THE CONFLICT BETWEEN FACILITATING INTERNATIONAL TRADE AND PROTECTING U.S. AGRICULTURE FROM INVASIVE SPECIES: APHIS, THE U.S. PLANT PROTECTION LAWS, AND THE ARGENTINE CITRUS DISPUTE[1]

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1. Stewart and Stewart shares the copyright to this article with the authors and THE FLORIDA STATE UNIVERSITY JOURNAL OF TRANSNATIONAL LAW AND POLICY. An earlier version of it appeared in the Agricultural Sanitary & Phytosanitary and Standards Report (April 2003), a publication by Stewart and Stewart.

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The authors extend their thanks to David S. Johanson (formerly of Stewart and Stewart) for his contributions to the preparation of this article.

I. INTRODUCTION

The United States Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS) is the primary agency responsible for safeguarding U.S. plant and animal resources from invasive pests and diseases.[2] Since its establishment in 1972, APHIS's mission has been to protect commercial crops and native ecosystems in the United States. For the past decade, APHIS has been adjusting to demands arising from expanded trade through multilateral and bilateral trade agreements. In response to international obligations such as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) of the World Trade Organization (WTO), the agency has been redefining its approach to agricultural safeguarding in order to "embrace a dual mission of trade facilitation and protecting agriculture."[3]

For most of the past century, the U.S. Department of Agriculture was authorized to restrict certain plant imports primarily through the Plant Quarantine Act of 1912.[4] That law remained in effect until 2000, five years past the conclusion of the Uruguay Round negotiations and the implementation of the WTO's SPS Agreement.[5] Since its inception, the U.S. Department of Agriculture has fulfilled its role as a protector of the ecosystem and agriculture by promulgating and enforcing regulations on imports of plants and plant products, including fruits and vegetables. In 2000, under the statutory authority of the Plant Quarantine Act of 1912, APHIS published a rule change to its citrus fruit regulations that permitted the importation of citrus from Argentina into the United States through a systems approach.[6] APHIS had previously implemented systems approaches when a single treatment method was not able to effectively reduce pest or disease risks. Over the last five years, APHIS's use of the systems approach has increased with the agency's increased focus on facilitating trade.[7]

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2. *See* NAT'L PLANT BOARD, U.S. DEP'T OF AGRIC., SAFEGUARDING AMERICAN PLANT RESOURCES: A STAKEHOLDER REVIEW OF THE APHIS-PPQ SAFEGUARDING SYSTEM 71 (1999), *available at* http://www.aphis.usda.gov/ppq/safeguarding/ [hereinafter SAFEGUARDING PLANT RESOURCES].

3. ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., A 25-YEAR RETROSPECTIVE OF THE ANIMAL AND PLANT HEALTH INSPECTION SERVICE 1972-1997 (1997), *at* http://www.aphis.usda.gov/oa/retro25.html [hereinafter APHIS RETROSPECTIVE].

4. Plant Quarantine Act of 1912, 7 U.S.C. §§ 151–167, *repealed by* Plant Protection Act of 2000, Pub. L. 106–224, 7 U.S.C. §§ 7701–7772 (2000).

5. *Id.*; *see generally* ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., APHIS IN THE GLOBAL TRADE ARENA 2 (Sept. 2001), *available at* http://www.aphis.usda.gov /oa/pubs/ brotradb.pdf (discussing creation of WTO in 1995).

6. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608 (June 15, 2000) (to be codified at C.F.R. pts. 300, 319)

7. *See* NAT'L PLANT BOARD, U.S. DEP'T OF AGRIC., PREVENTING THE INTRODUCTION OF

In an attempt to prevent the Argentine rule change from being implemented, the U.S. Citrus Science Council (Citrus Science Council) — a consortium of California and Arizona citrus growers — sued the agency. The growers claimed that APHIS had violated the Plant Quarantine Act by neglecting to determine how the systems approach would reduce the risk of citrus diseases and pests in Argentina contaminating U.S. citrus. [8] They also claimed that APHIS had failed to base its rule on sound science.[9] The court agreed with the Citrus Science Council in part and remanded the rule to APHIS in 2001.[10]

During the course of the Argentine citrus dispute, and apparently unrelated to it, Congress passed the Plant Protection Act of 2000, which was signed into law in June 2000.[11] The new Plant Protection Act was developed to "streamline and consolidate the 11 plant-related statutes," including the Plant Quarantine Act, that governed APHIS's actions.[12] While the Argentine rule fell under the old Plant Quarantine Act, the outcome of the Citrus Science Council's case has served as a stimulus for other domestic producers to question and legally challenge APHIS decisions. Under the new Plant Protection Act, U.S. avocado growers are attempting to block a rule change that would expand imports of Mexican Hass avocados.[13] A challenge has also been filed by U.S. producers in response to APHIS's decision to lift certain restrictions on clementine oranges imported from Spain.[14] In both cases, domestic producers are suing APHIS to prevent rule changes that they believe are lacking in sound science, are based on political motives and did not grant them appropriate opportunities to participate in a process that has a direct and serious impact on their livelihoods.[15]

This article first discusses the Plant Quarantine Act of 1912, followed by a discussion of the methodology APHIS used to amend its regulations and permit Argentine citrus imports into the United

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PLANT PATHOGENS INTO THE UNITED STATES: THE ROLE AND APPLICATION OF THE "SYSTEMS APPROACH" 1 (2002), *at* http://www.aphis.usda.gov/ppq/systemsapproach [hereinafter NAT'L PLANT BOARD, SYSTEMS APPROACH].

8. *See* Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1085–1086 (E.D. Cal. 2001).

9. *See id.* at 1087.

10. *Id.* at 1098–99.

11. Plant Protection Act of 2000, 7 U.S.C. §§ 7701–7772 (2000).

12. SAFEGUARDING PLANT RESOURCES, s*upra* note 2, at 7.

13. The case was filed in the United States District Court for the Eastern District of California. Cal. Avocado Comm. v. Veneman, No. 1:01-89 Civ. 6578 (E.D. Cal. Jan. 14, 2004).

14. Telephone Interview with Joel Nelsen, President, Cal. Citrus Mutual (Jan. 21, 2004).

15. U.S. Citrus Council, Comments on the Proposed Rule, *Importation of Grapefruits, Lemons, and Oranges fromArgentina*, to the Animal and Plant Health Inspection Serv., 1, 4 (Feb. 11, 1999) (in response to 63 Fed. Reg. 43,117 (Aug. 12, 1998)) (on file with the Animal and Plant Health Inspection Serv.) [hereinafter Citrus Council, Comments].

States. That leads to an evaluation of the Citrus Science Council's lawsuit against APHIS and the court's ruling. The article then progresses through an analysis of the shift that has occurred in APHIS's mission as a result of the WTO SPS Agreement and Plant Protection Act of 2000. Through discussion of the SPS Agreement, the legislative history and interpretation of the Plant Protection Act, and examples of two recent rule changes, the article will examine how APHIS is "working to enhance the free flow of trade by removing phytosanitary and technical barriers"[16] and why this mission has resulted in increased distrust by domestic producers. Finally, the article proposes ways in which the agency could address domestic producers' concerns earlier, with increased participation, improved transparency and, possibly, better science. These improvements would also help the agency achieve the goals of the SPS Agreement and 2000 Plant Protection Act — important steps forward as the agency's "role in the global marketplace [continues] to increase as the United States expands current trade relationships and establishes new partnerships with developing countries."[17]

II. PLANT QUARANTINE ACT OF 1912

Through most of the past century, the U.S. Department of Agriculture regulated the importation of various agricultural commodities that might carry plant pests and diseases through the Plant Quarantine Act of 1912 (7 U.S.C. § 151–167). Accordingly, when APHIS issued the final rule on Argentine citrus in 2000, the Plant Quarantine Act applied to its actions.[18] The Plant Quarantine Act authorized the Secretary of Agriculture to prohibit the importation of plants into the United States to prevent the introduction of "any tree, plant, or fruit disease or any injurious insect, new to or not theretofore widely prevalent or distributed within and throughout the United States."[19] Under the Plant Quarantine Act, regulations governing "fruits, vegetables, propagative material, logs, lumber and unmanufactured wood, as well as noxious weed[s]," were promulgated.[20]

The Plant Quarantine Act granted the Secretary of Agriculture the authority to restrict imports from areas where insects or diseases were present, stating in part:

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16. ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., PROTECTING PLANT HEALTH IN A GLOBAL ENVIRONMENT 2 (Sept. 2001).

17. ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., APHIS IN THE GLOBAL TRADE ARENA 6 (Sept. 2001).

18. Plant Quarantine Act of 1912, 7 U.S.C. § 151–167 (repealed 2000).

19. *Id.* § 160.

20. SAFEGUARDING PLANT RESOURCES, s*upra* note 2, at 7.

> Whenever, in order to prevent the introduction into the United States of any tree, plant or fruit disease or of any injurious insect, new to or not theretofore widely prevalent or distributed within and throughout the United States, the Secretary of Agriculture shall determine that it is necessary to forbid the importation into the United States of any class of nursery stock or of any other class of plants, fruits, vegetables, . . . or other plant products from a country or locality where such disease or insect infestation exists, he shall promulgate such determination, specifying the country and locality and the class of . . . plants, fruits, vegetables . . . or other plant products which, in his opinion, should be excluded. Following the promulgation of such determination by the Secretary of Agriculture, and until the withdrawal of the said promulgation by him, the importation of the class of . . . plant products specified in the said promulgation from the country and locality therein named, . . . is hereby prohibited . . . .[21]

The Act provided that when producers believed that the U.S. Department of Agriculture was not fulfilling its primary obligation of protecting U.S. agriculture, they could file suit against the agency.

The Plant Quarantine Act's purpose was to protect the United States, including U.S. agriculture, from the introduction and dissemination of foreign plant diseases and pests.[22] When the WTO SPS Agreement was finalized in 1995, the Plant Quarantine Act was considered to be in compliance with the Agreement's general standards and purpose. As a result, it was not necessary for the United States to amend the Act. However, implementation of the SPS Agreement marked a turning point in how the agency viewed itself.[23]

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21. 7 U.S.C. § 160 (repealed 2000).

22. *Id.*

23. APHIS responded to the SPS Agreement by setting up the Trade Support Team within its International Services department and the Phytosanitary Issues Management Team was established to aid the Plant Protection and Quarantine group. *See* APHIS RETROSPECTIVE, *supra* note 3.

III. PROPOSALS TO PERMIT THE IMPORTATION OF ARGENTINE CITRUS

A. 1993 Request by Argentina

In 1993, the Argentine government requested that APHIS amend its regulations and thereby exempt the States of Catamarca, Jujuy, Salta and Tucuman from the country-wide quarantine on Argentine citrus fruit codified at 7 C.F.R. §§ 319.56-319.56-8 and 7 C.F.R. § 319.28.[24] Argentina's request was based on surveys showing that those states were free from citrus canker as of 1992.[25] However, citrus black spot, sweet orange scab, Mediterranean fruit flies (Medflies), and other fruit flies — all of which are considered risks to U.S. agriculture — remained present in those states.[26]

Argentina proposed managing all of the quarantine-significant pests and diseases through a systems approach.[27] The U.S. Department of Agriculture has utilized systems approaches since 1967[28] to protect against plant pests and diseases when a single treatment method, such as fumigation treatment or cold treatment, will not effectively reduce risks such as insects or diseases.[29] According to the National Plant Board's report on the use of the systems approach, the systems approach is "designed for incorporation into a regulatory framework whereby foreign commodities may be imported into the United States with minimal risk of quarantine plant pathogen introduction."[30]

In response to Argentina's request and proposal, APHIS's experts traveled to the four states and conducted on-site evaluations in May 1994.[31] Following the on-site review, APHIS stated that Argentina had "demonstrated, in accordance with the standards established by the United Nations' Food and Agriculture Organization (FAO) for pest-free areas," that the four Argentine

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24. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. 43,117 (Aug. 12, 1998) (to be codified at 7 C.F.R. pts. 300, 319). Until 7 C.F.R. § 319.28(a)(1) was amended in 1998, Argentina was not included in the citrus canker strain A restrictions; however, the regulation was being enforced as a result of scientific literature indicating the presence of the strain in Argentine citrus. Argentina's citrus has continuously been included in restrictions on countries with strain B as well as sweet orange scab present. *Id.*

25. *Id.*

26. *Id.* at 43,118.

27. ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., FACTSHEET: PLANT PROTECTION & QUARANTINE – Q & A'S ABOUT ARGENTINE CITRUS 3 (2000) [hereinafter APHIS FACTSHEET].

28. *See* NAT'L PLANT BOARD, SYSTEMS APPROACH, *supra* note 7, at 5.

29. *Id.* at 1.

30. *Id.*

31. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1079 (E.D. Cal. 2001).

states were citrus canker-free.[32] However, APHIS concluded that it was unable to assess fully how successfully Argentina's protocol would combat the risk of citrus black spot and sweet orange scab, which remained present in the canker-free areas.[33] Consequently, APHIS identified areas in which additional research was needed and requested that Argentina substantiate its proposed mitigation measures with "another year's worth of data."[34] Argentina's 1993 request was rejected in 1995.[35]

In the years following the 1995 denial, APHIS combined efforts with Argentina's national plant protection organization, the Servicio Nacional de Sanidad y Calidad Argoalimentaria (SENASA), to prepare and implement a systems approach that would protect against pests and diseases spreading to the United States through Argentine citrus. The first step in that direction was APHIS's 1995 completion of a preliminary qualitative risk assessment.[36] The 1995 assessment was followed in 1997 by APHIS's final risk assessment, which the agency used to support its 1998 proposed rule change.

B. 1998 Proposed Rule Change

In 1998, APHIS published a proposed rule change that would permit Argentine citrus from the specified Argentine states to enter the U.S. market.[37] The amended regulations would be found at 7 C.F.R. §§ 319.56-319.56-8 and 7 C.F.R. § 319.28. Based on the results of the 1997 risk assessment, APHIS and SENASA developed a systems approach that involved the layering of protective phytosanitary measures, many of which would take place in Argentina.[38] These layers included origin requirements, grove requirements, phytosanitary certification, and disease detection.[39] The overlap that was created by the various measures was aimed at safeguarding against failures in the system and maintaining the requisite level of phytosanitary protection to protect U.S. citrus.[40]

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32. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. at 43,117–43,118.

33. *See Harlan Land*, 186 F. Supp. 2d at 1079.

34. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608, 37,611 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

35. *Harlan Land,* 186 F. Supp. 2d at 1079.

36. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,611.

37. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. at 43,117.

38. *Id.* at 43,118.

39. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,617.

40. *Id.*

The systems approach was largely dependent on the fulfillment of control and inspection procedures by SENASA in Argentina.[41]

Within the proposed rule, APHIS stated that it was motivated to make changes to the regulations by the belief that the specified states were free of citrus canker and that the proposed systems approach would reduce the risk of other plant pest and disease introduction to a negligible level.[42] APHIS further provided that "[m]aintaining a prohibition on the importation of grapefruit, lemons, and oranges from the Argentine States . . . in light of those State's [sic] demonstrated freedom from citrus canker would run counter to the United States' obligations under international trade agreements and would likely be challenged through the World Trade Organization."[43]

1. APHIS's Systems Approach

The Argentine systems approach started with the requirement that imported fruit originate in a grove within a region of Argentina that was disease-free.[44] Those regions included the States of Catamarca, Jujuy, Salta, and Tucuman.[45] The groves that produced the fruit for export had to be registered with SENASA's export program as well as "surrounded by a 150-meter-wide buffer area."[46] Further requirements were placed on the origin of new citrus planting stock that was used in a qualified grove.[47] Within the approved groves, SENASA was responsible for overseeing maintenance and inspection requirements that included verifying the fruit's freedom from disease through visual inspections as well as through sampling.[48]

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41. *Id.*

42. *Id.*

43. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. at 43,123.

44. *See id.* at 43,118. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures defines a pest- or disease-free in Annex A (4) as "[a]n area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur." World Trade Organization, Sanitary and Phytosanitary Measures: The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), *at* http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

45. APHIS FACTSHEET, *supra* note 27, at 5.

46. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1081 (E.D. Cal. 2001) (quoting 7 C.F.R. § 319.56-2f (2000)).

47. *Id.*

48. *Id.* The schedules for the treatments SENASA would conduct are listed in the USDA-APHIS Plant Protection and Quarantine Treatment Manual and were developed by USDA to eradicate plant pests of quarantine significance found in, on, or with commodities offered for entry into, export from, or for movement within the United States. Recommendations listed there are based on uses authorized under provisions of the Federal Insecticide,

Once the harvesting of the grapefruit, oranges, and lemons was complete, APHIS imposed further conditions on their handling. They were required to be moved in specially SENASA-marked boxes and never be in the same packinghouse as fruit from groves that did not meet the export requirements.[49] The origin of all fruit entering the packinghouse had to be certified by a SENASA technician, and the fruit was then held at room temperature for four days.[50] That period of time was necessary to allow any symptoms of citrus black spot to become evident.[51] After that period, the fruit was culled and inspected to check for the presence of citrus black spot and sweet orange scab.[52]

The next proposed step was a chemical treatment[53] followed by individual labeling and packaging in new specially marked boxes. All Argentine citrus bound for the United States was accompanied by a SENASA-issued phytosanitary certificate, verifying that all the required steps were followed and that the fruit were disease- and pest-free.[54] In order to protect against the Medfly and fruit flies of the genus *Anastrepha* that are present in Argentina, all citrus exports would also undergo an authorized cold treatment.[55] Cold treatments generally involve storing fruit at a temperature below 36˚F (2.2˚C) for a specified period of time.[56]

2. APHIS's Statements on the Domestic Impact of the Change

Members of the U.S. Citrus Science Council protested that the potential benefits of Argentine citrus imports were outweighed by the need to protect domestic groves from the introduction of diseases that would "cause irreparable injury" resulting in "denied domestic and export markets, lost jobs, and compromised global competitiveness for American industry."[57] APHIS responded to these

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Fungicide and Rodenticide Act (FIFRA), as amended. *See* Animal and Plant Health Inspection Serv., U.S. Dep't of Agric., *Fruits and Vegetables Treatment Manual* 1 (Jan. 12, 2004), *at* http://www.aphis.usda.gov/ppq/ manuals/pdf_files/FV_Chapters.htm.

49. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. 43,117, 43,119 (Aug. 12, 1998) (to be codified at 7 C.F.R. pts. 300, 319).

50. *Id.*

51. *Id.*

52. 7 C.F.R. § 319.56-2f(c)(4) (2003).

53. The fruit is treated by immersing it in a solution of sodium hypochlorite, then in orthophenilphenate of sodium. Following the immersion, the fruit is sprayed with imidazole and 2-4 thiazalil benzimidazole and wax are applied. *Id.*

54. *Id.*

55. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1082 (E.D. Cal. 2001).

56. Postharvest Florida Citrus Information Guide, *Cold Treatment* (last visited March 14, 1997), *at* www.fdocitrus.com/coldtreatment.htm.

57. Comments submitted by the U.S. Citrus Science Council, to the Animal and Plant Health Inspection Serv., 1 (Feb. 11, 1999) (on file with the Animal and Plant Health Inspection Serv.), (quoting ANIMAL AND PLANT HEALTH INSPECTION SERV., IMPORTATION OF

concerns by stating that imports from Argentina would not significantly compete with U.S. citrus because the imports would arrive primarily from May to October.[58] The U.S. season peaks in the late fall, winter, and early spring. As a result, the U.S. Department of Agriculture contended that importer brokers could benefit from the ability to provide a higher quality of fruit during low domestic production periods.[59] Staggering imports of agricultural products to avoid overlap with the U.S. production season is not uncommon among APHIS's rulings on foreign agricultural imports.

Another challenge by domestic producers was to the agency's decision not to proceed beyond the economic analysis it originally prepared on the impact of Argentine citrus to complete a Regulatory Flexibility Analysis.[60] The analysis evaluates the harmful impact a rule change may have on small businesses.[61] Under the Regulatory Flexibility Act, the Secretary of Agriculture can certify that a rule will not have a significant economic impact on a substantial number of small entities, thereby exempting APHIS from the requirement to assess the negative impact of new rules on small businesses through an initial and final regulatory economic analysis.[62] In this case, the agency concluded that there was a negligible risk of pest and disease introduction.[63] As a result of that determination, the agency concluded that small businesses were not likely to suffer economically due to disease or pest introduction resulting from the rule change.[64] The agency acted within the discretion granted by the Regulatory Flexibility Act, and did not complete the Regulatory Flexibility Analysis.[65] Fulfilling its obligations under the National Environmental Policy Act (NEPA) of 1969,[66] APHIS likewise made a "no significant impact" finding in the

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FRESH CITRUS FRUIT (SWEET ORANGE, *CITRUS SINENSIS*, LEMON, *C. LEMON*, AND GRAPEFRUIT, *C. PARADISI*) FROM ARGENTINA INTO THE CONTINENTAL UNITED STATES, SUPPLEMENTAL PLANT PEST ASSESSMENT (1997)).

58. APHIS FACTSHEET, *supra* note 27, at 5.

59. *Id.*

60. 5 U.S.C. §§ 603–605 (2000) (§ 604 requires the completion of a Regulatory Flexibility Analysis).

61. *Id.* § 604.

62. *Id.* §§ 603–605

63. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1097 (E.D. Cal. 2001).

64. *Id.*

65. *Id.* at 1096.

66. The National Environmental Policy Act, 42 U.S.C.A. § 4332 (2000), requires agencies to prepare an environmental impact statement "if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." *Harlan Land*, 186 F. Supp. at 1097 (quotations omitted).

required Environmental Assessment and, therefore, did not complete an environmental impact statement for the final rule.[67]

3. Public Comments

As part of APHIS's rule making process, the agency publishes its proposed rules in the Federal Register and announces that it will accept comments for a certain period of time, generally 60 days. During that time, comments and questions regarding the proposed rule change may be submitted from members of the public. In situations such as the rule change regarding Argentine citrus, the comment period does not occur until after the risk assessment is complete and the systems approach is designed. Thus, interested parties wishing to contribute to the process of designing the risk assessment or the systems approach are only allowed to do so at the final stage of the process, just before the final rule is adopted and made part of the agency's regulations.[68]

A large number of comments were submitted in response to the proposed rule, some 332 in all.[69] APHIS received comments from "foreign and domestic producers, handlers, packers, and processors of citrus fruit; Members of the U.S. Congress and elected representatives of State and local governments; State plant protection officials and officials from . . . [SENASA]; and representatives of the U.S. Citrus Science Council."[70] The submissions in support of the Citrus Science Council's position questioned the legitimacy of the Argentine systems approach and its ability to protect U.S. groves from Argentine pests and diseases.[71] The Citrus Science Council's comments encouraged APHIS to balance the "desire for more open global markets" against the "realities of Mother Nature," and quoted the agency's own risk analysis: "There are several *significant* arthropod pests and diseases of citrus in Argentina that do not occur in the United States. Introduction of *any* of these pests would constitute a *significant threat* to agriculture *in general*, and citrus production *in particular* in the United States."[72]

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67. *Harlan Land,* 186 F. Supp. 2d at 1097.

68. *See generally* Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. 43,117 (Aug. 12, 1998) (to be codified at 7 C.F.R. pts. 300, 319).

69. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

70. *Id.*

71. *See id.*

72. U.S. Citrus Science Council comments to the Animal and Plant Health Inspection Serv. 2 (submitted Sept. 22, 1998) (quoting Animal and Plant Health Inspection Serv., Importation of Fresh Citrus Fruit (Sweet Orange, Citrus sinensis, Lemon, C. lemon, and Grapefruit, C. paradisi) from Argentina into the Continental United States, Supplemental Plant Pest

The Citrus Science Council also submitted comments stating that APHIS's decision was improperly guided by concerns that the United States might be violating its international obligations under the SPS Agreement of the WTO.[73] The Citrus Science Council asserted that given the indisputable presence of other potentially devastating citrus diseases and pests beyond citrus canker, "the United States has no obligation [under the Uruguay Round WTO Agreement] to permit introduction and spread of these quarantine diseases and pests in [the United States]."[74] According to the Citrus Science Council's comments, a continuation of the quarantine of Argentine citrus fruit was supported by sound science and therefore did not violate the agreement.[75] In APHIS's responses to comments, it asserted that the proposed systems approach, based on sound science and confirmed by the risk assessment, would protect U.S. agriculture by keeping the risk to a negligible level.[76]

Food importers that believed the rule change would result in increased trade with Argentina submitted comments supporting APHIS's proposal. Many supporters noted that the proposal would significantly increase the supply of citrus products available to consumers, as well as provide a higher quality product, between U.S. peak seasons.[77]

C. APHIS's 2000 Final Ruling

After accepting comments in 1998 and 1999 on the proposed amendment to the restrictions on Argentine citrus imports, the U.S. Department of Agriculture published a final ruling on June 15, 2000, in the Federal Register.[78] The published rule change is located in 7 C.F.R. § 319.56-2f.[79] Ultimately, APHIS adopted the systems approach described above, but it also added distribution

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Assessment (Sept. 1997)).

73. *See* Citrus Council, Comments, *supra* note 15, at 9-10.

74. *Id.* at 9.

75. *See id.* at 9–10.

76. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608, 37,609 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

77. *See* Letter from Richard Sullivan, President, Ass'n of Food Indus., Inc., to the Animal and Plant Health Inspection Serv. (Sept. 17, 1998) (in response to 63 Fed. Reg. 43,117 (Aug. 12, 1998)) (on file with the Animal and Plant Health Inspection Serv.); Letter from Joel Segal, Produce Buyer, M. Levin & Co., Inc., to the Animal and Plant Health Inspection Serv. (Sept. 14, 1998) (in response to 63 Fed. Reg. 43,117 (Aug. 12, 1998)) (on file with the Animal and Plant Health Inspection Serv.).

78. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,608.

79. 7 C.F.R. § 319.56-2f is titled, "Administrative instructions governing importation of grapefruit, lemons, and oranges from Argentina."

limits as an extra precaution.[80] APHIS's final rule was based on the final risk assessment findings that the agency interpreted as supporting the exemption for Argentine citrus fruit from the specified states.[81]

1. Distribution Limitations

APHIS regularly imposes distribution limitations that ban imports from entering certain U.S. states in which there are similar goods. This policy helps protect domestic goods from the invasive species that the foreign goods are at risk of carrying. The Argentine citrus distribution limitations consisted of a three-stage plan, spanning from 2000 to 2004. In 2000, the first year that Argentine citrus was actually imported into the United States, shipments were banned from distribution in fifteen U.S. states that either produced citrus or acted as "buffer" states.[82] The second stage, the 2002 and 2003 shipping seasons, would have allowed imports into all U.S. states except Florida, California, Arizona, Louisiana, and Texas, the five commercial citrus producing states.[83] Under APHIS's approach, Argentine citrus would not have been allowed into these five states until the last stage, the 2004 season.[84]

In an effort to make it more likely that the distribution limitations would be effective, APHIS also included a requirement that all importers of Argentine citrus obtain a permit for their activities.[85] This requirement was aimed at ensuring that importers and distributors would be aware of the distribution limitations.[86] Personnel from APHIS, state regulatory agencies, and the U.S. Department of Agriculture's Agricultural Marketing Service would be responsible for enforcing the limitations.[87] Fulfilling this responsibility would involve "market visits, inspections, and outreach efforts targeted at importers, shippers, distributors, and retailers."[88]

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80. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,609.

81. *Id.*

82. *Id.* Imports were not allowed into Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Louisiana, Mississippi, Nevada, New Mexico, Oklahoma, Oregon, Texas and Utah.

83. *Id.*

84. *Id.*

85. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,609.

86. *Id.*

87. *Id.*

88. *Id.*

IV. HARLAN LAND CO. V. U.S. DEPARTMENT OF AGRICULTURE

A. The U.S. Citrus Science Council's Claims

In 2001, members of the Citrus Science Council and over 5,000 other lemon, orange, and grapefruit growers in Arizona and California responded to APHIS's final rule on Argentine citrus by filing a lawsuit in the U.S. District Court for the Eastern District of California. The growers sought judicial review of APHIS's final rule to implement a systems approach and thereby allow imports of grapefruit, lemons, and oranges from four Argentine states. The lawsuit epitomized the building tension between protection and trade promotion. APHIS adopted the Argentine citrus rule with the belief that it was based on sound science and in fulfillment of the United States' trade obligations. However, U.S. producers felt that "politics, not science, [was] driving USDA's push to allow Argentine citrus imports."[89] Joel Nelsen, President of California Citrus Mutual and co-chair of the Citrus Science Council, was quoted in *The Produce News* as stating, "[c]itrus has become nothing more than a political trading chip in this Administration's desire to open Argentina to U.S. exports and to help the country with its poor economy."[90]

The lawsuit alleged that APHIS did not provide adequate evidence as to how the systems approach would reduce the pest risk potential to the "negligible" level that APHIS used in its final rule announcement.[91] The plaintiffs further contended that APHIS failed to define specifically what a "negligible risk" would be in the context of these particular imports.[92] The citrus growers claimed that APHIS's decision was not based on the agency's statutory role articulated in the Plant Quarantine Act of protecting the United States against the introduction and dissemination of non-native plant pests and diseases.[93] They argued that APHIS was responsible under the Plant Quarantine Act for preventing the introduction of plant pests and diseases into the United States and that utilizing an undefined "negligible risk" standard resulted in an arbitrary exercise of discretion, violating the congressional intent of the statute.[94] The growers were resolute that APHIS could only

89. Allison Wright, *USDA Allows Citrus Imports from Argentina*, THE PRODUCE NEWS, June 19, 2000, *available at* http://www.theproducenews.com/storydetail.cfm?ID=449.

90. *Id.*

91. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

92. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1085-86 (E.D. Cal. 2001).

93. *Id.* at 1086.

94. *Id.* at 1085–86.

fulfill its statutory role by utilizing a zero tolerance policy in regard to plant pests and diseases.[95] The plaintiffs' claims further highlighted problems with the effectiveness of the Argentine systems approach and APHIS's ability to conclude that the likelihood of pest introduction would be negligible, particularly with regard to sweet orange scab and citrus black spot.[96] The case, *Harlan Land Co. v. USDA,* resulted in a summary judgment for the growers.[97] The court held that the agency had arbitrarily and capriciously based its ruling on a faulty risk assessment that did not define what constituted a "negligible risk" in relation to the Argentine citrus imports.[98]

The court looked to a 1994 report that APHIS scientists completed following an on-site review declaring that a grove-specific approach was unacceptable due to fears that disease pathogens from nearby non-registered groves might traverse buffer zones and infect registered groves.[99] The grove-specific method, which applied requirements to individual groves rather than larger geographically defined areas, was incorporated as part of the proposal four years later.[100] U.S. growers were concerned that the systems approach's grove cleaning requirements would be insufficient as a precautionary measure.[101] The plaintiffs claimed that the measures did not go far enough because they only required cleaning before the trees blossomed and not afterwards.[102] Their claim pointed to APHIS data showing that leaves continue to fall after trees blossom and argued that an increased risk of citrus black spot would result.[103] APHIS data also concluded that symptoms of citrus black spot infection do not necessarily become evident within the four-day holding period allotted for packing house inspections and that the disease would not be eradicated through post-harvest chemical treatments.[104]

A key component of every systems approach is accurate data on the level of pest or disease infestation. In this case, Argentina had provided survey data that contained little or no data on the infestation levels in the growing areas.[105] The growers complained

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95. *See id.* at 1086.
96. *Id.* at 1087.
97. *Id.* at 1099.
98. *Id.* at 1098–99.
99. *Id.* at 1087.
100. *Id.*
101. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1087 (E.D. Cal. 2001).
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 1094.

that designing a systems approach without that data might have led to inadequate and inconclusive results.[106] For example, Argentine data indicated that citrus black spot infection rates vary from one year to the next,[107] a situation that has a large impact on the effectiveness of fungicide treatments.[108] If the incidence of citrus black spot is 82 percent in untreated oranges, the incidence is only reduced to 25 percent after the pre-harvest treatment,[109] a level that the plaintiffs believed was greater than "negligible."[110]

Various other challenges were raised concerning the risk assessment, including the risk unit APHIS adopted,[111] as well as a purported lack of clarity and consistency and lack of independence in the separate stages of the systems approach.[112] According to a 2002 USDA commissioned report on utilizing systems approaches, it is vital that "two or more *independent* control or mitigation measures are required."[113] The requirement that at least two completely independent safeguards are in place attempts to ensure that if one preventative measure fails, the others will protect the commodity from pest or disease contamination.[114] Failure of one measure must not have any effect on the performance of the other independent measures.[115]

The plaintiffs also criticized APHIS's reliance on SENASA. In March 2001, the Citrus Science Council filed a rulemaking petition with APHIS to suspend the final rule, claiming that SENASA was not dependable.[116] The petition requested that a full "investigation of SENASA's competence, integrity, trustworthiness, and ability to oversee, verify, and enforce compliance with the systems approach" be completed.[117] The Citrus Science Council noted that a major outbreak of foot-and-mouth disease, a highly infectious disease affecting livestock, was affirmatively hidden by SENASA for several months in 2001.[118] APHIS rejected the petition, but did finalize a

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106. *Id.* at 1088.

107. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1088 (E.D. Cal. 2001). The court discusses the rate jumping from 14 to 82 percent in one year. *Id.*

108. *Id.*

109. *Id.*

110. *See id.*

111. APHIS adopted an 18-kilogram "box of fruit" for the risk unit. *Id.* at 1090.

112. *Id.* at 1091.

113. NAT'L PLANT BOARD, SYSTEMS APPROACH, *supra* note 7, at 9.

114. *See id.*

115. *See id.*

116. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1095 (E.D. Cal. 2001).

117. *U.S. Citrus Science Council Petitions USDA for Withdrawal of Argentine Citrus Rule*, FIELD TALK, Dec. 4, 2003, *available at* http://www.rinconpublishing.com/industry_news/citrus_news.html#argentina.

118. *Harlan Land,* 186 F. Supp. 2d at 1095. The Argentine government concealed an outbreak of bovine foot-and-mouth disease for several months in 2001. Anthony Faiola,

work plan in March 2001 that provided active and direct monitoring by APHIS in Argentina.[119]

APHIS's determination that the rule would not have a significant impact on a substantial number of small businesses and that it was therefore unnecessary to prepare a regulatory flexibility analysis was challenged as well.[120] In 2000, USDA reported that about 92 percent of U.S. farms are small businesses,[121] and according to the court in *Harlan Land Co. v. USDA*, about "97 percent of U.S. citrus farms are considered to be small entities."[122] Further, the plaintiffs claimed that if the risk assessment was faulty, then the conclusions APHIS drew from it regarding both the economic and environmental costs of pest infestation could be incorrect.[123] The plaintiffs claimed that the failure to provide an environmental impact statement (EIS) was arbitrary and capricious and a violation of NEPA.[124] Beyond the immediate risks that diseases and pests imported from Argentina might cause, the plaintiffs raised concerns that APHIS's methodology in this case might be applied to imports from other countries.[125] They claimed that lowering the risk threshold for all commodities would result in serious losses to the domestic industry from invasive species.[126]

B. APHIS's Response

APHIS's response to the citrus growers emphasized that the agency "routinely permit[s] the importation of agricultural commodities where the risk of pest introduction has been reduced to an insignificant or negligible level rather than a zero level."[127] Additionally, APHIS asserted that its selection of the model used in this case was based on the agency's "experience in examining the risks presented by agricultural commodities produced around the world . . . ."[128] The systems approach was defended as a proven

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Argentina's Concealed Outbreak; Meat Exports Banned Months After Livestock Virus Was Found, THE WASHINGTON POST, Mar. 17, 2001, at A13.

119. *Harlan Land,* 186 F. Supp. 2d at 1096.

120. *Id.* 5 U.S.C. § 605(b) permits agencies to avoid engaging in flexibility analysis if the agency head certifies that the rule will not cause a significant economic impact on a substantial number of small entities. *Id.*

121. RESEARCH, EDUCATION, AND ECONOMICS, U.S. DEP'T OF AGRIC., MEETING THE CHALLENGE OF A TIME TO ACT: USDA PROGRESS AND ACHIEVEMENTS ON SMALL FARMS REPORT 9 (2000), *available at* http://www.usda.gov/ oce/smallfarm/reports/pa_rpt1.htm.

122. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1096 (E.D. Cal. 2001).

123. *Id.* at 1097–98.

124. *Id.* at 1097; *see also supra* note 66 and accompanying text.

125. *Harlan Land,* 186 F. Supp. 2d at 1098.

126. *Id.* at 1086.

127. *Id.*

128. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608,

success for mitigating diseases and pests in past cases and for being supported by a scientifically sound risk assessment model.[129]

In response to concerns regarding the risk of diseases and pests from Argentina entering the United States, APHIS pointed to the layering approach as well as the distribution limitations in its systems approach. In 1996, APHIS tested the effectiveness of the systems approach on a grove in Argentina and found that none of the 30,000 oranges and 45,000 lemons examined showed disease symptoms.[130] The U.S. Department of Agriculture reported that following its final rule, and prior to the *Harlan Land* decision, Argentine imports entered the U.S. market in both 2000 and 2001 without incident.[131] This fact helped support APHIS's claim that SENASA was capable of overseeing the phases of the approach that were to take place in Argentina, particularly after the President of SENASA and Minister of Agriculture were replaced as a result of the foot and mouth cover-up.[132] APHIS pointed out that citrus fruit from Argentina was being exported to other citrus-producing countries without incident.[133] In 1999, Argentina was the world's second-largest lemon producer, exporting millions of boxes to Europe.[134] However, those shipments were reported to have slowed considerably due to an increase in costly phytosanitary restrictions by the European Union.[135] Even so, Argentina is now the world's largest lemon producer and exporter, followed by California and then Spain.[136]

C. The Court's Ruling

The court granted the U.S. citrus growers a summary judgment, remanding some issues to APHIS and dismissing others.[137] On the

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37,609 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

129. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1093-94 (E.D. Cal. 2001).

130. *Id.* at 1091.

131. Foreign Agric. Serv., U.S. Dep't of Agric., *Solicitor General Will Not Appeal Court Ruling Against Argentine Citrus* (April 12, 2002), *at* http://www.fas.usda.gov/htp/News/News02/04-02/04-12KD.htm (last modified Oct. 30, 2003) [hereinafter Foreign Agric. Serv., *Court Ruling*]. During the summer of 2001, about one million packages of Argentine citrus had been made available to U.S. purchasers. *Id.*

132. *Harlan Land,* 186 F. Supp. 2d at 1095.

133. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,608.

134. Larry Waterfield, *Citrus Council Debated Validity of Assessment,* THE PACKER, Mar. 15, 1999, at A3.

135. RONALD P. MURARO ET AL., UNIV. OF FLA., AN OVERVIEW OF ARGENTINA'S CITRUS CANKER CONTROL PROGRAM (2001), *at* http://edis.ifas.ufl.edu/FE285.

136. Tom Lister, *Prospect of Argentine Lemons Entering U.S. in 2003 Appears Dim*, THE PACKER, Jan. 27, 2003, at B3.

137. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1099 (E.D. Cal. 2001). The standard that the court followed when it judged APHIS's ruling was found in 5 U.S.C. §

issue of APHIS lacking a definition for the "negligible risk" standard utilized in the risk assessment, the court found that the agency's determination was deficient.[138] The Court remanded the final rule, granting APHIS the opportunity to develop specific risk levels for each pest and disease.[139] It held that "APHIS exceeded [its] authority by failing to define 'negligible risk' in the context of the Argentine Citrus Rule."[140] The court stated that the agency had not adequately described the standard it used for deciding that Argentine citrus imports from the four states should be permitted.[141] As a result, the court was unable to determine whether APHIS's decision was arbitrary, capricious, or an abuse of its discretion.[142]

The court affirmed the systems approach as "an acceptable method for phytosanitary regulation to protect the agricultural economy" and spoke out in support of APHIS's method for testing the approach and submitting it to expert review. [143] The court also complimented the knowledge and qualifications of APHIS's scientists who conducted the risk assessment. [144] However, with regard to the use of the systems approach for Argentine citrus, the risk assessment used to design the approach was judged faulty because the documents and data were not linked to each independent stage being tested. "One of the principles of risk assessment is the complete and transparent documentation of data used in the assessment."[145]

The court ruled that the findings APHIS reported lacked specificity as to what information and data were used to determine the accuracy of each stage of the systems approach and that "[m]ost of the input values were calculated without data or without reference to scientific or regulatory information."[146] Therefore, it was not possible to reproduce the calculations or to verify their

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706(2)(A), which allows U.S. courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court "must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 1084 (quoting Morongo Band of Mission Indians v. Federal Aviation Adm., 161 F. 3d 569, 573 (9th Cir. 1998)). The court must also grant deference to the agency's decision. Ultimately the court is not allowed to "substitute its [own] judgment for that of the agency." *Id.* (quoting Wetlands Action Network v. U. S. Army Corps of Eng'rs, 222 F. 3d 1105, 1114 (9th Cir. 2000)).

138. *Id.* at 1098-99.
139. *Id.* at 1087.
140. *Id.* at 1086.
141. *Id.* at 1086–87.
142. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1086-87 (E.D. Cal. 2001).
143. *Id.* at 1093.
144. *Id.* at 1093–94.
145. *Id.* at 1094.
146. *Id.*

success in determining risk levels. For example, APHIS reported that "[t]here was no scientific information that could be construed as evidence for any particular central tendency value, distribution range, or distribution type."[147] In certain instances, APHIS had no data with which to evaluate the risk at a particular stage in the systems approach.[148] Therefore, the experts relied on their "professional judgment," a process the court noted as devoid of true science.[149]

The court found that because "the scientists failed to follow the risk assessment guidelines when they constructed the Risk Assessment, the court [could not] defer to APHIS'[s] expert determination with respect to the input values for the eight [individual stages]."[150] As a consequence of the faulty risk assessment, the court determined that the final rule was arbitrary and capricious.[151] The determination that the risk assessment was flawed resulted in a remand of the final rule with instructions that APHIS consider the economic impact Argentine imports would have on small businesses.[152] The court also ruled that APHIS's decision not to issue an environmental impact statement violated NEPA and was also arbitrary and capricious.[153]

The court, like the plaintiffs, questioned SENASA's ability to oversee important steps in the systems approach that were to take place solely in Argentina prior to export. Citing unease that not everyone involved in the foot-and-mouth cover-up had been removed from the agency, the court voiced its concern about "whether SENASA can be entrusted to enforce the mitigation measures used by the systems approach."[154]

In accordance with the summary judgment, imports ceased and the Argentine citrus rule was remanded to APHIS and ordered suspended until a new rule could be put in place.[155] The U.S. Solicitor General's office announced on April 10, 2002, that it would not pursue an appeal of the court's decision against APHIS.[156] The court's decision to remand the final rule to APHIS gives the agency the opportunity to address the court's concerns in relation to the

147. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1094 (E.D. Cal. 2001).
148. *Id.* In the court's decision, APHIS is quoted as reporting "*Data*: None" for one stage evaluating citrus black spot detection at harvest. *Id.*
149. *Id.*
150. *Id.* at 1095.
151. *Id.*
152. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1097 (E.D. Cal. 2001).
153. *Id.* at 1098–99.
154. *Id.* at 1096.
155. *Id.* at 1099.
156. Foreign Agric. Serv., *Court Ruling*, *supra* note 131.

risk assessment as well as the other issues. As a result of the court's decision, it is necessary that APHIS complete an entirely new rulemaking process, including a new risk assessment evaluating the use of a systems approach for importing Argentine citrus. The agency has initiated that process but has not completed the assessment.[157] As noted earlier, the original Argentine citrus rule was governed by the Plant Quarantine Act, which was repealed when the U.S. Congress passed the Plant Protection Act of 2000.[158] Any new ruling by APHIS on Argentine citrus will fall under the new statute. It is unclear whether a similar ruling on Argentine citrus would result under the new law, but at least two rule changes have been challenged — Spanish clementines and Mexican Hass avocados — and are pending court action.[159]

V. SPS AGREEMENT OF THE WTO

The SPS Agreement of the World Trade Organization provides the framework through which WTO Members may maintain and adopt measures to protect humans, animals, and plants within their territories from threats posed by imported food and agricultural products.[160] The SPS Agreement does not create specific SPS standards. Instead, it provides general rules for governments to follow when establishing such standards. Under the SPS Agreement, WTO members are permitted to maintain measures necessary to protect human, animal, and plant life or health.[161] The SPS Agreement obligates WTO members, however, to base their SPS measures upon science as demonstrated through risk assessments.[162]

In assessing risks, the SPS Agreement requires WTO members to take into account the "relevant inspection, sampling and testing methods; . . . existence of pest- or disease-free areas; . . . and quarantine or other treatment."[163] SPS measures may not be used

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157. As of January 2004, APHIS had not published any notices in regards to the new risk assessment reevaluating Argentine citrus. A notice is not usually published until the assessment has been completed; at that time the agency will accept public comments on the risk assessment and the resulting proposed rule. Telephone Interview with Shirley Wager-Pagé, Trade Director for South America, Animal and Plant Health Inspection Serv. (Sept. 23, 2002).

158. Plant Quarantine Act of 1912, *supra* note 4.

159. *See supra* notes 13, 14 and accompanying text.

160. Agreement on the Application of Sanitary and Phytosanitary Measures of the World Trade Organization (1995), art. II, para. 1 (1995), *available at* http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm [hereinafter SPS Agreement].

161. *Id.*

162. *Id.* at art. II, para. 2, art. V, para. 1.

163. *Id.* at art. V, para. 2.

as disguised barriers to trade.[164] Further, a WTO member's SPS measures shall not be "more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection . . . ."[165] The SPS Agreement encourages WTO members to harmonize their SPS measures "on as wide a basis as possible" with international standards.[166] The SPS measures of a WTO member may be higher than the international norm if the member's measures are based upon science "or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5," which concern risk assessments.[167]

During negotiations that led to the SPS Agreement, the United States acted to ensure that the agreement's language remained broad, permitting countries to enact measures they deemed necessary to protect their environment and agricultural products against scientifically proven risks.[168] In the case of Argentine citrus, threats definitely existed as a result of the presence of plant pests and diseases. The Medfly, other fruit flies of the *Anastrapha* family, citrus black spot, sweet orange scab, and citrus canker are all recognized as posing serious risks to agriculture and the environment.[169] SPS measures adopted by countries to protect against such threats might include import prohibitions, cold treatments, chemical treatments, and other measures. When applying a number of these measures on one product through a systems approach, a country might, in certain cases, effectively eliminate phytosanitary pests or diseases while comporting with its rights under the SPS Agreement.[170]

Absent a dispute reaching the WTO, it is not possible to know for sure whether a particular SPS measure imposed by a country contravenes the requirements of the SPS Agreement. APHIS contends that continuing to prohibit citrus imports from Argentina may violate the United States' obligations under the SPS Agreement.[171] What is clear is that there are real threats posed by the pests and diseases at issue. While four states in Argentina

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164. *Id.* at art. II, para. 3.
165. *Id.* at art. V, para. 6.
166. *Id.* at art. III, para. 1.
167. *Id.* at art. III, para. 3.
168. SIMONETTA ZARRILLI, DIV. ON INT'L TRADE IN GOODS AND SERV., AND COMMODITIES, WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES: ISSUES FOR DEVELOPING COUNTRIES (1999), *available at* http://www.southcentre.org/publications/snp/toc.htm.
169. *See* Citrus Council, Comments, *supra* note 15, at 1.
170. *See id.* at 9.
171. *Id.* at 8.

might have been declared free of citrus canker, other invasive species remain present there: the Medfly, other fruit flies of the *Anastrapha* family, citrus black spot, and sweet orange scab.[172] The use of a multiple-layered systems approach to address such a large number of threats might not necessarily succeed in protecting U.S. agriculture from risks. As noted, WTO members, including the United States, are allowed to establish the level of SPS protection desired.[173] Thus, it would appear that the United States could pursue a policy of minimizing risk, seeking a higher standard for citrus based on the number of pests and diseases involved and the costs of an error. It is, of course, the Administration's selection of protection level and relationship to other objectives (including expanding export opportunities for agriculture) that is at the heart of the Argentine citrus and other SPS disputes with APHIS.

For example, the Citrus Science Council has advocated a zero risk standard for protecting U.S. agriculture.[174] By contrast, some in the U.S. agricultural sector, and APHIS itself, have voiced concerns that if the United States imposes a zero tolerance level for any level of scientifically established threat, it would run a great risk of alienating trading partners.[175] Stated differently, a zero tolerance policy could hurt U.S. exports. Still, the decision of a WTO member to adopt a zero risk level appears permissible in light of Article 2.1 of the SPS Agreement, which permits WTO members to take SPS measures necessary to protect the life and health of plants.[176] If scientific evidence exists that a plant or plant product

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172. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. 43,117, 43,118 (Aug. 12, 1998) (to be codified at 7 C.F.R. pts. 300, 319).

173. *See supra* note 160 and accompanying text.

174. Citrus Council, Comments*, supra* note 15, at 37-38.The Citrus Science Council argued in its comments to APHIS on the Argentine rule change that "the standard that is to be applied in reviewing such potential permits appears to be a 'zero risk' standard," which it thought was "clear from a literal reading of 7 C.F.R. [§] 319.56-2 in paragraphs (3) and (4)." The Citrus Science Council argued further that APHIS appeared to have adopted the "zero risk" standard in § 319.56 through the language "without risk." *Id.* APHIS published a proposed rule change in 67 Fed. Reg. 61,547 (Oct. 1, 2002) to delete the "without risk" language from §319.56. Importation of Fruits and Vegetables, 67 Fed. Reg. 61,547, 61,548 (Oct. 1, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

175. Allison Wright, *Court Suspends Argentine Citrus Imports*, THE PRODUCE NEWS, October 5, 2001, *at* http://www.theproducenews.com/storydetail.cfm?ID=1563. *See also* Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530, 55,542 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319).

176. SPS Agreement, *supra* note 160, art. II, para. 1. This is not to say that a zero *risk* approach, as opposed to a zero *tolerance* approach, with regard to potential risks posed by a product, necessarily comports with the SPS Agreement. The panel in *EC Measures Concerning Meat and Meat Products (Hormones)* wrote that "zero risk" concerning risks posed by a product, (*e.g.*, hormone-treated beef), is unobtainable as "science can never provide a certainty, *i.e.* exclude once and for all" that a potential risk will never be found in the future. WTO Dispute Panel Report: EC Measures Concerning Meat and Meat Products (Hormones),

poses risks to a WTO member, that member is permitted under Article 2.1 to take whatever measures necessary to protect against that risk.[177] While Article 5.6 provides that "Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection," no indication exists that a country cannot set such an "appropriate" level of protection at a zero tolerance level.[178] Thus, rather than APHIS taking action mandated by international agreements (which it typically claims), it is in fact making a policy decision that risk should be reduced — but not to zero because of the possible fallout for U.S. exports. Because the level of protection is the government's decision, APHIS would appear to be within its zone of authority and expertise to establish a level above zero. However, public debate would be improved if the true bases for decisions were acknowledged.

VI. PLANT PROTECTION ACT OF 2000

A. Provisions

The Plant Protection Act of 2000 was signed into law on June 20, 2000[179] and repealed the Plant Quarantine Act of 1912.[180] The Plant Protection Act, at its most basic, regulates the import and export of plant pests, including agricultural products carrying plant pests.[181] The law states that the Secretary of Agriculture may prohibit or restrict the importation into the United States of any plants or other objects that could harbor pests or noxious weeds.[182] The Plant Protection Act also directs the Secretary of Agriculture to conduct a study on the role and application of the systems approach.[183] The statute mentions the systems approach in several provisions and defines it as "a defined set of phytosanitary procedures, at least two

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Complaint by the United States, WT/DS26/R/USA, at para. 8.150, 8.152 (Aug. 18,1997). While the Appellate Body disagreed with the panel decision on a number of issues, the Appellate Body did agree that a "theoretical uncertainty is not the kind of risk which, under Article 5.1 [of the SPS Agreement], is to be assessed." WTO Appellate Body Report: EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, WT/DS26/AB/R, WT/DS48/AB/R, at para. 11.186 (Jan. 16, 1998).

177. SPS Agreement, *supra* note 160, art. II, para. 1.

178. *Id.* at art. V, para. 6.

179. Plant Protection Act of 2000, 7 U.S.C. §§ 7701–7772 (2000).

180. *Id.* § 7758(a), (b).

181. *See id.* § 7711(a).

182. *Id.* § 7712(a).

183. *Id.* § 7712(e). The Secretary of Agriculture completed the study in 2002. *See* NAT'L PLANT BOARD, SYSTEMS APPROACH, *supra* note 7, at 1.

of which have an independent effect in mitigating pest risk associated with the movement of commodities."[184]

The Plant Protection Act reflects provisions of the SPS Agreement. The law provides that decisions regarding plant pests, such as whether to grant requests to import foreign agriculture products, be based upon sound science and be transparent.[185] The act also states that the Secretary of Agriculture shall ensure that phytosanitary decisions involving imports and exports be "consistent with applicable international agreements."[186] In its findings section, the statute provides:

> Congress finds that . . . it is the responsibility of the Secretary to facilitate exports, imports, and interstate commerce in agricultural products and other commodities that pose a risk of harboring plant pests or noxious weeds in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds;[187]
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> . . . .
>
> [t]he smooth movement of enterable plants . . . into, out of, or within the United States is vital to the United State's [sic] economy and should be facilitated to the extent possible.[188]

The Plant Protection Act requires that the Secretary impose limitations on imports "to the extent practicable" to control the risk of pest and disease dissemination.[189] The Act grants the Secretary the discretion to determine how and when to impose those regulations.[190] The Plant Protection Act does not provide a standard for determining the risk other than requiring that "the processes used in developing regulations under [the Secretary's authority to prohibit the unauthorized movement of plant pests] governing consideration of import requests are based on sound science and are transparent and accessible."[191]

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184. 7 U.S.C. § 7702(18) (2000).
185. *Id.* § 7711(b).
186. *Id.* § 7751(e).
187. *Id.* § 7701(3).
188. *Id.* § 7701(5).
189. *Id.* § 7701(3).
190. *See* 7 U.S.C. § 7711(a) (2000).
191. *Id.* § 7711(b).

B. The Systems Approach

As discussed in Part VI, the Plant Protection Act directed the Secretary of Agriculture to conduct a study of the systems approach. The report, released in February 2002, was written by the National Plant Board and is titled *Preventing the Introduction of Plant Pathogens into the United States: The Role and Application of the "Systems Approach"* (Systems Approach Report).[192] As required by the statute, "scientists from State departments of agriculture, colleges and universities, the private sector, and the Agricultural Research Service" of the U.S. Department of Agriculture participated in the study.[193]

The Systems Approach Report describes the systems approach as based on "sound scientific knowledge" and aimed at allowing the movement of plants and plant products.[194] It specifically states that systems approaches "facilitate trade and allow countries to abide by the Sanitary and Phytosanitary Agreement."[195] It also warns that each systems approach will be unique and, as APHIS found in the Argentine case, obtaining the necessary information to develop an adequate systems approach can be challenging.[196] Ultimately, the Systems Approach Report concluded that, by combining quantifiable mitigation measures, a level of phytosanitary security is obtainable that would not be possible if any of the measures were used alone.[197] Thus, the report appeared to validate APHIS's use of systems approaches to combat invasive species, but it recognized that the success of the systems approach's application could vary depending upon the issues presented in each individual case.

C. Legislative History

Challenges and comments in response to APHIS's methodology have claimed that the Plant Protection Act supports the contention that APHIS's primary role is to protect U.S. agriculture from invasive species. APHIS, on the other hand, views the newer act as expanding the Secretary's discretion, noting that the act does not set a threshold of risk for when imports must be permitted or denied.[198] The legislative history of the 2000 Plant Protection Act demonstrates that its authors' principle intent was to strengthen

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192. NAT'L PLANT BOARD, SYSTEMS APPROACH, *supra* note 7.
193. 7 U.S.C. § 7712(e)(2).
194. NAT'L PLANT BOARD, SYSTEMS APPROACH, *supra* note 7, at 28.
195. *Id.*
196. *Id.* at 29.
197. *Id.* at 27.
198. Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530, 55,531 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319).

U.S. protections against foreign plant pests, but it does not resolve the tension between the agency and the domestic producers.

1. U.S. House of Representatives

Representative Charles Canady introduced H.R. 1504, the Plant Protection Act, in the U.S. House of Representatives on April 21, 1999. The 12th district of Florida, from which Representative Canady was elected, has an economy based largely upon fruit and vegetable farming.[199] When Representative Canady introduced the legislation, he stated that the impetus behind his bill was to protect U.S. agriculture from threats posed by invasive plants and pests brought into the country.[200] Representative Canady's main concern was the potential increase in exotic pests entering the United States on account of expanded trade. "The rapid growth of international trade has resulted in a vastly increased volume of goods flowing into the country — goods that may carry prohibited foreign plants or noxious weeds."[201] Representative Canady did not discuss two positive aspects of the 2000 Act. The Act enhances APHIS's ability to comport with U.S. requirements under the SPS Agreement and provides APHIS with an improved means of facilitating international trade.[202]

2. Hearing Discussing H.R. 1504

The public was given the opportunity to comment on H.R. 1504 at a public hearing of the Subcommittee on Livestock and Horticulture of the House Agriculture Committee in January 2000 in Lake Alfred, Florida.[203] The Subcommittee's Chairman, Representative Richard Pombo,[204] discussed the Plant Protection

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199. *See* PHILIP D. DUNCAN & CHRISTINE C. LAWRENCE, CONGRESSIONAL QUARTERLY'S POLITICS IN AMERICA 1998: THE 105TH CONGRESS 338 (1997).

200. 145 CONG. REC. E722 (Apr. 21, 1999) (statement of Rep. Canady).

201. *Id.*

202. *See id.*

203. *Invasive Species: Hearing Before the Subcommittee on Livestock and Horticulture of the Committee on Agriculture,* 106th Cong. 1 (2000) (statement of Richard Pombo), *available at* http://commdocs.house.gov/committees/ag/hag10642.000/hag10642_0.htm.

204. Representative Pombo serves the 11th district in California. Chairman Pombo discussed H.R. 1504 during another hearing of the Subcommittee on Livestock and Horticulture as well. This hearing, held in Rutherford, California, concerned the presence of Pierce's disease. He mentioned that this legislation was needed as "harmful pests and species represent a serious threat to [the fruits and vegetables] sector of American agriculture." *Pierce's Disease: Hearing Before the Subcommittee on Livestock and Horticulture of the Committee of Agriculture*, 106th Cong. 8 (2000) (statement of Richard Pombo), *available at* http://commdocs.house.gov/committees/ag/hag10644.000/hag10644_0.htm. When speaking of H.R. 1504, he did not mention the promotion of international trade.

Pierce's disease is being spread through California by the glassy-winged sharpshooter

Act in light of the need to determine the best methods for combating the growing problem of invasive species in "an era of increased and expanded agricultural trade between the United States and a growing number of countries."[205] During the hearing, Representative Canady drew attention to the devastating economic consequences of invasive species. He stated that "the enormous effect of invasive species on the movement of agricultural products in international trade cannot be over emphasized."[206]

Some attendees at the hearing voiced concerns that APHIS's responsibilities for protecting U.S. agriculture conflicted with its efforts to promote trade. Florida's Commissioner of Agriculture and Consumer Services, Bob Crawford, registered his overall support for increasing international trade and expanding agricultural markets abroad, but he warned that U.S. agriculture cannot "remain strong with the continued onslaught of foreign invasive pests and diseases" entering the United States.[207] Mr. Carl Loop, President of the Florida Farm Bureau, voiced concerns that agriculture was taking a back seat to trade promotion.[208] Mr. Loop added that the Florida Farm Bureau is concerned that "USDA/APHIS serves two masters – protecting American plant and animal resources while expediting trade."[209]

Mr. Charles Schwalbe, Associate Deputy Administrator of APHIS's Plant Protection and Quarantine Unit, represented the U.S. Department of Agriculture at the Florida hearing.[210] Mr. Schwalbe testified about the threat invasive species pose to U.S. agriculture as well as APHIS's role in preventing and combating this threat.[211] In the course of his comments, Mr. Schwalbe discussed the U.S. Department of Agriculture's support for the Plant Protection Act's passage given the proposed legislation's intent to help "streamline and modernize APHIS' existing statutory authorities regarding invasive species exclusion activities."[212] The

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and is causing serious damage to wine grapes in certain regions. During the U.S. House Agriculture Committee's Subcommittee on Livestock and Horticulture hearing in 2000 held in California, Representative Ken Calvert reported that high populations of the pest were found in San Diego, Orange, Riverside, San Bernardino, Los Angeles, Ventura, and Santa Barbara counties. *Id.* at 13 (statement of Hon. Ken Calvert).

205. *Invasive Species: Hearing Before the Subcommittee on Livestock and Horticulture of the Committee on Agriculture,* 106th Cong. 8 (2000) (statement of Richard Pombo), *available at* http://commdocs.house.gov/committees/ag/hag10642.000/hag10642_0.htm.

206. *Id.* at 12 (statement of Charles Canady).

207. *Id.* at 116 (statement of Bob Crawford, Fla. Comm'r of Agric. and Consumer Serv.).

208. *Id.* at 38 (statement of Carl Loop, President, Fla. Farm Bureau).

209. *Id.*

210. *Id.* at 71 (statement of Charles Schwalbe, Assoc. Deputy Adm'r, Plant Protection & Quarantine, U.S. Dep't of Agric.).

211. *Id.*

212. *Id.* at 78.

agency supported the bill's passage as the Act would consolidate and eliminate gaps in authority as well as outdated and ambiguous provisions.[213] Mr. Schwalbe further stated that in addition to its core mission of safeguarding U.S. agricultural resources and protecting the country's natural ecosystem from damage due to invasive species, APHIS is also responsible for facilitating agricultural trade.[214] However, he did not mention the Plant Protection Act in the context of expanding the agency's role in promoting trade.[215]

D. Conclusion on Plant Protection Act of 2000

The Plant Protection Act has support on almost all sides of the dispute as to how to regulate foreign pests. As noted above, the Plant Protection Act states in its findings section that the Secretary of Agriculture has the responsibility to facilitate exports and imports of agricultural products "in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds."[216] The statute also provides that phytosanitary decisions made by APHIS should be consistent with international agreements, presumably including the SPS Agreement.[217]

By contrast, the legislative history indicates that the primary purpose of this law is to better enable the Secretary of Agriculture to protect the United States from threats posed by invasive species. The starting point for domestic industries facing increased imports is the concern of extraordinary damage where there is no meaningful compensation scheme and no liability for mistakes. The starting point for APHIS is the pursuit of regulations under old procedures and making decisions as to what level of protection is enough on a case-by-case basis to minimize disruption of trade while minimizing risk of pest infestation. While the lines drawn appear contradictory, there may be ways to reduce the concerns of domestic producers while achieving the dual objectives facing APHIS. An examination of some of the more recent regulations will identify the problems confronted.

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213. *Id.*
214. *Id.* at 72.
215. *See id.* at 78.
216. 7 U.S.C. § 7701(3) (2000).
217. *See id.* § 7751(e).

VII. APHIS RULEMAKING UNDER THE 2000 PLANT PROTECTION ACT

A. Regulations Governing the Movement of Plant Pests

The 2000 Plant Protection Act grants the Secretary of Agriculture "broad authority to carry out operations or measures to detect, control, eradicate, suppress, prevent, or retard the spread of plant pests."[218] As the agency responsible for these activities, APHIS has proposed a number of rule changes since the 2000 Act's enactment. These rule changes were possible because of the flexibility the Act grants the agency. They include changes to the criteria used to determine whether an organism qualifies as a "plant pest"[219] as well as to the criteria for deciding when a direct or indirect injury or damage to a plant or plant products is of a type that should be regulated and to what extent.[220]

The published rule changes under the 2000 Act exhibit an inclination by APHIS to apply a more liberal approach to fruit and vegetable imports. One such change, the deletion of the "without risk" requirement from the regulations governing when fruits or vegetables may be imported from disease-free and pest-free areas, is scheduled to result in the importation of a variety of products that were not permitted entry under the old regulations.[221] As dictated by the 2000 Act, APHIS published an amended version of its procedures and standards governing the consideration of import requests within a year of the Act's passage.[222] The procedures and standards are aimed at making the process more transparent and accessible.[223] To that end, every import request that is designated "nonroutine"[224] and results in a final risk assessment will be posted

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218. Plant Pest Regulations; Update of Current Provisions, 66 Fed. Reg. 51,340 (Oct. 9, 2001) (to be codified at 7 C.F.R. pt. 330).

219. The 2000 Plant Protection Act defines a "plant pest" as "any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: (A) A protozoan; (B) A nonhuman; (c) A parasitic plant; (D) A bacterium; (3) A fungus; (F) A virus if vuriud); (G) An infectious agent or other pathogen' and (H) Any article similar to or allied with any of the articles specified in the preceding subparagraphs." 7 U.S.C. § 7702(14).

220. Plant Pest Regulations; Update of Current Provisions, 66 Fed. Reg. at 51,340.

221. Importation of Fruits and Vegetables, 67 Fed. Reg. 61,547 (Oct. 1, 2002) (to be codified at 7 C.F.R. pts. 300, 319).

222. 7 U.S.C. § 7712(d).

223. *Id.* § 7712(b).

224. The agency will designate every request as either "routine" or "nonroutine" in place of the former designations, "minor" and "major." The new labels are not intended to connote different types of risk assessments; however, a nonroutine assessment is associated "with issues that may require greater resources, including greater risk communication." Risk communication is defined in the notice as: "The open exchange of information and opinion, which leads to better understanding of risk and risk-related decisions." Procedures and

on APHIS's Plant Protection and Quarantine web site for a 60-day comment period.[225] APHIS is committed to ensuring that the assumptions and uncertainties that were part of the risk assessment process are clearly specified in the risk assessment documents. Those assumptions and uncertainties will include aspects such as mitigation measures aimed at functioning both individually and as components of a system.[226] However, the actual process for conducting the risk assessment is not open to comments until after the assessment is completed.[227]

As a result of the increase in import requests for fruits and vegetables received by APHIS, requesters are now offered the opportunity to conduct their own pest risk assessment.[228] The assessments must be conducted according to APHIS's Plant Protection and Quarantine's pest risk assessment process.[229] According to APHIS's web site, the completed assessments must be submitted to APHIS for review and response.[230]

If APHIS determines that a risk exists, the 2000 Plant Protection Act grants APHIS the authority to control the entry of fruits and vegetables into the United States.[231] The regulations governing importation of fruits and vegetables were promulgated prior to the 2000 Act's passage; however, amendments to certain sections controlling the entry of fruits and vegetables have been adopted since.[232] The regulations require that one of the following four conditions must be met before the agency can allow certain fruit and vegetable imports into the United States:

> 1. [It i]s not attacked in the country of origin by injurious insects, including fruit and melon flies (*Tephritidae);*

Standards Governing the Consideration of Import Requests, 66 Fed. Reg. 32,923, 32,924 & 32,926 (June 19, 2001).

