "the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms," and to this end proclaimed that "all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations." G.A. RES. 2131, U.N. GAOR, 20th Sess., Supp. No. 12, at 11; U.N. Doc. A/6014 (1965).

the entire community of a territory subject to either colonial rule, foreign domination or racist regimes.

In the third phase of its development, which chronologically emerged somewhat later than the decolonization phase but cannot be separated from the latter in terms of time, self-determination indeed came to be seen as a certain entitlement of segments of the population of independent, non-racist states. Antonio Cassese opined that the right to self-determination as enunciated in Article 1 of the International Covenant on Civil and Political Rights of 1966[78] — and this would also apply to the identical provision in the International Covenant on Economic, Social and Cultural Rights of the same year[79] — was not confined to non-independent peoples but also belonged to national or ethnic groups "constitutionally recognized as a component part of a multinational state."[80] Gaetano Arangio-Ruiz pointed out that the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations of 1970[81] made the right to self-determination applicable to "all peoples."[82] The Helsinki Final Act of 1975,[83] by defining the principle of equal rights and self-determination of peoples as entitling "all peoples always . . . in full freedom, to determine, . . . without external interference, and to pursue as they wish their political, economic, social, and cultural development,"[84] certainly seems to include the peoples of independent states.[85] The definition of self-determination as the right of peoples "freely [to] determine their political status and freely [to] pursue their economic, social and

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78. International Covenant on Civil and Political Rights, *supra* note 61, at 173 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

79. *See* G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

80. Antonio Cassese, *The Self-Determination of Peoples, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92, 96 (Louis Henkin ed., 1981). Cassese added, somewhat obscurely, that this was not a right of minorities as such.

81. *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

82. GAETANO ARANGIO-RUIZ, THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW 135-36. (1979).

83. Conference on Security and Co-operation in Europe: Final Act, 14 I.L.M. 1292 (1975) [hereinafter The Helsinki Final Act].

84. *Id*. art. VIII.

85. UN Special Rapporteur, Héctor Espiell, also made it clear that peoples under colonial and alien domination were not the only ones with a right to self-determination. *See* HECTOR GROS ESPIELL, THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS, para. 42; U.N. Doc. E/CN 4/Sub 2/405 (1978).

cultural development"[86] does not in itself exclude ethnic sections within a political community.

In the *Greco-Bulgarian Communities* case of 1930, the Permanent Court of International Justice gave the following definition of the "general traditional conception" of a community, which in contemporary usage would be called "a people":

> the 'community' is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.[87]

More recently, the peoples within an independent and sovereign state with a claim to self-determination have been more clearly identified as national or ethnic, religious and linguistic minorities. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[88] thus speaks to "the right [of national or ethnic, religious and linguistic minorities] to enjoy their own culture, to profess and practise [sic] their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination."[89]

General definitions of the right to self-determination, such as the one contained in the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960,[90] which proclaimed the right of peoples to "freely determine their political status" and the right to

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86. *See* International Covenant on Civil and Political Rights, *supra* note 61, art. 1(1); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 15, at 66; U.N. Doc. A/4371 (1960). *See also Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* of 1970, *supra* note 81; *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11-12, U.N. Doc. A/6014 (1965).

87. Advisory Opinion No. 17, *Greco-Bulgarian* "*Communities*," 1930 P.C.I.J. (ser. B) No. 30, at 21 (July 1930), *reprinted in* [1927-1932] 2 HUDSON WORLD CT. REP. 640, 653-54.

88. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/46/49/Add.1 (1992).

89. *Id*. art. 2.1.

90. ESPIELL, *supra* note 85, para. 62, n.33.

"freely pursue their economic, social and cultural development," must thus be limited and understood in the context of the "peoples" whose right is at stake.

Governments, through their respective constitutional and legal systems, ought to secure the interests of distinct sections of the population that constitute minorities in the above sense. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[91] clearly spells out the obligation to protect and encourage conditions for the promotion of the concerned group identities of minorities under the jurisdiction of the duty-bound state:[92] afford to minorities the special competence to participate effectively in decisions pertinent to the group to which they belong;[93] do not discriminate in any way against any person on basis of his/her group identity,[94] and in fact, take action to secure their equal treatment by and before the law,[95] and so on.

In 1995, the Council of Europe's Framework Convention for the Protection of National Minorities[96] spelled out minority rights in much the same vein: it guarantees equality before the law and equal protection of the laws.[97] States Parties promise to provide "the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage."[98] Furthermore, States Parties recognize the right of persons belonging to a national minority "to manifest his or her religion or belief and to establish religious institutions, organisations [sic] and associations,"[99] and the Framework Convention guarantees the use of minority languages, in private and in public, orally and in writing.[100]

Failure of national systems to provide such protection to sectional interests of minorities must be seen as an important contributing cause of the secessionist drive. However, international

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91. G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/46/49/add.1 (1992).
92. *See id*.
93. *See id*. art. 2.3.
94. *See id*. art. 3.
95. *See id*. art. 4.1.
96. 34 I.L.M. 351 (1995).
97. *See id*. art. 4.1.
98. *Id*. art. 5.1.
99. *Id*. art. 8.
100. *See id*. art. 10.1; *see also* Council of Europe, EUROPEAN CHARTER FOR REGIONAL MINORITY LANGUAGES (1992) (creating a charter to protect and promote regional or minority languages as a threatened aspect of Europe's cultural heritage).

law does not sanction secession as the answer to the plight of a repressed minority.

### *B. Self-determination Revisited*

In *Reference Re Secession of Quebec,* the Court defined the right to (internal) self-determination as "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."[101] In a more recent instrument of the United Nations,[102] the General Assembly reaffirmed:

> the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize[d] the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.[103]

The Declaration reaffirms that the right to self-determination belongs to all peoples. Several categories of peoples are, however, singled out in the Declaration as the ones whose right to self-determination deserves special emphasis. In particular, those under colonial or other forms of alien domination or foreign occupation and those who are not represented in the governmental structures of their country on the basis of equality and non-discrimination deserve special emphasis. These categories are, of course, not all-inclusive. The above historical exposition has shown that the right to self-determination developed over time and that its substantive meaning

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101. Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 282.

102. *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, G.A. Res. 50/6, U.N. GAOR, 50th Sess., Supp. No. 49, at 13, U.N. Doc. A/50/49 (1995).

103. *Id*. at 13.

varies according to the disposition of peoples who, due to their particular situation, have a special stake in asserting that right.

Four components of the right to self-determination can thus be distinguished, determined in each instance by the identity of the "peoples" that emerged as repositories of that right. First, when World War I was drawing to a close, the idea of self-determination of peoples was advanced to legitimize the disintegration of the world empires of the time. Within this meaning existed the right of "peoples" in the sense of (territorially defined) nations to assert political independence. Second, following World War II, the emphasis of the concept of self-determination shifted to the principle of decolonization, the repositories of the concerned right now being colonized peoples and the substance of their right denoting political independence from foreign domination or colonial rule. Third, in the 1960s, yet another category of "people's" came to be identified: those subject to racist regimes. Here, the concept substantively denoted the right of such peoples to participate in the structures of government within the countries to which they belonged. Finally, the right to self-determination has been extended to national or ethnic, cultural, religious and linguistic minorities whose particular entitlements are centered upon a right to live according to the traditions and customs of the concerned group.

It should be evident that the inhabitants of Quebec, while not being a people as defined in international law, cannot claim a right to self-determination. Sections of the population of Quebec, united by a common ethnic extraction, cultural heritage or religious affiliation, could of course lament the denial of their right to self-determination on the grounds that they are not permitted to accede to a life style dictated by their national or ethnic, religious or linguistic extraction. But that is *de facto* not the case — at least not as far as Francophone Quebecers are concerned.

## V. SELF-DETERMINATION AND THE RIGHT TO SECESSION

In *Reference Re Secession of Quebec*, the Court defined secession as "the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane."[104] Except perhaps for noting that secession would entail more than "the effort" to redraw the boundaries of an existing state,

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104. Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 263.

this definition will suffice for purposes of our analysis of the right to secession under international law.

It is important to note that a people's right to self-determination does not include a right to secession,[105] not even in instances where the powers that be act in breach of a minority's legitimate expectations. A superficial reading of the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* cited above[106] has led the Court in *Reference Re Secession of Quebec* to construct, albeit hesitatingly, a right to secession in cases where the state is not "possessed of a Government representing the whole people belonging to the territory without distinction of any kind" because, if that were the case, the proscription in the Declaration of "any action that would dismember or impair, totally or in part, the territorial integrity or political unity of . . . states" would not apply.[107] The truth is that self-determination of peoples discriminated against in the allocation of political rights does not entail secession from the state of their nationality but simply requires the removal of the discriminatory laws and practices. Dismembering or impairing the territorial integrity or political unity of a racist state must not be taken to denote the territorial disintegration of the state but could, in the present context, mean a right to resistance, a legitimate armed struggle, or even foreign intervention to topple the regime.

Even in the case of colonialism, alien domination or foreign occupation, secession is not the appropriate remedy. Here, the colonized country already exists as a distinct territorial entity, and self-determination, therefore, simply denotes the right to independence of that territorial entity from (extra-territorial) foreign domination.[108]

The following considerations bear out the proposition that self-determination and secession signify quite different modalities of political action. First, the establishment of a new state by means of

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105. *See* VAN DYKE, *supra* note 66, at 88; Berman, *supra* note 68, at 87; Emerson, *supra* note 67, at 464-65.

106. *See Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, supra* note 102.

107. Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 280-81; however, the Court reveals its own doubt as to whether this circumstance would indeed create a right to unilateral secession. *See id*. at 286, 295. Karl Doehring is also of the opinion that "[i]t is . . . well arguable that discrimination against ethnic minorities could potentially give rise to a right of secession." Doehring, *supra* note 58, at 66.

108. It could perhaps be argued that Algerian independence was gained through secession from France, because Algeria was supposedly a "department" of France and not a colony. *See* Doehring, *supra* note 58, at 66. However, the status afforded by France to Algeria never really amounted to political integration but was in reality probably no more than an attempt to avoid the stigma of colonialism. The same applied to Portugal's proclaiming Mozambique to be a province of Portugal and not a colony.

secession applies to a particular territory,[109] while the right to self-determination belongs to a "people." Statehood essentially depends on a territorially defined foundation.[110] The right to self-determination also differs from a right to secession in that the former constitutes a collective right, while legitimate secession may be exercised (in the limited circumstances alluded to hereafter) as an institutional group right. A "collective human right" is afforded to individual persons belonging to a certain category, such as children, women, or ethnic, religious and cultural minorities.[111] The right of national minorities to peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion[112] thus belongs to every member of the group and can be exercised separately or jointly with any other member(s) of the group. An institutional group right, on the other hand, vests in a social institutions as such, and can only be exercised by that collective entity through the agency of its authorized representative organs. The church's right to internal sphere sovereignty is in that sense, an institutional group right.[113] So, too, is the right to secession of persons territorially united as a nation.[114] Finally, international instruments proclaiming the right to self-determination almost invariably also postulate inviolability of the territorial integrity of

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109. *See* Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 109 (1976) (noting that peoples seeking secession must be "located in a well-defined territorial area in which it forms a majority").

110. According to Hermann Mosler, "States are constituted by a people, living in a territory and organized by a government which exercises territorial and personal jurisdiction." Hermann Mosler, *Subjects of International Law*, 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 442, 449 (1984). Karl Doehring defined a state in international law as "an entity having exclusive jurisdiction with regard to its territory and personal jurisdiction in view of its nationals." Karl Doehring, *State*, *in* 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 423, 423 (R. Bernhardt ed., 1987). Herman Dooyeweerd defined the foundational function of a state in terms of "an internal monopolistic organization of the power of the sword over a particular cultural area within territorial boundaries." HERMAN DOOYEWEERD, III, A NEW CRITIQUE OF THEORETICAL THOUGHT 414 (1969). He further maintained that the leading or qualifying function of the state finds expression in a public legal relationship which unifies the government, the people and the territory constituting the political community into a politico-juridical whole. *Id*. at 433.

111. Yoram Dinstein defined "collective human rights" as those "afforded to human beings communally, that is to say, in conjunction with one another or as a group — a people or a minority. " *See* Dinstein, *supra* note 109, at 102-03.

112. *See Council of Europe: Framework Convention for the Protection of National Minorities*, 34 I.L.M. 35 (1995).

113. *See* Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745, 825-28 (1991).

114. "Nation" is used here in the sense of subjects of a particular territorially defined political entity (the State) (in German, *die Nation*), in contradistinction to "a people," which denotes a social entity united through a common history and certain ethnic, cultural and linguistic ties (in German, *das Volk*) and who may constitute sections within a nation or whose members might indeed be scattered across national borders of any particular state. *See* Dinstein, *supra* note 109, at 103.

existing states,[115] and reconciling the two principles in question necessarily means that self-determination must be taken to denote something less than secession. The United Nations' 1993 World Conference on Human Rights said it all when the right of peoples to "freely determine their political status, and freely pursue their economic, social and cultural development" was expressly made conditional upon the following proviso:

> [T]his [definition of self-determination] shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.[116]

Self-determination of peoples is thus a matter of *national independence* in the case of peoples subject to colonial rule or foreign domination, *participation in the political processes of a country* in cases where the people concerned have been denied such participation on a discriminatory basis, and *sphere sovereignty* of peoples that uphold a strong (sectional) group identity within a political community. Not one of these manifestations of self-determination amounts to the disruption of national borders of a territorially defined political community.

International law has been quite adamant in proclaiming the sanctity of post-World War II national borders,[117] and in censuring attempts at secession in instances such as Katanga, Biafara and the

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115. *See*, *e.g.*, The Helsinki Final Act, *supra* note 83, art. IV (territorial integrity) and art. VIII (equal rights and self-determination of peoples).

116. *World Conference on Human Rights, Vienna Declaration and Programme of Action*, U.N. Doc. A/Conf. 157/24, art. I.2 (June 25, 1993), *reprinted* in 32 I.L.M. 1661, at 1665 (1993); *see also Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, *supra* note 102, at 13.

117. *See* ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 104-05 (1963). *See*, *e.g.*, The Helsinki Final Act, *supra* note 83, art. III. The Charter of the Organization of African Unity, art. III, para. 3, 2 I.L.M. 768 (1963) committed Member States to adhere to the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence. " In furtherance of this principle, a Resolution adopted by the Assembly of Heads of State and Government, held at Cairo in 1964, reprinted in IAN BROWNLIE, AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPEDIA 10-11 (1979), called on all Member States of the OAU "to respect the borders existing on their achievement of national independence."

Turkish Republic of Northern Cyprus.[118] As explained by Vernon van Dyke, "the United Nations would be in an extremely difficult position if it were to interpret the right to self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members."[119] The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992 reiterated that its provisions must not be taken to contradict the principles of the United Nations pertaining to, inter alia, "sovereign equality, territorial integrity and political independence of States."[120] The Framework Convention for the Protection of National Minorities, 1995 of the Council of Europe also proclaims that "[n]othing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States."[121]

In terms of the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations, secession (or the restructuring of national frontiers) will indeed be lawful, provided the decision to secede is "freely determined by a people."[122] It is submitted that the decision rests with a cross-section of the entire population of the state to be divided and not only the inhabitants of the region wishing to secede.[123] On that basis alone, could the United Nations find peace with the reunification of Germany, and

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118. *See* Van der Vyver, *supra* note 64, at 403-07. For a more detailed discussion, see JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 235-36 (Katanga) and 265 (Biafara) (1979); JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS, 86-90 (Katanga), 84-85 (Biafara) and 108-111 (Turkish Republic of Northern Cyprus) (1987). *See also* Johan D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 35-37 (Katanga), 42-44 (Turkish Republic of Northern Cyprus) (1991).

119. VAN DYKE, *supra* note 66, at 102.

120. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, *supra* note 88, art. 8.4.

121. Council of Europe, *supra* note 100, art. 21.

122. ARANGIO-RUIZ, *supra* note 82. The Declaration provides, under the heading: "The principle of equal rights and self-determination of peoples" that "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, *supra* note 81.

123. Jan Heunis lost sight of this truism when arguing that the establishment of the South African (racially defined) homeland states (the TBVC-countries) occurred in conformity with the right to self-determination. *See* JAN HEUNIS, UNITED NATIONS VERSUS SOUTH AFRICA 328-30 (1986); *See also* HERCULES BOOYSEN, VOLKEREG, 'N INLEIDING (1980). For a critical comment on the Heunis/Booysen argument, *see* Van der Vyver, *supra* note 116, at 83 n.354.

the disintegration of the Soviet Union and of Czechoslovakia.[124] On that basis, too, Quebec could lawfully secede from Canada, as *Reference Re Secession of Quebec* rightly held.

The establishment of a new state through secession will also be recognized in international law if, following armed conflict, distinct territories of an existing state should agree to part ways under the terms of a peace treaty.[125] The secession of Eritrea from Ethiopia exemplifies a recent manifestation of this norm.

Secession is thus sanctioned by international law in only two instances: if a decision to secede is "freely determined by a people;" that is to say, by a cross-section of the entire population of the state to be divided and not only the inhabitants of the region wishing to secede; and secondly if, following armed conflict, national boundaries are redrawn as part of the peace treaty.

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124. Lee Buchheit specified, as elements for legitimizing secession in any given case, that the section of a community seeking partition should possess a distinct group identity with reference to, for example, cultural, racial, linguistic, historical or religious considerations; that those making a separatist claim must be capable of an independent existence, including economic viability (but bearing in mind international aid programs that might help a newly established political entity over its teething problems); and that the secession must serve to promote general international harmony, or at least not be disruptive of international harmony or disrupt it more than the status quo is likely to do. *See* LEE BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 228-38 (1978).

125. *See* CASSESE, *supra* note 67, at 359-63.

## VI. STATEHOOD OF A RECALCITRANT COMMUNITY

The prevailing circumstances in the province of Quebec cannot be likened to those that would vest in the collective peoples of Quebec a right to secession under international law. Constitutional change, approved by a cross-section of the entire Canadian population, would provide a legitimate basis for the secession of Quebec; but failing that, international law sanction of the secession of Quebec will remain wanting.

However, it has been said that "successful revolution begets its own legality,"[126] or as paraphrased by Bracton, "What is not otherwise lawful necessity makes lawful. "[127] This raises the question — hypothetical one would hope — of what the status of Quebec would be if its political leaders forcefully and unilaterally were to declare the territory an independent state.

International law personality of a people united or compounded by territorial boundaries is dependent on the capacity of statehood being attributed to such a political entity. Statehood, in other words, is a precondition for a territorially defined political entity to enter into treaties, to be eligible for membership of organizations that possess international law status, to exercise standing before international tribunals, to be counted when the creation of customary international law is in issue, and in general, to be the bearer of powers, rights and obligations in international law relations. Statehood, in a word, is the key for political entities of the kind under consideration to gain entry into the domain that is governed by public international law. What, then, are the qualities which a political entity need to have in order to be a state in the technical sense of international law?[128]

In *Reference Re Secession of Quebec*, the Court touched upon this question, siding quite explicitly with the constitutive theory of statehood.[129] While laboring the premise of the constitutive theory that support for secession expressed by a clear majority of the

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126. S.A. de Smith, *Constitutional Lawyers in Revolutionary Situations*, 7 W. ONT. L. REV. 93, 96 (1968), *also cited in* Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 290.

127. Venkat Iyer, *States of Emergency – Moderating their Effects on Human Rights*, 22 DALHOUSIE L.J. 125, 128 (1999). "*Id quod alias non est licitum, necessitas licitum facit*. " *Id*. at 128 n.7 (citing Glanville Williams, *The Defence of Necessity*, *in* CURR. LEG. PROBS. 216, 218 (1953)).

128. Van der Vyver, *supra* note 118, at 11.

129. Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 296 ("The ultimate success of . . . [de facto] secession would be dependent on [effective control of a territory and] recognition by the international community."). *See also* Van der Vyver, *supra* note 118, at 289 ("Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states.").

inhabitants of Quebec should prompt the federal and other provincial governments to enter into negotiations with Quebec on the question of constitutional change, the Court observed that:

> a failure [by Quebec] of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, . . . a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process.[130]

The Montevideo Convention on Rights and Duties of States (1933)[131] laid down in its definition clause[132] four requirements of statehood. The political entity claiming to be a state must have a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.[133] In terms of the *declaratory theory* of statehood, a political entity professing to be a state would in fact be one if it, objectively, complies with the criteria of statehood enunciated in the Montevideo Convention. Succinctly stated, the basic premise of the declaratist position is that "[r]ecognition presupposes a state's existence; it does not create it."[134]

The *constitutive theory* of statehood, on the other hand, is founded on the assumption that statehood is dependent — in addition to the Montevideo criteria — on the political entity in question being recognized as a state by other states. Oppenheim encapsulated the basic premise of the constitutive position as follows: "A State is, and

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130. *Id.* at 272-73; *see also id.* at 289 (holding that "national interest and perceived political advantage to the recognizing state" as well as "legality of the secession" would influence de facto recognition).

131. 49 Stat. 3097, T.S. 881, 165 L.N.T.S. 19, 3 Bevans 145.

132. *Id.* art. 1.

133. *See id.*

134. ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 147 (1986).

becomes, an International Person through recognition only and exclusively."[135]

A head-count will show that an overwhelming majority of international law experts subscribe to the declaratory theory.[136] Certainly in the United States, the leading authorities entertain a distinct bias in favor of the objective approach of the declaratory criterion of statehood.[137] Several international law instruments, likewise, expressly proclaim that the political existence of a state shall not be dependent on recognition by other states.[138] Although supporters of the constitutive theory of statehood included eminent international lawyers such as George Jellinek,[139] Hans Kelsen,[140] and

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135. LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 125 (8th ed., H. Lauterpacht ed., 1955); *see also* JOHN G. HERVEY, THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW AS INTERPRETED BY THE COURTS OF THE UNITED STATES 7 (1974) (". . . recognition . . . confers upon a state . . . the legal right to exist"); GEORG SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 58 (6th ed. 1976) ("The normal method for a new State to acquire international personality is to obtain recognition from existing States.").

136. *See* Doehring, *supra* note 110, at 427; *see also* CRAWFORD, *supra* note 118, at 22-23 n.88 (where he listed some of the declaratists), 17 n.62 (a list of the best known authorities who support the constitutive position). To Crawford's list of declaratists may be added, as far as non-American writers are concerned, Doehring, *supra* note 110, at 450 and JAMES, *supra* note 134, at 13-14, 147-48; and to his list of constitutivists, that of BERNARD R. BOT, NONRECOGNITION AND TREATY RELATIONS 17-19 (1968).

137. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (Under international law, "a sovereign state must have a defined territory and a permanent population, under its own governmental control, and must engage in, or have the capacity to engage in, formal relations with other sovereign states.").

138. *See Inter-American Convention on the Rights and Duties of States* (1933), art. 3, 49 Stat 3097, T.S. No. 881, 165 L.N.T.S. 19, 3 Bevans 145; *Charter of the Organization of American States* (1948), art. 9, 2 U.S.T. 2394, T.I.A.S. No. 2361, 117 U.N.T.S. 3, *amended by Protocol to the Charter of the Organization of American States* 21 U.S.T. 607, T.I.A.S. No. 6487 (1967).

139. *See* GEORGE JELLINEK, ALLGEMEINE STAATSLEHRE 273 (3rd ed. 1960) ("Der Staat ist Staat kraft seines inneren Wesens. In die Gemeinschaft des Völkerrechts aber tritt er erst vermöge der ihm von den anderen Mitgliedern dieser Gemeinschaft ausdrücklich oder stillschweigend zuteil werdenden Anerkennung ein, wie jede Individualität zur Person durch Anerkennung von seiten einer Rechtsgemeinschaft erhoben wird. Das Völkerrecht knüpft daher an das Faktum der staatlichen Existenz an, vermag dieses Faktum aber nicht zu schaffen.") [The state is state because of its inner nature. However, it can only join the community of international law in virtue of its having been recognized, expressly or implicitly, by other members of that community, in the same way as every individuality is elevated to being a person through recognition by a legal community. International law to this end is based upon the fact of an entity being a state, and cannot create this fact.] *See also* GEORGE JELLINEK, DIE RECHTLICHE NATUR DER STAATSVERTRÄGE 48 (1880) ("Auch für den Staat wird ein anderer zum Rechtssubject dadurch, dass es ihn als solches anerkennt . . . ") [Also as far as the state is concerned, someone else becomes a legal subject by the state recognizing him as such]; GEORGE JELLINEK , DIE LEHRE VON DEN STAATENVERBINDUNGEN 97 (1882) ("Wenn heute ein neues Staatswesen entsteht, so wird seine Geburt stets von anderen gefördert, ja es erhält sogar häufig seine erste innere Organisation von anderen Mitgliedern der Staatengemeinschaft.") [When currently a new state entity is created, its birth will always be attributed to others; indeed, it often even acquires its first internal organization from other members of the community of states.]; *id*. at 99-100.

140. *See* Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L. L. 605, 607 (1941): "The answer to this question, the establishment of the fact that in a given case a 'state in the sense of international law' exists, falls, according to general international law, within the jurisdiction of the states concerned. This establishment (*la constatation*) is the legal act of recognition." *Id.*

Sir Hersch Lauterpacht,[141] their following remained confined to a relatively small circle. Perhaps it was Lauterpacht himself that gave the constitutive theory a bad name, namely by adding to the basic premise the rider that once a political community complied with the "definite and exhaustive" (objective) conditions of statehood (for example, "external independence and effective internal government within a reasonably well-defined territory"[142]) the international community would be under an obligation to afford to that political community the recognition required to constitute its statehood.

To recognize a political community as a State is to declare that it fulfills the conditions of statehood as required by international law. If these conditions are present, the existing States are under the duty to grant recognition. In the absence of an international organ competent to ascertain and authoritatively to declare the presence of requirements of full international personality, States already established fulfill that function in their capacity as organs of international law. In thus acting, they administer the law of nations. This legal rule signifies that in granting or withholding recognition, States do not claim, and are not entitled to serve exclusively, the interests of their national policy and convenience regardless of the principles of international law in the matter. Although recognition is thus declaratory of an existing fact, such declaration, made in the impartial fulfillment of a legal duty, is constitutive, as between the recognizing State and the community so recognized, of international rights and duties associated with full statehood. Prior to recognition, such rights and obligations exist only to the extent to which they have been expressly conceded or legitimately asserted, by reference to compelling rules of humanity and justice, either by the existing members of international society or by the people claiming recognition.[143]

Analysis of state practice in respect of the Montevideo criteria of statehood[144] revealed all kinds of "anomalous" or "special cases",[145] which in turn prompted certain publicists to supplement those criteria with additional requirements of statehood. For example, in what seemingly constitutes a concession to the constitutive theory of statehood, D.W. Greig defined a state for the purposes of

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141. *See* HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 6 (1947) ("To recognize a political community as a State is to declare that it fulfils the conditions of statehood as required by international law.").

142. *Id*. at 31.

143. *Id*. at 6.

144. *See*, *e.g.*, CRAWFORD, *supra* note 118, at 36-48; Doehring, *supra* note 110, at 424-27.

145. *See* CRAWFORD, *supra* note 118, at 142-143.

international law as a territorial unit, containing a stable population, under the authority of its own government, and recognized as being capable of entering into relations with other entities with international personality.[146] Declaratist J.E.S. Fawcett, again, with reference to the special case of Rhodesia and in view of the principle of self-determination, proclaimed that the requirement of organized government would not be satisfied for purposes of statehood as long as there is a systematic denial to a substantial minority, or worse still, to a majority of the people, of a place and a say in the government.[147] Consequently, he suggested that the requirement of self-determination be added to the Montevideo criteria of statehood.[148]

Hans Reinhard argued, on the contrary, that the right to self-determination should not be seen as a constituent part of sovereignty — or statehood, I would add — since it essentially belongs to (non-sovereign) dependent peoples, and — again I would add, in terms of more recent adaptations of that principle — also to peoples subjected to racist regimes.[149] James Crawford, perhaps without conceding that the right to self-determination essentially belongs to non self-governing peoples, confined the pertinence of that right in respect of the question of statehood — in conformity, though, with the point made by Reinhard — to the legal subjectivity of newly established independencies only. Crawford stated: "It appears then that a new rule has come into existence, prohibiting entities from claiming statehood if their creation is in violation of an applicable right to self-determination."[150]

Within the ranks of adherents to the constitutive position, problems associated with self-determination and other peremptory norms of general international law, on the one hand, and statehood on the other, led to a shift in emphasis from recognition as a condition of statehood to non-recognition as the death knell of a prospective state. A noteworthy variation on this theme comes from John Dugard. He noted that it would be absurd to contend that

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146. D.W. GREIG, INTERNATIONAL LAW 93 (1976).

147. J.E.S. FAWCETT, THE LAW OF NATIONS 38 (1968). In a subsequent publication, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. INT'L. L. 1O3, 112 (l965-66), he seemingly held out this requirement as a distinct constitutive element of statehood, proclaiming that the regime claiming statehood "shall not be based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage. *Id. See also* Fawcett's brief response in 34 MOD. L. REV. 417 (1971) to the critique of D.J. Devine relating to the above point of view.

148. *See* FAWCETT, *supra* note 147, at 38.

149. H. REINHARD, RECHTGLEICHHEIT UND SELBSTBESTIMMUNG DER VÖLKER IN WIRTSCHAFTLICHER HINSICHT 23-26 (1980).

150. CRAWFORD, *supra* note 118, at 106.

territorially defined communities, while not recognized as states, have attained international legal personality or the status of statehood.[151] His contention was premised on a lucid and extremely persuasive analysis of United Nations practice in respect to the "law of non-recognition."[152] It has become increasingly evident that in contemporary international law the objective *essentialia* of statehood, with or without the added dimension of recognition, has been supplemented with additional requirements focused on "the 'quality' of statehood."[153] Dugard, while recognizing the existence of "factual anomalies" and "logical inconsistencies" in state practice regarding the recognition of aspirant states, concluded in essence on the basis of his own empirical analysis of the sources of customary international law that (formally): [154]

- statehood is conditional upon collective recognition of a political community as a subject in international law;

- the international community of states has delegated the authority to recognize a political entity as a state to the United Nations Organization;

- recognition as a prerequisite of statehood is exercised by the international community of states through admission of the political entity in question to membership of the United Nations;[155]

and that (substantively)

- non-recognition in the above manner is prompted by violations of the peremptory rules of general international law (*ius cogens*) by, or in relation to

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151. *See* DUGARD, *supra* note 116, at 123.

152. *Id.*

153. Gerhard Erasmus, *Criteria for Determining Statehood: John Dugard's Recognition and the United Nations*, 4 S. AFR. J. HUM. RTS. 207, 215 (1988) (book review). That, perhaps, is why Hermann Mosler proclaimed that the declaratory and constitutive theories of statehood had become "outdated." Mosler, *supra* note 108, at 450.

154. *See* DUGARD, *supra* note 118, at 164.

155. *See id*. at 73, where the submissions thus far are put forward in respect of decolonized states.

> the establishment of, the political community claiming statehood.[156]

Perhaps analysts tend to define basic legal concepts in too general and absolute of terms. Legal subjectivity for the purpose contract (the capacity to enter into an agreement, which capacity is conditioned by one's ability to appreciate the consequences of a legal act that creates or terminates legal obligations) is, substantive-wise, not identical to legal subjectivity for the purpose of criminal liability or accountability in tort (the capacity to commit unlawful acts, which capacity is conditioned by one's ability to appreciate the wrongful nature of an unlawful act, and in some jurisdictions, the ability to control one's conduct in accordance with an understanding of right and wrong).

Similarly, I would suggest that legal subjectivity of political entities in the context of constitutional law also does not have exactly the same material content as in international law. The need to differentiate is not a matter of relativity, it is a matter of teleological determinism. Substantive definitions of legal concepts, if they are to serve a useful purpose, are determined by the function in empirical law of the object of definition. Within the internal confines of the constitution, states compound a people within a defined territory and, through governmental institutions, execute a wide range of legislative, administrative, and judicial functions.[157] Where these basic attributes of a state are found to exist, there is an existential state within the meaning of constitutional law. However, for this political entity with internal (constitutional) statehood to enter the arena of transnational relations, considerations of a different kind apply and other, or rather further, conditions need to be satisfied; considerations and conditions which must essentially be accommodated within one's definition of statehood in the context of international law.

In the latter context, recognition becomes vital. This stands to reason. Though political communities, even if acting foolishly and improperly, can continue to operate as states within the four walls of their domestic territorial enclave, but without recognition they

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156. *See id*. at 80.

157. The celebrated Dutch legal philosopher, Herman Dooyeweerd, defined the state as the institutional community of a government and subjects, regulated by public law on the historical foundation of a monopolistic organization of the power of the sword (political authority) within a defined territory. *See* HERMAN DOOYEWEERD, DE STRIJD OM HET SOUVEREINITEITSBEGRIP IN DE MODERNE RECHTS — EN STAATSLEER 54 (1950); HERMAN DOOYEWEERD, VERKENNINGEN IN DE WIJSBEGEERTE, DE SOCIOLOGIE EN DE RECHTSGESCHIEDENIS 127 (1962); *see also* Dinstein, *supra* note 109, at 102.

cannot enter into relations with any other state unless that other state expressly or — by tolerating such relations — tacitly recognizes the political community as a subject of international law.

Here, however, further classification is called for. A political community only constitutes a state for purposes of international law inasmuch as other states, through recognition and by entering into international relations with that political community, permit it to participate in the areas governed by international law. *Vis-à-vis* Turkey, but no one else, the Turkish Republic of Northern Cyprus is a state. Diplomatic exchanges between these two states, as far as they — but no one else — are concerned, are governed by rules of international law. There are, therefore, states in the international law sense with a greater or lesser degree of recognition. In order to give a scholarly account of the implications of this phenomenon, it might be useful to take a closer look at the actual functioning of international law (state practice) in respect to the "generally recognized" and maverick states of the world.

In this regard, I find the distinctions made in the sociological analysis of the Dutch legal philosopher, Herman Dooyeweerd, particularly instructive.[158] Dooyeweerd classified social relationships into two major categories.

> (a) Inter-individual or inter-personal relationships (*'maatschapsverhoudingen'*) are those where the parties to the relationship in a coordinated manner function alongside one another without acting as members of a natural or organized social entity — for instance the relationship between contracting parties, or relations of friendship or animosity.
>
> (b) Community relationships (*'gemeenschapsverhoudingen'*), on the other hand, are those that precisely presuppose a communal bond between the persons concerned by virtue of their common membership of a natural or organized social structure — such as the relationship between

158. *See*, *e.g.*, DOOYEWEERD, DE STRIJD OM HET SOUVEREINITEITSBEGRIP, *supra* note 157, at 55; VERKENNINGEN, *supra* note 157, at 73; III A NEW CRITIQUE, *supra* note 110, at 177-78; HERMAN DOOYEWEERD, A CHRISTIAN THEORY OF SOCIAL INSTITUTIONS 74 (Magnus Verbrugge trans., John Witte Jr. ed., 1986).

> parent and child, or between a government and its subjects.[159]

There is a certain similarity between these concepts and the distinction made by the International Court of Justice in *Barcelona Traction* between the obligations of states *inter se* and the obligations of a state *erga omnes*.[160]

The international community is made up of many community structures, some of which confine their membership to states from a particular region (for example, the Organization of American States), while others confine their membership for the promotion of special interests (for example, the International Labor Organization). In each instance, the capacity of states to participate in the community relationships of those transnational structures remains confined to the members of the regional organizations or specialized agencies concerned. Nothing would, in principle, prevent such members from entering into inter-individual relations with non-member states, or for non-member states to enter into inter-individual relations with any of those organizations or agencies.

The world community of states, likewise, constitutes an international public order governed by an international normative system. Participation in community relations within the structures of the international community is similarly confined to those bodies politic that are recognized as members of the group. It would be incorrect to assume that a political entity has to be afforded United Nations membership before it can become a member of the international public order. Countries like Switzerland who do not wish to become member states of the United Nations are not necessarily excluded from community relations within the international community of states. However, a definite resolve not to admit a political entity to United Nations membership (collective non-recognition) would most certainly bar that entity from the international community of states and deprive it of the competence to participate in the relationships of the international community. Such political entities may still exercise the capacities of statehood in isolated, inter-individual relations — but that is all.

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159. The translation of "*maatschapsverhouding*" and "*gemeenschapsverhouding*" in A CHRISTIAN THEORY OF SOCIAL INSTITUTIONS, *supra* note 158, i.e. as "social relationship" and "communal relationship" respectively, is not at all acceptable.

160. Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain) (Second Phase), 1970 I.C.J. 3, para. 33 (Feb. 5).

The government of Ian Smith was thus invited, on the inter-individual level, to negotiate the independence of Zimbabwe in spite of the refusal of the international community to admit Rhodesia to their number.[161] South Africa was likewise a party to inter-individual negotiations that culminated in the independence of Namibia, even though South Africa's continued administration of South West Africa/Namibia had been declared illegal by the Security Council of the United Nations[162] and the International Court of Justice.[163]

What, then, are the functions of state associated, respectively, with inter-individual and community relations in international law? Inter-individual relationships emanate in essence from contract and delict, including both criminal and tortuous conduct. It is therefore reasonable to assert that states that comply with the constitutional criteria of statehood but are not generally recognized as such are nevertheless capable of entering into bilateral treaties with those states that are prepared to recognize their statehood. The maverick states of the world can furthermore be held liable in tort,[164] and their functionaries are likewise subject to the proscriptions of international crimes.

The capacity to enter into multilateral treaties that establish an international public order — albeit on the regional level, or with either a broader or more narrowly defined area of specialized interests in mind — is conditioned, on the other hand, by collective recognition; or, more accurately, frustrated by collective non-recognition. Being excluded from the international community by collective non-recognition deprives the maverick state of all the benefits and facilities of that community, including the law-creating

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161. *See* Res. 216, U.N. SCOR, 20th Sess., 1258th mtg. at 8, R 20.7.1(b)(ii) (1965) (condemning the Smith government as being the "illegal racist minority regime in Southern Rhodesia"); Res. 217, U.N. SCOR, 20th Sess., 1258th mtg. at 8, R 20.7.1(b)(ii) (1965) (imposing mandatory sanctions against Rhodesia).

162. *See* Res. 276, U.N. SCOR, 25th Sess. 1529th mtg. at 1, Res. 276 (1970).

163. *See* Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 3 (June 21).

164. In England it has been held that a non-recognized state, along with its government officials and officers can be afforded standing in English courts in civil proceedings as representatives of the government that established the unrecognized regime. *See* Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd., [1966] 2 All E.R. 536; [1967] App.Cas. 853 (H.L.). The case concerned the German Democratic Republic, which at the time was not recognized by the U.K. Lord Reid explained the rule as follows:

> We must therefore hold that the U.S.S.R. set up the German Democratic Republic not as a sovereign state but as an organization subordinate to the U.S.S.R. . . . and we must regard the acts of the German Democratic Republic, its government organs and officers, as acts done with the consent of the government of the U.S.S.R. as the government entitled to exercise governing authority. *Id*. at 547.

competence of contributing, through its practices, to the formation of customary international law.

John Dugard was perfectly right in concluding from actual state practice that the primary insignia of collective non-recognition finds expression in resolutions of the United Nations, inspired, it would seem, by the sanctity of *ius cogens*. The consequences of such collective non-recognition should be confined, however, to the denial of statehood for purposes of community relations within the international public order. Collective non-recognition does not deprive a political community that complies with the substantive *essentialia* of statehood of the power to execute the functions of state within the internal confines of constitutional law. As long as the maverick state can find any other state willing to associate with it, that maverick state will furthermore be capable of entering into inter-individual relations, governed by the norms of international law, with that other state.

Though legality may, within these confines, attend the existence and *de facto* functioning of the maverick state, collective non-recognition of that political community through the agency of the United Nations clearly signifies that its existence and functioning lack legitimacy.

# THE TRANSFORMATION OF THE ISRAELI BANKRUPTCY SYSTEM AS A REFLECTION OF SOCIETAL CHANGES

RAFAEL EFRAT*

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## I. INTRODUCTION

A fresh-start policy in bankruptcy provides the honest but financially troubled individual some form of financial relief by furnishing the individual with an opportunity to productively re-integrate into the economy and the society. While traditionally most countries have had a largely limited as well as punitive fresh-start policy, a growing number of countries today seem to deliver a broader financial relief to individuals who resort to bankruptcy protection.

The Israeli financial fresh-start policy in bankruptcy is an example of one country's dramatic transformation from a bankruptcy regime unsympathetic to the plight of deeply financially troubled individuals to a regime that is comparatively more concerned and somewhat more responsive to the needs of bankrupt individuals.

This evolution in the Israeli bankruptcy law over a period of almost fifty years did not take place in a vacuum. Similar to any other legal system in the

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world, the bankruptcy regime in Israel was continuously shaped by powerful outside social, political and economic pressures. The traditional socialist orientation of the political structure as well as society's traditional emphasis on personal responsibility and de-emphasis on individual choice have led in the past to the preservation of a relatively conservative fresh-start policy in bankruptcy. Moreover, one can attribute the creditor-oriented bankruptcy system to the powerful and active pro-creditor interest groups and to the lack of grassroots consumer organizations that could have served the interests of the politically underrepresented bankrupts. As the majority of Israeli bankrupts were primarily unsophisticated, unskilled, blue collar, Sephardic Jews belonging to the lower socio-economic class, their plight of financial hardship did not get the attention or support of the largely middle-class Ashkenazik members of the legislative body.

Lastly, the historically conservative and punitive nature of the Israeli fresh-start policy can be attributed to the perceived phenomenon of illegalism in Israeli society. This perceived phenomenon could be described as the tendency of Israelis to avoid conformance to laws and to continuously search for ways to bypass the legal system and its authority. Indeed, throughout the several reforms of the bankruptcy system there was an underlying perception by Israeli legislators that a more liberal approach to the fresh-start policy would be disastrous. Legislators were concerned that such an approach would be abused by the average citizen and perceived as a way to avoid the legal obligation of repaying one's debts.

While its most recent liberalization was prompted by an internal factor (the massive increase in the numbers of financially troubled individuals being redirected from the bankruptcy system to prison), external social forces were the dominant contributors to the liberalization of the fresh-start policy in Israel. First, one can attribute the liberalization of the fresh-start policy to society's shift from collectivism to individualism. The recognition and acknowledgment of the dignity, privacy and autonomy of the individual helped generate an environment more hospitable to the idea of a second chance for a financially troubled individual.

Second, the changing orientation of Israel's economy from being socialist-based to more capitalistic can also be linked to the liberalization of the fresh-start policy. As entrepreneurship became a more widely-accepted activity in Israel, society began to acknowledge the incentives a more liberal fresh-start policy could provide to a private market economy.

Lastly, the recent growth and social acceptance of consumerism and debt undertaking in Israel have brought about a more tolerant attitude towards the over-extended consumer who falls into financial trouble. This tolerance may have contributed to wider support for the recent liberalizing of the fresh-start policy.

This Article will first briefly identify and discuss the transformations that have taken place in the Israeli fresh-start policy in bankruptcy law during the last fifty years. The Article will then attempt to explore and

address critical societal changes that may have had a discernable impact on the evolution of the bankruptcy regime in Israel during the last fifty years.

## II. THE EVOLUTION OF THE FRESH-START POLICY IN ISRAELI BANKRUPTCY LAW

Long before the establishment of the State of Israel in 1948, Jewish communities around the world struggled with how to treat financially troubled individuals. Initially, the Jewish communities were strong advocates for the freedom and dignity of financially troubled debtors. Although non-Jewish legal institutions regularly imprisoned defaulting debtors, the Jewish communities initially prohibited such practices.[1] However, beginning in the seventh century, social and economic changes brought about more tolerance towards punitive debt-collection practices in many Jewish communities.[2] The continuing growth of commerce and the persisting custom of debtor's prison outside the Jewish communities culminated, by the sixteenth century, in widespread acceptance in most of the Jewish communities of imprisoning financially able debtors for failing to pay their debts.[3]

The emerging practice in Jewish communities of imprisoning defaulting debtors, deemed to have financial ability to satisfy debts, was formally adopted in the newly established Jewish state in 1948.[4] Under the new law, a debtor who had the ability to pay her debts but failed to do so, was subject to imprisonment up to ninety-one days. Moreover, the debtor had the burden to prove that she was unable to repay the debt.[5]

Similar to this creditor-oriented debt collection mechanism, the leaders of the young Jewish State adopted a largely pro-creditor bankruptcy regime modeled after the British Bankruptcy Act of 1914.[6] While this early bankruptcy law recognized the right of the bankrupts to obtain debt-forgiveness, it reserved this valuable benefit to financially troubled individuals who were able to repay substantial sums of their outstanding debts.[7]

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1. *See* MENACHEM ELON, HERUT HAPRAT BEDARCHE GVEYAT HOV BAMISHPAT HA'IVRI [FREEDOM OF THE DEBTOR'S PERSON IN JEWISH LAW] 16 & 255-56 (1964). *See also* Menachem Elon, *The Sources and Nature of Jewish Law and its Application in the State of Israel – Part II*, 3 ISR. L. REV. 88, 108 (1968).

2. *See* ELON, *supra* note 1, at 257.

3. *See* Elon, *supra* note 1, at 114 n.301.

4. *See* Ron Harris, *Nefilato Ve'aliyato Shel Ma'asar Ha'chayavim* [*The Fall and Rise of Debtors' Prison*], 20 TEL-AVIV U.L. REV. 439, 460-62 (1996).

5. *See id.* at 461.

6. *See* SHLOMO LEVIN, PSHITAT-REGEL [BANKRUPTCY] 13 (1984); *see also* Celia W. Fassberg, *Cross-Border Insolvency in Israeli Law*, *in* ISRAELI REPORTS TO THE XIII INTERNATIONAL CONGRESS OF COMPARATIVE LAW 113-15 (Celia W. Fassberg ed., 1990).

7. Pursuant to the bankruptcy law, a court was precluded from granting the debtor an unconditional discharge if the bankrupt's assets were "not of a value equal to five hundred mils in the pound on the amount of his unsecured liabilities. . . ." Bankruptcy Ordinance, 1936, Official Gazette, Supp. 1, § 26(3) [hereinafter the 1936 Bankruptcy Ordinance].

During the first thirty years of the State of Israel, the legislature and the courts were largely unsympathetic, and at times even hostile, to the plights of financially troubled individuals. The legislature's hostility towards bankrupts initially manifested in the adoption of laws aimed at penalizing the bankrupts and impairing their ability to resume a new chapter in their lives. Beginning in the 1950s, the government banned all individuals declared bankrupt from serving as a member of any city council or municipality.[8] In the early 1960s, financially troubled attorneys who declared bankruptcy were prohibited from ever practicing again.[9] In the middle of the 1960s, the government declared that any contractual agency relationship automatically terminates when either the agent or the principal is declared bankrupt.[10] A few years later, the government announced that a bankrupt individual could no longer enter into any binding contractual relationship.[11]

This belligerent attitude towards bankrupts culminated in 1976, when the Israeli legislature severely restricted financially troubled individuals' access to bankruptcy protection.[12] The legislature curtailed debtors' access to the bankruptcy process because it believed that the recent increase in debtor-initiated bankruptcy petitions, as opposed to creditor-initiated petitions, was inconsistent with the original bankruptcy mandate which was intended to serve creditors' interests.[13] The legislature was also persuaded that it was critical to curtail debtors' access to bankruptcy protection because the recent increasing number of voluntary petitions was violating fundamental moral norms of the society, was too expensive for the government to administer, and was harmful to the debtors themselves.[14]

The unsympathetic attitude towards bankrupts in Israel can also be illustrated by the acts of the judiciary. While the Supreme Court recognized the legitimate interest of a financially troubled individual to pursue a financial

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8. *See* Rafael Efrat, *The Evolution of the Fresh-Start Policy in Israeli Bankruptcy Law*, 32 VAND. J. TRANSNAT'L L. 49, 66 (1999).

9. *See id*.

10. *See id*.

11. *See id*.

12. Specifically, the government added three provisions to the bankruptcy law with the goal of reducing the frequency of bankruptcy filings initiated by the debtors. The first provision stated that a debtor may not voluntarily commence a bankruptcy petition unless the following conditions were satisfied: (a) he has liabilities in excess of ten thousand Israeli Lirot (approximately $1,250 American dollars or almost seven monthly salaries of the average bankrupt); (b) the debtor has at least two creditors; and (c) he enclosed with his bankruptcy application a report about his financial condition. *See* the 1936 Bankruptcy Ordinance, *amended by* 797 S.H. 106, § 7(1) (1976) [hereinafter the 1976 Bankruptcy Amendment]. Second, a court was granted the authority to deny an application for bankruptcy protection unless it was satisfied that, considering the judgment execution proceedings, which may or may not have yet been taken against the debtor, bankruptcy proceedings are the appropriate course of action. *See* the 1976 Bankruptcy Amendment § 7. Lastly, a court was granted the power to annul the bankruptcy adjudication of an individual if the court determined the bankruptcy process would not benefit the creditors. *See* the 1976 Bankruptcy Amendment § 29(1)a.

13. *See* Efrat, *supra* note 8, at 77 n.167.

14. *See id*. at 76-81.

fresh-start in bankruptcy, the Court construed that policy very narrowly. Similar to the limitations the legislature placed on a debtor's access to bankruptcy in 1976, the Supreme Court mandated that a debtor's financial relief in bankruptcy be directly conditioned on the creditor's receipt of adequate distributions. In doing so, the Court admittedly hoped to preserve some fundamental moral values of debt-repayment in the market place.[15]

Lastly, the government's negative predisposition during Israel's first thirty years towards the plight of financially troubled individuals was demonstrated in its strengthening of debtor-prison law. During Israel's early years, several attempts were made to liberalize debtor prison law inherited from the Ottoman Empire; every attempt failed as there was strong resistance coming from the powerful community of judges and the bar association. These well-established groups, judges and the bar, believed that liberalization of debtor prison law would impair the only effective tool for dealing with the perceived chronic problem of debt-repayment avoidance by certain segments of the newly formed society in Israel.[16] During parliamentary debate on the reform of debtor prison law, several legislators echoed this sentiment, arguing that existing social conditions in Israel simply made the country ill-prepared to deal with unethical and opportunistic tendencies in some segments of Israeli society.[17] Some legislators were even more explicit and specifically referred to the Sephardic Jews as the problematic segment of Israeli society.[18]

Faced with the strong opposition to any liberalization attempts to debtor prison law, the advocates for liberalization reform eventually settled for a reform of the law that in many ways was even more punitive than before. Specifically, in 1968, one newly adopted regulation shifted the burden of proof to a defaulting debtor, desiring to avoid the issuance of an imprisonment order, to establish that there was another way for the creditor to collect his debt.[19] Further in 1968, the legislature made it procedurally much easier for a creditor to obtain an imprisonment order against a defaulting debtor. From then on, creditors no longer needed to obtain a judgment from a court to proceed with a request for the debtor's imprisonment on account of a defaulting promissory note, a returned check, or a bill of exchange.[20]

Following the 1976 legislative bankruptcy reform, bankruptcy relief was no longer available for debtors who had few assets or limited potential for post-petition earnings. For the next twenty years, the bankruptcy process was not a refuge for the financially troubled individuals. Instead, the bankruptcy regime became a mechanism that served almost entirely the interests of the creditors.[21] Courts began interpreting the 1976 legislative

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15. *See id*. at 67-69.
16. *See id*. at 69-72.
17. *See id*. at 72-73.
18. *See id*. at 73.
19. *See id*. at 71.
20. *See id*.
21. *See id*. at 88.

reform in a way that foreclosed the door of bankruptcy to numerous overly-encumbered and financially distressed individuals unable to repay a meaningful portion of their debts within a reasonable period of time.[22] Applying the newly-adopted rigid eligibility standard when commencing bankruptcy protection, the courts exercised their discretionary powers and implemented the legislative mandate restricting individuals' access to the bankruptcy process. In routinely turning down bankruptcy relief applications of financially troubled debtors, the courts re-directed the debtors back to the judgment execution process.[23]

Unfortunately for those financially troubled individuals who were disqualified from the bankruptcy process, the judgment execution process was not much more hospitable to their needs because that process imposed the constant threat of imprisonment for failure to pay.[24] To avoid imprisonment and other collection procedures, the debtors were required to strictly fulfill the terms of a repayment order issued by an overly-burdened judgment execution officer. However, as the rigid repayment demands made by those orders became increasingly more difficult to satisfy, more debtors found themselves subject to the impending threat of an imprisonment order.[25]

However, as described earlier, the bankruptcy system was largely foreclosed to the financially troubled by the 1976 bankruptcy reform and its subsequent interpretations. Hence, as a result of the various changes in the law beginning in 1976, by the late 1980s, insolvent individuals with few assets and limited future income potential were, in practice, precluded from the bankruptcy process and the repayment options traditionally available under the judgment execution process.[26] As a result, an increasing number of insolvent individuals faced an impending fate of imprisonment. Indeed, by the early 1990s the number of imprisoned debtors had grown from thirty individuals per year in 1963 to over twenty-four thousand insolvent individuals.[27]

The massive and almost indiscriminate use of debtor's prison in Israel as a tool for collection of unpaid debts ceased almost entirely in 1993. Acting in response to an appeal brought by a recently-established grassroots debtors organization, the Supreme Court held that imprisonment orders would be issued only when the creditors can clearly show that the debtor has the means to repay the outstanding debt.[28] This movement by the grassroots organization served as a catalyst for the relatively revolutionary

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22. *See id*. at 89.
23. *See id*. at 94.
24. *See id*.
25. *See id*. at 94-95.
26. *See id*. at 98.
27. *See id*. at 99 n.256.
28. *See id*. at 101-02.

reform of personal bankruptcy law in 1996.[29] The bankruptcy reform of 1996 was aimed to promote two seemingly contradictory goals; while the reform was designed to expand the fresh-start opportunities for certain insolvent individuals, it also had the objective of penalizing certain insolvents who pursued the bankruptcy option.

The reform broadened the opportunities for a financial fresh-start by lifting the restrictive access limitations to bankruptcy relief placed on the financially troubled twenty years earlier. Furthermore, the reform dismissed the requirement that certain debtors formally apply for a discharge of debts and significantly liberalized the standard by which a court evaluates whether to grant a bankrupt an unconditional discharge of debts.[30]

However, to deter the individual from pursuing the bankruptcy option, the reform adopted several provisions aimed at restricting the bankrupt's ability to engage in business transactions upon the filing of his bankruptcy petition. Among other penalties, the bankrupt was prohibited from holding any credit card, retaining an interest in any corporate entity, or maintaining any checking account.[31] These seemingly inconsistent objectives of the bankruptcy reform demonstrated the legislature's recognition of the legitimate interest of the financially troubled to a financial fresh-start, while at the same time the reform reflected the legislature's persisting preoccupation to neutralize any attempt made by individuals to take unfair advantage of the more liberalized bankruptcy system.[32]

The 1996 bankruptcy reform evidenced a significant departure from the rather restrictive and conservative approach to fresh-start policy in Israel. For the first time, it formally proclaimed the importance of the basic dignity and freedom of the insolvent debtor. While the reform retained and even intensified the penalties associated with filing for personal bankruptcy, the overall departure signaled a new vision for financially troubled individuals in Israel. The next section of this Article will attempt to identify the reasons for the evolution of this new vision in Israel.

## III. THE TRADITIONAL BIAS AGAINST PRIVATE ENTERPRISE AND ITS IMPACT ON THE FRESH-START POLICY IN ISRAEL

To some extent, the evolution of the fresh-start policy in the Israeli bankruptcy law has been a function of society's evolving view toward entrepreneurship. A broad fresh-start policy provides incentives for individuals to start new business enterprises and undertake risks because such a policy provides the entrepreneurial individuals an important cushion

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29. *See id*. at 102.
30. *See id*. at 108-10.
31. *See id*. at 112-13.
32. *See id*. at 113.

and a safeguard in the event of a business failure.[33] Conversely, a conservative and punitive fresh-start policy discourages individuals from taking entrepreneurial risks. As discussed earlier, the Israeli fresh-start policy has traditionally exhibited conservative and punitive features. One of the reasons for this policy in bankruptcy is Israeli society's traditional ambivalence towards individual entrepreneurship.

Leaders of the early Zionist movement had conflicting views about the shape of the market economy of the anticipated Jewish State. American Jewish leaders advocated for a free market economy as a way to encourage private investors to invest capital in the Jewish State.[34] Further, this pro-capitalist American camp supported a decentralized and hands-off approach by the Zionist organization for the economic development of the new country.[35] In sharp contrast, European leaders argued against private enterprise and in favor of a government-centered economy.

This socialist-oriented approach to the market prevailed in the early days of the Jewish settlement, then called Palestine.[36] However, while the Jewish leadership retained its strong orientation toward a socialist-based economy, realities in the land eventually forced the leaders to abandon their absolutist views against private enterprise.[37] As a result, a consensus emerged in the leadership, whereby private enterprise became tolerated but not encouraged or fostered.[38] Hence, the emerging economic policies

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33. *See* Michelle J. White, *Economics Versus Sociological Approaches to Legal Research: The Case of Bankruptcy*, 25 L. & SOC'Y REV. 685, 694 (1991) ("The availability of bankruptcy is a valuable cushion for the self-employed, for if the business fails, bankruptcy can be used to discharge the firm's debts. The availability of bankruptcy as a downside cushion thus increases the attractiveness of starting a new business."). For example, the relatively liberal fresh-start policy in the U.S. reflects the American's orientation toward private market enterprise.

34. *See* YAIR AHARONI, THE ISRAELI ECONOMY: DREAMS & REALITIES 62 (1991) ("Judge Louis Brandeis of the United States advocated a free enterprise system as a basic means to colonize Eretz Israel. He proposed that the Zionist Organization encourage large-scale private investments and the immigration of potential investors into the country to achieve a rapid colonization.").

35. *See id.*

36. *See* YAKIR PLESSNER, THE POLITICAL ECONOMY OF ISRAEL: FROM IDEOLOGY TO STAGNATION 115-16 (1994) (describing the dominance of the labor movement in the 1920s through the 1940s over the Jewish settlement economy where profit did not play a role in operating and managing business enterprises); *id.* at 96 ("[The Israeli] Founding Fathers did not believe in economic laws, nor were they willing to rely on unfettered market forces to bring about economic growth or socially desirable income distribution.").

37. In the mid 1920s, the wave of middle-class immigrants from central Europe "signaled an end to the vision of a society-wide socialist economy and signified the loss of agriculture's exclusive standing. Not that the leadership abandoned its regard for the supremacy of agriculture or disdain for private enterprise, . . . but it could no longer pretend that agriculture was the only way to absorb mass immigration". *Id.* at 153.

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> Reluctant acceptance [of private enterprise] meant that private enterprise was going to be tolerated but, unlike cooperative and communal enterprise, it would not be eligible for financial support. Public funds would be channeled almost exclusively to agriculture, where only very few new settlements had been the result of private initiative. . . . [I]n other

during the early years of the State of Israel combined strong emphasis on central government control with an almost coerced and suspicious acceptance of private entrepreneurship.[39]

Several reasons backed the leadership's strong preference for government-run economy. First, many believed that the paramount and immediate national goals of nation building and immigrant absorption would not be safeguarded by sterile efficiency considerations.[40] Encouragement and absorption of new immigrants to the new state was one of the most important national goals at that time. Some believed that agriculture rather than industry would be most capable of absorbing the anticipated mass immigration.[41] Since private enterprise was more closely associated with industry rather than agriculture, most leaders did not view private enterprise favorably.[42] Moreover, some asserted that enterprise motivated by profit would actually be detrimental to the paramount national goal of absorption of new immigrants since absorption of new immigrants does not necessarily enhance profits.[43]

The second reason for the pre-disposition toward a socialist-based economy is the political and religious background of many Israeli leaders. Since most leaders of the pre-statehood Zionist movement, as well as the

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> words, private enterprise was going to be tolerated provided that it did not behave as private enterprise. There was no recognition of the profit motive as a useful guide to economic activity. *Id.*

*See also* Moshe Sanbar, *The Political Economy of Israel 1948-1982*, *in* ECONOMIC AND SOCIAL POLICY IN ISRAEL: THE FIRST GENERATION 6 (Moshe Sanbar ed., 1990).

39. *See* PLESSNER, *supra* note 36, at 77 ("[During the first twenty years of the Jewish state, the labor idealists] viewed private capital as relatively useless to the national effort. Yet, owing to the lack of national capital, it was necessary to invite private capital to participate, albeit reluctantly."); *see also* Eran Razin, *Social Networks, Local Opportunities and Entrepreneurship among Immigrants - The Israeli Experience in an International Perspective, in* IMMIGRATION & ABSORPTION: ISSUES IN A MULTICULTURAL PERSPECTIVE 156 (Richard E. Isralowitz, et al., eds., 1991) ("Because of a socialist bias, which has been characterized by deep antagonism, and even hostility, toward the self-employed sector, the Israeli political system has not been very receptive to small entrepreneurs.").

40. *See* Razin, *supra* note 39, at 4 ("[T]here was the relegation of economic considerations to a position of secondary importance because of what was perceived as national imperatives that ran contrary to economic efficiency In essence, it held that the state would have never been born if its founders had allowed efficiency considerations to bother them. . . ."). *See also* AHARONI, *supra* note 34, at 62 ("[European leaders] argued that the American experience was not applicable to conditions in Eretz Israel, that the emphasis on private enterprise and profits was premature and that affluent Jews were not ready to come to Eretz, Israel. Therefore, the Zionist Organization should subsidize those that were willing to immigrate. . . .").

41. *See* PLESSNER, *supra* note 36, at 150.

42. *See id.*

43. *See id.* at 152 ("The reasoning was simple: private enterprise is motivated by private profits. . . . This implied that private enterprise was detrimental to the economic absorption of new immigrants and thus inimical to the main purpose of the Zionist Organization."). The belief that the goals of private enterprise are inconsistent with the national goals manifests itself in the heavy government involvement in the Israeli capital market. "As we have seen, the virtual nationalization of the capital market was underpinned by the perceived need to allocate investment in a manner that would enhance national objectives." *Id.* at 61.

early statehood years, were of Eastern European origin and predominantly accustomed to socialist ideology, socialist orientation flourished in Israeli economy.[44] Lastly, some trace the origin of the Israeli government-run economy to the Jewish tradition of social equality.[45]

This socialist orientation of the pre- & early- statehood leadership was also predominant during the first few decades in Israel.[46] The policies adopted by the government during that time significantly restrained private enterprise and reflected society's uneasiness with private enterprise.[47] Although private enterprise was no longer degraded in the 1960s as it was initially, entrepreneurship remained highly regulated and disliked by the government.[48]

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> The first political nucleus that was organized enough to advance its ideological agenda [in the Zionist movement] in a systematic manner consisted of immigrants from Eastern Europe, who held both Zionist and socialist views. These views were forged by the terrible plight of the Jews, especially in Czarist Russia, and it was quite natural for the immigrants to associate the longings for a socialist revolution with a liberation of the Jews from their bondage, so much so that they came to view national and social liberation as inextricably intertwined. This is how socialist Zionism came into existence. *Id.*

*See also* AHARONI, *supra* note 34, at 16 ("The high degree of government intervention stems partially from the Socialist tradition of many pioneers of the first generation."); Milton Friedman, *Capitalism and the Jews, in* MORALITY OF THE MARKET: RELIGIOUS AND ECONOMIC PERSPECTIVES 401, 416 (Walter Block et al. eds., 1985) ("I conclude then, that the chief explanations for the anti-capitalist mentality of the Jews are the special circumstances of nineteenth century Europe which linked pro-market parties with established religions and so drove Jews to the Left. . . "); Eran Razin, *Location of Entrepreneurship Assistance Centers in Israel*, 89 J. ECON. & SOC'Y GEOGRAPHY 431, 433 (1998) ("The Israeli political-economic system was not very receptive towards small entrepreneurs, due to socialist bias associated with deep antagonism or even hostility towards small business owners.").

45. *See* AHARONI, *supra* note 34, at 16-17 ("To some extent, the [high degree of government] intervention has also been a result of the prophetic message of Judaism inspired to achieve social justice, human equality, brotherhood and mutual responsibility and a high level of education."). *But see* NATHAN GLAZER, AMERICAN JUDAISM 138 (2d ed. 1973) ("[I]t is an enormous oversimplification to say Jews in eastern Europe became socialists and anarchists because the Hebrew prophets had denounced injustice twenty-five hundred years before.").

46. *See* AHARONI, *supra* note 34, at 194 ("At the beginning of the 1950s, the formal ideology of the labor movement leaders continued to oppose private property and called for *Hagshama* (fulfillment), pioneering, and sacrifice and the disciplining of the individual to achieve collective goals and socialist vision."); PLESSNER, *supra* note 36, at 5 ("This book tries to describe the Israeli economy and understand it in light of the systematic exclusion and distrust of, and the squeezing of operating space for, private enterprise."); MEIR TAMARI, CORPORATE FINANCE UNDER CONDITIONS OF GOVERNMENT INTERVENTION: THE ISRAELI CASE, 1950-1972 23 (1979) ("Although private enterprise was recognized [following the establishment of the State of Israel] . . . it was and is felt that reliance on private entrepreneurship would not lead to the achievement of the social and political goals. . . .").