225. *Id.* at 32,927.

226. *Id.* at 32,928.

227. *See id.*

228. Animal and Plant Health Inspection Serv., U.S. Dep't of Agric., *Request for Pest Risk Assessments*, *available at* http://www.aphis.usda.gov/ppq/pra/commodity/requestforpra.htm (n.d.).

229. *Id.*

230. *Id.*

231. 7 U.S.C. § 7712(a) (2000).

232. *See, e.g.*, Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319); Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319); Importation of Fruits and Vegetables, 67 Fed. Reg. 61,547 (Oct. 1, 2002) (to be codified at 7 C.F.R. pts. 300,319); Importation of Clementines from Spain, 67 Fed. Reg. 64,702 (Oct. 21, 2002) (to be codified at 7 C.F.R. pt. 319).

> 2. [It h]as been treated or is to be treated for all injurious insects that attack it in the country of origin, in accordance with conditions and procedures that may be prescribed by the Administrator;
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> 3. [It i]s imported from a definite area or district in the country of origin that is free from all injurious insects . . . [and] its importation can be authorized *without risk* and its importation is in compliance with the criteria of paragraph (f) [quoted below] of this section; or
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> *4.* [It i]s imported from a definite area or district of the country of origin that is free from certain injurious insects that attack the fruit or vegetable, its importation can be authorized without risk, and the criteria of paragraph (f) of this section are met with regard to those certain insects, provided that all other injurious insects that attack the fruit or vegetable in the area or district of the country of origin have been eliminated from the fruit or vegetable by treatment or any other procedures that may be prescribed by the Administrator.[233]

In the subsection quoted above, APHIS has two major options when considering a permit request for importing a product from an area either known to contain or to be at risk of containing pests or diseases. APHIS can either (1) ban the import completely or (2) stipulate inspections, treatments and other conditions that must be fulfilled prior to importation.[234] In order to utilize the second option, the U.S. Department of Agriculture's regulations explicitly require that when importing fruits or vegetables from an area that is pest-free with regard to "certain injurious insects" but not all, the imports will only be allowed if they can be authorized "without risk."[235]

However, on October 1, 2002, APHIS published a proposed rule change that would delete the "without risk" requirement. APHIS claimed in the Federal Register notice announcing the change that "[e]ven with strict adherence to the preventive measures that the regulations prescribe, there will always be some risk . . . which

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233. 7 C.F.R. § 319.56-2(e) (2003) (emphasis added).
234. *See id.*
235. *See id.* § 319.56-2(e)(4).

makes the 'without risk' criterion a standard that, in practical terms, is impossible to satisfy."[236] The rule change also proposed substituting references in § 319.56-2(e) to "injurious insects" with "quarantine pests."[237]

The requirements in § 319.56-2(e) refer to three criteria located in § 319.56-2(f) that must also be fulfilled before a plant or plant product can be imported:

> 1. Within the past 12 months, the plant protection service of the country of origin has established the absence of infestations of injurious insects known to attack fruits or vegetables in the definite area or district based on surveys performed in accordance with requirements approved by the Administrator as adequate to detect these infestations;
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> 2. The country of origin has adopted and is enforcing requirements to prevent the introduction of injurious insects known to attack fruits and vegetables into the definite area or district of the country of origin that are deemed by the Administrator to be at least equivalent to those requirements imposed under this chapter to prevent the introduction into the United States and interstate spread of injurious insects; and
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> 3. The plant protection service of the country of origin has submitted to the Administrator written detailed procedures for the conduct of surveys and the enforcement of requirements under this paragraph to prevent the introduction of injurious insects.
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> When used to authorize importation under §319.56-2(e)(3), the criteria must be applied to all injurious insects that attack the fruit or vegetable; when used to authorize importation under §319.56-2(e)(4), the criteria must be applied to those particular injurious

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236. Importation of Fruits and Vegetables, 67 Fed. Reg. 61,547, 61,548 (Oct. 1, 2002) (to be codified at 7 C.F.R. pts. 300, 319).

237. "Quarantine pests" would be defined in 7 C.F.R. §319.56-1 as, "A pest of potential economic importance to the area endangered by it and not yet present there, or present but not widely distributed there and being officially controlled." The definition is consistent with the International Plant Protection Convention (IPPC) of the United Nations Food and Agriculture Organization's definition. *Id.*

> insects from which the area or district is to be considered free.[238]

APHIS has also proposed replacing the specific criteria in subsection (f) with "a standard requiring that the area from which the fruit or vegetable is being imported meets the requirements of the IPPC's International Standard for Phytosanitary Measures (ISPM) No.4, 'Requirements for the establishment of pest free areas.'"[239] According to APHIS's proposed rule change, IPPC's requirements for a pest- or disease-free area include having "a system to establish freedom, phytosanitary measures to maintain freedom, and a system for the verification of the maintenance of freedom."[240]

The Department of Agriculture has also promulgated regulations governing the enforcement and administration of plant quarantine and safeguards at 7 C.F.R. § 352.3. Those regulations grant the Deputy Administrator the discretion to modify regulations by making them less stringent when he finds existing conditions make it safe to do so.[241] In such cases, the Administrator must publish his findings in administrative instructions and specify the modification as well as when it will become effective.[242] When taking such actions, the regulations impose a duty on the Administrator to carry out the regulation's purposes in a manner that "will impose a minimum of impediment to foreign commerce, consistent with proper precaution against plant pest dissemination."[243]

B. Current Challenges

1. Hass Avocados

In July 2001, under the 2000 Plant Protection Act, the U.S. Department of Agriculture announced a proposal to amend its regulations on Mexican avocados that would increase the quantity permitted to enter the United States by expanding the permitted distribution of Mexican avocados from 19 to 31 states and the

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238. 7 C.F.R. § 319.56-2(f).

239. Importation of Fruits and Vegetables, 67 Fed. Reg. at 61,548. The United States is a member of the International Plant Protection Convention of the United Nation's Food and Agriculture Organization (IPPC), an organization that establishes international standards aimed at harmonizing phytosanitary measures. *Id.*

240. *Id.*

241. 7 C.F.R. § 352.3(b) (2001).

242. *Id.*

243. *Id.* § 352.3(d).

shipping season by two months.[244] As a result, U.S. avocado growers adopted an approach similar to the U.S. citrus growers and organized through the California Avocado Commission to bring a lawsuit against the U.S. Department of Agriculture to prevent the broadening of import allowances for Mexican Hass avocados.[245] The final rule was published on November 1, 2001. The avocado rule change was similar to the Argentine citrus rule and involved specifically approved orchards in certain Mexican municipalities.[246]

The California Avocado Commission's lawsuit makes claims comparable to those by the Citrus Science Council — that APHIS used a faulty risk assessment and import protocol.[247] It also alleges that APHIS underestimated the risk of Mexican pests and diseases to U.S. producers.[248] The growers argue that APHIS should have taken a more conservative approach under its regulations and the SPS Agreement than the approach used in the proposed rule change.[249] Echoing the sentiments expressed by Joel Nelsen of the Citrus Science Council, the California Farm Bureau Federation quoted the California Avocado Commission complaint as stating that APHIS's avocado decision "was apparently prompted instead by the USDA's desire to facilitate increased trade with Mexico and its other global trading partners."[250] The California Avocado Commission further criticized APHIS's risk assessment as "completely contrary to what the science would suggest."[251]

Focused on the risk Mexican avocados may pose to their product, the domestic growers challenged APHIS's ability to diminish the risk of pest introduction to the zero risk level desired by the domestic producers.[252] The California Avocado Commission filed a petition in October 2001, "requesting that [APHIS] suspend further administrative steps related to" the avocado rule change as a result

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244. Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319).

245. The case was filed in the United States District Court for the Eastern District of California. Cal. Avocado Comm. v. Veneman, No. 1:01-89 Civ. 6578 (E.D. Cal. Jan. 14, 2004).

246. Press Release, U.S. Dep't of Agric., USDA Proposes Expansion of Mexican Hass Avocado Import Program (July 9, 2001), *at* http:/www.ceris.purdue.edu/napis/pr-release/pr010709-mxavoc.txt.

247. Tom Karst, *Citrus Growers Threaten Lawsuit Over US Ban of Spanish Clementines*, THE PACKER, Jan. 28, 2002, at A4.

248. *Id.*

249. *Id.*

250. Christine Souza, *Ag. Alert: Avocado Commission Sues U.S. Over Mexican Imports,* CALIFORNIA FARM BUREAU FEDERATION (Jan. 30, 2002), *at* http://www.cfbf.com/agalert/2002/aa-013002b.htm.

251. *Id.*

252. Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530, 55,542 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319).

of the court's decision on the Argentine citrus rule.[253] APHIS denied the petition as well as the suggestion that it conduct, publish, and make available for public comment additional risk information in compliance with the Argentine citrus decision in Harlan Land.[254] The avocado growers had pointed to the Harlan Land determination to support their contention that the definition of "negligible risk" was lacking.[255]

In response, APHIS stated that it "disagree[d] with much of the Harlan Land decision and believe[d] that it was predicated on the unique facts of that case and should, therefore, be limited to the Argentine citrus regulations that were at issue in that litigation."[256] The agency responded to the avocado comments on the "negligible risk" issue saying that it had "deliberately not defined the point at which risk becomes negligible" because that determination might have "important consequences in international trade, as [its] reciprocal use by other countries could adversely affect the export of domestic products . . . ."[257] In APHIS's final rule on Mexican Hass avocados, the agency stated that the 2000 Plant Protection Act "does not require that the Secretary's decision be based on a numerical or quantitative measurement of risk."[258] APHIS noted further that it did not believe that the act "set[s] forth specific factors that the Secretary must consider in making her decision."[259]

In December 2002, Mexican fruit flies were discovered in northern San Diego County, California.[260] That infestation resulted in a 117-square-mile quarantine being set up surrounding the infestation areas.[261] The Mexican fruit fly has been a reoccurring problem in California and attacks more than 40 kinds of fruit, including citrus and avocados, and could reportedly cost California $750 million to $2 billion a year if not eradicated.[262] However, APHIS maintains that its systems approach can successfully mitigate the risks from dangerous pests such as fruit flies.[263]

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253. *Id.* at 55,530.
254. *Id.* at 55,531.
255. *Id.*
256. *Id.*
257. *Id.* at 55,542.
258. Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319).
259. *Id.* at 55,531; s*ee also* 7 U.S.C. § 7712 (2000).
260. Todd Foltz, *Emergency Declared in Fruit Fly Battle,* THE PACKER, Dec. 27, 2002, *available at* http://www.thepacker.com/icms/_dtaa2/content/2002-112259-900.asp. The flies were found in two locations in northern San Diego County, which produce a reported $75 million in crops annually. *Id.*
261. *Id.*
262. *Id.*
263. Souza, *supra* note 250.

The original case challenging the agency's assertions, California Avocado Commission v. Ann Veneman, Secretary of Agriculture,[264] was heard by Judge Coyle, who also presided over the Citrus Science Council's case. The California Avocado Commission's case challenged the USDA's 1997 ruling to allow Mexican Hass avocados into the United States[265] as well as the agency's 2001 amended regulations discussed above.[266] On January 14, 2004, the California Avocado Commission's claim regarding the 1997 rule was dismissed as moot.[267] However, the claim regarding the 2001 amendment, which expanded the areas into which Mexican Hass avocados may be shipped in the United States, is still pending before Judge Coyle.[268]

2. Spanish Clementine Citrus

Until December 2001, Spanish clementine citrus entered the United States pursuant to 7 C.F.R. § 319.56-2(e)(2) under a permit based on the condition that they were cold treated for Medflies. However, Medfly larvae were discovered in shipments of clementine citrus from Spain in November and December of 2001.[269] As a result, the U.S. Department of Agriculture suspended imports of the fruit.[270] According to APHIS, the Medfly is "one of the world's most destructive pests of numerous fruits and vegetables," which "can cause complete loss of crops."[271]

As a result of the suspension, Spanish citrus growers filed a lawsuit against APHIS in the U.S. District Court for the Eastern District of Pennsylvania in February 2002.[272] In August 2002, the court ruled in the U.S. Department of Agriculture's favor, finding that the Secretary's action banning Spanish clementines as a result of Medfly infestation was "rational, prudent and in accord with

264. Cal. Avocado Comm. v. Veneman, No. 1:01-89 Civ. 6578 (E.D. Cal. Jan. 14, 2004).
265. Importation of Fresh Hass Avocado Fruit Grown in Michoacan, Mexico, 62 Fed. Reg. 5,293 (Feb. 5, 1997) (to be codified at 7 C.F.R. pt. 319).
266. Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530, (Nov. 1, 2001) (to be codified at 7 C.F.R. p. 319).
267. Cal. Avocado Comm. v. Veneman, No. 1:01-89 Civ. 6578 (E.D. Cal. Jan. 14, 2004).
268. Telephone Interview with Tom Bellamore, Senior Vice President and Corporate Counsel, Cal. Avocado Comm. (Jan. 21, 2004).
269. Tom Karst, *USDA Says 'bienvenido' to Clementines,* THE PACKER, Oct. 21, 2002, at A2.
270. *Id.*
271. Mediterranean Fruit Fly; Addition to Quarantined Areas, 66 Fed. Reg. 53,123 (Oct. 19, 2001) (to be codified at 7 C.F.R. pt. 301).
272. Intercitrus v. U.S. Dep't of Agric., No. 02 Civ. 1061 (E.D. Pa. Aug. 13, 2002).

applicable law."[273] Spanish growers estimated that they lost $54 million as a result of the U.S. ban.[274]

On July 11, 2002, under the 2000 Plant Protection Act, APHIS published a proposed rule that would allow Spanish clementine imports to resume under the requirement that they be "cold treated en route to the United States" as well as meet other pre- and post-treatment requirements.[275] Some of the comments submitted in response to the proposed rule revoking the suspension on clementine imports criticized APHIS based on the Harlan Land case. As with the U.S. citrus growers in Harlan Land and in the avocado case, APHIS was criticized for not clearly defining what it considers a "negligible level of risk" when authorizing imports from an area with a known pest or disease infestation.[276] The agency again declared its disagreement with the Harlan Land decision, noting that "negligible" is used to "describe risk in a qualitative, descriptive sense."[277]

The final rule, published in October 2002, also prohibited the distribution of Spanish clementines into citrus-growing states[278] during the 2002–2003 shipping season and required all boxes to bear a label noting the shipping limitations.[279] Opponents to the rule change voiced concerns that the rule lacked oversight capabilities, non-compliance penalties, and most importantly, any hard scientific data to prove that the U.S. Department of Agriculture's approach would actually kill Medflies contaminating the fruit.[280] APHIS has offered assurances that the treatments proscribed by the final rule "will prevent the introduction of the Medfly . . . and safeguard American agriculture."[281] Members of the U.S. citrus industry adamantly disagree. They point to failures in APHIS's ability to regulate the Spanish imports, citing the January 2003 discovery of Medfly larvae in a box of Spanish clementines and the November 2002 distribution of 200 cartons of Spanish clementines to a store

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273. Foreign Agric. Serv., U.S. Dep't of Agric., *U.S. District Court Finds in Favor of USDA Concerning the Spanish Clementine Lawsuit* (Aug. 26, 2002), *at* http://www.fas.usda.gov/htp/News/News02/08-02/8-23-02%20KD.htm.

274. Karst, *Citrus Growers Threaten Lawsuit Over US Ban of Spanish Clementines, supra* note 247.

275. Importation of Clementines from Spain, 67 Fed. Reg. 64,702 (Oct. 21, 2002) (to be codified at 7 C.F.R. pt. 319).

276. *Id.* at 64,705.

277. *Id.*

278. Those states include Arizona, California, Florida, Louisiana, Texas, Puerto Rico, the U.S. Virgin Islands, the Northern Mariana Islands, Guam and American Samoa. *Id.* at 64,711.

279. *Id.*

280. Todd Foltz, *Speakers at Hearing Decry Clementine Rule*, THE PACKER, Aug. 26, 2002, at A4.

281. Karst, *USDA Says 'bienvenido' to Clementines, supra* note 269.

in Tallahassee, Florida, to emphasize the merit of their concerns.[282] Requesting that imports halt until a properly conducted risk assessment is completed, California Citrus Mutual joined with the California Grape & Tree Fruit League in Fresno, California, to file a complaint in District Court requesting a judgment to terminate the clementine rule.[283]

VIII. CONCLUSION

The Plant Quarantine Act of 1912 was concerned exclusively with the protection of the United States from foreign plant pests and diseases.[284] The 1912 Act served as the basis for quarantines on agricultural products around the world, including the citrus and avocados discussed in this paper.[285] However, through the implementation of the WTO SPS Agreement and the Plant Protection Act's passage, APHIS's mission has shifted away from the purely protective goals of the 1912 Act.

The shift in APHIS's mission has created increased controversy between the agency and those domestic growers the agency is charged with protecting. The controversy reflects the tension between APHIS's two objectives: pursuing trade-promotion and protecting the U.S. agricultural industry. The National Plant Board's 1999 stakeholder review states that the "emergence of trade facilitation as an important mechanism to assure the continued protection of America's plant resources co-evolved with the development and implementation of the WTO-SPS [Agreement] and NAFTA."[286] The implementation of the SPS Agreement and other trade agreements has reportedly resulted in both internal and external tension.[287] The National Plant Board's report stated that profound change would have to be instituted to alleviate that tension and for APHIS to effectively perform its three major functions: (1) safeguarding the United States' plant resources from invasive species; (2) securely and expeditiously admitting an

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282. Terry Scruton, *Larvae Find Prompts FFVA, USDA Pow-Wow,* THE PACKER, Jan. 27, 2003, at A3; see *also* Jim Offner, *Spanish Clementines Sold in Florida Despite Ban,* THE PACKER, Dec. 2, 2002, at A1.

283. The case was filed in the U.S. District Court in Fresno, California; Chuck Harvey, *2 Groups Challenge Clementine Rule*, THE PACKER, Mar. 31, 2003, at A5. The case is still pending. Robert Rodriguez, *Oh, Rival Clementine,* THE FRESNO BEE, Dec. 4, 2003, *available at* www.fresnobee.com.

284. 7 U.S.C. §§ 151-167 (repealed 2000).

285. *Id.*

286. SAFEGUARDING PLANT RESOURCES, *supra* note 2, at 16.

287. *Id.* at 14. The National Plant Board's report notes that the "multiple roles have led to conflicting cultures, competition for attention and resources, and employee confusion regarding the Agency mission." *Id.*

"increasing volume of goods and passengers into the United States;" and (3) complying with international obligations to facilitate agricultural trade.[288]

The external conflicts arising from APHIS's mission shift are evident in disputes between the agency and the domestic industry over Argentine citrus, Mexican Hass avocados, and Spanish clementines. U.S. agricultural producers in all three cases are dissatisfied with APHIS's shift in methodology, particularly the use of systems approaches that they believe are not based on sound science. One recurring complaint by the domestic producers involves the lack of opportunities for participation during the development and testing of the systems approaches. APHIS's process for adopting rule changes such as those discussed before leaves domestic producers in the dark until the last stage when their comments are taken on a fully developed proposal. For example, in February 2003, APHIS announced plans to allow shipments of Mexican citrus to enter the United States untreated. While the plans were announced to domestic producers, in this case no formal proposals were printed in the Federal Register that would give rise to a public comment period. Joel Nelsen, president of California Citrus Mutual, summarized domestic growers' discontent, commenting that the plan's objective seemed acceptable, "[b]ut getting there and bypassing your ability to participate and question the efficacy, that's a problem."[289]

The challenges waged against APHIS's use of the systems approach in Harlan Land and in the other two lawsuits are a further indication of domestic producers' dissatisfaction with APHIS's methodology and perceived lack of transparency. Ensuring transparency in the removal and imposition of phytosanitary measures is important for domestic producers as well as international exporters — it builds confidence that the protective measures are not being posed arbitrarily or unfairly. The avocado industry, like the citrus growers, charged that the approach used in their case was "based on a fatally flawed set of pest risk assessments, unsupported and erroneous factual assumptions, and non-existent scientific data."[290] The various domestic producers are very concerned by what they see as a due process problem. They view APHIS's new trade-promoting methodology as driven by

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288. *Id.* at i.

289. Todd Foltz, *APHIS Stance on Mexican Citrus Raises Concerns,* THE PACKER, Feb. 24, 2003, *at* http://thepacker.com/icms/_dtaa2/content/2003-93628-53.asp.

290. Souza, *supra* note 250.

political motives and dismissive of the serious threat invasive species pose to their livelihoods.[291]

Further complicating the problem is the lack of safeguards protecting domestic producers if a systems approach results in disease or pest importation and dissemination. Under current U.S. Department of Agriculture procedure, no federal compensation is available for producers whose crops are damaged as a result of a faulty risk assessment that results in a poorly devised systems approach.[292] The Plant Protection Act contains no such provision. Instead, the burden falls on state governments and the individual producers to pick up the costs of pest or disease eradication.[293] According to the California Avocado Commission's Chairman, Jerome Stehly, avocado production costs have increased by $300 an acre due to pest problems in recent years.[294]

As APHIS attempts successfully to balance trade with its former role that was strictly protective, improving the science used in designing a systems approach is vital. When risk assessments are conducted and systems approaches tested, the data used must be complete, accurate and applicable to the subject commodity and the exporting country. The requirement that sanitary and phytosanitary measures are based on "sound science" is fundamental to the WTO's SPS Agreement. Fulfilling this requirement is crucial to building confidence among domestic growers as well as trading partners.

The Harlan Land case raises a series of questions that the agency could address moving forward. However, subsequent statements by APHIS suggest that it will use the new law as a justification for maintaining the status quo. For example, Harlan Land called into question APHIS's ability to set the risk level without providing a quantifiable risk amount. APHIS currently interprets the Plant Protection Act as granting the agency the discretion to evaluate the risk and set the protection level as appropriate without quantifying it. It is unclear whether the pending clementine and avocado cases will follow the Harlan Land decision or whether the court will uphold APHIS's discretion.

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291. *See* Ben Wood, *D.C. Buzzing with Talk on Medfly, Inspection Fees,* THE PACKER, Jan. 20, 2003, at A8.

292. FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., FACT SHEET: EMERGENCY DISASTER DESIGNATIONS AND DECLARATION PROCESS 1 (Jan. 2004), *available at* http://www.fsa.usda.gov/ pas/ publications/facts/html/EMProcess04.htm.

293. *See id.* Federal disaster assistance has only been given where the situation escalated far enough that the infested area was declared a "disaster area," or the U.S. Congress legislated specific assistance amounts through the appropriations process. *See id.*

294. Mark Walker, *Avocado Commission Sues over Inspection Program,* NORTH COUNTY TIMES, Jan. 17, 2002, *available at* http://www.nctimes/news/2002/ 20020117/ 92133. html.

APHIS's justification (to match the protection to the specific threat and not provide a target that other nations could use against U.S. exports) suggests that APHIS may be tipping its balance in favor of keeping export markets open. The unwillingness to quantify the magnitude of risk which is acceptable also suggests the potential for abuse by the agency in either or both directions (too much protection or too little protection). Surely APHIS personnel have some standard that they are using in determining that a systems approach or individual treatment will adequately protect U.S. agriculture. A refusal to articulate that standard denies transparency and understandability to what the agency is seeking to achieve. By contrast, granting domestic growers the ability to participate in a transparent process that assures that sound science is being used to determine and minimize the risks imports pose to their goods would increase their willingness to accept a risk level other than "zero."

APHIS's mission is important, and its job has always been difficult. With expanded international trade being a result of recent trade agreements, APHIS is being asked to perform a difficult balancing act, designing methods that will both protect domestic industry from invasive species and facilitate the importation of goods that pose some level of risk resulting from plant pests or diseases. APHIS could better balance the demands being placed on the agency and avoid some of the challenges it faces from domestic producers if some of the concerns raised by domestic producers and echoed throughout this paper were met. In particular, APHIS needs to give interested parties opportunities to comment or contribute earlier in the decision-making process. This could be accomplished by releasing interim reports followed by the acceptance and incorporation of comments where feasible. Transparency and sound science were an important aspect of the Plant Protection Act of 2000's passage and contributed to the new act's classification as a much-needed modernization of the 1912 Plant Quarantine Act.[295] APHIS has unquestionably moved forward toward achieving the improvements intended to occur through the new law. But APHIS, now a part of the new Homeland Security Department, still needs to improve its processes by further increasing its transparency and ensuring that it is using sound science.

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295. SAFEGUARDING PLANT RESOURCES, *supra* note 2, at 7.

"STRANGERS IN A STRANGE LAND" — TRANSNATIONAL LITIGATION, FOREIGN JUDGMENT RECOGNITION, AND ENFORCEMENT IN ONTARIO

ANTONIN I. PRIBETIC*

Table of Contents

I. INTRODUCTION

Well into the new millennium, the landscape of international business commerce continues to change dramatically. As many companies expand into global markets, the extant business reality of prosecuting or defending lawsuits arises from companies relying upon standard or "boiler plate" contracts or invoices when selling goods and services to customers or buying products from suppliers or third parties. It is trite to say that a review of the wording of a company's sales contracts or invoices is advisable. However, any domestic or foreign company which conducts business or sells products in Canada should be mindful of the conflict of law issues and jurisdictional disputes which may result in costly litigation affecting the company's "bottom-line."

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This article discusses transnational contractual and litigation issues in Canada,[1] with specific application to the province of Ontario. This article first addresses, from an Ontario company perspective, the importance of incorporating choice of forum, choice of law, and time of the essence clauses in standard international contracts, with particular reference to the United Nations Convention on Contracts for the International Sale of Goods.[2] The second part draws upon the jurisdictional issues prevailing when foreign defendants are sued in Ontario, including procedural and substantive law considerations. Finally, a discussion of the principles for recognition and enforcement of foreign judgments in Ontario necessarily involves a review of the Supreme Court of Canada's landmark decisions in *Morguard Investments Ltd. v. de Savoye*,[3] and the recently released decision in *Beals v. Saldanha.*[4] An appreciation of the complexities and subtleties within developing Canadian jurisprudence in the transnational litigation context offers foreign and domestic litigants an opportunity to consider the benefits and drawbacks of litigating in Ontario.

II. INTERNATIONAL SALES CONTRACT ISSUES

There are three types of clauses which most contracts or invoices should contain: a choice of forum clause; a choice of law and exclusive jurisdiction clause; and a time of the essence clause.[5]

A. Choice of Forum Clauses

Many contracts include a standard clause in which the parties agree that any dispute between them is subject to arbitration or to the exclusive jurisdiction of a given court. Where a plaintiff brings an action in a jurisdiction that violates such a clause and receives a judgment, the trend is for Ontario courts to assume jurisdiction, notwithstanding the agreement, on the grounds that such clauses are interpreted to confer concurrent, but not exclusive, jurisdiction on the foreign court. However, in interpreting the contract, Ontario

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1. This article focuses on choice of forum and choice of law issues from a contractual perspective. For an analysis of choice of law, vis-à-vis tort and product liability issues, see Janet Walker, *"Are We There Yet?" Towards a New Rule for Choice of Law in Tort,* 38 OSGOODE HALL L.J. 331 (2000).

2. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. No. A/CONF.97/19 (1981), *incorporated by*, International Sale of Goods Act, R.S.O. 1990, c-I-10.

3. [1990] 3 S.C.R. 1077.

4. [2003] S.C.C. No. 72, WL No. 28829 (Can. Dec. 18, 2003) (slip opinion).

5. There are a variety of other contract indemnity (or risk allocation) clauses beyond the scope of this article, including limitation of liability, release, waiver, hold (and save) harmless, insurance-waiver of subrogation, etc.

courts generally are required to apply the governing law based upon the choice of forum (*lex fori*) clause[6]. Therefore, it is recommended that Ontario-based corporations, whether carrying on business inter-provincially or multi-nationally, ensure that any contracts or invoices specify Ontario as the choice of forum in the event of a dispute.

Forum selection clauses are generally treated with a measure of deference by Canadian courts. In *Rudder v. Microsoft Corp.*,[7] Justice Winkler relied upon the decision of the British Columbia Court of Appeal in *Sarabia v. Oceanic Mindoro*, which held that:

> [T]here is no reason for forum selection clauses not to be treated in a manner consistent with the deference shown to arbitration agreements. Such deference to forum selection clauses achieves greater international commercial certainty, shows respect for the agreements that the parties have signed, and is consistent with the principle of international comity.[8]

Justice Winkler also cited with approval the English case, *Eleftheria (Cargo Owners) v. Eleftheria*,[9] relied upon by Justice Huddart in *Sarabia,* "as the decision most often followed in Canada in setting out the factors that a court will consider in determining whether it should exercise its discretion and refuse to enforce a forum selection clause in an agreement."[10] Justice Winkler summarized the relevant factors as follows:

> (1) In which jurisdiction is the evidence on issues of fact situated, and the effect of that on the convenience and expense of trial in either jurisdiction; (2) whether the law of the foreign country applies and its differences from the domestic law in any respect; (3) the strength of the jurisdictional connections of the parties; (4) whether the defendants desire to enforce the forum selection clause is genuine or merely an attempt to obtain a procedural advantage; and(5) whether the plaintiffs

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6. *See generally* NICHOLAS RAFFERTY ET AL., PRIVATE INTERNATIONAL LAW IN COMMON LAW CANADA: CASES, TEXT, AND MATERIALS chs. 9, 10 (2nd ed. 2003); Neil Guthrie, *'A Good Place to Shop:' Choice of Forum and the Conflict of Laws*, 27 Ottawa L. Rev. 201 (1995-96)

7. [1999] 47 C.C.L.T. 2d 168, para 8.

8. Sarabia v. Oceanic Mindoro, [1996] 26 B.C.L.R.3d 143, *cited in* Rudder v. Microsoft Corp., [1999] 47 C.C.L.T. 2d 168, para. 8.

9. Eleftheria (Cargo Owners) v. Eleftheria, [1969] 2 All E.R. 641.

10. *Rudder*, 47 C.C.L.T.2d at para. 19.

> will suffer prejudice by bringing their claim in a foreign court because they will be (a) deprived of security for the claim; or (b) be unable to enforce any judgment obtained; or (c) be faced with a time-bar not applicable in the domestic court; or (d) unlikely to receive a fair trial.[11]

In *Z.I. Pompey Industrie v. ECU-Line N.V.,*[12] Justice Bastarche, writing for the unanimous Supreme Court of Canada, characterized the appropriate test for enforcement of forum selection clauses as the "strong cause" test referred to in *Eleftheria*. Justice Bastarche states:

> The "strong cause" test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the "strong cause" test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.[13]

B. Choice of Law and Exclusive Jurisdiction Clauses

As a corollary to the choice of forum clauses discussed above, parties are free to specify that foreign law applies, despite a choice of forum clause stipulating Ontario as the *lex fori*.[14] In most cases, the choice of law is a matter of negotiation and may include considerations such as imposing private mediation and

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11. *Rudder*, 47 C.C.L.T.2d at para. 20.
12. [2003] 224 D.L.R.4th 577.
13. *Id.* at para. 20.
14. *See generally* J.G. CASTEL, CONFLICT OF LAWS; CASES, NOTES, & MATERIALS ch. 12 (5th ed. 1984); NICHOLAS RAFFERTY ET AL., *supra*, note. 6.

international commercial arbitration clauses. At a minimum, the contract should specify which law should govern in the event of a dispute. Moreover, depending on the nature of the claim, an Ontario-based company should seriously consider incorporating an "exclusive jurisdiction clause" stating that all disputes, whether contractual, quasi-contractual, tort-negligence, or product-liability based, etc., will be interpreted according to Ontario law.

From a contractual perspective, Ontario is a signatory to the United Nations Convention on Contracts for the International Sale of Goods (CISG).[15] The CISG is incorporated by reference in Ontario by the International Sale of Goods Act (ISGA). Buyers or sellers, who wish to be exempt from the application of the CISG or the ISGA, should consider including a specific clause excluding the application of this legislation. It is noteworthy that the ISGA is silent on choice of forum and choice of procedural law, delegating these issues to buyers and sellers for inter se negotiation and pre-contractual bargaining.[16]

Furthermore, unlike the Ontario Sale of Goods Act,[17] which was governed by a six-year limitation, the International Sale of Goods Act, imposes a two-year limitation and specifies a notice requirement. Articles 39(1) and 39(2) of the International Sale of Goods Act read:

> (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice [to the seller] specifying the nature of the non-conformity within a reasonable time after discovery.
>
> (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-

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15. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. No. A/CONF.97/19 (1981), *incorporated by*, International Sale of Goods Act (ISGA), R.S.O., ch. I-10 (1990) (Ont.). Section 6 of the ISGA reads: "Parties to a contract to which the Convention would otherwise apply may exclude its application by expressly providing in the contract that the local domestic law of Ontario or another jurisdiction applies to it or that the Convention does not apply to it." Quaere whether any foreign court or tribunal would recognize any unilateral "opting out" provision as contemplated under section 6 of the ISGA. For an American perspective, see Allison E. Butler, *The International Contract: Knowing When, Why, and How to "Opt Out" of the United Nations Convention on Contracts for the International Sale of Goods*, 76 FLA. BAR J. 24 (May 2002).

16. *Id.*

17. R.S.O., ch S-1 (1990).

limit is inconsistent with a contractual period of guarantee.[18]

C. Time of the Essence Clauses

Often a buyer and seller will reach an agreement on price, quantity, and method of payment and description of the goods or services. However, delay in shipment or delivery is never welcome and, if the goods are perishable, may be disastrous. Insurance coverage is no guarantee. However, a precisely worded clause specifying that "time is of the essence" and providing a deadline will not only motivate both parties to complete the deal, but will also provide grounds for termination should one party unduly delay payment or delivery of the product. No contract or invoice is "bullet-proof" or will shield a company from a lawsuit. However, where provision is made for the choice of forum, time of the essence, and choice of law, a company will garner some advantage should it wish to either prosecute or defend an action in Ontario.

III. JURISDICTIONAL ISSUES

In 1990, the Supreme Court of Canada adopted the principles of international comity in the case of *Morguard Investments Ltd. v. de Savoye*.[19] *Morguard* was primarily a constitutional decision regarding enforcement of inter-provincial judgments.[20] Nevertheless, the Court also applied its analysis to foreign judgments.[21] Justice La Forest, writing for a unanimous Court, emphasized that Canadian courts should recognize international comity in deference to the reality of modern international commerce:

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18. International Sale of Goods Act, R.S.O., ch. I-10, arts. 39(1)-(2) (1990) (Ont.). *See also* Camilla Baasch Andersen, *Reasonable Time in Article 39(1) of the CISG — Is Article 39(1) Truly a Uniform Provision?*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1998 63, 63-176 (1999), *available at* http://www.cisg.law.pace.edu/cisg/biblio/andersen.html; La San Giuseppe v. Forti Moulding Ltd., [1999] 104 O.T.C. 213, paras. 28-31, 39 (Ont. Super. Ct. of Justice). For a detailed critique of the International Chamber of Commerce Model International Sale Contract, see James M. Klotz, *Critical Review of The ICC Model International Sale Contract, Pace Law School Institute of International Commercial Law* (Feb. 6, 1998), *at* http://www.cisg.law.pace.edu/cisg/biblio/klotz.html. Another helpful guide for drafting contract clauses in the CISG context may be found in John P. McMahon, *Drafting CISG Contracts and Documents and Compliance Tips for Traders Pace Law School Institute of International Commercial Law*, Pace Law School Institute of International Commercial Law (last modified Jan. 27, 2003), *at* http://www.cisg.law.pace.edu/cisg/contracts.html.

19. [1990] 3 S.C.R. 1077, 1096.

20. *Id.*

21. *Id.*

> The business community operates in a world economy and we correctly speak of a "world community" even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments, to the general advantage of litigants.[22]

The *Morguard* decision established that "the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills, and people across state lines in a fair and orderly manner."[23] Comity, defined by the Supreme Court of Canada as "the deference and respect due by other states to the actions of a state legitimately taken within its territory,"[24] needed to be contemporised "in light of a changing world order."[25] Justice La Forest articulated the constitutional principles as follows:

> The application of the underlying principles of comity and private international law must be adapted to situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the court of other constituent units of the federation. In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.
>
> . . . .
>
> A similar approach should, in my view, be adopted in relation to the recognition and enforcement of judgments within Canada. As I see it, the courts in one province should give *full faith and credit*, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court

22. *Id.* at 1098.
23. *Morguard*, [1990] 3 S.C.R. at 1096.
24. *Id.* at 1095.
25. *Id.* at 1097.

> has properly, or appropriately, exercised jurisdiction in the action. Both order and justice militate in favour of the security of transactions.[26] (emphasis added)

Following *Morguard*, voluntary attornment by the defendant no longer was a prerequisite to initiating foreign enforcement proceedings in Canada.[27] A foreign litigant need only demonstrate that the foreign judgment was "issued by a court acting through fair process and with properly restrained jurisdiction,"[28] and there exists a "real and substantial connection" between:

> the issue in the action and the location where the action is commenced;
>
> the damages suffered and the jurisdiction; and
>
> the defendant and the originating forum.[29]

Justice La Forest, in *Hunt v. T & N plc*,[30] further clarified the approach by stating that the assessment of the "reasonableness" of a foreign court's assumption of jurisdiction was not a mechanical accounting of connections between a case and a territory, but a decision "guided by the requirements of order and fairness."[31] In *Tolofson v. Jensen*,[32] Justice La Forest prioritized these procedural requirements:

> It may be unfortunate for a plaintiff that he or she was the victim of a tort in one jurisdiction rather than another and so be unable to claim as much compensation as if it had occurred in another jurisdiction. But such differences are a concomitant of the territoriality principle. *While, no doubt, as was observed in* Morguard*, the underlying principles of*

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26. *Id.* at 1101-02.
27. The "personal subjection" approach was rejected by both Justice Sharpe in Muscutt v. Courcelles, [2002] 213 D.L.R.4th 577, paras. 59-109, and Justice Le Bel, dissenting, in Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 209 (Can. Dec. 18, 2003).
28. *Morguard*, [1990] 3 S.C.R. 1077, 1103.
29. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 177 (Can. Dec. 18, 2003)
30. Hunt v. T & N plc, [1993] 109 D.L.R.4th 16.
31. *Id.* at 42.
32. [1994] 3 S.C.R. 1022.

> *private international law are order and fairness, order comes first. Order is a precondition to justice.*[33]

A. Jurisdiction Simpliciter

The Ontario Court of Appeal, in a recent pentad of cases,[34] has attempted to clarify the "real and substantial connection" test. In *Muscutt v. Courcelles*,[35] the Court identified eight relevant factors when considering the threshold issue of jurisdiction simpliciter.[36] First, "[t]he connection between the forum and the plaintiff's claim;" second, "[t]he connection between the forum and the defendant;" third, the "[u]nfairness to the defendant in assuming jurisdiction;" fourth, the "[u]nfairness to the plaintiff in not assuming jurisdiction;" fifth, "[t]he involvement of other parties to the suit;" sixth, "[t]he court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;" seventh, "[w]hether the case is interprovincial or international in nature;" and eighth, "[c]omity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere."[37]

In *Muscutt*, Justice Sharpe identified three bases for jurisdiction simpliciter:

> There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments.

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33. *Id.* at 1058 (emphasis added).

34. Muscutt v. Courcelles, [2002] 213 D.L.R.4th 577; Gajraj v. DeBernardo, [2002] 213 D.L.R.4th 651; Leufkens v. Alba Tours International Inc., [2002] 213 D.L.R.4th 614; Lemmex v. Sunflight Holidays Inc., [2002] 213 D.L.R.4th 627; Sinclair v. Cracker Barrel Old Country Store Inc., [2002] 213 D.L.R.4th 643.

35. [2002] 213 D.L.R.4th 577.

36. Jurisdiction simpliciter is the preliminary question of whether the Ontario court lacks jurisdiction or whether the Ontario court should assume jurisdiction over a foreign defendant

37. *Id.* at paras. 77-101.

. . . .

> Assumed jurisdiction is initiated by service of the court's process out of the jurisdiction pursuant to Rule 17.02. Unlike presence-based jurisdiction and consent-based jurisdiction, prior to *Morguard* and *Hunt*, assumed jurisdiction did not provide a basis for recognition and enforcement.[38]

B. Service Ex Juris

A foreign party defendant, who has no presence in Ontario and has neither consented nor attorned to the Ontario jurisdiction, has three avenues to challenge service ex juris and "assumed jurisdiction:"

> First, Rule 17.06(1) allows a party who has been served outside Ontario to move for an order setting aside the service or staying the proceeding. Second, s. 106 of the *Courts of Justice Act* provides for a stay of proceedings, and it is well established that a defendant may move for a stay on the ground that the court lacks jurisdiction. Third, Rule 21.01(3)(*a*) allows a defendant to move to have the action stayed or dismissed on the ground that "the court has no jurisdiction over the subject matter of the action." Together, this procedural scheme adequately allows for jurisdictional challenges to ensure that the interpretation and application of Rule 17.02(*h*) will comply with the constitutional standards prescribed by *Morguard* and *Hunt*.[39]

The relevant text of Rules 17.02 and 17.04 of the Ontario Rules of Civil Procedure, governing service and jurisdiction, read as follows:

> 17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims . . . [(f) breach of contract] (iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside

38. *Id.* at paras. 19-20.
39. *Id.* at para. 53 (citing Ontario Rules of Civil Procedure).

> Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario . . . (h) Damage Sustained in Ontario — damage sustained in Ontario arising from tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed. . . .[40]
>
> 17.04(1) An originating process served outside Ontario without leave shall disclose the facts and specifically refer to the provision of rule 17.02 relied on in support of such service.[41]

Rule 17.06 provides the procedural framework for a foreign defendant to challenge service ex juris:

> 17.06(1) A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance, (a) for an order setting aside the service and any order that authorized the service; or (b) for an order staying the proceeding.
>
> 17.06(2) The court may make an order under subrule (1) or such other order as is just where it is satisfied that, (a) service outside Ontario is not authorized by these rules; (b) an order granting leave to serve outside Ontario should be set aside; or (c) Ontario is not a convenient forum for the hearing of the proceeding.
>
> 17.06(3) Where on a motion under subrule (1) the court concludes that service outside Ontario is not authorized by these rules, but the case is one in which it would have been appropriate to grant leave to serve outside Ontario under rule 17.03, the court may make an order validating the service.
>
> 17.06(4) The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party.[42]

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40. Ontario Rules of Civil Procedure r. 17.02(f)(iv), 17.02(h) (2004).
41. *Id*. at r. 17.04(1).
42. *Id*. at r. 17.06(1)-(4).

Pursuant to sub-rule 21.03(1)(a) of the Ontario Rules of Civil Procedure, a defendant may concurrently move before a judge to have an action stayed or dismissed on the ground that the court has no jurisdiction over the subject matter of the action.[43] Finally, under section 106 of the Courts of Justice Act, "a court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just."[44]

C. Forum Non Conveniens

If the Ontario court assumes jurisdiction over the dispute, the foreign defendant may concurrently bring a motion to stay the proceeding on the grounds that Ontario is not the convenient forum. The test for forum non conveniens "is whether there clearly is a more appropriate jurisdiction than the domestic forum chosen by the plaintiff in which the case should be tried."[45] Canadian courts have developed a non-exhaustive list of additional factors that may be considered in determining the most appropriate forum for the action, including the following:

> the location of the majority of the parties;
>
> the location of key witnesses and evidence;
>
> contractual provisions that specify applicable law or accord jurisdiction;
>
> the avoidance of a multiplicity of proceedings;
>
> the applicable law and its weight in comparison to the factual questions to be decided;
>
> geographical factors suggesting the natural forum; and

43. Ontario Rule of Civil Procedure 21.01(3)(a) provides: "A defendant may move before a judge to have an action stayed or dismissed on the ground that . . . the court has no jurisdiction over the subject matter of the action. . . ."

44. Courts of Justice Act, R.S.O. 1990, ch. C.43, § 106.

45. Frymer v. Brettschneider, [1994] 19 O.R.3d 60, 78, 84.

> whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.[46]

D. Proper Law of Contract

In general terms, where a contract is made or where it is to be performed is presumed to be the law of the contract (the *lex loci contractus*).[47] J. G. Castel, a prominent scholar in the field of conflict of laws writes:

> If there is no express choice of the proper law, the court will consider whether it can ascertain that there was an implied choice of law by the parties . . . [I]f the parties agree that the courts of a particular legal unit shall have jurisdiction over the contract, there is a strong inference that the law of that legal unit is the proper law. Other factors from which the courts have been prepared to infer the intentions of the parties as to the proper law are the *legal terminology in which the contract is drafted, the form of the documents involved in the transaction, the currency in which payment is to be made, the use of a particular language, a connection with a preceding transaction, the nature and location of the subject matter of the contract, the residence (but rarely the nationality) of the parties, the head office of a corporation party to the contract*, or the fact that one of the parties is a government.[48]

In *Eastern Power Ltd. v. Azienda Communale Energia and Ambiente*,[49] Justice MacPherson also considered the important issue of the legal relationship between a faxed acceptance of an offer and the place where the contract is formed. Writing on behalf of the Ontario Court of Appeal, Justice MacPherson stated that "[t]he general rule of contract law is that a contract is made in the location where the offeror receives notification of the offeree's acceptance."[50] The Court continues by citing *Imperial Life Assurance Co. of*

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46. Muscutt v. Courcelles, [2002] D.L.R.4th 577, para. 41.
47. J.G. CASTEL, CONFLICT OF LAWS; CASES, NOTES, & MATERIALS 1-7 (5th ed. 1984).
48. J.G. CASTEL, CANADIAN CONFLICT OF LAWS 596-98 (4th ed. 1997) (emphasis added).
49. [1999] 178 D.L.R.4th 409.
50. Eastern Power Ltd. v. Azienda Communale Energia & Ambiente, [1999] 178 D.L.R.4th 409, para. 28.

Canada v. Colmenares,[51] saying, "It has long been recognized that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made."[52] Justice MacPherson specifically rejected the plaintiff's contention that the rule with respect to facsimile transmissions should follow the postal acceptance exception stating:

> EP has cited no authority in support of its position. There is, however, case authority for the proposition that acceptance by facsimile transmission should follow the general rule, which would mean that a contract is formed when and where acceptance is received by the offeror. I would hold that in contract law an acceptance by facsimile transmission should follow the general rule of contract formation, not the postal acceptance exception.[53]

Therefore, in Ontario, a faxed contract is formed when and where the acceptance is received.[54]

In sum, unless the jurisdictional and choice of law issues are considered and incorporated into an international sales contract, Ontario-based companies wishing to sue in Ontario may face a preliminary jurisdictional challenge from the foreign debtor, which may result in unnecessary legal costs, delays and an unrecoverable accounts receivable.

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Although *Morguard* involved the enforcement of interprovincial judgments, Canadian courts have uniformly applied *Morguard* in enforcing true "foreign" judgments. For foreign litigants, *Morguard* has streamlined the enforcement procedure. The foreign judgment will be enforced in Canada provided that: (1) the foreign court properly exercised its jurisdiction according to its own rules; (2) there is a "substantial connection" between the subject matter of the

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51. [1967] S.C.R. 443, 447.

52. *Id.*

53. *Id.* at 418.

54. The Ontario courts have not yet resolved the issue of contract formation in the context of internet e-mail communications. Compare *Rudder v. Microsoft Corp.*, [1999] 47 C.C.L.T.2d 168, para. 9, where Justice Winkler held that an agreement reached on the forum placed a burden of showing "strong cause" as to why the forum selection should not be determinative on the plaintiff with *Holo-Deck Adventures Ltd. v. Orbotron Inc.*, [1996] 8 C.P.C.4th 376, para. 13, where Justice Molloy found that an agreement reached on forum is dispositive of the issue and no further inquiry is needed. *See also* Koolatron a Div. of Urus Indus. Corp. v. Icode, Inc., [2002] O.J. No. 1709 (Ont. Div. Ct.).

litigation and the jurisdiction; and (3) the defendant fails to raise a recognized defense.[55]

A. Finality of the Judgment

A foreign judgment must be final and conclusive in the originating jurisdiction in order to be considered enforceable by Canadian courts.[56] Finality presupposes two factors: (1) that the litigant has exhausted all avenues of appeal; and (2) that the foreign court judgment has no further power to rescind or vary its own decision. With respect to the first factor, if a foreign judgment is under appeal in the originating jurisdiction, a Canadian court will not refuse to enforce that foreign judgment; rather, it will often stay its decision on enforceability, pending the decision of the foreign appellate court.[57]

B. Defenses to the Enforcement of Foreign Judgments

Once the foreign court's jurisdiction is recognized, the only available defenses to an action for enforcement in Ontario are: the foreign judgment was obtained by fraud, the foreign judgment involved a denial of natural justice, enforcement of the foreign judgment is contrary to public policy, or the foreign judgment involves a defendant who was not a party to the foreign suit.[58]

In *Girsberger v. Kresz,*[59] the Superior Court declined to follow the well-established precedent that a foreign judgment is to be treated as a contract debt and not a judgment for the purposes of the Limitations Act.[60] The court accepted the argument that this rule was inconsistent with the modern conflict of laws principles, holding that, for the purposes of enforcement, foreign judgments are to be treated as judgments and are subject to a 20-year limitation period — not a six-year limitation period.[61] Justice Paisley considered *Girsberger* in *Lax v. Lax*:

> The plaintiff submits that the applicable limitation period is 20 years, pursuant to s. 45(1)(c) of that Act.

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55. *See* Morguard, [1990] 3 S.C.R. at 1103-10.

56. Four Embarcadero Centre Venturee v. Kalen, [1988] 65 O.R.2d 551, 563.

57. *See generally* PETER R. BARNETT, RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW (2001).

58. *Four Embarcadero*, 65 O.R.2d at 571. See discussion, *infra* Part IV, of the narrow scope of the available defenses of fraud, denial of natural justice, and public policy by the Supreme Court of Canada in Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829 (Can. Dec. 18, 2003).

59. Girsberger v Kresz, [2000] 47 O.R.3d 145, *aff'd* [2000] 50 O.R.3d 157.

60. *Id*. at para 48.

61. *Id*. at para 49.

> In *Girsberger v. Kresz* . . . Cumming J. concluded that the limitation period in respect of a foreign judgment which met the "real and substantial" test defined by the Supreme Court of Canada in *Morguard Investments Ltd. v. de Savoie* . . . [was 20 years.]
>
> . . . .
>
> Although the Court of Appeal dismissed an appeal from the decision of Cumming J., the limitation issue was not expressly dealt with and it is submitted that the limitation issue is obiter dictum to the essential issue that Cumming J. had to decide.
>
> I am persuaded that Cumming J. came to the correct conclusion on this issue and the defendants' motion is therefore dismissed.[62]

In *Adelaide Capital Corporation v. Stinziani*,[63] Judge Thomson determined that the limitation period for enforcement of a Quebec judgment was 20 years, following *Girsberger*. "The Quebec court has appropriately exercised its jurisdiction: full faith and credit must be given to the Judgment which shall be recognized and can be enforced as a Judgment within twenty years after it is given."[64] Non-Ontario resident plaintiffs are, nevertheless, subject to the six-year limitation period for registration under the Ontario Reciprocal Enforcement of Judgments Act.[65] Therefore, depending

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62. Lax v. Lax, [2003] O.J. No. 337, paras 3-5 (Ont. Super. Ct. of Justice) (citations omitted).

63. Adelaide Capital Corp. v. Stinziani, [2000] O.J. No. 1465 (Ont. Ct. of Justice (Small Cl. Ct.)).

64. *Id.* at para. 12.

65. The Ontario Reciprocal Enforcement of Judgments Act, R.S.O., ch. R.5, 2-3 (1990), reads:

> 2. (1) Where a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to any court in Ontario having jurisdiction over the subject-matter of the judgment, or, despite the subject-matter, to the Ontario Court (General Division) at any time within six years after the date of the judgment to have the judgment registered in that court, and on any such application the court may, subject to this Act, order the judgment to be registered.
>
> . . . .
>
> 3. No judgment shall be ordered to be registered under this Act if it is shown to the registering court that:
>
> (a) the original court acted without jurisdiction; or
>
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; or
>
> (c) the judgment debtor, being the defendant in the proceedings, was not

on the vintage of the foreign judgment, an inter-provincial litigant may have to sue on the judgment and address the four very limited defenses specified above.[66]

C. Beals v. Saldanha — Morguard Revisited

The *Morguard* decision is not without controversy. Many Canadian courts appear to have taken an overtly laissez-faire approach in recognizing foreign judgments, which, on occasion, are clearly apocryphal. Some have criticized the practice of enforcing judgments rendered in foreign judicial systems that do not follow Anglo-Canadian standards of procedural fairness or American due process. Moreover, the spectre of compensatory or punitive damage jury awards that are exorbitant by Canadian standards is manifest.

> duly served with the process of the original court and did not appear, despite the fact that the judgment debtor was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or
> (d) the judgment was obtained by fraud; or
> (e) an appeal is pending, or the judgment debtor is entitled and intends to appeal against the judgment; or
> (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason would not have been entertained by the registering court; or
> (g) the judgment debtor would have a good defence if an action were brought on the original judgment.

See also Reciprocal Enforcement of Judgments (U.K.) Act, R.S.O., ch. R-6, pts. III, V, VI (1990) (Ont.).

66. The Limitations Act, S.O., ch. 24-B (2002) (Ont.), represents an overhaul of the law of limitation periods in Ontario. The following are some of the highlights:

> A basic limitation period of *two years* is introduced commencing from the day the "claim" is discovered, replacing the general limitation periods found in the present Limitations Act, as well as many of the numerous special limitation periods found in other statutes.
>
> A schedule to the new Act contains a list of special limitation periods contained in other statutes, which will remain in force. If a limitation period set out in or under another act is not listed in the schedule, it is of no effect.
>
> An "ultimate limitation period" of 15 years applies so that even if a claim has not been discovered within 15 years of the occurrence which gave rise to the claim, an action commenced after the fifteenth anniversary of that occurrence will be barred by statute. Special considerations apply to "incapable" parties and situations involving concealment.
>
> Under the new Limitations Act, a claim will only be subject to no limitation period at all if expressly provided for in the Act.
>
> There are transition provisions for claims based on acts or omissions that took place before the coming into force (the "effective date") of the new Act where no proceeding has been commenced before the effective date.

Id.

In the Supreme Court of Canada decision of *Spar Aerospace Ltd. v. American Mobile Satellite Corporation*,[67] Justice Le Bel raised some uncertainty as to whether the *Morguard* principles, applicable inter-provincially, were correlative to international jurisdictional disputes:

> I agree with the appellants that *Morguard* and *Hunt* establish that it is a constitutional imperative that Canadian courts can assume jurisdiction only where a "real and substantial connection" exists. . . . However, it is important to emphasize that *Morguard* and *Hunt* were decided in the context of interprovincial jurisdictional disputes. In my opinion, the specific findings of these decisions cannot easily be extended beyond this context. In particular, the two cases resulted in the enhancing or even broadening of the principles of reciprocity and speak directly to the context of interprovincial comity within the structure of the Canadian federation.[68]

Recently, the Supreme Court of Canada released its long anticipated judgment in *Beals v. Saldanha*.[69] In a 6 to 3 split decision, the Court held that the "real and substantial connection" test, which until now only applied to interprovincial judgments, should apply equally to the recognition and enforcement of foreign judgments.[70] However, it is the dissenting opinion of Justice Le Bel (the Le Bel Dissent) which offers conceptual clarity by proposing a "purpose-driven and contextual" approach to the considerations of "comity, order and fairness [which] support the application of the 'real and substantial connection' test to the recognition and enforcement" of foreign judgments.[71]

At both the trial court[72] and the Court of Appeal levels,[73] both parties conceded that the Florida court had jurisdiction over the plaintiffs' action pursuant to the "real and substantial connection" test set out in *Morguard*. Accordingly, "presence-based jurisdiction"

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67. Spar Aerospace Ltd. v. American Mobile Satellite Corp., [2002] 4 S.C.R. 205.

68. *Id.* at para. 51.

69. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829 (Can. Dec. 18, 2003). The majority decision was delivered by Justice Major, with Justices McLachlin (Chief), Gonthier, Bastarache, Arbour, and Deschamps. The two dissenting opinions were delivered by Justice Binnie (Justice Iacobucci concurring) and Justice Le Bel.

70. *Id.* at para. 79.

71. *Id.* at para. 205.

72. Beals v. Saldanha, [1998] 42 O.R.3d 127, 134.

73. Beals v. Saldanha, [2001] 202 D.L.R.4th 630, para. 31.

rendered moot the issue of jurisdiction simpliciter.[74] Moreover, "consent-based jurisdiction" was recognized by the majority opinion (the Majority Judgment), wherein Justice Major emphasized that the defendant, Dominic Thivy, had "attorned to the jurisdiction of the Florida court when he entered a defense to the second action. His subsequent procedural failures under Florida law do not invalidate that attornment."[75] Nevertheless, the Supreme Court of Canada seized the opportunity to attempt to further contemporize the *Morguard* principles in the context of recognition and enforcement of foreign judgments. The factual matrix in the *Beals* case — at times disturbing and compelling — is outlined below.

i. The Facts in Beals v. Saldanha

In 1981 the Saldanhas and the Thivys, who were mutual friends, purchased a lot in Florida for $4,000 in U.S. funds.[76] In the summer of 1984, James O'Neil, a Florida real estate agent, contacted Mrs. Thivy, who told her that he had a prospective purchaser for their lot.[77] After discussion with the Saldanhas and her husband:

> Mrs. Thivy told Mr. O'Neil that the [Saldanhas and Thivys] would sell the lot for $8,000 (U.S.). Subsequently, Mrs. Thivy received an Agreement of Purchase and Sale signed by Mr. William Foody and witnessed by Mr. O'Neil. In the description of the property on the agreement, the lot was referred to as "Lot #1." The [Saldanhas and Thivys] owned Lot #2 and not Lot #1. After discussions with Mr. O'Neil, Mrs. Thivy changed the reference on the Agreement of Purchase and Sale from Lot #1 to Lot #2. At the trial of the Ontario action, Mrs. Thivy testified that she told Mr. O'Neil that she owned Lot #2, and he told her to change the lot number on the offer. Mrs. Thivy did not initial the change and she did not delete the rest of the description of the property. That description was of Lot #1.[78]

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74. *Id.*

75. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 34 (Can. Dec. 18, 2003) (quoting J.G. CASTEL & J. WALKER, CANADIAN CONFLICT OF LAWS 14-10 (5th ed. 2001)). If the defendants had retained Florida counsel, they would have been able to raise a preliminary challenge based upon forum non conveniens relying upon Rule 1.061 ("Choice of Forum") under the Florida Rules of Civil Procedure. Fla. R. Civ. P. 1.061 (2003).

76. *Beals*, [1998] 42 O.R.3d at 129.

77. *Id.*

78. Beals v. Saldanha, [2001] 202 D.L.R.4th 630, para. 12.

This amended offer was signed by all four defendants and sent to the agent in Florida and accepted by the Beals. At trial, Mr. Beals said he did not read the closing documents referring to Lot 2.[79] Upon closing, the defendants received their asking price of $8,000 (U.S.). Mrs. Thivy was later advised that the sale had closed and the defendants received a cheque for $8,000 (U.S.).[80]

In January 1985, about three months after the transaction closed, Mr. Beals told Mrs. Thivy that he was one of the purchasers. He said that he had been sold the wrong lot and that he had intended to purchase Lot #1. After discussing the matter with Mr. Beals, Mrs. Thivy suggested that he speak to Mr. O'Neil. Mr. Beals commenced the Florida action in February 1985, claiming $5,000 (U.S.) in damages for inducing them to buy the wrong lot through false representation.[81]

The Saldanhas and the Thivys each submitted a defense to the Florida court. They were subsequently notified that the action had been dismissed "without prejudice." Several months later, the defendants received notice of a second action in a different court, similar to the first but for a higher claim in damages. The defendants filed a copy of the same defense as for the initial action and made no further response when the second action was amended three times.[82]

In December 1991, the Saldanhas were advised that a default judgment had been entered against them by a Florida court. They sought legal counsel and were advised by an Ontario lawyer that the judgment could not be enforced in Ontario. They later received notice of a jury trial to assess damages, but did not appear. In December, the appellants received a default judgment against them for $260,000 (U.S.), plus post-judgment interest at the rate of 12 per cent per annum.[83]

The Beals then commenced a proceeding in Ontario to enforce the Florida judgment. At the Ontario trial, the Saldanhas called evidence in their defense to support their allegation that the Florida judgment had been obtained as a result of the Beals' false accusations to the jury assessing the damage claim. The Beals did not dispute this evidence.[84]

The Saldanhas and Thivys defended the action in Ontario on several grounds, including claims that "the Florida court did not have jurisdiction, they were denied natural justice in the Florida

79. Beals v. Saldanha, [1998] 42 O.R.3d 127, 129, 131.
80. *Id.* at 129.
81. *Id.*
82. *Id.* at 130.
83. *Id.* at 133.
84. *Id.*

proceedings, the enforcement of the Florida judgment in Ontario was contrary to public policy, and the Florida judgment was obtained by fraud in the Florida court."[85] Their primary submission was that the plaintiffs had deliberately misled the court in obtaining the Florida judgment. The defendant Thivy "also contended that she had made an assignment in bankruptcy in 1994 after the Ontario action had been commenced, and that she had subsequently been granted an absolute discharge," which relieved her of any liability she may have had to the plaintiffs.[86]

ii. Trial Judgment

The trial judge, Justice Jennings, dismissed the action, holding that while he could not consider allegations of fraud as they related to merits on liability, he could consider allegations of fraud as they related to the assessment of damages:[87]

> Accordingly I conclude that it is possible to apply the defence of fraud to the facts of this case. Liability of the defendants is accepted, because of the domestic policy on default judgments. However, on the question of the assessment of damages, the plaintiff gave at the very least, misleading evidence. That evidence was not considered by the Florida court in the context of fraud and so it is open to the Ontario Court to adjudicate upon it. Having considered it, I have found it to be fraudulent. In my opinion, the defence of fraud in the context that I described, must succeed. The Florida judgment will not be enforced by this court.[88]

Justice Jennings further held that the enforcement of some foreign judgments, even where the fraud exception was not available, worked an injustice, and that the parameters of the public policy defense, "must be broadened to cover a situation where conduct which triggers neither the traditional defence of public policy nor the defence of natural justice is yet so egregious as to raise a negative impression sufficient to stay the enforcing hand of the domestic court."[89] Furthermore, Justice Jennings found that

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85. Beals v. Saldanha, [2001] 202 D.L.R..4th 630, para. 4.
86. *Id.*
87. Beals v. Saldanha, [1998] O.R.3d 127, 143.
88. *Id.*
89. *Id.* at 145.

enforcement of the Florida judgment would contravene the public policy of Ontario:

> I recognize the inherent danger of importing palm tree justice into an arena properly designed to recognize the reality of global commercial transactions, and, accordingly, I would expect the widened defence to be rarely available and only in very limited circumstances. I find however, that those circumstances are present in this case. If required to do so, I would have found enforcement of the Florida judgment would contravene the public policy of Ontario and accordingly I would have declined to enforce it.[90]

iii. The Ontario Court of Appeal

Justice Doherty for the Court of Appeal majority, confirmed that in Canada:

> fraud going to the basis upon which the foreign court took jurisdiction, or fraud which undermines the integrity of the foreign proceedings, may be proved in defence to an action for the enforcement of the foreign judgment. Some Canadian authorities permit a defendant to rely on allegations of fraud which go to the merits of the claim determined by the foreign judgment, but only where the defendant relies on facts to support the allegation of fraud which were not before the foreign court.[91]

The defendant must produce new and material facts, or newly discovered and material facts, which were not before the foreign court. "New" facts are facts which came into "existence after the foreign judgment was obtained." "Newly discovered facts" refers to facts which existed at the time the foreign judgment was obtained but were not known to the defendant" and could not have been discovered through the exercise of reasonable diligence.[92]

The Court of Appeal held that the trial judge erred in treating any fact which was not before the Florida jury on the damage assessment as a newly discovered fact, rather than limiting

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90. *Id*.
91. Beals v. Saldanha, [2001] 202 D.L.R.4th 630, paras. 39, 40.
92. *Id.* at para. 42.

newly discovered facts to those facts which could not have been discovered prior to the Florida judgment by the exercise of reasonable diligence.[93] "None of the facts relied on by the trial judge qualifies as a newly discovered fact."[94] All of the facts would have been reasonably ascertainable by the defendants had they chosen to participate in the Florida proceeding.[95] The trial judge's finding that the enforcement of the Florida judgment would contravene public policy could not be upheld.[96]

Justice Doherty found that the trial judge had erred in concluding that the "substantial connection" approach to jurisdiction compels a broader public policy defense to the enforcement of foreign judgments:

> Even if what the trial judge described as "some sort of judicial sniff test" should be applied in considering whether public policy precludes enforcement of a foreign judgment, I can see no reason not to enforce this judgment. The Beals and Foodys launched a lawsuit in Florida. Florida was an entirely proper court for the determination of the allegations in that lawsuit. The Beals and Foodys complied with the procedures dictated by the Florida rules. There is no evidence that they misled the Florida court on any matter. Rather, it would seem they won what might be regarded as a very weak case because the respondents chose not to defend the action. I find nothing in the record to support the trial judge's characterization of the conduct of the Beals and Foodys in Florida as "egregious." They brought their allegations in the proper forum, followed the proper procedures, and were immensely successful in no small measure because the respondents chose not to participate in the proceedings.[97]

Despite the fact that the plaintiffs were not listed as creditors in Thivy's bankruptcy, her discharge released her from the debt represented by the Florida judgment. An order of discharge operates to release all provable claims made against the bankrupt,

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93. *Id.* at para. 49.
94. *Id.*
95. *Id.* at paras. 48-49.
96. *Id.* at paras. 49.
97. Beals v. Saldanha, [2001] 202 D.L.R.4th 630, paras. 83-84.

even though a creditor has been omitted from the list provided to the trustee by the bankrupt. While a bankrupt is under a duty to give the trustee the names of all of his or her creditors, the failure to do so will not prevent the bankrupt from obtaining a discharge if that failure was not intentional or fraudulent.[98]

Justice Weiler, dissenting, argued that it would be inappropriate for the court to enforce the Florida judgment for two reasons: fraud and the denial of natural justice.[99] The defendants were denied natural justice in the Florida proceedings because the claim failed to advise the defendants that the plaintiffs would be seeking damages for loss of opportunity by a company owned by them, with the result that they were not in a position to appreciate the extent of their jeopardy.[100]

> At the hearing to assess damages, damages were assessed beyond the pleadings. As a result of the lack of transparency with respect to the damages, the Ontario defendants were unaware that the major portion of the jury's assessment of damages related to the Florida plaintiffs' company's loss of opportunity to build an undefined number of homes in the future until the Florida plaintiffs sought to enforce the judgment in Ontario.[101]

Justice Weiler supported the trial judge's finding of fraud on the basis that plaintiffs concealed certain material facts from the jury, resulting in the jury being misled when assessing damages for loss of profit for lost opportunity to build the homes.[102]

Justice Weiler further agreed that the failure of the defendants to move to set aside the proceedings before the Florida courts should not prevent them from successfully raising the defenses of denial of natural justice and fraud before the enforcing court in Ontario.[103] Upon "receiving the Florida judgment for damages, the defendants sought legal advice and were told that the Florida judgment could not be enforced in Ontario."[104] Moreover, it was not until the plaintiffs sought to enforce the Florida judgment in Ontario that the defendants learned that damages had been assessed beyond the pleading and of the circumstances relating to

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98. *Id.* at para. 113.
99. *Id.* at para. 108.
100. *Id.* at para. 111.
101. *Id.* at para. 111.
102. *Id.* at para. 112.
103. Beals v. Saldanha, [2001] 202 D.L.R.4th 630, at para. 113.
104. *Id.*

the plaintiffs' fraud.[105] Justice Weiler proposed a "flexible approach" when deciding whether to "allow the defense of fraud to be raised in relation to a foreign default judgment," based upon the following factors:

> (i) the reason why the defendants did not defend the action;
>
> (ii) whether it is now possible or practicable to seek a remedy before the foreign court;
>
> (iii) any explanation as to why no steps were taken to seek a remedy before the foreign court;
>
> (iv) the likelihood of success had steps been taken before the foreign court;
>
> (v) the stage of the proceedings at which the circumstances of the fraud should have become or were known to the defendants;
>
> (vi) any delay in raising the defence once the circumstances became known; and
>
> (vii) whether there is any prejudice to the foreign plaintiffs that cannot be compensated by an order as to costs and strict terms if the defence is allowed to be raised.[106]

iv. The Supreme Court of Canada

a. Majority Judgment

The Majority Judgment is premised on the view that "[i]nternational comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law."[107] This led the majority to conclude that, "subject to the legislatures adopting a different approach by statute, the 'real and substantial connection' test,"[108] which has until now

105. *Id.*
106. *Id.* at para. 162.
107. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 28. (Can. Dec. 18, 2003).
108. *Id.*

only been applied to interprovincial judgments, "should apply equally to the enforcement of foreign judgments."[109]

Surprisingly, there is no express approval, in either the Majority Judgment or dissents, of the eight factors set forth in *Muscutt*[110] for the "real and substantial connection" test. The Majority Judgment generally states that the test "requires that a significant connection exist between the cause of action and the foreign court."[111] Here, the "real and substantial connection" test was made out. "The appellants entered into a property transaction in Florida when they bought and sold land. . . . There exists both a real and substantial connection between the Florida jurisdiction, the subject matter of the action and the defendants."[112] According to the majority, since the Florida court properly took jurisdiction, its judgment must be "recognized and enforced by a domestic court, provided that no defenses bar its enforcement."[113]

The Majority Judgment approved Justice Sharpe's approach to the fraud defense, concluding that the defense was not made out.[114] The appellants had not claimed that there was evidence of fraud that they could not have discovered had they defended the Florida action. In the absence of such evidence, the trial judge erred in concluding that there was fraud.[115]

The Majority Judgment's rejection of the fraud defense hinged on the appellants' "conscious decision not to defend the Florida action against them. . . . As a result, the appellants are barred from attacking the evidence presented to the Florida judge and jury as being fraudulent."[116] However, the indictment leveled against the appellants, for ostensibly following their own solicitors' negligent advice to not defend the action, may have been tempered if a transcript of the damage assessment proceedings, the evidence heard by the Florida jury, or the Florida judge's instructions to the jury had been available. The harsh reality is that only the exercise of reasonable diligence in uncovering new and previously

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109. *Id.* at para. 19.