47. *See* AHARONI, *supra* note 34, at 240 ("The need to receive a license for almost any activity may have been a major curb, restraining private initiative. . . .").

48. "In the first decade of statehood, . . . private ownership was not assumed to be an acceptable form of pioneering activity. Since the 1960s, the government has veered sharply away from direct control, but this has not meant a free market. The Israeli economy is still highly politicized, and it is almost impossible to be successful in a business without a favorable

However, a liberalization trend in the economy, which began approximately twenty years ago, has brought about a more conducive environment for private entrepreneurship. Starting with the displacement of the socialist-minded Labor party by the more private market-oriented Likud party, the liberalization of the socialist-based economy has ensued.[49] Indeed, studies indicate that by the beginning of the 1980s, the Israeli society had become much more receptive to the role of private enterprise in the Israeli economy.[50] Reinforced by approving public opinion, the process of market liberalization has significantly accelerated since 1985, resulting in a decrease in government domination of credit allocation, a decrease in the private sector's reliance on government consent for operation, and a decrease in overall public participation in the economy.[51]

The evolution of fresh-start policy from being a much conservative and punitive to a more liberal one, reflects the changing economic ideology in the Israeli society. While Israeli society traditionally championed a socialist market-oriented ideology, it recently transformed its approach to a more private enterprise-oriented market.[52] The principles of a liberalized fresh-start policy are more compatible with a private market economy; thus, the

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government attitude." *Id.* at 161-62; PLESSNER, *supra* note 36, at 11 ("[T]he dominating role played by the government during the first two decades created an environment hostile to private enterprise. . . .").

49. *See* MENACHEM MAUTNER, YERIDAT HA'FORMALIZM VE'ALIYAT HA'ARAKHIM BA'MISHPHAT HA'YISRAELI [THE DECLINE OF FORMALISM AND THE RISE OF VALUES IN ISRAELI LAW] 131 (1993) (stating that the political change of 1977 brought about full legitimization of private enterprise); PLESSNER, *supra* note 36, at 41 ("[T]he domination of the capital market by the government has been slowly declining recently. . . ."); *id.* at 220 (stating that the political victory in 1977 by the economically neo-conservative political party, Likud, brought about the abolishment of "a regulatory system that had been in place since Israel's early days."); Razin, *supra* note 39, at 157 ("[The gradual change in attitude in favor of the small business sector in Israel] was provoked in part by a political-ideological shift. The right-wing Likud party which assumed power in 1977, was at least officially more committed to free enterprise than the Labor Party, which had let Zionist and Israeli politics until then."). However, while some trace the fundamental changes in the orientation of the market to much earlier in the Israeli history, some contend that the changes did not begin until the mid 1980s. *Compare* Sanbar, *supra* note 38, at 19 (asserting that the Labor governments of the 1960s actually initiated the trend towards a free market orientation), *with* AHARONI, *supra* note 34, at 192 (questioning whether the political change in 1977 actually brought about any change in economic orientation in Israel).

50. *See* Avi Gottlieb & Ephraim Yuchtam-Yaar, *Materialism, Postmaterialism, and Public Views on Socioeconomics Policy: The Case of Israel, in* 3 POLITICS & SOCIETY IN ISRAEL: STUDIES OF ISRAELI SOCIETY 385, 396 (Ernest Krausz ed., 1985) ("[The Israeli public believes that] the preferred source of economic intervention and change is the private sector, bolstered indirectly by concessions from the government.").

51. *See* ASSAF RAZIN & EFRAIM SADKA, THE ECONOMY OF MODERN ISRAEL: MALAISE AND PROMISE 191-205 (1993); *see also* PLESSNER, *supra* note 36, at 278-81. Governmental receptiveness to the role of private enterprise in Israel's economy has intensified in the late 1980s as a way of absorbing the influx of mass immigrants from the former Soviet Union. *See* Razin, *supra* note 39, at 155-56.

52. Recent governmental support for private enterprise is reflected in the Ministry of Education's newly adopted high school curriculum that strongly advocates entrepreneurship. *See* Joseph Shimron & Dani Klos, *Entrepreneurial Education Makes its Debut in Israel: New Curriculum in an Ideological Shift*, 26 CURRICULUM INQUIRY 25 (1996).

emerging market orientation created a more receptive environment for the reformed fresh-start policy.[53] Specifically, since the market oriented philosophy is more tolerant of individuals taking business risks as a way of initiating private business enterprise, the recent liberalization of the fresh-start policy provides the necessary incentives for such behavior by generating an important cushion and safeguard in the event of financial failure. Indeed, the private enterprise market orientation philosophy now prevailing in Israeli society clearly influenced the debates and the formulation of the recently enacted and broader fresh-start policy.[54]

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53. A similar observation was made relating to the transformation of the U.S. fresh-start policy during the nineteenth century. *See* Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 56 (1986) ("[The growth of entrepreneurs during the nineteenth century in the U.S.] created a fundamental change in public attitudes toward borrowing and eventually toward economic failure and insolvency as well. Indebtedness, once regarded as a sign of extravagance and poor financial management, came to be seen as an appropriate and indeed essential aspect of successful commercial activity.").

54. In persuading the chairman of the sub-committee on bankruptcy reform to adopt liberalization of the fresh-start policy in Israel, the Deputy Attorney General emphasized that the "idea is to permit an economic unit [of a person] to have a limited liability since that is a pre-requisite to private enterprise." *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judicial Comm.*, 13th Knesset 9 (May 23, 1995) (statement of Davida Lachman-Messer, Deputy Attorney General).

## IV. THE RISE OF INDIVIDUALISM AND ITS IMPACT ON THE FRESH-START POLICY IN ISRAEL

The transition from the traditional and conservative fresh-start policy to a more liberal policy was due, in part, to a shift in the orientation of Israeli society from collectivism toward individualism. Individuals in an individualist-oriented society are more concerned with their own personal goals as opposed to the goals of the collective.[55] In such a society, the belief in the dignity and sacredness of the individual has a high value.[56] This orientation tends to safeguard the individual's rights, interests, property, and privacy.[57] In contrast, individuals in a collectivist-oriented society tend to give priority to collective goals over the goals of personal ambitions of the individual.[58]

A society's orientation toward collectivism or individualism influences its fresh-start policy. A broader fresh-start policy is consistent with individualism, since an expansive debt-forgiveness policy acknowledges and safeguards the dignity of the individual debtor. This policy provides the debtor with a meaningful opportunity to earn a living, have control over his life, choose among various options, and retain a certain degree of personal autonomy.[59]

During the first twenty years of its existence, Israeli society by and large had a collectivist orientation.[60] That orientation placed significant obstacles in the path of any liberalization attempt towards the fresh-start policy since the financial interests of the community trumped those of the financially

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55. *See* LAWRENCE FRIEDMAN, THE REPUBLIC OF CHOICE 61 (1993) ("The concept [of individualism] stresses the right of each person to develop himself or herself as an individual; to choose as freely as possible a suitable and satisfying style of life."); *see also* Harry C. Triandis, *The Self and Social Behavior in Differing Cultural Contexts*, 96 PSYCHOLOGY REV. 506, 509 (1989).

56. *See* ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 142 (1985).

57. *See* Batya B. Weinreb, Cultural Reflections in Multinational Corporations: A Comparison Between Israeli and U.S. Subsidiaries 46 (1986) (unpublished Ph.D. dissertation, Stanford University) (on file with the Stanford University Library).

58. *See* Triandis, *supra* note 55, at 509.

59. *See* Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 536 & 543 (1991).

60. *See* AHARONI, *supra* note 34, at 194 ("At the beginning of the 1950s, the formal ideology of the labor movement leaders continued to . . . [preach] for *Hagshama* (fulfillment), pioneering, and sacrifice and the disciplining of the individual to achieve collective goals and the socialist vision."); MAUTNER, *supra* note 49, at 122 ("The fundamental cultural value in the 1950s [in Israel] was the value of personal sacrifice: the sacrifice of the individual's life for the collective . . . in areas such as settlement, security & immigrants absorption, etc."); YOSSI MELMAN, THE NEW ISRAELIS: AN INTIMATE VIEW OF A CHANGING PEOPLE 208 (1992) ("Israeli society in those early years [of the mid 1960s] loyally reflected Labor's socialist ethos. The individual's wishes were wholly subject to the needs of the community."); Yael Har-Even, Emigration as a Social Problem: Emigration from Israel as Reflected in "Letters to the Editor" of Ha'Aretz, 1949-1987 52 (unpublished M.A. thesis, Tel-Aviv University) (on file with the Tel-Aviv University Library) ("The cultural tenants of that period (1949-1965) were derived from collectivists values which held that the person fulfills his purpose only if he serves the society.").

troubled individual. For example, in the 1970s the Israeli legislature significantly restricted individual access to bankruptcy protection.[61] Many legislators believed that limited sympathy towards the plight of the financially disadvantaged was necessary to prevent uncontrolled deterioration of commercial morals and norms in society at large.[62]

The collectivist orientation of Israeli society was a product of the nationalist ideals of that time of creating and securing a homeland for the Jewish people.[63] Furthermore, past experiences, national origin, and religious background of the leaders of the young country contributed to the fostering of the collectivist orientation.[64]

While the Israeli society still retains many traits of its collectivist identity,[65] the social force of collectivism began to decline and

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61. *See* the 1976 Bankruptcy Amendment, *supra* note 12.

62. *See Proposed Amendment of the Judgment Execution Law, 1974: Hearings Before the Judiciary Comm.*, 8th Knesset 4 (June 10, 1974) (statement of the chairman, Mr. Verheptig) ("Bankruptcy ruins a person economically. It also ruins the morals in the economy."). D.K. (1975) 312 ("This growing phenomenon [of increased bankruptcy filings] damages the commercial practices, the public order and the economic life. . . . I am looking forward to a comprehensive reform of the bankruptcy system which will improve the commercial practices and the morality of debt-repayment in Israel.").

63. *See* YARON EZRAHI, RUBBER BULLETS: POWER AND CONSCIENCE IN MODERN ISRAEL 163-64 (1997) ("Since 1948, many Israelis have regarded the State of Israel primarily as a collective expression of the Jewish people. . . . In this view, Israel was founded to secure the survival . . . of the Jewish people, and only secondarily . . . can it address the issues of individual freedom and welfare."); *see also* AMNON RUBENSTEIN, LE'HIYOT AM HOFSHI [TO BE A FREE NATION] 36 (1977) (describing how during the pre-statehood and early statehood years of Israel, the main objective of members of society was to build a new Jewish nation through settlements and hence the personal fulfillment of the individual was limited to serve the collective national goal by settling the land in the new country).

64. *See* EZRAHI, *supra* note 63, at 163 ("In Israeli society, the history of Jewish persecution has reinforced the communitarian-collectivist orientations already inherent in the religious, nationalist, and ideological sources of the polity, deepening already ingrained Jewish commitments to the primacy of the group."); *id.* at 286 ("[The Jewish religion] stresses the distribution of duties or obligations. . . . [T]he rhetoric of mitzvoth (commandments) assumes the primacy of collective corporate experience, of the community."); MELMAN, *supra* note 60, at 45 ("The centralist system in which the state intervenes in the life of the individual was founded on the Soviet model. . . . [T]he founders of Israeli socialism [many of whom came from Russia] grafted this collectivist approach onto Israel."). For more discussion on the links between the collective nature of the Israeli society and the Jewish tradition, see Shlomo Swirski, *Community and the Meaning of the Modern State: The Case of Israel*, 18 JEWISH J. SOC. 123 (1976).

65. *See* AHARONI, *supra* note 34, at 16 ("To date, Israeli society is characterized by a prevalence of a collectivist orientation, not by an individualistic orientation as in the Unites States or Western Europe."); EZRAHI, *supra* note 63, at 73 ("These developments in Western culture and politics have, of course, penetrated modern Israeli society. . . . Their impact in Israel has nevertheless been severely restricted by the powerful collectivist counter-liberal orientations toward language, space, and, time."). To illustrate his point, Professor Ezrahi provides two examples of the persisting collectivist nature of the Israeli society:

> By welding into the annual ceremonial schedule of memorial days, holidays, and festivals events of a few thousand years ago (the destruction of the Temple, the Exodus from Egypt) and events of more recent epic Jewish history (the Holocaust, the creation of the State of Israel), the Israeli calendar fuses historical and religious time. . . . This radical appropriation

individualism began to rise following the Six Days War in 1967.[66] Since the 1970s, for example, more and more Israelis have begun to use leisure and non-leisure time to pursue personal rather than communal activities.[67] Moreover, an empirical study in the late 1980s concluded that the major shift in the Israeli attitudes towards emigration is a reflection of a shift in the ideological orientation in the society from collectivism to individualism**.** Through the mid 1960s, the public negatively viewed an individual who emigrated from Israel; the act was regarded as a betrayal of the national goals of the country. In contrast, the study found that beginning in the late 1960s the public gradually began to tolerate and regard the practice of

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> of time for the narratives of collective history dwarfs and marginalizes autobiographical time. . . . In modern Israel, adult birthdays have characteristically been downplayed as brining too much attention to the individual, who is expected to be self-effacing and indifferent to private needs and delights. For decades birthdays were generally for children, and then celebrated in school with a party for several children at once, rather than as a separate one for each. While this is no doubt more economical, the notion that a separate birthday party celebrates individuality and uniqueness has been too weak to induce a sense of deprivation among teachers and parents alike.

*Id*. at 60-62. *See also* DAN HOROWITZ & MOSHE LISSAK, TROUBLE IN UTOPIA: THE OVERBURDENED POLITY OF ISRAEL 112 (1989) ("[C]ompulsory military service and reserve duty, in addition to [heavy] income tax and other levies, are basic tools at the disposal of the Israeli government for mobilizing the resources and energies of its citizens toward its collective goals."); Weinreb, *supra* note 57, at 47-48 ("In Israeli culture the collective is perceived to be the constitutive component of society, while the individual derives his/her importance from being an element in the collective or 'a link in the chain.' . . . [In comparison to the U.S., in Israel] there is considerably less respect for individual will, individual interests, individual property and privacy. . . .").

66. *See* GADI WOLFSFELD, THE POLITICS OF PROVOCATION: PARTICIPATION AND PROTEST IN ISRAEL 11 (1988) ("The sixties in Israel were a time of transition, as Israel became a "normal" Western society. The ideology of collectivism, although still prevalent, was being subsumed to a more individualistic life style and commitment."); Har-Even, *supra* note 60, at 54-55 ("While [during the earlier years of the State of Israel], the collectivism was the dominant value structure, it is possible to say that [in the later years] the value structure became more and more individualistic. . . . The research literature dealing with the Israeli society generally divides the trends in the Israeli society up until 1967 and after 1967."). *See generally* Luis Roniger & Michael Feige, *From Pioneer to Frier: The Changing Models of Generalized Exchange in Israel*, 33 ARCH. EUROP. SOCIO. 280 (1992) (detailing the cultural transformation in Israel from a collective vision to strong emphasis on individualistic independence).

67. *See* ELIHU KATZ & HADASSA HAAS, THE CULTURE OF LEISURE TIME IN ISRAEL: CHANGES IN PATTERNS OF CULTURAL ACTIVITY, 1970-1990 (1992). Other collective oriented activities have been in decline since the late 1960s:

> Once it was shameful to avoid army service. Today, young rock stars, sports heroes and fashion models regularly skip their stint in the army. Increasing numbers of young men — particularly from the sectors that once held the sabra fighter image dear- are choosing not to volunteer for combat units. . . . More and more kibbutzim — once the country's model of collective responsibility and idealism are relaxing their communal rules, and some are evolving into mere suburban bedroom communities of business havens.

Allison K. Sommer, *Who Are We Now*?, JERUSALEM POST INT'L ED., May 10, 1997, (publication no longer in circulation) (on file with author). *See* Har-Even, *supra* note 60, at 60.

emigration as an important personal decision of an individual, who is entitled to make the choices he or she deems appropriate.[68] Also, the rhetoric of leading public figures demonstrates the changing social orientation toward individualism.[69] The rise of individualism in the Israeli culture resulted from the partial fulfillment of the collectivist-nationalistic agenda of the earlier days,[70] the gradual but significant rise in the standard of living of the average Israeli citizen,[71] and the pervasive influence of the American individualistic culture on the Israeli society.[72]

The rise of individualism in Israel influenced the liberalization of its civil law, in general, and bankruptcy law in particular. The emphasis on the rights and dignity of individuals contributed to the adoption of revolutionary and fundamental liberty rights in the Israeli legislation. For example, in 1988 Israel finally adopted laws that prohibit employment discrimination based on gender, sexual orientation, marital status, parental status, age, race, religion, ethnic background, national origin, or party affiliation.[73] Furthermore, in 1992 the Knesset enacted the Human Freedom & Dignity Act, referred to by some as the constitutional revolution of the Israeli legal system.[74] Reform in the criminal law system also reflects growth in respect to individual autonomy. According to a recent penal reform, the prohibition against attempted suicide was abolished, as were the prohibitions against private acts of sodomy between consenting adults.[75]

Similarly, the rise of individualism contributed, in part, to the adoption for the first time of a more liberal fresh-start policy in bankruptcy. This

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68. *See id*. at 54.

69. During his swearing-in speech as the then new prime minister of the State of Israel, Yitzhak Rabin said, "[w]e are determined to place the citizen at the top of our concerns." EZRAHI, *supra* note 63, at 71.

70. *See* MAUTNER, *supra* note 49, at 127 (asserting that collectivism began to decline partly because the goal of nationhood has already been achieved); *see also* RUBENSTEIN, *supra* note 59, at 38 (contending that one of the reasons for the decline of the collective nature of the Israeli society was the lack of new collective missions for the young members of the society, except for the mission of service in the army, which created a sentiment among many that upon the service in the army there was no further need to serve the collective).

71. *See* AHARONI, *supra* note 34, at 195 ("[T]he constant rise in the standard of living and the receipts of personal reparations of money from Germany materially reduced the dependence of citizens on the political apparatus or the government system."); MELMAN, *supra* note 60, at 207-08 ("Israel in the 1960s was a modest society with limited financial means and resources. . . . The Six-Day War and its aftermath, however, changed [that] . . . The newly occupied territories provided Israelis with economic opportunities to boost their standard of living.").

72. MAUTNER, *supra* note 49, at 125 ("[I]n the 1970s and 1980s, as a result of the rapid influence of the American culture on the Israeli culture, a new culture evolved in Israel, one which was based on personal fulfillment and individualism. . . .").

73. *See* David Kretzmer, *Constitutional Law, in* INTRODUCTION TO THE LAW OF ISRAEL 39, 56 (1995).

74. *See id*. at 52.

75. *See* i*d*. at 256.

liberalization was motivated primarily by concerns for the welfare, privacy, and dignity of the financially troubled individual.[76]

## V. THE GROWTH OF CONSUMERISM AND ITS IMPACT ON THE FRESH-START POLICY IN ISRAEL

The increased legitimization in the Israeli society of personal debt undertaking and personal consumption is another contributor to the recent liberalization of the fresh-start policy in Israel. There is a link between society's perception of debt undertaking and consumption, on the one hand, and the fresh-start policy on the other hand, because as society begins to favorably regard debt and consumption, it also becomes more tolerant of bankruptcy, the sometimes natural consequence of debt. As society adopts a more receptive attitude towards bankruptcy, the environment becomes more conducive to a liberalization of the fresh-start policy in bankruptcy.

Studies have found that consumers' excessive undertaking of credit is closely correlated with financial trouble and bankruptcy.[77] Since overextension of credit is related to bankruptcy, it is important to understand society's perception of consumer credit undertaking to have a fuller appreciation of its attitude towards bankrupt individuals. To the extent that society negatively views the practice of undertaking consumer credit, society is likely to have a negative perception of individuals who file for bankruptcy because of their association with the practice. Further, since the undertaking of credit by individuals is used in many cases to support certain consumption patterns, an examination of society's attitude toward consumption will also provide an understanding of society's attitude toward credit undertaking, and ultimately toward bankruptcy.

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76. Statements made by the chairman of the recent bankruptcy reform subcommittee reflect those sentiments. *See Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 13th Knesset 45 (July 18, 1995) (statement of Yitzhak Levi, the chairman of the bankruptcy reform subcommittee) (referring to the proposed amendments in discharge in bankruptcy as important humanitarian changes); D.K 73 (1996) (statement of Yitzhak Levi, chair of the bankruptcy reform) ("The logical, the economic and the humanistic approach under cases [where the honest but financially troubled individual has no assets or income to repay his debts] is to give him a discharge."); *id*. at 83 ("Gentlemen, [this proposed reform] is a balance with the Basic Law: dignity and freedom of the individual with protection of his privacy rights."); *id*. at 96 ("In summary, I am calling upon you to give final approval for the this proposal that balances between the dignity and the rights of the financially troubled individual who desires to open a new chapter in his life, and the property rights of the creditors.").

77. *See The Increase in Personal Bankruptcy and the Crisis in Consumer Credit: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 21 (1997) (prepared statement of Ian Domowitz, educator and researcher from the Department of Economics and Institute for Policy Research at Northwestern University) ("[C]redit card use [in the U.S.] is very highly correlated with, if not causal determinant of, consumer bankruptcy."); *id*. at 36 (statement of Kim Kowalewski, Chief, Financial and General Macroeconomics Analysis Unit of the Congressional Budget Office) ("The increase in non-business bankruptcy filings [in the U.S.] since 1994, like past increases during economic expansions, mirrors an increase in the indebtedness of the household sector.").

To the extent that society negatively views the practice of acquiring credit for consumption purposes, it is less likely to forgive individuals who fall into financial trouble after undertaking excessive credit to support consumption patterns. Such an adverse perception toward consumption and credit undertaking is likely to be translated into a conservative fresh-start policy. Conversely, to the extent that society views the practice of credit undertaking or consumption as an acceptable or a cherished behavior, the society is likely to exhibit more understanding where an individual financially fails and is unable to repay his consumer credit undertaking. Such a positive or tolerant attitude toward consumption and credit undertaking may eventually be translated into a more liberal fresh-start policy.

While society's negative perception of consumption and the undertaking of debt can explain the traditionally conservative fresh-start policy in Israel, society's gradual acceptance and embracing of consumption and the undertaking of consumer credit can explain the recent liberalization of the policy. In its early years, Israeli society had a negative perception of private consumption and undertaking of debt. Indeed, private consumption and personal debt undertaking were limited. Consumption was limited primarily due to limited resources both at the individual[78] and national levels.[79] Also, consistent with the egalitarian ideology, held by the early leaders of the country, it was believed that limited private consumption would help assure the socialist agenda of the young country. Partly to that end, almost immediately upon the creation of the Jewish State, the government actively implemented a private consumption austerity program,[80] placed heavy taxes on consumption,[81] and conducted a guilt campaign against private consumption.[82] In addition to the lack of

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78. Since much of the population of Israel during its earlier years was composed largely of new immigrants, most of whom were refugee, they could not afford a high level of consumption. MELMAN, *supra* note 60, at 207 ("Israel in the 1960s was a modest society with limited financial resources.").

79. *See* Mohe Sanbar, *The Political Economy of Israel, 1948-1982*, *in* ECONOMIC & SOCIAL POLICY IN ISRAEL: THE FIRST GENERATION, *supra* note 38, at 9-10 ("After the cease-fire agreements had been signed in 1949, the supply of basic needs such as food, clothing and shelter, and the reorganization of the economic system, including the civil service, became the major tasks.").

80. *See id.* at 10 ("[In 1949, t]he government instituted a very strict austerity program consisting of controls on prices and foreign exchange and the rationing of food and other basic human necessities. This was meant to maintain at least minimum standards of consumption, especially for unemployed new immigrants and demobilized soldiers.").

81. *See* MELMAN, *supra* note 60, at 208 ("To implement this ideology [of anti-consumerism] the government took steps that prevented Israelis from obtaining basic Western consumer goods. It added huge taxes and levies of up to three hundred percent to the basic price of appliances like fridges, washing machines, irons.").

82. "[S]tarting with the Yishuv period and continuing uninterruptedly in the years of the state — political leaders, leading economists and influential newspaper persons joined in giving the average citizen a guilt complex. Citizens were told they should be ashamed for wanting to consume more, that only such an irresponsibility causes the country to be in a bad

resources and the government's campaign against consumption, the Jews in Israel were influenced by the Jewish tradition, which strongly advocated modest individual consumption.[83]

In addition to the anti-consumption sentiments existing in the earlier days of the country, the undertaking of personal credit was almost a rare phenomenon. People did not rely on personal credit primarily due to its limited availability in the anti-capitalist credit environment,[84] as well as the cultural and religious influences of the traditional Jewish community.[85]

The pervasive negative perception of consumption and the undertaking of debt resulted in an almost hostile environment for individuals who engaged in unacceptable levels of consumption, acquired credit to support the consumption activity, and then failed to repay the debt. This negative perception and hostile environment may have manifested itself in the traditionally conservative fresh-start policy in Israel.

However, following the 1967 war, Israeli society gradually began tolerating and, to some degree, even cherishing private consumption and personal credit undertaking.[86] Whereas previously affluent individuals were ashamed of displaying their wealth in public, it has now become almost a routine feature in Israeli society.[87] Indeed, consumerism[88] became

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economic state. . . . The citizen must refrain from even dreaming of owning such luxury items as a washing machine or a refrigerator." AHARONI, *supra* note 34, at 333. The government campaign seems to have worked. MELMAN, *supra* note 60, at 207 ("The prevailing mood [in the 1960s] caused the wealthy to take an apologetic stance, as if they were ashamed of their own affluence."); *id*. at 208 ("Thus the phrase "consumer goods" was considered obscene in the national vocabulary. Instead of consumerism, what was preached were the ideals of moderation and austerity.").

83. *See* MEIR TAMARI, THE CHALLENGE OF WEALTH: A JEWISH PERSPECTIVE ON EARNING AND SPENDING MONEY 132 (1995) ("'Thou shall walk modestly before thy God' is a spiritual demand by prophet Amos. This is reflected in the simplicity in furniture, clothing, and lifestyle of Jews throughout the centuries, a simplicity that has always been an integral part of Jewish living.").

84. Since the government owned the credit industry, its aversion of personal consumption led to the restrictions on the availability of personal credit. *See* PLESSNER, *supra* note 36, at 162; *see also* YISRAEL BAR-YOSEPH, BANK YISRAEL-LE 'HALACHA VE'LEMAESE [BANK OF ISRAEL-POLICY & PRACTICE] 144 (1985) (author describing Bank of Israel's policy of discouraging banks from extending consumer credit during the 1950s).

85. *See generally* TAMARI, *supra* note 84, at 132.

86. *See* MELMAN, *supra* note 60, at 208 ("The Six-Day War [of 1967] and its aftermath, however, changed the perception [in Israeli society about consumption]."); MICHAEL WOLFFSOHN, ISRAEL: POLITY, SOCIETY, ECONOMY 1882-1986 231 (1987) ("The extent to which material living conditions in Israel have improved is illustrated by the fact that in 1982, 99% of all households possessed a refrigerator, as opposed to only 34% in 1958. The improvement is further documented by the rise in car ownership from 4% in 1962 to 44% in 1982.").

87. *See* MELMAN, *supra* note 60, at 210 ("Israelis of today do not regard freezers, dryers, and color televisions as appliances that make life better and more comfortable. Rather, they are seen as status symbols. . . . Israelis have a love for these items that borders on obsession: electric appliances make Israelis today feel prosperous and proud.").

88. As used in this Article, consumerism refers to the increased tendency of individuals in society to consume, generally on credit, consumer goods that are not necessity items.

pervasive in the society beginning in the 1980s[89] and has become more so during the 1990s.[90] Corresponding to the growth in private consumption, private savings have dramatically declined since the 1970s.[91]

Both economic and cultural reasons are responsible for the increase in private consumption in Israel since the late 1960s. First, an overall increase in real income and a significant reduction of consumption taxes have made personal consumption substantially more economically feasible.[92] Second, Israeli society's exposure to the consumption culture from Western countries,[93] as well as the Israeli politicians' public abandonment of the pioneers' egalitarian vision, have contributed to the growth in consumerism in Israel.[94]

In addition to becoming a consumerist-oriented society, the Israeli people began to accept and grow accustomed to personal credit. Since the 1980s, the Israeli society has witnessed a steady rise in the use of credit

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89. *See* RAZIN & SADKA, *supra* note 51, at 18-19 (demonstrating the rapid private consumption growth per capita beginning in the 1980s).

90. *See* Melman, *supra* note 60, at 213 ("Having adopted almost every American habit and style, Israel has become a consumer society, a quintessential leisure-time nation. . . . Recent years have seen the opening of numerous American-style shopping malls – more than Israeli population really needs. Plastic cards are already in wide use throughout the country. . . ."). *See also* INTERNATIONAL MONETARY FUND, ISRAEL: SELECTED ISSUES AND STATISTICAL APPENDIX 21 . . . sixty-three percent in 1998); RUTH LOVENTHAL, ET AL., KALKALAT YISRAEL BE'DAGESH KAL [ISRAELI ECONOMY] 101 (2nd. ed. 1998) ("Private consumption per capita [in Israel] in 1995 is 5.2 higher in real terms as compared to 1950. . . .").

91. According to a Bank of Israel's annual report, the savings ratio out of total net disposal income of the average Israeli declined from a high of 20.9 percent in 1975 to a low of 9.8 percent in 1990. *See* PLESSNER, *supra* note 36, at 82.

92. *See* Shmuel N. Eisenstadt, *Tahalichim Ve'Magamot Be'Eizuva Shel Ha'Chevra Ha'Yisraelit, [Evolution and Trends in the Shaping of the Israeli Society], in* ANASHIM VE'MEDINA: HA'CHEVRA HA'YISRAELIT [PEOPLE AND STATE: ISRAELI SOCIETY] 41, 52 (Shmuel Stempler ed. 1989) (asserting that the Six Days war of 1967 brought about prospering economy and an increase in the standard of living); *see also* Yoram Ben-Porath, *Introduction, in* THE ISRAELI ECONOMY: MATURING THROUGH CRISES 11-13 (Yoram Ben-Porath ed., 1986) (noting that the standard of living has increased in Israel since the late 1960s due to maintenance of full employment, increase in real wages, decline in net taxation and maintenance of too low an exchange rate); ISRAEL YEARBOOK AND ALMANAC 153 (Naftali Greenwood ed., 1996) (stating that consumption increased in Israel due to rising real wages and lowering of tariffs, among other things).

93. *See* EZRAHI, *supra* note 63, at 66 ("Moreover, in Israel as elsewhere, the marked increase in mass travel abroad (even by less affluent Israelis) and the spread of television have exposed more and more Israelis to present-oriented consumerist culture."); ISRAEL YEARBOOK AND ALMANAC *supra* note 92, at 153 ("Magnifying [the economic factors that contributed to the rise in consumption in Israel] . . . were several new developments in the past few years that encouraged consumption per se . . . (1) a profusion of modern *shopping malls* . . . (2) commercial advertising on *television* . . . (3) a massive incursion of big *foreign brands*. . . ."); *see also* MELMAN, *supra* note 60, at 213 (describing how Israel has become a consumer society as a result of American influence).

94. *See* Shmuel N. Eisenstadt, *The Israeli Political System and The Transformation of Israeli Society, in* 3 POLITICS AND SOCIETY IN ISRAEL: STUDIES OF ISRAELI SOCIETY 415, 423-24 (Ernest Krausz ed., 1985) ("The various elites, including large parts of the political one, came to overlap with the upper economic strata, developing a lifestyle stressing a continuous rise in the standard of living and a relatively high emphasis on conspicuous consumption. In this sense the elites became distanced from other strata and abandoned the pioneering vision. . . .").

cards for private consumption, as credit card companies have aggressively marketed them to the consumer-public.[95]

This significant growth in consumption and use of personal credit must have resulted in greater societal tolerance of private consumption and debt undertaking. As consumption and personal debt acquisition were no longer viewed by society as deviant conduct, the social environment became more tolerant and understanding of indebted consumers in financial trouble and in need of bankruptcy protection. This emerging attitude towards private consumption, debt undertaking, and financial trouble may have contributed to the new vision regarding personal bankruptcy, which was manifested in the 1996 bankruptcy liberalization reform.[96]

## VI. THE POLITICAL POWER OF BANKRUPTS IN ISRAEL AND ITS IMPACT ON ITS FRESH-START POLICY

The conservative shape of the fresh-start policy that has traditionally prevailed in Israel was also partly due to the lack of political power among the bankrupts to bring about a liberalization of the law.[97] There are two main reasons for the lack of historical political power among Israeli bankrupts.