110. *See generally* Muscutt v. Courcelles, [2002] 213 D.L.R.4th 577. The sole reference to *Muscutt* in the *Beals* decision is at paragraph 21, wherein Justice Major highlights the Ontario Court of Appeal's reliance on *Morguard*, which established that the determination of the proper exercise of jurisdiction by a court depended upon two principles, the first being the need for "order and fairness," the second being the existence of a "real and substantial connection." Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829 (Can. Dec. 18, 2003); *see also* Indyka v. Indyka, [1969] 1 A.C. 33.

111. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 32 (Can. Dec. 18, 2003).

112. *Id.* at paras. 36, 34.

113. *Id.* at para. 79.

114. *Id.* at para. 58.

115. *Id.* at para. 55.

116. *Id.* at para. 54.

undiscoverable evidence of fraud will meet the threshold of unfairness. Equally significant was the finding that, "although the amount of damages awarded may seem disproportionate, it was a palpable and overriding error for the trial judge to conclude on the dollar amount of the judgment alone that the Florida jury must have been misled."[117]

It appears that any unfairness to the defendant in incurring the substantial expense of retaining Florida counsel, defending the Florida action, exhausting all avenues of appeal, and marshalling new and undiscoverable evidence, is secondary to observing the principles of international comity and reciprocity.[118]

After rejecting the fraud defense, the majority then considered the natural justice argument:

> The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. . . . However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof. . . .[119]

In the circumstances of the *Beals* case, the defense could not avail the appellants, which the majority concluded had "failed to raise any reasonable apprehension of unfairness."[120] In the majority's opinion:

> the appellants were fully informed about the Florida action. They were advised of the case to meet and were granted a fair opportunity to do so. They did not defend the action. Once they received notice of the amount of the judgment, the appellants obviously had precise notice of the extent of their financial exposure.[121]

Furthermore, the majority held that "[t]heir failure to act when confronted with the size of the award of damages was not due to a lack of notice" but due to their reliance upon negligent legal advice.[122] "[T]hat negligence cannot be a bar to the enforcement of

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117. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, para. 54 (Can. Dec. 18, 2003).
118. *Id.*
119. *Id* at para. 64.
120. *Id.*
121. *Id.* at para. 69.
122. *Id.*

the respondents' judgment."[123] This may be the most nettlesome aspect of the *Beals* decision, since the decision to not attorn or defend a foreign action can as easily be made without the benefit (or detriment) of legal advice.

It is submitted that the failure of adequate notice is a substantive impeachment defense, rather than a procedural one, such that the lack of familiarity with a foreign jurisdiction's procedure and insufficient notice of the extent of the defendants' financial jeopardy is tantamount to a denial of natural justice. Such an approach contextualizes both the *Morguard* requirements of "order and fairness" and should be a paramount consideration in the defense of denial of natural justice. For every right, there is a remedy. For example, while Florida law and procedure is fairly comparable to that of Ontario, the reality is that the rules of pleading are significantly different. In Ontario, a first defense filed applies to any subsequent amended claims, while, in Florida, unless a defendant refiles a new defense to each and every amended claim, the defendants are deemed to have not defended the action at all. This may be the most compelling argument against the "consent-based" jurisdiction approach adopted by the majority. After all, why should the filing of a defense in the first instance equate to attornment, when failure to follow Florida pleadings procedure ultimately results in a default, or undefended, judgment?

The majority also considered the public policy defense, which prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. This defense "turns on whether the foreign *law* is contrary to" a distinctly "Canadian" view of basic morality.[124] The award of damages by the Florida jury was held to not violate these principles of morality such "that enforcement of the Florida monetary judgment would shock the conscience of the reasonable Canadian."[125] The money involved, although it has grown to a sizeable amount, is not a reason to refuse enforcement and recognition of the foreign judgment in Canada.[126] "The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada."[127]

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123. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 36 (Can. Dec. 18, 2003).
124. *Id.* at para. 71.
125. *Id.* at para. 77.
126. *Id.* at para. 76.
127. *Id.* The Majority Judgment also rejected the appellants' argument that the recognition and enforcement of the Florida judgment by a Canadian court constituted a violation of section 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act

b. The Binnie Dissent

The Binnie Dissent acknowledges that the "real and substantial connection" test provides an appropriate conceptual basis for the enforcement of final judgments obtained in foreign jurisdictions.[128] However, given the "constitutional flavour of the *Morguard* analysis," Justice Binnie adopts a flexible approach to the availability of defenses to enforcement of foreign judgments:[129]

> While I accept that the Morguard test (real and substantial connection) provides a framework for the enforcement of foreign judgments, it would be prudent at this stage not to be overly rigid in staking out a position on available defences beyond what the facts of this case require. Both Major J. and LeBel J. acknowledge (with varying degrees of enthusiasm) that a greater measure of flexibility may be called for in considering defences to the enforcement of foreign judgments as distinguished from interprovincial judgments.[130]

Justice Binnie remarks that, had notice been sufficient, he would have "reluctantly" agreed with the majority that the Florida default judgment would be enforceable in Ontario "despite the fact the foreign court never got to hear the Ontario defendants' side of the story."[131] This, notwithstanding that the Florida default judgment, which now commands payment of over $1,000,000.00 Canadian dollars, was an award described by the Ontario trial judge as "breathtaking," involving damages assessed by a Florida jury in less than half a day.[132]

The source of Justice Binnie's misgivings arises from the insufficiency (or lack) of notice, which Justice Binnie believed constituted a breach of natural justice:[133]

(1982), Canada Act 1982, Schedule B, ch. 11., which came into force on April 17, 1982. It reads: "Life, liberty and security of person: Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Given that section 7 does not shield a Canadian resident from the financial effects of the enforcement of a judgment rendered by a Canadian court, the majority concluded that it should not shield a Canadian defendant from the enforcement of a foreign judgment. *Cf.* Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 180 (Can. Dec. 18, 2003) (Justice Le Bel, dissenting).

128. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 86 (Can. Dec. 18, 2003).
129. *Id.* at para. 85.
130. *Id.* at para. 86 (citations omitted).
131. *Id.* at para. 83.
132. Beals v. Saldanha, [1998] 42 O.R.3d 127, 144.
133. *Beals*, [2003] S.C.C. 72, WL No. 28829, at para 83.

> They were not served with some of the more important documents on liability filed in the Florida proceeding *before* they were noted in default, nor were they served with other important documents relevant to the assessment of damages filed after default but prior to the trial at which judgment was entered against them. Proper notice is a function of the particular circumstances of the case giving rise to the foreign default judgment. In this case, in my view, there was a failure of notification amounting to a breach of natural justice. In these circumstances, the Ontario courts ought not to give effect to the Florida judgment.[134]

The suggestion that the appellants were the authors of their own misfortune on the basis that if they had hired a Florida lawyer they would have found out about subsequent developments in the action, was rejected.[135] Quoting the trial judge, Justice Binnie noted with chagrin that:

> based on what was disclosed in the Complaint, litigation of an US$8,000 real estate transaction in Florida hardly seemed to be "worth the candle." The fact this evaluation proved to be disastrously wrong is a measure of the inadequacy of what they were told about the Florida proceedings.[136]

He continued by discussing the majority opinion, arguing that Justice Major:

> holds, in effect, that the appellants are largely the victims of what he considers to be some ostrich-like inactivity and some poor legal advice from their Ontario solicitor. There is some truth to this, but such a bizarre outcome nevertheless invites close scrutiny of how the Florida proceedings transformed a minor real estate transaction into a major financial bonanza for the respondents.

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134. *Id.*
135. *Id.* at para. 89.
136. *Id.*

. . . .

> While the notification procedures under the Florida rules may be considered in Florida to be quite adequate for Florida residents with easy access to advice and counsel from Florida lawyers (and there is no doubt that Florida procedures in general conform to a reasonable standard of fairness), nevertheless the question here is whether the appellants *in this proceeding* were sufficiently informed of the case against them, both with respect to liability and the potential financial consequences, to allow them to determine in a reasonable way whether or not to participate in the Florida action, or to let it go by default.
>
> . . . .
>
> To make an informed decision, they should have been told in general terms of the case they had to meet on liability and been given an indication of the jeopardy they faced in terms of damages. [The respondents' complaint] did not adequately convey to the appellants the importance of the decision that would eventually be made in the Florida court, the appellants were merely told, unhelpfully, that the claim exceeded US$5,000.00.[137]

Moreover, the appellants' initial comfort drawn from the fact that the action implicated both the real estate developer and title insurer was evanescent, given that the intervening settlement, which "radically transformed the potential jeopardy of the appellants," was not disclosed to the appellants.[138]

In reviewing Rule 1.190(a) of the Florida Rules of Civil, Justice Binnie concludes:

> In terms of procedural fairness, I think the appellants were entitled to assume that in the absence of any new allegations against them there was no need to refile a defence that had already been filed in the same action. To non-lawyers, a requirement for such apparently useless duplication would come as a surprise.

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137. *Id*. at paras. 90-91, 103.
138. *Id*. at para. 104.

. . . .

> When a Canadian resident is served with a legal process from within his or her own jurisdiction, he or she is presumed to know the law and the risks attendant with the notice. There can be no such presumption across different legal systems.[139]

Furthermore, a party must be made aware of the potential jeopardy faced. Some telling examples of lack of notice relied upon in the Binnie Dissent include:

> The appellants were not notified that the treble damage claims against other defendants were dismissed on grounds that would have applied to the appellants had they known about it.[140]

> The appellants were not notified that the respondents had made a deal with the realtor to forego the treble damage, punitive, and statutory claims against it. These same claims were pursued on similar facts against the appellants.[141]

> Because the respondents settled the claims against the realtor and the title insurers, the appellants were the only defendants at the damages hearing. The terms of the settlements were not disclosed to the appellants.[142]

> The appellants did not have adequate notice of the court order for mandatory mediation, requiring the participation of all the parties. In addition, the appellants were not served with notice of the experts the respondents intended to call at the damages hearing.[143]

> The original complaint did not state that the respondents would claim damages as a result of a lost

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139. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 106, 108 (Can. Dec. 18, 2003).
140. *Id*. at para.112.
141. *Id*. at para. 116.
142. *Id*. at para. 119.
143. *Id*. at paras. 118, 120.

> business opportunity. The complaint did not mention that the respondents "would be seeking damages for the *corporation's* lost opportunity to build an undefined number of homes on land to which neither the respondents nor the corporation held title."[144]

Justice Binnie concluded by addressing a final issue raised by the appellants:

> I would also reject the argument that the appeal should be dismissed because the appellants ought to have moved "promptly" to set aside the default judgment for "excusable neglect." Such relief is normally available to a defendant who has formed an intention to defend but for some "excusable" reason had "delayed" in taking appropriate steps. The problem here is that the appellants had in fact filed a Statement of Defence but had decided, based on what they were told about the respondents' action, not to defend it further. *The appellants' problem was not that they failed to implement an intention to defend but that their intention not to further defend was based on a different case.*
>
> In these circumstances, I would not enforce a judgment based on (in my view) inadequate notice — and thus violative of natural justice — just because the appellants did not appeal the Florida judgment to the Florida appellate court, or seek the indulgence of the Florida court to set aside for "excusable neglect" a default judgment that rests on such a flawed foundation.[145]

c. The Le Bel Dissent

Justice Le Bel's dissent follows his views expressed in the *Spar Aerospace v. American Mobile Satellie Corporation* case.[146] At the outset, Justice Le Bel outlines his divergence with the majority:

> The enforcement of this judgment, which has its origins in a straightforward sale of land for US$8,000

144. *Id.* at para. 123.
145. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at paras. 129-30 (Can. Dec. 18, 2003) (emphasis added).
146. [2002] 4 S.C.R. 205.

> and has now grown to well over C $800,000, is *unusually harsh*. In my view, our law should be flexible enough to recognize and avoid such harshness in circumstances like these, where the respondents' original claim was *dubious in the extreme* and the appellants are guilty of little more than *bad luck*. To hold that the appellants are the sole authors of their own misfortune, it seems to me, is to rely heavily on the *benefit of hindsight*; and to characterize the respondents' case in the original action as merely weak is something of an *understatement*. The implication of the position of the majority is that Canadian defendants will from now on be obliged to participate in foreign lawsuits no matter how *meritless* the claim or how small the amount of damages in issue reasonably appears to be, *on pain of potentially devastating consequences* from which Canadian courts will be *virtually powerless* to protect them.
>
> In my opinion, this Court should avoid moving the law of conflicts in such a direction. Thus, I respectfully disagree with the reasons of the majority on *two points*. I would hold that this judgment should not be enforced because a *breach of natural justice* occurred in the process by which it was obtained. *I also have concerns about the way the real and substantial connection test, in its application to foreign-country judgments, is articulated by the majority.*[147]

Justice Le Bel forcefully argues that the real and substantial connection test ought to "be modified significantly when it is applied to judgments originating outside Canada."[148] "[T]he assessment of the propriety of the foreign court's jurisdiction should be carried out in a way that acknowledges the "additional hardship" imposed on a defendant who is required to litigate in a foreign country."[149] The purposive, principled framework articulated in *Morguard*,[150] should not be confined only to the question of jurisdiction simpliciter.[151] Moreover, Justice Le Bel urges that the impeachment defenses of

147. *Id.* at paras. 132-33 (emphasis added).
148. *Id.* at para. 135.
149. *Id.*
150. [1990] 3 S.C.R. 1077.
151. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 135 (Can. Dec. 18, 2003).

public policy, fraud, and natural justice ought to be reformulated. "Liberalizing the jurisdiction side of the analysis while retaining narrow, strictly construed categories on the defence side is not a coherent approach."[152] From a private international law perspective, Justice Le Bel makes the following admonition:

> The solution that the majority sets out to the question of recognition and enforcement of foreign judgments appears to go further than courts have gone in other Commonwealth jurisdictions or in the United States. . . . This discrepancy may place Canadian defendants in a disadvantageous position in international litigation against foreign plaintiffs. As a result, the risks and thus the transaction costs to our citizens of cross-border ventures will be increased, in some cases beyond what commercially reasonable people would consider acceptable. Canadian residents may consequently be deterred from entering into international transactions — an outcome that frustrates, rather than furthers, the purpose of private international law.[153]

The locus of the Le Bel Dissent is "fairness." More specifically, whether any unfairness to the defendant occurs when applying the jurisdiction test, implicitly taking into account the differences between the international and interprovincial contexts. The constitutional requirements of "order and fairness" articulated in *Morguard* are more easily applied given that the "integrated character of the Canadian federation makes a high degree of cooperation between the courts of the various provinces a practical necessity."[154] Justice Le Bel distinguishes constitutional imperatives and international comity, outlining the difference between the two concepts. "One of those differences is that the rules that apply within the Canadian federation are 'constitutional imperatives.' Comity as between sovereign nations is not an obligation in the same sense, although it is more than a matter of mere discretion or preference."[155] He continues by adopting the definition of comity used by the United States Supreme Court in *Hilton v. Guyot*:[156]

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152. *Id.*
153. *Id.* at para. 136.
154. *Id.* at para. 164.
155. *Id.* at para. 167.
156. 159 U.S. 113 (1895).

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[157]

In discussing international duty and convenience, Justice Le Bel notes that the phrase:

> does not refer to a legally enforceable duty. No super-national legal authority can impose on sovereign states the obligation to honour the principle of comity. Rather, states choose to cooperate with other states out of self-interest, because it is convenient to do so, and out of "duty" in the sense that it is fair and sensible for State A to recognize the acts of State B if it expects State B to recognize its own acts.[158]

The contextual and purpose-driven approach and the "real and substantial connection" test are reflected in Justice Le Bel's observation that "Canada is a single country with a fully integrated economy, but the world is not."[159] The learned justice discerns that:

> the "real and substantial connection" test should apply to foreign-country judgments, but the connections required before such judgments will be enforced should be specified more strictly and in a manner that gives due weight to the protection of Canadian defendants without disregarding the legitimate interests of foreign claimants. In my view, this approach is consistent with both the flexible nature of international comity as a principle of enlightened self-interest rather than absolute obligation and the practical differences between the international and interprovincial contexts.[160]

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157. *Id.* at 163-64.
158. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para 168 (Can. Dec. 18, 2003).
159. *Id.* at para. 171.
160. *Id.* at para. 174.

Justice Le Bel's contextual and purpose-driven approach is predicated on a balance between the hardship to the defendant in litigating in the foreign jurisdiction[161] and the strength of connections to the *lex fori*. The interplay between jurisdiction simpliciter and forum non conveniens is addressed as follows:

> In some respects, this formulation of the jurisdiction test might overlap with the doctrine of *forum non conveniens*, although it is not exactly the same. Certain considerations, such as juridical disadvantage to a defendant required to litigate in the foreign forum, are relevant to both inquiries. When the issue is jurisdiction, however, the court should restrict itself to asking whether the forum was a reasonable place for the action to be heard, and should not inquire into whether another place would have been more reasonable.[162]

Focusing on unfairness, Justice Le Bel continues by pointing out that "[i]f it is unfair to expect the defendant to litigate on the merits in the foreign jurisdiction, it is probably unfair to expect the defendant to appear there to argue *forum non conveniens*."[163]

The Le Bel Dissent appears to elevate the "loss of juridical advantage" as a predominant factor in the "real and substantial connection" test, particularly in light of a domestic defendant's unfamiliarity with a foreign legal system in the context of language, continental versus common law systems, and procedural subtleties lost on an unsophisticated litigant.[164] Justice Le Bel also disavows the Majority Judgment's views on reciprocity, suggesting that: "It makes sense that the jurisdictional rules on assumption and recognition should dovetail together in a federal state where the justice systems of the various provinces are interconnected parts of a harmonized whole. This reasoning does not extend to the

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161. Referred to in the Le Bel Dissent as "additional expense, inconvenience and risk." *Id*. at para. 183 and:

> the expense and inconvenience of travelling, the need to obtain legal advice in the foreign jurisdiction, the perils of navigating an unfamiliar legal system whose substantive and procedural rules may be quite different from those that apply in the defendant's home jurisdiction, and even the possibility that the foreign court may be biased against foreign defendants or generally corrupt.

Id. at para. 188.

162. *Id*. at para. 184.

163. *Id*. at para. 186.

164. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at paras. 196-98 (Can. Dec. 18, 2003).

international setting."[165] Justice Le Bel thereafter proposes a reformulation of the impeachment (nominate) defenses of public policy, natural justice, and fraud.

Firstly, Justice Le Bel proffers that the better approach is to continue to reserve the public policy defense "for cases where the objection is to the law of the foreign forum, rather than the way the law was applied, or the size of the award *per se*."[166] He continues by saying the defense "should also apply to foreign laws that offend basic tenets of our civil justice system, principles that are widely recognized as having a quality of essential fairness."[167] Here, the defects in the judgment, while severe, did not engage the public policy defense.[168] "The enforcement of such a large award in the absence of a connection either to harm suffered by the plaintiffs and caused by the defendants or to conduct deserving of punishment on the part of the defendants would be contrary to basic Canadian ideas of justice."[169] However, Justice Le Bel held that "there is no evidence that the law of Florida offends these principles. On the contrary, the record indicates that Florida law requires proof of damages in the usual fashion. . . . There is no indication that punitive damages were available where the defendant's conduct is not morally blameworthy."[170]

Secondly, Justice Le Bel concurs with the majority that the defense of fraud must be based on previously undiscoverable evidence.[171] Nevertheless, Justice Le Bel recommends that a broader test should be applied to default judgments, at least in cases where the defendant's decision not to defend the claim was "demonstrably reasonable:"[172]

> If the defendant ignored what it justifiably considered to be a trivial or meritless claim, and can prove on the civil standard that the plaintiff took advantage of his absence to perpetrate a deliberate deception on the foreign court, it would be inappropriate to insist that a Canadian court asked to enforce the resulting judgment must turn a blind eye to those facts. . . . In my opinion, enforcement of a judgment that was obtained by intentionally

165. *Id*. at para. 203.
166. *Id*. at para. 221.
167. *Id*. at para. 223.
168. *Id*. at para. 246.
169. *Id*.
170. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para 246 (Can. Dec. 18, 2003).
171. *Id*. at para. 233.
172. *Id*. at para. 234.

> misleading the foreign court in the kind of circumstances I have outlined could well amount to an abuse of the judicial process. In my opinion, a more generous version of the fraud defence ought to be available, as required, to address the dangers of abuse associated with the loosening of the jurisdiction test to admit a broad category of formerly unenforceable default judgments.[173]

Notwithstanding this position, Justice Le Bel concludes that the defense of fraud was not made out. "All the facts that the appellants raise in this connection were known to them or could have been discovered at the time of the Florida action."[174] Furthermore, even though "this is the kind of case for which a more lenient interpretation of the fraud defence would, in principle, be appropriate, because the appellants' decision not to attend the Florida proceedings was a reasonable one,"[175] the defense could not succeed even on the view that the "judgment could be vitiated by proof of intentional fraud."[176] The combination of a lack of transcript (or other record of the proceedings) and the appellants' "failure to question either Mr. Beals or Mr. Groner [the Beals' Florida solicitor who testified at trial concerning Florida procedure] either in discovery or at trial in Ontario, as to the information given in the damages hearing," meant that the defense of fraud was inapplicable.[177]

Finally, Justice Le Bel argues that the defense of natural justice "concerns the procedure by which the foreign court reached its decision."[178] If a defendant can establish that the process by which the foreign judgment was obtained was contrary to the Canadian conception of natural justice, then the foreign judgment should not be enforced.[179] "[T]wo developments should be recognized in connection with this defence: First, the requirements of notice and a hearing should be construed in a purposive and flexible manner, and secondly, substantive principles of justice should also be included in the scope of the defence."[180] On the issue of the notice requirement, Justice Le Bel states:

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173. *Id*. at para. 234.
174. *Id*. at para. 248.
175. *Id*. at para. 249.
176. *Id.* at para. 251.
177. *Id.*
178. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 235 (Can. Dec. 18, 2003).
179. *Id*. at para. 236.
180. *Id*.

> Notice is adequate when the defendant is given enough information to assess the extent of his or her jeopardy. This means, among other things, that the defendant should be made aware of the approximate amount sought. Canadian procedural rules require that the amount of damages claimed be stated in the pleadings. This is not the rule in all jurisdictions, and notice will still be adequate even where the pleadings do not conform to Canadian standards as long as the defendant is informed in some other way of the amount in issue.[181]

Justice Le Bel goes on to suggest that adequate notice should include "alerting the defendant to the consequences of any procedural steps taken or not taken . . . as well as to the allegations that will be adjudicated at trial."[182]

In assessing whether the defense of natural justice has been made out, the opportunities for correcting a denial of natural justice that existed in the originating jurisdiction should be assessed in light of all the relevant factors, including:

> The plaintiffs' failure "to give the defendants proper notice of the true nature of their claim and its potential ramifications."[183]

> The defendants received "no notice as to the serious consequences to the defendants of failure to refile their defence in response to the claimant's repeatedly amended pleadings. As a result, the notice afforded to the defendants did not meet the requirements of natural justice."[184]

> "The only mention of [damages in the complaint] …was the formulaic reference to damages over $5,000 required to give the Florida Circuit Court monetary jurisdiction. The form of pleading did not give the defendants a clear picture of what was at stake."[185]

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181. *Id.* at para. 238 (citations omitted).
182. *Id.* at paras. 239-40.
183. *Id.* at para. 252.
184. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 252 (Can. Dec. 18, 2003).
185. *Id.* at para. 253.

> The plaintiffs' complaint "did not set out with any precision the allegations on the basis of which damages, beyond the sale price of the land, were claimed." While the complaint mentioned construction costs and lost revenue, there was no reference "to the plaintiffs' assertion that the planned model home was to be rented to their company, Fox Chase Homes, and used to obtain further construction contracts. In fact, there is no mention at all of Fox Chase Homes.[186]
>
> The defendants were not given notice that they were required to file new defences to amendments to the complaint filed by the plaintiffs. Although the allegations against the defendants remained the same, there was no indication "on the face of the Amended Complaint that would alert them to the need to refile . . . The annulment of their defence resulted from a technicality of Florida procedure of which defendants from a foreign jurisdiction could hardly be expected to be aware."[187]
>
> The fact that the appellants received mistaken legal advice and did not avail themselves of the remedies available in Florida "should not operate to relieve the claimants entirely of the consequences of a significant or substantial failure to observe the rules of natural justice, and it should not bar the appellants from relying on this defence.[188]
>
> In the circumstances of this case, when all the relevant factors are considered, the appellants' apprehensiveness about going to Florida to seek relief was understandable.[189]

As a "residual concern," Justice Le Bel suggests, "The circumstances of this case are such that the enforcement of this judgment would shock the conscience of Canadians and cast a negative light on our justice system."[190] In his view, the appellants

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186. *Id*. at para 254.
187. *Id*. at para. 255.
188. *Id*. at para 261.
189. *Id.*
190. Beals v. Saldanha, [2003] S.C.C. 72, WL No. 28829, at para. 265 (Can. Dec. 18, 2003).

had not infringed upon the legal rights of the respondents and had "done nothing to deserve such harsh punishment."[191] They did not seek "to avoid their obligations by hiding in their own jurisdiction" nor did they demonstrate disrespect for the Florida legal system.[192] These facts demonstrated "good faith throughout" and an exercise of reasonable diligence based upon limited information and inaccurate legal advice.[193] The respondents' actions did not escape Justice Le Bel's ire:

> The plaintiffs in Florida appear to have taken advantage of the defendants' difficult position to pursue their interests as aggressively as possible and to secure a sizeable windfall. In an adversarial legal system, it was, of course, open to them to do so, but the Ontario court should not have to set its seal of approval on the judgment thus obtained without regard for the dubious nature of the claim, the fact that the parties did not compete on a level playing field and the lack of transparency in the Florida proceedings.[194]

V. CONCLUSION

The Supreme Court of Canada's decision in *Beals* provides valuable insight into the substantive defenses of fraud and denial of natural justice, both of which remain attenuated. Regrettably, the *Beals* decision does not achieve decisional clarity, primarily due to the lack of unanimity on the scope and applicability of the "real and substantial connection" test. This lack of clarity begs the question whether financial hardship and other "hard cases" will continue to put pressure on the traditional doctrine that an enforceable foreign judgment is conclusive on the merits. Furthermore, cases involving truly "foreign" jurisdictions and forum non conveniens blocking statutes,[195] anti-suit injunctions, and

191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *See* Winston Anderson, *Forum Non Conveniens Checkmated? The Emergence of Retaliatory Legislation* 10 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 183, 186 (2001).

parallel proceedings[196] will continue to entangle both domestic and foreign litigants.[197]

Ontario-based companies are well advised to review existing contracts, invoices, purchase orders, and related agreements as a measure of control over potential litigation. It is vital to take positive steps to shield the company from excessive jury damage awards, including treble and punitive damages, which may be

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196. The late Justice Sopinka, writing for the unanimous Supreme Court of Canada, in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 914, provides insight into Canadian judicial views on parallel proceedings and anti-suit injunctions:

> It has been suggested that by reason of comity, anti-suit injunctions should either never be granted or severely restricted to those cases in which it is necessary to protect the jurisdiction of the court issuing the injunction or prevent evasion of an important public policy of the domestic forum. A case can be made for this position. In a world where comity was universally respected and the courts of countries which are the potential fora for litigation applied consistent principles with respect to the stay of proceedings, anti-suit injunctions would not be necessary. A court which qualified as the appropriate forum for the action would not find it necessary to enjoin similar proceedings in a foreign jurisdiction because it could count on the foreign court's staying those proceedings. In some cases, both jurisdictions would refuse to decline jurisdiction as, for example, where there is no one forum that is clearly more appropriate than another. *The consequences would not be disastrous. If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings, but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases*.

Id. (emphasis added) (citations omitted). *See also* Westec Aerospace Inc. v. Raytheon Aircraft Co., [1999] B.C.C.A. 0134, *appeal granted*, 86 A.C.W.S.3d 697, *rev'd*, [1999] 173 D.L.R.4th 498, *appeal dismissed without reasons*, [2001] S.C.R. iv. In *Westec*, the Supreme Court of Canada declined to consider directly the relevance of parallel proceedings in determinations of appropriate forum. [2001] S.C.R. at iv. Raytheon obtained summary judgment in its Kansas declaratory action and there was, accordingly, no parallel proceedings on which to base the appeal. *Id*. *See* Janet Walker, *Parallel Proceedings — Converging Views: The* Westec *Appeal*, THE CAN. YEARBOOK OF INT'L LAW 155, 185 (2000).

197. *See* Buth-na-bodhiaga Inc. (c.o.b. Body Shop) v. Lambert, [2002] 60 O.R.3d 787 (Ont. Ct. of Appeals), which involved a failed effort to petition into bankruptcy the debtor relying upon section 43 (1) (a) and (b) of the Canadian Bankruptcy and Insolvency Act, R.S.C., ch. C-3 (1992). The petitioning creditor obtained consent judgments under the U.S. bankruptcy (Chapter 11) legislation, 11 U.S.C. § 101 (2003), and further obtained assignments by Citibank resulting in default judgments against the Lamberts as personal guarantors of the security. *Lambert*, [2002] 60 O.R.3d at para. 30. The Court of Appeal dismissed the appeal and affirmed the decision of Justice Cameron which had dismissed the petition on the grounds that the "Body Shop's retention of the assets and asserting the full amount of the indebtedness of the Franchisees without accounting for the value of the retained assets … constitutes sufficient cause to dismiss the Petition." *Id. Cf.* Society of Lloyd's v. Saunders, [2001] 210 D.L.R.4th 519 (upholding an application for enforcement of a foreign (U.K.) judgment, notwithstanding an assumed breach by Lloyd's of the prospectus requirements of the Ontario Securities Act when soliciting "names" in Ontario).

enforced by an Ontario court, depending on the circumstances. The policy considerations of certainty, ease of application, and predictability, which serve as signposts for Canadian courts, should also resonate with Ontario companies with cross-border business dealings and international suppliers and customers.

From the perspective of enforcement of foreign judgments in Ontario, it is noteworthy that, in *Beals*, the Saldanhas made a third party claim against their Ontario solicitor:[198]

> They claimed full contribution and indemnity for any amount owing on the Florida judgment and for the costs associated with the Ontario action. The Saldanhas alleged that they had not challenged the Florida judgment in Florida after it was made because Mr. Kelly [their solicitor] told them that the judgment was not enforceable in Ontario. They contended that the advice was wrong and that Mr. Kelly acted negligently and was in breach of his contract with them in giving that negligent advice. The Saldanhas took the position that had they contested the Florida judgment in Florida, it would have been set aside.[199]

Fortunately, for the Saldanhas and Thivys, it appears that LAWPRO, the Ontario bar's insurer, will indemnify them due to their solicitors' negligent advice.[200]

There are significant transactional and litigation costs which can (and should) be avoided by taking the time to review a company's standard form contracts and invoices with a duly qualified lawyer. Given that the Supreme Court of Canada has solidified the rules on recognition and enforcement of foreign judgments in Canada, Ontario defendants who choose to ignore or fail to defend foreign actions (and, correspondingly, foreign

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198. Beals v. Saldanha, [1998] 42 O.R.3d 127, 133, 146.

199. Beals v. Saldanha, [2001] 202 D.L.R.4th 630, para. 6.

200. Kirk Makin, *Family Must Pay Florida Bill*, THE GLOBE & MAIL, Dec. 18, 2003:

> Fortunately for the Saldanha and Thivy families, an Ontario insurer that covers the province's legal profession — LAWPRO — will pay their legal bill because they received bad advice from local lawyers many years ago.
>
> LAWPRO stepped up to the plate and said: 'We will take over, because we want to find out the real answer for lawyers,' said Brian Casey, a lawyer for the insurer. "Everybody does business in foreign jurisdictions nowadays, and this ruling makes them aware of their jeopardy in foreign courts."

Id.

defendants who choose not to defend actions in Canada) — ostensibly on the view that the foreign "nuisance" claims appear to be groundless or without merit — do so at their own peril: *caveat litigator*.

ESTABLISHING THE TRUTH ON FACTS: HAS THE CHINESE CIVIL PROCESS ACHIEVED THIS GOAL?

ZHONG JIANHUA* & YU GUANGHUA**

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I. INTRODUCTION

It is fair to state that the Chinese civil procedural system is designed primarily to ascertain the truth.[1] One of the fundamental tasks of the Law of Civil Procedure of the People's Republic of China (Law of Civil Procedure) is to ensure the courts establish the truth based on facts. [2] To achieve this end, Chinese law allows judges to play a more active role in adjudication than the U.S. Federal Court System permits. Unlike their American counterparts, Chinese judges do not share their power to determine cases because China

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* Attorney at Law. Zhong Jianhua wishes to express his special gratitude to Prof. Lewis Silverman of Touro Law Center for his insightful comments and suggestions.

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1. *See* The Law of Civil Procedure of the People's Republic of China, art. 2. The Law of Civil Procedure of the People's Republic of China was adopted on April 9, 1991 at the Fourth Session of the Seventh National People's Congress.

2. *Id.* arts. 2, 7.

does not use a jury system. Thus, Chinese judges not only decide issues of law but also those of fact. Furthermore, as a trier of fact, Chinese judges are more intrusive than the trier of fact at common law — the jury. Chinese judges' determinations of facts are not restricted to the evidence presented at a hearing. Chinese judges may conduct an independent investigation, collect their own evidence, and even hold the hearing at the scene of the incident. Because of their increased discretion and involvement, Chinese judges are more vulnerable to disciplinary measures or other punishment when they make errors in their adjudication. Even the president of the court (roughly equivalent to a chief judge) will be vicariously liable for major errors. As a result, the Chinese system has an extensive supervisory mechanism to review judges' decisions.

While the Chinese system seems better designed to ascertain the truth, reality depicts a different picture. Judicial misconduct is still intolerably rampant among Chinese judges.[3] It is undeniably accurate to state that no truth can be discovered whenever judicial misconduct is involved. In addition, "*zhi xing nan*" (the difficulty in execution and enforcement of judgments) has seen no sign of alleviation. Numerous reasons help explain this problem, yet it is mostly attributed to the poor quality of judicial work — which includes a failure to ascertain the truth. Further, the number of judgments found to be inappropriate, and subsequently corrected, remains unbelievably high.[4] This clearly indicates the failure of the Chinese civil process to achieve its purported goal of ascertaining the truth.

This article explores the problems inherent in the Chinese system that have resulted in the failure to achieve its intended purpose of ascertaining the truth. Following this introduction, Part II provides an overview of the structure of Chinese courts. Part III examines the extensive powers of Chinese judges. Part IV analyzes the supervisory mechanism of the Chinese civil process. Part V addresses obstacles to ascertaining the truth, and Part VI concludes the article.

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3. Shao Zongwei, *Disciplinary Measure to Weed Out Bad Judges*, CHINA DAILY, November 7, 2001. Statistics from the Supreme People's Court indicate that in 2000 more than 1,200 judges in China were disciplined for misusing judicial power for personal gain, in addition to another forty-six who were prosecuted for malpractice and illegal law enforcement. *Id.*

4. He Bing, *Fayuan De Anjian Weiji yu Duice* [*Caseload Crisis and Its Countermeasures*], FAZHI RIBAO [LEGAL DAILY], Nov. 26, 2000, *available at* http://www.legaldaily.com.cn (last visited June 1, 2003).

II. OVERVIEW OF THE CHINESE CIVIL PROCESS

A brief description of the structure of Chinese courts is helpful to an analysis of whether the Chinese civil process has achieved its intended purpose of ascertaining the truth. The Chinese court system is structured like a pyramid[5] composed of four levels: one Supreme Court at the national level, thirty-two high courts at the provincial level, several hundred intermediate courts at the prefectural level, and over 3,000 basic courts at the county and city level (see Diagram I).[6] While "[t]he Supreme People's Court is the highest judicial organ" of the state,[7] it may still hear cases of first instance.[8] Also, China's constitution empowers the Supreme Court to supervise adjudication by the local people's courts at different levels.[9] Basic courts hear all trial cases except for those the law requires other courts to hear.[10] Intermediate courts and high courts are generally appellate courts, but they may also hear cases of first instance.[11] Thus, intermediate courts, high courts, and the Supreme Court each serve a dual function: they act as trial courts and appellate courts.[12] Within each Chinese court there are usually a

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5. The structure of Chinese courts is established in accordance with China's fundamental system of state that China is a unitary country rather than a federal one. The Preamble of the Constitution of the People's Republic of China states that "[t]he People's Republic of China is a unitary multi-national state created jointly by the people of all its nationalities." XIANFA pmbl. (1982); P.R.C. CONST. pmbl. (1982) (For ease of understanding all Chinese legal documents will be cited initially with both the correct romanized Chinese name and the translated English name. After the initial citation, all further citations will use the English name only.) Therefore, China has only one single uniform court system. Conversely, in a federal country, there are normally two separate court systems, state and federal.

6. Chinese courts can be divided into two categories: courts of general jurisdiction and specialized courts. Specialized courts have jurisdiction over specific subject matters, such as maritime, military and railway transportation. In this paper, Chinese courts refer to courts of general jurisdiction unless otherwise indicated.

7. P.R.C. CONST. art. 127 (1982).

8. The Law of Civil Procedure of the People's Republic of China, art. 21. The Supreme Court may hear cases of nationwide impact, and other cases it deems necessary. *Id.*

9. P.R.C. CONST. art. 127 (1982).

10. The Law of Civil Procedure of the People's Republic of China, art. 18; *see also id.* arts. 19 and 20 (providing jurisdictional scope of high courts and intermediate courts). Basic court may refer major or important cases of first instance to a higher court if it regards it necessary for the higher court to hear these cases. Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa, art 21; Organic Law of People's Courts of the People's Republic of China, art. 21.

11. The Law of Civil Procedure of the People's Republic of China, art. 19. An intermediate court has jurisdiction over cases of first instance forwarded by basic courts. Organic Law of People's Courts of the People's Republic of China, art. 25 (2).

12. As an appellate court, an intermediate court may hear appeals against judgments or rulings made by basic courts. Organic Law of People's Courts of the People's Republic of China, art. 25(3). A high court may hear appeals against judgments or rulings made by intermediate courts. *Id.* art. 28(3). The Supreme Court may hear appeals against judgments or rulings made by high courts. *Id.* art. 32(2). This is different from the American system where appellate courts only have jurisdiction of appeals from all final decisions of the trial courts. *See* 28 U.S.C. § 1291 (2003).

few divisions, such as the civil, criminal, administrative, and enforcement divisions (see Diagrams II and III).

Like executive agencies, Chinese courts are internally organized according to a strict hierarchy of administrative ranking. Each Chinese court has one president who is at the top of the hierarchy.[13] Next to the president are several vice-presidents, who are in charge of the respective divisions of the court.[14] Chief judges and associate chief judges supervise individual divisions.[15] Court presidents are elected by the People's Congress at the same level, but vice presidents, division chiefs, associate division chiefs and other senior judges are appointed by the corresponding People's Congress Standing Committee.[16] Courts recruit junior judges and law clerks

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13. Organic Law of People's Courts of the People's Republic of China, art. 19. "A basic people's court is composed of a president, vice-presidents and judges." *Id.* However, the intermediate, high and Supreme People's Court is composed of a president, vice-presidents, chief judges and associate chief judges of divisions, and judges. *See id.* arts. 24, 27 and 31.

14. *Id.* art. 19. The Supreme Court has one president, Xiao Yang, and seven vice presidents, Jiang Xingchang, Shen Deyong, Wan Exiang, Cao Jianming, Zhang Jun, Huang Songyou, Jiang Bixin, *at* http://news.xinhuanet.com/ziliao/2002-01/25/content_253690.htm (last visited June 1, 2003). *See also* Organic Law of People's Courts of the People's Republic of China, arts. 24, 27 and 31.

15. Organic Law of People's Courts of the People's Republic of China, arts. 19, 24, 27 and 31.

16. *Id.* art. 35. This article provides:

> Presidents of local people's courts at various levels are elected by the local people's congresses at the corresponding levels, and their vice-presidents, chief judges and associate chief judges of divisions, and judges are appointed and removed by the standing committees of the local people's congresses at the corresponding levels. Presidents of intermediate people's courts established in prefectures of provinces or in municipalities directly under the Central Government are elected by the people's congresses of the provinces and municipalities directly under the Central Government, and their vice-presidents, chief judges and associate chief judges of divisions, and judges are appointed and removed by the standing committees of the people's congresses of the provinces and municipalities directly under the Central Government. Presidents of local people's courts at various levels established in national autonomous areas are elected by local people's congresses at the corresponding levels in these areas, and their vice-presidents, chief judges and associate chief judges of divisions, and judges are appointed or removed by the standing committees of local people's congresses at the corresponding levels in these areas. The President of the Supreme People's Court is elected by the National People's Congress, and its vice-presidents, chief judges and associate chief judges of divisions, and judges are appointed or removed by the Standing Committee of the National People's Congress.

Id. The constitution of the People's Republic of China stipulates:

> The National People's Congress has the power to remove from office the following persons:
> (1) the President and the Vice President of the People's Republic of China;
> (2) the Premier, Vice-Premiers, State Councillors, Ministers in charge of ministries or commissions, the Auditor-General and the Secretary-General of the State Council;

at their discretion.[17] Unlike the western tradition where judges are normally elected or appointed from a body of experienced lawyers, few Chinese judges have had experience as a lawyer before being appointed.[18] In addition to administrative ranking, judges are classified into four classes[19] and twelve grades according to their professional title (see Diagram II).[20]

Each Chinese court has an adjudication committee.[21] All members of the adjudication committee are subject to appointment and removal by the standing committee of the local people's congress.[22] The adjudication committee, the most authoritative body in the court, is authorized to discuss any major, complex, or difficult case, and correct any judgment errors.[23] The judge or the collegiate panel that heard the case must enter a particular verdict as directed by the adjudication committee.[24]

Temporary collegiate panels, formed to hear particular cases, occupy the bottom of the hierarchy. Either judges or a mixture of judges and people's assessors selected from the populace compose a collegiate panel, which "must have an odd number of members."[25]

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(3) the Chairman of the Central Military Commission and other members of the Commission;
(4*) the President of the Supreme People's* Court; and
(5) the Procurator-General of the Supreme People's Procuratorate.

P.R.C. CONST. art. 63 (1982) (emphasis added). The Standing Committee of the National People's Congress has the power "to appoint or remove, at the recommendation of the President of the Supreme People's Court, the Vice-Presidents and Judges of the Supreme People's Court, members of its Judicial Committee and the President of the Military Court." *Id.* art. 67(11). "Local people's congresses at and above the county level elect, and have the power to recall, presidents of people's courts and chief pocurators of people's procuratorates at the corresponding level." *Id.* art. 101.

17. Zhonghua renmin gongheguo faguan fa, art 11; Law on Judges of the People's Republic of China, art 11. *See also* Organic Laws of the People's Courts of the People's Republic of China, art. 37.

18. Georgory S. Kolton, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts,* 17 U. PA. J. INT'L ECON. L. 415, 450 (1996).

19. Zhongua Renmin Gongheguo Faguan Dengji Zanxing Guize, art 1; Interim Regulation of Professional Ranking of Judges, art. 1. The four classes include chief grand judge, grand judges, senior judges and judges. *Id.*

20. *Id.* The title of chief grand judge is the highest grade, which is reserved to the president of the Supreme People's Court. *Id.* art. 2. Grand judges are further classified into grade one and grade two grand judges. *Id.* art. 3. Senior judges are ranked among grades one, two, three and four. *Id.* art. 4. There are five grades among judges and associate judges. *Id.* art. 5.

21. Organic Law of People's Courts of the People's Republic of China, art. 11.

22. *Id.*

23. *Id.* arts. 11, 14. Apart from discussing major cases, judicial committees also deal with a number of other adjudicative matters. *See id.* art. 11.

24. Organic Law of People's Courts of the People's Republic of China, art 11.

25. The Law of Civil Procedure of the People's Republic of China, art. 40. *See also* Organic Law of People's Courts of the People's Republic of China, art. 10 (adopting the collegial

A collegiate panel is normally formed to adjudicate more complex cases; a single judge can adjudicate simpler cases that do not require a collegiate panel.[26]

In common law jurisdictions, formal legal training and experience as a lawyer are normally two prerequisites for a judicial candidate. However, for many years, China required neither a college education nor formal legal training to become a judge.[27] As a result, most Chinese judges fail to meet the minimum educational requirements.[28] Although "[a] new Judges Law passed in 1995 requires minimum judicial qualifications of a university degree and at least some prior legal experience,"[29] China has a long way to go before all judges meet these minimum educational requirements.[30] On one hand, the Chinese requirements for judges may be the most flexible in the world; on the other hand, Chinese courts have more judges than the courts in other countries.[31]

In China, a judgment of second instance by an appellate court is final; this is the so-called system of two trials, which concludes the

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system).

26. *See* The Law of Civil Procedure of the People's Republic of China, arts. 40, 41; Organic Law of People's Courts of the People's Republic of China, art. 10.

27. *See* Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years,* 20 NW. J. INT'L L. & BUS. 383, 397 (2000).

28. Eric W. Orts, *The Rule of Law in China*, 34 VAND. J.TRANSNAT'L L. 43, 65 (2001). "Only about one-fifth of all lawyers in China have law degrees, and an even lower percentage of judges have formally studied law at a university." *Id.* In 1993, 33.4% of the judges had no college degrees. An even lower percentage of judges had received formal legal education. Lubman, *supra* note 27, at 397.

29. Orts, *supra* note 28, at 65.

30. *Id.*

31. According to 1994 statistics, China has "more than 3,000 courts across the country." Ma Chenguang, *Court Eyes Lead Role in Reform*, CHINA DAILY, Dec. 29, 1994. Now, China has a total of approximately 220,000 judges, including one chief grand judge, forty-one grand judges, 30,000 senior judges and more than 180,000 judges. Shao Zongwei, *Judges Urged to Stick to Justice*, CHINA DAILY, Mar. 23, 2002. Thus, each court has an average number of seventy-two judges. To get a clearer picture, compare the number of judges in the New York State (NYS) Court of Appeals, NYS' highest court, and its counterpart—the High Court of Hainan Province in China. The NYS Court of Appeals is composed of only seven judges (a Chief Judge and six Associate Judges). State of New York Court of Appeals (Official Website), *at* http://www.courts.state.ny.us/ctapps/ (last visited on June 1, 2003). However, the High Court of Hainan Province in China has seventy-one judges. http://www.hicourt.gov.cn /gjfy/hngy/hngy.htm (last visited on June 1, 2003). Hainan Province has a total population of 7.62 million, less than that of New York City which has a population, as of 2000, of slightly more than 8 million. China in Brief: Administrative Division, *at* http:// www.china.org.cn/e-china/administrative/administrative.htm (last visited on March 7, 2004); New York City Department of City Planning, *at* http://www.ci.nyc.ny.us/html /dcp/html/census/popdiv.html (last visited January 27, 2004). Hainan Province is one of the smallest, in terms of population, among thirty-two provincial administrative divisions (twenty-three provinces, five autonomous regions, four municipalities directly under the Central Government, excluding two special administrative regions) in China. China in Brief: Administrative Division, *supra.*

case.[32] However, the Chinese rule of finality should be distinguished from the final judgment rule in the U.S. court system. In the United States, a judgment is final when a trial court has finally determined all the issues involved in a particular lawsuit.[33] This is the so-called final judgment rule that determines when an appeal can be taken.[34] However, in China, a final judgment means that the judgment has become effective because the case has been concluded by the two trials.[35] Pursuant to the Chinese system of the second trial being final, a judgment of second instance made by an *appellate court* is always final.[36] A judgment made by a trial court can only become final when the litigant fails to appeal within the prescribed time.[37] While the American final judgment rule determines when the aggrieved party can take an appeal, the Chinese rule of finality prescribes when a judgment becomes enforceable. Although both rules share the common goal of achieving judicial economy and efficiency, they achieve this goal in different ways. The American final judgment rule is "intended . . . to avoid 'all the delays and expenses incident[tal] to a repeated revision' of fragmented appeals of a single issue."[38] The Chinese rule of finality prevents limitless trials of a single case.

In a broader sense, the Chinese civil process also includes the system of people's mediation conducted by People's Conciliation Committees. People's Conciliation Committees are mass organizations that reconcile civil disputes under the guidance of the local government and basic courts.[39] The committee mediates

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32. The Law of Civil Procedure of the People's Republic of China, art. 10. The Chinese rule of finality includes the following factors: (1) Any party who is not satisfied with the judgment or ruling of first instance of courts at various levels may file an appeal with the court at the next higher level. (2) If the party fails to file an appeal within the time limit, and there is no procuratorial protest, the judgment or the ruling of first instance becomes the one that has legal effect. (3) Any judgment or ruling of second instance made by intermediate courts, high courts or the Supreme Court is final—that is, has legal effect. Organic Law of People's Courts of the People's Republic of China, art. 12.

33. St. Louis, Iron Mountain & S. R.R. Co. v. S. Express Co., 108 U.S. 24, 28-29 (1883) (holding that a judgment is final "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined").

34. Lapidus v. Vann, 112 F.3d 91, 94-95 (2d Cir. 1997).

35. Organic Law of People's Courts of the People's Republic of China, art. 12; *see also* The Law of Civil Procedure of the People's Republic of China, art. 10.

36. Organic Law of People's Courts of the People's Republic of China, art. 12.

37. *Id.* The aggrieved party must take an appeal within fifteen days from the date when the judgment is served. The Law of Civil Procedure of the People's Republic of China, art. 147.

38. *See* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 728 (1993) (quoting United States v. Bailey, 32-33 U.S. (9 Pet.) 354, 355-56 (1835)).

39. The Law of Civil Procedure of the People's Republic of China, art. 16.

disputes "in accordance with legal provisions and the principle of voluntariness."[40] The parties to an agreement "shall execute the resolution reached through conciliation."[41] When one party refuses conciliation, retracts the agreement, or an agreement proves unsuccessful, legal proceedings may be initiated in a court.[42] The system of people's mediation is one of the most important features of China's civil process. However, it is beyond the focus of this paper because of its extra-judicial nature.[43]

III. ACTIVE AND POTENT CHINESE JUDGES

A. Powers of Chinese Judges

Although China's recent reform of its judicial system has increased the burden of proof on the part of the parties and weakened the role of judges in discovering the truth,[44] the Chinese judicial system remains a system based upon the inquisitorial model.[45] The main feature of the inquisitorial system is that judges conduct "an active and independent inquiry into the merits of each case."[46] The judge may also question and examine witnesses.[47] In contrast, judges outside of China, maintain a comparatively passive role in adjudicating a case under the adversary system. In jurisdictions where the adversary system is practiced, "the trial judge acts merely as an impartial umpire."[48] It would be "improper for a judge to intervene in the presentation of evidence by asking extensive questions."[49] Another difference between the Chinese judicial system and the adversary system is that the goal of the Chinese civil process is to seek "objective truth"[50] beyond any doubt;

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40. *Id.*
41. *Id.*
42. *Id.*
43. For those who are interested in this system, see Vai Io Lo, *Resolution of Civil Disputes in China*, 18 UCLA PAC. BASIN L.J. 117 (2000).
44. Since the early 1990's, China has been reforming its civil process with a focus on increasing the burden of proof on the part of the parties to a lawsuit and weakening the role of judges in discovering the truth. *See* Jiang Wei and Wu Zeyong, *Zhengjufa Ruogan Jiben Wenti de Fazhexue Fengxi* [*Jurisprudential Analysis of Some Basic Issues Regarding the Law of Evidence*], 2 ZHONGGUO FAXUE [CHINESE JURISPRUDENCE] 45-46 (2002).
45. The civil process of the former Soviet Union also influenced the Chinese system. In the former Soviet Union, the court not only controlled the litigation process, but also collected, investigated, and confirmed evidence. Hu Huajun, *Xiandai Minshi Susong Jiegou yu Jiancha Jiandu* [*Modern Structure of Civil Litigation and Procuratorial Supervision*], RENMIN FAYUAN BAO [PEOPLE'S COURT NEWSPAPER], Aug. 29, 2000, *available at* http://jc.gov.cn/personal/ysxs/fnsx2/fnsx1269.htm.
46. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 2 (3d. ed. 1999).
47. *Id.*
48. *Id.* at 478.
49. *See id.*
50. Chinese scholars use the term "objective truth" (*keguan zhenshi*) in contrast with the

that is, the truth ascertained by the court must be completely consistent with the fact.[51] The court must ascertain all the facts relevant to the case, even those that are not claimed or undisputed. If any party cannot prove a specific fact, the court should investigate and collect the evidence to prove it.[52]

Because China's civil process is fundamentally an inquisitorial system and its goal is to seek "objective" rather than "legal" truth, Chinese judges have more extensive powers than their U.S. counterparts. In common law jurisdictions, judges will only consider the issues raised, the objections mentioned, and the points made in the pleadings.[53] The issues that the parties do not raise are usually waived.[54] Therefore, the judge's determination is limited to the pleadings the parties have filed. As the judge "sits solely to decide" the dispute,[55] she will not make an independent inquiry into the merits of the case, let alone independent investigation. Under the Chinese system, however, a judge's adjudication is not limited to the pleadings and arguments, but focuses on actual investigation and study. The adjudication system and the style of work of Chinese courts are intended to be convenient to, maintain close ties with, and serve the masses.[56] Only after the court has discovered the whole truth of the case and collected sufficient evidence can it make its judgment.[57] Chinese courts have the power to acquire other evidence by conducting their own investigations of relevant organizations and individuals. Neither organizations nor individuals can refuse to cooperate,[58] and the court may impose fines on any party who refuses to cooperate with the court's

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term "legal truth" (*falu zhenshi*). While "objective truth" refers to the truth which is completely consistent with the facts, "legal truth" indicates the legally assumed truth that the court has ascertained by complying with rules of evidence and requirements of proof. The legal truth may or may not be consistent with the facts. *See* Hu Huajun, *supra* note 45.

51. *Id.* However, in the U.S. court system, a party normally can prove his case in civil proceedings by a preponderance of the evidence. Under this doctrine, the evidence does not need "to free the mind wholly from all reasonable doubt." BLACK'S LAW DICTIONARY 1201 (7th ed. 1999). As long as the evidence has greater weight, it "is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Id.* The rule of preponderance of the evidence is the standard "of proof in a civil trial in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be." *Id.*

52. *See* Hu Huajun, *supra* note 45.

53. FRIEDENTHAL ET AL., *supra* note 46, at 2.

54. *Id.*

55. *Id.*

56. He Weifang, *Zhongguo Sifa Guanli Zhidu de Liangge Wenti* [*Two Issues Regarding the System of Judicial Administration in China*], 4 ZHONGGUO SHEHUI KEXUE [J. CHINESE SOC. STUD.], July 1997, at 120-24, *available at* http://www.law-thinker.com/detail.asp?id=323.

57. *Id.*

58. The Law of Civil Procedure of the People's Republic of China, art. 65.

investigation and acquisition of evidence.[59] Before litigation, judges must carefully check the materials for the litigation and collect necessary evidence through investigation.[60] The court may entrust another court with investigation within the latter's jurisdiction.[61] The entrusted court is required to complete an investigation within thirty days.[62] The court may dispatch itinerant tribunals to hear cases on the scene.[63] Even an appellate court may make its own investigation and question the witnesses.[64]

A party may request a court to investigate and collect evidence in the event that the party cannot collect evidence by himself due to "objective reasons."[65] Also, a court "shall investigate and collect" evidence which the court deems necessary to the hearing.[66] If evidence is relevant to any fact that is likely to damage "the interest of the state, the public interest … or the lawful" rights and interests of the individual, or relevant to procedural issues in joining third parties, suspending litigation, terminating litigation and recusal, such evidence is necessary to litigation and the court therefore can collect it by itself.[67] The court may also investigate and collect its own evidence if the evidence offered by the parties is conflicting and unascertainable, or in any other situations where the court believes it should collect evidence by itself.[68] An exception to the above evidence is that the court shall investigate and collect evidence only on a party's motion.[69] When the court investigates and collects evidence, such investigation shall be conducted by at least two judges.[70] The investigating judges, the person under investigation, and the stenographer shall sign the investigation report.[71]

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59. *Id*. art. 103(1).
60. *Id*. art. 116.
61. *Id*. art 118.
62. *Id*.
63. *Id*. art. 121.
64. *See id*. art. 152.
65. *Id*. art. 64. The Law of Civil Procedure of the People's Republic of China does not define "objective reasons." In the authors' opinion, objective reasons are those that the party has no control over. Pursuant to the Regulation Regarding Evidence in Civil Procedure, the following two types of evidence are those that the party cannot collect due to objective reasons: first, when evidence is "kept by relevant organs of the state and must be accessed by the people's court upon authority," such as archive files. Regulation Regarding Evidence in Civil Procedure, art. 17. Second, this is also an issue when evidence involves "state secrets, commercial secrets or personal privacy." *Id.*
66. *See* The Law of Civil Procedure of the People's Republic of China, art. 64.
67. Regulation Regarding Evidence in Civil Procedure, art. 15.
68. Opinion Concerning Application of the Law of Civil Procedure of the People's Republic of China, arts. 73(3)-(4) (For the sake of brevity, this source will be cited "Opinion Concerning the Law of Civil Procedure" for the remainder of the article).
69. Regulation Regarding Evidence in Civil Procedure, art. 16.
70. Opinion Concerning the Law of Civil Procedure, art. 70
71. *Id.*

Chinese judges may inspect the real evidence and the scene of the incident.[72] The inspection report contains the time and place of the inspection, the process of inspection, and the results of the inspection.[73] The inspection report shall be signed or stamped by the inspector and persons present at the inspection.[74] The map of the scene should indicate the time and location of the drawing, and the identity of the artist.[75]

Due to their extensive powers and active role, Chinese judges may be able to avoid some errors that might be acceptable in common law jurisdictions. As an illustrative example, consider *Brown v. Voss*, a seminal case in American property law.[76] (*Brown* involved an easement dispute where the plaintiffs lost their case largely because of their attorney's failure to present a correct map.[77]) However, the inquisitorial system provides "no true opportunity for defense."[78] For instance, if the judge makes an independent investigation and collects his own evidence, can the parties challenge the validity of the evidence the judge offers? Is the evidence relevant? Is the evidence hearsay? Is the evidence covered by the exclusionary rule? If the answer to any of the above questions is yes, has the judge placed himself in the position of an "adversary"? Has the judge any interest which conflicts with those of the parties? Is the judge still an impartial umpire? A negative answer means the parties have an inadequate defense. Furthermore, even if the parties are allowed to challenge the evidence offered by the judge, do the parties feel as comfortable as when they challenge each other? Do they fear being accused of contempt of court? While the adversary system has no such problems, "[it] is not the only way to the truth."[79] In the inquisitorial system, the parties may have no adequate opportunity for defense, but because the judge is more active, the *Brown* error would have been avoided. The adversary system does provide more opportunity for defense, but it also creates more chances for the *Brown* error.

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72. Regulation Regarding Evidence in Civil Procedure, art. 30.
73. *Id*.
74. *Id*.
75. *Id*.
76. 715 P.2d 514 (Wash. 1986). For a detailed and illuminating exploration of the litigation in this case, see Elizabeth J. Samuels, *Stories Out of School: Teaching the Case of* Brown v. Voss, 16 CARDOZO L. REV. 1445 (1995).
77. *See generally Brown*, 715 P.2d 524; *see also supra* note 76.
78. *See* FRIEDENTHAL ET AL., *supra* note 46, at 2 n.5.
79. *Id.*

B. Chinese Judges and People's Assessors

Chinese judges are more powerful than their common law counterparts because Chinese judges do not share the power to adjudicate with a jury. China does not have a jury system comparable to the system in the United States. While the Chinese civil process does allow laypersons to participate as people's assessors in adjudication of cases of first instance, people's assessors do not constitute a restriction on the power of Chinese judges and usually are regarded as "decorations" in the courtroom.[80] There are both striking similarities and considerable differences in the two distinct systems.

Both systems purport to facilitate judicial democracy. The jury resulted from mistrust of the judiciary. In seventeenth century England, the jury served "as political check on the judges of the Stuart monarchy."[81] In colonial America, the jury became an extremely valuable instrument against oppression "by the British government and its appointed judges."[82] Historically, the jury served as "an extremely valuable bulwark against government oppression."[83] In China, the participation in adjudication by people's assessors is also regarded as one form of a democratic participation in the political system.[84]

In addition, both systems represent the values of the common people. In the United States, the jury represents an American viewpoint about the nature of justice. While the law often takes into consideration general principles and rules, the jury focuses more on "social judgments as to what is fair and equitable."[85] "[T]he jury's greatest value is that it applies the strict and sometimes harsh principles of law with the sense of justice of the 'man on the street.'"[86] Consistent with this view, the U.S. Supreme Court held that the jury is "the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases."[87] Like American jurors, people's assessors are primarily selected from the common people. They are familiar with the community and understand and represent the public opinion of the community.

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80. Sun Jungong, *Renmin Peishenyuan Shi "Baishe" ma?* [*Are People's Assessors "Decorations" in the Courtroom*?], FAZHI RIBAO [LEGAL DAILY], Feb. 19, 2001, *available at* http://www.legaldaily.com.cn/gb/content/2001-02/19/content_13509.htm.

81. FRIEDENTHAL ET AL., *supra* note 46, at 492.

82. *Id.*

83. *Id.*

84. Sun Jungong, *supra* note 80.

85. FRIEDENTHAL ET AL., *supra* note 46, at 493.

86. *Id.* at 551.

87. Dimick v. Schiedt, 293 U.S. 474, 485-86, 493 (1935).

They are more likely to judge a case from the viewpoint of social and moral norms.[88]

Both systems also have their critics. Even though the right to a jury is entrenched in the American legal system, there are detractors who believe among other things that jurors are "unskilled in the application of frequently particularized and difficult legal concepts,"[89] and that "the delays inherent in the jury process" increase the cost to the judicial system.[90] In addition, "there is no effective judicial supervision over the process by which juries render verdicts."[91] The jury treats similar cases unevenly, often applying its own standard of popular justice.[92] In China, the system of people's assessors is also the target of criticism. As some people's assessors have served for a long time, they have become quasi judges and therefore can no longer effectively supervise adjudication. While people's assessors supplement their own professional knowledge for the judge's ignorance of some technical and professional knowledge and skills,[93] most of them lack legal knowledge. They are not qualified for the functions of a people's assessor[94] because people's assessors determine issues of both fact and law.[95]

Despite the similar attacks on both institutions, there are many fundamental differences in the functions of people's assessors and the American jury. In China, people's assessors have the same "rights and obligations" as judges.[96] They may review the court records and participate in the investigation, adjudication, and deliberation.[97] They may also determine issues of law as well as issues of fact.[98] However, in American jury cases the judge normally decides questions of law and procedure only. The jury is charged with the responsibility to decide the questions of fact. Even when the jury is "deadlocked and cannot reach a verdict," the judge should not exert any pressure on any juror to make a decision, let alone

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88. Sun Jungong, *supra* note 80.
89. FRIEDENTHAL ET AL., *supra* note 46, at 491.
90. *Id.*
91. *Id.* at 492.
92. *Id.* at 497.
93. Sun Jungong, *supra* note 80. For instance, in a case involving scientific information, a people's assessor with scientific background will be a great help in ascertaining the facts. Also, in juvenile cases, a people's assessor selected from the school faculty might help educate and reform the juvenile defendants.
94. *Id.*
95. *See* The Law of Civil Procedure of the People's Republic of China, art. 40.
96. *Id.*
97. Sun Jungong, *supra* note 80.
98. The Law of Civil Procedure of the People's Republic of China, art. 40.