First, bankrupts in Israel traditionally did not have the backing of a politically connected consumer movement. While there have always been two consumer interest groups in Israel, these groups were and continue to be funded and controlled by the government. Since these consumer interest groups are not autonomous, they only serve the consumers' interests as

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> By year's end, *credit cards* were carried by an estimated 60% of adults and used for about 30% of personal non-housing consumption, up from roughly 25% in 1994, and were approaching cash as the preferred method of payment. There are several reasons for this: . . . (3) The two major credit-card companies courted businesses aggressively and allowed them to sign on without the restrictive terms previously imposed. (4) Willingness to obtain and use credit cards has permeated all age, education-level, and income groups. . . .

ISRAEL YEARBOOK AND ALMANAC, *supra* note 92, at 154 ("Credit cards are now widespread; as of December, 1993, some one million cards were being used for 10 million transactions per month.").

96. A similar trend was recently observed in Europe where a general increased consumer over-indebtedness contributed in part to a more favorable legislative predisposition towards the fresh-start policy in bankruptcy. *See generally* Johanna Niemi-Kiesilainen, *Changing Directions in Consumer Bankruptcy Law and Practice in Europe and USA*, 20 J. CONSUMER POL'Y 133 (1997).

97. One scholar has attributed the lack of active litigation in socio-economic legal rights matters in Israel to the weak political power of the affected groups. "[The] deficiency [in the number of cases involving socio-economic rights in Israel] flows from a number of reasons. Firstly, the lack of resources and organizations to fund such litigation. Secondly, usually, potential petitioners who could raise socio-economic rights cases belong to the lower socio-economic classes and thus lack the financial resources necessary to conduct court cases. Moreover, such members of this social stratum are often not even aware of their rights." SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 468 (1994).

perceived by the government. Hence, these groups could not have effectively functioned to represent the interests of the consumers (including bankrupts).[98]

While the existing consumer interest groups did not function as effective advocates for bankrupts, other organizations with generally conflicting interests with bankrupts (i.e., the bar association, banks, etc.) have maintained long-established and well-organized interest groups.[99] Indeed, the interest groups representing the banks and the Israeli bar have not only consistently attended the bankruptcy reform committee hearings,[100] but they were actively sought after for guidance by the legislature.[101] In contrast, not a single representative of the interests of individual bankrupts was present during any of the legislative hearings on bankruptcy reform.

The historical absence of a truly representative consumer interest group was partly because most bankrupts were particularly politically inactive. While Israelis, in general, were politically inactive up until the early 1970s,[102] the individuals constituting the majority of bankrupts came from particularly politically inactive segments of Israeli society. Up until the

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98. *See* Yael Yishai, *Kvutsut Interes Be'Yisrael* [*Interest Groups in Israel*], *in* ANASHIM VE'MEDINA: HA'CHEVRA HA'YISRAELIT [PEOPLE AND STATE: ISRAELI SOCIETY] 235, 240 (Shmuel Stempler ed., 1989) (arguing that the two consumer groups in Israel do not function as two autonomous organizations since they are funded and controlled by the government or other public agencies).

99. The significant influence held by the bar association in the context of bankruptcy legislation was alluded to during the recent bankruptcy reform hearings. *See Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 13th Knesset 4 (May 30, 1995) (statement of Davida Lachman-Messer, Deputy Attorney General). *See also* YAEL YISHAI, KVUTSOT INTERES BE'YISRAEL [INTEREST GROUPS IN ISRAEL: THE TEST OF DEMOCRACY] 138 & 174 (1986) (stating that the bar association plays a significant role in the design of legislation in Israel as the legislative body routinely requests that the bar association comment on proposed bills and participate in legislative committee hearings).

100. Interest groups in Israel do not formally engage in lobbying of politicians as a way of influencing legislation. Rather, they primarily rely on providing testimony in committees' hearings as a form of political persuasion. *See* Yishai, *supra* note 99, at 241 ("[L]obbying, as known in the U.S., has not developed in Israel. Only one or two groups . . . have employed a special person for the purpose of lobbying in the Knesset. The more acceptable route is to appear before one of the Knesset's committees. . . .").

101. *See, e.g., Proposed Amendment of the Bankruptcy Ordinance, 1981: Hearing Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.* 10th Knesset 14 (Dec. 2, 1981) (statement of Mr. Weirshobski) (requesting that the sub-committee obtain the advise of a representative of the bar association in relation to the proposed bankruptcy reform). In addition, the government appointed chairperson of the several commissions for bankruptcy reform were always members of the bar.

102. *See* EVA ETZICNI-HALEVY & RINA SHAPIRA, POLITICAL CULTURE IN ISRAEL: CLEAVAGE AND INTEGRATION AMONG ISRAELI JEWS 86 (1977) (based on data from the early seventies, the authors described the Israelis as merely interested spectators in the political process largely because of a sense of being blocked from institutional participation); ITZHAK GALNOOR, STEERING THE POLITY: POLITICAL COMMUNICATION IN ISRAEL (1982) (based on data from the 1960s, the author concluded that while the Israelis tend to have high responsive participation (i.e. voting), they tend to be less inclined to initiate political action (i.e. grassroots organizations)).

1970s, the bankrupts in Israel were predominantly low income and uneducated individuals.[103] Since many of the low income and the less educated population in Israel during those times were Sephardic Jews,[104] many of the bankrupts were Sephardic as well.[105] Corresponding to the demographics of bankrupts in Israel during that era, studies have shown that the most politically inactive segments of the Israeli society were individuals from the low income sectors, being largely uneducated and ethnically Sephardic.[106] Since individuals who filed for bankruptcy protection were predominantly from the less politically active groups in society, it is easy to understand why the people most affected by the bankruptcy laws did not form a grassroots movement during the 1970s with the aim of exerting political pressure for a more pro-debtor reform.[107]

In addition to the lack of an established interest group that would lobby in favor of their interests, the segments of the Israeli society that composed the majority of bankrupts lacked meaningful political representation in the Israeli parliament. Throughout the 1970s, members of the Israeli parliament were mostly Ashkenazik Jews.[108] In contrast, as stated previously, most bankrupts through the 1970s were Sephardic Jews.[109] The lack of adequate political representation in the Israeli parliament of those who were most in

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103. *See* Philip Shuchman, *Field Observations and Archival Data on Execution Process and Bankruptcy in Jerusalem,* 52 AM. BANKR. L.J. 341, 354-55 (1978).

104. *See* SAMMY SMOOHA, ISRAEL: PLURALISM AND CONFLICT 154 (1978) ("The index of relative inequality [for the period 1956-1975] indicates that an Oriental family income ranged between 57 and 82 per cent of an Ashkenazi family income, but the mean was around 70 per cent."); *id*. at 159 ("[As of 1975] [t]here is a considerable gap in the educational level of the two ethnic groups. The Ashkenazim have on the average about three more years of schooling than the Orientals.").

105. *See* Shuchman, *supra* note 102, at 355.

106. *See* SAM LEHMAN-WILZIG, MECHA'A ZIBURIT BE'YISRAEL 1949-1992 [PUBLIC PROTEST IN ISRAEL 1949-1992] 88, 90 (1992); WOLFSFELD, *supra* note 66, at 41 ("[S]ocio-economic status (usually measured through education and income) has been found to affect the level of political involvement in every country in which it has been studied. . . . Israel is no exception to that rule and the two strongest correlates of psychological involvement in politics are education . . . and income. . . ."); *id*. at 62 ("Jews who were born in either Africa or Asia [i.e., Sephardic], and especially those with lower levels of education and income, were less likely to think about politics or develop political opinions.").

107. *See* WOLFSFELD, *supra* note 66, at 41 ("If certain ethnic groups take less of an interest in politics, they are less likely to make political demands and less likely to have an impact on policy.").

108. *See* SMOOHA, *supra* note 104, at 142 ("Despite the Oriental penetration of many power positions [during the 1970s], the distribution of power is still grossly unbalanced. Despite the extent of the Orientals' participation in power, the Ashkenazim are at present [1978] in full control."); Dan Caspi, *How Representative is the Knesset?,* 14 JERUSALEM Q. 68, 72 (1980) ("[T]hose from Europe and America are over-represented in the *Knesset* in comparison to their statistical weight in the population, at the expense of those from Muslim countries. In fact, only ten per cent of the 428 members ever elected to the *Knesset* were born in Islamic countries.").

109. *See* Shuchman, *supra* note 103, at 355.

need of liberalization of the fresh-start policy may have contributed to the persisting punitive and conservative nature of bankruptcy laws.[110]

While the absence of a liberalization of the fresh-start policy through the early 1980s can be partly explained by the lack of political clout on the part of the bankrupts, the liberalization reform of 1996 can partly be attributed to the growth of a grassroots debtor organization. In the 1980s, Israel began to experience a general and gradual increase in grassroots political activism.[111] This emerging, and relatively successful, political activist environment generated the necessary conditions for the creation of the first grassroots organization for financially troubled individuals.[112]

Apparently the grassroots organization was created in response to the massive increase in the number of financially troubled individuals who were imprisoned under the judgment execution system in the early 1990s, after

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110. The mistreatment of the Sephardic Israelis by the largely Ashkenazic led Labor governments gave rise to the growth of the Wadi-Salib riots of the late 1950s and the Black Panther demonstrations of the early 1970s. *See* SMOOHA, *supra* note 104, at 209-16.

> The post-state mass influx of Oriental immigrants was received with mixed feelings. The Zionist dream of the ingathering of the exiles was coming true, but it was feared that the 'backward' Orientals would dilute the Western culture and upset the political democracy of the newly founded state. To forestall these dangers, the dominant Ashkenazi group has taken the countermeasures of providing minimal services for the Oriental arrivals in order to prevent destitution, admitting them into the lower and middle rungs of society and neutralizing them as an independent force.

*Id*. at 260-61; *id*. at 192 ("In spite of official denials, the Israeli public are well aware of widespread discriminatory practices against the Orientals."). In addition to discrimination, private as well as public stereotyping of the Orientals was widespread. *See id*. at 189-191. Indeed, some of the legislative debates on the debtor's prison law in the late 1960s suggest that one of the reasons for maintaining the debtor's prison system was some legislators' perception that the Sephardic Israelis are routinely concealing their assets from their creditors. *See* Harris, *supra* note 4, at 480.

111. MARCIA DREZON-TEPLER, INTEREST GROUPS AND POLITICAL CHANGE IN ISRAEL 251 (1990) ("In Israel by the 1980s, interest groups had emerged from the shadows."); LEHMAN-WILZIG, *supra* note 106, at 116 ("It is clear that in the eighties the public justification of public protests in Israel has become a national consensus."); WOLFSFELD, *supra* note 66, at 27 ("[As of 1988], Israelis are no longer willing to play the part of interested spectators: a good deal of political involvement is now taking place in the streets."); *see also* YISHAI, *supra* note 99, at 46 (noting that the number of registered groups [in Israel] has increased from 3,186 in 1984 to more than 9,000 in 1986); *id*. at 247 ("Not only the number of [interest groups] has increased significantly, but there has also been an increase in their legitimization."). The interest groups in Israel, including the Ad-Hoc interest groups, have recently experienced relative success in their missions. *See* WOLFSFELD, *supra* note 66, at 155, 158 ("The majority of [interest] groups reported general success, success in persuading the public, and success at meeting with public officials. . . . Even unorganized protest groups in Israel have a good chance of success, but their probability of victory is consistently lower.").

112. In addition to a general increase in political activism by the Israeli public, there was a particular growth in the economic-based political protests beginning in the early 1980s. *See* LEHMAN-WILZIG, *supra* note 106, at 48, 51, 57 (pointing out that the numbers of socio-economic public protests have progressively increased between 1955 and 1986).

the bankruptcy system denied them appropriate relief.[113] The grassroot movement was active on two fronts: It sought relief from the judicial system and facilitated an ad-hoc letter-writing public awareness campaign regarding the plight of its members.[114] This grassroots campaign was a success on both fronts. In 1993, the Israeli Supreme Court issued a landmark decision severely restricting the use of debtors' prisons.[115] The Supreme Court decision, together with the letter writing campaign (referred to by government officials as the "suicide letters"), clearly prompted a legislative liberalization reform of both the judgment execution laws in 1994 and the bankruptcy laws in 1996.[116]

## VII. THE PERCEIVED CULTURE OF ILLEGALISM IN ISRAEL AND ITS IMPACT ON THE FRESH-START POLICY

Lastly, the relatively conservative and punitive approach to fresh-start in Israel reflects the legislative and societal belief that a punitive mechanism is needed to neutralize perceived tendencies to routinely disobey and ignore the law whenever possible. A persisting argument in opposition to a liberalization of the fresh-start policy and debtors' prison law in Israel has been that a relaxation of the laws would adversely affect the commercial morality in the market place. Opponents of liberalization presume that debtors would take unfair advantage of the liberalized law and escape their legal obligations to repay. Specifically, some legislators have suggested that a liberalization of the fresh-start policy in bankruptcy would not be well utilized by the average Israeli man or woman since he or she inherently lacks the fundamental respect for the law and will find every available loophole to avoid compliance with it, thereby dishonoring their obligation to repay their debts.[117]

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113. The grassroots movement was called *Perach*, a foundation providing assistance to individual debtors and bankrupts in Israel. *See* Dorit Gabayi, *La'Kcha Et Ha'Chov Le'Liba [Took the Debt to her Heart*], MA'ARIV, June 23, 1993, at 6.

114. The ad-hoc campaign encouraged members to write to top government officials urging them to enact legislative reforms of the judgment execution laws and of the bankruptcy laws. *See* Efrat, *supra* note 8, at 100-01. In addition to the letters, several newspaper articles were written on the topic describing in detail the unfortunate conditions and the extreme steps taken by some debtors. *See, e.g.*, Gabayi, *supra* note 113, at 6 (describing the conditions leading to the suicide committed by a financially troubled individual).

115. *See* Efrat, *supra* note 8, at 101-02.

116. *See id.* at 102.

117. Minutes of the Levin Commission 5 (Nov. 5, 1991) (on file with author) (statement of Judge Bar-Ofir) ("One must distinguish between debtors that have nothing (and they are the minority) and those [debtors] that have [money] who explore all avenues to avoid [repayment]."). During a legislative hearing on bankruptcy reform in 1976, one legislator asked an expert witness testifying before the sub-committee: "Why should we be concerned about ending [the bankruptcy] process quickly. Don't you think that the fact that the vast majority of bankruptcy petitions [in Israel] are initiated by the debtors indicates that most of the bankrupts are attempting to defraud the creditors?" *Proposed Amendments to the Bankruptcy Ordinance (no. 6): Hearings Before the Judiciary Comm.*, 8th Knesset 7 (Jan. 5, 1976) (statement of S.J. Abramov, a committee member). Others share the legislators' concern. An editorial comment in a major

To combat the potential abuse of the bankruptcy system, legislators have either made access to bankruptcy more difficult[118] or added penalties and other significant restrictions to the lives of bankrupts as a way of deterring individuals from unfairly pursuing the bankruptcy option.[119] For example, even while the legislature attempted to finally liberalize the fresh-start policy in 1996, it made sure to add several new penalties and restrictions applicable to bankrupts as a way to counteract the perceived potential abuse of the liberalization efforts.[120]

Compliance with the law is partly a function of the degree to which individuals perceive the relevant legal authority as having a legitimate right to direct them on how to act.[121] The legal authority's legitimacy is a product of two factors. First, it is a product of the extent to which authorities enjoy the public's support and confidence. Second, it is a product of the extent to which individuals internally perceive an obligation to obey the law.[122]

Studies have shown that the legitimacy of legal authority in the United States is relatively high. Overall, Americans have a strong orientation toward obeying the law.[123] This is partly because the relevant legal authorities generally enjoy the overall public support[124] and because the average American seems to internally perceive that it is important to obey

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daily newspaper also voiced its concern that the public may interpret a liberalization of the debt-collection laws as a signal that debts need not be repaid. *See* Yoseph Lapid, *Hot'za La'poal [Judgment Execution Laws*], MA'ARIV, June 23, 1993, at 3. Similar fears of abuse or opportunism are also prevalent in the U.S. *See, e.g.*, AMERICAN BANKRUPTCY INSTITUTE, PERCEPTION AND REALITY: AMERICAN BANKRUPTCY INSTITUTE SURVEY ON SELECTED PROVISIONS OF THE 1984 AMENDMENTS TO THE BANKRUPTCY CODE 31-32 (1987) (finding that fifty percent of surveyed U.S. trustees believed there was significant abuse in the bankruptcy system); F. H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 189-91 (1998) (noting that the 1984 bankruptcy reforms were aimed at curbing debtor's abuse); Thomas H. Jackson, *The Fresh Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1402 (1985).

118. An example of that is the 1976 reform law which limited access to bankruptcy to only individuals who could demonstrate that they were able to make meaningful payments to their creditors. *See supra* note 12 and accompanying text.

119. Examples of that policy are manifested in the several restrictions on occupations, business and trades of the bankrupt that were added in the 1950s through the 1970s. *See* Efrat, *supra* note 8, at 82.

120. *See id.* at 112-13.

121. *See* LAWRENCE FRIEDMAN, LAW AND SOCIETY: AN INTRODUCTION 143 (1977) ("People are more likely to obey a system or order, if, . . . [they feel] the system is legitimate. . . ."); CHARLES R. TITTLE, SANCTIONS AND SOCIAL DEVIANCE: THE QUESTION OF DETERRENCE 176 (1980) ("Some social scientists maintain that conformity is largely a function of the legitimacy that an individual attributes to a norm."); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 33 (1990) ("[T]he results of these studies support the hypothesis that behavior is strongly influenced by legitimacy. . . .").

122. *See* FRIEDMAN, *supra* note 121, at 77 ("Legitimacy is an attitude of respect or approval for law and legal process. . . ."); *see also* TYLER, *supra* note 122, at 28, 45.

123. *See* TYLER, *supra* note 122, at 65 ("People clearly have a strong predisposition toward following the law.").

124. For example, in one study the author found that "[only a] narrow majority [of the people] agreed with positive statements about the police and the courts." *Id.* at 47.

the law.[125] This orientation may partly explain why abuse of the system by individuals is not prevalent despite the liberal fresh-start policy in the U.S.[126]

In contrast to the relatively high legitimacy enjoyed by the legal system in the U.S., there is at least a prevailing perception in Israel of illegitimacy and legal non-conformity towards the law. While there is no definite empirical work on the subject, there is some support of that perception. Not only does the general public have a negative perception about the legislative body,[127] but the people also do not seem to internally perceive that it is important to obey the law.

The phenomenon of non-compliance with Israeli law, referred to by some as illegalism, has been defined by Israeli scholars as "the orientation [in Israeli society] that does not view respect to the law and respect to the legal system as a basic value, rather the prevailing view is that law should or should not be obeyed depending on calculations of benefits."[128] Some believe that the non-conformity with the law has become so embedded in Israeli culture that they refer to it as an Israeli sport.[129]

The most prevalent non-conformity phenomenon in Israeli society is favoritism, or *Proteksia* as referred to by Israelis. Favoritism generally takes the form of using relatives, friends, or people in one's social network, who are in a position of power to obtain certain sought-after benefits by bypassing the closed bureaucratic doors.[130] Such favoritism has been found to be pervasive in Israeli society.[131] Furthermore, some believe that the use

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125. For example, in one study it was found that eighty-five percent of the people believed that people should obey the law even if it goes against what they think is right. *See* TYLER, *supra* note 122, at 46.

126. *See* Teresa A. Sullivan et al., *Consumer Bankruptcy in the United States: A Study of Alleged Abuse and of Local Legal Culture*, 20 J. CONSUMER POL'Y 223, 256 (1997) ("By and large, there is little evidence that . . . [debtors in the U.S.] are the crafty manipulators that some fear and others suspect.").

127. *See* WOLFSFELD, *supra* note 66, at 15 (referring to an opinion poll finding that almost sixty percent of the adult Jewish population in Israel negatively views the Knesset).

128 *See* EHUD SPRINZAK, EISH HA'YASHAR BE'ENAV: ILLEGALISM BA'CHEVRA HA'YISRAELIT [EVERY MAN WHATSOEVER IS RIGHT IN HIS OWN EYES: ILLEGALISM IN ISRAELI SOCIETY] 22 (1986).

129. LEHMAN-WILZIG, *supra* note 106, at 115 ("In conclusion, in whatever angle one examines the behavior of the public in Israel, one will find that non-conformity with the law is an Israeli sport acceptable in all aspects of life: politics, social and economics."); Marjorie Miller, *It's a Sin to Be a Sucker in Israel*, L.A. TIMES, July 25, 1997, at A-1 ("If Israelis could agree on anything . . . it just might be that the cardinal sin is to be a *freier*. . . . [A] *freier* is anyone who cedes ground, plays completely by the rules or allows someone to get the better of him.").

130. *See* SAM LEHMAN-WILZIG, WILDFIRE: GRASSROOTS REVOLTS IN ISRAEL IN THE POST-SOCIALIST ERA 5 (1992).

131. *See id.* ("The use of friends, relatives, and social acquaintances in positions of power or authority to pry open closed bureaucratic doors has been the classic Israeli way of doing public business."); WOLFSFELD, *supra* note 66, at 18 ("Finding ways to bypass bureaucratic obstacles is a well-known tradition in Israel. . . ."). In one study almost seventy percent of the people reported that they used *Proteksia* within the last year. *See* Brenda Danet & Harriet Hartman, *On "Proteksia": Orientations Toward the Use of Personal Influence in Israeli Bureaucracy*, 3 J. COMP. ADMIN. 405, 432 (1972); Ariel Rosen-Zvi, *Culture of Law*, 17 TEL-AVIV U. L. REV. 689,

of favoritism in bypassing a law or a procedure has been widely accepted by the public to the extent that people find it normal, natural, and even legitimate.[132]

Another reflection of Israeli society's perceived culturally embedded illegalism is its well-developed and significant underground economy and tax avoidance practices. One study found that Israel's underground economy constitutes fifteen percent of its gross national product, as compared to less than four percent in England and Sweden and between four and ten percent in the U.S.[133] Here, too, the public seems to have accepted this form of illegalism as normal and legitimate.[134] Other common areas of non-compliance with the law include bending the formal rules to accomplish one's business ends,[135] utilizing pirate cable television,[136] and more recently, avoiding mandatory army reserve service.[137]

The scholars who believe in the illegalism tendencies of Israeli society attribute it to several factors. First, some contend that the historical distrust by Jewish people of foreign governments, while Jews were living in the Diaspora, has left its mark on the Israeli attitude towards their own law and government.[138] Second, some scholars point to the large scale political

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711 (1993) (stating that the notion of *Proteksia* continues to be the leading culture in some segments of the Israeli society). *See generally* BRENDA DANET, PULLING STRINGS: BICULTURALISM IN ISRAELI BUREAUCRACY (1988).

132. *See* Danet & Hartman, *supra* note 131, at 408.

133. *See* Ben-Zion Zilberfarb, *Omdanay Ha'Kalkalah Ha'shekhora Be'Yisrael Ve'bekhul [Estimates of the Black Market Economy in Israel and Overseas]*, 122 RIV'ON LE'KALKALAH 319, 320-322 (1984). Another study reached a similar result. *See* Vito Tanzi, *Ha'sibot Ve'hatotzaot Shel Ha'tofa'ah Ba'olam [The Reasons and the Results of the Phenomenon in the World*], 122 RIV'ON LE'KALKALAH 323, 328 (1984). *See also* LEHMAN-WILZIG, *supra* note 130, at 75.

134. *See* LEHMAN-WILZIG, *supra* note 106, at 114 ("The underground black market is a moderate form of illegalism in Israel- having attained a certain public support - even the newspapers report the exchange rate of the dollar in the underground market, and the authorities almost never take action to prevent this phenomenon.").

135. *See* IRA SHARKANSKY, THE POLITICAL ECONOMY OF ISRAEL 109 (1987) (noting that the prevailing culture among Israeli managers is to accept the bending of formal rules to accomplish one's goals).

136. *See* LEHMAN-WILZIG, *supra* note 130, at 175 ("As we have witnessed in a number of different Israeli areas of life — pirate cable television, black medicine, the underground economy — there seems to be no avoiding a certain increase in quasi-illegal . . . behavior. . . .").

137. *See* Miller, *supra* note 129, at A-10 ("While the vast majority of Israelis still fulfill obligatory army service, increasing numbers say the follow-up reserve duty is for freiers.").

138. *See* LEHMAN-WILZIG, *supra* note 106, at 113 ("After hundreds of years in the Diaspora, during which [the Jews] gained lots of experience in non-conforming to the foreign rules, this mentality . . . continues continuously to operate even when the Jew is in autonomous and independent structure. . . .").

> Unfortunately, in the past, the interests the local non-Jewish government in the Diaspora did not at all times necessarily coincide with those of its minority Jewish population. The Jewish minority was then subjected to harsh anti-Semitic and arbitrary decisions by the local judiciary. . . Naturally, this situation led to the development of a suspicious attitude on the part of Diaspora Jews towards local law. . . . [I]t was this attitude which underlay the approach adopted by the Zionist settlers to all three branches of the local government.

illegalism that has existed throughout the life of the Jewish state and suggest that those governmental actions which display disrespect to the law have contributed to the developed illegalism among the Israeli public.[139] Government officials manifest their disrespect for the law by contributing to a high level of corruption and greed,[140] formally excusing themselves from complying with the laws,[141] failing to evenhandedly apply the laws,[142] or ignoring the law altogether.[143] Some believe that the illegalism practiced by political officials displays to the people a conviction that the country can work fine without strict compliance with the law.[144] This attitude by public leaders may have translated into similar attitudes among individual citizens.[145] Lastly, the level of illegalism in the Israeli society may be a form of protest by the public of the all-encompassing, intrusive, and bureaucratic governmental actions, all of which are difficult to change politically.[146]

Whether the phenomenon of illegalism in Israeli society is in fact real or merely a widely held perception, it clearly had a profound impact on the evolution of the fresh-start policy in Israeli bankruptcy law.

## VIII. CONCLUSION

Legal systems are not autonomous; they reflect social norms and are a product of society. This Article has attempted to explore some of the more recent and fundamental social, political, and economic transformations in Israeli society that may have contributed to the evolution of the laws

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SHETREET, *supra* note 97, at 409-10. *See also* Miller, *supra* note 129, at A-10 ("[The Israeli people are] still battling the 2,000 year-old Jewish tendency to distrust government. . . .").

139. *See* Ehud Sprinzak, *Elite Illegalism in Israel and the Question of Democracy, in* ISRAELI DEMOCRACY UNDER STRESS 173, 175 (Ehud Sprinzak & Larry Diamond eds., 1993) ("[T]here exists a deep cultural layer of illegalism in Israel's political society.").

140. *See* WOLFSFELD, *supra* note 66, at 15 ("The inevitable [table] performance [of the creation of a coalition government] whereby small parties pressure larger parties into giving them an unrepresentative proportion of cabinet seats and funds lays bare the greedier side of politics."); *see also* Rosen-Zvi, *supra* note 131, at 712.

141. *See* RUBENSTEIN, *supra* note 63, at 52 (arguing that the legislators immunity laws legislated by the legislators themselves were extremely broad).

142. For example, a law that prohibits legislators from obtaining compensation for non-parliamentary work has no enforcement mechanism and has no related threat of punishment. *See id.* at 52. Other examples of the lack evenhandedness are the political-motivated exemptions from compliance with the law granted to certain small groups of the coalition government, such as the exemption from mandatory draft granted to religious Jews. *See* Rosen-Zvi, *supra* note 131, at 712.

143. One example is legislature members openly violating the law that prohibits them from obtaining compensation for non-parliamentary work. *See* RUBENSTEIN, *supra* note 63, at 52.

144. *See* Sprinzak, *Elite Illegalism in Israel and the Question of Democracy, in* ISRAELI DEMOCRACY UNDER STRESS, *supra* note 139, at 173, 175.

145. Rosen-Zvi, *supra* note 131, at 713 ("The political illegalism . . . finds its way to illegalism of the citizen.").

146. *See* LEHMAN-WILZIG, *supra* note 130, at 6-7.

affecting an individual's opportunity for a fresh-start. While the perceived phenomenon of illegalism has contributed to the retention of the traditionally punitive and anti-debtor features of the bankruptcy law, the emerging growth of entrepreneurship, consumerism, individualism, as well as, the empowerment of pro-debtor interest groups, have contributed to the recent liberalization trend of the fresh-start policy in Israel.

# SIZING UP THE WTO: TRADE-ENVIRONMENT CONFLICT AND THE KYOTO PROTOCOL

TANIA VOON*

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## I. INTRODUCTION

The international community increasingly acknowledges the state of the environment as a global concern. Few environmental issues relate exclusively to individual states, and even those that relate superficially to one region are more likely to be recognized

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today as indirectly affecting the people of the world as a whole.[1] An acute public awareness of the significance of international trade in the context of the environment is also apparent. In December 1999, the violent protests in Seattle during the third Ministerial Conference of the World Trade Organization (WTO)[2] exemplified the growing disquiet over the unresolved conflict between trade and environment. Tension also exists at the level of public international law, as multilateral environmental agreements (MEAs) increasingly rely on restrictive trade measures to achieve their goals, despite the uncertainty as to whether such measures contravene WTO obligations. No easy solution is in sight.

The multilateral efforts to combat climate change through the United Nations Framework Convention on Climate Change (FCCC)[3] and more recently, its Kyoto Protocol,[4] provide an extraordinary opportunity to examine the trade-environment conflict. The greenhouse gas emissions trading regime foreshadowed in the Kyoto Protocol will bring into sharp relief the use of trade in environmental conservation against the background of the WTO and the General Agreement on Tariffs and Trade (GATT).[5] The regime has the potential to affect global industry dramatically and, if successful, to make a positive contribution towards resolving the problem of climate change. It is timely, and necessary, to examine these issues because the details of the emissions trading regime will be reexamined at the Sixth Session of the Conference of the Parties to the FCCC in November 2000.

This article begins by examining the interrelationship between trade liberalization and environment, then moves on to consider the specific conflict between the GATT and trade measures in MEAs. This conflict can arguably be resolved by the applying of general rules regarding overlapping and inconsistent treaties, or by relying on the exemptions in Article XX of the GATT. This article looks at

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1. For example, the protection of natural forests in one country provides global benefits. *See* Raúl Sáez, *The Case of a Renewable Natural Resource: Timber Extraction and Trade, in* THE ENVIRONMENT AND INTERNATIONAL TRADE NEGOTIATIONS: DEVELOPING COUNTRY STAKES 13, 29 (Diana Tussie ed., 2000). *See also* James Cameron & Jonathan Robinson, *The Use of Trade Provisions in International Environmental Agreements and Their Compatibility with the GATT*, 2 Y.B. INT'L ENVTL. L. 3, 14-15 (1991).

2. *See generally* Agreement Establishing the World Trade Organization, 33 I.L.M. 1125 (1994) [hereinafter Establishing WTO].

3. *See* United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, 31 I.L.M. 849 (entered into force Mar. 21, 1994) [hereinafter FCCC].

4. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature* Mar. 16, 1998, U.N. Doc. FCCC/CP/1997/L.7/Add. 1 [hereinafter Kyoto Protocol].

5. *See* General Agreement on Tariffs and Trade, 55 U.N.T.S. 187 (1947) [hereinafter GATT].

the practical outcomes of GATT/WTO challenges to two trade-related environmental measures imposed by the United States (U.S.) to assess the utility of Article XX from the perspective of environmentalists. It then turns to the case of carbon emissions, and the steps taken to date towards achieving a global response to the threat of climate change. The article concludes with an analysis of several trade-environment issues that should be addressed in implementing the Kyoto Protocol.

## II. TRADE-ENVIRONMENT CONFLICT

If trade were responsible for environmental degradation, then presumably those countries that trade the least, such as Ethiopia and Sudan, would have the best environments. We know that is not the case. Trade creates wealth, and wealth cleans up the environment."[6]

Liberalization of international trade and conservation of the environment form a more complex relationship than perhaps suggested by the above quotation. On the one hand, free trade may improve the environment by:

> (a) increasing real income and standard of living, so that there are more resources available for dedication to the environment (to actually improve the environment, these resources must be so dedicated);[7]
> (b) reducing population growth through the higher education, that comes with higher incomes;
> (c) reducing waste through efficiency gains of competition and economies of scale;
> (d) encouraging intergovernmental cooperation on matters regarding the environment;[8] and
> (e) providing access to technology for dealing with waste.[9]

The assumption that free trade leads to efficiency and the optimal use of resources holds true under conditions of perfect competition and an undistorted market. However, *laissez faire* policies may be

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6. Marino Marcich, *Trade and Environment: What Conflict?,* 31 LAW & POL'Y INT'L BUS. 917, 920 (2000).

7. *See* DUNCAN BRACK ET AL., INTERNATIONAL TRADE AND CLIMATE CHANGE POLICIES 9 (2000).

8. *See* M. RAFIQUL ISLAM, INTERNATIONAL TRADE LAW 398 (1999).

9. *See* Diana Tussie, *Introduction* to THE ENVIRONMENT AND INTERNATIONAL TRADE NEGOTIATIONS: DEVELOPING COUNTRY STAKES, *supra* note 1, at 2.

inappropriate where these conditions are not met.[10] According to economic theory, producers will make economically efficient decisions if all the costs and benefits of production are "internalized," i.e., they form part of each producer's cost-benefit analysis. If some of the costs are not borne by the producer or are "externalized," then the producer's self-interest may not coincide with the community's interest. In a market setting, it is often argued that the costs of environmental degradation are externalized.[11] When producers pollute, they are either made to pay nothing, or to pay less for the pollution than its cost to the community. In either case, they fail to incorporate pollution fully into their cost-benefit analysis. This inefficiency leads producers to over-pollute.

Because of these market failures,[12] free trade may damage the environment by:

> (a) increasing energy consumption, farming and wastage by lowering prices and increasing demand;
> (b) increasing pollution and the risk of environmental accidents by facilitating movement of environmentally hazardous materials;[13] and
> (c) accelerating the overuse of natural resources.[14]

The theory of comparative advantage suggests that countries should specialize in producing those goods and services that they can produce most efficiently: "in other words, to maximize output from a given input of resources, which is a movement in the direction of environmental sustainability."[15] However, allowing comparative advantage to flourish cannot by itself resolve environmental concerns, since even if a country produces something more efficiently than the rest of the world, it may form part of an inherently more polluting industry. This means that local pollution

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10. *See* ALISTAIR ULPH, TRADE AND THE ENVIRONMENT 5 (1999).

11. *See* BRACK ET AL., *supra* note 7, at 9. *See also* PETER UIMONEN & JOHN WHALLEY, ENVIRONMENTAL ISSUES IN THE NEW WORLD TRADING SYSTEM 11-12 (1997).

12. *See* HÅKAN NORDSTRÖM & SCOTT VAUGHAN, TRADE AND ENVIRONMENT, WTO: SPECIAL STUDIES 4, 13 (1999).

13. *See* ISLAM, *supra* note 8, at 398. *See also* Richard Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231, 234 (1997).

14. *See* Tussie, *supra* note 9, at 2. *See also* Thomas Schoenbaum, *International Trade and Protection of the Environment: the Continuing Search for Reconciliation,* 91 AM. J. INT'L L. 268, 280 (1997).

15. BRACK ET AL., *supra* note 7, at 8. *See also* Duncan Brack, *Trade and Environment: Conflict or Compatibility?, in* TRADE, INVESTMENT AND THE ENVIRONMENT*:* PROCEEDINGS OF THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS CONFERENCE 1 (Halina Ward & Duncan Brack eds., 1998).

problems will simply be relocated to countries that have a comparative advantage in such industries. Generally, these are countries of the South, because of their lower environmental standards generated by lower incomes.[16]

## III. GATT/WTO V. MULTILATERAL ENVIRONMENTAL AGREEMENTS

### *A. Principles of the GATT/WTO*

The conflict between trade and environment is perhaps best demonstrated by the overlapping regimes of the GATT and the WTO on the one hand, and MEAs (agreements between three or more states to protect the environment) on the other.

The WTO has 142 member countries, who collectively account for the vast majority of the world's trade.[17] The aim of the GATT/WTO is trade liberalization, based on three core principles:[18]

> (a) most-favored nation – Article I states that any privilege granted to one member state must be granted to other member states;
> (b) national treatment – Article III requires that foreign goods imported into a member state be treated in the same manner as goods produced domestically in that state; and
> (c) prohibition on import/export restrictions – Article XI prohibits quantitative restrictions on imports or exports, such as a ban on imports from a particular country or a measure that has the effect of preventing or limiting such imports (e.g., quotas, import licenses).[19]

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16. *See* NORDSTRÖM & VAUGHAN, *supra* note 12, at 29-31. *See also* UIMONEN & WHALLEY, *supra* note 11, at 31.

17. *See* Helen Loose, *Trade Versus the Environment*, ENVTL. FIN., July-Aug. 2000, at 27. This figure is correct as of July 26, 2001, according to the WTO website at <http://www.wto.org>.

18. *See* Ryan L. Winter, Comment, *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat it Too?*, 11 COLUM. J. INT'L ENVTL. L. & POL'Y 223, 227-28 (2000).

19. *See* GATT, *supra* note 5, arts. I, III, XI. *See also* Winter, *supra* note 18, at 228.

### *B. Trade Measures in MEAs*

MEAs potentially infringe the core principles of the GATT/WTO by using restrictive trade measures for a range of purposes, for example, to:

> (a) control trade that causes environmental harm, e.g., trade in endangered species;
> (b) protect states from environmentally harmful substances, e.g., hazardous wastes; or
> (c) support agreements to protect the global commons, e.g., agreements to decrease the use of ozone-depleting substances.[20]

While only a relatively small proportion of existing MEAs contain trade measures,[21] in several cases the use of trade measures is central to the success and enforceability of the MEA - protection of the environment cannot occur in these cases without trade leverage.[22] Three of the most important MEAs containing trade measures are:

> (a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[23] which contains import/export controls on particular endangered species and limited regulations on trade with non-parties. Rather than using trade measures that are merely incidental to other environmental protection measures, "CITES is the only convention which seeks to protect wildlife solely by the regulation of international trade;"[24]
> (b) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and

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20. *See id.* at 230-31. *See also* Cameron & Robinson, *supra* note 1, at 4-6.

21. *See* Martijn Wilder, Multilateral Environmental Agreements and International Trade: The Use of Quotas as a Trade Measure Under the Convention on International Trade in Endangered Species of Wild Flora and Fauna, paper presented at Australian Centre for Environmental Law Conference, Defending The Environment, at 4 (Sept. 21-22, 1996). *See also* Rubens Ricupero, *Trade and Environment: Strengthening Complementarities and Reducing Conflicts*, *in* TRADE, ENVIRONMENT, AND THE MILLENNIUM 23, 28-29 (Gary Sampson & W. Bradnee Chambers eds., 1999).

22. *See* Richard Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1, 104-05 (1999).

23. *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 993 U.N.T.S. 243, 12 I.L.M. 1085 (entered into force July 1, 1974).

24. Cameron & Robinson, *supra* note 1, at 4.

their Disposal[25] which provides for prohibitions on imports of hazardous wastes from non-parties; and
(c) the Montreal Protocol on Substances that Deplete the Ozone Layer[26] which similarly restricts imports and exports of controlled substances from or to non-parties.

### *C. Reconciling Conflicting Treaties*

Where an environmental trade measure imposed as part of an MEA is inconsistent with a substantive provision of the GATT, and does not fall within any relevant exceptions,[27] the question arises whether the GATT or the MEA prevails to the extent of the inconsistency. Assuming that the two entities in question are party to both the GATT/WTO and the MEA, Article 30 of the Vienna Convention on the Law of Treaties[28] provides that the later treaty prevails. The strict application of this rule could lead to problems, in that it could arguably invalidate MEAs (or parts of them) that became binding before 1994. "The Vienna Convention's hard-and-fast rule is difficult to reconcile with the expectations of nations party to two arguably conflicting treaties. If enforced to resolve trade and environment conflicts the Convention rule will invalidate longstanding international environmental law that required over thirty years of intensive negotiations to develop."[29]

Article 30 of the Vienna Convention potentially conflicts with the rules of *lex specialis* (specific treaties should override general treaties on the same subject matter)[30] and *pacta sunta servanda* (treaties properly concluded are to be observed).[31] It is also unclear how to apply Article 30 to an amended treaty, i.e. whether the relevant priority date is the original date on which the treaty came into force

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25. *See* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *opened for signature* Mar. 22, 1989, 28 I.L.M. 649 (entered into force May 5, 1992) [hereinafter Basel Convention].

26. *See* Montreal Protocol on Substances that Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].

27. *See, e.g.*, art. XX, discussed *infra* Part III.

28. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980).

29. Winter, *supra* note 18, at 237.

30. *See* Cameron & Robinson, *supra* note 1, at 18.

31. *See* BUTTERWORTHS CONCISE AUSTRALIAN LEGAL DICTIONARY 292 (Peter E. Nygh & Peter Butt eds., 1997).

or the later date on which it came into force as amended.[32] This is particularly relevant to the GATT, which is constantly evolving.[33]

The requirements of Article 30 of the Vienna Convention are more straightforward when one treaty binds both the relevant parties, while a conflicting treaty binds only one. This would be the case if, for example, two disputing states were both party to the GATT/WTO but only one was party to an MEA containing trade measures inconsistent with the GATT. Conversely, both states might be party to the MEA and only one party to the GATT/WTO. In that case, the treaty to which all relevant states are bound prevails. In the case of trade-environment disputes, this is likely to be the GATT/WTO, since it is has more signatories than most MEAs.[34] However, it would be disheartening if the only way to ensure the enforceability of trade-related environmental measures in MEAs were to gather greater numerical support than that found at the level of the GATT/WTO. Given the global nature of many environmental problems, multilateral action by a consensus of as many countries as possible is, naturally, preferred. Nevertheless, many nations consider that they cannot wait for such a consensus to build, and that it is imperative to use trade measures now to protect the environment.

Aside from the Vienna Convention and other general rules for reconciling conflicting treaties, there is a normative argument that a higher category of conventional international law operates in particular circumstances to override other conventions. Where a multilateral treaty comes into force in order to address "a problem of universal concern"[35] for the benefit of the world community, it may take on a special character and thereby take precedence over other treaties concerning different subject matter. For example, a group of states entered the Montreal Protocol to address the depletion of the ozone layer in the interest of the people of the world as a whole and as a matter of urgency. On that basis, the Montreal Protocol could be regarded as superior to any inconsistent provisions of the GATT.[36] However, this argument is unlikely to persuade a GATT/WTO

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32. *See* Winter, *supra* note 18, at 237-38.
33. *Cf.* Schoenbaum, *supra* note 14, at 282-83.
34. *See* Winter, *supra* note 18, at 238.
35. A. McNair, LAW OF TREATIES 256 (1961) (cited in Cameron & Robinson, *supra* note 1, at 17).
36. *See* Cameron & Robinson, *supra* note 1, at 17.

dispute settlement panel, given their tendency to favor trade over environmental concerns, as discussed further below.[37]

## IV. ARTICLE XX AS A SOLUTION TO THE CONFLICT

### *A. The Terms of Article XX*

As discussed in Part III above, the underlying objectives of the GATT/WTO appear to conflict directly with the protection of the environment by MEAs through the use of trade measures.[38] Nevertheless, the preamble to the Agreement Establishing the World Trade Organization specifically refers to the "objective of sustainable development."[39] In addition, Article XX of the GATT makes some concessions to trade-related environmental measures, albeit without using the word "environment." Article XX provides that trade measures that would otherwise be unlawful under the GATT are permitted if they are:

- necessary to protect human, animal or plant life or health (Art XX(b)); or
- relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (Art XX(g)),

provided that they are not applied in a manner that would constitute:

- a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or
- a disguised restriction on international trade.[40]

The latter two requirements are found in the preamble to Article XX – its "chapeau." Only if a dispute settlement body finds that a trade measure falls within Article XX(b) or XX(g) will it then assess

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37. *See infra* Part III(C).
38. *See* Winter, *supra* note 18, at 233-34.
39. Establishing WTO, *supra* note 2, preamble (1994).
40. *See* GATT, *supra* note 5, art. XX.

the measure under the chapeau of Article XX.[41] On its face, Article XX seems to provide comfort to environmentalists and recognition of the effects that trade may have on the environment. However, it raises several problems, largely because its broad terms can be subject to widely differing interpretations.

### *B. Construing Article XX*

In practice, when GATT/WTO dispute settlement bodies have heard disputes relating to conflicting environmental and free trade concerns, they have narrowly construed Article XX and free trade has won out.[42] Such bodies have construed the word "necessary" in Article XX(b) such that a measure is not necessary if a different measure that is least inconsistent with the GATT (i.e. that is least restrictive to trade) could reasonably be employed.[43] They have also construed the words "relating to" in Article XX(g) in a narrow fashion. For a measure to be exempted under Article XX(g) it must be "primarily aimed at" conservation, in view of both its purpose and its effect.[44] An alternative, less stringent test is that the environmental trade measure must be "directly connected" with the relevant conservation policy.[45] However, this alternative test is not yet generally accepted. A measure falling within Article XX(g) must also be "even-handed" in the sense of applying to domestic as well as imported products, or applying alongside similar restrictions on domestic products.

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41. Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc WT/DS58/AB/R ¶ 118-20 (1998) [hereinafter Shrimp, Appellate Report]. *See also* the discussion in Petros C. Mavroidis, *Trade and Environment after the Shrimps-Turtles Litigation*, 34 J. WORLD TRADE 73, 83 (2000).

42. *See, e.g.*, Panel Report on Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, GATT Doc DS10/R (1990); Panel Report on United States – Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) [hereinafter Tuna-Dolphin I]; Panel Report on United States – Restrictions on Imports of Tuna, 33 I.L.M. 842 (1994) [hereinafter Tuna-Dolphin II]; Panel Report on United States – Taxes on Automobiles, GATT Doc DS31/R (1994); Panel and Appellate Body Reports on United States – Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603 (1996); Panel Report on United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc WT/DS58/R (1998) [hereinafter Shrimp, Panel Report]; Shrimp, Appellate Report, *supra* note 41; Panel Report on Japan – Measures Affecting Agricultural Products, WTO Doc WT/DS76/R (1998). *See also Working Group on Environmental Measures and International Trade, GATT, Trade and the Environment*, GATT Doc 1529 (Feb. 13, 1992).

43. *See, e.g.*, Panel Report on Thailand, *supra* note 42; ISLAM, *supra* note 8, at 402; Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea: Justice in Trade and Environment Disputes*, 25 ECOLOGY L.Q. 189, 201 (1998).

44. Panel Report on United States – Taxes on Automobiles, *supra* note 42.

45. Shrimp, Appellate Report, *supra* note 41, ¶ 140; Mavroidis, *supra* note 41, at 84-85.

Some GATT/WTO panels have also introduced a jurisdictional element to Articles XX(b) and XX(g), which further limits their scope. According to these panels, environmental measures will not fall within the exceptions unless they are aimed at protecting animals or conserving exhaustible natural resources *in the state taking the measures* rather than in any other state or in the world generally.[46] For example, MEAs commonly require that states not import specimens of particular endangered species unless the specimens have "been caught legally in the state of export, or . . . the exporting state has determined that the export will not be detrimental to the survival of the species."[47] Such conditions are intended to protect endangered species in the exporting state, rather than in the importing state (the state that is applying the condition of import). If tested, these conditions could well be found to contravene the GATT. The link to territorial jurisdiction may also mean that MEAs designed to protect the earth's atmosphere would also not fall within Article XX.[48]

GATT/WTO dispute settlement bodes have also interpreted the Article XX chapeau to limit the application of environmental trade measures. The chapeau is designed to balance the rights of states parties under the substantive provisions of the GATT with those of states parties to invoke exceptions under Article XX.[49] The wide discretion given to the GATT/WTO dispute settlement bodies in deciding the "balance" required by the chapeau is demonstrated by its decidedly vague terms. According to the chapeau, discrimination between countries where the same conditions prevail is acceptable, provided that the discriminatory measures are not "arbitrary" or "unjustifiable."[50] An assessment of whether discrimination is arbitrary or unjustifiable will depend, of course, on the assessor's views about trade, the environment and how best to deal with the conflict between them.

Under the Basel Convention, parties must prohibit imports of hazardous waste from non-parties,[51] even though equally hazardous waste may be imported from parties to that convention. This trade restriction could be seen as "arbitrary."[52] However, a party to the

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46. *See* Tuna-Dolphin I, *supra* note 42, ¶¶ 3.43, 5.27, 5.31. *Cf.* Tuna-Dolphin II, *supra* note 42, ¶¶ 5.20, 5.33.

47. Cameron & Robinson, *supra* note 1, at 11.

48. *See id.* at 14.

49. *See* Shrimp, Appellate Report, *supra* note 41, ¶ 156.

50. *See* GATT, *supra* note 5, art. XX.

51. Basel Convention, *supra* note 25, art. 4.5.

52. Cameron & Robinson, *supra* note 1, at 13.

Basel Convention could argue that the restriction is justifiable because it is necessary to encourage participation in the convention and thus to protect the environment through preventing spillage and unsafe waste disposal. The justification for imposing the trade restriction is the need to protect the environment. When framed this way, it becomes apparent that the chapeau simply brings the two concerns of trade and environment head to head, and does little to solve the conflict between them.

The question of whether the "same conditions prevail" in two countries for the purposes of the chapeau is also difficult to answer. Cameron refers to the condition under CITES that an export license will not be granted to a state to export specimens of particular species unless the importing state has an import permit, which is in turn conditional on the importing state being satisfied that the specimen will not be used for primarily commercial purposes.[53] This would constitute discrimination (in that the exporting state will export to one state but not another) unless it can be said that different conditions prevail in the two states wishing to import, because the imported specimen will be used for primarily commercial purposes in one state but not another.[54]

### *C. Learning from Tuna, Dolphin, Shrimp and Turtles*

Two GATT panels[55] heard disputes regarding the U.S. prohibition on importing tuna from states whose fishing practices involved high levels of incidental dolphin taking. Section 101(a)(2)(B) of the U.S. *Marine Mammal Protection Act* (MMPA)[56] banned the importation of yellowfin tuna harvested with purse-seine nets in the Eastern Tropical Pacific Ocean unless the Secretary of Commerce determined that:

> (a) the government of the exporting country had a program regulating the incidental taking of marine mammals (e.g., dolphins) comparable to that of the U.S.; and

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53. *See id.*
54. *See id.* at 10.
55. *See* Tuna-Dolphin I, *supra* note 42; Tuna-Dolphin II, *supra* note 42.
56. *See* Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1421h. (2000)).

> (b) the average rate of incidental taking of such mammals by vessels of that country was comparable to that of U.S. vessels.

In 1991, an embargo imposed by the U.S. government on yellowfin tuna imports from Mexico went into effect, restricting such imports until positive findings were made regarding compliance with the above standards.[57] Mexico challenged the embargo. In Tuna-Dolphin I, the GATT panel held the import prohibition inconsistent with Article XI of the GATT[58] and not saved by Article XX.[59] The panel reasoned that Articles XX(b) and (g) could not be interpreted in such a way as to enable the U.S. to deny other parties' trade rights under the GATT, unless those parties adopted the same life or health protection policies as the U.S.[60] However, the GATT Council never adopted the panel's report. The U.S. and Mexico reached agreement independently in relation to tuna fishing.[61]

In Tuna-Dolphin II, a second GATT panel considered a challenge by the European Community to the secondary embargo under the MMPA on imports from countries that traded in tuna with primary countries subject to embargo.[62] Like the panel in Tuna-Dolphin I, the Tuna-Dolphin II panel considered that Article XX did not enable parties to force their trading partners to adopt conservation policies identical to their own.[63] Again, the GATT Council did not adopt the panel report.

A similar factual situation arose in the Shrimp-Turtle case.[64] India, Malaysia, Pakistan and Thailand challenged a U.S. prohibition on the importation of certain shrimp and shrimp products harvested with commercial fishing technology that might adversely affect sea turtles.[65] The ban did not apply to shrimp from harvesting nations that were certified by the U.S. Certification depended on the harvesting nation:

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57. *See* Tuna Dolphin I, *supra* note 42, ¶ 2.7.
58. *See id.* ¶ 5.18.
59. *See id.* ¶¶ 5.22-5.34.
60. *See id.* ¶¶ 5.29, 5.4.
61. *See* Parker, *supra* note 22, at 46-49.
62. *See* Tuna Dolphin II, *supra* note 42, at 844-45.
63. *See id.* at 894-95.
64. *See* Shrimp, Panel Report, *supra* note 42; Shrimp, Appellate Report, *supra* note 41.
65. *See* Conservation of Sea Turtles; Importation of Shrimp, Pub. L. No. 101-162, tit.VI, § 609, 103, Stat. 1037 (1989); 16 U.S.C. § 1537 (2000).

> (a) having a fishing environment that did not pose a threat of incidental taking of sea turtles in the course of shrimp harvesting;
> (b) providing documentary evidence of the adoption of a regulatory program governing such incidental taking that was comparable to that of the U.S.; and
> (c) having vessels with an average rate of such incidental taking comparable to that of U.S. vessels.[66]

The WTO panel held that the import ban was inconsistent with Article XI of the GATT and not justified under Article XX.[67] On appeal, the Appellate Body held that the measure was provisionally justified under Article XX(g) but failed to meet the requirements of the chapeau.[68] While the Appellate Body's decision showed a greater concern for the environment and recognition of the role of trade measures in environmental conservation than previous decisions,[69] it was merely a step in the right direction rather than a solution to the trade-environment conflict.[70]

### *D. Is Article XX Enough?*

The tendency for free trade to triumph over environmental measures under the GATT/WTO regime, despite Article XX, may reflect the fundamental philosophy that in the longer term, free trade will be beneficial to the environment. Therefore, restrictive trade measures for environmental purposes are unwarranted. This philosophy is likely to be sustained by the predominance of trade-focused GATT/WTO panel members.[71] The GATT/WTO's consistent denial of the validity of environmental trade measures suggests that international trade law, as laid down by the GATT/WTO, may not provide the best basis for assessing MEAs and

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66. *See id.*

67. *See* Shrimp, Panel Report, *supra* note 42, ¶ 8.1.

68. *See* Shrimp, Appellate Report, *supra* note 41, ¶ 187.

69. *See* Marcich, *supra* note 6, at 917; Bruce Neuling, *The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate*, 22 LOY. L.A. INT'L & COMP. L. REV. 1, 46 (1999).

70. *See* Mavroidis, *supra* note 41, at 73, 87; Winter, *supra* note 18, at 243; Duncan Brack, *Environmental Treaties and Trade: Multilateral Environmental Agreements and the Multilateral Trading System*, *in* TRADE, ENVIRONMENT, AND THE MILLENNIUM, *supra* note 21, at 271, 288.

71. *See* Wilder, *supra* note 21, at 3; Brack, *Environmental Treaties, supra* note 70, at 288-89. *See also* ERNST-ULRICH PETERSMANN, INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND 91-92 (1995).

resolving trade-environment disputes.[72] Brotmann suggests that a preferable approach would be to create a specific body to deal with trade-environment disputes, since the existing system is designed to handle trade issues, and the jurisdiction of the Committee on Trade and Environment is limited.[73] However, it is significant that the measures challenged to date have been *unilaterally* imposed rather than required under an MEA. Bilateral or multilateral negotiations at least allow a more democratic process and an attempt at realizing shared goals.[74] An environmental trade measure under an MEA is more likely to survive scrutiny under the GATT/WTO,[75] at least as it concerns parties to the MEA.[76]

Despite the difficulties with using Article XX of the GATT to resolve the trade-environment conflict, as recently as July 2000 opinion was divided in the international community as to whether changes needed to be made at all. At an information session held by the Committee on Trade and Environment with MEAs, Switzerland called for an interpretative clarification of conflicts between the GATT/WTO and trade-related measures in MEAs, and was supported by Canada, the European Community, Hungary, Iceland, Japan and Norway. In contrast, Australia, New Zealand and the U.S. suggested that such clarification was unnecessary, as the GATT/WTO provided a sufficient framework already. Hong Kong, China, India, Brazil, Malaysia and Pakistan took a similar view.[77]

## V. THE CASE OF CARBON EMISSIONS

### *A. Greenhouse Gases and Global Warming*

Global warming appears to derive from the burning of fossil fuels and the emission of greenhouse gases (GHGs)[78] including

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72. *See* Cameron & Robinson, *supra* note 1, at 3; Winter, *supra* note 18, at 251-53; Jacob Werksman, *Greenhouse Gas Emissions Trading and the WTO*, 8 REV. EUR. COMMUNITY & INT'L ENVTL. L. 251, 261 (1999); Brack, *Environmental Treaties, supra* note 70, at 289.

73. *See* Matthew Brotmann, *The Clash Between the WTO and the ESA: Drowning a Turtle to Eat a Shrimp,* 16 PACE ENVTL. L. REV. 321, 333, 351 (1999).

74. *See* Winter, *supra* note 18, at 234-35.

75. *See* Shrimp, Appellate Report, *supra* note 41, ¶¶ 169-71; BRACK ET AL., *supra* note 7, at 16.

76. *See* Brack, *Environmental Treaties*, *supra* note 70, at 285.

77. WTO Secretariat, *Trade and Environment Bulletin: CTE Holds Information Session with MEAs and Addresses the Relationship Between the WTO and MEAs, the Export of Domestically Prohibited Goods, the TRIPs Agreement and Fisheries Subsidies*, Press Release, PRESS/TE/033 (July 10, 2000).

78. The most important gases are carbon dioxide ($CO_2$), methane ($CH_4$) and nitrous oxide ($N_2O$).

carbon dioxide into the atmosphere, e.g., in power plants, automobiles, and energy-intensive processing industries.[79] It poses the threat of rising sea levels,[80] hurricanes, storms and dramatic changes to climatic patterns to low-lying countries.[81] These climatic changes will indirectly impact other areas, leading to such harms as wildlife degradation and an increase in human diseases.[82] Although uncertainty and debate continue in scientific circles about the effects of GHGs on the atmosphere and the phenomenon of global warming,[83] measures to prevent or reverse global warming are desirable based on the "precautionary principle." This principle states that where there is a threat of serious or irreversible environmental damage, uncertainty regarding the causes or risks does not justify the failure to implement measures to anticipate or prevent the damage.[84]

The global ownership of and responsibility for the earth's atmosphere has been captured in such phrases as "common property," "common heritage," "common concern"[85] and "common interest."[86] Where shared resources (such as the earth's atmosphere) are limited and expendable (or capable of suffering irreversible damage), principles of equitable utilization arise.[87] To the extent that one country's use of these resources will limit or prevent their use by other countries, the interests of those other countries should be considered. These resources cannot be placed under the sovereignty

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79. *See* NORDSTRÖM & VAUGHAN, *supra* note 12, at 18.

80. *See* David Freestone, *International Law and Sea Level Rise*, *in* INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 109, 115-17 (Robin Churchill & David Freestone eds., 1991) (a particular concern for low-lying countries).

81. BRACK ET AL., *supra* note 7, at 2-4; NORDSTRÖM & VAUGHAN, *supra* note 12, at 18.

82. *See generally* Michael Bowman, *Global Warming and the International Legal Protection of Wildlife*, *in* INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE, *supra* note 80, at 127.

83. *See* Patricia Birnie, *Introduction* to INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE, *supra* note 80, at 1; Cameron Hepburn & Chester Brown, *Privatising the Commons? A Global Greenhouse Emissions Trading Regime at COP-6*, 19 AUSTL. MINING & PETRO. L.J. 157, 158 (2000).

84. *See generally* James Cameron, *The Precautionary Principle*, *in* TRADE, ENVIRONMENT, AND THE MILLENNIUM, *supra* note 21, at 239; David Freestone, *The Precautionary Principle*, *in* INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE, *supra* note 80, at 21-22. S*ee also* Alexandre Kiss, *The Protection of Environmental Interests of the World Community Through International Environmental Law*, *in* ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS VIABLE MEANS? 1, 6-7 (Rüdiger Wolfrum ed., 1996).

85. *See* Alan E. Boyle, *International Law and the Protection of the Global Atmosphere: Concepts, Categories and Principles*, *in* INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE, *supra* note 80, at 7, 9-13.

86 *See* Peter-Tobias Stoll, *The International Environmental Law of Cooperation*, *in* ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS A VIABLE MEANS?, *supra* note 84, at 39, 55.

87. *See id.* at 58-59.

of a particular country, so a cooperative solution is needed.[88] "There is hardly any field of international relations, where the necessity to cooperate is so obvious as is true for international environmental matters."[89] As well as legal measures, this may encompass scientific, technical, technological and financial cooperation.[90]

A global response (or as close to it as possible) is also required to avoid the problem of free riding. Without such a response, any given country is likely to lack the incentive to reduce its emissions for fear of losing competitiveness without sufficient returns. If one country maintains existing levels of emissions while others reduce theirs, the first country will still reap the benefits of lower emissions on a global scale.[91] At the same time, if particular countries do not participate in the global response, there is a risk that energy-intensive industries will relocate to those countries, undermining the attempt to reduce emissions and causing a "carbon leakage" problem.[92]

### *B. Convention on Climate Change*

The United Nations Framework Convention on Climate Change[93] was adopted in Rio de Janeiro and signed by 154 countries in 1992. The FCCC is directed at stabilizing GHG concentrations in the atmosphere[94] in order to address global warming, on the basis that it may adversely affect natural ecosystems and humankind.[95] Under Article 3 of the FCCC, the parties recognize that the status of different country parties means that climate change should be dealt with "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."[96] All parties commit to steps such as the development of inventories of their GHG emissions[97] and promotion of sustainable management,[98]

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88. *See id.* at 60-61.
89. *Id.* at 39.
90. *See id.* at 72-81.
91. *See* NORDSTRÖM & VAUGHAN, *supra* note 12, at 18-19; Richard Eckaus, *Laissez Faire or Nationalization and Collective Control of the Global Commons*, *in* TRADE, INNOVATION, ENVIRONMENT 283, 293-94 (Carlo Carraro ed., 1994).
92. *See* NORDSTRÖM & VAUGHAN, *supra* note 12, at 20. *Cf.* BRACK, *Conflict or Compatibility*, *supra* note 15, at 50.
93. *See* FCCC, *supra* note 3, preamble.
94. *See id.* art. 2.
95. *See id.* preamble.
96. *Id.* art. 3.
97. *See id.* art. 4.1(a).
98. *See id.* art. 4.1(d).

but developed country parties take the lead in combating climate change.[99]

The parties listed in Annex I of the FCCC (including Austria, Canada, Denmark, the European Economic Community, France, Germany, Japan, New Zealand, the Russian Federation, the United Kingdom and the U.S.) specifically commit to, inter alia:

> (a) adopt national policies and take measures to mitigate climate change by limiting anthropogenic emissions of GHGs and protecting and enhancing GHG sinks (being processes, activities or mechanisms that remove a GHG, aerosol or precursor of GHG from the atmosphere[100]) and reservoirs (being components of the climate system where a GHG or its precursor is stored[101]);[102] and
> (b) communicate detailed information on the policies and measures adopted with the aim of returning individually or jointly to their 1990 levels of these anthropogenic emissions by the year 2000.[103]

The parties listed in Annex II (including many of the parties listed in Annex I, plus Australia) agree to provide financial resources to meet the costs of developing country parties in satisfying their inventory and reporting obligations under Article 12 and implementing measures required by Article 4.1.[104] The FCCC also provides for: research and systematic observation;[105] education, training and public awareness;[106] a financial mechanism for provision of funds as a grant or concession, including technology transfer;[107] and a dispute resolution mechanism.[108]

The Conference of the Parties established by Article 7 of the FCCC regularly reviews the implementation of the FCCC, and the subsidiary body for scientific and technological advice established by Article 9 provides the Conference of the Parties with timely

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99. *See id.* arts. 3.1, 4.2(a).
100. *See id.* art. 1.8.
101. *See id.* art. 1.7.
102. *See id.* art. 4.2(a).
103. *See id.* art. 4.2(a-b).
104. *See id.* art. 4.3.
105. *See id.* art. 5.
106. *See id.* art. 6.
107. *See id.* art. 6.
108. *See id.* art. 14.

information and relevant advice. A second subsidiary body for implementation established by Article 10 assists the Conference of the Parties in the assessment and review of the implementation of the FCCC. Within a few years of adoption of the FCCC, it became clear that most Annex I parties would fail to meet their target emissions levels.[109]

### *C. Kyoto Protocol*

The Third Session of the Conference of the Parties to the FCCC (COP-3) unanimously adopted the Kyoto Protocol to the FCCC in December 1997. It will come into force on the 90th day after the date on which at least 55 parties to the FCCC including Annex I, parties that together accounted for at least 55% of the total carbon dioxide emissions emanating from Annex I parties in 1990, have deposited their instruments of ratification, acceptance, approval or accession.[110] Unlike the FCCC, the Kyoto Protocol imposes legally binding obligations on the parties, and on the whole represents a more practical approach to GHGs.[111] It also recognizes the importance of research and development, requiring Annex I parties to investigate new and renewable forms of energy, carbon dioxide sequestration technologies, and advanced and innovative environmentally sound technologies.[112]

The Kyoto Protocol imposes individual caps on emissions for Annex I parties, averaging 5.2% below the relevant party's emission levels in 1990. The caps range from 92% of 1990 levels, for the European Community, the United Kingdom and many other countries to 108% and 110% of 1990 levels, for Australia and Iceland respectively per year.[113] Parties are to ensure that they do not exceed their "assigned amounts" (being five times the yearly cap) for the commitment period 2008 to 2012, individually or jointly,[114] and that they make demonstrable progress towards achieving these goals by 2005.[115] The interim period is designed to give governments and the private sector time to develop environmentally friendly technology and replace equipment as required.