"order them to agree."[99] The jury's province is limited to "determining … the facts germane to a given dispute, and deciding how the relevant law should apply to those facts."[100] If the jury "consider[s] evidence obtained outside the courtroom, such as by visiting the scene of the accident," it would constitute jury misconduct and consequently "be the basis for a challenge to the verdict either by motion for new trial or by appeal."[101]

The system of people's assessors is more similar to the earlier common law jury system. The jury's origin came from the need for truth. Originally, fitness as a witness was the primary concern in selecting jurors. In addition, jurors were chosen from the neighborhood in which the case occurred so that the selected jurors could be in the best position to evaluate the evidence in light of their own background in the locale.[102] Thus, the jurors acted as active "witness-adjudicators."[103] They not only determined issues of fact but also determined issues of law.[104] The judge guided the "decision making process by comments on the witnesses and the evidence."[105] Only after the jury transformed from "witness-adjudicator" to "impartial finder of fact" did the jury become more passive. Thus, the jury's verdict increasingly turned on only the materials presented to it at trial.[106]

Another functional difference is that people's assessors are intended to supervise adjudication and facilitate judicial fairness.[107] China's constitution states, "All power . . . belongs to the people."[108] Judicial power also comes from the people. Therefore, the exercise of the judicial power must be subject to the supervision by the people. This supervision of adjudication is one of the most important functions of the people's assessors.[109] Unlike people's assessors, the American jury has no power to supervise adjudication of particular cases. While the jury system resulted from mistrust of the judiciary, the jury has never served as a supervisor of the adjudicative process.

Although the United States Constitution prescribes and protects the right to a jury,[110] this right in civil cases has not been made

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99. FRIEDENTHAL ET AL., *supra* note 46, at 481.
100. *Id*. at 495.
101. *Id*. at 581-82.
102. *Id*. at 494.
103. *Id*.
104. *Id*. at 496.
105. *Id*.
106. *See id*. at 494
107. Sun Jungong, *supra* note 80.
108. P.R.C. CONST. art. 2. (1982).
109. Sun Jungong, *supra* note 80.
110. U.S. CONST. art. III, § 2; amends. VI-VII.

binding on the states through the Due Process Clause of the Fourteenth Amendment.[111] In China, the trial by people's assessors is not mandated by the constitution and is therefore optional.[112]

The selection of people's assessors is different from jury selection. In China, the People's Congress elects people's assessors.[113] The term of a people's assessor is five years, but he can renew his term without limitation.[114] Some people's assessors have served for as many as seven terms.[115] Once elected, a people's assessor can participate in the adjudication of multiple cases during his term.[116] People's assessors have in fact become quasi judges. Of course this is a far cry from what occurs in United States federal courts, where a juror is selected on a random basis for a particular case only.[117] When the case is concluded, the juror's duty is over.

Because people's assessors enjoy more extensive powers than American jurors people's assessors, in theory, should be in a better position to limit the judge's role in adjudication than the American jury. Reality presents the opposite picture — people's assessors rarely limit the judge's power in adjudication. First, a single judge handles all minor cases, which people's assessors cannot adjudicate. Second, when a case is so complex that a collegiate panel is necessary, the collegiate panel may or may not include a people's assessor.[118] Third, even if a collegiate panel does consist of both judges and people's assessors, the people's assessor constitutes a minority on the panel and has only one vote.[119] While the American jury can only determine issues of fact, they enjoy independent power to make such decisions. The jury's deliberation is not subject to judicial supervision.[120] Finally, people's assessors have no legal obligation to participate in adjudication. Thus, they may refuse to participate in adjudication for any reason, such as a conflict with their employment. Also, due to limited financial resources, some courts cannot afford the expenses incurred in having people's assessors participate in adjudication. For these reasons, people's assessors have participated in adjudication of only about eight percent of the cases.[121] Despite the potential for people's assessors

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111. *See, e.g.,* Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916).
112. *See* P.R.C. CONST. chap. 3, § 7 (1982).
113. Organic Law of the People's Courts of the People's Republic of China, art. 38.
114. *See generally*, Sun Jungong, *supra* note 80
115. *Id.*
116. *Id.*
117. 28 U.S.C. § 1861 (2003).
118. The Law of Civil Procedure of the People's Republic of China, art. 40.
119. Sun Jungong, *supra* note 80.
120. *See* FRIEDENTHAL ET AL., *supra* note 46, at 584.
121. Sun Jungong, *supra* note 80.

to have a significant impact on the role of judges, in reality, their impact is much less than that of an American jury.

C. Who Controls the Litigation?

If "we think litigation is an inquiry into truth," we are likely to want judges "rather than the adversaries to control the inquiry" because the personalized battle is less likely to yield the truth.[122] Under the adversary system, however, the parties (normally via their attorneys) rather than the judge "control and shape the litigation. . . . [T]he ultimate responsibility for presenting the case remains with the attorneys. . . ."[123] The parties can exercise control over the litigation at almost all stages.

The parties' domination over litigation commences with pleadings. Pleadings "set forth the parties' contentions" and "guide the court as well as the parties throughout the pendency of the case."[124] Pleadings have two functions: to shape the case and guide the litigation. To shape the case, pleadings permit the parties to eliminate irrelevant issues from consideration.[125] By eliminating the irrelevant issues, pleadings actually limit the judge's scope of attention. Pleadings guide the litigation, serving as a means to delineate and control the direction of a case. Under certain circumstances, the pleadings constitute the sole basis for the judge's decision. For instance, the judge makes his decision as to "a party's demurrer … motion … solely upon the face of the pleadings."[126]

Chinese law has flexible rules regarding pleadings. If the plaintiff is illiterate, he may submit his complaint orally.[127] Additionally, because Chinese judges do not determine cases solely based upon the pleadings submitted by the parties, pleadings do not play as crucial a role in the Chinese civil process as they do in the American system. Judges have much more leeway to look beyond the pleadings and as a result, the parties cannot control litigation through pleadings in China.

Discovery refers to the act or process of "obtain[ing] and preserve[ing] information regarding the action."[128] Since the adoption of the Federal Rules of Civil Procedure (FRCP) in 1938, discovery has been "a vital part of the litigation process."[129] One of

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122. STEPHEN C. YEAZELL, CIVIL PROCEDURE 306 (5th ed. 2002).
123. FRIEDENTHAL ET AL., *supra* note 46, at 2-3.
124. *Id.* at 244.
125. *Id.* at 246.
126. *Id.* at 451.
127. The Law of Civil Procedure of the People's Republic of China, art. 109.
128. FRIEDENTHAL ET AL., *supra* note 46, at 386.
129. *Id.*

the main purposes of discovery is to "ascertain the issues that actually are in controversy between the parties."[130] Discovery is a self-help device for the parties to ascertain the truth of the case. Strictly speaking, there is no system comparable to discovery in China. Chinese law does not allow the parties to discover any evidence from another party except for the pleadings, which have been submitted to the court.[131] Although parties in recent years have been exchanging evidence, the law does not require such exchanges. Therefore, the parties cannot control the litigation through discovery and the exchange of evidence.

IV. SUPERVISION OF JUDGES' ADJUDICATION

Powerful and active judges alone are not sufficient to ensure "objective truth." In order to ensure that judges adjudicate cases correctly, the Chinese system has designed a comprehensive supervision procedure by which a purported final decision can be subjected to review. This procedure is available to virtually anyone who is interested in the litigation.

A. Internal Supervision

As previously stated, Chinese courts are composed of specialized divisions for different types of cases, including family, economic, intellectual property, and traffic divisions.[132] In addition, all courts have an internal department of the Chinese Communist Party (Party)[133] along with a discipline and supervision department. The supervision department may rehear the cases which the "court's special panel of senior judges have ruled unfair."[134] To discover possible judicial misconduct, they also review cases that have been remanded for retrial due to a protest by the procuratorate, or cases whose judgments have been amended to discover whether any judicial misconduct occurred.[135]

In November 1998, the Chinese Supreme Court "appointed 10 prestigious judges as superintendents to supervise the work of local courts and investigate cases of judicial corruption."[136] The superintendents are composed of former presidents of local high

130. *Id*. at 387.
131. *See* The Law of Civil Procedure of the People's Republic of China (Evidence Regulations), arts. 10, 14.
132. Shao Zongwei, *Civil Court System Changes*, CHINA DAILY, Dec. 8, 2000.
133. Laifan Lin, *Judicial Independence in Japan: A Re-investigation for China*, 13 COLUM. J. ASIAN L. 185, 198. (1999).
134. Shao Zongwei, *Civil Court System Changes, supra* note 132.
135. Shao Zongwei, *Court Rules Tightened*, CHINA DAILY, Jan. 6, 2001.
136. *Reform Brings New Supervisory Judges*, CHINA DAILY, Nov. 2, 1998.

courts and current justices of the Chinese Supreme Court.[137] The purpose of this appointment is to facilitate the "development of the trial system in China and safeguarding judicial justice."[138] Their functions include: "offering advice in handling major, difficult, or misjudged cases;" investigating corruption practices involving judges; and handling "cases involving parties from different jurisdictions."[139] They report the findings of their investigations to the Chinese Supreme Court and make suggestions for resolution of any problems.[140] There are a few problems arising from this appointment. What is the legal basis for the jurisdiction of these superintendents? The Law of Civil Procedure of the People's Republic of China does not provide for any jurisdiction of such superintendents. Who will supervise these superintendents? The president of the Chinese Supreme Court cautioned the superintendents against being involved in corrupt practices.[141]

In China, a court at a higher level has the power and obligation to supervise all the courts below.[142] The Chinese Supreme Court supervises all the courts in China.[143] Each high court supervises all basic and intermediate courts within its jurisdiction. By withdrawing from all basic courts and most intermediate courts the jurisdiction over foreign-related commercial cases, the Chinese Supreme Court also intended to better supervise adjudication of these types of cases.[144] Pursuant to Chinese law, a judgment of the court of second instance (or appeal) is final.[145] Thus, a judgment made by a basic court or an intermediate court can rarely reach the Chinese Supreme Court through the normal appeal process. The Chinese Supreme Court could rarely exercise direct supervision over adjudication of these types of cases if basic or intermediate courts adjudicate them.

The Chinese Supreme Court introduced a new disciplinary measure on November 6, 2001.[146] According to this regulation, the

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137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. P.R.C. CONST. art. 127 (1982) "The Supreme People's Court supervises the administration of justice by the people's courts at various local levels and by the special people's courts. People's courts at higher levels supervise the administration of justice by those at lower levels." *Id.*
143. *Id.*
144. Xin Zhiming, *Judicial Reform Meets WTO Rules,* CHINA DAILY, Mar. 19, 2002.
145. The Law of Civil Procedure of the People's Republic of China, art. 10.
146. *See generally* Difang Geji Remnin Fayuan Ji Zhuanmen Fayuan Yuanzhang Fuyuanzhang Yinjiu Cizhi de Guiding; Regulation on Resignation of Presidents and Vice Presidents of Local and Special Courts at Various Levels (For the sake of brevity, this source will be cited as "Resignation Regulation" for the remainder of the article.).

president and vice presidents must tender their resignations in certain situations in which they failed to perform their administrative duties or if judicial misconduct occurred within their courts.[147] In the event that the president or the vice president responsible for any of the above violations fails to resign, the regulation empowers the Party committee, in consultation with a court at a higher level, to propose that the People's Congress (or its Standing Committee) remove the president or the vice president.[148]

China also established a system of liability for erroneous judgments in the late 1980's.[149] Those who are responsible for making erroneous judgments are subject to five forms of liability: criminal liability, civil liability (the court may hold the judge who made the erroneous judgment liable for the compensation paid by the court), administrative or Party disciplinary measures, economic penalties (such as fines or reduction in salary or bonus), and other forms of employment-related sanctions (such as suspension of promotion or removal from the judicial post).[150]

Further, pursuant to Chinese law, the trial court will be liable for compensation if it has made an erroneous judgment that has damaged the interests of the parties to the lawsuit.[151] This is the so-called system of state compensation.[152] Erroneous judgments subject to state compensation include illegal coercive measures, wrongful execution on judgment, and other decisions which infringe upon the legal rights of citizens, legal entities, or other organizations.[153] After the court has paid the compensation to the

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147. *Id.* art. 4. These situations include: (1) The judgment violated law, "causing heavy losses to State benefits, public benefits or lives and properties of the masses;" (2) failure to report or investigate serious violations of law or disciplines, "causing a serious consequence" or blatantly adverse impact; (3) failure to maintain proper administration has led to "a major accident or heavy economic losses." *Id.*

148. *Id.* art. 6. This provision also indicates the crucial role of the Party in matters regarding appointment and removal of judges. This is relevant to our discussion about the Party's intervention in judicial activity later in Part IV.

149. Chen Xiangjun, *Ren Renmin Fayuan Cuoan Zeren Zhuijiu Zhi* [*On System of Liability for Erroneous Judgments*], Zhengyi Luntan [Justice Forum], *at* http://www.jc.gov..cn/personal/ysxs/fnsx3/fnsx2980.htm (last visited January 5, 2004).

150. *Id.*

151. Law of the People's Republic of China on State Compensation, art. 31.

152. Law of the People's Republic of China on State Compensation formally introduced the system of state compensation on May 12, 1994.

153. Interpretation of the Supreme People's Court on Certain Issues concerning Judicial Compensation in Civil and Administrative Litigations, art. 1 (P.R.C.) (For the sake of brevity, this source will be cited as "Interpretation on State Compensation" for the remainder of the article.). "If the People's court has taken coercive measures against the activities of disturbing litigation or preservation measures illegally, or made wrongful execution on judgment, decision or other valid legal document which has infringed the legal rights of citizens, legal entities or other organizations and caused damages, then the State shall be responsible for compensation." *Id.*

victim, it may seek indemnity from the judge if the judge was involved in illegal conduct or judicial corruption.[154] This has placed judges in a risky situation.[155]

China has a code of judicial conduct that is similar to that of the United States. A judge cannot allow various social relationships to influence the judge's conduct or judgment.[156] In China, a judge, theoretically, cannot have ex parte meetings with either of the parties or their attorneys.[157] A judge cannot directly or indirectly use the prestige of the judicial office to advance the private interests of the judge, his relatives or others.[158] A judge must perform judicial duties impartially and fairly.[159] A judge must recuse himself or herself from a proceeding if the judge's participation in the proceeding will cast reasonable doubt on the judge's impartiality.[160]

There is, however, a fundamental difference between the Chinese code of judicial conduct and the American system. In the United States, a judge cannot act as a leader or hold any office in a political organization, make a speech for a political organization, or attend political gatherings.[161] However, a Chinese judge need not refrain from, but must take part in, all these political activities as his routine duties. A Party committee is established in every court, with the court president functioning as secretary, or political leader, of the committee. A Chinese judge's ex parte meetings with the

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154. Law of the People's Republic of China on State Compensation, art. 24.

155. Judge Zhou Liewei's story is an interesting case involving a judge's liability for state compensation. Judge Zhou Liewei adjudicated an economic dispute in 1996. Upon motion made by the plaintiff, Judge Zhou Liewei ordered to foreclose the property of the defendant which was worth RMB $ 230,100.00 (roughly equal to US $ 30,000). The defendant applied to a higher court for state compensation for wrongful enclosure. The appellate court confirmed that the enclosure was illegal because it lasted too long, affected more property than necessary and the enclosed property was not in appropriate custody. Therefore, the State Compensation Committee of the appellate court ordered the trial court to pay damages of RMB $ 103,675.30 to the defendant. The trial court decided that Judge Zhou Liewei should be liable for the damages. Lawyer Group, *at* http://www.lawyer-group.com/law-case/xz/2014.htm (last visited June 1, 2003). The report did not indicate whether Judge Zhou Liewei had been involved in illegal conduct or judicial corruption. This case demonstrates that the Chinese judiciary might be the most perilous one in the world. *See id.*

156. ABA CODE OF JUDICIAL CONDUCT Canon 2B (1990); Zhonghua Renmin Gongheguo Fayuan Zhiye Daode Jiben Zhuze, art 4; Basic Ethic Norms for Judges of the People's Republic of China, art. 4.

157. ABA CODE OF JUDICIAL CONDUCT Canon 3A(4) (1990); Basic Ethic Norms for Judges of the People's Republic of China, art. 8.

158. ABA CODE OF JUDICIAL CONDUCT Canon 3C (1990); Basic Ethic Norms for Judges of the People's Republic of China, arts. 23 and 26.

159. ABA CODE OF JUDICIAL CONDUCT Canon 3 (1990); Basic Ethic Norms for Judges of the People's Republic of China, art. 1.

160. ABA CODE OF JUDICIAL CONDUCT Canon 3C(1) (1990); Basic Ethic Norms for Judges of the People's Republic of China, art. 3.

161. ABA CODE OF JUDICIAL CONDUCT Canon 5B (1990).

parties are inevitable because Chinese law requires Chinese judges to conduct independent investigations. Meeting with the parties constitutes an essential part of such investigations.

B. External Supervision

1. Supervision by the People's Congress

According to the Chinese constitution, one of the major functions of the people's congresses, and their standing committees, is to supervise the work of the courts.[162] The president of the Chinese Supreme Court promised that the Court would invite some members of the National People's Congress (NPC) and the Chinese People's Political Consultative Conference to be special consultants strengthening supervision of judicial work.[163] The Chinese Supreme Court set up a special liaison office to communicate with the NPC.[164] The President of the Chinese Supreme Court also required local courts to set up similar offices and "invite members of local people's congresses to inspect and evaluate their work."[165] Because the people's congresses are constitutionally empowered to oversee the work of courts, why do members of people's congresses have to be invited to supervise? Can the invited members of the people's congresses exercise effective supervision given the potential conflict of interest? While such an arrangement may indicate the intention of the Chinese judiciary to improve judicial work, it also demonstrates the difficulty the people's congresses have in fulfilling their constitutional mandate of supervising the judiciary.

The NPC supervision also includes supervision of law enforcement. Under the Chinese Constitution, the NPC and its Standing Committee are responsible for supervising the work of the Chinese Supreme Court and Supreme Procuratorate.[166] On a smaller scale, local courts, local people's congresses have similar powers vis a vis local courts.[167] However, Chinese law does not define "the actual scope and form of supervision by the People's Congress[es]. . . some local People's Congresses have adopted various methods such as appraisal, suggestion and even inquiry" into adjudication of a particular case.[168] Another commonly used way to supervise enforcement of law is to send out inspection

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162. P.R.C. CONST. arts. 62(2), 67(1), 67(6), 128 (1982).
163. *People's Congresses to Monitor Court Work*, CHINA DAILY, Sept. 28, 1998.
164. *Id.*
165. *Id.*
166. P.R.C. CONST. art. 128 (1982).
167. *Id.*
168. Laifan Lin, *supra* note 133, at 198-99.

teams.[169] No scope or form of supervision has been defined, which makes it more difficult for the people's congresses to exercise effective supervision. This uncertainty also provides potential for impermissible intervention by the people's congresses into judicial work.

2. Supervision by the Party

From the viewpoint of the text of the Chinese constitution, the Chinese judiciary appears to have the authority to exercise its judicial power independently, and therefore, is not subject to interference by any administrative departments, public organizations, or individuals.[170] This provision seems to indicate that the Chinese judiciary is independent from any other state organs. In reality, however, the Chinese judiciary does not enjoy such independence. It is vulnerable to outside interference, particularly from the Party. Although the Party is China's major decision maker in state affairs, the Constitution mentions little about the Party.[171] As China's governing political organization since the establishment of the PRC in 1949, the Party plays a leading role in all levels of government established by the Chinese Constitution.[172] On the one hand, the Chinese Constitution provides that all organizations, including the Party and other political parties, are subject to the law.[173] On the other hand, the Chinese Constitution heralds the Party's leadership of the country,[174] elevating the Party to a privileged constitutional position over the law.[175]

While the Party has loosened the reigns on the economy, it still retains the final control of all powers.[176] As far as judicial power is concerned, the Party exerts its pervasive influence and control over the judiciary through the Political and Legal Committee (PLC).[177]

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169. *NPC Aims to Supervise Law Enforcement Better*, CHINA DAILY, Mar. 3, 1998. For instance, the NPC sent out an inspection team in 1996 to examine enforcement of 21 laws and regulations in various jurisdictions. The team, headed by a Vice-Chairman of the NPC, listened to reports made by 11 ministries concerning enforcement of the above laws. *Id.*

170. P.R.C. CONST. art. 126 (1982).

171. *See* P.R.C. CONST. pmbl. (1982). The Constitution only confirms in its preamble the leading role the Party played in the long-term struggle for China's independence and its continued leading role in the socialist cause. *Id.*

172. *Id.*

173. *Id.* art. 5.

174. *Id.* at pmbl.

175. *See* Orts, *supra* note 28, at 69.

176. Robert C. Berring, *Chinese Law, Trade and the New Century*, 20 Nw. J. INT'L L. & BUS. 425, 442 (2000).

177. While many people who are familiar with the Chinese legal system have no difficulty in recognizing the role of the PLC, few of them can provide much documentary evidence

The PLC is normally chaired by the police chief (head of the Public Security Bureau) and joined by the president of the court and the heads of governmental law enforcement agencies. While the PLC does not directly hear cases, it may discuss and make decisions about cases that it considers politically sensitive and legally complex.[178] As the Chinese judiciary is subject to the control of the Party (through the PLC), it is unable to enjoy real independence. "Especially in highly charged political cases . . . the duty of judges is subservient to decisions of the Party."[179] While the Chinese judiciary enjoys more independence in the area of civil litigation, the Party remains an "invisible but decisive hand" hidden in the legal machine.[180] The Party's "'brazen interference' with judicial decisions has continued," particularly when the outcome of a case "'conflict[s] with the Party's authority and interests.'"[181] One Chinese law professor wrote that the court "'often reports . . . to the local Party committee and solicits opinions for solution . . . and if contradictions arise among different judicial organs, the Party's political-legal committee often steps forward to coordinate.'"[182]

In addition to interference with court adjudication, the Party has control over appointment and removal of judges.[183] Pursuant to the Constitution, presidents and vice-presidents of courts are elected (or appointed) and removed by the People's Congress (the Chinese equivalent to a legislature) or its Standing Committee at various levels.[184] However, the process of election, appointment, and removal is under the complete control of the Party.[185] Further, the Chinese judiciary is financially dependent upon the Party-dominated government. This dependence makes it extremely difficult, if not impossible, to escape the outside influence of the

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showing the importance of the PLC in the Chinese legal system. One of the reasons is that most documents involving the role of the PLC are not readily available to the public.

178. Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgments in China,* 13 COLUM. J. ASIAN L. 35, 89 (1999).

179. Orts, *supra* note 28, at 66-67.

180. Nanping Liu, *supra* note 178, at 88.

181. Orts, *supra* note 28, at 67 (quoting Sherry Liu, *Coming Home*, *in* CHINA REMEMBERS 286, 290 (Zhang Lijia & Calum MacLeod eds., 1999)).

182. Lubman, *supra* note 27, at 395 (quoting He Weifang, *Tongguo Sifa Shixian Shehui Zhengyi: Dui Zhongguo Faguan Xianzhuang de Yige Toushi* [*The Realization of Social Justice Through Judicature: A Look at the Current Situation of Chinese Judges*], *in* ZOU XIANG QUANLI DE SHIDAI: ZHONGGUO GONGMIN QUANLI FAZHAN YANJIU [TOWARD A TIME OF RIGHTS: A PERSPECTIVE OF THE CIVIL RIGHTS DEVELOPMENT IN CHINA] 209, 249 (Xia Yong ed., 1995)).

183. Resignation Regulation, art. 6. Not much documentary evidence exists to demonstrate this observation because Chinese law seldom defines the powers of the Party and its organs.

184. P.R.C. CONST. arts. 62(7), 67(11), 101 (1982).

185. Normally, the organizational department of the Party is responsible for major appointments and removals. *See* Resignation Regulation, art. 6.

Party. This dependence renders the constitutional guarantee for independently adjudicating cases meaningless.

Judicial independence is not compatible with China's fundamental political system, under which the leadership of the Party cannot be challenged. Judicial independence is based upon the idea of separation of powers among the branches of government. As far as judicial power is concerned, the separation of powers doctrine prohibits the legislative and the executive branches from interfering with the courts' final judgments. However, as China has never adopted the doctrine of separation of powers, this interference is constitutionally authorized.[186]

3. Supervision by Any Citizen

Before the Law of Civil Procedure was revised in 1992, Chinese civil procedure allowed any citizen to make a complaint about a legally effective but allegedly erroneous judgment.[187] The 1992 revision of the Law of Civil Procedure abolished this right.[188] However, under the Chinese constitution, making a complaint about a decision is one of the democratic rights of all citizens.[189] There is no time limit or standing requirement for making a complaint about a court decision.[190] The most common form of making a complaint is to visit or write to the court for help.[191]

C. Formal Procedures for Correcting Errors in Judgments

1. The Trial Court's Power to Correct its Own Errors

Because the Chinese civil process does not tolerate erroneous judgments, trial courts in China have more flexible powers and are encouraged to correct their own errors.[192] Thus, the Chinese system provides more grounds for a motion for a new trial. A Chinese court must conduct a new trial if the litigant establishes any of the following: (1) that there is newly-found evidence sufficient for the court to reverse the judgment or ruling; (2) that there was not

186. P.R.C. CONST. art. 128 (1982).
187. Nanping Liu, *supra* note 178, at n.181.
188. *Id.*
189. *Id.*; P.R.C. CONST. art. 41 (1982).
190. Nanping Liu, *supra* note 178, at 83.
191. For instance, during the period between 1998 and 2002, Chinese courts throughout the country received and handled 42,240,000 complaints made by citizens in the form of a visit or letter. The Work Report of the President of the Chinese Supreme Court to the National People's Congress in March 2003 (For the sake of brevity, this source will be cited as "2003 Work Report" for the remainder of the article.).
192. The Law of Civil Procedure of the People's Republic of China, arts. 177 (on its own initiative); 178 (by motion).

sufficient evidentiary proof of the facts ascertained by the trial court; (3) that the court wrongfully applied the law in its judgment or ruling;[193] (4) that the court violated the legal procedure which prejudicially influenced the judgment or ruling; or (5) that the judge was bribed or committed other judicial misconduct.[194]

In China, there are several ways to initiate a new trial. First, a party to the lawsuit may move for a new trial.[195] A party who believes that there is a definite error in a legally effective judgment or ruling may move to the trial court or a court at a higher level to conduct a new trial.[196] In addition, a trial court may also conduct a new trial on its own initiative.[197] Where the president of a court at any level has found any "definite error in a legally effective judgment or order of his court and deems it necessary" to retry the case, he submits the erroneous judgment to the adjudication committee for discussion and determination.[198] While a litigant must submit his motion for a new trial within two years,[199] "there is no time limit for the court to conduct a new trial" on its own initiative.[200] Further, if a court at a higher level has found a definite error in a legally effective judgment rendered by a lower court, the higher court may conduct a new trial of the case or instruct the trial court to conduct a new trial.[201]

2. Appeal

To achieve the goal of ascertaining the truth, appellate courts in China are also designed to be more powerful and active than their counterparts in common law jurisdictions.

a. Chinese Assumptions Regarding the Role of Trial Courts

One cannot fully understand the Chinese appellate process without knowing the difference between Chinese and U.S. assumptions about the role of the trial court. In the United States, it is assumed that trial courts are in the best position to seek the truth because they are present when all evidence is offered and both

193. *See* Zhang Weiping, *Brief Exploration of New Trials in Civil Process*, PEOPLE'S COURT NEWSPAPER, Mar. 2, 2001, at 107, *available at* http://www.civillaw.com.cn/weizhang /default.asp?id=10526.
194. The Law of Civil Procedure of the People's Republic of China, art. 179.
195. *Id.* art. 178.
196. *Id.*
197. *Id.* art. 177.
198. *Id.*
199. *Id.* art. 182.
200. Nanping Liu, *supra* note 178, at 76.
201. The Law of Civil Procedure of the People's Republic of China, art. 177.

parties argue the case.[202] However, in China, it is assumed that trial courts are not necessarily in the best position to seek the truth because the quality of trial judges is presumably lower than that of appellate judges. The Chinese assumption of lower quality of trial judges is evidenced by the recent withdrawal of the jurisdiction of basic courts and most intermediate courts over foreign-related commercial cases.[203] According to a document recently issued by the Chinese Supreme Court, only high courts and intermediate courts located in provincial capitals; special economic zones, and economic, technological development areas have jurisdiction over foreign-related commercial cases.[204] In 1991, China amended its civil procedural law and as a result, intermediate courts have jurisdiction over *major cases* involving foreign parties.[205] The amendment actually extended to all basic courts the jurisdiction over foreign-related commercial cases because basic courts were allowed to hear non-major cases involving foreign parties.[206]

This new arrangement was intended to comply with the WTO principles of "non-discrimination"[207] because judges of courts at higher levels are of higher professional quality, thereby "ensur[ing] judicial justice and protect[ing] the legitimate interests of foreign individuals and enterprises."[208] According to one justice of the Chinese Supreme Court, judges of basic courts are not competent to hear foreign-related commercial cases because such cases involve complicated international trade issues.[209] Better adjudication of

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202. *See* Anderson v. Bessemer City, 470 U.S. 564, 575 (1985) ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."). For insightful commentary, see Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1095 (1991).

When a jury rather than a judge has found the fact in question, the appellate court will grant even more deference because of constitutional requirements. The Seventh Amendment of the U.S. Constitution states, "no fact, tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The Supreme Court of the United States has held that the Seventh Amendment permits trial court scrutiny of jury verdicts via Rules 50 and 59 motions. Gasperini v. Ctr. for the Humanities, Inc., 518 U.S. 415, 426 (1996). However, the Court has also suggested that the same reexamination by an appellate court, because it has not been historically sanctioned, is at least doubtful. *See id.*

However, trial court conclusions of law are not entitled to any deference. The Supreme Court of the United States has held that "a court of appeal should review de novo a district court's determination of state law." Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1991).

203. *See generally,* Xin Zhiming, *supra* note 144.

204. *Id.*

205. The Law of Civil Procedure of the People's Republic of China, art. 19.

206. *See id.* arts. 18, 19.

207. Xin Zhiming, *supra* note 144.

208. *Id.*

209. *Id.*

these types of cases requires basic knowledge of international trade law, judicial procedure and foreign languages. But "few judges [of basic courts] can meet these requirements."[210] This argument is not persuasive because very few judges in courts at higher levels can meet these requirements. Even if this assumption is correct, it is ironic that this reform is intended to comply with the WTO's non-discrimination principles. In fact, it has created discrimination against Chinese individuals and companies because Chinese individuals and companies cannot enjoy the work of "high quality" judges of higher courts.

b. Scope of Review

The supervisory function of Chinese appellate courts is also evidenced by the extensive scope of appellate review. The wide scope of appellate review in China is more evident when compared with that in the United States. First, it is commonly accepted in the United States that "[t]rials will not be error-free; nevertheless, appellate review will not be available to remedy all the mistakes."[211] However, the Chinese civil process is designed to be an error-free system, and accordingly, any error must be corrected through appellate review. Second, American appellate courts are "*not to supervise the conduct of each trial to ensure that the judge adhered to all the rules of procedure and evidence that were applicable*."[212] However, appellate courts in China are constitutionally mandated supervisors of courts below.[213] Also, the power of American appellate courts is considerably restricted by the jury system. Thus, an American appellate court may not inquire into what transpired during the deliberation process because such inquiry would threaten the entire jury system.[214] As China has no jury system, there is no such limitation on the power of appellate courts. Further, American trial judges enjoy great discretion in determining cases. "[A]ny rulings that are within the discretion of the trial judge will be reviewed under an abuse of discretion standard."[215] As Chinese trial judges have virtually no discretion in adjudication,[216] Chinese appellate courts do not need to honor the discretion of trial judges.[217] Finally, an American appellate court "does not independently search

210. *Id.*
211. FRIEDENTHAL ET AL., *supra* note 46, at 618.
212. *Id.* (emphasis added).
213. P.R.C. CONST. art. 127 (1982).
214. FRIEDENTHAL ET AL., *supra* note 46, at 584-85.
215. *Id.* at 625.
216. The Law of Civil Procedure of the People's Republic of China, art. 7.
217. Opinion Concerning the Law of Civil Procedure, art. 180.

the record for errors below, but leaves the decision of what needs review to the litigants."[218] In China, an appellate court may request the lower court's record for review.[219]

Apart from these general differences, there are even more specific distinctions between the Chinese appellate process and the American appellate system. In the United States, an appellate court will not review an error unless the "aggrieved party . . . objected promptly to the allegedly erroneous ruling in the trial court."[220] The Chinese system does not impose such a requirement upon the aggrieved party. An American appellate court will not set aside findings of fact unless clearly erroneous.[221] Even if an American appellate court determines that the trial court committed an error, it will not necessarily reverse it. In fact, the American system forbids federal courts from reversing a judgment for "errors or defects which do not affect the substantial rights of the parties."[222] Only after the appellate court has found that the error was harmful will it reverse the judgment. Thus, it is not unusual that flawed judgments are made and executed without review since the trial judge "cannot always be confident that he 'knows' what happened" and he can only make the decision based upon the facts that he believes are "more likely to be true than not."[223] However, the Chinese civil process is designed to "apply laws correctly."[224] Therefore, any error may constitute a ground for reversal in a Chinese appellate court.[225] A Chinese judge cannot make the decision based upon the facts that he believes are more likely to be true than not; he must exhaust all means to make sure that the fact is true.[226]

An American appellate court will review "only those issues that are presented in the parties' briefs and the relevant portion of the trial-court record that is brought to the appellate court's attention."[227] A Chinese appellate court is authorized to review any issue appealed, no matter whether the trial court has decided it on the merits or not.[228] In China, "any incorrectly decided issues or cases, the so-called unjust, feigned, or mistaken decisions . . . may,

218. FRIEDENTHAL ET AL., *supra* note 46, at 620.
219. The Law of Civil Procedure of the People's Republic of China, art 152.
220. *Id.* at 618.
221. FED. R. CIV. P. 52(a).
222. 28 U.S.C. § 2111 (2002).
223. Anderson v. Bessemer City, 470 U.S. 564, 580 (1985).
224. The Law of Civil Procedure of the People's Republic of China, art. 2.
225. *See id.* art. 153.
226. *See id.*
227. FRIEDENTHAL ET AL., *supra* note 46, at 620.
228. Nanping Liu, *supra* note 178, at 50.

in principle, be reopened or redecided, no matter when, where or how the error was discovered."[229] The appellate court may even correct an error that the appellate court has found, despite the party's failure to appeal the judgment of the trial court.[230] The reason is simple: any error should be avoided and corrected if it has occurred and been discovered in the Chinese civil process.

An American "appellate court cannot act as a trial court and receive new evidence concerning the facts."[231] "[T]aking of new evidence would be an intrusion on jury trial rights."[232] The litigants may present new evidence before a Chinese appellate court.[233] While this provision is found in Chapter 12, which deals with trial court proceedings, it is equally applicable to the appellate proceeding. According to the LCP, a Chinese appellate court should observe the provision in Chapter 14 dealing with appellate proceedings as well as those provisions prescribed in Chapter 12 regarding new evidence.[234] Furthermore, the litigants may request a new investigation or inspection.[235] A Chinese appellate court must form a collegiate panel to hear an appellate case.[236] The appellate court may question the parties, make additional investigation, and consult the record of the trial court proceeding.[237] A Chinese appellate court may hear the case in its own courtroom, on the scene of the event, or the courtroom of the trial court.[238] Finally, the appellate court may review all facts and law relevant to the appeal.[239] As Chinese appellate courts act as the supervisor of trial courts, Chinese appellate courts have virtually no limitation on the scope of their review.

c. Protests by Procuratorate

In the U.S. court system, the prosecution has no power to supervise the courts. In China, however, the primary function of the procuratorate is a supervisory organ for application of laws.[240]

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229. *Id*. at 53.
230. Opinion Concerning the Law of Civil Procedure, art. 180.
231. FRIEDENTHAL ET AL., *supra* note 46, at 619.
232. *Id*. at 620.
233. The Law of Civil Procedure of the People's Republic of China, art. 125.
234. *Id.* art. 157.
235. *Id.* art. 125.
236. *Id.* art. 152.
237. *Id*.
238. *Id*.
239. *Id.* art. 151.
240. P.R.C. CONST. art. 129 (1982); *see also* The Law of Civil Procedure of the People's Republic of China, art. 14. The procuratorate is also responsible for investigating cases involving corruption, bribery, and dereliction of duty, and for prosecuting criminal cases on behalf of the State. Yang Lixin, *Brief Study of Forms of Procuratorial Supervision over Civil*

The procuratorate normally supervises adjudicative activities of courts by making procuratorial protests against erroneous civil, administrative and criminal judgments.[241] Generally, the Chinese Supreme Procuratorate may protest against a legally effective judgment or ruling rendered by a court at any level.[242] The procuratorate at a higher level may protest against a judgment rendered by a court at a lower level.[243] The circumstances that trigger a protest by the procuratorate are the same as those that allow a litigant to make a motion for a new trial.[244] Where a court conducts a new trial of the case protested by the procuratorate, the court must give a notice to the procuratorate so that the latter can appear at the hearing.[245]

The system of procuratorial protest was transplanted from the former Soviet system of civil process, whereby the chief procurator might make protest against unlawful or unjustified judgments regardless of whether he participated in adjudication of the case.[246] While China now has a completely different social and political system from the former Soviet system, China retains the system of the procuratorial protest. Thus, once the procuratorate has made a protest, the court has to conduct a new trial.[247] Further, while the LCP requires the litigant to apply for a new trial within two years after the judgment or ruling becomes effective,[248] the LCP does not provide for any time limit for the procuratorial protest.[249] Therefore, the procuratorate can make a protest against an effective judgment any time it pleases.[250] As a result, litigation potentially never comes

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and Administrative Litigation, http://jc.gov.cn/personal/ysxs/fnsx2/fnsx1438.htm (last visited June 1, 2003).

241. P.R.C. CONST. art 129 (1982); s*ee also* The Law of Civil Procedure of the People's Republic of China, art. 14.

242. The Law of Civil Procedure of the People's Republic of China, art. 185.

243. *Id.*

244. *See* arts. 179, 185.

245. *Id.* art. 188.

246. Yang Lixin, *supra* note 240.

247. *Id.*

248. The Law of Civil Procedure of the People's Republic of China, art. 182.

249. *See id.* art. 185

250. Here is a rarely published case involving a protest by the procuratorate.

> The Shenzhen People's Procuratorate lodged a protest in April [1998] against a decision of Futian District People's Court made three years ago against Workers' Daily, a Beijing-based national newspaper. . . . Futian People's District Court decided in January 1995 that Workers' Daily and two guest correspondents had defamed Liu Xingzhong, general manager of the Shenzhen Car Industry Trading Company (SCITC), by publishing a news story a year before accusing him of corruption and presumption. . . . The Futian Court ruled that the [allegations] were groundless and ordered the three defendants to pay [the plaintiff] $50,000 yuan (US $6000) in [damages and] . . . publish an apology.

to an end. If litigation can never be concluded, it is unlikely that the court can ever discover the truth.

The procuratorial protest can be initiated by submitting a petition to the procuratorate by the party to the lawsuit or other interested persons.[251] The rules do not define "other interested persons."[252] The procuratorate received 432,000 visits by petitioners in 2002.[253] In addition, the people's congress and other institutions may transfer petitions to the procuratorate for a procuratorial protest.[254] Here, the rules again fail to characterize "other institutions." Generally, Party committees, youth organizations, women's organizations and media are frequent originators of petitions. A higher procuratorate may direct a lower procuratorate to make a procuratorial protest.[255] Further, the procuratorate may make the protest on its own initiative when it discovers an erroneous judgment.[256]

The procuratorate can make a protest only against a judgment or ruling that has taken effect.[257] Thus, if a judgment or ruling has not become effective, the procuratorate cannot protest against it.[258] In addition, the procuratorate cannot protest against a judgment if the court has agreed to conduct a retrial.[259] Further, the procuratorial protest does not apply to a termination of marriage or adoption.[260] Finally, the procuratorate will not accept a petition for a judgment as to which the procuratorate has decided not to protest the judgment.[261]

> *Libel Cases Cause Media Concern*, CHINA DAILY, Aug. 18, 1998 (internal quotations omitted). After the court decision, the defendants submitted a petition with the Supreme Procuratorate, which sent several procurators to Shenzhen to investigate the case. Then the Supreme Procuratorate directed the Provincial Procuratorate of Guangdong to lodge the protest in June 1995. The Provincial Procuratorate of Guangdong delegated the protest to the Shenzhen Procuratorate. The protest stated that the ruling of the Futian District Court was erroneous in both determining the facts and applying the law.
> *Id.*

251. Rules of the People's Procuratorate Regarding Protesting Civil and Administrative Judgments, art. 4 (For brevity, this source will be cited as "Procuratorial Protest Rules" for the remainder of the article).
252. *See id.*
253. *See generally,* Procuratorial Work Report.
254. Procuratorial Protest Rules, art. 4.
255. *See generally* Procuratorial Protest Rules.
256. *Id.*
257. *Id.* art. 5(1).
258. *Id.* art. 6(1).
259. *Id.* art. 6(3).
260. *Id.* art. 6(2).
261. *Id.* art. 6(4).

The judgment or the ruling must be erroneous for the procuratorate to make a protest. A judgment or a ruling is erroneous if based upon insufficient evidence, incorrect application of law, or violation of procedure.[262] The insufficient evidence standard can be satisfied in the following situations: (1) where the facts ascertained in the ruling are not supported by any evidence; (2) where the ruling failed to establish a fact despite sufficient evidence proving it; (3) where the ruling adopted false evidence as the basis for its factual determination; (4) where the judge failed to conduct a necessary investigation, resulting in prejudice to a party because that party was unable, for objective reasons,[263] to collect evidence; (5) where both parties produced conflicting evidence but the judge failed to conduct an investigation or collect evidence when he should have done so; (6) where the ruling adopted an appraisal made in violation of law or by an unqualified appraiser; or (7) where the judge failed to make his own appraisal when he was required to do so.[264]

Incorrect application of law can occur when the judge fails to correctly characterize the nature or the subject matter of the legal relationship involved in the case. Incorrect application of law can also involve erroneous ascertainment of the owner of the rights, burden of liability, or division of liability. If the judgment or the ruling imposes liability on the defendant by omitting claims or exceeding the claims, it is an incorrect application of law. A final example of an incorrect application of law is where the judgment or the ruling fails to sustain a claim that has not exceeded the statute of limitations or maintains a claim that exceeds the statute of limitations.[265]

Violation of legal procedure refers to the failure to observe the rules of recusal, i.e., the interested judge or clerk failed to recuse himself. Also, if the trial is held and the judgment or the ruling was made after the trial was closed, it clearly constitutes violation of procedure.[266] Further, if the judge made a judgment or ruling on default without serving a subpoena on the party who failed to appear in court, a violation occurs.[267] In addition, an obviously unfair judgment may also be characterized as "erroneous."[268]

While the judgment for which the procuratorate makes a protest must be erroneous, not all erroneous judgments will be subject to

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262. *Id.* art. 12.
263. *See supra* note 65.
264. Procuratorial Protest Rules, art. 33.
265. *Id.* art. 34.
266. *Id.*at art. 35
267. *Id.*
268. *See generally,* 2003 Work Report, *supra* note 192.

the procuratorial protest. The procuratorate will decide not to make a protest if the petitioner fails to meet the burden of proof during the trial.[269] The petitioner cannot apply for a procuratorial protest if the evidence admitted at trial is not sufficient to prove that the judgment or the ruling is erroneous or violates the law.[270] This limitation distinguishes the petition for a procuratorial protest from the motion for a new trial. The LCP allows the aggrieved party to apply for a new trial if he can produce new evidence that is sufficient to prove that the judgment is erroneous.[271] The procuratorate will also refuse to make a protest if there is an error in the judgment with respect to ascertainment of facts or application of law, but its result does not substantially affect the interests of the state, the public, or the parties to the lawsuit.[272] If the court violated legal proceedings, but its violation did not affect the making of the judgment or the ruling, the procuratorate will also refuse to make a protest.[273]

The procuratorate may request the record for consultation from the court.[274] Upon receipt of the court record, the procuratorate must conclude its review within three months.[275] After the procuratorate accepts a petition, it will check whether the petition has satisfied the requirements imposed by the LCP.[276] While the procuratorate will review the case primarily based on the court record,[277] it may conduct its own investigation if the court failed to conduct a necessary investigation or collect evidence as required by law.[278] The procuratorate may also conduct an investigation when it suspects that judicial corruption has probably occurred or the major evidence upon which the court ascertained the fact was

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269. Procuratorial Protest Rules, art. 26(11).
270. *Id.* art. 26(2).
271. The Law of Civil Procedure of the People's Republic of China, art. 179(1).
272. Procuratorial Protest Rules, art. 26(4).
273. *Id.* art. 26(5).
274. *Id.* art. 14.
275. *Id.*
276. *See* The Law of Civil Procedure of the People's Republic of China, art. 185. According to Article 185, the petition for a procuratorial protest must meet at least one of the following requirements:

> the main evidence ascertaining the facts in the previous judgment or order was insufficient;
> there was error in the application of the law in the previous judgment or order;
> a violation of the legal procedure may have affected the correctness of the judgment or order;
> the judicial personnel committed embezzlement, accepted bribes, or [otherwise manipulated the result for personal gain].

Id.
277. Procuratorial Protest Rules, art. 17.
278. *Id.* art. 18.

probably false.[279] It is commonplace for the aggrieved party to turn directly to the procuratorial petition process and disregard the right to appeal.[280] The procuratorate may also require the petitioner to produce evidence in support of his petition.[281] If the petitioner fails to produce evidence as required, he will be deemed to have withdrawn his petition.[282] After the procuratorate's review is concluded, the procuratorate will decide whether it will lodge a protest with the court.[283]

Apart from the procuratorial protest, the procuratorate may also exercise its supervisory power by making procuratorial suggestions.[284] Compared with the procuratorial protest, procuratorial suggestions have some advantages in that they do not trigger the complex procedure for the procuratorial protest,[285] the erroneous judgment can be corrected in a more timely way, and they help maintain a good relationship between the procuratorate and the court.[286] Finally, they have a wider scope of application and may be applied to correct any errors that occurred in the course of adjudication or in the judgment.[287]

V. OBSTACLES TO ASCERTAINMENT OF THE TRUTH

No system can ensure a perfect result in every case, and the Chinese system is no exception. Although China has an extensive supervisory system to ensure that the truth is discovered, the actual result is stunningly unsatisfactory. First, the number of judges who have been punished for judicial misconduct is still quite high. In 1998, 2,500 judicial officers were duly punished because of their misconduct.[288] In addition, some 1,454 cases that were "mishandled or not tried in strict accordance with law have been discovered, of which 1,255 have already been corrected."[289] In June 1998, the Chinese Supreme Court released statistics indicating that more than 10,000 judgments, from among 15 local courts alone, were found inappropriate and were later corrected.[290] Further,

279. *Id.*
280. Wang Peizhong, *Tantan Sifa Jiandu de Ruogan Wenti* [*Several Issues Involving Judicial Supervision*], JURISPRUDENCE, Feb. 2000, at 152, *at* http://www.jc.gov.cn/personal/ysxs/fnsx2/fnsx1956.htm.
281. Procuratorial Protest Rules, art. 19.
282. *Id*.
283. *Id*. art. 25.
284. *See* Yang Lixin, *supra* note 240.
285. *Id.*
286. *Id.*
287. *Id*.
288. *Top Judge Elaborates Courts' Focus of Work*, CHINA DAILY, Mar. 12, 1999.
289. *Judges Honored for Services to Justice*, CHINA DAILY, Oct. 21, 1998.
290. *Commentary*, CHINA DAILY, Aug. 13, 1998.

preliminary statistics suggest that, in the first eight months of 1998, "local people's courts returned 8.27 million yuan (US$996,300) of overcharged fines."[291] These statistics indicate that the Chinese civil process frequently fails to realize its purported goal of seeking the truth. There are a number of problems inherent in the Chinese system that are attributable to the failure of the Chinese civil process to achieve its purported purpose. The following issues account for most of the problems of the Chinese civil system.

A. The Traditional Combination of the Judicial and the Administrative (Executive) Functions

It is generally understood that the extensive powers of Chinese judges are derived from the civil law tradition — the inquisitorial system. The Chinese legal system is influenced more by the civil law system than by the common law system. China began to import western legal systems in the early twentieth century.[292] Based upon some European legal codes, the Nationalist Government (which ruled from 1912 to 1949) enacted six basic substantive and procedural codes covering commercial, civil, and criminal law.[293] After the Chinese Communist Party seized power in 1949, China turned to the Soviet Union for a model for its legal institutions.[294] However, the current system is derived primarily from a unique tradition.

Traditionally, there was no distinction between the judiciary and the executive in China. A single local official, called the county magistrate, performed the functions of the head of the local government as well as that of the judge.[295] His primary task was to foster "the overall welfare of the Emperor's charges living within his district."[296] Therefore, he took on "a range of investigatory, prosecutorial, adjudicatory, and other responsibilities."[297] In order to discharge his responsibility to ascertain the truth, the county magistrate had the authority to "ask any questions he wished, personally view the scene of the crime, assign staff to investigate and to produce all evidence and witnesses, apply torture . . . and admonish the accused."[298] The myriad of duties of a county

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291. *People's Congresses to Monitor Court Work, supra* note 151.

292. Robb M. LaKritz, *Taming a 5,000 Year-old Dragon: Toward a Theory of Legal Development in Post-Mao China*, 11 EMORY INT'L L. REV. 237, 248-49 (1997).

293. *Id*. at 249.

294. *Id*. at 250.

295. William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945, 952 (1986).

296. *Id.*

297. *Id.*

298. *Id.*

magistrate also included providing advice on functions such as "assessing and collecting taxes, regulating the local militia, maintaining a healthy fiscal administration, promoting the public welfare, overseeing the administration of justice, and fulfilling the Confucian ritual obligations of the position."[299] The county magistrates were not judicial officers in the sense of the common law system. They were "the 'father and mother of the people,' [standing] in the place of the Emperor, enforcing the Emperor's commands. There could be no checks upon such power. . . . The magistrate *was* the state."[300] "The courts of traditional China . . . served not only as judicial centers of dispute settlement, but also as the local outposts of the civil service administration. The county magistrate . . . supervised the gamut of civil services" in his county.[301]

After the establishment of the PRC, military officials gradually filled many judicial posts.[302] These new judges lacked legal knowledge and skills, "bringing a new approach to the law. . . . [T]hey argued that the law should be simple, free of technicalities, and easy for one to understand. The "new cadres" stressed simplicity, in part to rationalize their own lack of legal expertise."[303] "The primary task of the [judicial] officials was to educate the people to behave properly."[304] Chinese courts became forums for dispute resolution, education, and governance. As Professor William Jones, a prestigious expert in Chinese legal tradition concluded, "courts in contemporary China, unlike those in the West, are not central institutional constituents of the formal legal system, but are instead of only marginal significance."[305]

Chinese practice, however, indicates that active judges are not necessarily in a better position to seek the truth than their U.S. counterparts. About 50% of trial court judgments in 1999 were appealed.[306] Among these judgments, only 26.6% of judgments were

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299. Janet E. Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law*, 82 CORNELL L. REV. 19, 38-39 (1996).

300. Berring, *supra* note 176, at 440.

301. Justice Robert F. Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383, 385 (1987).

302. *See id.* at 388.

303. *Id*. at 389.

304. Bobby K. Y. Wong, *Chinese Law: Traditional Chinese Philosophy and Dispute Resolution,* 30 HONG KONG L.J. 304, 307 (2000). "During the Cultural Revolution, the Chinese court system was decimated and became effectually non-functional." James Hugo Friend, *Foreword: The Rocky Road Toward the Rule of Law in China: 1979-2000*, 20 NW. J. INT'L L. & BUS. 369, 374 (2000).

305. Janet E. Ainsworth, *On Seeing Chinese Law from the Chinese Point of View: An Appreciative Look at the Scholarly Career of Professor William Jones,* 74 WASH. U. L.Q. 547, 556 (1996) (citing William Jones, *Some Questions Regarding the Significance of General Provisions of Civil Law of the People's Republic of China*, 28 HARV. INT'L L.J. 309, 324 (1987)).

306. *See* He Bing, *supra* note 4.

sustained.[307] The low rate of sustained judgments indicates that appellate courts have strengthened their supervision of trial courts, but also demonstrates the poor quality of adjudication of trial courts,[308] even though trial judges have extensive powers to investigate cases. Furthermore, active judges may obstruct or inhibit the truth seeking process. For instance, a court should conduct a new trial if the litigant has produced new evidence that is sufficient to reverse the judgment or the ruling.[309] However, the LCP does not define the scope of "new evidence."[310] Examples of "new evidence" include three types of evidence: first, where the litigant failed to produce the evidence because he did not discover it at the time of litigation; second, where the litigant believed pertinent evidence existed but was unable to collect it, or he informed the court of this belief but the court failed to collect the evidence; third, the litigant had the evidence but, for some reason, failed to produce it.[311] Under these circumstances, the judgment will likely be erroneous due to a lack of crucial evidence.

B. Extensive Supervision Leads to Excessive Intervention

While extensive supervision may facilitate fair adjudication, it also provides illegitimate opportunities for external influence, consequently abridging judicial independence. Judicial independence requires that the judicial power be separate from the legislative and executive powers.[312]

In recent years, local protectionism — in American terms, "hometown justice" — is "the strongest and most insidious type of extra judicial influence on the outcomes of disputes."[313] Chinese judicial reform, initiated in the late 1970's, has lead to the "decline in the power and role of the central government in the creation, implementation and enforcement of law and policy."[314] This reform, however, is not proceeding in accordance with a detailed master plan.[315] There is a great deal of experimentation at the local level. Such local experimentation gradually extended the authority of local

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307. *Id.*
308. *Id.*
309. The Law of Civil Procedure of the People's Republic of China, art. 179(1).
310. *See id.*
311. Zhang Weiping, *supra* note 193.
312. Laifan Lin, *supra* note 133, at 187.
313. Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, *in* CHINESE LAW AND LEGAL THEORY, 289-380 (Perry Keller ed., Dartmouth Publishing Company Limited 2001).
314. Friend, *supra* note 304, at 374.
315. *See id.*

governments to make their own decisions.[316] Today, local governments have much more authority to make decisions in local affairs. While this decentralization effectuated China's economic reform goals, it also produced local protectionism. Local protectionism favors locals over outsiders in adjudications and in enforcement of judgments. If an outsider does achieve a judgment in his favor, "the enforceability of that judgment by a local Chinese court is extremely difficult, unnecessarily time consuming, and often ultimately unsuccessful."[317]

"[L]ocal Party subunits like Political-Legal Committees place significant external pressure on judicial dispute resolution. Local cadres also exercise control through their ability to make formal judicial appointments and dismissals."[318] While Chinese law requires that court presidents be elected by the people's congress, the organizational department of the local Party committee determines appointment of court presidents.[319]

> While in theory local [officials] regulate court behavior by general policy making and local legislation, in practice they remain watchful of judicial behavior. . . .
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> . . . [J]udges seemed more like extensions of state administration, checking abuses of power by local cadres to protect economic policies of central planners, than rational Western adjudicators applying law to serve justice among disputants.[320]

Judges are financially and institutionally dependent upon local governments in the jurisdictions in which they serve.[321] As the financing of the courts still depends on the governments at various levels, judges do not have any financial independence.[322] While the Chinese Supreme Court supervises the adjudicative work of all

316. *Id*.
317. *Id*. at 380.
318. LaKritz, *supra* note 292, at 260.
319. He Weifang, *Two Issues Regarding the System of Judicial Administration in China, supra* note 56.
320. LaKritz, *supra* note 292, at 260-61.
321. Laifan Lin, *supra* note 133, at 198.
322. *Id*.

other courts, it has no power over their individual budgets.[323] Decisions in these matters are in the hands of local governments. This system contributes greatly to conversion of local protectionism to "local judicial protectionism," in that local courts use their judicial power in favor of local parties. "Judges are dependent on local government personnel for their wages, promotions, and bonuses, and are therefore discouraged from draining local government resources by deciding in favor of nonlocal [sic] contract parties."[324]

In order to protect local interests, local officials often interfere with adjudication in pending litigation. This influence "creates pressures on the courts to persuade complaining parties to withdraw suits, to issue judgments not in accord with law and facts, and to punish judges who try to be impartial with transfers."[325] It is not surprising that local governments and local people's congresses intervene in the execution of judgments.[326] The local police and procuratorate are also involved in resisting the execution of judgments against local businesses.[327] In extreme cases, they even resist the enforcement of judgments from other jurisdictions by force or by taking away goods confiscated by the court.[328] More than 50 such cases have been reported to the Supreme Court since 1992.[329] Local protectionism is one of the reasons that the Chinese Supreme Court withdrew jurisdiction over foreign-related commercial cases from all basic and some intermediate courts.[330]

Some Chinese scholars show great sympathy for Chinese judges. They argue that when leaders (whether from a local government, Party Committee or People's Congress) believe the case should be decided in favor of a local litigant, the court president should not resist this influence because all benefits and financial resources are in the hands of these leaders.[331] Chinese courts depend largely upon

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323. P.R.C. CONST. art. 127 (1982).

324. LaKritz, *supra* note 292, at 262.

325. Lubman, *supra* note 27, at 395. State-owned enterprises, those companies affiliated with the army and local authorities, are often the most difficult to collect outstanding debts from. For instance, Chongqing Special Steel Corp. (CSSC), the largest steel company in China, owed 700 million yuan (US $84 million) to its creditors. When the court executed the judgment against CSSC, the Chongqing Government refused to let CSSC be treated like a bankrupt business. *Courts Face Hurdles in Backlog*, CHINA DAILY, Nov. 30, 1998.

326. *Courts Face Hurdles in Backlog, supra* note 325. Jilin Provincial Government announced that ninety-four major enterprises within its province would have "special protection" — free from any liability in debt collection actions. *Id.* There are likely more protective enterprises at the prefectural and county levels.

327. *Id.*

328. *Id.*

329. *Id.*

330. Xin Zhiming, *supra* note 144.

331. He Weifang, *Two Issues Regarding the System of Judicial Administration in China, supra* note 56.

local government and Party authorities on such matters as appointment, removal, and promotion.[332] In addition, financial sources come entirely from the appropriation made by the local government.[333] The budgetary funds of local governments primarily come from the taxes paid by local businesses.[334]

Supervision by the people's congress is also problematic as it damages the finality of judicial power. The people's congress lacks procedural safeguard for its supervision.[335] The Chinese constitution empowers the people's congress to supervise adjudication of the courts, but it does not provide for any procedure for such supervision.[336] A decision made by the people's congress without any formal procedures is hardly more just than a judgment by a judge through formal legal procedures. Furthermore, some people's deputies may have a stake in a particular lawsuit. There are nearly 3,000 deputies to the national people's congress.[337] The number of deputies in local people's congresses at various levels far exceeds this number.[338] Given the great number of people's deputies, it is hard to believe that none of them are involved in lawsuits; accordingly, their impartiality is reasonably doubtful.[339]

Due to extensive supervision, a judge may feel some hesitation in making his decision if the case seems complex or involves some political elites. In this situation, a judge may seek instructions from a higher court, making that court (appellate court) the actual trial court.[340] When the instructions from the higher court prove wrong (which is not unusual because the higher court did not hear the case), the higher court will often decline to correct its own error even if the case is appealed to it.[341] As the normal appellate process fails to perform the function of correcting erroneous judgments, the aggrieved party has to resort to other means to obtain justice, thereby encouraging resort to external influence.

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332. *Id.*
333. *Id.*
334. Yantian District People's Procuratorate of Shenzhen Municipality, The Current Situation of Our Adjudicative System, *available at* http://www.jc.gov.cn/ (last visited Jan. 5, 2004).
335. *See* P.R.C. Const. art. 128 (1982).
336. Wang Peizhong, *supra* note 280, at 152.
337. Statistics available at http://www.chinadaily.com.
338. P.R.C. CONST. art. 128 (1982).
339. Wang Peizhong, *supra* note 280, at 153.
340. P.R.C. CONST. art. 152 (1982).
341. *Id.*

C. Preference of Substantive Truth over Procedural Value

Supervision, even unnecessarily extensive supervision, by itself is not the root of interference and intervention. The problem lies in China's preference of substantive truth over procedural values.

As previously suggested in this article,[342] in order to seek the truth, the county magistrate had authority to use any conceivable means to adjudicate a case.[343] No formal procedures existed to restrain the county magistrates' authority to adjudicate cases, although some informal procedural rules might have existed.[344] Mao's instrumentalist approach to legal institutions further intensified the Chinese preference of substantive truth over procedural values.[345] Mao's approach to procedure was the so-called "mass line," which included administration of justice by the people rather than by a group of elite professionals.[346] The mass line approach to administration of justice soared to prominence during the Cultural Revolution (1966-1976), which led to the overthrow of all formal legal institutions and everyone associated with them, including judges, lawyers, and procurators.[347] The most often-used mass line technique was the mass campaign. "The mass campaign [was] designed to mobilize popular awareness of and support for current government priorities and goals . . . . Launched by a central government directive defining its objectives and scope, a mass campaign [was] pursued by local government, mass organizations, the mass media" and many other entities.[348]

After more than 20 years of reform, the mass line approach has lost its domination of the administration of justice in China. But it is still an important supplement to formal legal institutions. For instance, campaigns are excellent devices by which Chinese courts can crack down corruption. The Chinese Supreme Court launched a nationwide campaign to promote ethical conduct and punish corruption among judges in 1998.[349] Three years later, the President of the Chinese Supreme Court announced the launching of a new campaign addressing ethical education and disciplinary action in order to ameliorate increasingly widespread judicial corruption.[350] The launching of a new campaign indicates that the

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342. *See infra* Part V.
343. *See* Alford, *supra* note 295, at 952.
344. Ainsworth, *supra* note 280, at 39.
345. *See* Lakritz, *supra* note 292, at 250.
346. Utter, *supra* note 301, at 390.
347. *Id*.
348. Ainsworth, *supra* note 322, at 557 n.46.
349. Shao Zongwei, *Judge Calls for Judicial Clean-up*, CHINA DAILY, Jan. 4, 2001.
350. Shao Zongwei, *Court Rules Tightened*, CHINA DAILY, Jan. 6, 2001.

previous campaign failed to achieve its purpose of coping with corruption.

In civil proceedings, the LCP requires that courts base their judgments on fact "and take the law as the criterion."[351] In reality, however, the law is not the only criterion. The courts must accept the leadership of the Party and the guidance of the Party's ideology.[352] While Chinese judges are more professional now than at any other time in China's history, it is still not uncommon for a judge to "use 'ideological discretion' to achieve a 'correct' ideological result which is consistent with the [Party] policy. This is not only legal in China, but is actually mandated by the 1982 Constitution."[353] Thus, civil process becomes a tool to articulate and apply the Party's ideological principles, values, and programs and helps to mobilize people to increase their commitment to the Party's policies and goals. Among the qualifications required of a good judge, ideological purity and political dependability are most critical.[354] One of the primary tasks for courts is to educate judges in the Party's ideology.[355] This practice of Chinese courts of putting politics first raises a number of questions. First, what is the Party's ideology? Nobody can provide an accurate answer to this question because the Party's ideology is ever changing — and extremely simple and broadly worded. If there is no definitive answer to this question, then how can judges adjudicate cases under the guidance of the Party's ideology? Additionally, the Party's current ideology is in conflict with Marxist orthodox theories, even though the Party still claims Marxism-Leninism as its guiding principle. When the Party's ideology is not consistent with itself, which is commonly the case, who interprets the conflicting doctrines? For instance, can a judge use as guidance a Marxist theory which conflicts with the Party's current policy? Finally, and most importantly, there is no procedure under which the Party's ideology directs adjudication. The vagueness of the Party's ideology, conflicting policies, and lack of procedure provide Party officials many opportunities to interfere with judicial work. Thus, in reality, the Party and its officials influence judicial ideology. As a result, China's legal discourse repeatedly asks, "[W]hat matters more: official rank or the law?"[356] One Party secretary provided a definite answer to this question:

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351. The Law of Civil Procedure of the People's Republic of China, art. 7.
352. 2003 Work Report, *supra* note 192.
353. Friend, *supra* note 304, at 375.
354. 2003 Work Report, *supra* note 194.
355. *Id.*
356. Donald C. Clarke, *Dispute Resolution in China*, 5 J. Chinese L. 245, 265 (1991) (quoting Gaishan Zhifa de Keguan Tiaojian [Improve the Objective Conditions for the Implementation of Law], FAZHI RIBAO, Apr. 13, 1989, at 16).

"Law is made by man; without man, how could there be law? Without man how could law matter at all? That's why I say rank matters more."[357] Although now no Party official would openly make such a statement (indicating China's progress towards the rule of law), the reality remains basically unchanged.

Party ideology is not the only problematic aspect of the Chinese legal system. Some scholars also point to a number of problems with the adjudication committee, a body that violates the principles of litigation.[358] First, the committee separates the power to determine the case from the body that hears the case.[359] When the adjudication committee gets involved in a case, the ones who hear the case (judge or collegiate panel) are not the ones who have the power to decide the case.[360] Second, the committee deprives parties of the right to request the withdrawal of a judge who is prejudiced against them.[361] There is no right to request the withdrawal of any member of the adjudication committee, even if that member has a stake in the outcome of the litigation.[362] Third, the committee's involvement in a case makes it difficult to determine the liability for erroneous judgments.[363] When the adjudication committee decides a case without participating in any of the court proceedings, it is not clear who should be responsible if the judgment turns out to be erroneous. In practice, the collegiate panel is held liable for any error in ascertaining the facts, while the adjudication committee is responsible only for any incorrect application of law if it determines the case.[364] But it is not always clear whether it is wrongful ascertainment of facts or incorrect application of law. The members of the adjudication committee know little about the cases on which they are going to deliberate before the adjudication committee is convened.[365] Although the LCP recognizes the fundamental principle of open trials,[366] the adjudication committee's deliberations violate this principle because they are completely closed to the public.[367]

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357. *Id.*.
358. Shi Weibing, *Shenpan Weiyuanhui Zhidu Gaige Chutan* [*Brief Exploration of Reform of the System of the Adjudication Committee*], LEGAL DAILY, *available at* http://www.jc.gov.cn/ (Feb. 27, 2000).
359. *Id.*
360. *Id.*
361. *Id.*
362. Shi Weibing, *supra* note 381.
363. *Id.*
364. *Id.*
365. *See Id.*
366. The Law of Civil Procedure of the People's Republic of China, art. 10.
367. He Weifang, *Zouxian Sifa Gongzheng de Bage Zhidu Yaojian* [*Eight Elements of Judicial Fairness*], *at* http://mylaw.myrice.com/ (last visited Jan. 5, 2004).