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109. *See* Paul E. Hagen et al., *International Environmental Law*, 32 INT'L LAW. 515, 517 (1998); BRACK ET AL., *supra* note 7, at 5.

110. *See id.* art. 15.

111. *See id.* Annex A (applying to carbon dioxide ($CO_2$), methane ($CH_4$), nitrous oxide ($N_2O$), hydrofluorocarbons (HFCs), perfluorobarbons (PFCs) and sulphur hexafluoride ($SF_6$)).

112. *See id.* art. 2.1(a)(iv).

113. *See id.* Annex B.

114. *See id.* art. 3.1.

115. *See id.* art. 3.2.

Article 4.2(a) of the FCCC allows Annex I countries to implement emissions reduction policies and measures "jointly with other Parties." This provision sowed the seeds for the Kyoto Protocol's three flexibility mechanisms,[116] which are designed to assist parties in complying with the capping system by lowering the costs of compliance.[117] These mechanisms are joint implementation, the clean development mechanism, and emissions trading. They are key factors in the task of enabling and ensuring compliance, and in achieving the goal of GHG stabilization with the participation of developed and developing countries. "These mechanisms have the potential to spur a vast global competitive market in cost-effective emissions reduction opportunities, energizing innovation in processes and technologies as investors and entrepreneurs compete to deliver better and cheaper ways of reducing GHG emissions."[118]

The three flexibility mechanisms operate as follows:

Joint implementation – under Article 3 of the Kyoto Protocol, projects that reduce emissions or enhance removal of emissions by sinks may be used to offset emissions and are taken into account in assessing a party's performance against its assigned amount. For example, a newly planted forest acts as a sink by absorbing $CO_2$ from the atmosphere.[119] Annex I parties may trade emissions reduction units (ERUs) arising from such products with other Annex I parties under Article 6, provided that:[120]

> (a) the project is approved by the parties involved;
> (b) the project reduces emissions or enhances removals by sinks in addition to any reduction or enhancement that would otherwise occur;
> (c) the party acquiring the ERUs complies with its obligations under Articles 5 (regarding mechanisms for calculating anthropogenic emissions and their removal by sinks) and 7 (regarding inventory and reporting); and

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116. *See* Peter Cameron, *From Principles to Practice: the Kyoto Protocol*, 18 J. ENERGY & NAT. RESOURCES L. 1, 6 (2000).

117. *See* JAMES CAMERON ET AL., IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW 97, 231 (1996).

118. Hagen et al., *supra* note 109, at 518.

119. *See* Cameron, *supra* note 116, at 7.

120. *See* Kyoto Protocol, *supra* note 4, art. 6.1.

> (d) the party acquiring the ERUs also undertakes domestic actions to meet its commitments under Article 3.[121]

Where a party transfers ERUs to another party, the transferring party subtracts the ERUs from its assigned amount,[122] reducing its allowable emissions. The party acquiring the ERUs adds them to its assigned amount, increasing its allowable emissions. [123]

Clean development mechanism – Article 12 of the Kyoto Protocol establishes a clean development mechanism to assist non-Annex I parties in achieving sustainable development, and Annex I parties in complying with their Article 3 commitments. This mechanism enables Annex I parties to fund emission reducing projects in the territories of non-Annex I parties, such that developing states are involved in the emission reduction process without having caps imposed on their emissions.

Projects forming part of the clean development mechanism must be voluntarily undertaken by both parties, and involve "real, measurable, and long-term benefits related to the mitigation of climate change."[124] They must also be certified by operational entities designated by the Conference of the Parties to the FCCC.[125] The developing party hosting the project benefits from the reduction of emissions using funds and/or technology that might not otherwise be available to it. This is particularly important given the predicted increase in developing countries' emissions in the coming years. The Annex I party benefits because it can use the certified emission reductions (CERs) derived from the project to increase its assigned emissions amount, and achieving these reductions in developing countries (e.g., through a subsidiary) may be cheaper than doing so in the home country.

Unlike ERUs, CERs obtained between 2000 and 2008 can be used to achieve compliance in the period 2008 to 2012.[126] In addition, Article 12 lacks the requirement found in Article 6 that the party acquiring CERs be in compliance with Articles 5 and 7. This means that, theoretically at least, it should be easier to benefit from and

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121. *See id.* art. 6.1(d).
122. *See id.* art. 3.11.
123. *See id.* art. 3.10.
124. *Id.* art. 12.5(a-b).
125. *See id.* art. 22.5.
126. *See id.* art. 22.10.

trade in CERs than in ERUs. This difference may have the effect of encouraging developed countries to assist and collaborate with developing countries. However, it could also create problems for trade in ERUs and CERs, if they are regarded as "like products," which should therefore be treated equivalently, under the GATT.[127]

Emissions trading – the Kyoto Protocol provides for trading in emissions or ERUs between the developed parties listed in Annex B. The transfer of ERUs affects assigned amounts in the same way as transfer of ERUs under Article 7 joint implementation schemes.[128] The relevant provision is Article 17:

> The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3. Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under that Article.[129]

Although Article 17 is extremely broad, and includes little detail as to how the emissions trading system will work, it is significant that it *requires* the Conference of the Parties to set up such a system. The Kyoto Protocol thus mandates emissions trading, and this is one of its most important features in relation to the trade-environment conflict.

### *D. Buenos Aires Plan of Action*

In November 1998, the FCCC adopted the Buenos Aires Plan of Action (BAPA) at the Fourth Session of the Conference of the Parties to the FCCC (COP-4).[130] The BAPA incorporates a two-year deadline in preparation for the Kyoto Protocol's entry into force. The two-year process is reaching an end, following the Fifth Session of the

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127. *See* BRACK ET AL., *supra* note 7, at 121-22.
128. *See* Kyoto Protocol, *supra* note 4, art. 3.10(11).
129. *Id*. art. 17.
130. Report of the Conference of the Parties on its Fourth Session, FCCC, 4th Sess., U.N. Doc. FCCC/CP/1998/16/Add. 1, 4 (1999).

Conference of the Parties (COP-5) in Bonn in late 1999[131] and the twelfth sessions of the subsidiary bodies (SB-12) of the FCCC in Bonn in June 2000.[132] The process will culminate during the Sixth Session of the Conference of the Parties (COP-6), November 13-14, 2000 in The Hague. In anticipation of the Kyoto Protocol being implemented, some governments and governmental bodies have already begun to take steps to comply with it, and several companies are taking action themselves to achieve emissions reductions.[133] This may increase the impact of the Kyoto Protocol regardless of whether it is ratified. In the meantime, it is worth examining some of the trade issues that should be taken into account at COP-6 in determining the details for the Kyoto Protocol's flexibility mechanisms.

## VI. FLESHING OUT THE KYOTO PROTOCOL

### *A. Trading of Emissions Credits/Allowances*

Emissions trading should enable developed countries and private entities to pay for the right to produce more emissions, and to seek out the cheapest CERs and ERUs. It should therefore lower the global cost of reducing emissions levels in the long term.[134] However, the impact of emissions trading on global equity and efficiency will be critically dependent on the precise structure of the trading system. Several precedents for such a system in domestic jurisdictions, particularly in the U.S., already exist. The *International Rules for Greenhouse Gas Emissions Trading*, prepared by the United Nations Conference on Trade and Development (UNCTAD), identify two broad forms of such trading systems:[135]

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131. *See* Report of the Conference of the Parties on its Fifth Session, FCCC, 5th Sess., U.N. Doc. FCCC/CP/1999/6, 21 (1999). *See also* INT'L INSTITUTE FOR SUSTAINABLE DEV., EARTH NEGOTIATIONS BULLETIN: SUMMARY OF THE FIFTH CONFERENCE OF THE PARTIES TO THE UNFCCC (NOV. 8, 1999), *available at* <http://www.iisd.ca/climate/ cop5/> (copy on file with author).

132. *See* Report of the Subsidiary Body for Implementation on its Twelfth Session, FCCC, 12th Sess., U.N. Doc. FCCC/SBI/2000/5 (2000); Report of the Subsidiary Body for Scientific and Technological Advice on its Twelfth Session, FCCC, 12th Sess., U.N. Doc. FCCC/SBSTA/2000/5 (2000). *See also* INT'L INSTITUTE FOR SUSTAINABLE DEV., EARTH NEGOTIATIONS BULLETIN: SUMMARY OF THE TWELFTH SESSION OF THE SUBSIDIARY BODIES OF THE UNFCCC (JUNE 19, 2000), *available at* <http://www.iisd.ca/climate/ sb12/> (copy on file with author).

133. For example, General Motors, BP Amoco, Monsanto, Shell, DuPont; Cameron, *supra* note 117, at 2-3, 12-13. *See also* Loose, *supra* note 17, at 29.

134. *See* David M. Driesen, *Choosing Environmental Instruments in a Transnational Context*, 27 ECOLOGY L.Q. 1, 8 (2000).

135. *See* Hepburn & Brown, *supra* note 83, at 167-69 (discussing these two types of trading systems).

> (a) Credit trading, under which parties may trade excess emission reductions above specified targets. This type of system tends to focus on specific emission reducing projects. The amount of any excess is determined at the end of the particular commitment period, and parties can then trade credits or bank them for use in a later period. Operation of credit trading systems to date has not been wholly successful.[136]
>
> (b) Allowance trading, under which parties are authorized to generate specific levels of emissions, and may trade these authorizations or allowances. As the authorized emission levels are set, there is more certainty as to the desired outcome, and greater focus on that outcome,[137] than in a credit trading system. There may also be fewer transaction costs, since the allowances are centrally determined at the commencement of the period, whereas credits under a credit trading system must be individually approved as they are generated. The trading occurs during the commitment period and the allowances expire at the end of the period.[138]

The emissions trading envisaged by the Kyoto Protocol is at the level of sovereign government parties. However, trading within the private sector is likely to take place in parallel. While references are made to the private sector ("legal entities" and "private and/or public entities") in other Articles of the Kyoto Protocol,[139] there is no such mention in Article 17, which governs emissions trading.[140] Nevertheless, it is generally accepted among Annex I countries that private entities may participate in such trading with the approval of the relevant party.[141] Thus, a party might allocate allowances or credits to private domestic entities, who could then use the allowances or credits (and surrender them to the domestic

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136. *See id.* at 168.
137. *See id.*
138. *Id.*
139. *See* Kyoto Protocol, *supra* note 4, arts. 6.3, 12.9.
140. *See id.* art. 17.
141. *See* Werksman, *supra* note 72, at 253; Hepburn & Brown, *supra* note 83, at 169-70; BRACK ET AL., *supra* note 7, at 117.

government) or trade them with other private entities within the same country. An extension of such private trading could involve two or more parties recognizing each other's allowances or credits, such that the parties themselves could trade in them and private entities from each jurisdiction could also trade in them. A party could also trade with another party's private entities, even if the first party had not established a domestic trading regime.[142]

One advantage of the involvement of private entities in emissions trading is that these entities have the best information in determining whether to invest in energy-efficient technology or maintain emissions levels by buying credits and allowances. Another advantage is that the number of participants would be dramatically increased, removing liquidity problems with the emissions trading market.[143]

The way in which a country structures its emissions trading, domestically and with other countries, could involve contravention of the GATT. For example, given that the Kyoto Protocol provides only for trading between Annex I parties, it is quite likely that countries may restrict trading in emissions allowances and credits by not recognizing such allowances and credits where issued by non-parties or by non-Annex I countries.[144] To ensure it is able to meet its obligations under the Kyoto Protocol and that its energy industries do not suffer, an Annex I country might limit the number of credits and allowances that can be exported. Conversely, to ensure its industries make real attempts to reduce emissions, it might limit the number of credits and allowances that can be imported.[145]

These measures could contravene the GATT or the General Agreement on Trade in Services (GATS) if emissions credits and allowances are classified as "products" or "services," (neither term is defined). Werksman considers that tariff schedules, international rules on customs classifications, and common sense indicate that GATT/WTO members see products as tangible goods. Emissions credits and allowances may be commodities, as they will have a market value and be tradable internationally, but they are unlikely to be regarded as products. The text of the WTO agreements and GATT/WTO practice similarly suggest that emissions credits and allowances do not constitute services for the purpose of the GATS.

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142. *See* Werksman, *supra* note 72, at 253.
143. *See* Hepburn & Brown, *supra* note 83, at 170.
144. *See* Werksman, *supra* note 72, at 255.
145. *See id.*

While they might be regarded as "negotiable instruments" for the purposes of the GATS financial services agreement,[146] at most this could prevent GATT/WTO members from limiting imports of credits and allowances, but not from denying the validity of such imports or from distinguishing between imports from different countries.[147]

### *B. Impacts on Other Trade*

Werksman suggests that even though emissions allowances (or, presumably, credits) could not themselves be regarded as products or services under the WTO, design choices in the emissions trading system will likely affect other such products and services.[148] In particular, competition in relation to energy and fossil fuel products is likely to be influenced by emissions trading. These are the industries that will seek allocations of emissions credits and allowances from their governments. Parties could allocate credits and allowances using the "grandfathering" approach, i.e., proportionate to past emissions levels of the relevant enterprise or industry, as applies to the Kyoto Protocol in determining assigned amounts for Annex I parties. Alternatively, they could simply auction credits and allowances to the highest bidder.[149] In either case, care would need to be taken to ensure that the allocation of credits and allowances was not discriminatory against foreign competitors in contravention of the WTO's Agreement on Subsidies and Countervailing Measures.[150]

Products or services that are created using fossil fuels but that do not involve any emissions when they are purchased or used may also be affected by placing restrictions on emissions. Electricity, for example, may be created using large amounts of fossil fuels, and exported, even though the importer generates no emissions in using the electricity. If parties seek to discriminate between electricity created using environmentally friendly methods rather than carbon-intensive methods,[151] this may result in discrimination between imported products based on process and production methods

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146. *See* BRACK ET AL., *supra* note 7, at 119-20.

147. *See* Werksman, *supra* note 72, at 256-57. *Cf.* Loose, *supra* note 17, at 28.

148. *See* Werksman, *supra* note 72, at 252, 255.

149. *See id.* at 257.

150. *See id.* at 258-59. *See also* Loose, *supra* note 17, at 28; BRACK ET AL., *supra* note 7, at 120-21.

151. For example, by requiring credits and allowances for environmentally-friendly methods of electricity but not carbon-intensive methods of electricity.

(PPMs), which may contravene the GATT.[152] Such discrimination is analogous to the U.S. measures that distinguished between tuna and shrimp caught using methods that reduced incidental catch of dolphin and turtle respectively and other methods. As discussed above, these measures were denounced by the GATT/WTO dispute resolution bodies.[153] The problem with PPMs is that the reference to "like product" in Article III of the GATT offers little flexibility. Strictly speaking, discriminating between two products on the basis of how they were produced involves discriminating between like products. However, there is some suggestion from recent WTO panel jurisprudence that the WTO will not always necessarily view PPMs as contravening the GATT.[154]

Once credits and allowances are allocated, the point at which they must be surrendered will be a key determinant of whether contravention of WTO rules occurs. If credits and allowances must be surrendered "upstream," at the point where fossil fuels are imported, and the number of credits and allowances is limited, this will effectively impose a quantitative restriction on the import of fossil fuel products in violation of Article XI of the GATT.[155] If credits and allowances must be surrendered further along the chain from extraction to emission, upstream but at the point of delivery or sale of fossil fuel products, potential contraventions of the Most Favored Nation and national treatment principles of the GATT arise. For example, even if credits and allowances are allocated by open auction, access must remain open and non-discriminatory throughout the commitment period. To comply with the national treatment principle, parties must treat energy products of foreign new entrants in a manner similar to established domestic products. In the case of credit or allowance scarcity, parties may need to favor such foreign entities over domestic entities.[156] Werksman concludes that credits and allowances should preferably be surrendered downstream, at the point of actual emission, in order to minimize potential conflicts with the GATT/WTO.[157] Under this methodology, all allocations will be to industries regarded as domestic, irrespective of the source of the fossil fuels used.

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152. *See* Werksman, *supra* note 72, at 260.

153. *See supra* Part IV(C). *See also* Schoenbaum, *supra* note 14, at 288-89.

154. *See* BRACK ET AL., *supra* note 7, at 15; Magda Shahin, *Trade and Environment: How Real Is the Debate?*, *in* TRADE, ENVIRONMENT, AND THE MILLENNIUM, *supra* note 21, at 35, 46.

155. *See* Werksman, *supra* note 72, at 258.

156. *See id.*

157. *See id.* at 259.

Aside from making choices regarding the allocation and surrender of emissions credits and allowances, Annex I parties might attempt to encourage their industries to reduce emissions by imposing carbon or energy taxes on activities that consume high amounts of fossil fuels or emit high amounts of GHGs.[158] To address any consequent diminution in global competitiveness of affected industries[159] (e.g., electricity producers, products that cause GHG emissions),[160] these parties might also seek to impose domestic subsidies, rebates or exemptions, revenue recycling mechanisms, or border tax adjustments on imported products of this kind.[161] There are various problems with these measures. For example, exemptions from energy taxes for particular industries reduce the incentive for those industries to invest in more energy efficient technology and, of course, reduce the revenue raised from such taxes.[162] This revenue could otherwise be used for environmental purposes. Revenue recycling (e.g., returning the revenue from the energy tax back into the economy by reducing other corporate taxes)[163] risks paying industry for technology investments it would have made anyway.[164] In addition, these kinds of measures could well contravene the GATT.[165]

Another way in which the Kyoto Protocol raises potential trade implications is in connection with enforcement. Three factors may induce non-compliance: lack of will, lack of diligence, and lack of resources.[166] The latter is the key problem, particularly for developing countries, in the context of environmental protection. In order to encourage parties to comply, and non-parties to participate, trade measures may be incorporated into the emissions trading system.[167] The aim of these measures would be to ensure that the benefits of compliance outweigh the benefits of non-compliance – the paradigm of rational opportunism suggests that if this is not the case,

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158. *See* BRACK ET AL., *supra* note 7, at 59-70.

159. *See id.* at 71.

160. *See id.* at 10.

161. *See* Loose, *supra* note 17, at 28-29; BRACK ET AL., *supra* note 7, at 73-81.

162. *See* BRACK ET AL., *supra* note 7, at 73.

163. *See id.* at 74.

164. *See id.* at 74-75.

165. *See id.* at 89. *See also* Zen Makuch, *The World Trade Organization and The General Agreement on Tariffs and Trade*, *in* GREENING INTERNATIONAL INSTITUTIONS 94, 103 (Jacob Werksman ed., 1996).

166. *See* Michael Bothe, *The Evaluation of Enforcement Mechanisms in International Environmental Law: An Overview*, *in* ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS VIABLE MEANS?, *supra* note 84, at 13, 17.

167. *See* BRACK ET AL., *supra* note 7, at 132-40.

compliance will not be achieved.[168] Trade measures would also help address the difficulties created by the fact that governments consent to be bound by the Kyoto Protocol and accept obligations under it, while private entities are generally responsible for producing GHG emissions.[169]

Assuming that some of the trade measures described above do contravene substantive provisions of the GATT, the next question is whether they can be excused under Article XX. A critical feature of applying Article XX(b) of the GATT to trade measures adopted in connection with emission reductions under the Kyoto Protocol will be determining whether these measures are *necessary* to fulfill the objective of reducing emissions. Some parties may view such measures as vital to achieving the goals of the Kyoto Protocol, while others would prefer a fluid and unrestricted market in emissions credits and allowances and related products and services.[170] Unless the parties to the Kyoto Protocol reach clear agreement on which approach should prevail, WTO dispute resolution bodies will be left to impose their own views on what is required to achieve these environmental policy objectives. Similarly, a clear understanding of the measures allowed according to the Conference of the Parties will assist parties in justifying trade measures taken for the purposes of the chapeau of Article XX.

### *C. North and South: Implications for Developing Countries*

The complexity of the relationship between trade and environment is exacerbated by the different effects that trade may have on the environment in developed and developing countries.[171] Northern countries consume far more natural resources per capita than Southern countries, and generate most of the world's pollution and waste.[172] Northern countries have already exploited most of their resources[173] and tend to advocate more stringent environmental

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168. *See* Gebhard Kirchgässner & Ernst Mohr, *Trade Restrictions as Viable Means of Enforcing Compliance with International Environmental Law: An Economic Assessment*, *in* ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS VIABLE MEANS?, *supra* note 84, at 199, 203.

169. *See* Bothe, *supra* note 166, at 18.

170. *See* Werksman, *supra* note 72, at 260.

171. *See* Graciela Gutman, *Agriculture and the Environment in Developing Countries: The Challenge of Trade Liberalization*, *in* THE ENVIRONMENT AND INTERNATIONAL TRADE NEGOTIATIONS: DEVELOPING COUNTRY STAKES, *supra* note 1, at 33.

172. *See* ISLAM, *supra* note 8, at 410.

173. *See* Martin Davies, *Just (Don't) Do It: Ethics and International Trade*, 21 MELBOURNE U. L. REV. 601, 603 (1997).

standards.[174] They also typically have the financial, technological and political power to dictate and implement these standards.[175] In contrast, in trying to catch up with Northern countries, Southern countries may be inclined to relax environmental policy.[176] For these countries, poverty, famine and debt are more pressing concerns than the environment.[177] An insistence by the North that they impose environmental standards as stringent as those of developed countries may look suspiciously like "eco-imperialism" to the South.[178]

> Richer countries tend to adopt more stringent environmental standards and regulations than poorer countries. And richer countries tend to be more powerful in trade negotiations than poorer countries . . . [T]he richer, greener states have used their power to exert environment-friendly pressure on international trade-environment rules, coercing poorer countries into accepting greener rules . . . .[179]

Thus, on one view, the pursuance of free trade restricts the ability of developed nations to "act unilaterally to further [their] goals; be they economic, political or environmental."[180]

Tussie distinguishes the Northern or "green" agenda, which is concerned with climate change, bio-diversity, deforestation and fisheries issues, from the Southern or "brown" agenda, which is concerned with drinking water, poverty alleviation, trade, market access and the need for technology transfer and greater flows of development assistance.[181] She notes that Northern countries highlight the needs of future generations, whereas Southern countries are more concerned with alleviating poverty, reducing debt and dealing with growing populations in the immediate future.[182] This difference in the broad environmental agenda of North and South is reflected in attitudes towards particular

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174. *See* Winter, *supra* note 18, at 232.
175. *See* ISLAM, *supra* note 8, at 410.
176. *See* Winter, *supra* note 18, at 232.
177. *See* ISLAM, *supra* note 8, at 410.
178. *See* UIMONEN & WHALLEY, *supra* note 11, at 67.
179. Steinberg, *supra* note 13, at 232-33.
180. Brotmann, *supra* note 73, at 323.
181. *See* Tussie, *supra* note 9, at 2.
182. *See id.* at 2-3. *See also* ANITA HALVORSSEN, EQUALITY AMONG UNEQUALS IN INTERNATIONAL ENVIRONMENTAL LAW: DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES 5 (1999).

environmental resources. For example, Islam states that developed countries consider endangered species in need of protection, whereas poor countries may value such species as an exploitative resource.[183] The developed country response focuses on sustaining the environment in the long term; the developing country response focuses on staying alive now.

The preamble to the FCCC specifically notes:

> that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs . . . .[184]

Against this background, the obligations of developing countries to reduce GHG emissions under the Kyoto Protocol are limited or non-existent. This seems only fair in a general sense – those who generated the emissions should be responsible for cleaning them up.[185] Another way of formulating this argument is to say that even before the Kyoto Protocol established assigned amounts for particular countries, equity set quotas, and the developed world has already used up its quota.[186]

To participate fully in emissions trading and reduction, developing countries require the assistance of Annex I countries through technology transfers and financial aid.[187] They lack the independent resources to implement adjustments to production methods and monitor and enforce higher environmental standards.[188] If developed countries impose restrictive trade measures in the name of environmental protection without

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183. *See* ISLAM, *supra* note 8, at 409.

184. *See* FCCC, *supra* note 3, preamble. S*ee also* Christine Batruch, "*Hot Air*" *as Precedent for Developing Countries? Equity Considerations*, 17 UCLA J. ENVTL. L. & POL'Y 45, 56 (1998).

185. Paul Harris, *Common But Differentiated Responsibility: The Kyoto Protocol and United States Policy*, 7 N.Y.U. ENVTL. L. J. 27, 28-31 (1999). *See also* Schoenbaum, *supra* note 14, at 295-96 (discussing the "polluter pays principle"); Eckaus, *supra* note 91, at 286; Peter Slinn, *Development Issues: The International Law of Development and Global Climate Change*, *in* INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE, *supra* note 80, at 75, 78.

186. *See* Eckaus, *supra* note 91, at 290.

187. *See* Cameron, *supra* note 116, at 15.

188. *See* Veena Jha & René Vossenaar, *Breaking the Deadlock: A Positive Agenda on Trade, Environment, and Development?*, *in* TRADE, ENVIRONMENT, AND THE MILLENNIUM, *supra* note 21, at 65, 76-77.

providing support to developing countries, the environmental objectives risk being thwarted.[189] Effectively, developed countries will need to subsidize developing country compliance with emissions reduction targets once they are established.[190] This is a form of international affirmative action:

> Affirmative action in this context, points to a kind of historic, causal-related injustice because developing countries have not had the same socio-economic benefits as the developed countries that over-exploited the global environment, yet they are expected to share the burden of controls on economic development that may have a negative impact on the environment.[191]

Developed countries may be regarded as having a *duty* to provide development assistance to developing countries, and to make reparation for the damage done to the environment to date through the emission of GHGs.[192] The type and extent of assistance required will depend on the particular circumstances of the developing country, including its population and geography.[193] If developing countries do not eventually commit to emissions reduction targets, or are unable to meet them, the world will suffer as a whole because of the likely impact on global warming. However, the developing countries will suffer most.[194] They have the least resources to combat or adapt to climate changes and the most people to account for. They also tend to occupy regions that are already hotter and drier than those occupied by developed countries,[195] and to be more dependent on natural resources and systems.[196]

For countries such as Russia and the Ukraine, the assigned amount under the Kyoto Protocol fails to take into account the decline in emissions that has resulted from their economic downturn.[197] Thus, although the assigned amount may be 100% of that country's 1990 emission levels, the country's decline in

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189. *See id.* at 77.
190. *See* HALVORSSEN, *supra* note 182, at 4.
191. *Id.* at 28.
192. *See* Slinn, *supra* note 185, at 80-83.
193. *See* HALVORSSEN, *supra* note 182, at 6.
194. *See* BRACK ET AL., *supra* note 7, at 31; Harris, *supra* note 185, at 47-48.
195. *See* BRACK ET AL., *supra* note 7, at 31.
196. *See* Slinn, *supra* note 185, at 77.
197. *See* Batruch, *supra* note 184, at 46.

emissions since 1990 means that, even without any emission reducing efforts or technology, the actual emission levels in the commitment period are likely to be only 70% of 1990 levels. This surplus allocation (of around 30%) is known as "hot air" — the difference between the assigned amount and the likely level of emissions in the absence of climate related policies and measures.[198] The existence and extent of any hot air will depend, in part on the relevant countries' economic performance and recovery, before and during the commitment period. Some commentators argue that there may be no hot air at all.[199] However, these countries certainly have the potential to increase instead of decreasing their emissions between 2000 and 2008, while complying with the Kyoto Protocol. Alternatively, they could trade their hot air to developed countries, who could thus effectively buy their way out of emissions reduction targets.[200] This could have serious implications for the objectives of the FCCC, particularly if developing countries refer to this as a precedent for how their own emissions should be dealt with as they increase.[201]

By 2010, developing countries are likely to have become the major producers of GHGs.[202] This poses a problem for the long term success of the Kyoto Protocol in reducing GHG emissions overall, unless additional or amended obligations are imposed on developing countries. An important change would be to allow developing countries to participate in emissions trading under Article 17 of the Kyoto Protocol. This could address problems of industry relocating to developing countries with fewer restrictions on emissions than Annex I countries,[203] and could also enable developing countries to "generate hard currency income."[204] However, developing countries will face difficult decisions in engaging in emissions trading, particularly if it occurs at the level of private entities.[205] Initially, given the immediacy of many of these countries' problems, the temptation would be to sell credits and allowances to the highest bidder, securing much needed funds. As their development demands higher emissions levels, and assuming assigned amounts

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198. *See* Michael Grubb, *International Emissions Trading under the Kyoto Protocol: Core Issues in Implementation*, 7 REV. EUR. COMMUNITY & INT'L ENVTL. L. 140, 142 (1998).

199. *See* Batruch, *supra* note 184, n.10, 54-55.

200. *See* Driesen, *supra* note 134, at 11-12.

201. *See generally* Batruch, *supra* note 184.

202. *See* Cameron, *supra* note 116, at 6.

203. *Cf.* BRACK ET AL., *supra* note 7, at 9-10.

204. Cameron, *supra* note 116, at 9.

205. *See* Hepburn & Brown, *supra* note 83, at 172.

are determined for developing countries, they might find themselves lacking sufficient credits and allowances. If forced to purchase credits and allowances from developed countries or their private entities, possibly even "buying back" those they had sold themselves,[206] the price could be prohibitive.[207] Unless a mechanism is included in the trading system to account for the different economies and standards of wealth among the Kyoto Protocol parties, the system could prevent the development of the countries that need it most.

At present, a "grandfathering" approach is taken in the Kyoto Protocol to determine assigned amounts for Annex I countries, relying on a calculation of the emissions levels for that country in 1990. Since developed countries had the highest levels at that time, this approach gives them an advantage. Although assigning equal per capita levels of emissions for all countries would have made it much harder for some countries to comply than others, and would have created more hot air, it would also have avoided giving preferential treatment to countries with high emissions levels, and removed the incentive for developing countries to increase their emissions to benefit from the same treatment if and when they are assigned limited emission amounts. At the same time, it would in fact have favored the developing world to the extent that its population is larger than that of the developed world.[208] A third approach would have been to establish emission quotas proportional to GDP: "[t]his criterion posits that all production should be required to be equally clean in terms of emissions, wherever it takes place."[209] However, this approach fails to take into account the greater responsibility of developed countries for the emissions to date, and the financial difficulties that developing countries would face in ensuring their industries obtained and relied on environmentally friendly technologies.[210]

### *D. Preparing for a Challenge*

As discussed above, the Kyoto Protocol raises several different trade implications and potential challenges to the GATT/WTO. The protocol itself recognizes the possibility of such challenges in

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206. *See id.*
207. *See* Driesen, *supra* note 134, at 12.
208. *See* Batruch, *supra* note 184, at 64.
209. *Id.* at 63.
210. *See id.*

requiring Annex I parties to implement the relevant environmental policies and measures "in such a way as to minimize adverse effects . . . on international trade."[211] Of course, the Kyoto Protocol's challenges may never be formally realized. If the U.S. fails to ratify it, it may be very difficult to get sufficient numbers of developed countries together for the Kyoto Protocol to come into force. Ironically, while the U.S. was the first developed country to ratify the FCCC, it may be the last to ratify the Kyoto Protocol, if it ever does.[212] Lobbying by the energy industry may account for this apparent change of heart,[213] and the outcome of COP-6 may determine the extent to which such lobbying continues. If the emissions trading regime is sufficiently flexible and offers the U.S. the opportunity to comply with Article 3 of the Kyoto Protocol without making major domestic changes or emissions reductions, the U.S. may be more likely to ratify.