Even where formal adjudicatory procedures exist, it is quite common for Chinese courts to only loosely follow the procedures. For example, a higher court may equally offer instructions to a lower court without request when the higher court believes the case is one of "important impact."[368] While the LCP does not authorize such a practice, one senior judicial officer suggests that such a practice would prevent an error from occurring at the outset, and accordingly facilitate judicial economy.[369] He further argues that a higher court has an obligation to supervise lower courts in their adjudication.[370] If a higher court failed to provide guidance in a timely way and allowed the error to occur, the higher court breached its duty of supervision.[371] This practice, however, is not consistent with the relevant statute, which requires basic courts and intermediate courts to refer important and major cases to a higher court, but does not allow instructions in advance.[372]

Formal procedure is often perfunctorily applied. Because the judge conducts an extensive investigation and collects evidence before he hears the case, he has an understanding of the likely result of the litigation before adjudication commences. In some instances, the judge will make a decision about the outcome of a case before hearing any argument, making the trial essentially a "show trial." Further, in the course of investigation, the judge inevitably has frequent, often ex parte, contacts with both litigants. All of these extra-evidentiary influences on judgments are problematic. Frequent contacts between the judge and litigants facilitate judicial corruption because they are not subject to any procedural requirements.

a. Inconsistency in Laws

In China, both the legislative body and the executive branch share the rule-making power. The legislative, law-making body is the National People's Congress (NPC) and its Standing Committee.[373] The executive branch is headed by the State Council, which has authority to make administrative regulations.[374] The

368. He Weifang, *Two Issues Regarding the System of Judicial Administration in China, supra* note 56.
369. *Id*.
370. *Id.*
371. He Weifang, *Two Issues Regarding the System of Judicial Administration in China, supra* note 56.
372. *See* Organic Law of People's Courts of the People's Republic of China, arts. 21 and 25.
373. P.R.C. CONST. arts. 62(3), 67(2) (1982); *see also* The Law on Legislation of the People's Republic of China, art. 7.
374. P.R.C. CONST. arts. 85, 89(1) (1982); *see also* The Law on Legislation of the People's Republic of China, art. 56.

executive agencies may enact departmental rules.[375] Apart from the diversity of rule-making power, the power to interpret the law is also fragmented. The legislative body, the executive branch, and the Chinese Supreme Court all possess the power to interpret laws.[376] The consequence of this fragmentary power to make and interpret the law is widespread inconsistency both in enacted law and in the interpretation of law. Not only do courts have difficulty applying these conflicting rules and interpretations, but the conflicting rules also provide opportunities for judges to arbitrarily apply the law, particularly when they are motivated by personal interest or external pressures. Chinese laws are usually expressed in simple, broad language.[377] "Standard drafting techniques include the use of general principles, undefined terms, broadly worded discretion, omissions, and general catch-all phrases."[378] Vague and conflicting provisions in Chinese law may lead to arbitrary application by courts of these rules in particular cases. Fragmentation of the power to make and interpret rules provides other institutions with opportunities to impermissibly interfere with courts' adjudication.[379]

Another less formal, but more important, category of Chinese law is the "policy law," which takes the form of policy statements, meetings, notices, instructions, and speeches.[380] As a result, the Chinese legal system amounts to "a bewildering and inconsistent array of laws, regulations, provisions, measures, directives, notices, decisions, explanations, and so forth, all claiming to be normatively binding."[381] Complicating this legal uncertainty is the fact that China does not adopt the doctrine of precedent; Chinese courts "have been more concerned with substantive justice than with

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375. P.R.C. CONST. art. 90 (1982); *see also* The Law on Legislation of the People's Republic of China, arts. 71 and 72.

376. P.R.C. CONST. art. 67(4) (1982); The Law on Legislation of the People's Republic of China, arts. 85, 86.

377. Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 749-52 (1994).

378. Lubman, *supra* note 27, at 391.

379. On Nov. 30, 1998, China's Ministry of Public Security (MPS) issued to all public security bodies throughout the nation the Notice on the Scope of Application of Reeducation through Labor (RTL). This notice is intended only to be a document directing the work of public security bodies because MPS is an executive agency. However, the notice also tells courts what to do by clearly stating, "When reviewing the administrative decisions as to application of RTL, *courts should take into full consideration the actual situation in rural areas, treat them with great care and should not readily turn down the decisions made by the relevant authorities which approved application of RTL.*" *Id*. (emphasis added).

380. *Id*.

381. Orts, *supra* note 28, at 68 (quoting Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China,* 11 CULTURAL DYNAMICS 315, 333 (1999)).

ensuring uniformity of results."[382] Because the Chinese legal system is not consistent in terms of its laws and result, Chinese judges have greater latitude to arbitrarily adjudicate cases. This inconsistency also encourages external influence on judicial decisions. "The complexity of the interaction among these different levels of law and their administration opens the door for political policy decisions to replace legal rules in deciding particular cases."[383]

D. Quality of Judges

One commentator suggests that Chinese judges are "ordinary civil servants rather than special officials independent of political authority."[384] Thus, they do not share the same values that typical common law judges have. As stated earlier, most Chinese judges fail to meet the minimum educational requirements. One of the reasons so many judges lack formal education is that, during the upheaval of the Cultural Revolution (from 1967 to 1978), law schools were closed, and China's judicial system was virtually wiped out.[385] When courts were reestablished in the late 1970's, courts and procuratorate offices "had to hire non-professionals with limited understanding of the law and then provided them with training in the 1980s."[386]

Now, China has increased its entry requirements for judges. Only those who have passed National Judicial Examination, which replaced the separate examinations for judges, procurators and lawyers, can become judges.[387] But even under the Judges Law, formal law school education is not a requirement.[388] Because a great number of judges lack formal education, China must spend a lot of money on training programs. For instance, from 1997 through 2002, more than 200,000 judges received professional training.[389] In recent years, China has adopted "ambitious plans to send top judges to study abroad" so that they will be more qualified to adjudicate foreign-related cases.[390]

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382. Friend, *supra* note 304, at 375 (quoting Margaret Y. K. Woo, *Law and Discretion in Contemporary Chinese Courts, in* THE LIMITS OF THE RULE OF LAW IN CHINA 163, 170 (Karen Turner et al. eds., 2000)).

383. Orts, *supra* note 28, at 67.

384. Alford, *supra* note 295, at 949 (quoting Jerome A. Cohen, *Due Process?, in* THE CHINA DIFFERENCE 237 (R. Terrill ed. 1979)).

385. Shao Zongwei, *Exam to Improve Legal Professionals*, CHINA DAILY, Apr. 1, 2002; Lubman, *supra* note 27, at 388-89.

386. Shao Zongwei, *Exam to Improve Legal Professionals*, *supra* note 387.

387. Shao Zongwei, *Exam to Improve Legal Professionals*, *supra* note 387.

388. Law on Judges, art. 45.

389. Shao Zongwei, *Court to Guarantee Fair Trials*, CHINA DAILY, Dec. 25, 2002.

390. Shao Zongwei, *Courts Trained for Fairness and Efficiency*, CHINA DAILY, Jan. 17, 2002.

Another issue that plagues the Chinese judicial system is the difficulty courts and law enforcement personnel have in executing judgments. As of September 1998, nearly one million cases with a combined value of more than twenty-two billion dollars were pending in China,[391] a fact which makes judgments little more than pieces of paper. The trials of a number of the cases pending likely occurred more than 50 years ago during the early period of the founding of the PRC in 1949.[392]

> The national incidence of unexecuted cases now stands at 30 percent per year. In some courts, the backlog of adjudicated but unresolved cases has risen to a stunning 60-70 percent of the annual caseload. . . . [M]ore than 30 incidents have been reported in Fujian Province in which 30 law enforcers were injured during their attempts to resolve cases. "The violence against law enforcement officers has become an increasingly serious problem," says Zhang [Fuqi, director of the Enforcement Division of the Supreme People's Court]. "Four court police officers have been killed during the process of execution in the past three years."[393]

Although Chinese courts have used a variety of methods in efforts to alleviate this problem, the outcome is far from satisfactory. Some Chinese courts even "publish the names of those who refused to implement judgments against them."[394] The reasons for execution difficulty may be varied, but the quality of the judicial work is one of the major causes. He Weifang, a law professor at Peking University School of Law, stresses the necessity of improving trials.[395] If the trials strictly follow legal procedures, courts might be able to convince the litigants that the process is fair, thereby increasing the perceived legitimacy of their judgments.[396] He Weifang also argues that, instead of carrying out the execution of judgments themselves, courts should delegate enforcement to the police.[397] He suggests that courts "should concentrate on trials while leaving execution of their rulings to others."[398]

VI. CONCLUSION

Although the Chinese civil process has been designed to achieve the goal of seeking the truth, it does not necessarily mean that the

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391. *Courts Face Hurdles in Backlog, supra* note 325.
392. *Id*.
393. *Courts Face Hurdles in Backlog, supra* note 325.
394. *Courts Call for Local Enforcement of Rulings*, CHINA DAILY, Aug. 20, 1999.
395. Courts Face Hurdles in Backlog, *supra* note 325.
396. *Id*.
397. *Id.*
398. *Id.*.

Chinese system is an error-free system as it is intended to be. It is clear that the Chinese civil process has not facilitated to ascertain but rather twisted the truth. Due to the problems inherent in the system itself, corrupt practices, abuses of the judicial power, and other judicial misconduct remain rampant in China. This judicial misconduct has considerably restrained Chinese courts from seeking the truth in civil process.

The Chinese system has not only failed to achieve its primary purpose of ascertaining the truth but has also proved to be inefficient and ineffective. Extensive formal and informal supervisory devices are highly costly and time-consuming. A case may literally never come to an end, leaving the truth to never be ascertained. The Chinese Supreme Court dealt with 4,673 cases in 1998; local courts dealt with 5.41 million cases in 1998.[399] No system can ensure 100% correct judgments. "No one would assert that the trial process is a scientific one or that a just result may be achieved only if no errors are made."[400] "We bring some disputes to an end not because we're sure we're right, but because we're sure there has to be an end to the disputes so people can move on with their lives."[401] The Chinese civil system needs to strike a balance between ascertainment of truth and efficiency.

In fact, the Chinese Supreme Court has become aware of the importance of judicial efficiency. At a national conference held in early January 2001, Xiao Yang, the president of the Chinese Supreme Court, stated that judicial fairness and efficiency had been top priorities on the agenda of Chinese courts.[402] At the end of the same year, the Chinese Supreme Court set justice and efficiency as the goals all courts should pursue in their work in the new century.[403] At the end of 2001, the Chinese Supreme Court issued a judicial interpretation on the evidence of civil lawsuits—judges can refuse to consider evidence offered after the time limits have elapsed and failure to offer evidence within these time limits would be considered a renunciation of the right.[404] Delay in producing evidence has been one of the major obstacles to efficiency in the adjudication of cases in Chinese courts.[405]

As the forgoing pages indicate, Chinese courts are subject to supervision of external institutions such as the procuratorates, people's congresses, and the Party. The term "external supervision"

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399. *Top Judge Elaborates Courts' Focus of Work*, CHINA DAILY, Mar. 12, 1999.
400. FRIEDENTHAL ET AL., *supra* note 46, at 574.
401. YEAZELL, *supra* note 122, at 886.
402. Shao Zongwei, *Judge Calls for Judicial Clean-Up,* CHINA DAILY, Jan. 4, 2001.
403. Shao Zongwei, *Judges Urged to Stick to Justice*, CHINA DAILY, Dec. 12, 2001.
404. Regulation Regarding Evidence in Civil Procedure, art. 34.
405. Shao Zongwei, *Courts Trained for Fairness and Efficiency*, CHINA DAILY, Jan. 17, 2002.

conveys an inaccurate message that such external supervision is independent. It is true that these external institutions are independent from courts. However, all branches of government in China are under the unified leadership of the Party.[406] As a result, like judicial work in general, supervision of adjudication must also accept the leadership and guidance of the Party. Since both the supervisors (people's congresses and the procuratorates) and the supervised (courts) are vulnerable to the command of the same boss (the Party), no real independent supervision exists in the Chinese civil process. When supervision lacks independence, it may not only fail to achieve its functions, but also becomes a further obstacle to effective adjudication. It is true that more than twenty years of reform has loosened the Party control of the Chinese society to a noticeable extent. But the reality is that the Party is still the sole and ultimate source of all powers.

For a long time, the decisions made by the collegiate panels were subject to approval first by the division chief and then by the vice-president or the president.[407] The Chinese Supreme Court has determined to gradually reform the approval practice to enhance quality and efficiency.[408] According to a new law, the judge or the collegiate panel is not required to obtain approval from division chiefs or president.[409] But it is still the common practice that the division chief or the president steps in and directs the adjudication.[410] Therefore, the division chief or the president remains the ultimate arbitrator of all major cases. Since the approval system has been abolished, why does the judge or the collegiate panel defer to the opinions of the division chief or the president? The answer is simple. The division chief and the court president have the final say in the matters regarding performance evaluation, promotion, housing, participation in training, and joining the Party.[411] Therefore, if a judge holds on to his own views, he will find himself in a disfavored position, or even risk ruining his career as a judge.[412] Further, Chinese law still allows the president or division chiefs to examine the conclusion of deliberation of the collegiate panel or written verdicts.[413] Although the president or the

406. P.R.C. Const. prml. (1982).
407. 2003 Work Report, *supra* note 192.
408. *Id.*
409. Yantian District People's Procuratorate of Shenzhen Municipality, The Current Situation of Our Adjudicative System, *available at* http://www.jc.gov.cn/ (last visited Jan. 5, 2004) [hereinafter Our Adjudicative Situation].
410. *See Id.*
411. *See Id.*
412. Our Adjudicative Situation, *supra* note 448.
413. Some Provisions of the Supreme People's Court Concerning the Work of the Collegiate

division chief can no longer change the deliberation result of the collegiate panel, they may provide their written opinions on the ruling with which they disagree and the reasons for their disagreement.[414] They may also suggest that the collegiate panel reconsider it.[415] If the collegiate panel still will not change its decision, the division chief may refer the decision to the court president for review, who may further forward it to the adjudication committee for final decision.[416] These provisions indicate that the opinions of the division chief and the president are still decisive—the judge or the collegiate panel appears not to have any choice but follow their opinions.

The distinction of judges by their administrative ranks is incongruous with the nature and function of the administration of justice because judges cannot make independent decisions. Because of the increasing administrative nature of Chinese courts, not only are these courts less independent from other political institutions, but the judges are less independent as well. The higher rank of a judge means he is treated better both politically and economically, and indicates his dominant position in relation to those lower rank judges and represents his superior quality as a judge.[417] The adjudication committee, presidential and division chief approval system and the ranking of judges have combined to injure judges' pride and sense of responsibility and honor.[418] As a result, judges would be unlikely to commit themselves to performing their mission of seeking the truth. This is one of the crucial factors in the high rate of erroneous judgments. This also constitutes a starting point in a vicious circle. As the quality of judges is so poor, it is necessary to intensify supervision. Extensive supervision in turn has diluted judges' power and functions and consequently adversely affected judges' performance. Again, poor performance of judges is cited as justification of more supervision. Real judicial independence requires independence of courts but also independence of judges.

In order to tackle the problems with China's civil process, China has worked upon reform toward the adversary system and the Evidence Regulation is one of the results of such reform. Every legal system has formed, evolved, and improved by using the experience of other legal systems. In fact, since the reform was initiated in late 1970s in China, China has never stopped drawing

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Panel of the People's Courts, art. 16.

414. *Id.* arts. 16 and 17.

415. *Id.* art. 17.

416. *Id.*

417. He Weifang, *Two Issues Regarding the System of Judicial Administration in China, supra* note 56.

418. He Weifang, *Eight Elements of Judicial Fairnes, supra* note 369.

on the experience of other legal systems. In recent years, China's efforts to join the World Trade Organization (WTO)[419] further sustained China' s interest in learning from other countries. In early 2001, the Chinese Supreme Court began to identify those judicial interpretations that are not consistent with the WTO regime.[420] The Chinese Supreme Court also pledged that Chinese courts would give priority to WTO rules in cases where domestic laws and regulations are in conflict with the WTO regime.[421] In order to honor the WTO principle of transparency, China would publish foreign-trade laws, regulations and policies as well as judicial rulings.[422]

While it is important to make use of the experience of another system, law is "local knowledge"[423] in the sense that a legal system is "a unique and finely tuned product of the overall cultural context in which it is embedded."[424] China cannot and should not substantially reform its judicial system by copying indiscriminately the experience of other systems, including the American system. As part of a legal order, a judicial system does not exist in a vacuum but in the combination of "political arrangements, social relations, interpersonal practices, economic processes, cultural categorizations, normative beliefs, psychological habits, philosophical perspectives, and ideological values."[425] A lesson we should draw from China's experience in reforming its legal institutions is that China has not cherished those positive aspects in its own culture, including its legal tradition.

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419. *See generally* Greg Mastal, *China and the World Trade Organization: Moving Forward without Sliding Backward*, 31 LAW & POL'Y INT'L BUS 981-87 (2000).

420. Shao Zongwei, *Supreme Court Gets Ready for WTO Entry,* China Daily, Feb. 22, 2001.

421. *Id*.

422. *Id*.

423. Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective, in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 215 (1983).

424. Ainsworth, *supra* note 280, at 28.

425. *Id*.

THE DAM CONTROVERSY: DOES THE ENDANGERED SPECIES ACT APPLY INTERNATIONALLY TO PROTECT FOREIGN SPECIES HARMED BY DAMS ON THE COLORADO RIVER?

BRIDGET KELLOGG*

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I. INTRODUCTION**

Today, thousands of species face the danger of extinction. As the global community continues to develop, that risk, for many species, is quickly becoming a reality. Recognizing this threat, the United States enacted the Endangered Species Act (ESA) to protect plants and animals from further habitat destruction. However, this act is not being extended beyond the United States' border to protect endangered species in Mexico. As a result, species are dying from the harmful effects of dams operated on American soil. Instead of dealing with this problem on an international level, America is

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** Special thanks to Professor J.B. Ruhl for his expertise regarding the Endangered Species Act, and to Evan Smitha for the concept.

choosing to ignore the harm to endangered species living outside an invisible border. This selective protection contradicts the tenants of the Endangered Species Act.

In enacting section seven of the Endangered Species Act, the federal government prohibited actions that would jeopardize the future existence of an endangered species. The federal government, however, currently operates numerous dams along the Colorado River, which significantly reduce the amount of water flowing into Mexico. As a result, the Rio Colorado Delta is shrinking, destroying the habitat of numerous varieties of Mexican wildlife, including threatened and endangered species. Under the Endangered Species Act, and the Treaty with Mexico,[1] the federal government has a duty to protect these endangered species living in the delta. Under the terms of the ESA and Treaty of Mexico, the U.S. government should be held accountable for negative impacts to endangered species in Mexico resulting from over-allocation of the Colorado River.

This article will explore whether the U.S. government has a duty to protect endangered species living in Mexico. While the courts have never addressed the issue of federal action taken within the U.S. that affects endangered species in a neighboring country, this article will assert that the Endangered Species Act extends beyond the borders of the United States. This article will further contend that the United States has a duty under the Treaty with Mexico to protect species living in the Mexican portion of the Colorado River and in the Rio Colorado Delta.

Part I of this article explores the background and history of the Colorado River. The Colorado once flowed freely, carrying freshwater and nutrients into the sea and creating a delta whose vast wetlands supported countless varieties of wildlife. However, as civilization slowly crept westward, the need for water eventually became a national concern, giving birth to the dam building era. While the surge of new dams brought much needed water to the parched soil, the blessing came at a cost. The dams diverted virtually all of the water and sediment that once sustained a thriving ecosystem, leaving the delta to wither and die.

Part II discusses the legal context of the federal government's duties regarding the dam controversy. The federal government has a duty under the Endangered Species Act not to authorize any act that jeopardizes the future existence of a threatened or endangered

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1. Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mex., 3 U.N.T.S. 313. [hereinafter Treaty with Mexico]. The Treaty with Mexico was signed on February 3, 1944 and guaranteed 1.5 maf of the Colorado River's water to Mexico. The International Boundary & Water Commission, United States and Mexico, *available at* <http://www.ibwc.state.gov/html/about_us.html> (last visited Feb. 11, 2004).

species, even if the species is foreign. However, agencies, including the Lower Colorado River Multi-Species Conservation Program, have continually neglected to apply the duties of the Endangered Species Act to foreign species. The federal government also has a duty under the Treaty with Mexico to ensure that 1.5 million-acre feet (maf) of water reaches Mexico a year. The Colorado's water is currently over-apportioned and the overuse of water by the United States is seriously straining the Rio Colorado Delta. Because actions taken by the United States are harming the delta, the U.S. has a duty to repair the harm under the treaty.

In Part III of this article, the case study of the totoaba is used to illustrate how the dams have jeopardized the future existence of an endangered species. The totoaba is a large schooling fish that has become endangered in Mexico due to the lack of nutrient-rich water flowing from the Colorado River into the Gulf of California. Historically, the totoaba fed and spawned exclusively in the brackish waters of the Upper Sea and delta, relying on the Colorado to provide nutrients and to regulate the temperature and salinity of its environment. However, diversion of the Colorado River has converted the formerly brackish-water habitat into a hyper-saline environment, drastically altering the habitat of the totoaba and significantly reducing the totoaba population. Unfortunately, being located solely in Mexico, the totoaba is not currently benefiting from the protection of the Endangered Species Act.

This author advocates the following. The Endangered Species Act should be interpreted to extend protection to foreign species harmed by actions taken within the United States. Federal agencies should be required to consult with the Fish and Wildlife Service before implementing plans that will affect the delta directly or indirectly. Further, the delta should be within the scope of the action area when considering the cumulative effects of an action. Finally, the dams should be deemed as taking the totoaba, and the appropriate measures instituted to prevent future takings.

II. BACKGROUND

The Colorado River once flowed for 1,450 uninterrupted miles[2] from the Rocky Mountains of Colorado and Wyoming into the Gulf of California,[3] depositing nutrient-rich sediment along the way. The continuous accumulation of sediment created the Rio Colorado Delta, supporting numerous species of wildlife. Over the course of

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2. DALE PONTIUS, SWCA, INC., COLORADO RIVER BASIN STUDY: REPORT TO THE WESTERN WATER POLICY REVIEW ADVISORY COMMISSION 5 (1997).

3. *Id.* The river also flows through Mexico and into the Sea of Cortez. *Id.*

the last century, the U.S. government built several dams along the River, impeding the river's flow. As of 1995 only about twenty-five percent of the Colorado's water was reaching the delta, causing the delta to erode.[4] The decrease in the size of the delta has forced threatened and endangered species to compete for habitat, or face extinction.

A. The Colorado River Environment Before Dams

Before the construction of dams, the Colorado River flowed freely through the Grand Canyon, bringing an average of 13.5 maf of water to the Gulf of California.[5] Since most of the river's flow reached the delta, the freshwater, silt and nutrients carried by the water created a fertile wetland covering 780,000 hectares.[6] The wetland provided feeding and nesting grounds for birds, as well as spawning habitat for marine life, and supported 200 to 400 species of plants.[7]

The delta mainly consists of the Rio Hardy wetlands, found where the Colorado River meets the Hardy River, and the Cienaga de Santa Clara wetlands, located at the drainage site of the Mohawk Irrigation District.[8] While providing habitat for countless species of wildlife, the wetlands also serve as a sanctuary for numerous endangered species. For example, the wetlands provide habitat for the largest populations of two species that are listed under the Endangered Species Act, the desert pupfish and the Yuma clapper rail.[9] Further, the Colorado River delta supports the endangered totoaba fish and endangered vaquita porpoise.[10] These species depend on the Colorado River's free flowing water to bring the amount of freshwater, sediment and nutrients necessary to sustain the fragile delta ecosystem.

B. The Authorization of Dams on the Colorado River

Until the early 1900's, settlement of the West had been hindered by failed attempts to implement irrigation systems.[11] The West's

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4. Edward P. Glenn et al., *Effects of Water Management on the Wetlands of the Colorado River Delta, Mexico*, 10 CONSERVATION BIOLOGY 1175, 1177-78 (1996).

5. David Meko et al., *The Tree-Ring Record of Severe Sustained Drought*, 31 WATER RESOURCES BULLETIN 789, 800 (1995).

6. Glenn et al., *supra* note 4, at 1176.

7. *See id*.

8. *Id*. The El Indio wetlands and the El Doctor wetlands have also been included in describing the delta area. Michael J. Cohen et al., *A Preliminary Water Balance for the Colorado River Delta, 1992-1998*, 49 J. ARID ENVIRONMENTS 35, 36-37 (2001).

9. Glenn et al., *supra* note 4, at 1176.

10. *Id.* The delta also supports transitory birds on the Pacific Flyway. *Id.*

11. *See* MARC REISNER & SARAH BATES, OVERTAPPED OASIS: REFORM OR REVOLUTION FOR

unforgiving weather severely impaired population growth, subjecting the area to boom and bust cycles and a dependency on capital from outside the region.[12] State water law offered an incentive to invest in irrigation, but adequate funds still could not be generated for the establishment of a stable irrigation system.[13] The government realized in the early 1900's that irrigation could not be implemented without federal input.[14] Thus, the federal government began the seemingly impossible task of creating a system capable of distributing the Colorado's water beyond its natural boundaries.

The Reclamation Act of 1902 was enacted to give Congress the ability, and the responsibility, of developing a system of dams for the West. Initially, the Act merely established the federal government as a short-term lender.[15] However, federal input steadily increased, as did the scope of the projects.[16] The scope expanded to include projects addressing flood control, navigation, and hydro-electricity.[17] In 1939, the Reclamation Project Act was approved, authorizing the Secretary of the Interior to invest in projects involving flood control and municipal water supply.[18] The Act allowed the government to recoup capital costs by charging project beneficiaries for the water provided.[19]

Initially, most of the resistance towards the Reclamation Act came from Westerners who felt the federal government was unnecessarily interfering in local affairs.[20] However, support steadily grew after the flood of the Mississippi River in 1928, during the drought of the Depression, and with the ever-increasing demand for power.[21] Also contributing to the greater support for federal dam building was Section I of the Flood Control Act of 1936.[22] The broad language of the Act operated as general approval for any reasonably designed plan and contributed to the boom of new water diversions.[23]

WESTERN WATER 13-14 (1990).

12. Western Water Policy Review Advisory Commission, *Water in the West: Challenge for the Next Century* 4.2 (1998) [hereinafter *Water in the West*], *available at* http://www.waterwest.org/reading/readingfiles/fedreportfiles/chapt4.pdf.

13. *See id*.

14. REISNER & BATES, *supra* note 11, at 14.

15. *Water in the West*, *supra* note 12, at 4.3.

16. *See id*.

17. *Id*. at 4.2.

18. *See* REISNER & BATES, supra note 11, at 20.

19. *Id*. at 15. The result was, in effect, an interest free loan. *Id.*

20. *Id*. at 17.

21. *Id*. at 18-19.

22. *Id*. at 20. This led to the benefit/cost calculations that approved dams for marginal irrigation. *Id.*

23. *See id*. at 19-20.

The Federal government derived its authority to build projects concerning irrigation, hydropower, flood control, and municipal/industrial use from the commerce clause.[24] Congress and the Supreme Court construed the federal power under the commerce clause broadly through the 1950's.[25] The federal power to regulate water resources has remained unabridged despite the Supreme Court's steady narrowing of the scope of federal power since the 1980's.[26] The Bureau of Reclamation may have begun as an experiment, but it quickly gained support and became a permanent feature of the federal government,[27] accomplishing numerous water diversion projects and providing the West with a successful irrigation system.[28]

The Bureau of Reclamation's prolific "dam-building era" began with the Boulder Canyon Project Act.[29] Under the authority of the Act, the lake behind Hoover Dam began to fill in 1935.[30] Many more dams were to follow. Throughout the twentieth century, $21.8 billion was spent on 133 western water projects.[31] The dams had a number of purposes, including conserving water for the upper basin states, generating hydroelectricity, and regulating the amount of water flowing to the lower basin states.[32]

Regardless of the well-intended purpose behind the dams, an unintended effect has been to harm wildlife. The dams are capable of holding a combined total capacity of more than 125 maf, which is over seven times the average flow of the Colorado.[33] Therefore, no water from the Colorado River reaches the delta unless there are spill flows. This forces the delta to rely on water from groundwater

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24. *Water in the West*, *supra* note 12, at 4.2.

25. *Id.*

26. *Id.*

27. REISNER & BATES, *supra* note 11, at 19-21. The Bureau of Reclamation gained support largely because the Depression had changed society's view of public works. The New Deal also fed on this sentiment. *Id.* at 18-19.

28. *See id.* at 21.

29. PHILIP L. FRADKIN, A RIVER NO MORE: THE COLORADO RIVER AND THE WEST 143 (Alfred A. Knopf, Inc.) (1981). The dam building era gave birth to the Hoover Dam and died with the Glen Canyon Dam in 1963. *Id.*

30. Gasser v. United States, 14 Cl. Ct. 476, 490 (1988). While the legal propositions established in *Gasser* are no longer good law, the scientific data contained within remains accurate and is cited throughout this article.

31. *Water in the West*, *supra* note 12, at 4.3.

32. *Id.*

33. PONTIUS, *supra* note 2, at 5. *See also* Glenn et al., *supra* note 4, at 1184. Hoover Dam has a storage capacity of 27, 000,000 acre-feet and Glen Canyon Dam has a storage capacity of 25,000,000 acre-feet. *Gasser,* 14 Cl. Ct. at 490-491. Glen Canyon Dam was completed in 1963, but Lake Powell did not finish filling until 1980.

seeps, agricultural drainage and tidewater,[34] increasing the concentration of salt in the environment.[35]

Despite the harm to the delta and irrigation's unsuccessful early phases, by 1997 nearly 80 percent of the Colorado was dedicated to agriculture.[36] In the process, the federal government invested an estimated $3.6 billion in water development on the Upper Basin alone.[37] Solely responsible for reservoirs with a total storing capacity of over 119 maf, the Bureau of Reclamation controls the largest segment of federal reservoir water storage in the West.[38] Further, the Bureau has overseen the construction of 133 water projects in the West.[39] The Bureau of Reclamation has far exceeded the goals of the initial Reclamation Act, which provided the authority for the federal government to operate dams along the Colorado River.

C. The Effect of Dams on the Rio Colorado Delta

The Colorado River has been called the "lifeline of the Southwest," supplying 25 million people with water, irrigating three million acres of land, and producing 11.5 billion kilowatt-hours of hydroelectric power.[40] Over a third of the river is diverted to cities like Denver, Colorado Springs, Salt Lake City, Albuquerque, Los Angeles, and San Diego.[41] However, such diversions and impoundments are preventing water from reaching the delta. While the dams are bringing life to some areas, they are simultaneously sucking the life out of the delta.

The delta is formed when sediment from the Colorado River is deposited at the mouth of the river.[42] However, daily sediment transport and water discharge data gathered at gauging stations along the Colorado shows that the river's sediment load has greatly decreased since 1941.[43] Between 1925 and 1940, the mean annual

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34. Glenn et al., *supra* note 4, at 1178. The water sources come mainly from the Welton-Mohawk main outlet drain extension, the Riito Drain, natural seepage from artesian springs, and seawater from the Gulf of California. *Id.*

35. *Id*.

36. PONTIUS, *supra* note 2, at 13.

37. *Id*. at 19. Even more has been spent on the lower basin, for example, $3.5 billion was spent on the most recent project, the Central Arizona Project, but between $1.8 and $2.2 million will eventually be repaid to the government. *Id*.

38. Glenn et al., *supra* note 4, at 1184.

39. *Water in the West*, *supra* note 12, at 4-3.

40. PONTIUS, *supra* note 2, at 2.

41. *Id*. at 8.

42. Cohen et al., *supra* note 8, at 35.

43. Edmund D. Andrews, *Sediment Transport in the Colorado River Basin*, *in* COLO. RIVER ECOLOGY & DAM MANAGEMENT, PROCEEDINGS OF A SYMPOSIUM MAY 24-25, 1990 SANTA FE NEW MEXICO 54, 63 (1991), *available at* http://books.nap.edu/books/0309045355/html/54.html.

suspended sediment load was 195 million tons per year, which is significantly greater than the period between 1941 and 1957, when the annual suspended sediment load decreased to 85.9 million tons per year.[44]

This decrease in sediment load is caused by the dams' detainment of all silt deposits and the decrease in water flow. The dams trap all sediment, except for the finest silt, preventing nutrients from being carried further downstream.[45] Also, the dams have stabilized the Colorado's flow, creating a consistent and even flow, which is not turbulent enough to stir up additional sediment from the river bottom.[46] This lack of riverbed sediment was especially evident during the years required to construct the dams and fill the reservoirs, during which the delta received virtually no water.[47]

For example, from 1904 to 1934, the peak monthly discharge measured at Yuma was between 13,000 to 130,000 cubic feet per second (cfs).[48] From 1935 to 1941, the flow decreased to between 12,000 and 29,000 cfs, while Lake Meade was filling. The flow further decreased to between 2,000 and 12,000 cfs while Lake Powell was filling from 1963 to 1980.[49] Practically all of the Colorado's water is now captured.[50] Satellite pictures taken from 1979 to 1980 showed that the river's water was not reaching the Gulf.[51] The water that does reach the delta is mainly water that has seeped through heavily cultivated soil, bringing with it a high concentration of salt, toxins, and chemicals.[52] Without freshwater from the Colorado to dilute the delta's high salinity, the delta is becoming a highly toxic environment.

In addition to diverting water from the Colorado River, the evaporation caused by dams also decreases the amount of water available. Evaporation from dam reservoirs is the second major consumption of Colorado River water.[53] The man-made reservoirs behind the dams increase the surface area of the water, increasing the amount of water that evaporates. Some reservoirs continue to

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Evidence is based on sediment load for annual runoff. *Id.*

44. *Id.*

45. *See* PONTIUS, *supra* note 2, at 5.

46. *See* REISNER & BATES, *supra* note 11, at 44-45. More than twelve main-stem and tributary dams have been built on the Colorado by the Bureau of Reclamation. *Id.*

47. Glenn et al., *supra* note 4, at 1177.

48. Gasser v. United States, 14 Cl. Ct. 476, 490-491 (1988).

49. *Id.*

50. Cohen et al., *supra* note 8, at 35.

51. *Gasser*, 14 Cl. Ct. at 496.

52. REISNER & BATES, *supra* note 11, at 46.

53. PONTIUS, *supra* note 2, at 10. The average annual evaporation loss due to storage in reservoirs is over 2 maf a year. *Id.* at 8.

maintain levels above the optimum level of storage, even though there is no net increase because of evaporation.[54]

Another problem that prevents water from reaching the delta is that while the river averages a mere 15 maf per year,[55]17.4 maf of the Colorado's water is currently apportioned between the United States and Mexico.[56] The river is estimated to have been over allocated by 20 to 30 percent.[57] Fortunately, only 12 to 13 maf is generally withdrawn.[58] But, if the delta is dying when the apportioned water is not fully utilized, the delta has no hope of surviving if each water right is fully exercised.[59]

Consequently, the construction of dams and the subsequent impoundment of water has caused the delta to shrink from 7,700 square km to 600 square km.[60] The delta is now eroding at a higher rate than it is accreting, degenerating from a vast wetland into a brackish mudflat.[61] Unless action is taken, the water supply will continue to decrease as development continues to increase.

III. LEGAL CONTEXT

Once the federal government accepted the responsibility of creating an irrigation system for the West, a door was opened to the acceptance of more responsibilities. Today, the federal government is tangled between so many responsibilities and competing interests, that its duties inevitably conflict. A prime example of this conflict is the tension between the federal government's duties under the Endangered Species Act and the Treaty with Mexico. The federal government has a duty under the Endangered Species Act to protect endangered species by supplying the delta with sufficient amounts of water.[62] Simultaneously, the federal government has a

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54. *Id*. at 8.

55. *Gasser*, 14 Cl. Ct.. at 492; *see also* PONTIUS, *supra* note 2, at 5. The long-term historical average is 14.95 maf, but studies of tree-rings, depicting hundreds of years of flow, averages 13.5 maf. PONTIUS, *supra* note 2, at 6.

56. *Id*. at 14. 1.5 maf is dedicated to Mexico under Article 10 of the 1944 treaty, while the Colorado River Compact of 1922 apportioned 7.5 maf to the upper basin and another 7.5 maf to the lower basin. *Id.* at 10.

57. PONTIUS, *supra* note 2, at 14. Water is allocated between parties using treaties and agreements. *See id* at 10-14.

58. *Gasser*, 14 Cl. Ct. at 492.

59. *Id*. The Central Arizona Project is expected to use another 1.5 maf of water, which will put even more strain on the current over allocation. *Id*. *See also* PONTIUS, note 2, at 13. California uses more than its 4.4 maf allotment, Nevada uses all but 300,000 acre-feet and Arizona uses its entire 2.8 maf allotment. *Id*.

60. Cohen et al., *supra* note 8, at 35. Before the Colorado River was altered with dams and diversions, the mean annual discharge of water at Lees Ferry, Arizona was 1067 km. *Id.*

61. Glenn et al., *supra* note 4, at 1176-7.

62. *See* Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2000).

duty under the Treaty with Mexico to divert 1.5 maf from the delta each year.[63]

A. Duties of the Federal Government Under the ESA

One of the few occasions in which a federal court has analyzed the federal government's duties under the Endangered Species Act was in the case of *Defenders of Wildlife v. Lujan*.[64] This case was overruled by the Supreme Court on procedural grounds:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"– an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court."Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[65]

Because the Supreme Court did not address the substantive issues, the Eighth Circuit's decision is one of the few insights into how the federal courts interpret the federal government's duties to endangered species. Under the ESA the federal government is prohibited from authorizing, performing, or funding an act that jeopardizes an endangered or threatened species.[66] While the courts have never directly addressed the issue of federal action taken within the U.S. that affects endangered species in a neighboring country, courts reviewing similar cases have suggested that the ESA's protection extends beyond the borders of the United States.[67] In order to comply with the requirements of the ESA, organizations

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63. The International Boundary & Water Commission, United States and Mexico, *available at* <http://www.ibwc.state.gov/html/about_us.html> (last visited Feb. 11, 2004).

64. 911 F.2d 117 (8th Cir. 1990), *overruled by* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

65. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (internal citations omitted).

66. Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2000).

67. *See* Defenders of Wildlife v. Lujan, 911 F.2d 117, 122-23 (8th Cir. 1990) *overruled by* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

like the Lower Colorado River Multi-Species Conservation Program (LCRMSC Program) have been created to protect listed species while simultaneously optimizing current water diversion facilities, and ensuring the development of similar operations in the future.[68] However, environmental groups have alleged that the LCRMSC Program inadequately fulfills the duties imposed under the ESA.[69]

1. Introduction to the Endangered Species Act

In 1973, Congress enacted the ESA for the purpose of providing a means, and a program to conserve, the ecosystems where endangered and threatened species live, as well as the species themselves.[70] Included under the requirements of the ESA is the duty of the federal government to carry out programs to conserve threatened and endangered species.[71] The ESA must also ensure that any authorization, performance, or funding does not jeopardize the continued existence of a threatened or endangered species.[72] Further, federal agencies are required to "'use . . . *all methods* and procedures which are necessary' to preserve endangered species."[73]

If a federal agency suspects that an action might negatively impact a threatened or endangered species, the agency must consult with the Fish and Wildlife Service about the potential impact, and ways to decrease the impact.[74] The consulting agency must determine whether the action will jeopardize the continued existence of an endangered species, and must issue a Biological Opinion.[75] Most water projects, such as the operation of dams on the Colorado River, have a connection to the federal government and must consult with the FWS over whether the proposal will

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68. PONTIUS, *supra* note 2, at 55. "Listed" means the species is listed as endangered or threatened under the ESA. *See e.g.,* 50 C.F.R §17.11(a)-(b) (2002).

69. *See* Kara Gillon, *Watershed Down?: The Ups and Downs of Watershed Management in the Southwest*, 5 U. DENV. WATER L. REV. 395, 420.

70. Endangered Species Act, 16 U.S.C. § 1531(b) (2000).

71. *Id*.

72. *See id*. § 1536(a)(2).

73. Tennessee Valley Authority v. Hill, 437 U.S. 153, 185 (1978) (quoting 1976 U.S.C. §§ 1531(c), 1532(2) (1976)).

74. *See* Interagency Cooperation — Endangered Species Act of 1973, 50 C.F.R. § 402.01(b) (2002).

75. *See* Endangered Species Act, 16 U.S.C. § 1536(a)(2)(2000). The Biological Opinion is a report done by the Fish & Wildlife Service based on the evaluation of a Biological Assessment. 65 Fed. Reg. 43,031, 43,032 (July 12, 2000). The report takes into consideration the description of the proposed action, effects of the action, cumulative effects, current species status, and environmental baseline. The FWS makes a conclusion regarding the effects of current operations on the continued existence of listed species and includes a list of actions necessary to avoid jeopardizing a listed species. If the consulting agency finds an action is not likely to cause jeopardy, the agency may issue an incidental take permit. 16 U.S.C § 1536(b)(4)(A)-(C)(iv) (2000); 16 U.S.C. § 1536(c) (2000).

adversely affect an endangered or threatened species.[76] This consultation requirement under section seven of the ESA would seem to extend to all endangered species affected by the dams, even those whose habitat is in Mexico, such as the totoaba, vaquita harbor porpoise, the desert pupfish, the Yuma clapper rail and the southwestern desert flycatcher.[77]

The text of the ESA provides evidence of Congress' intent to apply the ESA extra territorially. For example, the ESA defines "endangered species" without limiting the group by physical location.[78] The ESA also mandates a commitment to international conservation efforts, suggesting that the ESA applies to foreign species as well.[79] The ESA does not distinguish between federal actions taken domestically and actions taken abroad.[80] The Endangered Species Preservation Act of 1966 (the predecessor to the ESA) was amended by the Endangered Species Conservation Act of 1969 to provide the same amount of protection for foreign species.[81] Congressional concern for the preservation of foreign species can also be seen in the fact that as of 1989, 507 of 1046 endangered and threatened species were predominantly found outside the United States.[82] Therefore, the ESA appears, on its face, to protect foreign endangered species.

However, while the ESA clearly controls the federal government's action regarding the impact of domestic agency actions on native species, it is unclear whether the ESA controls agency actions when the effects cross an international border.[83] In *Defenders of Wildlife v. Lujan*, the court held that the ESA applies to federal agency actions performed in foreign countries,[84]

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76. PONTIUS, *supra* note 2, at 19.

77. *See generally* George D. Lozano, *Defenders of the Wildlife v. Hodel: Protection of Endangered Species in Foreign Nations Under the ESA of 1973,* 2 GEO. INT'L ENVTL. L. REV. 209 (1989) (discussing the ESA's extra-territorial application).

78. Defenders of Wildlife v. Lujan, 911 F.2d 117, 123 (8th Cir. 1990) *overruled by* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

79. *Defenders of Wildlife*, 911 F.2d at 122-23

80. *See* Listing Endangered and Threatened Species and Designating Critical Habitat, 50 C.F.R. 424.12 (2002). With the exception that land designated critical habitat must be under state or federal jurisdiction. *Id.* at 424.12(h)(2002).

81. 66 Fed. Reg. 15,643, 15,645 (Mar. 20, 2001). The Endangered Species Act, Pub. L. No. 91-135, § 3(a), 83 Stat. 275 (1969), extended the protection of the ESA by allowing foreign species to be listed, including the Aleutian Canada Goose, which has since been delisted. *Id.*

82. *Defenders of Wildlife*, 911 F.2d at 123.

83. Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Stevens, J. concurring).

84. Defenders of Wildlife v. Lujan, 911 F.2d 117, 125 (8th Cir. 1990) *overruled by* Lujan v. Defenders of Wildlife 504 U.S. 555 (1992). The case dealt with a challenge by an environmental organization to the issuance of a regulation by the Secretary of Interior that limited the consultation obligation of the ESA to actions occurring in the United States or on the high seas. The court found the challenged regulation invalid, holding that Congress intended for the consultation obligation of the ESA to extend to all agency actions affecting

suggesting that the ESA also applies to foreign species harmed by those actions. The court further held that limiting the consultation duty to domestic species contradicts the international commitment expressed in the ESA,[85] considering that in creating the scope of the ESA's protection Congress used "expansive language which admits to no exceptions."[86] In reviewing the plain language of the text, the court stated "we believe that the [ESA], viewed as a whole, clearly demonstrates congressional commitment to worldwide conservation efforts."[87] Thus, Congress gave the impression that the ESA was intended to require Federal agencies to give foreign species the same protection afforded to domestic species.

However, on January 4, 1978, the Secretary of Interior dissolved this impression by publishing a final rule that provided that the ESA merely "requires every Federal agency to insure that its activities or programs in the United States, upon the high seas, and in foreign countries, will not jeopardize the continued existence of a listed species."[88] Even though the final rule purported to limit the scope of the federal agency's duties, the Court concluded, "To overcome the presumption that the [ESA] was not intended to have extraterritorial application, there must be clear expression of such congressional intent."[89]

Nonetheless, the Secretary sidestepped this requirement by propagating a different interpretation of section seven of the 1973 ESA, which only required consultation for "actions taken in the United States or on the high seas."[90] Environmental Groups challenged this new interpretation, but the case was dismissed for lack of standing.[91] Because the case was reversed on procedural grounds and never reached the substantive issue, the question remains open as to whether the new interpretation completely overrules *Lujan's* interpretation of congressional intent, or merely overrules the section applying to the scope of the action area.

Regardless, the federal government still has a duty to protect the endangered species in the Rio Colorado Delta under this new interpretation of the ESA. Under the new interpretation, federal agencies are still required to conduct consultations for actions harming endangered species that are taken within the United

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endangered species, whether home or abroad. *Defenders of Wildlife*, 911 F.2d. at 118.

85. *Defenders of Wildlife*, 911 F.2d. at 122-23.

86. *Id*. at 122.

87. *Id*. at 123.

88. *Id*. at 124. (quoting 42 Fed. Reg. 4871(1978)) (emphasis removed).

89. *Id*. at 125.

90. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992).

91. *Id.*

States or on the high seas.[92] In the case of the Colorado River, the dams causing the harm are operated within the United States. The foreign species living in the delta must be provided the same protection as native species because the foreign species are being harmed by an action taken within the United States.

2. Application of the ESA to the LCRMSC Program

In addition to affecting actions taken by the federal government, the ESA's impact can be seen in state governments as well. For example, in 1993, water users in the lower basin states created a Steering Committee to consider the concerns for endangered species along the Colorado River.[93] Consequently, a Memorandum of Agreement was signed in August of 1995 between the Department of the Interior and the states of Arizona, Nevada, and California, to create the LCRMSC Program.[94] The Fish and Wildlife Service deemed the Steering Committee to be an "Ecosystem Conservation and Recovery Implementation Team" (ECRIT) and the Secretary exempted the committee from Federal Advisory Committee Act requirements under authority of the ESA.[95] Despite the creation of the LCRMSC Program, the Fish and Wildlife Service is still required by statute to ensure adequate steps are being taken to recover the species.[96]

The LCRMSC Program is a habitat conservation plan developed in response to the problem of compliance with the ESA.[97] Specifically, the program is intended to facilitate the designation of critical habitat for the Yuma clapper rail, razorback sucker, bonytail, peregrine falcon, bald eagle, and southwestern willow flycatcher.[98] The program is designed to help listed species and potentially threatened species to recover while "accommodat[ing] current water diversions and power production and optimiz[ing] opportunities for future water and power development."[99]

The LCRMSC Program now consists of federal, state, tribal, and public and private stakeholders concerned with the management of the Lower Colorado River Basin's water resources.[100] The

92. *Id.*
93. PONTIUS, *supra* note 2, at 55.
94. Multi-Species Conservation Program for the Lower Colorado River, Arizona, Nevada, and California, 64 Fed. Reg. 27,000, 27,001 (May 18, 1999).
95. PONTIUS, *supra* note 2, at 55-56.
96. *See id.*
97. Multi-Species Conservation Program for the Lower Colorado River, 64 Fed. Reg. at 27,001.
98. *Id.*
99. *Id.*
100. *Id.* Mexico was not officially represented in this agreement. *See id.*

stakeholders hope to obtain incidental take permits from the Secretary of the Interior in exchange for mitigation measures like the LCRMSC Program's conservation of habitat and species.[101] The incidental take permit would in essence allow the stakeholders' water power plant to "take" species.[102] The Memorandum of Agreement creating the LCMRSC Program acted as a substitute for a reasonable and prudent alternative, and was designed to postpone consultation with the Fish and Wildlife Service under the ESA.[103] However, several environmental groups opposed the Memorandum of Agreement, claiming that the LCRMSC Program prioritized water and power operations over species recovery.[104]

Four U.S. organizations and four Mexican organizations challenged the adequacy of the consultation under the ESA in March of 2003. The suit, brought in Federal District Court for the District of Columbia, was based on the Bureau's operation and management of the dams and diversions.[105] The Bureau of Reclamation was named along with the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS).[106] Plaintiffs claimed the government "failed to satisfy the consultation requirements of the ESA with regard to protected species in the Colorado River Delta in Mexico."[107]

The court found that while the consultation that led to the 1996 Biological Assessment and Biological Opinion analyzed the effects on species found in Mexico, the analysis was not "supplemented in [the Bureau's] reinitiated consultation with FWS in April 2002."[108] The Bureau concluded that its operations may affect the totoaba and the Southwestern Willow Flycatcher.[109] The Bureau acknowledged that "reductions in the flow and changes in the water quality of the Colorado River have been identified as 'primary factors' contributing to declines of the Totoaba Bass, because the

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101. *Id*. Incidental take permits allow a permit-holder to "take" endangered species during the course of a specified project. *Id*. For example, if a dam were issued an incidental take permit, the dam would be permitted to kill endangered species incidental to the operation of the dam without being penalized. *See id*.

102. "Take" is defined under 16 U.S.C. § 1532(19)(2000) as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id*.

103. Gillon, *supra* note 69, at 419.

104. PONTIUS, *supra* note 2, at 55.

105. *See* Defenders of Wildlife v. Norton, 257 F.Supp. 2d 53, 57-58 (D.D.C 2003). The challenge came from four organizations in the United States — including the Defenders of Wildlife and the Center for Biological Diversity — and four organizations in Mexico. *Id.* at 57.

106. *Id*. at 57.

107. *Id.*

108. *Id.* at 61.

109. *Id.* at 60. The Totoaba is endemic to Mexico and the Southwestern Flycatcher is a migrant species. *Id*.

Totoaba spawn at the mouth of the river."[110] Despite this recognized threat to the totoaba, the court found that the duty of consultation under the ESA did not extend to operations affecting extra-territorial species in the delta.[111]

This holding seems to contradict the court's previous decisions in which the FWS's biological opinions violated the ESA by failing to consider the cumulative impact of all federal actions that are affecting the species in the area.[112] The cumulative impact requirement suggests that the LCRMSC Program must look beyond the borders of the United States and consider the impact on endangered species in Mexico.[113] However, the LCRMSC Program currently does not cover species in portions of the river outside the boundaries of the United States.[114] Under the plan, 90 miles of the Colorado River and the delta will not be covered, even though the LCRMSC Program agreed to follow an ecosystem-based approach.[115] The LCRMSC Program narrowed the scope of the program in order to avoid consideration of the delta.[116]

However, as discussed above, the ESA mandates that the program consider endangered species living in the delta, regardless of whether the species ever crosses into the United States.[117] Thus, the LCRMSC Program violates the ESA by not considering the impact of the dams on endangered species in the Rio Colorado Delta.[118] The LCRMSC Program even admits, "Without a coordinated, comprehensive ecosystem-based conservation approach for the region, listed species may not be adequately addressed by individual project-specific mitigation requirements."[119] Nonetheless, the LCRMSC Program has yet to provide the protection and ecosystem-based conservation that the program promised to the FWS.

Under the ESA, the LCRMSC Program has a duty to take the endangered species of the Rio Colorado Delta into consideration. If

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110. *Id*. at 62. (citation omitted).

111. *Id.* at 69.

112. *See* Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d 121, 122-23 (D.D.C. 2001).

113. *See id.* at 128. Under the cumulative impact requirement, the action area to be considered includes areas indirectly affected by Federal actions. *Id.*

114. S. H. HULBERT, SAN DIEGO STATE UNIVERSITY, SHOULD THE LCR MSCP GO SOUTH OF THE BORDER? DIFFERING VIEWS, *at* http://www.sci.sdsu.edu/salton/LCR_MSCP_south_of_border.html (last modified May 19, 1998).

115. *See* Multi-Species Conservation Program for the Lower Colorado River, 64 Fed. Reg. 27,000, 27,001 (May 18, 1999).

116. *See* HULBERT, *supra* note 114.

117. *See* Defenders of Wildlife v. Lujan, 911 F.2d at 122-23, *overruled by* Lujan v. Defenders of Wildlife 504 U.S. 555 (1992).

118. *See* Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d at 125.

119. Multi-Species Conservation Program for the Lower Colorado River, 64 Fed. Reg. at 27,000, 27,001.

the LCRMSC Program continues to ignore the problems caused by lack of water in the delta, the federal government (and the FWS) must intervene to ensure that adequate steps are taken by the LCRMSC Program to recover the endangered species living in the Mexican portion of the Colorado River. The federal government has a duty to extend the ESA to foreign species living in Mexico by forcing the LCRMSC Program to rectify its violations of the ESA.

B. Duties of the Federal Government Under the Treaty with Mexico

In the Convention of 1889, the United States signed a treaty with Mexico creating the International Boundary Commission (IBC).[120] The commission's purpose was to employ the rights and obligations under the treaty in a manner that benefits both countries, to improve relations between the United States and Mexico, and to settle any future boundary questions.[121] The IBC later became the International Boundary and Water Commission (IBWC), which is responsible for employing other boundary and water treaties.[122] The commission is the only organization given bi-national authority over the Colorado River. However, the IBWC is limited to water supply and quality problems and does not address issues involving environmental protection.[123] No organization exists to monitor or regulate the health of the delta.

On February 3, 1944, another treaty was signed between the United States and Mexico entitled Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande.[124] The treaty guaranteed 1.5 maf of the Colorado's water to Mexico, annually.[125] The treaty also provided that in times of drought or other water shortages, there would be a pro rata reduction,[126] making the United States liable for the monitoring and apportioning of the water in the Colorado River.

Despite this newfound responsibility, the U.S. government did not create a bi-national organization to monitor the affects of the Colorado's apportionment, nor was the task assigned to the IBWC. Studies in conservation biology and watershed management suggest

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120. The International Boundary & Water Commission, *supra* note 63.

121. *Id.* For example, the IBWC is responsible for allocating the water of the rivers between the two countries; conducting and maintaining international storage dams/reservoirs; utilizing levees and other projects to protect land from flooding; preserving the rivers as the international boundary; and solving problems of border water quality. *Id.*

122. *Id.*

123. *See id.*

124. *Id.*

125. *Id.*

126. PONTIUS, *supra* note 2, at 10.

that ecosystems must be managed as a whole to prevent the problems associated with discoordination.[127] Nonetheless, the IBWC is divided into two sections: a U.S. section and a Mexican section.[128] Each section has its own engineering staff with legal advisers and assistants, and each country is responsible for the operation costs of their own section.[129] This disconnect between the two sections prevents management of the ecosystem as a whole and promotes an isolated view of problems and solutions.

Although cooperation between the two sections is rare, both sections of the IBWC collaborated in amending the treaty with Minute 242 on August 30, 1973, addressing the problem of increasing concentrations of salinity in the water crossing into Mexico.[130] Since Mexico only receives about ten percent of the Colorado's flow,[131] Mexico would practically have to stop drawing water from the river in order to restore the delta's salinity levels to normal concentrations.[132]

Fortunately for Mexico, restoration of the delta is not Mexico's responsibility. According to the 1944 treaty, when a man-made project or operation in one country causes (or threatens to cause) harm to the other country, the government of the country causing the problem must pay for the cost.[133] Therefore, the U.S. government has the duty to either pay for the harm caused to the species living in the Mexican portion of the Colorado River and in the Rio Colorado Delta, or decrease the amount of water removed from the Colorado River. Either way, the United States is accountable for the harm to the species living in Mexico caused by the lack of water.

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127. *See* N. LeRoy Poff et al., *The Natural Flow Regime*, 47 BIOSCIENCE 769, 770 (Dec. 1997).

128. The International Boundary & Water Commission, *supra* note 63.

129. *Id.* The 1944 Treaty created the IBWC as an international body, and required the head of each country's section to be an Engineer Commissioner. The Treaty also required joint action be carried out through the Department of State in the United States and through Mexico's equivalent (the Secretariat of Foreign Relations). The Commissioners contact each other approximately once a day and meet at least once a week, alternating the meeting place each time. *Id.*

130. *See id.*; Agreement on the permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River, 12 I.L.M. 1105 (entered into force Aug. 30, 1973). The IBWC must receive specific approval when proposing construction, operation or maintenance of joint projects and joint expenditures. When the agreement is conditioned on the approval of both governments, the agreement is written as a Minute in both languages. Once authorized by both Commissioners and endorsed by both Secretaries, the Minute binds both governments. The International Boundary & Water Commission, *supra* note 63.

131. Glenn et al., *supra* note 4, at 1177.

132. *See* PONTIUS, *supra* note 2, at 10-13.

133. The International Boundary & Water Commission, *supra* note 63.

IV. CASE STUDY OF THE TOTOABA

The totoaba is a large schooling fish that lives between the Gulf of California and the mouth of the Colorado River.[134] Once a source of income for commercial fishers, the totoaba was banned from the market when the totoaba population decreased from a maximum annual yield of 2261 tons in 1942 to 58 tons in 1975.[135] Early in 1976, the totoaba was put on the endangered list of the Convention on International Trade in Endangered Species.[136] On December 30, 1976, the FWS and NMFS proposed to list the totoaba under the ESA as endangered.[137] A workshop was held in September of 1978 to assess the biological status of the totoaba.[138]

Attending the workshop were scientists that not only studied the totoaba, but also examined the literature and information provided by fieldwork in the upper Gulf of California.[139] Evidence showed that essentially no water had flowed into the delta for ten to fifteen years.[140] The scientists concluded that the decrease in water flowing to the delta was negatively impacting the totoaba's spawning and nursery grounds, decreasing the totoaba population.[141]

A. Effect of Dams on Totoaba Habitat

The Colorado River once had a surplus of water flowing into the delta.[142] However, the construction of the Hoover Dam in 1928 significantly reduced the amount of water and sediment arriving at the delta.[143] Water flow continued to decrease as more dams were built along the Colorado, until the flow virtually stopped in the mid 1960's. [144] This reduction of freshwater increased evaporation and salinity in the delta while at the same time decreasing the input of

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134. Miguel A. Cisneros-Mata et al., *Life History and Conservation of* Totoaba Macdonaldi, 9 CONSERVATION BIOLOGY 806, 807-808 (1995). Totoaba can reach over 100kg, 2 meters and 25 years of life. *Id.*

135. J.C. Barrera Guevara, *The Conservation of* Totoaba Macdonaldi *(Gilbert), (Pisces: Sciaenidae), in the Gulf of California, Mexico*, 37 J. FISH BIOLOGY 201, 201.

136. *Id.*; *see also*, United States: Fish and Wildlife Service Regulations Implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 16 I.L.M. 390 (1977).

137. Totoaba; Listing as an Endangered Species, 44 Fed. Reg. 29,478 (May 21, 1979).

138. *Id.* at 29,478. The workshop was assembled by the NMFS in La Jolla, California at the NMFS' Southwest Fisheries Center. *Id.* at 29,479 n.1.

139. *Id.* at 29,478.

140. *Id.*

141. *Id.*

142. Cisneros-Mata et al., *supra* note 134, at 811. The amount of annual flow reported in 1857 was 1.9728 x 1010m3. *Id.*

143. PONTIUS, *supra* note 2, at 6. From 1896 to 1930, the average annual flow was around 17 maf per year, but decreased to 13.9 maf per year between 1930 and 1996. The decrease coincides with the dam building period. *Id.*

144. Cisneros-Mata et al., *supra* note 134, at 811.

nutrients, thus negatively altering the habitat of the species living there, including the totoaba.[145]

Currently, there is no water dedicated to the preservation of the delta.[146] The delta has been referred to as "essentially a dead ecosystem."[147] In years without abnormal flooding, no water reaches the delta.[148] The most water the delta has received since the construction of the dams was from 1980 to 1993, when excess flows brought a surplus of water.[149] However, even though the surplus was three times more than the treaty allotment, the surplus was a mere one-fourth of the flow the delta received before the dams.[150]

Water diversion has significantly decreased not only the amount of water flowing into the delta, but also the amount of silt.[151] As a result, the delta has lost large amounts of wetland[152] and the upper flood-plain vegetation has changed from gallery forests to lower-growing plants.[153] If diversion of the Colorado continues to increase, the Colorado is predicted to shrink to less than 2000 hectares.[154] The totoaba depend on the delta for nutrients, shelter and reproduction.[155] As the delta gets smaller, the totoaba are increasingly forced to compete against each other, as well as against other species, for what remains of the limited wetland habitat.[156]

B. Effect of Habitat Degradation on the Totoaba

Historically, the totoaba's spawning migration correlated with the salinity gradient as the spring floodwaters of the Colorado River merged with the salty water of the Upper Gulf of California.[157] The resulting brackish water provided spawning grounds for the totoaba. However, the spawning season has been truncated due to the decreasing amount of water flowing from the Colorado River into the Gulf.[158] The decrease in water flow has significantly

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145. *See id.*
146. Glenn et al., *supra* note 4, at 1176.
147. *Id.*
148. *Id.* at 1177.
149. *Id.* at 1178.
150. *Id.*
151. *Id.* at 1184.
152. *Id.* at 1181. The Rio Hardy wetlands shrunk from 18,000 hectares in 1973 to 1175 hectares in 1988. *Id.*
153. *Id.* at 1184.
154. *Id.*
155. *See generally* Cisneros-Mata et al., *supra* note 134.
156. *See id.* at 812-13.
157. *Id.* at 812.
158. *Id.* at 806. Spawning season shrunk from February through June, to February through April. *Id.* at 809.

increased the water temperature,[159] which is one of the key factors in the timing of spawning.[160] The totoaba will not be able to reproduce sufficiently for the restoration of the population unless enough water is put back into the river to stabilize the water temperature.[161]

Further, the reduction in freshwater from the Colorado has jeopardized the totoaba because of the negative effect on prerecruits and on the totoaba's nursery grounds.[162] First, the reduction of water flowing in from the Colorado River has interfered with the river's ability to add nutrients and volume necessary to increase the carrying capacity of prerecruits and juvenile totoaba.[163] Secondly, the dams and other diversions of the Colorado's water have stabilized the once highly turbulent ecosystem, allowing nonnative fish into the totoaba's habitat.[164] These nonnative fish have been harmful to the native species.[165] Thus, the dams negatively affect the juvenile totoaba's ability to develop and fend off nonnative fish.

Since the Bureau of Reclamation and other federal agencies control all water stored in the Lower Colorado mainstream dams,[166] the federal government is responsible for the harm to the totoaba that stems from the water's impoundment. The federal government has violated the ESA by authorizing, funding and performing an operation that jeopardizes the continued existence of the endangered totoaba. Unless action is taken to curb the harmful effects to the delta, the totoaba's population will continue to spiral downward towards extinction.

C. Application of the ESA to Foreign Species of Totoaba

In response to the Bureau's draft Biological Assessment, the FWS directed the Bureau to examine the impacts of the Bureau's operation on three species found in Mexico, and to seek consultation with NMFS regarding two marine species in the Gulf of California, because the species were found "'in Mexico within the project area or . . . within the area of effects from the action under

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159. REISNER & BATES, *supra* note 11, at 46.

160. Cisneros-Mata et al., *supra* note 134, at 809.

161. *See id.*

162. *Id.* Prerecruits are totoaba ranging from an egg to one year old. *Id.*

163. *See id.* at 812. However, over-fishing also plays a key role in the decline of the totoaba's population. *Id.*

164. *See* W.L. Minckley, *Native Fishes of the Grand Canyon Region: An Obituary?*, *in* COLO. RIVER ECOLOGY & DAM MANAGEMENT, PROCEEDINGS OF A SYMPOSIUM MAY 24-25, 1990 SANTA FE NEW MEXICO 124, 124-125 (1991), *available at* http://books.nap.edu/books/0309045355/html/124.html.

165. *See id.*

166. *See generally* Arizona v. California, 373 U.S. 546 (1963).

consultation.'"[167] In the Final Biological Assessment, the Bureau of Reclamation admitted that modification of flow was harming the endangered totoaba.[168] Nonetheless, the court found that the duty of consultation under the ESA did not extend to operations affecting extra-territorial species in the delta.[169]

However, this holding conflicts with the duty under the ESA to include the totoaba in the biological assessment, regardless of which country the species inhabited. To satisfy the interagency consultation requirements under the ESA, the consulting agency must consider the "*entire* agency action."[170] Section seven of the ESA[171] requires the consulting agency to evaluate the biological impact of the planned action on "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action."[172] The entire agency action includes the federal action's impact combined with the ecological impact of "interrelated and interdependent" actions.[173] In essence, the NMFS must include the dams' effect on the delta in the biological assessment, whether the injury to the totoaba is direct or indirect.

In addition to considering the entire agency action, the consulting agency has a duty to determine "whether the action, *taken together with cumulative effects,* is likely to jeopardize the continued existence of listed species." [174] The consulting agency must evaluate the specific action's effects together with the past and present impacts of every other federal agency in that area.[175] The effects of the action include the direct and indirect effects on the species.[176] The agency may not side step this requirement by narrowly defining the action area in order to leave out the effects of other agency actions.[177] Thus, the consultation must consider not

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167. Defenders of Wildlife v. Norton, 257 F.Supp. 2d 53, 59 (2003) (quoting the Administrative Record of the Bureau of Reclamation, AR BOR Part III. Sec. 2.) The species include the Yuma Clapper Rail, Southwestern Willow Flycatcher, Desert Pupfish, Totoaba Bass and Vaquita Harbor Porpoise. *Id*.

168. *Id.* at 62. The Bureau acknowledged that "reductions in the flow and changes in the water quality of the Colorado River have been identified as 'primary factors' contributing to declines of the Totoaba Bass, because the Totoaba spawn at the mouth of the river." *Id*.

169. *See id.* at 69.

170. Conner v. Burford, 848 F.2d 1441, 1453 (9th Cir.1988).

171. *See* Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2000).