Assuming that the Kyoto Protocol does come into force, the issue of whether emissions trading under the Kyoto Protocol will contravene the GATT is one thing. Practically speaking, the issue of whether such trading will ever be challenged at the GATT/WTO level is quite another. Perhaps the forces that have so far protected other MEAs from challenge will continue to keep the conflict from erupting. However, several aspects of the Kyoto Protocol distinguish it from other MEAs: "no MEA has had the potential to impact so many sectors of the economy, so many economic interests and such high volumes of trade in products and services, as does the climate change regime."[214] At the same time, the Kyoto Protocol may not attract as many members as other MEAs containing trade measures, such as the Montreal Protocol, CITES, and the Basel Convention.[215] This may remove the apparent reluctance of GATT/WTO parties to challenge trade measures in MEAs,[216] and increase the likelihood of a dispute regarding the Kyoto Protocol being brought to the level of the GATT/WTO.

In particular, disputes are likely to arise concerning the rules on emissions trading under the Kyoto Protocol, no matter how well designed or carefully worded they may be. This is especially due to the impact on sovereign and commercial interests that will

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211. Kyoto Protocol, *supra* note 4, art. 2.3.
212. *See* Cameron, *supra* note 116, at 11.
213. *See id.* at 11-12.
214. Werksman, *supra* note 72, at 252.
215. *See supra* Part II(B).
216. *See* Werksman, *supra* note 72, at 261.

necessarily result from rewarding climate-friendly behavior.[217] In order to deal with such disputes, and take the opportunity to clarify the limits of such trading, a dispute resolution mechanism specific to the Kyoto Protocol should be established. As discussed above, to date GATT/WTO dispute resolution bodies have shown themselves to be more concerned with principles of free trade than with protecting the environment. A new body is needed to balance the conflict between trade and environment in the context of the Kyoto Protocol. This is perhaps even more important than in the case of other environmental trade measure disputes, due to the large numbers of parties involved, and the relative urgency of addressing global warming.

## VII. CONCLUSION

Trade-related environmental measures play a key role in several MEAs. The importance of resolving the conflict between such measures and the GATT/WTO cannot be overstated. It is clear that Article XX of the GATT alone is insufficient to resolve the trade-environment conflict in the near future. Its terms are too ambiguous and its interpretation to date too one-sided. In addition, although GATT/WTO jurisprudence is creeping towards a more environmentally friendly stance, WTO dispute settlement panels are ill-equipped to deal with the conflict at present. While it may be argued that there is an implicit, informal understanding that parties to an MEA will not challenge any of its trade measures under the GATT/WTO, or that such measures are exempt from the GATT/WTO,[218] the parties concerned would be wise to demand more certainty than this.

One way to achieve greater certainty would be to amend the GATT.[219] Another would be to create a separate WTO agreement on MEAs.[220] The trade-environment conflict is coming to a head. At the very least, the Sixth Session of the Conference of the Parties to the FCCC should give the matter serious consideration at The Hague in November in particularizing the flexibility mechanisms of the Kyoto Protocol. Preferably, measures that could potentially breach the GATT or other WTO rules but that are agreed to be acceptable

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217. *See id.*

218. *See* Wilder, *supra* note 21, at 4-5.

219. Cameron & Robinson, *supra* note 1, at 18-30; Winter, *supra* note 18, at 248-49; Schoenbaum, *supra* note 14, at 283-84; Brack, *Environmental Treaties, supra* note 70, at 293-96.

220. BRACK ET AL., *supra* note 7, at 20.

should be specifically identified as such. In addition, a separate dispute resolution body with environmental expertise as well as trade knowledge should be established to hear disputes arising under the Kyoto Protocol, and potentially other MEAs. Finally, careful analysis of the likely changes in the levels of emissions of developing countries and countries in transition to a market economy should also be conducted in structuring the emissions trading system.

If the Conference fails to consider the free trade implications in determining the mechanisms for implementing the Kyoto Protocol, there is a real risk of a GATT/WTO challenge being brought against these mechanisms. At best, this will create uncertainty and unnecessary costs in time and money. At worst, it will prove lethal to the system of emission credits, allowances and trading, and the chance of winding back the clock on global warming will be squandered.

## VIII. POSTSCRIPT

Since the time of writing, several significant events have taken place in relation to the Kyoto Protocol. In November 2000, negotiations in the Hague during the Sixth Conference of the Parties to the FCCC were suspended when the negotiators (particularly, the U.S. and the European Union countries) failed to reach agreement on key political issues, including the international emissions trading system and the treatment of carbon sinks.[221] Subsequently, in March 2001, President Bush announced that the U.S. was abandoning the Kyoto Protocol.[222]

The withdrawal of the U.S. created grave doubts about the future of the Kyoto Protocol, given the U.S.'s substantial contribution to global emissions and the requirement for the Kyoto Protocol's entry into force that Annex I parties together accounting for 55% of carbon dioxide emissions consent to be bound by it.[223] Nevertheless, the Conference of the Parties to the FCCC resumed talks in Bonn in July 2001[224] and, after lengthy negotiations, adopted a text on the implementation of the Buenos Aires Plan of Action[225] that should

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221. Press Release, FCCC Secretariat, Climate Change Talks Suspended: Negotiations to Resume During 2001(Nov. 25, 2000).

222. *Breakthrough in Bonn*?, ECONOMIST, July 23, 2001.

223. *See supra* Part IV(C) for the details of this requirement.

224. Press Release, FCCC Secretariat, Climate Talks Formally Resumed in Bonn (July 26, 2001).

225. *See supra* Part IV (D).

enable parties to begin ratifying the Kyoto Protocol and, ultimately, its entry into force.[226]

The Spokesman for United Nations Secretary-General Kofi Annan stated that the agreements reached in Bonn "provide a solid political basis for the Johannesburg Summit in September 2002."[227] The involvement of states such as Japan and Canada will be crucial in bringing the Kyoto Protocol into force, given the absence of the U.S.

The Seventh Session of the Conference of the Parties to the FCCC will take place in Marrakech from October 29, 2001 to November 9, 2001, and at that time detailed decisions on the text of the Kyoto Protocol and its implementation are to be finalized and formally adopted.[228] Doubts remain as to how successful the Kyoto Protocol can be without the U.S., with compromises being made to obtain the support of other industrialized countries. However, it is also important to remember that if the Kyoto Protocol is to achieve its environmental goals it must not only enter into force, but must also be capable of enforcement without interfering with other international obligations of the parties. This means that in the final states of drafting and negotiation of the Kyoto Protocol, the parties to the FCCC should pay close attention to the implications for free trade of the emissions trading regime, as discussed in this article.

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226. FCCC, *Review of the Implementation of Commitments and of Other Provisions of the Convention: Preparations for the First Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol (Decision 8/CP.4), Decision 5/CP.6*, U.N. Doc. FCCC/CP/2001/L.7, July 24, 2001.

227. Statement by Spokesman for the Secretary-General, *Secretary-General Welcomes Bonn Agreements on Emission Limitation*, SG/SM/7898, ENV/DEV/595, July 23, 2001.

228. Press Release, FCCC Secretariat, Bonn Decisions Promise to Speed Action on Climate Change (July 27, 2001).

# AT THE CROSSROADS OF ENVIRONMENTAL AND HUMAN RIGHTS STANDARDS:

## *AGUINDA V. TEXACO, INC.*

# USING THE ALIEN TORT CLAIMS ACT TO HOLD MULTINATIONAL CORPORATE VIOLATORS OF INTERNATIONAL LAWS ACCOUNTABLE IN U.S. COURTS

LISA LAMBERT*

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## I. INTRODUCTION

In December of 1999, the World Trade Organization ("WTO") Summit in Seattle, Washington, was met with several thousand unexpected attendees. Labor, environmental, and human rights activists took to the streets of Seattle to protest the WTO's exclusion of the their interests from the bargaining table.[1] Multinational corporations ("MNC")[2] have grown and prospered, but often at the

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*J.D., The Florida State University, College of Law, 2001; B.A., Kent State University, 1993. This paper is dedicated to Jelly.

1. *See* Jonathan Peterson, *Bottom Line on WTO Still Shaky for U.S.*, L.A. TIMES, Nov. 29, 1999, at A1.

2. *See* BLACK'S LAW DICTIONARY 1015-16 (6th ed. 1990) (defining a MNC as a company "which has centers of operation in many countries," versus an international corporation which generally has one

expense of basic international human rights and the natural environment. Many MNC's have annual profits exceeding the Gross Domestic Product ("GDP") of smaller nations, yet they are not bound to the same laws as these nations.[3] Industrial globalization will not end, but the activists want to ensure that the environmental and human rights protections are included within the international trade accords proposed by organizations such as the WTO.[4]

The protestors' shutdown of the WTO summit announced to the world the realization that MNC's can impact everything from environmental issues to basic human rights.[5] In three short days, the meetings were adjourned.[6] The protests of Seattle were formed by a coalition of advocates spanning from across the non-profit sector.[7] Human rights leaders were hand-in-hand with sheet metal workers; representatives of various religious organizations marched with Earth First! members.[8] Though each group and individual may have had its own priority, they found a common ground in protesting the actions of the MNC's.

The implementation of worker and environmental protections into both newly created and existing trade agreements is imperative. International accords and conventions addressing these issues are binding only upon the ratifying states; therefore, the private MNC may escape international scrutiny. However, until that time, the United States ("U.S.") federal courts may provide an outlet for redress.

The Alien Torts Claims Act ("ATCA") allows foreign plaintiffs to sue defendants of any nationality in a U.S. federal court for a tort constituting a violation of international law.[9] Therefore, a U.S.-

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central nucleus of operation with activities crossing borders; however, the terms are used interchangeably).

3. *See* Sherrie E. Zhan, *World Trade 100*, WORLD TRADE, Nov. 1999, at 46 (listing the top 100 international businesses based in the United States).

4. *See* Peterson, *supra* note 1, at A1. Note, however, that some of the activists do want to stop globalization; in fact, the movement is referred to by some as an anti-globalization movement. *See* Jane Spencer, *Raising a Ruckus: Students Take the Bus to DC*, THE NATION, Apr. 24, 2000, at 23.

5. *See* John Burgess, *Protesters at WTO Plan D.C. Follow-Up*, WASH. POST, Jan. 26, 2000, at E1.

6. *See id.*

7. *See* John Nichols, *The Beat*, THE NATION, Apr. 24, 2000, at 9. Seattle is just the beginning of a coalition of activists protesting unchecked global corporate activity; on April 16-17, 2000, over 400 organizations, including the AFL-CIO, Direct Action Network, Rainforest Action Network, and Global Exchange, protested the World Bank/International Monetary Fund meetings in Washington, D.C. (simply named, 'A16' – as the WTO protests which began on November 30, 1999, were termed 'N30'). *See id.*

8. *See* Nov. 30 Nonviolent Direct Action (last visited Mar. 20, 2000) <http://www.agitprop.org/artandrevolution/wto/n30.html> (stating co-sponsors include, among others, Direct Action Network, Global Exchange, Rainforest Action Network, Ruckus Society, National Lawyers Guild, 50 Years is Enough, and Earth First! and the Green Party of Seattle).

9. *See* 28 U.S.C. § 1350 (1999).

owned MNC may face a lawsuit in its own courts if it operates abroad in contravention to international standards. Indeed, Texaco, Inc. ("Texaco") is the named defendant in a class action lawsuit under the ATCA in the Second Circuit, the site of its headquarters.[10]

Seven years ago, a class-action lawsuit, *Aguinda v. Texaco, Inc.*, was filed by citizens of the Republic of Ecuador ("Ecuador") alleging environmental and personal harms caused by Texaco.[11] The citizens of the "Oriente,"[12] or rainforest, region of Ecuador claimed Texaco's operation of an oil pipeline resulted in environmental degradation causing illness and destroying their livelihood in the forest.[13] After a myriad of litigation involving motions to dismiss for *forum non conveniens*, international comity, and joinder of necessary parties, the plaintiffs may well have their day in court.[14] On January 31, 2000, presiding Judge Rakoff issued an order to submit briefings on whether the issue can be fairly adjudicated in Ecuador.[15] Presumably, if the court finds that the plaintiffs will not receive justice in their home courts, the lawsuit will continue here in the United States.

*Aguinda v. Texaco, Inc.* stands to be an important case in international litigation for several reasons. First and foremost, the plaintiffs initiated a lawsuit against a U.S.-owned MNC in U.S. federal court for alleged harms committed in another country in violation of international laws. Second, the case may stand as an expansion of the ATCA, making environmental torts a part of the *jus cogens*[16] of international law, and hence, our federal common law.

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10. *See* Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994), *adhered to by*, 850 F. Supp. 282 (S.D.N.Y. 1994), *dismissed by*, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated sub nom.*, Jota v. Texaco Inc., 157 F.3d 153 (2d Cir. 1998), *on remand*, 2000 U.S. Dist. LEXIS 745 (S.D.N.Y. Jan. 31, 2000).

11. *See Aguinda*, 1994 WL 142006. However, the defendants reference Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994), as the first case in this litigation—most likely because the court dismissed *Sequihua* on grounds of *forum non conveniens*, a friendly holding for Texaco. In reality, the causes of action are similar, but the *Sequihua* case is "arguably distinguishable." *Aguinda*, 1994 WL 142006, at *3 (finding the district court's reliance on *Sequihua* for dismissal erroneous). The most notable difference is that the *Aguinda* plaintiffs pointed to their belief that decisions made by the defendant in New York led to the actions of their subsidiary in Ecuador, thus leading to the harms suffered. *See id*.

12. "Oriente" literally means "east" — the Amazon of Ecuador is located in the eastern portion of the country, hence the term. *See* BANTAM NEW COLLEGE SPANISH & ENGLISH DICTIONARY 250 (1991).

13. *See Aguinda*, 1994 WL 142006, at *1.

14. *See id.* For a detailed description of the procedural history, see *infra*, notes 38-71 and accompanying text.

15. *See Aguinda*, 2000 U.S. Dist. LEXIS 745.

16. *Jus cogens* are the peremptory norms of customary international law, such as "genocide, slavery . . . the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights." RESTATEMENT

Third, the case, if litigated and won, may provide a collectible judgment in ATCA litigation rather than judgments yet to be recovered by victorious ATCA plaintiffs.[17] Finally, the case may serve as a warning to first-world MNC's that they will be held responsible for the harms they cause in less-developed states.

This note will explore the possibilities of suing MNC's in U.S. federal courts, using the *Aguinda* claims as a basis, and thus further expanding international norms. Part II traces the history of Texaco's involvement in Ecuador, together with the procedural history of the case. Part III examines the ATCA and its application to private, corporate defendants. Lastly, Part IV explores some of the barriers facing ATCA plaintiffs pursuing litigation against MNC's.

## II. AGUINDA V. TEXACO, INC.

### *A. Background*

The saga of Texaco's connection with Ecuador began over thirty years ago. In 1964, the Ecuadorian government, a U.S.-endorsed military-junta regime,[18] invited Texaco and Gulf Oil Corporation ("Gulf Oil") to explore for oil in the Amazon region,[19] the Oriente. Texaco and Gulf Oil formed a consortium with equal interests, signed a twenty-eight year agreement, and began drilling for oil in the rainforest.[20] By 1972, the TransEcuadorian pipeline was completed and major amounts of oil were being extracted from the Oriente.[21] In 1974, Petroecuador, the state-owned oil company, acquired a twenty-five percent interest in the consortium,[22] beginning Ecuador's long dependence on petroleum.[23]

The leadership of Ecuador's military dictatorship during the 1970s led the country into prosperity based on the oil industry.[24]

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(THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 702 (1987). However, the list is an evolving standard, not a fixed one. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

17. *See* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 218 (1996) (noting only $400 was recovered against the judgment in Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988), and all other multi-million dollar judgments are as yet uncollected).

18. *See* John D. Martz, *Ecuador: The Fragility of Dependent Democracy*, *in* LATIN AMERICAN POLITICS AND DEVELOPMENT 378, 389 (Howard J. Wiarda & Harvey F. Kline eds., 3d ed. 1990).

19. *See* TEXACO, TEXACO AND ECUADOR: HISTORY OF OPERATIONS (last modified Sept. 22, 1999) <http://www.texaco.com/shared/position/docs/history.html>.

20. *See* Aguinda v. Texaco, Inc., 945 F. Supp. 625, 626-27 n.1 (S.D.N.Y. 1996).

21. *See* TEXACO, TEXACO AND ECUADOR: CHRONOLOGICAL OVERVIEW (last modified Feb. 1, 1999) <http://www.texaco.com/shared/position/docs/chron_overview.html>.

22. *See Aguinda*, 945 F. Supp. at 626-27 n.1.

23. *See* Martz, *supra* note 18, at 380.

24. *See id*. at 386.

Government agencies and employees tripled in three years time.[25] In 1976, Gulf Oil stepped out of the picture, and Petroecuador acquired its shares, giving the nation a 62.5 percent interest in the consortium.[26] Ecuador joined the Oil Producing and Exporting Countries ("OPEC") and became an active participant.[27] Petroleum soon became the baseline of the Ecuadorian economy, and by 1987, oil accounted for two-thirds of export revenue and sixty percent of government earnings.[28]

However, the bounties of the oil industry were not destined to last. The reserves gradually dwindled and production declined.[29] Ecuador began ignoring the OPEC quotas to offset the losses.[30] Then a catastrophic earthquake hit in 1987 and severely damaged the TransEcuadorian pipeline,[31] which by then was completely controlled by Petroecuador.[32]

The boom of the petroleum industry was also not without environmental and human costs, which have led to the instant lawsuit. Estimates place pipeline spills at 16.8 million gallons of crude oil emptying into the Amazon River Basin.[33] Additionally, almost 30 billion gallons of toxic by-products of the petroleum extraction were released into the environment.[34]

A study in 1993 found that Oriente residents were being exposed to levels of oil-related contaminants surpassing international standards.[35] The study also revealed they were suffering from a high rate of skin-related diseases.[36] Lastly, the study showed that such findings pointed to an increased risk of more serious diseases such as reproductive and neurological problems, as well as cancers.[37] In fact,

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25. *See id*.
26. *See Aguinda*, 945 F. Supp. at 626-27 n.1.
27. *See* Martz, *supra* note 18, at 390.
28. *See id.* at 380.
29. *See id*.
30. *See id.* at 388.
31. *See id.* at 380. After the earthquake, the United States sent 6,000 troops to assist reconstruction efforts in the Amazon region. *See id.* at 389. The action fueled many underlying anti-U.S. sentiments; however, by July 1987, the U.S. Congress resolved to withdraw the troops. The troops did not leave until October, with little rebuilding completed. *See id*. at 390.
32. *See* TEXACO AND ECUADOR, *supra* note 21. In 1986, Petro-ecuador acquired 100% ownership of the pipeline, while Texaco maintained its 37.5% share of the consortium.
33. *See* Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 SW. J.L. & TRADE IN AMERICAS 293, 315 n.77 (1995). By comparison, the Exxon-Valdez spill sent 10.8 million gallons of crude oil into the Alaskan bay. *See id.*
34. *See* THE CENTER FOR ECONOMIC AND SOCIAL RIGHTS, RIGHTS VIOLATIONS IN THE ECUADORIAN AMAZON: THE HUMAN CONSEQUENCES OF OIL DEVELOPMENT 23 (Mar. 1994), <http://www.cesr.org>.
35. *See id*. at 20.
36. *See id.*
37. *See id*.

an unpublished study's preliminary findings state the overall rate of cancer in the Oriente is 2.3 times higher than residents of Ecuador's capital, Quito.[38]

### *B. Procedural History*

*Aguinda v. Texaco, Inc.* is a class-action lawsuit filed by citizens of Ecuador in November of 1993 in the Southern District of New York alleging large-scale environmental abuse in the Oriente.[39] The *Aguinda* plaintiffs have been through pre-trial litigation spanning seven years and have yet to get past an order allowing for limited discovery.[40] Instead, the years have been spent fending off Texaco's motions to dismiss based on three premises: *forum non conveniens*, international comity, and failure to join an indispensable party.

The initial presiding judge, Vincent L. Broderick, denied Texaco's motions to dismiss and permitted limited discovery to proceed.[41] Judge Broderick reasoned that discovery was necessary to determine the validity of plaintiffs' claim that Texaco's headquarters maintained final authority over all decision-making in the Ecuadorian project.[42] Further, the Judge's memorandum stated that absent a binding agreement by Texaco accepting jurisdiction in Ecuador, no final determination concerning dismissal would be made.[43]

Regarding the issue of international comity, the court stated that Texaco's motion sounded more like a choice of law argument and found no apparent conflict with Ecuadorian laws.[44] Ecuador filed a brief in support of the motion to dismiss; however, the basis of its argument was neither international comity nor national sovereignty. Ecuador's brief argued that retention of jurisdiction by a U.S. court

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38. *See* Eyal Press, *Texaco on Trial*, THE NATION, May 31, 1999, ¶ 6 <http://www.thenation.com/issue/990531/0531press.shtml> (interviewing Dr. Miguel San Sebastian, who is analyzing the health patterns in areas of the Oriente affected by oil production). The preliminary results also point to Oriente men suffering from larynx cancer thirty times more, and stomach cancer rates five times higher, than men of comparable age in Quito, Ecuador. *See id.*

39. No. 93 Civ. 7527, 1994 WL 142006, at *1-2 (S.D.N.Y. Apr. 11, 1994) *adhered to by*, 850 F. Supp. 282 (S.D.N.Y. 1994), *dismissed by*, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated sub nom.*, Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998), *on remand*, 2000 U.S. Dist. LEXIS 745 (S.D.N.Y. Jan. 31, 2000). The initiating attorney, Cristobal Bonifaz, is a native of Ecuador, grandson of a former Ecuadorian president and former chemical engineer; he enlisted the assistance of Kohn, Swift & Graf, a Philadelphia firm specializing in class action lawsuits on behalf of plaintiffs. *See* Press, *supra* note 38, at 8-9, 11. *See also* Kohn, Swift & Graf, P.C., Texaco, Inc. (visited Apr. 3, 2001) <http://www.kohnswift.com>.

40. 1994 WL 142006. The first unreported memorandum allowed for limited discovery. *See id.* at *1.

41. *Id.*

42. *See id*. at *4.

43. *See id*. at *2.

44. *See id.* at *8.

would be a disincentive to U.S. investors.[45] The court agreed that countries like Ecuador rely upon foreign investment, however, the court noted the real disincentive would be "to conduct likely to violate applicable legal norms regardless of the site of the property affected."[46]

Interestingly, Judge Broderick noted the plaintiffs' failure to plead a particular treaty for their ATCA claims, then proceeded to point to the Universal Declaration of Human Rights[47] and the Rio Declaration on Environment and Development[48] as being the most relevant.[49] As luck would have it for the plaintiffs, Judge Broderick died a year after affirming his order.[50]

Under the new judge, Jed Rakoff,[51] Texaco again raised its motion to dismiss — this time with a more favorable outcome for the defendants. In November of 1996, Judge Rakoff granted the defendants' motion to dismiss.[52] For the grounds of *forum non conveniens* and international comity, the court relied upon a similar, yet distinguishable case from Texas, *Sequihua v. Texaco, Inc.*,[53] without meaningful discussion.[54] The court did, however, analyze an independent ground for dismissal, the failure to join Ecuador and Petroecuador as indispensable parties.[55] These parties were necessary to provide full relief to the plaintiffs,[56] yet they are subject to the Foreign Sovereign Immunities Act ("FSIA")[57] and cannot be sued in the U.S. courts.[58] Because of their immunity, the court held dismissal of the entire action proper.[59]

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45. *See id.* at *9.

46. *Id*.

47. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71, Article 3 (1948) [hereinafter UDHR].

48. Rio Declaration on Environment and Development, *adopted by*, United Nations Conference on Environment and Development (UNCED), U.N. Doc. A/CONF.151/26 (vol.1) (1992), 31 I.L.M. 874 (1992) [hereinafter Rio Declaration].

49. *See Aguinda*, 1994 WL 142006, at *6-7.

50. *See* Press, *supra* note 38, ¶ 18. Before his death, Judge Broderick dismissed the plaintiffs' motion requesting to structure a settlement agreement. *See Aguinda*, 1994 WL 142006, at *1. He based his denial on the fact that the plaintiffs had not completed the allowed discovery and the issue of forum was not completely resolved; therefore, any issues of settlement procedures were premature. *See id*. at *3-4.

51. Judge Rakoff is a former partner in a large firm that represented Texaco's patent interests (although he never personally handled any of the cases). He also authored a journal article defending the officers of corporations committing environmental harms. *See* Press, *supra* note 38, ¶ 18.

52. *See* Aguinda v. Texaco, Inc., 945 F. Supp. 625, 628 (S.D.N.Y. 1996).

53. 847 F. Supp. 61 (S.D. Tex. 1994).

54. *See Aguinda*, 945 F. Supp. at 626-27.

55. *See id*.

56. *See id*. at 627 (citing FED. R. CIV. P. 19(a)).

57. *See* 28 U.S.C. §§ 1603(b), 1604 (1994).

58. *See Aguinda*, 945 F. Supp. at 628.

59. *See id*.

After the dismissal, Ecuador and Petroecuador submitted motions to intervene in the action, stating support of the plaintiffs' litigation in the U.S.[60] This move was odd because from the beginning of the litigation, Ecuador had "repeatedly lodg[ed] formal and unequivocal demands that the Court dismiss the action in the interests of international comity."[61] The change of heart was attributed to a change of political leadership.[62] The court was not persuaded and denied the motion as untimely and lacking an unequivocal waiver of immunity.[63] Further, the court found Ecuador to have no legal interest warranting intervention because it had executed a formal settlement with Texaco, releasing the corporation from future liability.[64]

Starting their fifth year of litigation, the dismissal was vacated and remanded on appeal.[65] The court held that the finding in favor of the *forum non conveniens* doctrine was erroneous because Texaco was not required to submit to the jurisdiction of the Ecuadorian courts.[66] Regarding the issue of international comity, deference was given to the position of the interested state, and due to Ecuador's oscillating position on the litigation, the appellate court suggested further inquiry upon remand.[67] The final issue of joinder was held neither to require nor authorize dismissal "simply because [the] party cannot be joined."[68] Rather, the test is whether the litigation can proceed "in equity and good conscience" without the unnamed party.[69] The court held Ecuador was not an indispensable party for all claims of relief; therefore, litigation could continue without joinder of the state.[70] However, an opportunity for Ecuador to

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60. *See* Aguinda v. Texaco, Inc., 175 F.R.D. 50, 51 (S.D.N.Y. 1997).
61. *Id*. at 51.
62. *See id*.
63. *See id*. at 51-52.
64. *See id*. at 53. A copy of the agreement and release between Ecuador and Texaco is available at TEXACO AND ECUADOR, LEGAL ARCHIVES (last modified Sept. 22, 1999) <http://www.texaco.com/shared/position/docs/legal.html>.
65. *See* Jota v. Texaco, Inc., 157 F.3d 153, 155 (2d Cir. 1998), *vacating*, Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996). In 1994, a companion case, Jota v. Texaco, Inc., No. 94 Civ. 9266 (JSR), was filed. The plaintiffs in *Jota* are a class of Peruvian indigenous tribes who reside in the rainforest, alleging similar environmental and health harms as a result of the toxins flowing into Peru via the Amazonian waterways. The *Jota* and *Aguinda* plaintiffs appealed to the Second Circuit together, as their claims were dismissed on the same grounds. This paper focuses solely on the *Aguinda* litigation, as the *Jota* plaintiffs raise even more issues outside the scope of this research. The *Jota* plaintiffs possess similar, yet distinct, claims in that their harms occurred in Peru, but Texaco did not operate directly in Peru, and they are a class comprised solely of indigenous tribes.
66. *See Jota*, 157 F.3d at 159.
67. *See id*. at 160.
68. *Id*. at 162.
69. *Id*. (citing FED. R. CIV. P. 19(b)).
70. *See id*.

amend its motion to intervene with a full waiver of immunity was reserved for remand.[71]

The *Aguinda* plaintiffs sustained victory on appeal. Now, back in the trial court, Texaco consented to jurisdiction in Ecuador,[72] and renewed the motions to dismiss regarding forum and comity.[73] The court stated Ecuador was probably the proper forum, but it reserved decision on the dismissal issues.[74] Instead, the court issued an order for all parties to brief whether Ecuador could provide a sufficient forum, with at least a "modicum of fundamental fairness to litigants,"[75] in light of the recent *coup d'etat*.[76] Although by a political turn of events, the plaintiffs may well have their day in U.S. court.

## III. ALIEN TORT CLAIMS ACT

The Alien Tort Claims Act ("ATCA") may be the vehicle to get extra-territorial victims of toxic torts into U.S. courts and vindicate their rights against the degradation of their homelands by U.S. MNC's. The ATCA is simplistic yet forceful. It states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[77] The seeming simplicity may be where the problems in application enter. The statute was enacted in 1789; however, until recently, attorneys rarely utilized the ATCA.[78]

Before World War II, internationally accepted laws were scant.[79] The horrors brought to the surface from this conflict promulgated the United Nations ("U.N.") conventions on human rights that exist

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71. *See id.*

72. Texaco also consented to jurisdiction in Peru. *See* Aguinda v. Texaco, Inc., 2000 U.S. Dist. LEXIS 745, at *4 (S.D.N.Y. Jan. 31, 2000).

73. *See id*.

74. *See id*. at *5.

75. *Id*. at *8 (relying on Brideway Corp. v. Citibank, No. 99 Civ. 7504, 2000 WL 1673 (2d Cir. Jan. 3, 2000)).

76. *See id.* at *7 (citing *Ecuador Coup Shifts Control to No. 2 Man*, N.Y. TIMES, Jan. 23, 2000, at 1, that on January 21, 2000, a military coup deposed President Jamil Mahuad). Judge Rakoff, *sua sponte*, researched the judiciary of Ecuador through the State Department's Country Reports. *See id.* at *8-9.

77. 28 U.S.C. § 1350 (1999).

78. *See* Derek P. Jinks, *The Federal Common Law of Universal, Obligatory, and Definable Human Rights Norms*, 4 ILSA J. INT'L & COMP. L. 465, 465-66 (1998). *See also* Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 890-93 (1999) (recounting the theories underlying the ATCA as a statute to enabling federal, rather than state, control of suits brought by foreign diplomats and an altruistic congressional move to allow any alien wronged by a U.S. citizen to have a forum for justice in U.S. courts).

79. *See* Jinks, *supra* note 78, at 466.

today, thus enabling a more definitive approach to using the ATCA.[80]

### *A. Jurisdiction*

The ATCA confers "original jurisdiction" to the federal courts of the United States.[81] It is well accepted that ATCA's express grant of access to the courts serves as a waiver to the requirement of monetary minimums for damages for diversity jurisdiction.[82] Moreover, jurisdiction is granted on grounds of international law; hence, the federal question requirement need not be addressed.[83]

The plaintiff in an ATCA action must be an alien.[84] The courts accept that the defendant does not have to be a resident of the United States.[85] The defendant, however, must be subject to service in the U.S. court system.[86] In order to maintain jurisdiction after service of process, the foreign defendant must have a sufficient nexus with the forum state.[87] No hard and fast set of rules exists to determine whether the court may exercise jurisdiction over a foreign defendant; the court exercises discretion on a case-by-case basis.[88] However, some general guidelines include whether the defendant does business in the forum state, has otherwise consented to jurisdiction, or has visited the state.[89]

An example of an ATCA claim dismissed on jurisdictional grounds is *International Labor Rights Education & Research Fund v. Bush*.[90] The plaintiffs sought an injunction against [then] President Bush to enforce the labor provisions of the Generalized System of Preferences ("GSP").[91] This case was dismissed on jurisdictional grounds, as well as issues of standing and political question

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80. *See id*; *see also* BLACK'S LAW DICTIONARY 1533 (6th ed. 1990). The United Nations was formed during World War II for the "purposes of preventing war, providing justice and promoting welfare and human rights of peoples."

81. *See* 28 U.S.C. § 1350 (1999).

82. *See* Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996); *see also* Jama v. United States Immigration & Naturalization Serv., 22 F. Supp. 2d 353, 363 (D.N.J. 1998).

83. *See Kadic*, 70 F.3d at 246; *see also* Lynch v. Household Fin. Corp., 405 U.S. 538, 546-47 (1972), *reh'g denied* 406 U.S. 911 (1972).

84. *See* 28 U.S.C. § 1350 (1999) (stating the action must be commenced "by an alien").

85. *See id.* (containing no language delineating the nationality of the defendant, and the courts have not construed it as such).