172. Interagency Cooperation—Endangered Species Act of 1973, 50 C.F.R. § 402.02(d) (2002) (defining "action area").

173. *Id*.

174. 50 C.F.R. §402.02(d) (2002). "*Cumulative effects* are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *Id*.

175. *See* Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d 121, 125-26 (D.D.C. 2001).

176. *Id*. The action area is defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." *Id.* at 128.

177. *Id.* at 126. "By limiting their analysis in such a manner, defendants avoid their

only the effect of a single dam on the totoaba, but also the combined effect of all of the dams on the delta.

Further, section four of the ESA states that "it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States."[178] The term "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap capture, or collect, or to attempt to engage in any such conduct."[179] While the dams do not take any totoaba within the borders of the United States, action taken within the United States is harming the endangered totoaba—and thus should be considered a taking.

Similarly, it is unlawful for any person to "take" an endangered or threatened species, under section nine of the ESA.[180] The definition of take includes "harm" and harm is further defined to include "significant habitat modification or degradation where it actually kills or injures wildlife."[181] Courts have interpreted this to require a taking to be an act that, through significant habitat modification or degradation, foreseeably causes death or injury to identifiable wildlife by significantly impairing essential behavioral patterns.[182] A decrease in fresh water input foreseeably increases the concentration of salt in a water body, thus the federal government's operation of the dams foreseeably modified and degraded the habitat of the totoaba. Furthermore, an increase in salinity foreseeably increases the temperature in the delta, and increased temperature has been identified as decreasing the spawning period of the totoaba.[183] The increase in salinity foreseeably caused injury to the totoaba by significantly impairing spawning, as well as other behavioral patterns.

In accord with the aforementioned definitions and duties imposed by the ESA, the Supreme Court has stated that the ESA "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies"[184] and that, "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[185] Under this reasoning, the ESA is intended to take

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statutory duty under the ESA to insure that their activities do not jeopardize the [endangered species]." *Id.*

178. Endangered Species Act, 16 U.S.C. § 1538(a)(1) (2000).

179. *Id.* § 1532(19).

180. *Id.* § 1538(a)(1)(B)

181. Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.3(c) (2002).

182. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 713 (1995) (O'Connor, J. concurring).

183. Cisneros-Mata et al., *supra* note 134, at 809.

184. Tennessee Valley Authority v. Hill, 437 U.S. 153, 185 (1978).

185. *Id.* at 184.

precedence over the wants and needs of other agencies. Therefore, providing the delta with enough water to save the endangered totoaba should take priority over other federal actions, such as the operation of the dams.

In concurrence with the emphasis of species preservation as a primary concern, the ESA mandates that federal agencies use their power to further the purposes of the ESA through programs that conserve endangered species and threatened species.[186] The ESA defines the terms "conserve," "conserving," and "conservation" as using all methods and procedures necessary to result in the increase of a listed species' population such that the species is no longer threatened or endangered.[187] Currently, the government is not using every method and procedure necessary to increase the totoaba's population. In fact, the federal government is not using any method at all. The federal government has a duty under the ESA to implement a procedure, or otherwise utilize a methodology, to conserve the totoaba. For example, the federal government could implement a policy setting a maximum limit for the amount of water stored in dam reservoirs, thereby decreasing the amount of water lost to evaporation. Similar policies would create excess water that could then flow into the delta, minimizing the harm to the totoaba and its environment. Government projects that jeopardize an endangered species must be terminated, devoid of agency discretion.[188] The dams and diversions along the Colorado River are jeopardizing the totoaba. Regardless of the Bureau of Reclamations' requirements, the dam projects must be terminated, or operated in a manner that does not jeopardize the totoaba. The agencies should have no say in the matter.

A district court recently came to the same conclusion in enjoining a dam on the Missouri River from taking endangered species.[189] "[T]raditional balancing of equities [for issuance of an injunction under the ESA] is abandoned in favor of an almost

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186. Endangered Species Act, 16 U.S.C. § 1536(a)(1); § 1531(c)(1).

187. *Id*. § 1532(3). Such methods and procedures may include a regulated taking in rare cases where population pressures in an ecosystem cannot be relieved. *Id*.

188. *See Tennessee Valley Authority*, 437 U.S. at 184-85. The Court noted, "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence' of an endangered species." *Id.* at 173 (quoting 16 U.S.C. § 1536 (1976)) (emphasis omitted).

189. American Rivers v. US Army Corps of Engineers, 271 F.Supp. 2d 230 (D.D.C. 2003) (enjoining dam where environmental groups established a likelihood of success on the merits and a likelihood or irreparable harm where balance of harms weighed in favor of a preliminary injunction).

absolute presumption in favor of the endangered species."[190] This follows "the Supreme Court's conclusion that Congress spoke in the 'plainest of words' in enacting the ESA, 'making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.'"[191] The court further held that "ESA compliance can come at the expense of other interests including navigation and flood control," in light of congressional intent to give endangered species priority over primary missions of federal agencies.[192] If saving endangered species is a high enough congressional priority to enjoin a U.S. dam from jeopardizing endangered species living in U.S. waters, then it should be a high enough priority to enjoin U.S. dams from jeopardizing endangered species living in Mexican waters as well.

A less drastic solution would be to reapportion the Colorado River. The Treaty with Mexico sets the minimum amount of water required, but nothing prevents the United States from providing more. If each state gave up a portion of the water originally allocated under the Colorado River Basin Compact, the excess water could revitalize the Rio Colorado Delta's ecosystem. This alternative approach, in conjunction with regulated maximums for water storage would ensure the totoaba would no longer be jeopardized and the dams would no longer violate the ESA.

V. CONCLUSION

The U.S. government should be held accountable for negative impacts to endangered species in Mexico resulting from over-allocation of the Colorado River.[193] The ESA should be interpreted to extend protection to foreign species affected by U.S. actions, and the U.S. should fulfill the duties imposed by the Treaty with Mexico. The border between the U.S. and Mexico is essentially an imaginary

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190. *Id*. at 248-49 (quoting Defenders of Wildlife v. EPA, 688 F.Supp. 1334, 1355 (D. Minn. 1988)).

191. *Id.* at 249 (quoting Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978)).

192. *Id*. at 257.

193. *But see* Defenders of Wildlife v. Norton, 257 F. Supp. 2d 53 (D.D.C. 2003). In *Defenders of Wildlife,* Mexican and American environmental groups sued the Department of the Interior based on the Bureau of Reclamation's operation of dams on the lower Colorado River. Focusing mainly on issues of standing, the court held that the Bureau of Reclamation's duty to consult under the ESA did not extend to the operation's effects on extra-territorial species in the Rio Colorado Delta since the Bureau of Reclamation had no discretionary control over the water flowing into the delta. "[A] Supreme Court injunction, an international treaty, federal statutes, and [government] contracts [with private water] users account[ed] for every acre foot of . . . river water." *Id*. at 69. While this case stands for the proposition that the Bureau of Reclamation is not in violation of the ESA in carrying out non-discretionary mandates, this case does not detract from my theory that the federal government is in violation of the ESA in mandating the water withdrawals in the first place.

line. The totoaba cannot distinguish between U.S. waters and Mexican waters. But the totoaba can distinguish between clean water and toxic water. Why should the U.S. government be absolved from responsibility for its actions, simply because the affect is felt further downstream? Were the imaginary line to move 90 miles south, the U.S. government would be forced to remedy the problem.

Foreign species should be extended the same protection under the ESA as native species. Federal agencies should be required to consult with the Fish and Wildlife Service before implementing plans that will affect the delta in any manner. Section seven of the ESA requires the consulting agency to evaluate the biological impact of the planned action on all areas directly or indirectly affected by the Federal action. Therefore, the consultation must consider the dams' affect on the delta because the decrease in water is causing the delta to erode, and the temperature of the water to increase along with the toxicity.

Similarly, the delta should be within the scope of the action area when considering the cumulative effects of an action. The consulting agency has a duty under the ESA to consider the cumulative impact of all federal actions in the area that are affecting the species. Accordingly, the consultation must consider not only the effect of a single dam, but also the combined effect of all of the dams on the endangered species living in the delta.

Further, the dams should be deemed as taking the totoaba, and appropriate measures implemented to prevent future takings. Section four of the ESA prohibits any person from harassing, harming, wounding, or killing an endangered species. However, the dams are foreseeably causing significant habitat modification and degradation that is foreseeably causing death and injury to the totoaba (and other species living in the delta) by significantly impairing essential behavioral patterns. While the dams do not take any totoaba within the borders of the United States, actions taken within the United States are harming an endangered species, and thus, should be considered a taking.

Finally, the protection of the endangered species in the Rio Colorado Delta should take precedence over the operation of dams and diversions along the Colorado River because the ESA places the priority of federal actions on the protection of endangered species. The ESA was intended to protect endangered species, even at the expense of other agency needs and goals. The ESA should be implemented as intended, and take preference over agency actions that are jeopardizing endangered species in the delta.

Currently, some agencies willingly follow the ESA's requirement to give preference to the protection of threatened and endangered

species. For example, in *Pacific Coast Federation of Fishermen's Ass'ns v. Bureau of Reclamation*, the National Marine Fisheries Services' (NMFS) biological opinion concluded that the Bureau of Reclamation's proposed water flow management of the Link River dam was likely to jeopardize the continued existence of the coho salmon in the Lower Klamath River.[194] Thus, the NMFS proposed a plan that would: (1) require the Bureau of Reclamation to meet minimum flow levels; (2) provide an additional amount that gradually increases each year with a water bank; (3) agree to specific long-term target water flows; (4) establish an inter-governmental task force to develop, procure, and manage water resources; and (5) establish an inter-governmental science panel to develop and implement a research program to further study coho salmon and their habitat.[195] Because the endangered totoaba is suffering the same harms from the operation of dams as the endangered salmon, the Bureau of Reclamation should work together with the NMFS to develop a plan similar to the one implemented in *Pacific Coast*, to increase flow levels and studies of the totoaba.

Additionally, the Bureau of Reclamation should implement *Pacific Coast's* water bank management plan and reapportion the Colorado River so that more water reaches the Rio Colorado Delta. One way to meet these specific long-term target water flows would be to require each state to give up a portion of their allocation in order for the excess to flow to the Rio Colorado Delta. States could more readily afford to give up some of their apportioned water if the water was not needed for irrigation. By 1997 eighty percent of the Colorado's water was dedicated to irrigating land not suited to grow crops.[196]

Even if states refuse to cooperate with the reapportionment process, legal tools exist to force compliance. The District Court for the District of Columbia recently held that in light of congressional intent to give endangered species priority over the primary mission of federal agencies, ESA compliance can come at the expense of other interests, including navigation and flood control.[197]

The ESA provides the legal context for application to foreign species. However, federal agencies continue to ignore this interpretation of the ESA. Until the courts enforce the ESA the Rio Colorado Delta will continue to shrink more each day and

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194. Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 2003 U.S. Dist. LEXIS 13745 at 23 (Cal. Dist. Ct. App. N.D. July 14, 2003).

195. *Id*.

196. PONTIUS, *supra* note 2, at 13.

197. Rivers v. Army Corps of Engineers, 271 F.Supp. 2d 230 (D.D.C. 2003) (enjoining water diversions along the Missouri River).

endangered species, like the totoaba, will continue to lose their home.

WHEN HER FEET TOUCH THE GROUND: CONFLICT BETWEEN THE ROMA FAMILISTIC CUSTOM OF ARRANGED JUVENILE MARRIAGE AND ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS TREATIES

JEFF TIMMERMAN*

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"Sit your daughter in a chair and if her feet touch the ground, she's ready for marriage."[1]

Romani Proverb

I. INTRODUCTION

When self-declared Romanian Gypsy king Florin Cioaba married his twelve-year-old daughter Ana Maria to fifteen-year-old suitor Birita Mihai in September 2003, the international human rights community finally decided to cry foul.[2] The controversial marriage was the second to make major international headlines in a six-month period. In May 2003, fifteen-year-old Gypsy bride Narcisa Tranca was reluctantly married to another Gypsy juvenile, consequently ending her dream of studying medicine.[3] In response to this outcry, the Child Protection Service in Sibiu, Romania, with the written consent of both sets of parents, returned the children to their respective homes so they could continue attending school, and initiated counseling sessions at the Child Protection Service until the children reach legal marriage age.[4]

Culturally speaking, her parents faced an unthinkable paradox: if Narcisa hadn't married, her father said, she would have faced imminent "abduction by potential suitors who wouldn't wait for negotiation."[5] Juvenile marriage is prototypical of time-honored Roma — or Gypsy — tradition, left alone for centuries by governments more concerned with state-sanctioned positive discrimination against Roma rights in other social forums. In 2000, the European Roma Rights Center (ERRC) submitted a statement for consideration to the United Nations Committee on the Elimination of Racial Discrimination, highlighting substantive violations of the International Convention on the Elimination of All Forms of Racial Discrimination, specifically: Article 2 (widespread discrimination and violence without adequate legal protection),

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1. Romany Information Service, Roma in the Czech Republic, Adolescence (June 4, 2000), *at* http://www.romove.cz/en/article/18091 [hereinafter *Adolescence*].

2. Associated Press, *Activists Condemn Gypsy Girl's Arranged Wedding In Romania* (Sept. 30, 2003), *at* http://www.cnn.com/2003/WORLD/europe/09/30/romanian.Gypsy.ap/index.html.

3. Associated Press, *Compelled To Wed At 15, Gypsy Bride Buries Dream of Studying Medicine* (June 28, 2003), *at* http://www.usatoday.com/news/world.2003-06-28-Gypsy-bride_x.htm [hereinafter *Associated Press*].

4. Statement from the European Roma Rights Center to the author (Oct. 7, 2003) (on file with author).

5. Associated Press, *supra*, note 3.

Article 3 (racially segregating governmental social policy), Article 4 (official encouragement of racism), Article 5 (equal protection under the law), Article 6 (ineffective protection and non-existent remedies for breaches), and Article 7 (insufficient or absent educational campaigns).[6] In response to the current media frenzy, the ERRC, while condemning forced juvenile marriage as violative of international human rights standards and applauding Romanian intervention, carefully notes that it is equally "crucial that Romanian authorities show an even-handed approach in their acts to counter human rights abuses [against Roma]."[7]

The question naturally begs its own answer: Why is the international human rights community so concerned with containing arranged juvenile marriage now, a concern with potentially punitive implications for internalized Roma lawmaking, at a time when so many other serious positive violations of Roma rights, often state-sanctioned, are embedded in host country[8] legal systems?[9]

This article spans three major substantive areas implicated in the juvenile arranged marriage dialogue specifically in the Balkan region. Section II focuses on demystifying the myths and traditions surrounding Roma origin and marriage customs. Section III attempts to piece together the latticework of international authority and sociological scholarship underlying the juvenile arranged marriage dilemma. Section IV explores the implications involved in imposing state-made law onto encapsulated ethnic communities,[10] taking special note of the problems inherent in externally criminalizing behavior internally viewed as permissible and socially accredited,[11] especially heightened in countries renowned for positive discrimination against Roma. Lastly, Section V concludes the article by discussing political pressures vertically applied on Balkan countries by European Union mandates in the ongoing

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6. *Racial Discrimination and Violence against Roma in Europe: Statement submitted by the European Roma Rights Center*, U.N. CERD, 57th Sess., at 3-33 (2000), *available at* http://www.errc.org/publications/legal/cerd_thematic_aug_2000.pdf.

7. Statement from the European Roma Rights Center to author, *supra* note 4.

8. Hereinafter, the term "host country" refers to a State with a Roma constituency.

9. *See generally* John A. Andrews, *Gypsies and the Law*, 22 EUR. L. REV. 365 (reviewing Buckley v. The United Kingdom, *infra* note 20, the seminal Gypsy-related case from the European Court of Human Rights, about which Andrews notes that the Court did not consider the minority rights of Gypsies until 1996).

10. *See* Edo Banach, *The Roma And The Native Americans: Encapsulated Communities Within Larger Constitutional Regimes*, 14 FLA. J. INT'L. L. 353, 356 (2002) (concentrating on "Roma sovereignty as an encapsulated nation," and attempting to "clarify the constitutional position of a neglected and misunderstood group.").

11. *See* Walter O. Weyrauch, *Romaniya: An Introduction to Gypsy Law*, 45 AM. J. COMP. L. 225, 231-232 (1997).

process of accession toward a unified European Union — a realm dominated by developed countries insisting on unfettered compliance with international human rights standards and policies.

II. SQUARING MYTHICAL ROMA ORIGINS WITH CUSTOMARY MARRIAGE PRACTICES

To understand Roma marriage customs, one must first understand the shroud of curiosity surrounding Roma genesis, a topic broad enough to independently fill the pages of numerous scholarly articles. Historians have known the accurate point of Roma origin since the eighteenth century, when Istvan Vali, a Hungarian pastor, linked a thousand-word lexicon compiled in southwestern India to a local Roma population in Hungary.[12] Gypsy migratory patterns have subsequently been "likened to a fishbone,"[13] quickly becoming convoluted as half the ethnicity's thousand-year migratory history contains no contemporary account, amplified by the fact that Gypsies have "never kept records of their own."[14]

Indeed, in terms of accuracy, history has offered the Roma culture little shelter. The five hundred-year gap in accredited Gypsy history, combined with pollutive Gypsy stereotypes originating in early Western accounts, helped create and intensify a Roma culture mystified to the extreme edges of absurdity.[15] Opportunistic "eye-of-the-beholder" biblical speculations, supported by selective *gadje* (outsider) textual interpretations, cast the Roma as descendants of Cain. This presumptive history is complicated by the lack of Western ideals within Roma history. Gypsies "have no heroes . . . no myths of a great liberation, of the founding of the 'nation,' [or] of a promised land,"[16] making such prominent Western stereotypes virtually irrebuttable.

Perhaps the most popular origination myth involves the crucifixion of Christ at Golgotha, an iconic image tinged with shame and hatred, malleably lending itself to contortive mystification. According to legend, Roman jailers charged with purchasing nails for Yeshua ben Miriam's crucifixion[17] set out to commission a

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12. ISABEL FONSECA, BURY ME STANDING: THE GYPSIES AND THEIR JOURNEY 85-86 (1995) [hereinafter *Fonseca*].

13. *Id.* at 83.

14. *Id.* at 86.

15. *Id.* at 87-88. For example, to make his accounts of Gypsy origination more exotic and compelling, eighteenth century linguistic paleontologist Heinrich Grellmann wrote of "wanton women, of carrion-eaters . . . who had a 'relish for human flesh.'" These myths abounded for more than a century.

16. *Id.* at 88-89. *Gadje* is the generic Romani term for non-Gypsies, or outsiders, used fairly liberally within Roma communities.

17. Yeshua ben Miriam is another name for Jesus Christ.

blacksmith to forge four such nails. After two Jewish blacksmiths refused to comply and were viciously murdered in retribution, the soldiers happened upon a Gypsy who eagerly pocketed the money and began the task.[18] When completed, the fourth nail remained red hot, taking on an aggressive personality and committing itself to incessantly chasing the Gypsy for all eternity. This is the reason why Christ was only crucified with three nails — and the reason why Gypsies were forced to adopt a nomadic lifestyle.[19]

In the context of all that is misunderstood about Gypsy heritage and cultural genesis, it is clear that Roma marriage customs are viewed with equally disconcerted speculation. From an outsider's perspective, the Gypsy marriage process involves colorful, ornate displays of courtship and is tainted with implications of possessory interest. This perception is further jaded by internalized discrimination and criminalization of Gypsy ethnicity, an imploding relationship often propelled by positive state action and lack of state-sponsored ethnic education. Indeed, at times it seems as if, rather than remedying ongoing human rights violations, Balkan host countries, themselves often perpetrators of hate crimes against Gypsies and immune from prosecution, choose instead to selectively enforce laws *further* criminalizing Gypsy behavior and reinforcing cultural stereotypes.[20]

Contrary to popular myths of prevalent immorality, Roma marriage is neither socially integrated nor culturally demoralized. The process of juvenile arranged marriage is culturally self-contained and affects only Roma youth. In this sense, it poses a unique dilemma for international human rights scholars: while it is undeniably true that Roma youth are being denied the right to choose whom and when to marry in some instances, the Roma community itself openly embraces juvenile arranged marriage as a protectionist strategy and means of cultural, economic, and societal preservation and autonomy. Choice of partner is culturally restricted in an effort to insulate "tribal and social purity,"[21] and Roma who marry *gadji* (a female "outsider") or *gadjo* (a male "outsider") are ostracized and forced to struggle for community acceptance.[22] As Isabel Fonseca observed, "[a]mong the Roma one felt as they did: utterly safe, as in a family . . . . [f]ar from suggesting a demoralized culture, endogamy here seemed the mark

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18. *Id.* at 90-91.

19. *Id.* at 91-92.

20. *See generally* Buckley v. United Kingdom, 23 Eur. Ct. H.R. 101 (1996) (the seminal Gypsy-related case from the European Court of Human Rights).

21. Patrin, *Romani Customs and Traditions: Marriage, at* http://www.geocities.com/Paris/5121/marriage.htm (last visited March 24, 2004).

22. *Id.*

of a buoyantly confident group, settled in their skin and not needing outsiders."[23]

Traditionally, Roma marriage customs involve engagement, *pliashka*,[24] and the marriage ceremony. In addition to possible human rights violations imbued in the notion of arranged marriage itself, Roma marriage embodies certain uncodified spousal rules and troubling gender-based social roles that potentially heighten human rights violations.

A. Engagement, Pliashka, and Marriage

Roma marriage traditionally occurred between the ages of nine and fourteen,[25] a practice increasingly threatened with complete eradication by Balkan countries that somewhat opportunistically seek to save face in the eyes of the international community. Social research seems to support Roma practice, suggesting that, to some extent, Romani girls are more socially prepared at an earlier age due to the fact that transformative years — adolescent years normally associated with "defiance and rebellion" — are entrusted to a future husband.[26]

It is important to note early in this article that, although Roma tradition still relies heavily on archaic marital bartering mechanisms like bride prices and dowries, not all Romani marriages are arranged — especially intercultural marriages between Roma and *gadjo*. Indeed, even within the framework of ritualistic arranged marriage, elopement is still recognized, albeit skeptically, as a viable alternative to dynastic marriage in the eyes of the Roma community.[27] Largely due to the fact that Roma place such a high value on sexual purity and virginity, elopement serves as a sort of marital euphemism "tantamount to marriage."[28] Elopement simply entails the couple escaping together, often only a short distance from home for a single evening, subsequently returning to the community renouncing virginity.[29] Successful elopement leaves

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23. FONSECA, *supra* note 12, at 24.

24. Patrin, *supra* note 21. *Pliashka*, or *plotchka*, is a ceremony held after a marriage agreement has been reached.

25. *Id.*

26. *Adolescence*, *supra* note 1. This entrustment is largely due to the fact that Romani mothers continue having children. The repercussions of an increased reproductive period are briefly discussed infra. *Citing* Daniela Sivakova, *Antropologicke vyskumy Ciganov (Romov) na Slovensku z roku 1992* ("Anthropolical research on Gypsies (Roma) in Slovakia in 1992").

27. FONSECA, *supra* note 12, at 130.

28. *Id*.

29. *See Id. See also* Patrin, *supra* note 21. The young couple often returns to the community with a bloody sheet, indicative of lost virginity, which is presented to the boy's mother, who treats the blood with *rakia* (plum brandy). If the *rakia* removes the blood in the shape of a flower, the girl's virginity has truly been lost — Gypsy folklore suggests that "pig's

Romani parents with no alternative but to allow marriage. The couple, while initially chastised, is not banished and eventually achieves community acceptance.[30]

Traditionally, a Roma engagement ceremony, or *mangavipen*, was conducted in the following manner:

> The young couple, in the accompaniment of each of their parents, swore before witnesses to be faithful to each other until death. The master of ceremonies, most often a chief elder (*chhibalo* or *vajda*), bound the hands of the couple together with a scarf and then poured wine or some spirit into their palms which they would then drink . . . [f]rom this moment, they are considered by Romani society to be husband and wife, and they may live together and produce children.[31]

The arranged engagement process assumes an air of negotiation with each child's father engaging in long discussions in an attempt to hash out an acceptable *darro* — or dowry — to compensate for the bride-to-be's earning potential.[32] Instead of physical appearance or romantic love, a potential bride's monetary value is calculated using factors "such as health, stamina, strength, dispositions, manners, and domestic skills . . . character of the girl's family, as well as [her family's] prestige in the community," taking into consideration the cost of raising her from birth.[33]

When the fathers reach an agreement as to all terms, the engagement enters a celebratory phase called a *pliashka*, or *plotchka*.[34] The celebration essentially serves as a coming-out party for the young couple, a proclamation of the engagement, and, more importantly, an announcement that the bride is no longer available to potential suitors.[35] At the conclusion of the *pliashka*, the couple prepares for the wedding ceremony.

The *abaiv* — or wedding — has little legal or religious significance to the Roma community aside from sheer symbolic value.[36] Participation in a formal civil ceremony is often nothing

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blood doesn't bloom right," protecting against false alarm and deception.

30. *See generally Adolescence*, *supra* note 1; Patrin, *supra* note 21; FONSECA, *supra* note 12, at 130.

31. *Adolescence*, *supra* note 1.

32. Patrin, *supra* note 21.

33. Patrin, *supra* note 21.

34. *Id.*

35. *Id.*

36. *Id.*

more than a method of conforming to and appeasing local host country laws and customs since Gypsies "simply do not believe in the importance of a formal wedding ceremony under the jurisdiction of a church or state."[37] Traditionally, the civil or religious ceremony, or *bijav*, would not take place until the couple had been together for a few years and had produced a child.[38]

The non-symbolic qualities of Gypsy marriage create an initial enforcement barrier for host countries. Devaluation of civil and religious recognition means Romani are less likely to officially register marriages in civil records.[39] It is difficult to prove that a couple is legally married, as opposed to some legally bewildering type of common law cohabitation[40] popular amongst Gypsies, and without this proof it is even more difficult to charge "spouses" with violating national or international rights laws. Moreover, attempts by host countries to *require* registration could face challenges under European Human Rights Convention standards.[41]

B. Romani Spousal Roles: Implicit Gender-Based Human Rights Violations

After a long, ceremonious Gypsy wedding celebration, a newlywed couple settles down into traditional gender-based social roles primarily dictated by sexuality. Spousal relationships are constantly overshadowed by the threat of *mahrime* or *magherdo*, a concept of impurity and uncleanliness solely associated with women.[42] Roma adhere to strict gender-driven rules concerning commitment, adultery, and infertility — rules which may give rise to independent violations of important international human rights norms and create added remedial pressures on host countries.

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37. *Id.*

38. *Adolescence*, *supra* note 1.

39. *Id.*

40. For the American equivalent, c*ompare* Marvin v. Marvin, 18 Cal. 3d 660 (1976) (seminal case turning to rules of express contract in division of unmarried cohabitants' property) *with* Hewitt v. Hewitt, 77 Ill. 2d 49 (1979) (rejecting Marvin on grounds that it revived common law marriage). These examples demonstrate how common law marriage and unmarried cohabitation are universal sources of judicial contention and confusion.

41. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, *available at* http://www.echr.coe.int/Convention/webConvenENG.pdf. Mandatory registration would likely be challenged under Article 8 (Right to respect for private and family life), Article 11 (Freedom of assembly and association), Article 12 (Right to marry), and Article 14 (Prohibition of discrimination). *But see* CEDAW, *infra* note 62. Article 16(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) expressly makes official registry compulsory. The two Convention bodies may fundamentally conflict.

42. *See generally* FONSECA, *supra* note 12, at 9.

Young Romani brides are expected to forgo education in lieu of domestic chores and perpetuation of the Gypsy race. Fifteen-year old Narcisa, the Gypsy bride described in the introduction who dreamt of becoming a pediatrician, withdrew from school before completing the eighth grade stating, "[i]t would have been useless to continue . . . As of tomorrow, I'll just be stooped over a pot or a broom all day anyway."[43] Although her parents attempted to ensure Narcisa's continued education through negotiation with her husband's family (and, as previously noted, the children were ultimately separated by government officials), substantive success is not likely because, as her parents admit, education of young women is simply "not the Gypsy way."[44]

Additionally, Romani women face stiff stereotypes and unequal treatment regarding infertility and infidelity. Because the ultimate goal of a Roma family unit is maximized reproduction, it is permissible for a husband to abandon his wife if she fails to produce children after a few years of marriage.[45] Instead of scorning such abandonment, Gypsy culture endorses the husband's conduct and, quite oppositely, stigmatizes *the wife* for failing her matrimonial duty.[46] Not only is the young woman deprived of her initial choice of husband, she is left materially limited once more. The process of devaluation brands the abandoned woman as a damaged divorcee, or "used goods," and, regardless of her age, usually means she will only attract a widowed or divorced man.[47]

Similarly, infidelity is treated with great inequality within the spousal relationship. While it is permissible — even expected — for a husband to abandon an adulterous wife, a husband's infidelity *increases* his social prestige to the point that his wife uses it as social leverage to tout her husband's qualitative worth.[48]

Host countries have an unquestionably inherent interest in interfering and reconciling such inequitable conditions with international human rights pacts. The following section attempts to patch together a cogent body of international law, squaring the chronology of human rights violations that merely begin with juvenile marriage and ultimately result in extended discrimination against women within traditional Gypsy cultural life.

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43. *Associated Press*, *supra* note 3. The European Union is currently sponsoring television spots promoting Roma education.

44. *Id.*

45. *Adolescence, supra* note 1.

46. *Id.*

47. FONSECA, *supra* note 12, at 134.

48. *Adolescence*, *supra* note 1 (explaining that if a husband fails to leave his wife upon discovery of infidelity, he is at least expected to punish her in public view using means such as cutting off her hair or beating her).

III. FROM CHILD BRIDE TO *PURI DAJ*: A LIFELONG VIOLATION OF INTERNATIONAL HUMAN RIGHTS STANDARDS[49]

The practice of early marriage has received little attention from women's and children's rights movements, while "[t]here has been virtually no attempt to examine the practice as a human rights violation in *itself*."[50] While juvenile marriage unequivocally causes more comprehensive harm to child brides than to male counterparts, the custom itself is merely the beginning of a much larger culturally embedded tradition of lifelong discrimination against Roma women. This section is dedicated to detailing bodies of international law which expressly and impliedly outlaw discrimination against Roma women, beginning with early arranged marriage — bodies which extend to protect against stereotypes imbued in Roma spousal unions. In correlation with these violations, this section also explores the sociological and physical ramifications of forcing young girls into premature marriage and corresponding communal reverberations.

A. Implicated Consequences of Arranged Juvenile Marriage

The combination of early marriage with forced arrangement creates four distinctly compartmentalized human rights dilemmas in relation to child brides. These violations encapsulate what UNICEF has described as psychosocial disadvantages, adolescent health and reproductive repercussions, the denial of education, and a propensity for violence and abandonment.[51]

From a psychosocial perspective, arranged juvenile marriage results in loss of adolescence, forced sexual relations, and stunted personal development[52] — substantive effects virtually ignored by social researchers. Of special import in the Roma context, UNICEF points to the isolation caused by imposed marriage, especially pertinent because a Gypsy bride is forced to leave her own family and is expected to seamlessly assimilate into her husband's matriarchal hierarchy. [53] As a result, a new bride is virtually friendless in her husband's household, the process of social assimilation gruelingly allotted with the progression of time.

Reproductive health presents multi-faceted concerns hindering both physical and social development, violative of a young woman's

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49. *Puri daj* is the Romani word for grandmother.

50. United Nations Children's Fund Innocenti Research Centre, *Early Marriage: Child Spouses*, INNOCENTI DIGEST, Mar. 2001, at 2-3 [hereinafter UNICEF].

51. *Id.* at 9-12.

52. *Id.* at 9.

53. UNICEF, *supra* note 50, at 9.

"right not to engage in sexual relations and the right to exercise control over reproduction."[54] UNICEF reports that sex within juvenile marriage is not likely consensual in the truest sense of the word, that few young married women have access to contraceptives,[55] while more suffer from higher susceptibility to STDs, and that pregnancy related diseases (such as recto-vaginal fistulas or RVF) and deaths are up to 200 percent higher than an older sampling of mothers aged twenty to twenty four.[56] Furthermore, research indicates that infant mortality rates are higher among younger mothers, while potentially large family sizes also depress local economies.[57]

Finally, UNICEF research confirms earlier assertions that juvenile arranged marriage results in denial of education, as well as violence and abandonment.[58] Lack of education translates into the loss of a chance at identity, meaning that girls are left with no qualifications, a hypothesis directly corroborated by "a strong link between very poor, women-headed households . . . and menial occupations . . . [and] the 'feminization of poverty' and its resulting impact on children."[59]

B. Scrutinizing Arranged Juvenile Marriage Under ICCPR, CEDAW, and CRC

As the ERRC openly admits, forced marriage "is a violation of fundamental human rights, implicating a wide range of international standards and laws."[60] Among the most substantive convention violations, the ERRC notes Article 23(3) of the International Covenant on Civil and Political Rights (ICCPR), which states that "[n]o marriage shall be entered into without the *free and full consent* of the intending spouses."[61]

Concurrently, Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) expressly denounces *both* juvenile and arranged marriages in separate yet equally strong terms:

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54. *Id.*

55. *Id.* at 10. Most cultures which encourage juvenile arranged marriage also encourage rapid and massive reproduction.

56. *Id.* at 11.

57. *Id.*

58. *Id.* at 12.

59. *Id.*

60. Statement from the European Roma Rights Center to the author, *supra* note 4.

61. Id. (citing International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 23(3), 6 I.L.M. 360, 999 U.N.T.S. 171, *available at* http://www.molossia.org/civilrights.html (emphasis added).

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (a) The same right to enter into marriage;
>
> (b) The same right *freely to choose* a spouse and to enter into marriage only with their free and full consent;
>
> . . . .
>
> 2. The betrothal and the marriage of a child *shall have no legal effect*, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.[62]

Both the ICCPR and CEDAW facially allow women the opportunity to freely choose a husband, a concept that becomes problematic in terms of cultural relativism and customary margin of appreciation. The larger problem, however, is enforcement, heightened by the fact that no judicial body exists to enforce the ICCPR or CEDAW. For example, of the Balkan host countries implicated in this article, Romania (Sept. 4, 1980), Bulgaria (July 17, 1980), and Hungary (June 6, 1980), were all CEDAW signatories within twelve months of the original date of signing and all ratified the Convention by the end of 1982.[63] However, none of these countries have actively applied CEDAW standards to Gypsy culture, perhaps due to stagnation and lack of urgency. Romania, the host country with the largest Romani constituency,[64] completely ignored

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62. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 16, *available at* http://www.un.org/womenwatch/daw/cedaw/econvention.htm [hereinafter CEDAW] (emphasis added).

63. *See* U.N. Division for the Advancement of Women, States Parties, *at* http://www.un.org/womenwatch/daw/cedaw/states.htm (last modified Mar. 17, 2004) (emphasis added).

64. Ian Hancock, On the Origin and Current Situation of the Romani Population in Europe and the Responsibility of the American Media to Make that Situation Known, Report Before the Congressional Human Rights Hearing on Abuses Against Gypsies in Eastern Europe (April 14, 1994), *in* The Romani Archive and Documentation Center, On-line Archive, Responsibility of the Media, *available at* http://radoc.net:8088/Responsibility_of_the_Media.htm.

juvenile arranged marriage throughout the remaining decade of post-CEDAW communist rule and continued to ignore the issue entirely until recently succumbing to a flurry of international human rights pressure, despite the existence of a Romanian law establishing a minimum age of sixteen for marriage with parental consent.[65]

While ICCPR and CEDAW regulations expressly provide shelter for child brides, the Convention on the Rights of the Child (CRC) implicitly bans child marriage in a much broader fashion.[66] Procedurally, Article 1 of the Convention establishes the scope of protection by defining a child as "any human being below the age of eighteen," although allowing some margin to legislate a lower applicable age under relevant state law (for instance, the aforementioned Romanian minimum age of sixteen).[67] Article 3 requires states to take appropriate legislative and administrative measures and ensure institutional compliance in the best interests of children.[68] Article 2 prohibits discrimination against children within a state's jurisdiction, which protectively encapsulates ethnic Roma.[69]

Substantively, CRC protects a child's identity (Article 8), right to education (Article 28), and right to survival and development (Article 6).[70] These concepts seem directly contradictory to arranged marriage customs, as women are forced to cease education and assume discriminatory spousal roles, thus stunting development and hindering identity.

Bulgaria, Hungary, and Romania had all similarly ratified CRC by November 1991.[71] Parallel to ICCPR and CEDAW, no judiciary body exists to enforce CRC rights and host countries have literally and practically ignored Romani youth.[72] Interestingly, CRC also provides an apparent "buffer" for indigenous subcultures within host countries[73] which could prove problematic in strict application

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65. *Associated Press*, *supra* note 3.

66. Convention on the Rights of the Child, Nov. 20, 1989, *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm [hereinafter CRC].

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, *at* http://www.unhchr.ch/pdf/report.pdf (last modified Nov. 2, 2003).

72. *See Racial Discrimination and Violence Against Roma in Europe: Statement submitted by the European Roma Rights Center*, *supra* note 6, at 31-2 (stating that about 75% of Romani children in the Czech Republic are relegated to "special schools," and children integrated in regular schools often face a "series of racially motivated obstacles").

73. CRC, *supra* note 66.

and enforcement. For example, children have the right to freedom of association (Article 15), and Article 30 provides that a child belonging to a "minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture."[74] In this respect, while the explicit language in CEDAW makes it unlikely that discriminatory practices would be allowed any margin of appreciation in relation to cultural practices,[75] CRC does implicitly suggest a point of collision — the point where violative cultural practices solicit international human rights regulation.[76] Sadly, CRC is silent as to a procedural resolution at this point of collision.[77]

C. Post-Marital Discrimination under CEDAW

Choice of husband is not the only choice a Romani woman learns to live without; it is merely the first in a long series of repressions defining a wife's spousal role. Roma women are relegated to performing household duties, and it is not uncommon for a husband to forbid his wife from leaving the home.[78] Paradoxically, Roma women see nothing unfair about mandatory spousal roles — "[q]uite the opposite: they had the comfort of having a clear role in a world of unemployment without end . . . . [T]he men, jobless and bored … looked the worse off."[79]

Consent to abide by a discriminatory customary practice — even if such consent is garnered by the victimized segment of a population itself — most certainly does not redeem that practice in the eyes of international human rights laws. Even if a juvenile consents to an arranged marriage, the entire text of CEDAW could be viewed as wholly anathema to Roma spousal customs. Most significantly, Article 5 mandates States to take appropriate notice of discriminatory customary practices:

> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[80]

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74. *Id*.
75. CEDAW, *supra* note 62.
76. CRC, *supra* note 66.
77. *Id.*
78. *See generally* FONSECA, *supra* note 12, at 40-52.
79. *Id.* at 47.
80. CEDAW, *supra* note 62.

Moreover, the nature of such consent in terms of potential physical and sociological ramifications seems to wholly obviate consent itself — if it were considered to be otherwise, the exception would truly swallow the rule. Nor does any notion of ex post facto consent, i.e., an arranged bride consenting to marriage at a later point in time after reaching maturity, seem to offer the practice any substantive retroactive protection. Instead, analogizing to the common law rule of contracts involving juveniles is instructive. For example, if a child consents to enter into a binding contract, and subsequently breaches the contract, she cannot be held liable *regardless* of her consent because of her inexperience and incapacitation. Similarly, when considering the actions of a juvenile in the commission of a common law tort, one looks to a juvenile reasonable person standard, correspondingly possessing diminished capacity and decision-making capabilities.

As in the case of arranged juvenile marriage, Balkan state parties to CEDAW are doing nothing to infiltrate and end discriminatory customary practices within Roma communities. Conversely, host countries are positively discriminating against these communities instead of taking negative limitative measures. Unless these countries get serious about holistically eliminating lifelong patterns of discrimination against Roma women, sanctioning the internal practice of arranged juvenile marriage will merely push the problem forward while uselessly impeding an imbued cultural tradition — an action which, in light of the already horrific human rights atrocities committed upon Gypsies, would serve as a double blow of sorts.

D. Possible Enforceability under the European Human Rights Convention

The power of judicial review afforded by the European Human Rights Court might prove a hypothetically viable yet practically infeasible alternative for Roma women wishing to agitate host countries into enforcing stricter human rights standards. Most notably, Article 12 of the Convention states that "[m]en and women of *marriageable age* have the right to marry and to found a family, according to the national laws governing the exercise of this right."[81]

The obvious problem inherent in this solution is one akin to standing — potential claims must be made by individuals — in this instance, women whose rights are violated through Roma customary practices would be forced to bring suit against host countries for

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81. The European Convention on Human Rights, art. 1-18, Nov. 4, 1950, *available at* http://www.hri.org/docs/ECHR50.html (emphasis added).

failing to enforce the European Human Rights Convention. In light of the extensive discussion concerning the cultural subjugation of Roma brides, and the forthcoming discussion of embedded Roma law, the likelihood of this type of suit being litigated is next to none.

IV. CHOICE OF LAW: IMPOSING INDIVIDUALIST STATE LAW ON COLLECTIVIST ROMA COMMUNITIES

While states are beginning to enact legislation attuned to codifying international human rights standards, enforcement standards prove doubly problematic when applying state-made law to indigenous groups with self-contained autonomous informal legal systems. The resulting legal interplay places criminal emphasis on different behaviors in different societies. Behavior criminalized by host country legislation may maintain societal importance within the Roma community, and vice versa — a phenomenon Lea and Young have designated "realist criminology."[82] Conversely, behavior deemed criminal by informal Roma law may go unpunished by host countries.

Underlying the enforcement problem is a much more deeply rooted human fundamental contradiction. While international standards focus principally on the individual, Gypsy law is "primarily concerned with the collective rights of the Gypsy community."[83] Historical inability to juxtapose a host country's own criminal law with informal clan law, even disregarding codification of human rights agreements, signifies the impending difficulty looming in the process of legal and policy harmonization. The vertical pressures of heightened international human rights standards add a third entangled tier of enforcement: rights standards must first be codified into host state law and then applied to embedded communities such as the Roma. There appears to be no alternative for the international community to bypass host states and apply international norms directly.

Moreover, if host states attempt to cooperatively criminalize Roma behavior according to international human rights standards, there is a danger of failing miserably unless the same host states also get serious about ending state-encouraged discrimination and blatant racism against Roma. Simply put, discriminative host societies offer no incentive for cooperative compliance — a

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82. Susan Caffrey & Gary Mundy, *Informal Systems of Justice: The Formation of Law Within Gypsy Communities*, 45 AM. J. COMP. L. 251, 262-63 (1997) (relying on JOHN LEA & JOCK YOUNG, WHAT IS TO BE DONE ABOUT LAW AND ORDER, Penguin Books 1984).

83. Caffrey, *supra* note 82, at 259.

relationship akin to the fox requesting the henhouse door be left wide open.

This final substantive area deals specifically with a skeletal structure of informal law within Gypsy communities, the interplay of subordinating encapsulated Gypsy law to formal host state law, and the convoluted practice of behavioral criminalization.

A. The Power of Misperception: Practically Interfacing Informal Roma Law and Formal Host Country Law

Long before human rights standards may be appropriately superimposed on Roma communities, host countries must strive to reconcile fundamental differences in harmonization between these informal bodies of law and formal codified state-made law. In many definitional areas, the three overarching bodies of law square off in an arena of mutual exclusivity.[84] Much scholarship has been dedicated to *describing* the lapses and overlays between these tiered relationships, and it would be redundant to simply recapitulate well-reasoned arguments.[85] Instead, this article looks to *apply* Roma jurisprudence as it relates to the practice of arranged juvenile marriage in light of impending formal host country law.

An initial barrier to universal understanding of Roma law is that, much like the culture it regulates, this unwritten code is mired in uncertainty and mystery. This barrier is compounded by host countries disinterested in any modicum of education. Romani law is confusing because it is corporeal in nature and based largely on arbitrary rules and distinctions — notions which run anathema to logic-based abstract Roman law.[86] Arranged juvenile marriage is better understood when considering its sustentative importance, based on the apparent perception among Roma that "[s]exuality, procreation and marriage . . . sustain law."[87] In light of the oppressive sexual regime dominant within Gypsy culture, it appears from the onset that Roma law perpetuates stereotypical myths and gender bias. Quite contrarily, Weyrauch[88] argues that, while gender is indeed concurrently important and perplexing to outside observers, *women* hold vast concealed legal power through

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84. *See generally* Banach, *supra* note 10, at 382-90 (arguing that four overlapping layers of law frame the Roma legal situation: International versus State, State versus District, District versus Roma, and Roma private law).

85. *See, e.g., id.*

86. Walter O. Weyrauch, *Romaniya: An Introduction to Gypsy Law*, 45 AM. J. COMP. L. 225, 226 (1997).

87. *Id.* at 227.

88. It is worth noting that Walter O. Weyrauch is considered to be a leading expert on internalized Gypsy law. For example, see Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323 (1993).

manipulation of sexual taboos (in accordance with the aforementioned notion of *mahrime*):

> The very foundation of law is protected by taboos that, although . . . adhered to, prevent their discussion and explanation . . . . [The] appearance of male dominance conceals the powerful position of women. Women have the power to curse and to pollute . . . They are also the guardians of law, because they communicate the taboos to their offspring from early infancy.[89]

In this sense, arranged juvenile marriage is a valid cultural attempt at sustaining social structure and value perpetuation at an early age, before potential young brides and grooms have the opportunity to choose a different lifestyle. Strict spousal rules and roles, heinous from an outsider's perspective, may be nothing more than a taboo-driven façade designed to promote the Roma way of life. While such legal mechanisms undoubtedly strip a child of precious identity, the practice, when considered from an insider's perspective, must be viewed as possessing some redeeming cultural value.

Further complicating the matter, arranged juvenile marriage seems wholly irrational in respect to modern women's rights and international human rights movements. Indeed, the practice seems overtly foreign to an individualist society. In practice, Roma dogmatism preserves the dogma itself — much like, when asking a Christian to empirically prove how she knows God exists, she will likely respond "because He does." In this sense, the differentiation between irrationality regarding internalized law encouraging arranged juvenile marriage and arcane "civilized" irrationality is merely a battle of form over substance, depending on which set of standards establishes the high-water mark.

As a more benign example of a similar Gypsy irrationality, Weyrauch calls to attention a Romani rule which dictates "that the presence of women on higher floors . . . pollutes the occupants of lower floors."[90] Weyrauch discounts attempts to discredit such rules as irrational as merely "expressions of ethnocentrism. To the equally ethnocentric Gypsy the validity of the rules of *Romaniya* is beyond dispute . . . . The whole distinction between rationality or irrationality of rules may be irrelevant for the Roma."[91] From a

89. Weyrauch, *Romaniya: An Introduction to Gypsy Law, supra* note 11, at 227.
90. *Id.* at 228-229.
91. *Id.* at 229-230.

human rights perspective, there is obviously a qualitative disconnect between those internal rules addressing such issues as placement in houses and arranged child marriage. However, this irrationality dichotomy, a further byproduct of impeded cross-cultural observation,[92] only serves to further entrench the collectivist/individualist paradox rather than bridging the substantive gap between international, state, and Gypsy law.

This gap poses a dangerous crossroads. While the constitutions of most Eastern European countries incorporate clauses that make anti-discriminatory international human rights standards take precedence even over domestic law, laws which fail to protect minority groups while concurrently passing international muster "can only be detrimental" to an enforcement system loosely based on standards akin to an honor system.[93] The pendulum swings the other way as well. State criminalization of Gypsy behavior without education or understanding of that behavior's internal importance or cultural value is a similarly disingenuous attempt to comply with international human rights standards. Under-enforcement and over-enforcement are birds of the same feather. Gypsies are relegated to cultural exposure and exploitation.

B. That Which Must Be Criminal: Criminalization as the Result of Social Compartmentalization

Social misperception — derived from this underlying sense of confusion and irrationality — quickly evolves into a need to define that which must be criminal. This is the logical conclusion to a host society's desire to mitigate perceived negative behavior and perpetuate a dominant legal code, regardless of apparent ingenuousness or bad faith. The price of misperception is social upheaval for the Roma. Host states fail to recognize key parts of informal law.[94] In pursuing their objectives, these states allow "fundamental nonrecognition or ignorance of a foreign legal system . . . result[ing] in the criminalization of that foreign legal culture."[95]

The downfall of communism in Eastern European host countries created a social equation ripe for promoting discriminatory behavior — a change largely attributed to the disruptive paradigm shift. In

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92. *See* W. Michael Reisman, *Autonomy, Interdependence, and Responsibility,* 103 YALE L.J. 401, 403-404 (1993) (describing the phenomenon of cross-cultural observation as referencing differing interpretations of the term "law . . . depending on . . . whether the observer is a member of the system observed . . . [or] is an outsider or is on the margin").

93. Maxine Sleeper, *Anti-Discrimination Laws in Eastern Europe: Toward Effective Implementation*, 40 COLUM. J. TRANSNAT'L L. 177, 188 (2001).

94. W. Michael Reisman, *supra* note 92, at 410.

95. Weyrauch, *Romaniya: An Introduction to Gypsy Law, supra* note 11, at 235.

a report before Congress detailing human rights abuses against Gypsies in Eastern Europe, Ian Hancock revealed that "[w]hereas under Communism, popular blame for mismanagement was directed upwards, it is now being directed downwards, and Romanies [sic], at the bottom of the social hierarchy, have become everybody's scapegoat, and are being subjected to increasingly blatant and virulent hatred."[96]

The result is an uncritically supervised one-sided approach to crime, as demonstrated by the dispositive facts in the European Court of Human Rights *Assenov* decision.[97] In *Assenov*, the father of a Romani teenager arrested and beaten for gambling in a public square rushed to his son intending to further punish his son with a wooden plank, in accordance with internal Roma custom.[98] Instead of allowing the father to punish his son, police arrested the father as well.[99] In this sense, *Assenov* represents a direct conflict between informal Roma law and criminalized host state criminal law.

Such anti-crime legislation fails in another complicated manner, that of the harmonization (or cohesion) of two distinct cultures. Host states, in an attempt to further compliance with international human rights standards, conversely aim anti-cohesive measures at Gypsy populations, thus missing an opportunity to commandeer the type of internal "manipulating" Reisman argues could potentially expedite the harmonization process.[100] Caffrey and Mundy make the case that such directed manipulation, as a "return to traditional forms of informal involvement in the process of control," would have voluminous benefits, including an enhanced quality of life, increased sensitivity to undesirable behavior and reporting of social deviance, community empowerment and sense of internalized control (tending to shift preventative criminalization to proactive criminalization), the availability of moral rights principles to maintain order, and concentric impact analysis (ensuring that offenders retain full realization of criminal impacts).[101]

Even if host states continue to criminalize Gypsy behavior in this convoluted, inefficient manner, the issue of time still serves as

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96. Hancock, *supra* note 64.

97. Assenov and Others v. Bulgaria, 96 Eur. Ct. H.R. 3264 (1998). The ECHR held that "failure to adequately investigate the claims of police brutality" amounted to a violation of Article 3 of the European Human Rights Convention, imposing, for the first time, "a positive mandate to actively secure the rights guaranteed by Article 3." For an in-depth analysis of the legal significance of *Assenov*, see Banach, *supra* note 10, at 379-381.

98. *Assenov*, 96 Eur Ct. H.R. at 3271.

99. *Id.*

100. W. Michael Reisman, *supra* note 92, at 410 (citing Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323 (1993).

101. *See* Caffrey & Mundy, *supra* note 82, at 263-65.

an effective, although largely unexplored, bar to implementation. As demonstrated by the aforementioned Florin Cioaba case, the same host states which for decades ignored the practice of arranged juvenile marriage are suddenly choosing to selectively enforce human rights measures without providing any form of substantive notice. This type of expedited enforcement seems to cut against the process of cooperative harmonization, leaving Gypsies to wonder which culturally imbedded remnant is next on the sacrificial chopping block. For example, could Romania, in an effort to enforce its obligations under the CEDAW treaty, infiltrate Roma communities and flush women into the workplace? At what point do tactics aimed at enforcing human rights standards *themselves* violate human rights? A well-tempered harmonization effort, coupled with education and effective notice procedures, stands a much better chance of realizing successful compliance with human rights standards.

C. Baseline Human Rights Boundaries: Limiting of Deference

Taking this deference argument to its logical conclusion, it becomes clear that host states should inevitably allow themselves to internalize some aspects of informal Roma legalities, while concurrently fostering equitable developmental compliance with international human rights standards. In a spectral sense, host states should hypothetically allow inconsequential Gypsy practices to continue unimpeded. This spectrum, however, should be framed by a general sense of injustice and does have its own inherent set of limits.[102] At the opposite end, restriction of blatantly violative behavior is inarguably the right thing to do.

Arranged child marriage falls within the realm of this inarguable position, and this article should by no means be interpreted as validating the substantive worth of the practice, but rather as criticizing the regulatory procedures employed by host states — particularly the general cultural misapprehension and shroud of mystery that are curable through education and tolerance. As Reisman proposes:

> The rights of group formation and the tolerated authority of group elites over their members extend insofar as they are indispensable for the achievement

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102. *Id.* at 266 (suggesting that repressive Gypsy practices exercised in the name of protectionism are best understood from a societal cost-spreading approach. Rather than viewing these violations as internalized within a single community, they must be seen as extending marginally, e.g. state repression against homosexuals).

> of individual rights. They cannot be justified if their effect is to abridge or limit basic individual rights … the practices of all groups must be appraised in terms of the international code of human rights . . . . The contention that suppressing [mahrime] practices that subordinate women may weaken Romani cohesion is about as compelling as the argument that prohibiting female mutilation in East Africa will undermine the indigenous cultures of the peoples who practice it.[103]

In light of the numerous human rights conflicts aforementioned, arranged juvenile marriage is truly an indefensible custom falling outside the limits of cultural autonomy. In this sense, there is no such thing as complete group autonomy. And while this article has suggested measures host states must take in order to fully comply with international standards, the fact remains that the Roma must correspondingly take internally proactive cooperative steps as well. The road to harmonization is replete with intersections.

V. CONCLUSION — TOWARDS ACCESSION TO THE EUROPEAN UNION

Eliminating arranged juvenile marriage customs within Gypsy cultures will not obviate the need to take further action protecting women within these cultures. In this sense, such elimination should not be viewed as a cure-all solution to an ongoing gender imbalance — even if Roma couples were forced to marry at a statutory age and under the guise of a legal registration system, Roma women are still likely to fulfill traditional gender roles. While the causation element is present, it is certainly not absolute.

Rather, the situation of child brides within Gypsy cultures more closely resembles the logic behind a gradated loss-of-a-valid-chance threshold. At this threshold, a Roma woman is deprived of the opportunity to make her first substantive decision, one which entails life-long repercussions. The result emulates a domino effect. Roma women are subsequently deprived of an education, instead forced at a young age into distinct spousal roles and begin the trend of living a life less important. More importantly, after passing through this threshold and losing the chance to make her first culturally valid decision, a Gypsy woman succumbs to a system of subjugation carefully constructed around gender-imbalanced entrenchment. While the cultural end is inarguably the same, manipulation of the means to that end might, at the very most, liberate Roma women from strict gender-based roles, or, at the very

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103. *See* W. Michael Reisman, *supra* note 92, at 416-17.

least, allow these women the opportunity to mature to an age where non-conventional decision-making is more than a remotely defunct possibility. Under either scenario, the house of cards relationship that structures Roma gender imbalance will most certainly endure some rattling.

At the very top of the enforcement pyramid, host countries are attempting to rapidly assimilate to European Union human rights standards to further effectuate a seamless ascension process (for example, as aforementioned, Romania is tabbed for entry in 2007, all things considered). While the legitimacy of the EU's motivation for compliance is unquestionable, the application of force at inopportune times runs the risk of jumping the gun. By effectively forcing host countries to unilaterally ban customary practices within embedded cultures while simultaneously turning the collective other cheek to host state-sanctioned positive discrimination against these same cultures, EU policy risks sacrificing substance for form. Instead, a proper EU mandate, in the true spirit of international human rights, should guarantee not only that when her feet touch the ground a young Romani girl will not be forced into an arranged marriage; rather, when her feet touch the ground, she should be free from gender imbalance and discriminatory complacency — free to live a life more important.

YEAR IN REVIEW: THE INTERNATIONAL ENVIRONMENTAL COMMUNITY CELEBRATES A SERIES OF SUCCESSES BUT LAMENTS THE ONE THAT GOT AWAY

RONALD C. SMITH, TIKKUN A.S. GOTTSCHALK, JEFF TIMMERMAN, AND JENNIFER RINGSMUTH*

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I. INTRODUCTION

Ronald C. Smith

International cooperation raced forward in 2003, but the environmental community took a notable pratfall as well. The year will be celebrated as one in which world bodies collected the final signatures necessary to put important international agreements into force in areas such as biodiversity, trade of hazardous chemicals, and pollution from heavy metals. It is also scarred by the memory of a much anticipated victory on climate change that collapsed without warning.

International environmental law encompasses an increasingly diverse group of topics, thus, it was necessary to leave many things out in this year-in-review piece. Recognizing that we cannot offer an exhaustive review of all the events that impact transnational law, we concentrate our efforts on multinational environmental

agreements and review developments within the major organizations concerned with protection of the environment.

Through the hard work of the United Nations (U.N.), its affiliated bodies, and many other regional and international organizations, 2003 marked significant progress towards protecting the earth and the people who live on it from environmental degradation. Building upon decades of foundational treaties, the U.N. acted on a wide range of environmental issues. International agreements negotiated through the U.N. system can easily be seen as more significant in establishing enforceable international regulation. We also note regional bodies that played an important role in the development of global policy. As seen in the adoption of new environmental treaties and the work of existing international instruments, environmental protection develops and matures in many manners and forums.

We highlight the changing roles of some of these international organizations, detail many of the major studies released in 2003, and discuss initiatives to undertake new studies of worldwide importance. Four members of the *Journal of Transnational Law and Policy* contributed to this year-in-review look at international environmental law. For the purposes of this report, the subject matter has been divided in to eight major divisions. The author of each section is credited separately.

II. KYOTO BREAKDOWN OVERSHADOWS CLIMATE CHANGE PROGRESS

Ronald C. Smith

A. Russia Drops Bombshell at Climate Change Conference

The international environmental community was left standing at the altar in September as Russia abruptly backed away from its anticipated approval[1] of the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The dramatic reversal occurred with scientists and policymakers assembled at the U.N. World Climate Change Conference in Moscow.[2]

Speaking on the first day of the Moscow conference, Russian President Vladimir Putin abandoned "earlier Russian promises to

1. Canadian Press, *Putin will ratify Kyoto Protocol, says Chretien* (last updated Oct. 20, 2003) (the statement coming just ten days before the Moscow conference), *available at* http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1066649789506_131//.

2. Vladimir Isachenkov, *Putin says Russia hasn't decided on Kyoto Protocol ratification* (Sept. 30, 2003), *at* http://www.enn.com/news/2003-09-30/s_8932.asp.

soon ratify the 1997 Kyoto Protocol"[3] and instead declared his nation undecided about the pact to reduce greenhouse gas emissions. Putin went on to cite theories that Russia could benefit from global warming.[4] He even joked that rising temperatures might save Russians money on fur coats.[5] The international response was anything but laughter.

Rajendra Pachauri, the chairman of the U.N.'s Intergovernmental Panel on Climate Change, responded harshly. "Simplistic assumptions that climate change would help Russian agriculture and make that extremely cold country warmer are scientifically erroneous," Pachauri said.[6] "The impacts of climate change on Russia could be quite complex."[7] Pachauri suggested that Russia was wasting an opportunity to regain some of the political influence it lost with the dissolution of the Soviet Union in 1991.[8] Boerge Brende, the head of the U.N. Commission on Sustainable Development, said climate change is the biggest environmental challenge the world faces and a Russian veto is a threat to international cooperation in other fields as well.[9]

European Union officials also pleaded with Russia to come back into the fold.[10] There was immediate concern that if Russia decides not to join the Kyoto Protocol it could spur backtracking by the European Union, Japan, or others who would be restricting emissions such as carbon dioxide when the provisions of the protocol do not have the force of international law.[11]

The Moscow bombshell came one year after well-received Russian and Canadian announcements of support for the treaty.[12] Canada followed through and ratified the treaty.[13] The only real

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3. Chris de Freitas, *Russians say sayonara to Kyoto Protocol,* THE NATIONAL BUSINESS REVIEW (Oct. 23, 2003), *at* http://www.nbr.co.nz/home/column_article.asp?id=7377&cid=5&cname=Asia.

4. Alister Doyle, *Kyoto veto will hurt Russia, says U.N. climate chief* (Oct. 17, 2003) ("Some Russian scientists reckon a warmer climate might aid farming by extending growing areas northwards, but others say rainfall might decrease in vital southern crop-growing regions and that the country could suffer more droughts and floods."), *at* http://www.enn.com/news/2003-10-17/s_9519.asp.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Alister Doyle, *Russian Kyoto veto threatens global environmental cooperation* (Oct. 1, 2003) (Brende, Norway's environment minister, did not specify what cooperation might be damaged), *at* http://www.enn.com/news/2003-10-01/s_8978.asp.

10. *Id.*

11. *Id.*

12. BNA, INC. *Russia, Canada Tell Development Summit They Will Push for Ratification of Kyoto Pact*, 25 Int'l Env't Rep. 862 (Sept. 11, 2002), *at* http://pubs.bna.com/ip/BNA/IER.NSF.

13. *United Nations Framework Convention on Climate Change, Kyoto Protocol, Status of*

hint of a late course correction by Russia came just five days before the Moscow conference with Deputy Prime Minister Alexei Goreyev saying Russia needed more time but maintaining Moscow's support in principle.[14]

It took a phenomenal rally of the world community to put the Kyoto agreement within reach of the necessary signatories to take effect and give Russia the environmental spotlight for the past year. The United States devastated the chances of the treaty ever taking effect when President George W. Bush disavowed it.[15]

The United States' strength under the Kyoto ratification formula[16] is so significant that the refusal of the current Bush administration to back U.S. involvement was greeted as a virtual veto. The U.S. action was characterized as unilateral and part of a pattern of acting out of self-interest, much to the chagrin of its allies.[17] Provisions of the 1997 protocol require ratification by countries responsible for fifty-five percent of 1990 global emissions of carbon dioxide.[18] Without the United States, the treaty requires the signatures of virtually every other country.[19] Some 119 countries

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Ratification, United Nations documents, *at* http://unfccc.int/resource/kpstats.pdf [hereinafter *Status of Ratification*].

14. Oliver Bullough, *No timetable for Russian Kyoto approval, said minister* (Sept. 26, 2003), *at* http://www.enn.com/news/2003-09-26/s_8823.asp.

15. Armin Rosencranz, *U.S. Climate Change Policy Under G. W. Bush*, 32 GOLDEN GATE U. L. REV. 479, 480. ("President George W. Bush's reversal and repudiation seemed a head-in-the-sand response driven by ignorance, shortsightedness and the interests of certain elements of the American business community." The Bush Administration repudiated the Kyoto Protocol in March 2001).

16. *Total carbon dioxide emissions of Annex I parties in 1990, for the purposes of Article 25 of the Kyoto Protocol*, United Nations documents, Kyoto Protocol, *at* http://unfccc.int/resource/kpco2.pdf.

17. *See* Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J. COMP. & INT'L L. 207 (2003); Gareth Evans, *The U.S. Versus The World? How American Power Seems to the Rest of Us*, 1 SEATTLE J. SOC. JUST. 541 (2003); Jane Perlez, *The World; Here's One Treaty That the Bush Team Loves, to Death*, N.Y. TIMES, Aug. 26, 2001, *at* 3 ("The Bush administration has irritated many allies with its aversion to treaties, especially the Kyoto Protocol on global warming and the 1972 Antiballistic Missile Treaty."); Kenneth Roth, *Is America's withdrawal from the new International Criminal Court justified?*, WORLD LINK (July 17, 2002), ("The move suggests that a radically new vision is guiding American foreign policy: that the United States, with its extraordinary power, is no longer served by the international rule of law."), *available at* http://www.worldlink.co.uk/stories/storyReader$1146.

18. *Status of Ratification*, *supra* note 13.

19. *Id.* (Russia is responsible for seventeen percent of global carbon dioxide emissions and trails only the United States, with thirty-four percent, among countries immediately affected. China has signed the treaty but is classified as a developing country under the Kyoto Protocol and does not have to reduce emissions during the first stage of the agreement). *See* BNA, INC. *China Announces Ratification of Protocol, Expects to Benefit From Emissions Trading*, 25 Int'l Env't Rep. 19 (Sept. 11, 2002).

have now ratified the protocol, but the fifty-five percent threshold can only be reached if Russia or the United States gets on board.[20]

That gave Russia center stage, but Putin walked into the wings where, it appears, he will stay at least for the foreseeable future.[21] The situation was largely unchanged when the parties reconvened in Milan in December for a ten-day climate conference. While Russian officials continued to send mixed signals, there was speculation that political deals could still bring about a reconciliation.[22] With Putin facing a reelection challenge in March 2004, no progress or clarity was expected for months.[23]

The astonishing reversal by Putin temporarily drew some of the international wrath away from the United States. The Bush administration has taken a scholarly bashing for its rejection of the treaty. In the climate control arena, the Bush administration is seen as having "tilted the scales against protection."[24]

In the face of that abuse and while watching the virtual stampede by the rest of the world to sign the treaty, the Bush administration in 2003 abruptly changed its rationale for failing to join the protocol.[25] The administration stopped opposing the treaty on the grounds that it was scientifically unfounded and adopted a rationale that it would be excessively costly. President Bush put forward the new grounds himself, saying "[t]he Kyoto treaty would severely damage the United States economy" and that he doesn't accept that.[26]

While no longer open to accusations of ignoring scientific realities, the Bush administration, by making the change, opened itself to an equally powerful line of criticism holding that the U.S. leadership is acting out of short-sighted self-interest. Indeed some

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20. *Status of Ratification*, *supra* note 13.

21. Isachenkov, *supra* note 2.

22. *Russia May Offer Kyoto Backing for WTO Concessions by Europe*, BLOOMBERG.COM (last updated Dec. 10, 2003) ("The EU may moderate demands that Russia stop regulating gas prices and split up OAO Gazprom's $16 billion export market should Russia agree to sign the Kyoto treaty, a global accord to reduce carbon dioxide emissions. Governments seeking to join the WTO must first resolve outstanding issues with existing members."), *at* http://quote.bloomberg.com/apps/news?pid=10000085&sid=a1pC0lIosurc&refer=europe#. *See also* Michael Meacher, *The Kyoto Protocol and a deadly game of Russian roulette*, THE INDEPENDENT (Dec. 7, 2003) (Meacher was the British Minister for the Environment from 1997 to 2003), *at* http://argument.independent.co.uk/commentators/story.jsp?story=470786.