86. *See generally* FED. R. CIV. P. 4.

87. *See id.* at 12(b)(2). This refers to whether the court can exercise personal jurisdiction over the defendant. *See generally* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

88. *See* ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 153 (3d ed. 1994).

89. *See id*.

90. 954 F.2d 745 (D.C. Cir. 1992).

91. *See id*. at 746.

doctrine.[92] The court denied jurisdiction, holding that the subject matter should be addressed in the Court of International Trade.[93]

In the example of *Aguinda v. Texaco, Inc.*, the initial requirements of jurisdiction were easily satisfied. The plaintiffs were aliens, suing for damages resulting from a toxic tort. Unlike the union in the *International Labor Rights* case, the foreign plaintiffs in *Aguinda* did have standing. The defendant, Texaco, was a corporate citizen of New York, the location of the court filing, and was obviously subject to service in the lawsuit.

### *B. Passing Jurisdiction . . . The Next Step*

After the jurisdictional requirements are met, a two-prong analysis is applied. "First, the court must determine if the plaintiffs have a claim under international law."[94] If the first prong is met, the court must decide if the action may proceed against the named defendants.[95] Only after this analysis will an ATCA claim defeat a motion to dismiss.[96] Grounds of *forum non conveniens* and international comity, however, will likely be addressed as grounds for dismissal as well.

#### *1. Prong One: Claims Arising Under International Law*

##### *a. Defining the "Law of Nations"*

The "law of nations" means international law.[97] International law is defined not only as "[t]hose laws governing the legal relations between nations," but also as the "relations with persons, whether natural or juridical."[98] International customs and treaties detail the universally accepted standards.[99] However, our judiciary has accepted U.S. federal common law as embodying the law of nations as well.[100]

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92. *See id*. at 748-52.

93. *See id*. at 747-48. *But see id.* at 752-59 (Mikva, C.J., dissenting) (offering a vigorous dissent against the conclusion that the Court of International Trade held exclusive jurisdiction, that the unions had no grounds for standing, and that the political question doctrine barred the case).

94. Jama v. United States Immigration & Naturalization Serv., 22 F. Supp. 2d 353, 361 (D.N.J. 1998).

95. *See id*.

96. *See* FED. R. CIV. P. 12(b)(6); *see, e.g.,* Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (stating that a complaint must be dismissed if the court finds "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

97. BLACK'S LAW DICTIONARY 886 (6th ed. 1990).

98. *Id.* at 816.

99. *See id*.

100. *See* Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (stating it is a "settled proposition that federal common law incorporates international law"), *cert. denied*, 116 S.Ct. 2524 (1996); *see also In re*

In the context of ATCA litigation, the courts have delineated the law of nations to encompass only those standards that are universal, obligatory, and definable.[101] These are known as the *jus cogens* or compelling law normatives.[102] The majority of ATCA cases rose in situations of torture at the hands of foreign government officials.[103] In fact, Congress expanded the Act in 1991 to allow U.S. citizen plaintiffs redress under the statute in cases of torture or extra-judicial killings.[104]

Nothing in the Act, however, designates its status as solely within the realm of torture. In addition to torture, the courts have recognized ATCA claims involving summary execution,[105] genocide,[106] war crimes,[107] disappearance,[108] arbitrary detention,[109] slave labor[110] and cruel, inhuman or degrading punishment.[111] The courts have refused to entertain allegations of property expropriation,[112] support of armed forces,[113] or labor rights of picketing.[114]

Internationally accepted standards are not applied equally in ATCA litigation. The judiciary has reserved this statute as a vehicle for vindicating only those wrongs that are universally accepted as reprehensible. However, these "norms" are fluid; as societies

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Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992) (stating "it is . . . well settled that the law of nations is part of federal common law").

101. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885-87 (2d Cir. 1980).

102. *See* Jinks, *supra* note 78, at 469-70.

103. *See Filartiga*, 630 F.2d at 878 (involving wrongful kidnapping and torture by a former Paraguayan official); *Kadic*, 70 F.3d at 236 (utilizing the ATCA to bring claims of war crimes and genocide by Bosnian Serb leader); *In re* Estate of Ferdinand Marcos, Human Rights Litig. 25 F.3d 1467, 1472-76 (9th Cir. 1994) (allowing class action certification under ATCA for claims of torture and disappearances by the Marcos regime); Abebe-Jira v. Negewo, 72 F.3d 844, 845-46 (11th Cir. 1996) (upholding damages against a former Ethiopian official for torture). For a more exhaustive listing, see Kieserman, *supra* note 78, at 899 n.106.

104. The revisions effectuated no substantive change in the wording of the statute but reflect Congress's ratification of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and subsequent obligation under UN protocols to incorporate "measures to ensure that torturers within their territories are held accountable for their acts." 138 CONG. REC. S2667-04, S2668 (daily ed. Mar. 3, 1992) (statement of Mr. Specter). *See also* STEPHENS & RATNER, *supra* note 17, at 25-29.

105. *See In re Estate of Ferdinand Marcos*, 25 F.3d at 1475.

106. *See Kadic*, 70 F.3d at 241-42.

107. *See id*. at 242-43.

108. *See* Forti v. Suarez-Mason, 694 F. Supp. 707, 710-11 (N.D. Cal. 1988).

109. *See* Xuncax v. Gramajo, 886 F. Supp. 162, 184-85 (D. Mass. 1995).

110. *See* John Doe I v. Unocal Corp., 963 F. Supp. 880, 892 (C.D. Cal. 1997).

111. *See Xuncax*, 886 F. Supp. at 187-89.

112. *See Unocal Corp*., 963 F. Supp at 899 (clarifying an earlier order dismissing plaintiffs' expropriation of property claim).

113. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208-09 (D.C. Cir. 1985) (dismissing Nicaraguan plaintiffs' allegations of a U.S. federal government conspiracy to support the *contras* in order to overthrow the Nicaraguan government).

114. *See* Khedivial Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49, 51-52 (2d Cir. 1960).

develop, so does the accepted level of human rights.[115] A human right can become cognizable under the ATCA when it surpasses the level of a goal, and becomes accepted as a right throughout the world.[116] In other words, the right to have a freedom or to be free from a particular injustice must be ripe.

I argue that a right to be free from environmental degradation, as described by the *Aguinda* plaintiffs, has risen to the level of universal acceptance, giving this right a place in the *jus cogens* of international laws.

*b. Law of Nations Addressing Environmental Standards*

The duty of one nation to compensate another for its environmental misdeeds that cross international borders and result in serious harm is time-honored in international law.[117] This concept of remuneration rests on the principle of *sic utere*; in other words, do not use your property in a manner that will harm others.[118] In the *Aguinda* scenario, the tort committed is environmental harm resulting in human rights violations. It may be a variation of the *sic utere* principle in that the alleged acts were perpetrated directly on the plaintiffs' property. The petroleum extraction, ensuing oil spills, and toxic waste release occurred directly on the lands upon which the plaintiffs live, as opposed to drifting to the plaintiffs homestead from Texaco's own property. Moreover, the lawsuit involves private parties, not states. A direct act of environmental harm may be seen as even more egregious than secondary pollution; and therefore, it contravenes the *jus cogens* law of nations.

The *sic utere* principle has been reaffirmed by various international documents.[119] The problem with reliance upon accepted international agreements in U.S. courts is that the United States, leader of the free world, has yet to secure Congressional ratification of most international conventions. Moreover, when ratification occurs, it is usually with reservations attached.[120] The good news is that we have existing case law and federal statutes that

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115. *See* Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989).

116. *See id.*

117. *See* STEPHENS & RATNER, *supra* note 17, at 89-90.

118. *See id.*

119. *See infra*, notes 122-30 and accompanying text.

120. *See, e.g.*, LOUIS HENKIN ET AL., HUMAN RIGHTS 334 (1999).

support the principles of these declarations, and may assist the federal judiciary in overseeing these types of claims.[121]

Curiously, the court in *Aguinda* noted a pleading of violations of international law without reference to a specific international document.[122] The court did not seem to find this problematic at the early stage of litigation, stating, "[n]o single document can create [non-treaty customary international law], but the unanimity of view as well as consistency with domestic law and its objectives are highly relevant."[123] However, specific international declarations address the types of harms alleged in *Aguinda*.

The triggering events in *Aguinda* consisted of environmental abuses, but the consequences of these actions have affected the basic human rights of the Ecuadorian plaintiffs. In a broad sense, the harms have affected the individual plaintiffs' fundamental "right to life, liberty and the security of the person."[124] The destruction of the environment in which a person lives can have a profound, if not deadly, impact upon basic human rights, thus, potentially violating the Universal Declaration of Human Rights.[125]

Indeed, the international documents address the inter-relatedness of environmental and human rights.[126] For instance, The Stockholm Declaration,[127] the premier international agreement on the environment, proclaims, "both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself."[128] This enunciation is then safeguarded as a "fundamental right to . . . an environment of a quality that permits a life of dignity, and well-

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121. Note the landmark case *Filartiga* was decided in 1980; the United States did not ratify the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment until 1991. Thus, there are universally accepted norms that can be adjudicated in U.S. Federal Courts utilizing the ATCA before our Congress moves to ratify existing conventions. *See also*, Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006, at *6 (S.D.N.Y. Apr. 11, 1994) (citing to various U.S. federal environmental statutes as "bespeak[ing] an overall commitment to responsible stewardship toward the environment").

122. *See Aguinda*, 1994 WL 142006, at *6.

123. *Id.* (citing to the UDHR, *supra* note 47, as an example).

124. UDHR, *supra* note 47, art. 3.

125. *See* STEPHENS & RATNER, *supra* note 17, at 92 n.74 (citing Case 7615, Inter-Am. C.H.R. 24, 28, 33 OEA/ser.L./V.11.66doc. 10 rev. 1 (1985)). The author points out the Brazilian government was held liable by the Inter-American Commission on Human Rights for not preventing the environmental harms leading to the decline in the Yanomami tribe of the Amazon. *See id.*

126. It is beyond the scope of this paper to address all existing international environmental agreements, declarations, or treaties; but for a comprehensive volume addressing international environmental law, see INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY (Anthony D'Amato & Kirsten Engel eds., 1996).

127. Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14Rev.1 (1973), 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

128. *Id.* at Proclamation 1.

being . . . " in the Declaration's first principle.[129] This theme has been repeated throughout U.N. documents,[130] with the Rio Declaration re-affirming the international standards put forth twenty years earlier in Stockholm.[131] While these documents affirm an individual right to a healthy environment, they also put forth an affirmative obligation to maintain and care for the environment.[132]

The international environmental principles receive strong criticism for their anthropocentric viewpoints.[133] In a very general sense, the philosophers divide into two camps: deep ecologists, who believe the natural world has an inherent value, and anthropocentrists, who view the worth of the environment according to its utility and value to humans.[134] The deep ecology theory would certainly bring interesting litigation in the ATCA context, along with its own peculiar problems.[135] Realistically, however, the beliefs of protecting the environment, whether for the benefit of the people or for its own sake, support a common goal. If some of the international declarations appear to say the natural world deserves protection from a human utility point of view, at least one, the World Charter for Nature, explicitly lays out our interdependence with the environment.[136]

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129. *Id*. at § 2, Principle 1.

130. *See, e.g.*, Rio Declaration, *supra* note 48, at Principle 1 (declaring that "[h]uman beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."); *Experts Group on Environmental Law of the World Commission on Environment and Development, Legal Principles for Environmental Protection and Sustainable Development*, adopted by, WCED Experts Group on Environmental Law, Article 1, U.N. Doc. WCED/86/23/Add. 1 (1986)(stating that "[a]ll human beings have the fundamental right to an environment adequate for their health and well-being.") [hereinafter *Experts Group*].

131. *See* Rio Declaration, *supra* note 48, at Preamble, ("[r]eaffirming the Declaration of the United Nations Conference on the Human Environment . . . and seeking to build upon it.").

132. *See, e.g.*, Stockholm Declaration, *supra* note 127, at Principle 2 (declaring "natural resources . . . must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate"); *Experts Group*, *supra* note 130, art. 2 (reporting that "[s]tates shall ensure that the environment and the natural resources are conserved and used for the benefit of present and future generations."); Rio Declaration, *supra* note 48, at Principle 7 (declaring "[s]tates shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.").

133. *See, e.g.*, ALEXANDER GILLESPIE, INTERNATIONAL ENVIRONMENTAL LAW, POLICY AND ETHICS 15-18 (1997).

134. *See id*. at 4-15, 127-36. *See generally*, CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? 7-33 (1996).

135. Assuming a foreign non-governmental organization (NGO) brought suit, the initial hurdle would be the standing doctrine. The exploration of this topic is outside the bounds of this paper. However, in the only ATCA claim brought by an organization I have uncovered, International Labor Rights Educ. & Research Fund v. Bush, 954 F.2d 745 (D.C. Cir. 1992), the concurring opinion makes a strong argument against the NGOs and labor unions' standing to bring suit. *See International Labor Rights*, 954 F.2d at 748 (Sentelle, J., concurring).

136. *See* INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY, *supra* note 126, at 64 (citing to the World Charter for Nature, Preamble, (1982), 22 I.L.M. 455 (1983) (declaring awareness that "(a) Mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrient . . . .")).

The *Aguinda* plaintiffs seek monetary damages to compensate the human victims, but the complaint also requests "equitable relief to remedy the contamination and spoliation of their properties, water supplies *and environment*." [137] The lawsuit itself recognizes the tie between the plaintiffs and the natural world. A big monetary judgment is meaningless if they can no longer survive in their environment. Accordingly, the equitable relief includes specific requests, such as the cleanup of the affected area, access to drinking water, and the establishment of a trust fund to finance environmental monitoring of the forest.[138]

Approximately thirty years ago, world leaders convened in Sweden to announce an international concern and recognition that protection of the environment protects human rights. Although not all environmental mishaps may constitute a violation of the law of nations,[139] the release of petroleum and hazardous wastes on such a large scale as in *Aguinda,* merit appropriate sanctions and penalties. The international documents, such as the Stockholm and Rio Declarations, collectively and individually, demonstrate the world's commitment to preserving and maintaining the global natural environment. The time is ripe for the *jus cogens* school of laws to encompass major environmental torts as violations of human rights.

*2. Prong Two: Defining the Defendant*

By definition, the ATCA would appear to provide a remedy against only official actions of states. International laws are accords between the states, and as such, may not always apply to private individuals. Indeed, the majority of the cases brought forth under the ATCA alleged wrongs by government officials.[140]

The ATCA has been likened to Section 1983 actions;[141] wherein, but for the person's stature as a state actor would the violation have been committed.[142] However, reading the statute, it can be utilized for "any civil action" for "a tort only, committed in violation of the

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137. Aguinda v. Texaco, Inc., 157 F.3d 153, 156 (2d Cir. 1998) (emphasis added).

138. *See id*. at 156 n.2.

139. *See* Aguinda v. Texaco Inc., No. 93 Civ. 7527, 1994 WL 142006, at *7 (S.D.N.Y. Apr. 11, 1994) (citing Amlon Metals v. FMC, 775 F. Supp. 668 (S.D.N.Y. 1991). *Amlon Metals* concerned a single shipment of hazardous waste, versus the wide scale environmental harms conducted over an extensive period of time involved here. *See id*.

140. *See* Kieserman, *supra* note 78, at 908-11. Kieserman notes that the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602-11 (1994), precludes jurisdiction over foreign countries with few exceptions. *See id.* This would account for the naming of individuals versus states.

141. *See* 42 U.S.C. § 1983 (1994). Section 1983 allows private citizens to sue for redress of Constitutional rights violations at the hands of state actors; Congress enacted the statute to enforce the provisions of the Fourteenth Amendment. *See* Monroe v. Pape, 365 U.S. 167, 171 (1961).

142. *See* Kieserman, *supra* note 78, at 905-11.

law of nations or a treaty of the United States."[143] Historically, tort claims defined the civil cause of action between private individuals.[144] It appears the verbiage of the statute does not preclude suits against private defendants. The courts have noted that particular situations allow for suits against "private individuals as well as state actors."[145] The *Unocal* case,[146] like *Aguinda*,[147] named a private corporate defendant. However, it may be argued the private actors allegedly received a benefit at the expense of the plaintiffs because of the state's complicity in the actions.

*Unocal* is another situation involving the petroleum industry pleading ATCA claims; however, the torts were committed in a labor setting.[148] Unocal Corp. ("Unocal"), a U.S.-owned oil company, built a gas pipeline in Myanmar (formerly Burma) as a joint project with the state government.[149] The plaintiffs claimed suffering torture and being forced into labor by Unocal and the military government.[150] The court found the foreign government defendants immune from suit as the commercial activity did not fall into the exceptions listed in the Foreign Sovereign Immunities Act ("FSIA").[151] But, the ATCA claims survived the motion to dismiss by the private defendant, Unocal.[152] This case is still pending.

In *Jota v. Texaco, Inc*, like *Unocal*, the harms alleged would not have been possible without the joint cooperation of the state of Ecuador.[153] But like Myanmar, Ecuador enjoys sovereign immunity under the FSIA.[154] However, arguing to let the private corporate offenders off the hook from a state action requirement perspective would defeat the purpose of the ATCA.

In these cases, it may be argued "but for" the state's willingness to comply with the desires of the private corporation, the violation of

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143. 28 U.S.C. § 1350 (1993).

144. *See* BLACK'S LAW DICTIONARY 1489 (6th ed. 1990).

145. Jama v. United States Immigration & Naturalization Serv., 22 F. Supp. 2d 353, 362 (D.N.J. 1998) (relying upon Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)). *See also* STEPHENS & RATNER, *supra* note 17, at 95. For an in-depth treatment of private plaintiffs and defendants in ATCA cases, see David P. Kunstle, Note, Kadic v. Karadzic*: Do Private Individuals have Enforceable Rights and Obligations Under the Alien Tort Claims Act?*, 6 DUKE J. COMP. & INT'L L. 319 (1996).

146. John Doe I v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997).

147. Jota v. Texaco, Inc., 157 F.3d 153, 155 (2d Cir. 1998).

148. *See* Unocal Corp., 963 F. Supp. at 880 (sustaining jurisdiction); *cf.* International Labor Rights Educ. & Research Fund v. Bush, 954 F.2d 745 (D.C. Cir. 1992) (dismissing on jurisdictional grounds).

149. *See Unocal Corp*., 963 F. Supp. at 883-86.

150. *See id.*

151. *See id*. at 885-88.

152. *See id.* at 889-92.

153. 157 F.3d 153 (2d Cir. 1998).

154. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1994) (allowing for waivers in limited circumstances, such as when a nation state is an actual market participant).

international law would not have occurred.[155] Countries such as Myanmar and Ecuador sustain a much-needed economic benefit from foreign investment, and will thus do whatever it takes to attract MNC's. Regulations may be overlooked regarding MNC's or fines suspended for violations, in order to acquire and keep the foreign investment coming in. Now, these types of actions do not relieve the host countries of liability; in fact, they make them more culpable. But, MNC's should not escape liability for engaging in tortious conduct—albeit with a national seal of approval.

International laws govern "international organizations" as well as states.[156] If MNC's intend to operate on a global scale, they must be held to the same international norms as the states and be held accountable for violations of international standards. However, until courts recognize MNC's as capable of violating (and complying with) international laws without the direction and assistance of states, the potential ATCA plaintiff must assert a concerted state effort.

## IV. VARIOUS HURDLES IN ACTA LITIGATION

### *A. Forum Non Conveniens*

The first line of defense in an ATCA suit is the federal common law doctrine of *forum non conveniens*.[157] The doctrine allows dismissal of a case, without prejudice, but only if the court otherwise has proper jurisdiction and venue.[158] Additionally, a case may not be dismissed on grounds of *forum non conveniens* absent a showing by the movant that an alternative forum exists to adjudicate the claims.[159] *Forum non conveniens* has diminished in U.S. federal courts since the passage of a federal statute allowing transfer of venue.[160]

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155. *See* Kieserman, *supra* note 78, at 908-11. Kieserman points out the conundrum for MNC's engaging in acts that violate international laws in that they may be "left holding the bag" for their collusion with the foreign government. *See id.*

156. *See* BLACK'S LAW DICTIONARY 816 (6th ed. 1990).

157. For an excellent comment critiquing the use of the *forum non conveniens* doctrine to dismiss foreign plaintiff's lawsuits as discrimination see Brooke Clagett, Comment, *Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs*, 9 TUL. ENVTL. L. J. 513 (1996). For a strong article promoting the elimination of the doctrine in human rights litigation altogether, see Kathryn Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41 (1998).

158. *See* HAYDOCK, *supra* note 88, at 167. If jurisdiction or venue were improper, the case must be dismissed or transferred on those grounds, not *forum non conveniens*. *See id.*

159. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981); *see also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

160. *See* 28 U.S.C. § 1404 (1994). This statute, entitled "Change of venue," allows transfer for the "convenience of parties and witnesses, in the interest of justice," see § 1404(a), at the court's discretion, see § 1404(b). *See also* HAYDOCK, *supra* note 88, at 167.

However, it continues to have great importance in cases where the alternate forum would be a foreign jurisdiction.[161]

The *forum non conveniens* doctrine is facially attractive to both the defendants and the courts in ATCA litigation. The events alleged in an ATCA claim will have taken place outside the borders of the United States. The discovery period will necessarily entail depositions of foreign nationals requiring translators and travel. Moreover, documents and other pertinent information will lie in the other country. Also, courts will be concerned about the necessity of applying either foreign law, choice of law, or both.[162]

In the *Aguinda* litigation, the plaintiffs have spent seven years fighting the defense of *forum non conveniens*. The peculiar nature of environmental claims makes this defense hard to overcome. The damages alleged in *Aguinda* took place and continue to harm an area of the world a continent away from the Second Circuit. The court has shown reservation to adjudicate these claims because of the inherent difficulties of determining the actual physical damage from the petroleum production.[163]

However, the plaintiffs allege Texaco headquarters spearheaded the policies and procedures leading to the damages in Ecuador.[164] Texaco's headquarters, along with all pertinent documents, are in New York. Additionally, if certified as a class, the named members would reasonably be able to travel to the United States to testify without an undue hardship.

Barriers such as language and choice of law should not bar the claims from adjudication in the United States either. Spanish is the second most common language in the United States and translation of witnesses or documents would be easily obtained. Also, the law pled is international, and these documents can readily be interpreted by our sophisticated federal judiciary.

The doctrine of *forum non conveniens* developed not as a punishment, but to eliminate burdens on the judiciary if the plaintiff chose an inconvenient location for trial.[165] But the doctrine results in dismissal, not solely a venue change, and therefore is regarded as a severe remedy that should not be taken lightly.[166] This accounts for

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161. *See* HAYDOCK, *supra* note 88, at 167.
162. *See id.*
163. *See* Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006, at *2 (S.D.N.Y. Apr. 11, 1994).
164. *See id.* at *3.
165. *See* HAYDOCK, *supra* note 88, at 167.
166. *See id.*

the necessity of ensuring an alternate, adequate court exists where "justice would be better served."[167]

Ecuadorian courts jump out as the obvious alternative; the events, after all, occurred in that country. Texaco has maintained its agreement to suit in Ecuador.[168] However, the possibility of a fair trial in Ecuador has been questioned for some time,[169] and following the *coup d'etat* in January 1999, the possibility of justice there seems unlikely. In fact, on remand, the trial court has *sua sponte* researched the political situation in Ecuador and has ordered the parties to brief the issue of adjudication abroad in light of the recent developments.[170] The court now appears willing to retain venue over the plaintiffs' claims. However, a final order on the issue is pending.

In the end, *forum non conveniens* relies upon the discretion of the court.[171] The court need not entertain a suit, regardless of proper jurisdiction and venue, if a more appropriate forum exists. However, given the chronic and current political unrest in Ecuador, and the claims of corporate parent responsibility, the *Aguinda* plaintiffs' choice of forum should not be disrupted.

### *B. International Comity*

International comity is the practice of deference to the acts, laws, and jurisdictions of foreign countries.[172] Essentially, it is respect for another's sovereignty.[173] But international comity, as a judicial doctrine, is not easily reduced nor defined. The historical position relates to keeping the judiciary out of foreign relations; however, the modern view puts forth an expanded role of the judiciary in these matters.[174] The modern analysis is a balancing test, comparing "the foreign sovereign's interest in not having a U.S. court rule on the

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167. BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

168. Texaco has, according to the record, maintained an oral agreement to suit in Ecuador; however, by the January, 2000 order, Texaco had formally agreed to suit in Ecuador. *See* Aguinda v. Texaco, Inc., 2000 U.S. Dist. LEXIS 745, at *4 (Jan. 31, 2000).

169. *See* U.S. DEP'T OF STATE, ECUADOR COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1999 § 1(e) (Feb. 25, 2000) (noting "the judiciary is susceptible to outside pressure. . . . Judges reportedly rendered decisions more quickly or more slowly depending on political pressure or the payment of bribes."); *see also Aguinda*, 2000 U.S. Dist. LEXIS 745, at *5-6 (citing Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 455-56 (D. Del. 1978) (finding Ecuador's military control of the courts to provide an unacceptable alternative forum)).

170. *See Aguinda,* 2000 U.S. Dist. *Lexis* 745, at *10.

171. *See id*.

172. *See* Jota v. Texaco, Inc., 157 F.3d 153, 159-60 (2d Cir. 1998) (citing Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997) (internal quotes omitted)).

173. *See id*.

174. *See* Curtis A. Bradley & Jack L. Goldsmith, *Commentary: Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2273 (1998).

validity of its public actions with the interests of the coordinate branches of the U.S. government."[175]

The issue of deference to Ecuador has been frustrated by the state's changing opinions on the pending litigation. Initially, the lawsuit was thought to be a grave violation of its sovereignty. Ecuador filed motions with the court demanding dismissal so adjudication could be rightly pursued in its court system. Then, after dismissal of the plaintiffs' claims, Ecuador completely changed its position and backed the lawsuit! The appellate court reasoned two competing considerations have erupted as a result of the changed stance: orderly adjudication and deference to the wishes of the state where the events occurred.[176] Without resolving the comity issue, the court stated the parties' reliance upon Ecuador's position should be considered upon remand.[177]

While the sovereignty of states should be given due respect, the claims in an ATCA suit involve violations of international law. More precisely, they involve the *jus cogens* of international law, which, in theory, are held to be applicable to all states. For this reason, adjudicating these claims in U.S. courts should pose no threat to another state's sovereignty, and the doctrine of international comity is inapplicable.

### *C. The Corporate Veil*

Peculiar to ATCA litigation initiated against a private MNC, the plaintiff will likely have to "pierce the corporate veil" of the subsidiary corporation operating in the foreign country. Piercing the corporate veil refers to looking beyond the usual limited liability of a corporation to remedy a fraud, wrong or injustice.[178] It can be imposed to find shareholder liability, or, in the case of *Aguinda*, parent company liability for the actions of its subsidiaries.[179] The phrase has a dangerous connotation; however, in practice from the plaintiff's perspective, the danger lies in instituting a suit without

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175. Leslie Wells, *A Wolf in Sheep's Clothing: Why Unocal Should Be Liable Under U.S. Law for Human Rights Abuses in Burma*, 32 COLUM. J. L. & SOC. PROBS. 35, 60 (1998) (citing to W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 409 (1990)).

176. *See Jota*, 157 F.3d at 160.

177. *See id*.

178. *See* BLACK'S LAW DICTIONARY 1147-48 (6th ed. 1990).

179. *See* David S. Bakst, *Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive*, 19 B.C. INT'L & COMP. L. REV. 323, 324 (1996) (noting courts will pierce the corporate veil and find shareholder liability as a matter of public policy to right the wrongs of the corporation; citing United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (7th Cir. 1905)). Parent company liability for the actions of its subsidiaries is a prime issue in domestic environmental lawsuits. *See id.*

uncovering sufficient documentation to hold the real decision-maker, and money-holder, liable for its actions.

Prior to the institution of any litigation proceedings against the MNC-parent company in an ATCA suit, research must be done on the home base of the offending company. Knowledge of the name of the subsidiary's parent is not enough. The parent must have exerted a sufficient amount of control over the subsidiary to be held liable for its actions.[180] Corporations can run the lines of defense through various offspring to avoid just this type of liability. Of particular concern to ATCA plaintiffs is whether they can find evidence of a disregard of legal formalities or a failure to maintain "arm's length relationships" between the parent and subsidiary corporations.[181]

The *Aguinda* litigation is against the U.S. headquarters of a MNC. Whether Texaco, Inc. of New York exerted substantial control over Texaco de Petroleos del Ecuador, S.A., remains an issue. In order for the plaintiffs to be successful, they must pierce the corporate veil between Texaco's operations in Ecuador and the home base in New York.

Texaco has questioned the validity of the forum based on the notion that its U.S. base of operations is distinct from the subsidiary corporation. By contrast, the plaintiffs assert that New York "micro-managed its Ecuadorian operations."[182] Former employees have stated that contracts were routinely sent to New York for approval and signatures; direct phone lines existed between Ecuador and New York for close communications; and reports and updates were photocopied and mailed to the United States on a daily basis.[183] Yet, the plaintiffs allege Texaco failed to support its Ecuadorian project with the necessary information to prevent or minimize environmental harms.[184]

Judge Broderick granted the initial period of limited discovery to determine the validity of potential liability for the U.S. office of Texaco.[185] Assuming the plaintiffs uncovered no evidence of substantial control and authority exercised by the New York office

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180. *See id.* at 333-34.

181. LARRY D. SODERQUIST ET AL., CORPORATE LAW & PRACTICE § 7:1 (2d ed. 1999).

182. Kimerling, *supra* note 33, at 319.

183. *See id*. (citing to amicus briefs in support of the plaintiffs containing a former employee's affidavit).

184. *See id*.

185. *See* Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006, at *1 (S.D.N.Y. Apr. 11, 1994) (stating "discovery is limited to . . . events relating to the harm alleged by plaintiffs occurring in the United States, including specific or generalized directions initiating events to be implemented elsewhere, communications to and from the United States and discussions in the United States concerning, or assistance to or guidance for events occurring elsewhere . . . .").

over the Ecuador operations, the suit would not go forward. However, if the evidence demonstrates Texaco's headquarters truly served as the base of operations, the court may find liability for the parent corporation.

## V. CONCLUSION

Seattle promulgated the beginning of a new era of activism, one of coalition-protests, whose members span ideological, socio-economic, and cultural backgrounds. The activist's agendas overlap with human rights, labor rights, and environmental rights at the crossroads. MNC's are a reasonable target because the majority are based in developed countries with high levels of regulation and protections for both the worker and the environment; yet, it appears in some instances that the MNC's standards are altered according to where they are working—in the name of profits.

The harms alleged in *Aguinda v. Texaco, Inc.* exemplify the convergence of environmental and human rights. While the input of the grassroots organizers and non-governmental organizations cannot be overlooked, the *Aguinda* plaintiffs may provide meaningful legal precedent that will further awareness of the interconnectedness of human and environmental rights. The rapid globalization of industry and business, calls for a quicker development of international norms for human, labor, and environmental rights. MNC's should be held accountable for their misdeeds and negligence. The time has come for the expansion of the *jus cogens* of international law to include large-scale environmental harms that infringe upon people's basic human rights.

## VI. POSTSCRIPT

While this article was prepared to ship to the printer, Judge Jed Rakoff entered an Order granting Texaco's Motion to Dismiss the plaintiffs' claims.[186] Judge Rakoff put off this long awaited decision pending the outcome of Plaintiffs' mandamus petition to the Second Circuit seeking recusal of Judge Rakoff.[187] The Second Circuit denied Plaintiff's petition.[188] The appellate court also denied Plaintiffs' motion for rehearing *en banc* on May 29, 2001.[189] One day

186. *See* Aguinda v. Texaco, Inc., No. 93CIV7527, 2000 WL 579776 (S.D.N.Y. May 30, 2001).
187. *See id*. at *3.
188. *See In re* Aguinda, 2000 WL 33182244 (2d Cir. Feb. 23, 2001).
189. *See Aguinda*, 2000 WL 579776, at *3.

later, Judge Rakoff proceeded to issue his order granting Texaco's Motion to Dismiss, on May 30, 2001.[190] The trial court's order reasoned the doctrine of *forum non conveniens*, coupled with Texaco's explicit assent to suit in Ecuador, deemed dismissal appropriate.[191] Presumably, the plaintiffs are mounting an appeal. While this order comes as a disappointment to the author, and surely to the plaintiffs, it by no means delineates a bar to toxic tort actions against MNC's in U.S. Federal Courts under the ATCA. The analysis of this most recent opinion will be left to another day, another note.

190. *See id.*
191. *See id.*