23. Tim Hirsch, *Life remains in Kyoto treaty*, BBC NEWS (Dec. 10, 2003), *at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/3308259.stm.

24. Jack B. Weinstein, *Why Protect the Environment For Others?*, 77 ST. JOHN'S L. REV. 217, 218 (2003) ("In the arena of environmental action, the present administration has tilted the scales against protection. Examples are our failure to endorse the Kyoto Protocol, a sustained drive to drill for oil in Alaska, and granting increased freedoms to loggers").

25. George Archibald and Carter Dougherty, *Bush pans Kyoto as Japan OKs Pact; EPA Diverges From President's Views*, WASH. TIMES, June 5, 2002, at A1.

26. *Id.*

critics thought the original position was mere cover for that less principled opposition.[27]

Putin's comments showed no awareness of the U.S. change of position and opened Russia to the same two types of criticism Bush had been hearing: scientific ridicule and allegations of putting short-term self-interest before the good of the world.[28]

B. Agreements Reached on Pollution Credits and Greenhouse Gas Register

While the Russian situation dominated the U.N. meetings, there were a few other notable developments. The European Union used the Milan conference to announce agreement on a program to allow trading of pollution credits that would enable the fifteen-nation bloc to meet greenhouse gas targets established under the Kyoto Protocol. The European Union's Environmental Chief Commissioner, Margot Wallstrom, said the trading program was ready should the Kyoto Protocol gain Russian approval and take force.[29] The creation of a Global Greenhouse Gas Register was also announced in Milan by the World Economic Forum. Companies will disclose their worldwide emissions through the register in what the creators hope will be a transparent, internationally consistent framework.[30]

The register was launched with the cooperation of eight companies that produce nearly five percent of global GHG emissions.[31] Another twelve major corporations were said to be immediately interested. Company data registration will begin on the register's website in early 2004 following the World Economic Forum's Annual Meeting in Davos, Switzerland, in January 2004.[32]

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27. *See* David A. Dana, *Symposium: Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior: A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315 (2003).

28. For a more optimistic note, *see generally* Frank E. Loy, *On A Collision Course? Two Potential Environmental Conflicts Between the U.S. and Canada*, 28 CAN.-U.S. L. J. 11, 15 (2002). ("I do not think the present U.S. administration will soon change its mind about Kyoto — maybe it never will. However, no administration lasts forever. I think that, faced with a near-universal Kyoto Protocol that is proven to be an effective working instrument, the chances that the U.S. will participate in some form of an international regime are not at all bad").

29. Frances D'Emilio, *E.U. environment chief says greenhouse gas emission trading scheme is ready* (Dec. 12, 2003), *at* http://www.enn.com/news/2003-12-12/s_11260.asp.

30. GreenBiz.com, *World Economic Forum creates global greenhouse gas register* (Dec.16,2003), *at http://www.enn.com/news/2003-12-16/s_11339.asp*.

31. *Id*. (The eight major companies are: Anglo American, Cemex, Hewlett-Packard, Lafarge, RAO Unified UESR, RWE, ScottishPower, and Vattenfall).

32. The World Economic Forum is partnering with BrasilConnects, Deloitte Touche Tohmatsu, the International Emissions Trading Association, the Pew Center for Global Climate Change, the World Business Council on Sustainable Development, the World Energy

III. CLEANING HOUSE: COOPERATIVE EFFORTS TO CURB POLLUTION AND MANAGE HAZARDOUS MATERIALS

Tikkun A.S. Gottschalk

A. UN Treaty Regulating International Chemical Trade Enters into Force

In 2003, trade was a prime target of international environmental cooperation. In November, Armenia ratified the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, triggering the entry into force of the Convention in 2004.[33] Promulgated in 1998, the Convention "require[s] exporters trading in a list of hazardous substances to obtain the prior informed consent of importers before proceeding with the trade."[34] While some nations had already instituted voluntary informed consent procedures prior to 1998, entry into force of the Rotterdam Convention will make PIC legally binding.[35] Aside from the PIC provisions, the Convention promotes the safe use and transportation of chemicals through labeling standards, technical assistance, and compliance procedures.[36]

Like Armenia, many of the signatories to the convention are developing countries.[37] Developing countries are unlikely to have the institutional controls that enable them to prevent misuse, which can lead to both environmental damage and toxic exposure. "Implementation of the Convention will help countries to control the availability of pesticides that are recognized to be harmful to human health and the environment and of highly toxic pesticides that cannot be handled safely by small farmers in developing countries."[38] The Convention allows signatories to restrict importation to only those chemicals that they can manage safely.[39]

At its signing in 1998, the Rotterdam Convention covered twenty-two pesticides and five industrial chemicals.[40] While the

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Council, the World Resources Institute, and the World Wildlife Fund in starting the register.

33. Press Release, United Nations Environment Program, Treaty on hazardous chemicals and pesticides trade to become law (Nov. 27, 2003) [hereinafter Treaty to Become Law], *at* http://www.unep.org/.

34. Rotterdam Convention, September 10, 1998, *at* http://www.pic.int/.

35. *Id*.

36. *Id*.

37. Treaty to Become Law, *supra* note 33.

38. *Id*. (quoting Jacques Diouf, the Director-General of the U.N. Food and Agriculture Organization).

39. *Id*.

40. Press Release, United Nations Environment Program, Asbestos and two hazardous pesticides could be added to trade watch list (Nov. 17, 2003), *at* http://www.unep.org.

signatories to the convention have added five pesticides to the list since then, recent negotiations over whether to include chrysotile, a form of asbestos, failed to produce an agreement.[41] The European Union, Australia, and Chile have already banned chrysotile, and a growing number of other countries, including the United States, are considering similar restrictions.[42] Opposition to the ban was led by Canada and Russia — two leading exporters of chrysotile products.[43] Although negotiators did agree to ban four other types of asbestos, chrysotile, used in automobile brakes, gaskets, and armaments, accounts for ninety-four percent of asbestos consumption.[44]

B. Phase Out of Methyl Bromide Faces Uncertain Future

As the Rotterdam Convention parties geared up for the treaty to enter into force, developed countries continued negotiations for the phasing out of the ozone-depleting pesticide methyl bromide under the Montreal Protocol on Substances that Deplete the Ozone Layer.[45] The Protocol, agreed upon in 1987, entered into force in 1989.[46] Targeted at all substances that deplete the ozone layer, "[t]he Montreal Protocol has so far been one of the great environmental success stories" responsible for the phasing out of chlorofluorocarbons (CFCs) and a seventy-percent reduction in the use of methyl bromide since the mid-1990s.[47]

Despite past successes, the methyl bromide initiative of the Montreal Protocol faces an uncertain future. Farmers in North America and Europe oppose the phase out, arguing that the few available alternatives to methyl bromide are either economically or technologically unfeasible.[48] The parties, negotiating in Nairobi, Kenya, postponed a final decision on the extent of exemptions to the phase out.[49] They reached agreement on a number of other issues but the exemptions issue will have to wait until the March 2004

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41. *Plan to Limit Asbestos Trade Fails*, TORONTO STAR, Nov. 19, 2003, at E04.
42. *Id*.
43. *Id*.
44. *Id*.
45. Press Release, United Nations Environment Program, Decision on Ozone Damaging Pesticide Deferred into 2004 (Nov. 14, 2003) [hereinafter Decision Deferred], *at* http://www.unep.org.
46. United Nations Environment Program, The Ozone Secretariat, The Montreal Protocol on Substances that deplete the Ozone Layer (Jan. 1, 1989), *at* http://www.unep.org/ozone/montreal.shtml.
47. Decision Deferred, *supra* note 45 (quoting Klaus Toepfer, Executive Director of the United Nations Environment Program).
48. Mary Beth Polley, *Sodium azide a possible replacement for methyl bromide*, 31 PESTICIDE & TOXIC CHEMICAL NEWS 20 (Aug. 4, 2003).
49. Decision Deferred, *supra* note 45.

meeting.[50] The phase out is scheduled to be complete by January 2005, with a seventy-percent reduction from 1991 levels required by 2003,[51] but further progress toward that goal will depend on the outcome of future negotiations.

C. Pollutants Targeted by New Protocols to 1979 Treaty

In contrast to the limited progress reached under the Montreal Protocol, parties to the 1979 Convention on Long-Range Transboundary Air Pollution achieved a number of milestones. Two additional protocols to the Convention entered into force in 2003.[52] The Protocol on Persistent Organic Pollutants (POPs Protocol) covers a variety of pesticides, industrial chemicals, and contaminants, banning some and restricting others. The Protocol on Heavy Metals (HM Protocol) targets cadmium, lead, and mercury, three well-known pollutants that cause chronic health problems and can travel great distances.[53] The United Nations Economic Commission for Europe (UNECE) adopted both the POPs and HM Protocols in Aarhous, Denmark, in 1998 at the same gathering of nations that approved the Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters.[54]

The POPs Protocol in many respects mirrors the Stockholm Convention; signed by over ninety countries in 2001, it focuses on the so-called "dirty dozen" chemical pollutants.[55] While the Stockholm Convention has yet to receive the necessary ratifications to become legally binding, in August the POPs Protocol received the final ratification needed for its enforcement.[56] The UNECE drafted both the POPs and HM Protocols, opening adoption and ratification, as with its parent Convention, to states within the UNECE region

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50. *Id*.

51. Chris Tomlinson, *U.S. Negotiators Meet Resistance in Seeking Exemptions to Chemical Treaty* (Nov. 12, 2003), *available at* http://www.enn.com/news/2003-11-12/s_10332.asp.

52. Convention on Long-Range Transboundary Air Pollution, Agreements on Environment and Development (Nov. 13, 1979) [hereinafter Agreements], *at* http://www.greenyearbook.org /agree/atmosphe/lrtap.htm.

53. Press Release, United Nations Economic Commission for Europe, Entry into force of the Protocol to control persistent organics [hereinafter Entry into Force of Protocol] (Oct. 21, 2003), *at* http://www.unece.org.

54. Press Release, United Nations Economic Commission for Europe, Protocol to control persistent organics to enter into force (Aug. 5, 2003), *at* http://www.unece.org.

55. *See, e.g.,* Michael Crane, *2003 Environmental Legislation Watch*, THE LEGAL INTELLIGENCER, Oct. 16, 2003 (The European Parliament ratified the Stockholm Convention at the same time as the POPs Protocol). *Parliamentary Green Light for Ratification of POPs Convention*, EUROPEAN REPORT (Nov. 22, 2003).

56. Entry into Force of Protocol, *supra* note 53.

and other countries with consultative status with the UNECE.[57] The seventeen states that have ratified the POPs Protocol held their first meeting in December to discuss its effectiveness and future amendments to the list of pollutants.[58]

The HM Protocol entered into force December 29, 2003. The Protocol seeks to reduce heavy metal pollution from industrial sources, such as coal power plants and garbage incineration.[59] It also aims to lower metal emissions from commercial products, such as batteries, fluorescent lamps, and paint. The first meeting of the parties is not scheduled until December 2004.[60]

Other U.N.-sponsored heavy metal agreements met with less success last year. Negotiations towards an international treaty on mercury pollution stalled at the meeting of the Governing Counsel of the UNEP in February.[61] The United States opposed any action leading to a binding international treaty on mercury pollution, although the conference did agree on a program to help countries reduce mercury emissions.[62] The Governing Counsel agreement, supported by more than 130 nations, also provides for a public awareness program to educate the public about the dangers of mercury exposure and pollution.[63]

D. United Nations Orchestrates Plan to Improve Chemical Safety Worldwide

Strategic Approach to International Chemicals Management (SAICM) is the latest effort by the international community to coordinate and improve chemical safety. In November 2003 more than 500 delegates met in Bangkok, Thailand, to discuss an international SAICM treaty.[64] The UNEP adopted the SAICM

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57. Agreements, *supra* note 52.

58. Entry into Force of Protocol, *supra* note 53.

59. Press Release, United Nations Economic Commission for Europe, Protocol on Heavy Metals Enters into Force and New Work on Persistent Organic Pollutants Agreed (Dec. 23, 2003) [hereinafter UNECE Press Release], *at* http://www.unece.org; *see also,* Agreements, *supra* note 52.

60. UNECE Press Release, *supra* note 59.

61. Cat Lazaroff, *U.S. derails U.N. plan to curb mercury emissions*, THE NEW ZEALAND HERALD, Feb. 12, 2003; *see also* Lauren Miura, *Mercury: Dems Attack U.S. Policy on International Treaty*, 10 GREENWIRE (Mar. 3, 2003).

62. Lazaroff, *supra* note 61; Press Release, United Nations Environment Programme, Action on Chemicals Pollution and Support for Africa Agreed at End of Global Environment Ministers Meeting, U.N. Doc. UNEP/135 (Feb. 7, 2003), *at* http://www.un.org/News/Press/docs/2003/unep135.doc.htm.

63. *Id.*

64. Press Release, United Nations Environment Programme, New Strategy for International Chemicals Management to be Launched in Bangkok, U.N. Doc. UNEP/179 (Nov. 5, 2003) [hereinafter UNEP Press Release], *at* http://www.unep.org; *see also U.N. Develops International Program to Manage Chemicals*, CHEMICAL WEEK, Nov. 12, 2003, at 8.

initiative in February 2002, after which it was formally endorsed at the World Summit on Sustainable Development.[65]

The UNEP, the Intergovernmental Forum on Chemical Safety (IFCS), and the Inter-Organizational Program for the Sound Management of Chemicals sponsored the Preparatory Committee for the development of SAICM (dubbed PrepCom I).[66] According to the IFCS, "A key feature of the SAICM process will be its engagement of all sectors of society with an interest in chemical safety, including environment, health, agriculture, labour, industry and development."[67] PrepCom I delegates "agreed that the goal stated in the Johannesburg Summit Plan of Implementation, that by 2020 chemicals should be used and produced in ways that lead to the minimization of significant adverse effects on human health and the environment, should be considered as the over-arching goal of SAICM."[68]

E. International Atomic Energy Agency Promotes Cooperation in Nuclear Safety

In the fiftieth year after Eisenhower's Atoms for Peace Speech,[69] the international community marked another year of progress in the safe and peaceful management of radioactive materials. The parties to the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (Joint Convention) held their first review meeting in November 2003.[70] Although the Joint Convention came into force in 2001, it received

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65. UNEP Press Release, *supra* note 64; *see also* INTERGOVERNMENTAL FORUM ON CHEMICAL SAFETY, *Strategic Approach to International Chemicals Management* [hereinafter IFCS *Approach*], *at* http://www.who.int/ifcs/Saicm.htm (last visited Feb. 23, 2004).

66. Morley Brownstein, *The intergovernmental forum on chemical safety: a unique cooperative approach to international chemicals management*, 55 CANADIAN CHEMICAL NEWS 13 (Oct. 1, 2003).

67. IFCS *Approach*, *supra* note 65.

68. *Id*.

69. Dwight D. Eisenhower, Atoms for Peace, Address before the United Nations (Dec. 8, 1953), *available at* http://www.eisenhowerinstitute.org/programs/globalpartnerships/safeguarding/atomsspeech.htm; *see also Legacy: Atoms for Peace*, EISENHOWER BIRTHPLACE, *at* http://www.eisenhowerbirthplace.org/legacy/ike0006.htm ("Eisenhower's Atoms for Peace speech embodied his most important nuclear initiative as President. From it sprang a panoply of peaceful atomic programs.").

70. *First Review Meeting of the Joint Convention*, IAEA Conventions, RasaNet (Nov. 20, 2003) [hereinafter *First Review Meeting*], *at* http://www-rasanet.iaea.org/conventions/jointcon_reviewmeetings.htm; *see generally* Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, *Summary Report,* IAEA (Nov. 14, 2003) [hereinafter *Summary Report*], *at* http://www-rasanet.iaea.org/downloads/conventions/jointcon_summary_report_finalNov19.pdf.

a boost in legal weight with the ratification by the United States last year.[71]

Discussions at the November meeting in Vienna focused on national reports, a central requirement of the Joint Convention, submitted by the thirty-three contracting parties.[72] A state's national report contains a detailed discussion of its nuclear program, from general energy policy to specific regulatory frameworks.[73] As part of the peer review process, the parties exchange reports three months prior to review meetings and respond to questions concerning them.[74]

As noted in the summary report issued by the parties, decommissioning of nuclear reactors was also a central point of discussions at the review meeting.[75] Although decommissioning methods vary from state to state,[76] the parties agreed that safe and successful decommissioning depends upon adequately financing decommissioning from start to finish, designing facilities with decommissioning in mind, and comprehensive planning in preparation for decommissioning, among other important factors.[77]

The Joint Convention meeting is one of a number of activities sponsored by the International Atomic Energy Agency (IAEA), which was particularly active in the past year dealing with international nuclear law and policy. The IAEA hosted the second meeting of the parties to the Early Notification and Assistance Conventions. Dr. Mohamed ElBaradei, Director General of the IAEA, hoped that the meeting would "begin the transformation of the emergency conventions from purely reactive to more proactive mechanisms for enhancing emergency preparedness and response."[78] The IAEA used the cooperative framework established by the two conventions to complete missions to Bolivia, Ecuador,

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71. Elaine Hiruo and Daniel Horner, *Senate Ratifies Waste Convention*, 28 NUCLEAR FUEL 3 (Apr. 14, 2003).

72. *First Review Meeting*, *supra* note 70.

73. *See, e.g.,* U.S. DEPT. OF ENERGY, U.S. National Report: Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (May 2003), *available at* http://web.em.doe.gov/integrat/National_Report_05-02-03_1.pdf.

74. Gamini Seneviratne, *Review Finds Joint Convention Has Already Benefited Safety*, 28 NUCLEAR FUEL 9 (Nov. 24, 2003).

75. *Id.; Summary Report, supra* note 70, at 5-13.

76. *Id.* ("[S]ome Contracting Parties had opted to commence decommissioning as soon as the reactor was finally shut down," so as to complete it "as soon as possible while the expertise existed." Others had opted to do it in three stages: defueling the reactor, dismantling some of the plant and equipment to put the reactor into safe storage, and completing dismantling later. Preferred safe storage times varied; one party has opted for a 40-year period, others for longer) (quoting *Summary Report*, *supra* note 70, at 10.)

77. *Id.*

78. Mohamed ElBaradei, Statement to the Forty-seventh Regular Session of the IAEA General Conference 2003 (Sept. 15, 2003), *available at* http://www.iaea.org.

Nigeria, and the United Republic of Tanzania.[79] The missions assisted the countries in the recovery, characterization, and securing of radioactive sources "seized in elicit trafficking incidents."[80]

Among its other regulatory activities, the IAEA published *The Long-Term Storage of Radioactive Waste: Safety and Sustainability*, a position paper targeted at protecting the environment from nuclear waste.[81] The publication is part of an action program initiated at the General Conference of the IAEA in 2001.[82] Guided by the principle that "[r]adioactive waste shall be managed in such a way that will not impose undue burdens on future generations,"[83] the paper argues that perpetual storage of nuclear waste is not a feasible alternative to disposal.[84] While recognizing the difficulties of transporting waste to disposal sites, the paper endorses geological disposal over long-term storage, although at the same time acknowledging that storage and disposal are complimentary activities.[85]

F. United Nations Combats Trade in "Environmental Commodities"

With the environmental dangers of pollution from POPs, nuclear waste, and other hazardous materials in mind, the UNEP launched a new program in June 2003, called Green Customs, to combat the illegal trade in environmentally harmful substances. Governed by numerous treaties, including the Basel Convention on the Transboundary Movements of Hazardous Wastes and their

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79. *Id*.

80. *Id*.

81. IAEA, *The Long Term Storage of Radioactive Waste: Safety and Sustainability: A Position Paper of International Experts* [hereinafter *Position Paper*], June 2003, *at* http://www-pub.iaea.org/MTCD/publications/PDF/LTS-RW_web.pdf.

82. *Id*.

83. *Id*. at 1. (This principle is one of nine outlined in the *Principles of Radioactive Waste Management, Safety Series No. 111-F*, published in 1995 by the IAEA and available at http://www.iaea.org.).

84. *Position Paper*, *supra* note 81, at 13.

85. *Id*. Discussions at the review meeting of the parties to the Joint Convention signaled possible disagreement over whether the long-term storage of spent fuel is an acceptable practice. In contrast to the views on long-term storage expressed by the authors of the *Position Paper*, supra note 81, the summary report of the review meeting notes that both "centralized long-term storage" and "storage on production sites pending the availability of a national disposal facility" are acceptable practices. Seneviratne, *supra* note 74, at 9. Whether this acceptance of both practices reveals an underlying divergence of views is not clear but it might explain the motivation behind the IAEA campaign to promote spent fuel safety.

Disposal,[86] the Rotterdam Convention,[87] and the Montreal Protocol,[88] Green Customs seeks to coordinate and support the worldwide enforcement of trade restrictions.[89] In addition to treaty organizations, the program involves Interpol and the World Customs Organization.[90]

According to the UNEP, trafficking in "environmental commodities . . . [is] one of the most profitable and fastest growing new areas of international criminal activity."[91] In December 2000, the U.S. government reported that crime syndicates earned upwards of $10 billion annually from the illegal dumping of hazardous waste.[92] The black market in CFCs and the illicit trade in natural resources, such as illegally logged timber, are similarly lucrative.[93]

The Green Customs initiative focuses in part on training border guards to identify illegal substances, which include endangered species, toxic waste, and ozone-depleting CFCs.[94] The UNEP-sponsored web site offers a range of educational products, from training videos and manuals to regional seminars on interdiction and enforcement.[95] The Green Customs program as a whole "aims to improve coordinated intelligence gathering, information exchange, guidance (such as codes of best practice) and training amongst the partner organizations involved."[96]

IV. 2003 SEES ADOPTION OF SIGNIFICANT FRAMEWORKS FOR IMPLEMENTATION OF SUSTAINABLE DEVELOPMENT

Jeff Timmerman

Sustainable development in its turgid catch-all nature, is at once both an inclusive, and at times, elusive topic in international environmental law. While 2002 was a year for forging conclusive substantive agreements, 2003 was the year for establishing procedural frameworks to realize these substantive agreements. In the aftermath of the World Summit on Sustainable Development

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86. For more information on the Basel Convention, *see* http://www.basel.int.

87. *See supra* Part III.A.

88. *See supra* Part III.B.

89. *See* Eryn Gable, *New Initiative Targets Environmental Crime*, 10 GREENWIRE (June 2, 2003).

90. *Id*.

91. Press Release, United Nations Environmental Programme, New Initiative to Combat Growing Global Menace of Environmental Crime (June 2, 2003) [hereinafter *New Initiative*], *at* http://www.unep.org.

92. *Id*.

93. *Id*.

94. *Id*.

95. *See* Green Customs, *at* http://www.unepie.org/ozonaction/customs.

96. *New Initiative*, *supra* note 91.

(WSSD) held in Johannesburg in 2002, the United Nations Commission on Sustainable Development convened for its first post-WSSD substantive session (CSD-11) from April 28th-May 9th, 2003.[97] CSD-11 member states adopted a working program to be implemented in the period 2004-2017 to be "organized in a series of two-year action-oriented Implementation Cycles," each cycle consisting of one-year review session followed by a one-year policy session.[98]

In the spirit of multilateralism, and in response to the pending Millennium Development Goals (MDG), the multi-year framework — an instructive pedagogical overview of the major substantive areas of sustainable development — consists of the following cycles:

> •2004/2005: water, sanitation, human settlements;
>
> •2006/2007: energy for sustainable development, industrial development, air pollution/atmosphere, climate change;
>
> •2008/2009: agriculture, rural development, land, drought, desertification, Africa;
>
> •2010/2011: transport, chemicals, waste management, mining, ten-year framework of programs on sustainable consumption and production patterns;
>
> •2012/2013: forests, biodiversity, biotechnology, tourism, mountains;
>
> •2014/2015: oceans and seas, marine resources, SIDS, disaster management and vulnerability;
>
> •2016/2017: overall appraisal of implementation ... [and] Further Implementation . . . .[99]

Also included in the working program are "cross-cutting issues" such as poverty eradication, gender equality, and education, to be

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97. *Summary of the Eleventh Session of the Commission on Sustainable Development,* EARTH NEGOTIATIONS BULLETIN (Int'l Inst. for Sustainable Dev.), May 2003, *available at* http://www.iisd.ca/linkages.csd/csd11/.

98. *Id.* at 1.

99. *Id.* at 9.

addressed within each cyclical period.[100] From a methodological viewpoint, implementation of the WSSD flows from the maintenance of a "people-centred [sic] approach to sustainable development."[101]

A. Marrakech Process Strengthens Resolve to Aid Developing Countries

In a further attempt to reinforce commitments made at the 2002 Johannesburg Summit, leaders met in Marrakech, Morocco, from June 16th-19th, 2003 to launch the "Marrakech Process" aimed at implementing a ten-year framework to "strengthen and focus international cooperation, information exchange and assistance for developing countries."[102] The Process re-emphasized the need to address consumption and production aspects of the three major pillars[103] of sustainable development — economy, environment, and society.[104]

The United Nations Development Program (UNDP) issued its *Human Development Report 2003*, launched at a July 8th press conference in Dublin, Ireland.[105] An entire chapter dedicated to public policies aimed at sustainability includes impact statements regarding the effects of worldwide poverty, gender imbalance, food, water, energy, and livelihoods.[106]

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100. *Id.*

101. *Chairperson's Summary of the High-Level Segment of CSD-11,* United Nations Division for Sustainable Development [hereinafter United Nations Division for Sustainable Development] (As will be discussed further *infra*, a proper point of perspective origination was a hotly debated academic topic in sustainable development and population this year), *available at* http://216.239.41.104/search?q=cache:wpReBlc-fhkJ:www.un.org/esa/sustdev/csd/csd11/hls_summary.pdf+%22chairperson%27s+summary+of+the+high-level+segment+of+CSD-11%22&hl=en&ie=UTF-8 (last visited Jan. 17, 2004).

102. *"Marrakech Process" to Promote International Cooperation on Sustainable Consumption and Production,* CSD UPDATE ON-LINE, (U.N. Div. for Sustainable Dev.), Aug.-Oct. 2003, *at* http://www.un.org/esa/sustdev/publications/csd_newsletter/csdup82b.htm.

103. *See Population Issues Left Out of Earth Summit Discussion*, (Population Reference Bureau), (September 2002) *at* http://www.prb.org/Template.cfm?Section=PRB&template=/ContentManagement/ContentDisplay.cfm&ContentID=6567.

104. United Nations Division for Sustainable Development, *supra* note 101.

105. *Human Development Report 2003: Millennium Development Goals: A Compact Among Nations to End Human Poverty*, HUMAN DEV. REP. (U.N. Dev. Program), *available at* http://www.undp.org/hdr2003/.

106. *See id. at Public Policies to ensure environmental sustainability, at* http://www.undp.org/hdr2003/pdf/hdr03_chapter_6.pdf (last visited Jan. 17,2004).

B. Biotechnological Harmonization Gains International Momentum under Pressure to Dissolve Ideological Deadlock

Food production was a hotly debated topic in sustainable development in 2003 highlighted by UNDP report addressing the importance of employing "[d]iverse genetic resources" to increase plant and livestock adaptability and production in an effort to solve world hunger.[107] In April 2003, representatives from developing African countries met to challenge the ideological deadlock undergirding the EU's five-year de facto moratorium on genetically modified organisms (GMO's).[108] Subsequently, in May 2003, the United States, Argentina, and Canada filed a World Trade Organization (WTO) case against the EU challenging the legality of the moratorium.[109]

The EU responded in July by passing two laws permitting its fifteen member nations to end the five-year moratorium on GMO's, opting instead to implement a tracking and labeling initiative to regulate genetically modified foods.[110] In a showing of cooperative authority, the EU consequently sued eleven member states in late July for failing to adhere to its decision to suspend the moratorium.[111] By October 2003, the EU's food safety chief announced that the five-year ban could effectively be lifted before the end of 2003.[112]

Additionally, the Codex Alimentarius Commission adopted a "landmark agreement" on the universality of biotechnology risk assessment in a July 2003 meeting in Rome.[113] The new system includes "pre-market safety evaluations and product tracing for recall purposes and post-market monitoring," with the effect of allowing individuals from any of the 169 member countries to

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107. *Id.* at 125.

108. Susan Mabonga, *Biosafety News (Kenya): African Countries Query EU's Move on GM Foods* (Apr. 21, 2003), *at* http://www.foodsecurity.net/news/newsitem.php3?nid=1904&tnews=news.

109. *European Union Moratorium*, (Biotechnology Industry Organization), *at* http://www.bioorg/foodag/eumoratorium.asp (last visited Jan. 17, 2003); *See also* News Release, United States Department of Agriculture, U.S. and Cooperating Countries File WTO Case Against EU Moratorium on Biotech Foods and Crops (May 13, 2003), *available at* http://www.usda.gov/news/releases/2003/05/0156.htm.

110. Biotechnology Industry Organization, *supra* note 109.

111. *Id.*

112. *EU May Start to Lift GMO Ban Before Year-End* (Oct. 3, 2003), *available at* http://www.enn.com/news/2003-10-03/s_9075.asp.

113. News Release, Food and Agriculture Organization of the United States, Codex Alimentarius Commission adopts more than 50 New Food Standards (July 9, 2003), *available at* http://www.fao.org/english/newsroom/news/2003/20363-en.html.

compare risk assessments developed by other member countries regarding attributes like allergenicity and irradiation.[114]

Genetically modified trees also made headlines in 2003. At a December U.N. convention in Milan, 180 countries agreed to allow for the planting of genetically altered trees to offset global warming.[115] As part of a compromise, individual nations retained the right to evaluate potential risks domestically, overcoming sovereignty objections by influential countries including China and Brazil.[116]

On September 11, 2003, the Cartagena Protocol on Biosafety took effect following the June ratification by the Republic of Palau.[117] The protocol governs living modified organisms (LMO's) — the byproduct of biotechnology — establishing a "harmonized" set of rules and procedures allowing countries to make informed decisions prior to importing LMO's and genetically modified foods and ensuring compliance with identification and documentation standards.[118]

C. Summer Crisis Pushes Europe Toward Realizing Sustainable Energy

In response to last summer's "deadly European heat wave", and citing "massive power failures in the U.S." and several developed European nations, the U.N. Environment Program launched a new initiative in Tokyo in October 2003 aimed at shifting investment to sustainable energy.[119] The initiative is aimed at spurring investment in sustainable energy as a viable alternative to damaging reliance on fossil fuels, concentrating especially on more "assessable, affordable and clean" energy sources for developing countries.[120]

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114. *Id.*

115. *UN to allow GM-Trees for producing carbon credits,* INDYMEDIA UK, Dec. 10, 2003, *at* http://www.indymedia.org.uk/en/2003/12/282705.html.

116. *Id.*

117. Press Release, United Nations Environment Program Convention on Biological Diversity, Cartagena Protocol on Biosafety Takes Effect 11 September, U.N. Doc. ENV/DEV/735 UNEP/163 (Sept. 9, 2003), *available at* http://www.un.org/News/Press/docs/2003/envdev735.doc.htm.

118. *Id.*

119. Press Release, United Nations Environment Program, UN Environment Chief Challenges World's Financiers: UNEP Launches New Initiative to Shift Investment to Sustainable Energy (Oct. 20, 2003), *available at* http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=352&ArticleID=4277&l=en.

120. *Id.*

V. DESERTIFICATION FIGHT MOVES FROM CONSCIOUSNESS-RAISING TO IMPLEMENTATION

Ronald C. Smith

The world fight against desertification was transformed from a battle to raise awareness, to one of action by a major decision at the Sixth Conference of Parties for the U.N. Convention to Combat Desertification.[121] Desertification is often misunderstood as the expansion of existing deserts.[122] It occurs because of human activities and climactic changes in arid, semi-arid, and dry sub-humid areas. These ecosystems are extremely vulnerable to deforestation, overgrazing, and poor irrigation practices. Many of the world's poorest are among the 250 million people directly affected.[123]

The conference agreed on a funding mechanism that allows the convention to move beyond its research and planning roles.[124] During its August-September meeting in Havana, the 190-country conference enjoyed record attendance and discussed its new mission after endorsing the long-awaited funding plan.[125]

The Global Environment Facility was agreed upon, as the financial arm for the convention[126] and $500 million was made available for the next three years.[127] The need for stronger financial

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121. *U.N. Desertification Conference Agrees On Initiatives*, U.N. WIRE, (U.N. Foundation) Sept. 8, 2003, (According to the U.N. the cost to prevent land degradation is around $2.4 billion a year but $42 billion in income is lost every year due to desertification.); *at* http://cw.groupstone.net/Scripts/WebObjects-3.dll/CMWebRequests.woa/wa/displayContents. For more information on the scope of commitments sought, *see* Press Release, UNCCD, Conference accepts the GEF as a financial mechanism and calls for more financial commitments to meet needs (Sept. 6, 2003) *at* http://www.unccd.int/public info/pressrel /showpressrel.php?pr=press06_09_03&nomenus=1.

122. *The United Nations Convention to Combat Desertification: An Explanatory Leaflet,* United Nations Convention to Combat Desertification (Jan. 18, 2003), *at* http://www.unccd.int /convention/text/leaflet.php.

123. *Id.*

124. Press Release, UNCCD, GEF Council adopts the operational modalities on sustainable land management, promising enhanced financial support to fight desertification (May 19, 2003) [hereinafter UNCCD Press Release] (The UNCCD was adopted after the 1992 United Nations Conference on Environment and Development. It has a permanent Secretariat based in Bonn and has been in force since 1996. It is the only international agreement on desertification and recurring droughts.); *at* http://www.unccd.int/publicinfo/pressrel/ showpressrel.php?pr=press19_05_03&nomenus=1.

125. Orfilio Palaez and Aldo Madruga, *U.N. Conference Against Desertification and Drought: A milestone in the fight against poverty,* GRANMA INTERNACIONAL DIGITAL, Sept. 3, 2003, *at* www.granma.cu/ingles/2003/septiembre03/mar9/36uncon-i.html. The parties grew by four nations in 2003 with the Russian Federation, Lithuania, Bhutan and Timor Leste joining. *See* http://www.unccd.int/convention/ratif/doeif.php?nomenus=1.

126. U.N. Wire, *supra* note 121.

127. *Id.*

resources to battle desertification was highlighted at the World Summit on Sustainable Development in 2002. The funding announcement now allows the desertification convention to contribute to the Millennium Development Goals through implementation of its National Action Programmes. The conference reported that sixty-six countries have finalized long-term policy guidelines.[128]

U.N. Secretary-General Kofi Annan said nations at the World Summit recognized UNCCD as an "important tool not only for improving the livelihoods of the millions of people living in dry lands, but also for achieving the Millennium Development Goals."[129] World leaders believe the desertification battle can assist in the goal of reducing the number of people living in abject poverty by half before 2015.[130]

The focus on desertification and deforestation becomes the fifth focal area of the Global Environment Facility.[131] Parties affected by desertification will now be able to apply for assistance in forming and implementing action programs.[132]

VI. POPULATION REMAINS INTERNATIONAL ENVIRONMENTAL LAW'S "INVISIBLE" ELEPHANT

Jeff Timmerman

A. Developmental Disparity Becomes Increasingly Relevant

The state of the world's population remains one of the grossly unresolved issues in current international environmental law partly because it encapsulates many characteristics of other substantive areas of the same body of law. Population is most conveniently compartmentalized as a subset of sustainable development. Controversially, the 2002 World Summit on Sustainable Development (WSSD) omitted population from its agenda, although population is "intrinsically linked" to economic, social, and environmental development — the aptly named "three pillars of

128. Press Release, UNCCD, A breakthrough in anti-desertification drive expected at UNCCD Conference (Aug. 21, 2003), at http://www.unccd.int/publicinfo/pressrel/showpressrel.php?pr=press21_08_03&nomenus=1.

129. Press Release, UNCCD, World leaders single out the UNCCD as a key instrument for the UN Millennium Development Goal of halving those living in abject poverty by 2015 (September 1, 2003), *at* http://www.unccd.int/publicinfo/pressrel/showpressrel.php?pr=press01_09_03&noMenus=1.

130. *Id.*

131. UNCCD Press Release, *supra* note 122.

132. *Id.*

sustainable development."[133] As has become increasingly apparent in 2003, the problem is not what has been said about population, but instead what has been left unsaid.

The population debate is hampered and effectively omitted from the sustainable development agenda by three convoluted academic arguments. The first, and perhaps most obtuse obstruction stems from a substantive trade-off reached at the 1992 Rio Earth Summit aptly dubbed the "North-South deal."[134] At the heart of the exchange, developed countries (the "North") agreed to drop discussion of population in exchange for a promise to avoid the topic of consumption by under-developed countries' (the "South"). Simply, rather than address over-population and over-consumption, the two sides employed an international avoidance tactic along battle lines established, in large part, by disparate gross national products.[135]

Further enhancing this epidemiological population disaster is a complete lack of interdisciplinary unanimity.[136] What exactly is being explicated by linking population and the environment? Which disciplinary determinations are to be favored over others? For example, population assumes different meanings to demographers, family planning managers, community planners, healthcare workers, and conservationists.[137] Unless and until cross-disciplinarians settle on a standardized set of population definitions, properly addressing population on a domestic, let alone an international, forefront will prove to be fruitlessly equivocal.

Finally, further obscuring the population debate in relation to interdisciplinary ambiguity, efforts to link population and the environment are hindered by a complete lack of agreed-upon methodological variables.[138] At issue is where to properly establish an epistemological frame of reference. While some scientific disciplines establish baseline population perspective in terms of relation with and effects on individuals, others focus instead on the ecosystem as a proper referencing point, but others look to the unlimited potential of human creativity and human ability to uniquely solve complex problems.[139]

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133. *Population Issues Left Out of Earth Summit Discussion*, *supra* note 103.

134. *Id.*

135. *See id.* (The "South" is essentially comprised of two countries with proliferate sway – China and India.).

136. *See* Roger-Mark De Souza et al., *Critical Links: Populations, Health, and the Environment*, POPULATION BULLETIN (Population Reference Bureau), Sept. 2003, at 7, *available at* http://www.prb.org/Template.cfm?Section=PRBLibrary&template=/ContentManagement/ContentDisplay.cfm&ContentID=9514.

137. *Id.*

138. *Id.* at 13.

139. *Id.*

B. UN Population Report Focuses on the Adolescent Dilemma; US Loses Ground

The United Nations Population Fund released its annual *State of World Population 2003* report in October, entitled *Making 1 Billion Count: Investing in Adolescents' Health and Rights*.[140] In response to MDG agreements, the report notes that nearly half of the world's population is under the age of twenty-five, resulting in far-reaching implications in terms of poverty, HIV/AIDS, mortality, reproductive health, education, and sustainable development.[141]

While concentrating primarily on eliminating risky behavior and promoting healthy lifestyles among booming adolescent populations, the study also speaks to the opportunity for countries to exploit a demographic "bonus" created by a low dependency ratio.[142] Correlatively, declining fertility rates have created a larger working age population worldwide, creating a potential windfall for countries implementing "appropriate investments, policies and governance … to launch an economic and social transformation."[143] The corresponding result — a swelled workforce with fewer social dependents — would create an intangible type of renewable benefit allowing future generations to profit from a one-time sociological *bonus*.

Finally, the 2003 Human Development Index, announced in *Human Development 2003*, warns of a pressing developmental crisis resulting in "severe and continuing socio-economic reversals."[144] Intriguingly, among wealthy countries in terms of poverty, illiteracy, unemployment, and life-expectancy, the United States ranks dead last.[145]

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140. Press Summary, United Nations Population Fund, State of World Population 2003: Making 1 Billion Court: Investing in Adolescents' Health and Rights (Oct. 8, 2003), *available at* http://www.unfpa.org/swp/2003/pdf/english/swp03summary_eng.pdf.

141. *Id.*

142. *Id.*

143. *Id.*

144. United Nations Development Program, *supra* note 105. *See also* Press Release, United Nations Development Program, 2003 Human Development Index Reveals Developmental Crisis (July 8, 2003), *available at* http://65.109.106.110/hdr2003/pdf/presskit/HDR03_PR4E.pdf.

145. *Id.*

VII. INFORMATION TECHNOLOGY FRAMES NEW-AGE CULTURAL PRESERVATION EFFORT

Jeff Timmerman

Cultural preservation serves as another all-encompassing international environmental law forum, spanning issues as diverse as free trade and ethnic discrimination. For example, the Society for International Development (SID), a group of concerned individuals and non-governmental organizations, ended its three-year cyclical portfolio in 2003 focusing on multitudinous preservation topics including: conflicts over access to natural resources, supporting societies in transition, knowledge and information technologies for development, participatory action for capacity building and food security, feminization of power[146] and reproductive health, and the global challenges involved in transforming Europe.[147]

Perhaps the most pressing and practical innovations in cultural preservation came in the realm of information technology. Addressing the World Summit on the Information Society, Mark Malloch Brown, the UNDP Administrator, noted that information technology is "transforming societies and bringing positive change faster than any other current phenomenon — in developed and developing countries alike."[148] UNDP aspires to manipulate information technology to further international development through innovations including distance learning programs, civil service reform, e-governance, and promotion of an unfettered free media — specifically aimed at the world's most impoverished nations — while concurrently furthering cultural self-sufficiency by allowing progress to occur more naturally through local policy ordinances and entrepreneurship.[149] While not officially promulgated, UNDP action seems to be motivated by a desire to reach Millennium Development Goals while concurrently allowing for continued preservation of individual cultural heritage.

On a more concrete ground, the twenty-seventh session of the World Heritage Committee, held from June 30th – July 6th, placed twenty-four new sites on the World Heritage List in 2003, including

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146. The term "feminization of power" refers to a cultural paradigm shift delegating increased authority to women.

147. Society for International Development, Yearbook of International Cooperation of Environment and Development, *at* http://www.greenyearbook.org/ngo/sid.htm (last visited Jan. 17, 2004).

148. Mark Malloch Brown, Address at the World Summit on the Information Society (Dec. 11, 2003). Brown notes that technology development should focus on "three key pillars: practice, policy and partnerships."

149. *Id.*

582 cultural sites and twenty-three sites of "outstanding universal value."[150] Among the new designated cultural landmarks are the landscape and archaeological remains of the Bamiyan Valley, containing Buddhist "monastic ensembles and sanctuaries" and highlighting the destruction of two Buddha statutes by the repressive Taliban regime in 2001. Also making the list were Prague's historic Jewish Quarter, the United Kingdom's famed Royal Botanic Gardens, and China's imperial tombs of the Ming and Qing Dynasties.[151]

Finally, the U.N. Economic and Social Council met in August 2003 to discuss the prevention of discrimination and protection of indigenous peoples.[152] The principal theme was "indigenous peoples and globalization," concentrating on "continued exploitation" and a new breed of neo-colonialism.[153] To demonstrate the cultural effects of globalization, Representative M. El. Hadgi Guisse[154] `described the plight of the Ogoni tribe of Nigeria, persecuted and executed for demanding a share of the profits derived from territorial oil extraction.[155] Indigenous representatives also spoke to the "detrimental effects" caused by the imposition of agricultural subsidies in wealthy countries.

VIII. ECOSYSTEM STUDY, DURBAN ACCORD BOOST BIODIVERSITY

Jennifer Ringsmuth

A. Study on Ecosystems Will Aid Conservation Efforts

Ecosystem managers and policy makers have had difficulty protecting the Earth's biodiversity due to a lack of "current, comprehensive, and scientifically authenticated data about the condition and capacity of the ecosystems they administer, how they interact, and the full effects of resource extractions."[156] The year 2003 saw the realization of a study that will collect the data needed to illuminate how to manage and maintain such precious

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150. *World Heritage Committee Inscribes 24 New Sites on the World Heritage List,* UNESCO (July 3, 2003), *at* http://www.portal.unesco.org/culture/en/ev.php@URL_ID=10122&URL_DO=DO_TOPIC&URL_SECTION=201.html.

151. *Id.*

152. U.N. ESCOR, 55th Sess., U.N. Doc. E/CN.4/Sub2/2003/22 (2003).

153. *Id.* at 10. Indigenous groups claim that globalization is merely "colonialism in a new format."

154. Guisse is an eminent Senegalese jurist and former chairman of the U.N. Human Rights Sub-Commission.

155. U.N. ESCOR, *supra* note 152, at 9.

156. The Millennium Ecosystem Assessment, Bill Moyers Reports: Earth on Edge- Science Matters (last visited Jan. 5, 2004), at http://www.pbs.org/earthonedge/science/.

ecosystems.[157] This study, known as the Millennium Ecosystem Assessment (MA), "synthesizes information from the scientific literature, datasets, and scientific models, and makes use of knowledge held by the private sector, practitioners, local communities and indigenous peoples."[158]

> The MA focuses on ecosystem services (the benefits people obtain from ecosystems), how changes in ecosystem services have affected human well-being, how ecosystem changes may affect people in future decades, and response options that might be adopted at local, national, or global scales to improve ecosystem management and thereby contribute to human well-being and poverty alleviation.[159]

The MA seeks "to recognize priorities for action, provide tools for planning and management, supply foresight regarding the ramifications of decisions that affect ecosystems," establish response tactics to reach human development and sustainability goals, and help create the individual and institutional capacity to take on ecosystem assessments and to act on their conclusions.[160] Additionally, it will help to meet assessment needs of several UN treaties, including the Convention to Combat Desertification, the Ramsar Convention on Wetlands, the Convention on Migratory Species, and the Convention on Biological Diversity.[161]

The MA, touted as "the most extensive study ever of the linkages between the world's ecosystems and human well-being,"[162] was launched in June of 2001 by U.N. Secretary-General Kofi Annan.[163] It was planned by a conglomerate of UN agencies, international scientific organizations, and development agencies, with direction from private sector and civil society groups.[164] This year the first study, titled *Ecosystems and Human Well-being: A Framework for Assessment*, was published.[165] This "report lays out the approaches, assumptions, processes, and parameters scientists are using in the

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157. *See* Millennium Ecosystem Assessment Releases First Report, Millennium Ecosystem Assessment (Sept. 23, 2003), *at* www.milleniumassessment.org/ en/article.aspx?id=32.

158. About the Millennium Ecosystem Assessment, Millennium Ecosystem Assessment, *at* http://www.millenniumassesment.org/en/about.overview.aspx (last visited Jan. 5, 2004).

159. *Id.*

160. *Id.*

161. *Id.*

162. Upcoming Reports Link Human Well-being and Nature, Millennium Ecosystem Assessment, (June 5, 2003), *at* http://www.millenniumassessment.org/en/article.aspx?id=2.

163. *About the Millennium Ecosystem Assessment, supra* note 158.

164. *Upcoming Reports Link Human Well-being and Nature, supra* note 162.

165. *Millennium Ecosystem Assessment Releases First Report,* supra note 157.

study. It offers decision-makers a mechanism to identify options that can better achieve core human development and sustainability goals and better understand the trade-offs in decisions about development and the environment."[166] The later research results will be published in 2004 in a series of four in-depth reports and several shorter studies.[167] Future volumes will detail ecosystems' conditions, describe ecosystem change and human well-being situations, provide sample reactions to ecosystem changes and how to avoid them[168] and "will look at how these three topics are treated at a variety of scales from villages to regional watersheds".[169] Approximately 500 scientists from seventy countries will labor on these reports which will then undergo an expert evaluation by hundreds of additional scientists.[170] With this assessment underfoot, participants in the MA hope to bring about sensible and sustainable management of Earth's ecosystems[171] and to construct a basis for wise policy-making.[172]

B. Durban Accord to Protect More Land and Biodiversity

The year 2003 also welcomed the Fifth International Union for the Conservation of Nature (IUCN)[173] World Parks Congress in Durban, South Africa.[174] Conservationists gathered to review the progress made since the last congress met ten years ago to discuss how to "preserve the planet's natural heritage."[175] Since that meeting in 1992, approximately twelve percent of the Earth's surface is now considered to be 'protected.' Protected areas are vital in maintaining biodiversity.[176] The theme of this year's conference was "Benefits Beyond Boundaries;"[177] it focused on the world's protected nature areas and how poor countries can make

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *The Millennium Ecosystem Assessment, supra* note 156.
172. *Id.*
173. *World Parks Congress,* 1 CROSSROADS 6, 2003, *at* http://www.heinzctr.org/crossroads/vol_1_issue_02.pdf (last visited Jan. 5, 2004).
174. Media Release, Department of Environmental Affairs and Tourism/IUCN, Vth IUCN World Parks Congress Sets Agenda For Next Decade, Spurs Conservation Initiatives for Africa (Sep. 17, 2003) [hereinafter Media Release], *at* http://www.iucn.org/themes/wcpa/wpc2003/pdfs/newsevnt/day10/finalwpcpr170903.pdf.
175. *See* Ed Stoddard, *Parks Congress to Focus on Global Protected Areas*, WORLD ENVIRONMENT NEWS, Sep. 9, 2003, *at* http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=22161.
176. *World Parks Congress, supra* note 173, at 6.
177. Stoddard, *supra* note 175.

conservation pay for itself.[178] IUCN President Yolanda Kakabadse Navarro noted that one of the greatest challenges to the conservation community is "[t]urning 'paper parks' into real parks."[179] 'Paper parks' are those areas that are officially protected but fail to offer real security for their wildlife.[180] For example, much of Indonesia's Papua province is considered to be national parkland or nature preserve.[181] However, smuggling of rare and endangered birds is rampant in this supposedly protected area.[182] Also, in countries with internal wars and political unrest, such as the Democratic Republic of Congo, "parks are parks in name only."[183] This year, the World Parks Congress attempted to find ways to broaden the rewards of conservation beyond park borders[184] by offering real economic benefits to local populations,[185] a goal that is essential to the successful protection of fragile ecosystems.[186]

To achieve this goal, the Fifth IUCN World Parks Congress developed the Durban Accord and the Durban "Action Plan, 32 Recommendations, and a message to . . . [the] Convention on Biological Diversity."[187] The Durban Accord celebrates the role of protected areas in attaining conservation and development goals,[188] but also introduces new strategies that stress the role of local communities in protected area decisions and benefits.[189] The Durban Action Plan is "a technical document that provides policy-makers with key targets and timetables for the protected area agenda."[190] Neither the Accord nor the Action Plan are legally binding. However, "they carry the voice of this decade's most prestigious assembly of resource managers, conservation scientists, civil servants and community leaders devoted to protected areas."[191] Thirty-two Recommendations were also made at the convention.[192] These Recommendations centered around three major themes: 1) making sure to incorporate the "interests and needs"[193] of the communities in and around the protected areas into the

178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. Stoddard, *supra* note 175.
184. *Id.*
185. *World Parks Congress, supra* note 173, at 6
186. *Id.*
187. Media Release, *supra* note 174, at 1.
188. *Id.*
189. *Id.*
190. *Id* at 3.
191. *Id.*
192. *Id*.
193. Media Release, *supra* 174, at 1.

management of the protected areas; 2) realizing that protected areas do much more than protect threatened species; they also can provide clean water and "play an important role in relation to mitigation and adaptation to climate change";[194] and 3) recognizing "the importance of providing practical tools, guidelines and training, as well as resources, for protected area managers to achieve their objectives."[195] The Accord, Action Plan, and Recommendations should be very helpful for protected area managers and policy makers internationally.[196] "With the Durban Accord and the Recommendations in hand, they can start a process with their governments, institutions and organizations to make the vision set in Durban — of protected areas as a common tool for biodiversity protections and poverty alleviation — a reality."[197]

Additionally, a new study was unveiled at the Fifth World Parks Congress that indicates that approximately 1,310 species are not protected in any part of their ranges, with at least 831 species at the risk of extinction.[198] The study, known as the "global gap analysis," reveals that striving to protect a targeted range of land in each country (such as ten percent) will not be effective in protecting biodiversity.[199] Rather, because "biodiversity is not distributed evenly over the surface of our planet[,]… some regions require much more protected area coverage than others to ensure that their full range of life forms is represented."[200] The global gap analysis warns that the areas that need the most urgent protection are mostly in tropical forests and on islands.[201] Authors of the study placed the most urgency on protecting biodiversity in Asia and small island nations.[202]

In response to the study, the Fifth World Parks Congress delivered a message to next year's meeting of the Convention on Biological Diversity (CBD)[203] emphasizing the "need to identify and fill-in the existing gaps in the global protected areas system."[204]

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194. *Id.* at 3.
195. *Id.*
196. *Id.*
197. *Id.* at 2.
198. *Global Gap Analysis: Towards a Representative Network of Protected Areas*, ADVANCES IN APPLIED BIODIVERSITY SCIENCE (Center for Applied Biodiversity Science), 2003, *at* http://cabs.kms.conservation.org/wombat/application/document/summary.cfm?RecordID=831FDA57-2060-4764-86B1-BC392C07AD20&ObjectID=4&IDList=831FDA57-2060-4764-86B1-BC392C07AD.
199. *Id.* at 3.
200. *Id.*
201. *Id.* at 7.
202. *Id.* at 3.
203. Media Release, *supra* note 174, at 1.
204. *Id.* at 3.

Additionally, the message to the CBD stressed the importance of ensuring that local communities participate in the protection of areas and share in the benefits of the areas.[205] It also noted the importance of creating the conditions that are required of an efficiently-run system of protected areas,[206] such as "institutional and human capacity, supportive policy, legal frameworks that cut across all sectors, assessment mechanisms, and most importantly, . . . financial support . . . ."[207]

Also, the Fifth World Parks Congress established over 200,000 square kilometers of newly protected areas in Madagascar, Senegal, and Brazil.[208] It also looked to the future by "urg[ing] governments to greatly increase the amount of protected marine and coastal areas."[209] A recommendation was made to establish a global system of marine protected areas by 2012, including "strictly protected areas that amount to at least twenty to thirty percent of each habitat."[210]

C. EU Upholds Severe Fishing Restrictions to Prevent Further Peril to Fish Population

The IUCN is not the only group worried about protecting marine life; the European Union (EU) has been forced to confront the problem of depleting fish stock head-on. Scientists have sternly warned the EU Fisheries Council that fish, such as cod and hake, are very near the brink of extinction in the waters off Europe.[211] Stocks of cod in the North Sea are already at levels one-tenth of the amount they were at in 1970.[212] Scientists have recommended for the second year in a row that the EU completely halt fishing on these fish stocks,[213] warning that the situation may otherwise end up like the one off Eastern Canada in which years of over fishing caused cod to disappear in the 1990s.[214] Canadian cod stocks still have not recuperated.[215] The EU fisheries commission is loath to

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205. *Id*. at 4.
206. *Id.*
207. *Id*.
208. *Id.* at 2.
209. Ed Stoddard, *Parks Congress Sets 10-Year Plan to Protect Planet,* WORLD ENVIRONMENT NEWS, Sep. 18, 2003, *at* http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=22279.
210. *Id.*
211. Press Release, The European Commission, Outcome of the Fisheries Council of 17-19 December 2003 (Dec. 22, 2003), *at* http://europa.eu.int/comm/fisheries/news_corner/press/inf03_62_en.htm.
212. EU Reaches Deal on Fish Quotas, CNN.com (Dec. 19, 2003), *at* http://www.edition.cnn.com/2003/WORLD/europe/12/19/eu.fish.ap/index.html.
213. *Outcome of the Fisheries Council of 17-19 December 2003, supra* note 211.
214. *EU Reaches Deal on Fish Quotas*, *supra* note 212.
215. *Id.*

adopt such stringent restrictions because doing so would eliminate the livelihoods of over 200,000 people.[216] Instead, the EU fisheries commission decided to keep the fishing quotas at last year's historically low level,[217] a level that has been said to be "the most radical reform of the European Union's common fisheries policy in its 20-year history."[218] This level includes a limit of 23,000 tons of North Sea cod, or less than a fifth of the amount fishermen were permitted to catch in 1998.[219] Additionally, the amount of time that fisherman can spend at sea was limited to fifteen days a month.[220] The purpose of these restrictions "is to get reluctant fisheries ministers to sign up to long-term recovery plans for two of the most endangered species, aiming to boost cod by 30 percent and northern hake by five percent each year for five to ten years."[221] Environmental groups have criticized this approach to conservation, saying that "Europe's long-term interest in saving fish stocks and fishing communities has been sacrificed for short-term gain."[222]

D. Gloomy Update of IUCN's Endangered Species Red List

Of course, North Sea cod is not the only species of wildlife in danger of extinction. There are 12,259 varieties of animals, plant, and water life that have earned a spot on the IUCN's 2003 Red List as critically endangered.[223] Among these critically endangered species are the Galapagos Island snails, the variegated spider monkey, and the Mekong giant catfish.[224] The IUCN and other organizations blame the loss of species on human activities.[225] For example, the Mekong giant catfish, which can grow up to ten feet in length and can weigh up to 660 pounds,[226] has suffered from more than an eighty percent decline in population since 1990 "due to

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216. *Id.*

217. *Q & A: Europe's Fishing Crisis,* GUARDIAN UNLIMITED, Dec. 19, 2003, *at* http://www.guardian.co.ik/fish/story/0,7369,1110622,00.html.

218. Andrew Osborn, *Fishermen Face Ruin as EU Slashes North Sea Catch Quotas,* THE GUARDIAN, Dec. 21, 2002, *available at* http://www.guardian.co.uk/fish/story/0,7369,864120,00.html.

219. Andrew Osborn, *Fishing Chiefs Clinch Quota Deal,* THE GUARDIA,N Dec. 19, 2003, *at* http://www.guardian.co.ik/fish/story/0,7369,1110698,00.html.

220. *Id.*

221. Jeremy Smith, *EU's Fischler Fires First Shot in Fish Talks,* WORLD ENVIRONMENT NEWS, Dec. 19, 2003, *at* http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=23177.

222. *Fishing Chiefs Clinch Quota Deal, supra* note 219.

223. *Nature Body Warns of Wildlife Extinction Threat,* WORLD ENVIRONMENT NEWS, Nov. 19, 2003, *at* http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=22881.

224. Press Release, IUCN Species Survival Commission, Release of 2003 IUCN Red List of Threatened Species, *at* http://www.iucn.org/themes/ssc/RedList2003/English/newsreleaseen.htm (last visited Feb. 23, 2004).

225. *See id.; Nature Body Warns of Wildlife Extinction Threat, supra* note 223.

226. *Nature Body Warns of Wildlife Extinction Threat, supra* note 223.

overfishing, habitat loss (such as through siltation and dredging) and obstruction of migratory routes through dam construction."[227] Despite the Red List's gloomy update, Achim Steiner, the IUCN Director General, remains hopeful that these species can recuperate, saying "[w]e now need the political will and resources to stem the loss of biodiversity. Human activities may be the main threat to the world's species but humans can also help them recover. . . ."[228]

IX. SECRETARY-GENERAL ELEVATES HOPES FOR RECURRING GLOBAL MARINE ASSESSMENT

Ronald C. Smith

A. Regular Marine Assessment Placed on a Fast Track

Strong momentum developed toward an ongoing Global Marine Assessment (GMA) that has been discussed for years but was first formally proposed at the World Summit on Sustainable Development in 2002. Remarkable progress was made during discussions at an inter-agency meeting held in Paris in September 2003.[229] The GMA process envisions a global, comprehensive, and regular assessment that is focused exclusively on the marine environment. Most of the assessments in existence are regional in nature or cover one issue such as climate change.[230] The Global Environment Network is designed to be regular but it covers all elements of the environment and devotes only limited attention to the oceans. The Global International Water Assessment is a one-time study that should be completed this year. The Millennium Assessment is a single event scheduled for completion in 2005. A report issued in 2003[231] also noted the Global Ocean Surveying System and the United Nations Atlas of the Oceans which collect

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227. Press Release, IUCN Species Survival Commission, Release of the 2003 IUCN Red List of Threatened Species, *at* http://www.iucn.org/themes/ssc/RedList2003/English/newsreleaseen.htm (last visited Jan. 5, 2004).

228. *Id.*

229. *Oceans and the Law of the Sea: A regular process for the global reporting and assessment of the state of the marine environment: Proposals on modalities,* U.N. GAOR, 58th Sess., Agenda item 52(a) U.N. Doc. A/58/423 (Oct. 8, 2003) [hereinafter Oceans and the Law of the Sea], *available at* http://www.un.org/Depts/los/general_assembly/documents/a58_GMAunedited.pdf. (The publication Global Marine Assessments: A survey of global and regional marine environmental assessment and related scientific activities was released at the meeting. It included guidelines for the establishment of GMA. *Id.* at 7.).

230. *Id.* at 8. These include the Intergovernmental Panel on Climate Change (covering only climate change); the International Coral Reef Action Network (limited to the conservation and protection of coral reefs); and the Global Programme of Action for the Protection of the Marine Environment from Land Based Activities (dealing with the mitigation of outside impacts).

231. *See Oceans and the Law of the Sea, supra* note 229.

data and provide information but do not carry out assessments. Any future Global Marine Assessment would strive to track changes over time and establish trends. It would attempt to build on the existing assessments and integrate existing systems.[232]
The Secretary-General reported:

> The GMA is meant to be global in geographic scope, comprehensive in the issues it covers, regular (no limit in time) and dedicated specifically to the state of the marine environment. It would take the ecosystem approach, assessing the interrelationship of all aspects of the environment and of all activities of the sea.[233]

In his summary to the United Nations following the Paris meetings, the Secretary-General also detailed some of the remaining complexities but then put forward a general framework[234] that would accomplish the assessment. The assessment would be under the oversight of the General Assembly without the creation of any new organization.[235] The Secretary General identified a set of policy decisions to be made by the General Assembly[236] and delineated a number of steps to be taken to formally establish the GMA before the end of this year.[237]

B. Law of the Sea Tribunal Still Underutilized

In contrast to that frenetic activity, the world mostly slept through the thirteenth meeting of the United Nations Convention on the Law of the Sea. The convention welcomed four new member nations to its meeting at U.N. headquarters in June 2003.[238] The meeting was dominated by budgetary and housekeeping matters while the organization seeks more widespread acceptance.

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232. *Oceans and the Law of the Sea, supra* note 229, at 15.
233. *Id.* at 8
234. *Id.* at 10.
235. *Id.*
236. *Id*. at 13.
237. *Id.* (They include appointing experts to prepare a detailed plan and convening an intergovernmental meeting to review the resulting plan. The Secretary-General called for a final draft formally establishing the GMA to be endorsed by the General Assembly before the end of the year.).
238. Daolos/Unitar Briefing On Developments In Ocean Affairs And The Law Of The Sea, United Nations Institute for Training and Research, 3, a*vailable at* http://www.un.org/Depts/los/reference_files/new_developments_and recent_adds.htm. (Armenia, Kiribati, Qatar and Tuvalu bring total number of Parties to 142.) (last modified Jan. 16, 2004).

The Annual Report received from the International Tribunal for the Law of the Sea noted that the judicial role of the tribunal has not been fully utilized by the world community. The President of the Tribunal, Judge L. Dolliver M. Nelson, reported the legal arm of the convention had handled only one dispute in the previous twelve months and has had only eleven cases since its inception.[239] Backed by a General Assembly resolution, he called for more states to use the tribunal for the resolution of disputes.[240] Nelson also announced a plan to establish an international foundation in Hamburg, Germany, to benefit the Law of the Sea.[241]

C. Treaty to Provide Protection for Caspian Sea

The Caspian Sea will be given unprecedented protection after a first ever treaty between the five nations that border the planet's largest inland body of water.[242] The signing followed nearly ten years of discussions,[243] and addressed pollution, habitat destruction, and the over-exploitation of marine life.[244] The Framework Convention for the Protection of the Marine Environment of the Caspian Sea grew out of the Caspian Environment Programme established in 1995 and follows an environmental assessment completed by the World Bank and the United Nations Development Programme.[245]

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239. *Id*. at 5.

240. *Id*. at 7. (The tribunal met in December 2002 to resolve a dispute over the Australian detention of the Russian vessel Volga and members of its crew.).

241. *Id*. at 8.

242. Press Release, United Nations, Secretary General Hails Signing of Caspian Sea Protection Treaty, U.N. Doc. SG/Sm/8984/L/T/4375 (Nov.11, 2003), *at* http://www.un.org/News/Press/docs/2003/sgsm8984.doc.htm. (The five nations are Azerbaijan, the Islamic Republic of Iran, Kazakhstan, the Russian Federation, and Turkmenistan.).

243. *Id.*

244. Press Release, United Nations, Ministers to Sign New Environmental Treaty on Protecting the Caspian Sea, U.N. Doc. UNEP/178 (Nov. 3, 2003), *at* http://www.un.org/News/Press/docs/2003/unep178.doc.htm.

245. *Id.*

STATE REGULATION OF CRUISE SHIP POLLUTION: ALASKA'S COMMERCIAL PASSENGER VESSEL COMPLIANCE PROGRAM AS A MODEL FOR FLORIDA

STEPHEN THOMAS, JR.*

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I. INTRODUCTION

> [T]he [Florida-Caribbean Cruise Association] and [International Council of Cruise Lines] have acted in "good faith" working with the [Florida Department of Environmental Protection] and the [United States Coast Guard] to develop waste management practices which preserve a clean and healthy environment and which demonstrate the cruise industry's commitment

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> to be a steward of the environment and set policies that make the industry a leader in environmental performance. . . .[1]
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> Between 1994 and 1998, at least eight ships owned and operated by Royal Caribbean Cruises Ltd. were involved in hundreds of separate incidents of illegally discharging oily waste and wastewater contaminated by pollutants through ships' gray water systems. In many cases, Coast Guard CVE inspectors were misled by false oil record books and deceptive statements from ships' crews. Some ships' engineers installed temporary pipes to bypass oil-water separators, allowing unprocessed oily bilge water to be discharged directly to the sea. These pipes were disassembled and stored away during scheduled Coast Guard inspections.[2]

Florida is the busiest North American port of call for cruise ships.[3] A major tourist destination in its own right, Florida also enjoys close proximity to the Bahamas and the Caribbean, making the Sunshine State an ideal hub for cruise ship operations.[4] But the natural attributes that make Florida an ideal tourist destination — beaches and coastal waters on the Atlantic Ocean and the Gulf of Mexico, the Everglades, and North America's largest coral reef, to name a few — make Florida particularly vulnerable to pollution generated by giant cruise ships that are often described as "floating cities."[5]

All of the major cruise lines operating in the waters of Florida are owned by foreign corporations and their ships fly so-called "flags of convenience" from countries such as Liberia, Panama, and the Bahamas. [6] This allows them to take advantage of the lower taxes

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1. Memorandum of Understanding between the Fla. Dep't of Envtl. Prot. (FDEP), the Fla. Caribbean Cruise Assoc.(FCCA), and the Int'l Council of Cruise Lines (ICCL) (2001) [hereinafter FDEP Memo], *available at* http://www.iccl.org/resources/fdep_mou.cfm.

2. The Ocean Conservancy, Cruise Control: A Report on How Cruise Ships Affect the Marine Environment 39-40 (May 2002), *available at* http://www.oceanconservancy.org/dynamic/learn/publications/cruiseControl.pdf.

3. *See* U.S. ENVTL. PROT. AGENCY, CRUISE SHIP WHITE PAPER 3 (Aug. 22, 2000)[hereinafter EPA], *available at* http://www.epa.gov/owow/oceans/cruise_ships/white_paper.pdf.

4. BUS. RESEARCH & ECON. ADVISORS, INT'L COUNCIL OF CRUISE LINES, THE CONTRIBUTION OF THE NORTH AMERICAN CRUISE INDUSTRY TO THE U.S. ECONOMY IN 2002 2 (August 2003), *available at* http://www.iccl.org/resources/USEconomicImpactStudy2002.doc.

5. *See, e.g.*, THE OCEAN CONSERVANCY, *supra* note 2, at 3.

6. *Id.* at 9. *See also* discussion *infra* Part II.

and more lenient safety and employment standards of their "home" country.[7] Flying foreign colors may confer an additional benefit on the cruise industry. In *United States v. Locke*, the United States Supreme Court struck down a Washington statute imposing strict state regulations on oil tankers operating in state waters, holding that federal law preempted the state regulations.[8] The United States Environmental Protection Agency (EPA), suggested in its *Cruise Ship White Paper* that the *Locke* decision may indicate that state efforts to regulate foreign-flagged cruise ships may also be preempted by federal law.[9]

The State of Florida, under the administration of Governor Jeb Bush, has responded to this situation by closely working with the cruise industry to create a regime of voluntary standards and self-monitoring. On December 6, 2001, the Florida Department of Environmental Protection (FDEP) and the cruise ship industry interest groups the Florida-Caribbean Cruise Association (FCCA) and the International Council of Cruise Lines (ICCL), which represent sixteen cruise lines that operate in Florida's waters, signed a Memorandum of Understanding[10] "in which the industry pledged to comply with laws and regulations pertaining to waste streams consistent with ICCL waste management guidelines."[11] ICCL industry standards have been commended by some environmentalists as exceeding "state, national, and international standards," but these standards are voluntary and the Memorandum of Understanding contains no enforcement mechanisms.[12] Instead, the Memorandum relies on the U.S. Coast Guard (Coast Guard), the enforcer of federal shipping regulations, "to provide reasonable assurances that [a] cruise vessel is following management practices and industry standards. . . ."[13]

Critics are skeptical, pointing to the cruise industry's recent record of environmental violations and circumvention of Coast Guard inspection efforts.[14] Environmental groups such as Oceana and the Ocean Conservancy have called for stricter state and federal regulation of the cruise industry and enforcement mechanisms to replace voluntary compliance and self-monitoring.[15]

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7. *Id.*
8. 529 U.S. 89 (2000).
9. EPA, *supra* note 3, at 7.
10. FDEP Memo, *supra* note 1.
11. THE OCEAN CONSERVANCY, *supra* note 2, at 33.
12. *Id.* at 25.
13. FDEP Memo, *supra* note 1, at ¶ 2.
14. *See, e.g.*, THE OCEAN CONSERVANCY, *supra* note 2, at 35-42.
15. *Id.*

Other states with a major cruise industry presence have been more aggressive in regulating cruise ship pollution. In 1999, Alaska instituted a steering committee, the Alaska Cruise Ship Initiative, "to review the cruise ship industry's waste management and disposal practices."[16] Subsequently, Alaska passed a series of state laws creating the Commercial Passenger Vessel Environmental Protection (CPVEC) Program, a state program that regulates pollution from cruise ships in state waters.[17] California and Hawaii have also recently considered similar measures.[18]

As demonstrated by the introductory quotations at the beginning of this article, there is a disconnect between the actions of the cruise industry, demonstrated by bad faith attempts to circumvent basic pollution-control measures required by federal law,[19] and the reactions of Florida environmental officials, which rely on the cruise industry to monitor itself in good faith.[20] This Article is written with the hope that Florida will adopt legislation similar to Alaska's CPVEC Program rather than continuing to rely on the "good faith" of an industry that has demonstrated the opposite. The article compares the strategies used by Alaska and Florida to control pollution from cruise ships, evaluates the viability of these strategies in light of recent federal preemption decisions, and proposes a framework for evaluating future state legislation. Part II is an introduction of the cruise industry and pollution from cruise ships. Part III discusses "flags of convenience," the practice of registering ships for economic reasons in countries other than that of the beneficial owner.[21] Part IV examines two U.S. Supreme Court preemption decisions: *Ray v. Atlantic Richfield*[22] and *Locke*,[23] and evaluates their potential affects on state efforts to regulate pollution from cruise ships. Part V examines different strategies employed by two major cruise industry states, Alaska and Florida, to control pollution from cruise ships. Part VI discusses federal law relating to cruise ship pollution and how it might present preemption problems for states. Finally, Part VII will suggest a framework for

16. EPA, *supra* note 3, at 6. For details about the Alaska Cruise Ship Initiative, *see* Alaska Department of Environmental Conservation, Cruise Ship Waste Disposal and Management, Alaska Cruise Ship Initiative, *at* http://www.state.ak.us/dec/press/cruise/documents /cruiseshipinitiative.htm (last visited Feb. 27, 2004).

17. ALASKA STAT. §§ 46.03.460-46.03.490 (Michie 2002).

18. *See* THE OCEAN CONSERVANCY, *supra* note 2, at 33.

19. *See, e.g.*, U.S. v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358 (1998).

20. *See* FDEP Memo, *supra* note 1.

21. *See, e.g.*, H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience*, 21 TUL. MAR. L.J. 139, 156-57(1996).

22. 435 U.S. 151 (1978).

23. 529 U.S. at 89.

evaluating state cruise ship legislation to help lawmakers identify and avoid potential federal preemption challenges.

II. THE CRUISE INDUSTRY AND POLLUTION

According to the ICCL, the cruise industry contributed over twenty billion dollars to the United States economy in 2002.[24] Globally, over 9.2 million passengers sailed on cruise ships in 2002 despite a weak global economy, the increased threat of terrorism, and health concerns raised by highly publicized outbreaks of the Norwalk virus.[25] This represented a 9.8 percent increase from 2001.[26] 6.5 million passengers embarked from ports in the United States, an increase of 10.2 percent.[27] Florida accounted for sixty-eight percent of the U.S. embarkations, with 4.4 million passengers sailing from Florida ports in 2002.[28] The ICCL predicts similar growth in 2003.[29]

In 2002, ICCL reported that 176 ships operated in North American waters with a total of 196,694 passenger berths.[30] *Voyager of the Seas*, a Royal Caribbean Cruise Line ship, was the "largest cruise ship in the world" as of 2002.[31] Built in Finland by Kvaener Masa, *Voyager of the Seas* is a 142,000 ton, 1,017 foot behemoth with a top speed of twenty-two knots.[32] 1,648 cabins hold up to 3,840 passengers.[33] The ship is manned by a crew of almost 1,200.[34]

The Ocean Conservancy describes *Voyager of the Seas* and other cruise ships as "floating cities" with huge environmental impact:

> Some of the pollutants generated by these giant ships daily include as much as 37,000 gallons of oily bilge water; 30,000 gallons of sewage (or black water); 255,000 gallons of non-sewage wastewater from showers, sinks, laundries, baths, and galleys (or gray water); 15 gallons of toxic chemicals from photo processing, dry cleaning and paints; tens of thousands of gallons of ballast water, bearing

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24. BUS. RESEARCH & ECON. ADVISORS, *supra* note 4, at 5.
25. *Id.* at 2.
26. *Id.*
27. *Id.*
28. *Id.*
29. BUS. RESEARCH & ECON. ADVISORS, *supra* note 4, at 3.
30. *Id.* at 2.
31. THE OCEAN CONSERVANCY, *supra* note 2, at 59.
32. *Id.*
33. *Id.*
34. *Id.*

> pathogens and invasive species from foreign ports; seven tons of garbage and solid waste; and air pollution from diesel engines at a level equivalent to thousands of automobiles.[35]

The ICCL cruise industry standards for disposal of this waste, accepted by Florida in the Memorandum of Understanding, call for the disposal of "graywater" and treated "blackwater" while ships are "proceeding at a speed of not less than six knots," which must be in compliance "with all applicable laws and regulations."[36] Similarly, bilge and oily water residues, trash, and other solid and liquid wastes are to be disposed of in accordance with applicable laws and regulations as well as international treaty requirements.[37] U.S. federal laws and international treaties regulating pollution from cruise ships will be discussed in depth below.

Three foreign corporations: Carnival Corp. (incorporated in Panama);[38] Royal Caribbean Cruises, Ltd. (incorporated in Liberia);[39] and Star Cruises, Ltd. (incorporated in Hong Kong, China),[40] control a solid majority of the North American cruise market.[41] Each owns several major cruise lines and fleets of ships registered, or flagged, in various countries.[42]

On April 17, 2003, Carnival and P&O Princess Cruises merged into a dual-listed company, comprised of separate legal entities with a single economic entity.[43] This created the largest cruise line group in the world with over sixty ships operating world-wide, including Carnival Cruise Lines, P&O Princess, Holland-America Line, Costa Cruises, Cunard Line, and other brand names.[44]

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35. *Id.* at 3.

36. FDEP Memo, *supra*, note 1, *citing* ICCL Industry Standard, *Cruise Industry Waste Management Practices and Procedures*, ¶¶ 11-12 (Revision 1), *available at* http://www.iccl.org/resources/exhibit_a.pdf (last modified Dec. 1, 2001).

37. FDEP Memo, *supra*, note 1, *citing* ICCL Industry Standard, *Cruise Industry Waste Management Practices and Procedures*, ¶¶ 1-9 (Revision 1), *available at* http://www.iccl.org/resources/exhibit_a.pdf (last modified Dec. 1, 2001).

38. The McGraw-Hill Co., Inc., Standard & Poor's Corp. Descriptions plus News, *Carnival Corp.* (Oct. 25, 2003) [hereinafter Standard & Poor's: Carnival Corp.] *at* http://www.lexis.com.

39. The McGraw-Hill Co., Inc., Standard & Poor's Corp. Descriptions plus News, *Royal Caribbean Cruises, Ltd.* (Oct. 25, 2003) [hereinafter Standard & Poor's: Royal Caribbean] *at* http://www.lexis.com.

40. Hoover's Inc., Hoover's Company Fact Sheet Database - World Companies, Star Cruise Lines, Ltd.(2003)[hereinafter Hoover's], *at* www.lexis.com.

41. ROSS A. KLEIN, CRUISE SHIP BLUES 4 (2002).

42. *See, e.g.*, *id.* at 3-4.

43. The McGraw-Hill Co., Inc., Standard & Poor's Corp. Descriptions plus News, *Carnival plc* (Oct. 25, 2003) [hereinafter Standard & Poor's: Carnival plc] *at* http://www.lexis.com.

44. Standard and Poor's: Carnival Corp., *supra* note 38.

Royal Caribbean Cruises, Ltd. is the next biggest player in the cruise industry with twenty-five cruise ships operating under the Royal Caribbean International and Celebrity Cruises brand names.[45] Star Cruises is the other major player in the world cruise market, having acquired Norwegian Cruise Lines in 2001.[46] Star Cruises operates over twenty ships under the brand names: Star Cruises, Norwegian Cruise Lines, and Orient Lines.[47]

III. FLAGS OF CONVENIENCE

The practice of registering, or flagging, ships in countries other than that of their beneficial owner is often referred to as using a "flag of convenience."[48] Modern use of "flags of convenience" began during the U.S. prohibition era, aboard cruise ships, when some U.S. ship owners reflagged their vessels in Panama in order to circumvent "the U.S. law forbidding the sale of alcohol aboard U.S. ships."[49] Since then, the term "flag of convenience" has been used to refer to registration of a vessel for "primarily economic reasons in a country with an open registry."[50]

In 1970, the United Kingdom published the Rochdale Report which listed:

> six criteria for determining the status of a 'flag of convenience': 1) The country of registry allows ownership and/or control of its merchant vessels by non-citizens; 2) Access to the registry is easy; ship may usually be registered at a consulate abroad. Equally important, transfer from the registry at the owner's option is not restricted; 3) Taxes on the income from the ships are not levied locally, or are very low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given; 4) The country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered, but receipts from very small charges on a large tonnage may produce a substantial effect on its national

45. Standard and Poor's: Royal Caribbean, *supra* note 39.
46. Hoover's, *supra* note 40.
47. *Id.*
48. *See, e.g.*, Anderson, 21 TUL. MAR. L.J. at 156-57.
49. *Id.* at 156.
50. *Id.* at 157.

> income and balance of payments; 5) Manning of ships by non-nationals is freely permitted; and 6) The country of registry has neither the power nor the administrative machinery effectively to impose any governmental or international regulations; nor has the country even the wish or the power to control the companies themselves.[51]

Until recently, Panama, Liberia, and Honduras were the primary nations of registry for "flags of convenience."[52] Honduras is no longer a major "flag of convenience" provider, but many other developing nations are getting into the business.[53]

Registering ships under "flags of convenience" often confers the same types of benefits that offshore tax havens provide for corporations: an international legal identity, a corporate shield from tax, and environmental and labor laws in a country other than the one where most of the company's business is conducted.[54]

All of the major cruise lines operating in the North American market from ports in the U.S. register their ships with "flags of convenience."[55] This practice allows cruise lines to take advantage of lower taxes, lenient labor and safety standards, and fewer inspections.[56] Carnival's fleet includes ships registered in Liberia, Panama, Bahamas, Netherlands, United Kingdom, Bermuda, and Italy.[57] Royal Caribbean registers its ships in Liberia, Norway, and Panama.[58] Star Cruises, Norwegian Cruise Lines, and Orient Lines ships are flagged in the Bahamas.[59]

In addition to the tax and regulatory benefits companies enjoy when employing "flags of convenience," there are also potential legal benefits. According to international law, a ship is under the jurisdiction of its nation of registry while at sea, and under joint jurisdiction of the flag country and the host country when in port.[60]

In *United States v. Royal Caribbean Cruises, Ltd.* the U.S. Department of Justice charged Royal Caribbean with falsifying

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51. *Id.* at 157-58 (citing Committee of Inquiry into Shipping: London, H.M.S.O. 1970, Cmnd 4337 (Rochdale Report)).

52. Herbert R. Northrup & Peter B. Scrase, *The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995*, 23 U. Denv. TRANSP. L.J. 369, 372 (1996).

53. *Id.*

54. *See* THE OCEAN CONSERVANCY, *supra* note 2, at 9.

55. Klein, *supra* note 41, at 141-43.

56. *Id.* at 142.

57. *Id.* at 141.

58. *Id.*

59. *Id.*

60. *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571 (1953).

pollution records required by law and intentionally bypassing pollution control devices.[61] Attorneys for Royal Caribbean, armed with a diplomatic note from Liberia, asked for the case to be dismissed, arguing that because the ship in question was registered in Liberia, the U.S. had no jurisdiction.[62] The trial court rejected this argument in this case involving violation of international and federal standards.[63] Other cases, however, suggest that *state* regulation of shipping in excess of U.S. federal regulation might be federally preempted where a foreign vessel is involved.[64] For example, a "flag of convenience" could shield a ship whose beneficial ownership is headquartered in Florida, as most of the major cruise ship companies are, from any Florida statute or regulation that exceeds federal standards. The potential for the federal preemption doctrine to hamper state regulation of foreign-flagged cruise ships is discussed in the next section.

IV. STATE REGULATION OF SHIPPING AND THE PREEMPTION DOCTRINE

Since nearly all of the cruise ship fleet is flagged in countries other than the U.S., federal preemption is a potential obstacle to any state wishing to regulate pollution from cruise ships.[65] At least two major Supreme Court decisions, *Ray*[66] and *Locke*,[67] have held that federal law relating to oil tankers and the pollution they can potentially cause, preempts much state regulation of oil tankers.

While the pollution from an oil spill — as evidenced by the *Exxon Valdez* spill[68] and the more recent *Prestige* spill off of the coasts of Spain, Portugal, and France[69] — is potentially devastating, consider that oil tankers are designed to *prevent* oil spills.[70] Whereas, in contrast, while a cruise ship may employ pollution control methods, much of the waste it produces is intentionally

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61. 11 F. Supp. 2d at 1358-1359.
62. *Id.* at 1358-1362.
63. *Id.*
64. *See Ray*, 435 U.S. at 15; *Locke*, 529 U.S. at 89.
65. *See* EPA, *supra* note 3, at 7.
66. 435 U.S. at 151.
67. 529 U.S. at 89.
68. *See Id.* at 94.
69. *See* World Wildlife Fund, *Oil Spill Off Spain's NW Coast* (Nov. 2002) *at* http://www.panda.org/news_facts/crisis/spain_oil_spill/index.cfm (providing detailed information on the *Prestige* spill)(last visited Mar. 2, 2004).
70. *See, e.g.*, Australian Marine Safety Authority, Comparison of Single and Double Hull Tankers, *available at* http://www.amsa.gov.au/amsa/pub/tankers.pdf (last visited on Mar. 2, 2004)

discharged into the sea.[71] Legally, the two classes of ships are more analogous. The federal law, regulations, and treaties cited in the oil tanker federal preemption cases (the Oil Tanker Cases) are often applicable to all commercial shipping — cruise ships, as well as oil tankers.[72] Thus, a state wishing to regulate cruise ships would be wise to pay close attention to the Oil Tanker Cases.

A. Ray v. Atlantic Richfield

In response to the *Torrey Canyon* oil spill off the English coast in 1967, both Congress and the State of Washington passed legislation regulating oil tankers.[73] In *Ray*, the U.S. Supreme Court overturned Washington state laws regulating "the design, size, and movement of oil tankers in Puget Sound."[74] The unanimous court held that federal law preempted Washington requirements that required tankers to use a Washington-licensed pilot, limited tanker size, and regulated tanker design and construction.[75]

According to the *Ray* Court, Title I of the Port and Waterways Safety Act of 1972 (PWSA) allows states to regulate their ports and waterways as long as the regulation pertains to "the peculiarities of local waters that call for special precautionary measures,"[76] and the Coast Guard has not adopted regulations on the subject or determined that regulation is unnecessary or inappropriate.[77]

The *Ray* court upheld a Federal District Court decision holding "that under the Supremacy Clause . . . which declares that the federal law 'shall be the supreme Law of the Land,' the [Washington] Tanker Law could not coexist with the PWSA and was totally invalid."[78] The discussion of the Supremacy Clause in *Ray* is important because it was relied upon as the appropriate analysis in *Locke*,[79] below. It reads:

> [W]hen a State's exercise of its police power is challenged under the Supremacy Clause, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest

71. *See* THE OCEAN CONSERVANCY, *supra* note 2, at 11-19.
72. *See* EPA, *supra* note 3, at 7-12.
73. *Locke*, 529 U.S. at 95.
74. 435 U.S. at 151.
75. *Id.* at 154-155.
76. *Id.* at 171.
77. *See id.* at 151-155.
78. *Id.* at 155.
79. 529 U.S. at 89.

> purpose of Congress." (citations omitted) Under the relevant cases, one of the legitimate inquiries is whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating the various aspects of oil-tanker operations and design with which the Tanker Law is concerned. As the Court noted in [*Rice v. Santa Fe Elevator Corp*.] (citation omitted). "[The congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. (citations omitted) Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. (citations omitted) Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." (citations omitted) Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," (citations omitted) or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (citations omitted)[80]

This framework was upheld and expanded upon in *Locke*.[81] It is likely that any state law regulating cruise ships would be challenged in court under the same analysis, where federal law already covers the same ground.

B. U.S. v. Locke

In *Locke*, the United States Supreme Court struck down regulations promulgated by the State of Washington's Office of Marine Safety, created in the wake of the 1989 *Exxon Valdez* oil spill off of the Alaskan coast, to establish "best achievable protection" (BAP) standards for the prevention of oil spills in

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80. *Ray*, 435 U.S. at 157-58.
81. 529 U.S. at 89.

Washington waters.[82] The Washington regulations included tanker design, equipment, reporting, and operating requirements for oil tankers operating in Washington's state waters, with sanctions for non-compliance including "statutory penalties, restrictions of the vessel's operation in state waters, and a denial of entry into state waters."[83]

The Washington regulations were challenged in Federal District Court by the International Association of Independent Tanker Owners (Intertanko), a trade association representing most of the world's independent oil tanker fleet.[84] Intertanko sued for declaratory and injunctive relief against the Washington officials tasked with implementing the new standards, arguing:

> Washington's BAP standards invaded areas long occupied by the Federal Government and imposed unique requirements in an area where national uniformity was mandated. Intertanko further contended that if local political subdivisions of every maritime nation were to impose differing regulatory regimes on tanker operations, the goal of national governments to develop effective international environmental and safety standards would be defeated.[85]

The District Court received diplomatic notes from thirteen maritime countries in support of Intertanko.[86] The Danish note stated that the Washington legislation:

> [W]ould cause inconsistency between the regulatory regime of the U.S. Government and that of an individual State of the U.S. Differing regimes in different parts of the U.S. would create uncertainty and confusion. This would also set an unwelcome precedent for other Federally administered countries.[87]

The District Court upheld the Washington regulations despite the diplomatic protests.[88]

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82. *Id.* at 97.
83. *Id.*
84. *Id.*
85. *Locke*, 529 U.S. at 97.
86. *Id.* at 98.
87. *Id.*
88. *Id.*

On appeal, the U.S. intervened on behalf of Intertanko, claiming "that the District Court's ruling failed to give sufficient weight to the substantial foreign affairs interests of the Federal Government."[89] The Ninth Circuit upheld all of the Washington regulations except for requirements "for vessels to install navigation and towing equipment," which were struck down on the authority of *Ray*.[90]

The U.S. Supreme Court heard the case and reversed the Ninth Circuit decision, also relying heavily on *Ray*, striking down some of the Washington regulations and remanding others to the District Court. Justice Kennedy, for a unanimous Court, wrote that the Washington regulations were enacted:

> [I]n an area where the federal interest has been manifest since the beginning of our Republic and is now well established. The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution.[91]

The Court cited provisions of the Tank Vessel Act of 1936, the PWSA, and the Oil Pollution Act of 1990 (OPA) that covered the same substance as the Washington regulations.[92]

V. STATE CRUISE SHIP POLLUTION CONTROL STRATEGIES

States with a major cruise industry presence have employed different strategies to address the problem of cruise ship pollution. Between 1999 and 2001, Alaska passed a series of laws regulating cruise ships and created the Alaska Cruise Ship Initiative which created a committee that reviews cruise ship industry waste management and disposal plans.[93] On the other end of the regulatory spectrum, Florida signed a Memorandum of Understanding with the cruise industry, a strategy of self-monitoring and voluntary compliance.[94] Other cruise industry states have also passed or proposed statutes or regulations. This

89. *Id.*
90. *Locke*, 529 U.S. at 98.
91. *Id.* at 99.
92. *Id.* at 100-03.
93. EPA, *supra* note 3, at 6.
94. *See* FDEP Memo, *supra* note 1.

section will contrast the very different approaches to regulating cruise ship pollution employed by Alaska and Florida.

A. Alaska

In 1999, The Alaska Cruise Ship Initiative, a steering committee with representation from the U.S. Coast Guard, the Environmental Protection Agency, the Alaska Department of Environmental Conservation, and the cruise ship industry, was created "to review the cruise ship industry's waste management and disposal practices."[95] As a result, the cruise industry has voluntarily agreed: to not release waste in international "doughnut holes" surrounded by state waters; "to not discharge gray or black water within ten miles of Alaskan embarkation or destination ports;" to create and maintain spill response vessels; to undergo limited gray and black water sampling and analysis; and to conduct "Cruise Ship Awareness Days."[96]

As a result of the Cruise Ship Initiative's work, Alaska has produced significant environmental legislation to protect its state waters from cruise ship pollution. Alaska's Commercial Passenger Vessel Environmental Compliance Program (CPVEC),[97] a comprehensive scheme of monitoring and registration specifically targeting pollution from cruise ships, went into effect on July 1, 2001.[98] CPVEC provides for:

> 1) terms and conditions of vessel discharges; 2) independent verification of environmental compliance; and 3) allowing the [Alaska Department of Environmental Conservation (ADEC)] to monitor and supervise discharges from commercial passenger vessels through a registration system.[99]

CPVEC registration requirements call for annual registration of all commercial passenger vessels operating in Alaska state waters.[100] Vessel owners must provide their business and vessel registration information, maintain a registered agent in the State of Alaska for the purpose of process service, and agree to comply with CPVEC discharge terms and conditions.[101]

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95. EPA, *supra* note 3, at 6.
96. *Id.*
97. ALASKA STAT. §§ 46.03.460-46.03.490 (Michie 2002).
98. *Id.* § 46.03.460(a).
99. *Id.*
100. *Id.* § 46.03.461.
101. *Id.*

CPVEC requires commercial passenger vessel operators to comply with certain terms and conditions for waste discharges in Alaska state waters. The standard terms and conditions under CPVEC are:

> [T]he owner or operator [of a commercial passenger vessel regulated under CPVEC]: 1) may not discharge untreated sewage, treated sewage, graywater or other wastewater in a manner that violates [CPVEC discharge limits and prohibitions]; 2) shall maintain records and provide the reports required under [CPVEC]; 3) shall collect and test samples as required under [CPVEC] and provide the reports with respect to those samples required by [CPVEC]; 4) shall report discharges in accordance with [CPVEC requirements]; 5) shall allow [ADEC] access to the vessel at the time samples are taken . . . for purposes of taking the samples or for purposes of verifying the integrity of the sampling process; and 6) shall submit records, notices, and reports to [ADEC] in accordance with [CPVEC requirements].[102]

CPVEC allows ADEC, in certain circumstances, to create alternate standards for owners and operators of vessels "who cannot practically comply with the standard terms and conditions," or who wish to employ or test alternative equipment or procedures.[103]

CPVEC also limits and prohibits certain types of discharges from commercial passenger vessels in Alaska state waters.[104] The discharge of untreated sewage is prohibited.[105] Treated sewage, gray water, and other wastewater must meet standards mandated by the CPVEC statutes[106] or, alternatively, the standards set by ADEC using the "best available scientific information on the environmental effects of the regulated discharges, the materials and substances handled on the vessels, vessel movement effects, and the availability of new technologies for wastewater."[107] CPVEC also sets standards for the manner in which vessels may discharge waste, requiring discharges to be performed: underway, and at a speed of

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102. ALASKA STAT. § 46.03.462(b)(1)-(6) (Michie 2002).
103. *Id.* § 46.03.462(c).
104. ALASKA STAT. § 46.03.463 (Michie 2002).
105. *Id.* § 46.03.463(a).
106. *Id.* § 46.03.463(b)-(c).
107. *Id.* § 46.03.463(d).

not less than six knots; at least one nautical mile from shore, except in areas designated by ADEC; compliant with all applicable federal law; and in an area where discharge is not prohibited.[108] Exceptions to these discharge regulations are made where discharges are permitted under federal cruise ship legislation or where the safety of the ship's passengers and crew require a discharge of waste.[109]

Finally, CPVEC requires cruise ship owners and operators to collect data about discharges from their ships;[110] maintain records of the collected data for three years;[111] report data collected under CPVEC, as well as any other federally mandated data;[112] report any discharges in violation of CPVEC;[113] and file a plan with ADEC, prior to operating in Alaska state waters, for disposal of hazardous and nonhazardous waste other than sewage.[114] CPVEC also created a trust fund to pay for the program.[115] The CPVEC Fund is funded through user fees charged each time a cruise ship or other commercial passenger vessel enters Alaska state waters,[116] fines assessed for CPVEC violations,[117] and legislative allocations.[118]

In addition to CPVEC, Alaska has also passed other legislation that regulates cruise ship pollution; examples include a law banning from Alaska state waters vessels painted with TBT-based paint,[119] and legislation requiring owners and operators of large non-tank vessels to prove financial responsibility to respond to a spill for large non-tank vessels such as cruise ships.[120]

Civil, administrative, and criminal penalties for violating Alaska's pollution laws give CPVEC teeth for compliance enforcement.[121] Additionally, as security to ensure payment of fines, Alaska statutes allow ADEC to seize ships that discharge petroleum products or bilge water in violation of Alaska law.[122]

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108. *Id.* § 46.03.463(e).
109. *Id.* § 46.03.463(g)-(h).
110. ALASKA STAT. § 46.03.465 (Michie 2002).
111. *Id.* § 46.03.470.
112. *Id.* § 46.03.475(b).
113. *Id.* § 46.03.475(a).
114. *Id.* § 46.03.475(e).
115. ALASKA STAT. § 46.03.482 (Michie 2002).
116. *Id.* § 46.03.480.
117. *Id.* § 46.03.480(b).
118. *Id.*
119. *Id.* § 46.03.715.
120. ALASKA STAT. § 46.04.055 (Michie 2002).
121. *Id.* §§ 46.03.759-790.
122. *Id.* § 46.03.770.

B. Florida

In contrast to Alaska's regulatory approach, Florida's Memorandum of Understanding[123] with the cruise industry relies on voluntary compliance to reduce cruise ship pollution. The Memorandum of Understanding was signed on December 6, 2001 by David Struhs, the Secretary of the Florida Department of Environmental Protection (FDEP), and representatives of two interest groups representing the cruise industry in Florida: the Florida-Caribbean Cruise Association (FCCA), and the International Council of Cruise Lines (ICCL).[124] The agreement accepts industry waste management standards, voluntarily adopted by the cruise industry, and relies on the Coast Guard for reporting, inspection, and enforcement.[125]

The substantive part of the Memorandum outlines nine "environmental policy goal attainments" agreed upon by the parties, of which seven are outlined here: 1) cruise industry waste management standards are accepted and the cruise industry agrees to discharge waste water outside Florida territorial waters;[126] 2) jurisdiction over environmental matters in navigable waters, inspection of passenger ships, and corresponding documentation is the responsibility of the Coast Guard, and "the [Coast Guard] is the proper U.S. agency to provide reasonable assurances that the cruise vessel is following" the agreed upon waste management standards;[127] 3) the parties accept Coast Guard inspection standards and agree that "FDEP may request, from the [Coast Guard], and inspect all records for cruise vessels entering Florida territorial waters";[128] 4) cruise vessels will be registered using a national identification system to be created by the EPA;[129] 5) FDEP accepts the cruise industry plan for compliance with the Resource Conservation Recovery Act, "as the appropriate process for vendor selection and management of hazardous wastes in Florida;"[130] 6) "all records required by RCRA for cruise vessels entering Florida territorial waters shall be available to FDEP upon written request to the cruise vessel operator;"[131] and 7) the parties agree to work in

123. FDEP Memo, *supra* note 1.
124. *Id.*
125. *Id.*
126. *Id.* at ¶ 1.
127. *Id.* at ¶ 2.
128. FDEP Memo, *supra* note 1, at ¶ 3.
129. *Id.* at ¶ 4.
130. *Id.* at ¶ 5.
131. *Id.* at ¶ 6.

"good faith" to achieve the agreed upon waste management standards.[132]

While it is certainly admirable that the cruise industry has agreed to the standards outlined in the Memorandum of Understanding, there is no mechanism for enforcing the agreement. Instead, Florida relies on the cruise industry to monitor itself and relies on the Coast Guard "to provide reasonable assurances" that the cruise industry is following their own standards.[133] Given the cruise industry's history of bad faith efforts to circumvent federal regulations,[134] it would seem that the "trust but verify"[135] approach employed by the Alaska CPVEC Program, backed by serious penalties for violations, warrants serious consideration by Florida lawmakers.

VI. FEDERAL LAWS AND REGULATIONS

As demonstrated in *Locke*, the United States Supreme Court has struck down state environmental laws affecting oil tankers where federal law addresses the same substantive area regulated by the state law, there is no specific saving clause authorizing additional state regulation, and the state law does not address a specific local need.[136]

The EPA published the *Cruise Ship White Paper* in August 2000; the report suggested that the holding in *Locke* might be used to strike down any state law regulating cruise ship pollution.[137] The *Cruise Ship White Paper* also lists federal legislation and treaties that regulate pollution from cruise ships.[138] Under *Locke*, federal law and regulation of cruise ship pollution would preempt any state legislation attempting to cover the same ground, absent a saving clause specifically authorizing further state regulation or a special need unique to the local circumstances of the state.[139] Federal legislation and treaties that might preempt state regulation in this field include: the Clean Water Act (CWA);[140] the Oil Pollution Act of 1990 (OPA);[141] the International Convention for the Prevention of

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132. *Id.* at ¶ 7.
133. FDEP Memo, *supra* note 1, at ¶ 2.
134. *See, e.g.*, *Royal Caribbean*, 11 F. Supp. 2d at 1358; *see also* THE OCEAN CONSERVANCY, *supra* note 2, at 39-40.
135. Former President Ronald Reagan is attributed with using this oft-quoted Russian expression in his arms treaty negotiations with former Soviet Premier Mikhail Gorbachev.
136. 529 U.S. at 89.
137. 137. EPA, *supra* note 3, at 7.
138. *Id.* at 7-12.
139. 529 U.S. at 89.
140. 33 U.S.C. § 1311 (2002).
141. *Id.* § 2701-2720.

Pollution from Ships (MARPOL);[142] the Act to Prevent Pollution from Ships;[143] the International Convention for the Safety of Life at Sea (SOLAS);[144] the Resource Conservation and Recovery Act (RCRA);[145] the Marine Protection, Research, and Sanctuaries Act (MPRSA);[146] and the Shore Protection Act (SPA).[147]

A. The Clean Water Act

Section 301 of the Clean Water Act (CWA) prohibits the discharge of pollutants from point sources, including vessels, except under certain circumstances.[148] Section 312 of the CWA establishes standards for marine sanitation devices that treat or store ship sewage before discharge and procedures for designating "no discharge zones" to protect environmentally sensitive areas designated by individual states.[149] "Section 402 establishes the National Pollutant Discharge Elimination System (NPDES) permit program to regulate the discharge of pollutants from point sources to waters of the United States."[150]

The Oil Pollution Act (OPA)[151] amends Section 311 of the CWA[152] to expand federal and industry spill prevention, preparedness, and response capabilities.[153] "OPA applies to cruise ships and prohibits the discharge of oil or hazardous substances" in harmful quantities in U.S. territorial waters and the U.S. Exclusive Economic Zone (EEZ).[154]

B. MARPOL and the Act to Prevent Pollution from Ships

MARPOL was originally signed in 1973 and was amended in 1978.[155] MARPOL contains international regulations for the release of oil, waste, and hazardous materials into the marine environment.[156] The Act to Prevent Pollution from Ships (APPS) implemented the MARPOL Convention domestically.[157] The

142. 17 I.L.M. 546 (1978).
143. 143. 33 U.S.C. §§ 1901-1915 (2002)(implementing MARPOL).
144. Nov. 1, 1974, 32 U.S.T. 47.
145. 42 U.S.C. §§ 6901-6992k (2002).
146. 33 U.S.C. §§ 1401-1445 (2002).
147. *Id.* §§ 2601-2623.
148. *Id.* § 1311.
149. *Id.* § 1322.
150. EPA, *supra* note 3, at 11; *see also* 33 U.S.C. § 1342.
151. 33 U.S.C. §§ 2701-2720.
152. *Id.* § 1321.
153. EPA, *supra* note 3, at 8.
154. *Id.*
155. 33 U.S.C. §§ 2701-2720.
156. *Id.*
157. *Id.* §§ 1901-1915.

provisions of APPS apply to any "ship of United States registry or nationality, or . . . operated under the authority of the United States, wherever located," as well as any ship in a U.S. port, U.S. territorial waters, or the U.S. EEZ.[158] APPS is administered by "the Secretary of the department in which the Coast Guard is operating,"[159] currently the Department of Homeland Security.[160] APPS requires seagoing ships, including cruise ships, to limit discharges of oil and noxious substances, maintain monitoring equipment, and record and report discharges.[161] APPS also implements MARPOL garbage and plastics disposal requirements.[162] MARPOL Annex IV, which calls for regulation of sewage discharges from ships, has not been ratified as part of APPS.[163] APPS contains no saving clauses reserving the right of individual states to promulgate additional regulations.

C. Safety of Life at Sea Convention (SOLAS)

SOLAS, originally adopted in response to the *Titanic* disaster, is considered the most important international treaty regarding merchant ship safety.[164] The current version of SOLAS was adopted in 1974 and went into effect in 1980.[165] Under SOLAS, the International Maritime Organization (IMO) "specifies minimum standards for the construction, equipment, and operation of ships," including cruise ships.[166] SOLAS flag states are required to ensure their ships meet SOLAS requirements.[167] Member states are allowed to inspect foreign flagged ships and refer violations to the flag state for action. [168]

D. Other Federal Regulations

The Resource Conservation and Recovery Act (RCRA) imposes federal management requirements for generators and transporters

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158. *Id.* at § 1902.
159. *Id.* at § 1903.
160. *See generally* U.S. Department of Homeland Security,. U.S. Coast Guard, *at* http://www.uscg.mil (last visited Mar. 3, 2004).
161. EPA, *supra* note 3, at 8-9.
162. *Id.*
163. *Id.* at 9.
164. International Maritime Organization, International Convention for the Safety of Life at Sea, Introduction and History, *available at* http://www.imo.org/conventions/contents.asp?topic_id =257&doc_id=647 (last visited Mar. 3, 2004); *see also* SOLAS, *supra* note 146, at 147.
165. SOLAS, *supra* note 146, at 147.
166. EPA *supra* note 3, at 9-10.
167. *Id.* at 9.
168. *Id.* at 9-10.

of hazardous waste, including cruise ships.[169] The Marine Protection, Research, and Sanctuaries Act (MPRSA) prohibits unlicensed transportation of materials for disposal from the U.S. and unlicensed dumping in U.S. territorial waters. [170] Effluents incidental to the propulsion of vessels are explicitly excluded.[171] The Shore Protection Act (SPA)[172], administered by the EPA and the Department of Transportation (DOT), regulates the disposal of "trash, medical debris, and other unsightly and potentially harmful materials" in the territorial waters of the United States.[173]

E. Oversight

Although the EPA and DOT administrate many of the federal programs relating to cruise ship pollution, the primary responsibility for ensuring compliance of cruise ships with U.S. laws and international agreements belongs to the Coast Guard. The Coast Guard has recently been reorganized under the Department of Homeland Security; its mission is now more acutely focused on border control and counter-terrorism.[174] It is unclear how this change of mission and organization will affect other functions performed by the USCG, but it is easy to imagine where environmental inspections of cruise ships falls on the Department's list of priorities.

Considering the USCG's important enforcement role in all of the federal and international schemes discussed above, it is important that state and federal policy-makers consider means to ensure that enforcement of pollution regulations is not lost to the demands of a more pressing mission. Even before it moved to the Department of Homeland Security, the USCG demonstrated that environmental regulation was a low priority. The D.C. Circuit recently issued a writ of mandamus in *In Re: Blue Water Network*, compelling the Coast Guard to announce regulations required by the OPA, holding, "[OPA] is now more than ten-years old, but the Coast Guard, the enforcing agency, still has failed to promulgate regulations required by the Act."[175] The FDEP Memo defers all inspection and enforcement of regulations affecting cruise ships to the Coast

169. 42 U.S.C. §§ 6901-6992k; *see also* EPA, *supra* note 3, at 10.
170. 33 U.S.C. §§ 1401-1445 (2002); *see also* EPA, *supra* note 3, at 10-11.
171. *Id*.
172. 33 U.S.C. §§ 2601-2623 (2002).
173. EPA, *supra* note 3, at 11.
174. *See* U.S. Department of Homeland Secuiry, U.S. Coast Guard, *at* http://www.uscg.mil /hq/g-cp/comrel/factfile/Factcards/Homeland.htm (last visited Mar. 5, 2004).
175. 234 F. 3d 1305, 1307 (D.C. Cir. 2000).

Guard,[176] while Alaska statutes employ additional state monitoring and reporting requirements.[177]

VII. FRAMEWORK FOR STATE REGULATION

Assuming that *Locke* will extend federal preemption to state laws regulating cruise ship pollution, states seeking to pass new laws in this area must first consider the preemption analysis from *Ray* which was subsequently upheld by the U.S. Supreme Court in *Locke*.[178] The *Ray/Locke* preemption analysis (hereinafter *Ray/Locke*) can be summarized as seven factors that state regulators must consider to avoid preemption: 1) the state regulation must not be expressly preempted by federal law; 2) "the scheme of federal regulation [must not] be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it;"[179] 3) "the federal interest [must not be] so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject;"[180] 4) the state law must not actually conflict with a valid federal law; 5) compliance with both the state and federal regulations must be physically possible; 6) state law must not stand "as an obstacle to the accomplishment and execution of the full purposes of Congress;"[181] 7) where a saving clause authorizes a state to promulgate further legislation or regulation, states must stay within the parameters of the saving clause.[182]

In order to test this analysis, I will examine a portion of Section 46.03.463 of the Alaska Statutes, a section of CPVEC which prohibits and limits certain discharges from commercial passenger vessels.[183] For sake of brevity, I will only examine the first part of this statute, even though the analysis could be equally applicable to all of the CPVEC statutes.

Section 46.03.463(a) prohibits the discharge of "untreated sewage from a commercial passenger vessel into the marine waters of the state,"[184] except when the discharge is "made for the purpose of securing the safety of the commercial passenger vessel or saving life at sea if all reasonable precautions have been taken for the purpose of preventing or minimizing the discharge."[185]

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176. FDEP Memo, *supra* note 1.
177. ALASKA STAT. §§ 46.03.460-46.03.490 (Michie 2002).
178. 435 U.S. at 157-58 (1978).
179. *Id*. at 157.
180. *Id*.
181. *Id*. at 158.
182. *Id.* at 171; *see also*, *Locke*, 529 U.S. at 104-112.
183. ALASKA STAT. § 46.03.463 (Michie 2000).
184. *Id. at* § 46.03.463(a).
185. *Id.* § 46.03.463(h).

In order to analyze this statute for potential federal preemption using the *Ray/Locke* analysis, it is first necessary to determine if any federal legislation covers the same subject matter as the state legislation. This can be done by referring to the EPA list of federal programs and treaties that relate to the control of pollution from cruise ships (*see infra* Part VI).

In this case, the Clean Water Act (CWA) is the relevant federal legislation. Section 312 of the CWA specifically authorizes states to "completely prohibit the discharge from all vessels of any sewage, whether treated or not," into some or all state waters determined by the state to require greater environmental protection.[186]

The next step is to determine if state regulation in this area is preempted by federal law. In this case, Section 312 of the CWA specifically contemplates state prohibition on the discharge of raw sewage,[187] therefore, there is no express federal preemption.

Express federal authorization also seems to dispose of the next five steps of the *Ray/Locke* analysis — federal regulations so pervasive that there is no room for state regulation,[188] dominant federal interest,[189] conflict with a valid federal law,[190] possibility of compliance with both the state and federal regulations,[191] and accomplishment and execution of Congressional goals.[192] However, in order to find the type of federal regulation that might preclude a state statute under these steps in the analysis, one need only look at another provision of Section 312 that specifically prohibits states from adopting and enforcing statutes and regulations of "the design, manufacture, installation or use of any marine sanitation device."[193] A hypothetical Alaska Statute of this nature would likely fail the *Ray/Locke* test.

Finally, the *Ray/Locke* analysis addresses saving clauses in federal legislation that authorize further regulation by states.[194] A state must stay within the parameters of the saving clause.[195] In the case of the Alaska Statutes, Section 46.03.463, the state regulation is authorized by a saving clause in the federal legislation, Section 312(f)(3)of the CWA, which reads:

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186. 33 U.S.C. § 1322(f)(3)(2002).
187. *Id.*
188. 435 U.S. at 157-58.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 158.
193. 33 U.S.C. § 1322(f)(1)(a) (2002).
194. *Locke*, 529 U.S. at 104-112.
195. *Id.*

> [A]fter the effective date of the initial standards and regulations promulgated under this section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply. Upon application of the State, the Administrator shall make such determination within 90 days of the date of such application.[196]

This saving clause allows states to completely prohibit the discharge of sewage from vessels, subject to approval of the EPA Administrator's determination that the facilities for treatment and removal of sewage are available before such a prohibition takes effect. Assuming the EPA Administrator has made such a determination and approved the Alaska statutory prohibition, Section 46.03.463 passes this part of the *Ray/Locke* analysis. If not, the statute would be invalid until Alaska received such approval.

VIII. CONCLUSION

Although Florida and Alaska are separated by thousands of miles and several climate zones, the two states have at least two things in common: vast, sensitive coastlines and the cruise ship industry.

After learning its pollution lessons the hard way, Alaska responded to the challenges of cruise ship pollution by working with the cruise industry to a certain extent, while simultaneously reinforcing the cooperative effort with comprehensive state laws that exceed federal regulatory levels where possible and carry real negative consequences for violators. Florida, by contrast, has worked with the cruise industry to produce a Memorandum of Understanding that accepts cruise industry standards for pollution control and relies on the Coast Guard to ensure industry compliance. Because Florida has a greater cruise industry presence than Alaska, it arguably needs additional state regulation as much,

196. 33 U.S.C. § 1322(f)(3).

if not more than, Alaska. This article can assist Florida lawmakers in achieving this important next step to protect the fragile coastal environment of the Sunshine State.

THE REALPOLITIK OF EMPIRE

TIKKUN A. S. GOTTSCHALK*

Table of Contents

I. INTRODUCTION

The United States approaches the formulation and use of international law from a unilateralist perspective, encouraging foreign compliance, yet stymieing domestic incorporation. Decisions involving customary international law (CIL) are an important part of the business of the U.S. court system. However, the gap between the potential value of CIL to domestic issues and the actual application of CIL to these issues remains wide. Further widening this gap, both the President and Congress continue their opposition to almost all forms of domestic incorporation and international enforcement of CIL. The unique status of the United States on the world stages of power and influence perpetuates a lack of mutual obligation, a vacuum of corresponding incentives to adopt at home what is law abroad. The battery of rights protected through the U.S. Constitution reflects many of the precepts of international humanitarian law, but the United States is still behind the international curve in the protection of human rights. The U.S. judicial system is often a strong advocate of humanitarian law, yet U.S. courts, as well as Congress and the President, fall short of the

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international standard set by other countries. Contrary to the contemporary practice of its allies, the United States has shown limited interest in looking beyond the boundaries of American notions of law, policy, and politics when considering human rights issues.

Despite this imbalance, there are emerging avenues of indirect pressure on the United States from foreign and international bodies. Even if many U.S. politicians remain opposed to broad-based codification of international law, litigation in foreign and international contexts may create a back door to increased compliance with normative humanitarian law. The ever-shrinking impunity of world leaders for crimes against humanity and the growing legitimacy of international courts suggest that the U.S. unilateralist abstention from customary human rights law may begin to erode. With the prospect of individual leaders and political figures facing criminal or civil liability for their actions, the United States may, at the very least, be forced into minimal compliance with CIL.

Similarly, the active participation of foreign and international judicial bodies in the development and enforcement of CIL, as compared with only marginal domestic acceptance of international law, will strengthen efforts to incorporate normative human rights law in an effort to combat a decline in U.S. judicial legitimacy. Even if the United States remains opposed to international judicial institutions, pressure to support the enforcement of international human rights standards will rise out of the War on Terrorism, among other foreign policy agendas, because of the U.S. desire for foreign and international cooperation in the capture and prosecution of terrorist suspects. While it is unlikely that the increased pressure from abroad will trigger the wholesale adoption of CIL into domestic law, it could lead to increased conformity with international human rights standards.

As the point of departure for this essay, Part II discusses the development of CIL in the U.S. court system and the debate over the status of CIL. Part III places CIL human rights claims in modern context, outlining Alien Tort Claims Act[1] (ATCA) litigation and sorting alleged jus cogens[2] violations into a three-tiered analytical framework. Notwithstanding the incorporation of human rights law

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1. 28 U.S.C. § 1350 (2000): "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."

2. "A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." BLACKS LAW DICTIONARY 864 (7th ed. 1999).

in the ATCA and the Torture Victims Protection Act[3] (TVPA) noted in Part III, Part IV describes political antagonism to ATCA jurisdiction and discusses the related hostility to international law reflected in U.S. foreign policy and Supreme Court jurisprudence. In addition, Part IV argues that this political and judicial opposition to international law threatens to erode the legitimacy of the U.S. court system. Highlighting this erosion, Part V describes international efforts to prosecute leaders for human rights violations, arguing that these efforts put increasing pressure on all countries, including the United States, to conform to international human rights standards. Describing similar external influences on the United States, Part VI discusses international pressure on the United States to conform to international humanitarian standards, arguing that this pressure will force the United States to further conform to international norms. Finally, Part VII concludes that this pressure, compounded by the U.S. desire for international cooperation in the War on Terrorism, will force the United States to back away from the unilateralist approach to foreign policy and force greater judicial and political acceptance of CIL.

II. HISTORICAL BACKGROUND: CIL IN THE U.S. COURT SYSTEM

Ever since *Filartiga v. Peña-Irala*,[4] the role of CIL in the domestic legal framework has been a subject of intense debate, in both the federal courts[5] and in academic circles.[6] In *Filartiga*, the plaintiffs, Dolly M.E. Filartiga and her father Joel Filartiga, sought a civil judgment against Americo Norberto Peña-Irala, the former Inspector General of Police in Asuncion, Paraguay, for the torture and murder of Mrs. Filartiga's brother, Joelito Filartiga.[7] Although the events at issue occurred outside U.S. jurisdiction and all the

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3. 28 U.S.C. § 1350 (2000).

4. Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980).

5. *See, e.g.,* Al Odah v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (J. Randolph, concurring): "Congress — not the Judiciary — is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts." *See also* Kadic v. Karadzic, 70 F.3d 232, 238 (2nd Cir. 1995): "We find the norms of contemporary international law by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." (internal quotations omitted) (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820)).

6. *See, e.g.*, Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law,* 86 GEO. L. J. 479 (1998); Harold H. Koh, *Commentary: Is International Law Really State Law?,* 111 HARV. L. REV. 1824 (1998). For a discussion of some of the implications of the Bradley/Goldsmith position on human rights litigation in the U.S., see Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 192-93 (2001).

7. *Filartiga,* 630 F.2d at 878.

parties were aliens, the Second Circuit resurrected the long-dormant ATCA to secure jurisdiction over the suit and a cause of action.[8] Embracing an interpretive approach to international law, the court used the ATCA to provide a basis for the enforcement of human rights norms.[9] Expanding the scope of the ATCA to include emerging notions of CIL and humanitarian law, *Filartiga* rejected the static conception of international law.[10] Despite limiting claims to violations of universal norms of international law,[11] *Filartiga* opened the door to domestic punishment for jus cogens violations committed abroad.

Although criticized little for its policy rationale that human rights violations should be punished, *Filartiga* sparked a disagreement over whether CIL is federal common law.[12] *Erie Railroad Co. v. Tompkins,*[13] the foundational case behind this debate, abolished generally applicable federal common law, but the effect that *Erie* had on the status of international law was arguably uncertain at the time.[14] The *Erie* court, in ruling that federal courts must apply state law in cases where there is no constitutional provision or federal statute on point, said little about where its ruling left concepts of CIL not explicitly reflected in congressional enactments or the Constitution.[15]

The uncertainty over the status of CIL was in part allayed through *Banco Nacional de Cuba v. Sabbatino*,[16] where the Supreme Court formally carved out a place for international law within the context of federal "foreign relations law."[17] In considering the plaintiff's claim that the Cuban government's expropriation of property violated international law, *Sabbatino* held that the act of state doctrine[18] prohibited U.S. courts from inquiring into the

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8. *Id.* at 880.

9. *See id.*

10. *See* Andrew M. Scoble, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 143 (1986).

11. *See* part II., *infra*.

12. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), *with* Koh, *supra* note 6. For a discussion of some of the implications of the Bradley/Goldsmith position on human rights litigation in the U.S. court system, *see* Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 192 (2001).

13. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

14. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1558-59 (1984).

15. *Erie*, 304 U.S. at 78.

16. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

17. Henkin, *supra* note 14, at 1559; *see also* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 472-73 (1997).

18. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("[E]very sovereign State is bound

legality of a foreign government's actions within its own territory.[19] Noting that *Erie* limitations on federal common law should not be extended to rules of international law,[20] including the act of state doctrine, *Sabbatino* gave rise to the "modern position,"[21] the notion that international law is federal law.[22] Yet, while *Sabbatino* appeared to settle uncertainty over the status of international law — and while U.S. courts generally accept the "modern position" — the issue is by no means settled.[23]

In their acceptance of the "modern position," federal courts require, under a variety of ATCA precedents,[24] that claims allege a jus cogens violation — a violation of a universal, definable, and obligatory precept of international law.[25] The Supreme Court articulated the principals governing the interpretation and identification of such violations in *The Paquete Habana*,[26] where the Court held that the capture of fishing vessels as prizes of war was a violation of international law.[27] In addition to the probative value of judicial precedent and state practice, *The Paquete Habana* standard, in providing that international law may be ascertained by "consulting the works of jurists and commentators"[28] opens the door

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to respect the independence of every other sovereign State."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 443 (1987):

> In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.

19. *Sabbatino*, 376 U.S. at 415.

20. *Id*. at 424. See Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939), for the theoretical bases behind the Supreme Court's discussion of *Erie's* applicability to international law.

21. Bradley & Goldsmith, *supra* note 12, at 816; Harold H. Koh terms the other side the "revisionist position." *Supra* note 6, at 1824.

22. Henkin, *supra* note 14, at 1560.

23. *See* Bradley & Goldsmith, *supra* note 12, at 816 (challenging the notion that *Sabbatino* supports CIL as federal common law).

24. *See, e.g.,* Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995):

> [ATCA jurisdiction] require[s] that: 1) no state condone the act in question and there is a recognizable "universal" consensus of prohibition against it; 2) there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; 3) the prohibition against it is non-derogable and therefore binding at all times upon all actors.

Id; see also Kadic, 70 F.3d at 232; In re Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d 1467, 1473, 1475 (9th Cir. 1994) [hereinafter *Marcos*]; Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987); *Filartiga*, 630 F.2d at 876.

25. Goodman & Jinks, *supra* note 17, at 495.

26. The Paquete Habana, 175 U.S. 677, 700 (1903).

27. *Id.* at 686.

28. *Id.* at 700:

to criticism that CIL is "made up" by federal courts. Despite the squishiness of this standard, there is little evidence that U.S. courts acknowledge anything but the most obvious and discernable CIL violations.[29] The standard, theoretically, could be construed to include certain acts that, while often condemned by international commentators and jurists, are not, realistically, outside the realm of legitimate state practice.[30] Yet U.S. courts continually demonstrate a willingness to recognize the uncertainty of a stipulated jus cogens rule, disallowing the invocation of asserted "norms" of international law where those "norms" do not reflect universal and obligatory practice.[31]

Criticism of *The Paquete Habana* framework for analyzing CIL claims may be more justified outside the realm of the ATCA, in areas where there are no statutes on point. Article I of the Constitution expressly delegates to Congress the authority to define and punish offenses against the law of nations,[32] suggesting that judicial definitions of international law usurp Congress' constitutional authority. Yet this power does not mandate judicial blindness to the guiding principals of international law. Congress has implemented the Article I mandate in diverse contexts, affirmatively delegating its constitutional authority to the courts, as in the ATCA,[33] yet CIL remains important even in areas where Congress has not expressly "defined" international law.[34]

Whether the oft-quoted phrase from *The Paquete Habana,* "international law is part of our law,"[35] should be interpreted to mean that CIL is federal common law is unimportant to the discussion of influences on U.S. policy and practice. Under ATCA precedents and the continued endorsement of the "modern

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> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

See also U.S. v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820).

29. *See infra* Part III, notes 46 through 50.

30. State-sponsored assassination, for example.

31. *See* Goodman & Jinks, *supra* note 17, at 495; *Filartiga*, 630 F.2d at 881. *See infra* Part III discussion of cruel, unusual, and degrading treatment for an example of an uncertain norm.

32. U.S. CONST. art. I, § 8 ("Congress shall have power to…define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.").

33. *See Smith*, 18 U.S. (5 Wheat.) at 157-158.

34. *See* Martha F. Davis, *Lecture: International Human Rights and United States Law: Predictions of a Court Watcher*, 64 ALB. L. REV. 417, 418-419, 432-433 (2000).

35. *The Paquete Habana,* 175 U.S. at 700.

position,"[36] CIL *is* part of our law, at least for the time being. Despite the debate over the application of international law, federal courts continue to make active use of CIL on the human rights stage, under both the ATCA and the TVPA.[37] Further confirming the basic approach of *Filartiga,* Congress, in the passage of the TVPA, noted that the ATCA creates a right of action under "norms that already exist or may ripen in the future into rules of customary international law."[38]

> [The TVPA extended to] U.S. citizens the same right to sue in U.S. court that the ATCA gives aliens to sue for torture or extra-judicial killing. The passage of this act is seen by many legal commentators as bolstering the legitimacy of the ATCA by codifying the right to sue, which courts had previously read into the ATCA.[39]

Some courts are certainly less willing than others to delve into human rights issues through the ATCA,[40] but most accept the *Filartiga* framework for determining whether an act is a violation of CIL.[41] Even with the many barriers to claims brought under the ATCA, including forum non conveniens[42] and the act of state doctrine,[43] the use of the statute is an essential element of U.S. involvement in the enforcement of human rights standards.

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36. *See, e.g, Xuncax*, 886 F. Supp. at 162; *Kadic*, 70 F.3d at 232; *Marcos*, 25 F.3d at 1475; *Forti*, 672 F. Supp. at 1531; *Filartiga*, 630 F.2d at 876.

37. 28 U.S.C. § 1350 (2000). Congress enacted the TVPA in part as a response to Judge Robert Bork's concurring opinion in Tel-Oren v. Libyan Arab Republic, where he stated that the ATCA does not imply a cause of action. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801 (D.C. Cir. 1984).

38. H.R. REP. NO. 367, 103d Cong., 1st Sess. 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84; *see also* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 53 (1996).

39. Sarah M. Hall, Note, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401,415 (2002).

40. *See, e.g. Tel-Oren,* 726 F.2d at 774-801.

41. *See, e.g., Kadic*, 70 F.3d at 232.

42. Forum non conveniens provides that a court, although otherwise an appropriate forum, may dismiss the litigation if "it appears that the action should proceed in another forum in which the action might originally have been brought." BLACK'S LAW DICTIONARY 665 (7th ed. 1999). For a thorough discussion of forum non conveniens issues in relation to human rights litigation see Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 507-510 (2002).

43. For further discussion of the act of state doctrine's effects on ATCA litigation, *see* Aaron Xavier Fellmeth, Note From the Field, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?* 5 YALE H.R. & DEV. L.J. 241 (2002); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002).

III. LITIGATION UNDER THE ATCA

As Ryan Goodman and Derek P. Jinks outline in their article defending *Filartiga* and the modern position, there are three general categories of claims under the ATCA.[44] Ranging from least successful to most they are as follows: (1) claims that, while commonly prohibited by domestic law, are not within the scope of international law; (2) claims that, while based on general principles of CIL, lack consistent definition and application in the international community; and (3) claims alleging established, well recognized jus cogens violations.[45] Discussed below, these three categories define the bounds of ATCA litigation, separating human rights claims into a tripartite framework.

The first category, where rights are codified in domestic law but not universally protected in CIL, includes many of the rights that are enshrined in the U.S. Constitution. Although generally protected by many nations, these rights are not reflected in international law. For example, certain nations actively protect private property from uncompensated governmental seizure, but others (such as communist nations) do not, resulting in divergent views and a lack of consensus in international law.[46] Similarly unenforceable within the scope of the ATCA and international law are claims based on fraud,[47] free speech rights,[48] and libel,[49] among others.[50] Although many of these claims are often adjudicated in federal court using other jurisdictional bases besides the ATCA, the ATCA remains constrained to the more insidious, violent offenses. Beyond the realm of rights that have no expression in international law or no demonstrable consensus supporting their enforcement, the second category is where the principle of CIL is universal, but the definition is not. International agreements and state practice might demonstrate a consensus, an agreement that a certain type of conduct is universally condemned, but the degree of protection

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44. Goodman & Jinks, *supra* note 17, at 498-513.

45. *Id.*

46. *Sabbatino*, 376 U.S. at 428 ("There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.").

47. *See* ITT v. Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975) (concluding that, while fraud may be of individual concern for all nations, it is not a "mutual" concern of the community of nations); Trans-Continental Inv. Corp., S.A. v. Bank of the Commonwealth, 500 F. Supp. 565, 566 (C.D. Cal. 1980) (noting that the universal condemnation of fraud does not mean that it is within the scope of the international law).

48. Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (holding that first amendment rights to free speech are not universal and therefore are not part of international law).

49. Akbar v. New York Magazine Co., 490 F. Supp. 60, 63 (D.D.C. 1980) (libel not within the scope of judicial interpretations of international law).

50. *See* Goodman & Jinks, *supra* note 17, at 509.

afforded to the right associated with that condemnation varies from nation to nation. The most notable of such rights is the prohibition against cruel, inhuman, or degrading treatment.[51] "The norm, broadly speaking, satisfies the requirements of universal condemnation and obligatory prohibition,"[52] but the range of behavior and practice that the norm prohibits is uncertain and subject to intense debate.[53] This "twilight zone" is arguably where CIL prohibitions spend their time before they either become universal norms or return to the arena of legitimate practice through active use or lack of international support.[54]

While encompassing more venerable prohibitions, such as slavery, the third category includes the more modern prohibitions against official torture, extrajudicial killing, prolonged arbitrary detention, genocide, disappearances, and war crimes.[55] The typical case in the *Filartiga* line, raising one or more of these "incontrovertible"[56] jus cogens violations, involves an individual defendant found and served in the United States, who allegedly perpetrated various human rights abuses "under color of law." The defendant is usually a former government official who exceeded the authority of the office in committing the human rights violations.[57] Although the *Filartiga* line is not limited to jus cogens violations

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51. *See id.* at 506; *Forti*, 672 F. Supp. at 1543 (although evidence sufficient to prove "disappearance" is a jus cogens violation, there is no similar consensus on a "right to be free from 'cruel, inhuman and degrading treatment'") (citing plaintiffs', Forti and Benchoam, complaint paras. 47-48.); *but see* Xuncax, 886 F. Supp. at 162 (certain claims within the "cruel, inhuman, or degrading" classification are in fact universally condemned, and therefore actionable as jus cogens violations).

52. Goodman & Jinks, *supra* note 17, at 506-7 ("While nations may agree that certain grotesque practices fall within the category, they are unable to agree, with the requisite precision, on the definitional parameters of the norm involved").

53. *See infra* Part VI (discussion of death penalty and extradition).

54. By way of analogy, see Michael J. Kelly, *Time Warp to 1945, Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law,* 13 FLA. ST. J. TRANSNAT'L L. & POL'Y 1, discussing the preemption doctrine — a doctrine that, while denounced by many nations, may be moving out of the "gray area" and into a realm of greater legitimacy.

55. Goodman & Jinks, *supra* note 17, at 498-506.

56. *Id.*

57. *E.g., Forti*, 672 F. Supp. at 1531 (involving a suit against former Argentine general for the disappearance of plaintiff's mother during the "dirty war"). Conceptually, the defendant is deemed to be a state actor acting outside his legal authority (as defined by the law of the country), thus the term "under color of law," yet this terminology can be deceptive. The average defendant in a *Filartiga*-like case is simply one of many individuals who have taken part in widespread, systematic human rights violations in their home country — they just had the bad luck of being caught in the U.S. Ostensibly, viewed from a purely legal standpoint, the acts exceed the constitutional or statutory authority of the country where they took place, but the cultural or political climate in the country was such that a de facto authority existed.

involving state action, the majority of such claims deal with official or semi-official conduct.[58]

Litigation in the "incontrovertible" category began with a line of suits against individuals, as in *Filartiga,*[59] but has recently been more common in suits against corporations.[60] Often based on clear violations of CIL, suits against corporations, usually multinationals with significant assets in the United States,[61] fall into a unique subcategory, distinct from the *Filartiga* line in their particularity. These cases, such as *Doe v. Unocal*,[62] where Myanmar residents alleged corporate involvement in forced relocation, enslavement, rape, and torture in connection with the building of a pipeline,[63] generally deal with corporations that contract with governments in resource exploitation and infrastructure projects in developing countries.

Hinging more on whether there is a sufficient connection between the corporation's activities and the violations carried out by the state than on whether the acts violate jus cogens norms, such suits strike to the heart of the primary beneficiaries of human rights violations. Because multinational corporations (MNCs) are increasingly more powerful in economic activity between and within states, especially developing countries acutely vulnerable to human rights violations, MNCs are a prime target for human rights groups seeking to remove the economic incentives to human rights abuses. Thus, if the cost of doing business with the Myanmar government, for example, includes defending multiple suits under the ATCA, then avoiding similar countries with poor human rights records becomes more cost-effective, which in turn encourages all countries to pay more attention to how they treat their citizens.

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58. *See* Hall, *supra* note 39, at 413.

59. See description of *Filartiga*, *supra* Part II. *See also Kadic*, 70 F.3d at 232 (suit by two groups of plaintiffs alleging president of "Srpska" directed the genocide, forced prostitution and impregnation, torture, and summary execution carried out by Bosnian-Serb military forces).

60. *E.g.,* Doe v. Unocal, 963 F. Supp. 880 (C.D. Cal. 1997); *see generally* Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level,* 1999 B.Y.U.L. REV. 1139 (This is arguably at least one area where the U.S. has successfully promoted human rights: the dearth of recent cases against individuals for state-sponsored jus cogens violations may indicate that similarly culpable individuals are no longer "retiring" in the U.S. For corporations, on the other hand, it is likely much more difficult to avoid being found (for jurisdiction purposes) in the increasingly interconnected global economy.)

61. In contrast to the majority of suits against individuals under the ATCA, where judgments generally go uncollected, successful suits against corporations provide victims of human rights abuses with something more than abstract justice. *See* Boyd, *supra* note 60, at 1144-1145.

62. *Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997) *vacated, rehearing granted en banc by* John Doe I v. Unocal Corp., 2003 Cal. Daily Op. Service 1388 (9th Cir. 2003).

63. *Unocal*, 963 F. Supp. at 883.

IV. RESISTING INTERNATIONAL LAW: U.S. PRACTICE AND POLICY

As civil suits against corporate and individual human rights violators continue in U.S. courts, all three branches of the government are laying the groundwork for a coming crisis of legitimacy, undermining the professed status of the United States as the world's preeminent crusader for liberty and justice. U.S courts sometimes recognize the importance of international law, yet these courts often show only marginal acceptance of international trends and foreign precedents.[64] U.S. courts acknowledge the importance of non-domestic case law in some circumstances, but the gap between the probative value and actual usage of international law is, at times, embarrassingly obvious.

The disparity between international precedent and Supreme Court jurisprudence can be extreme. For example, in *Miller v. Albright*,[65] the Supreme Court rejected an equal protection challenge to 8 U.S.C.S 1409, a law establishing differential criteria based on gender for obtaining citizenship. If a person born abroad and out of wedlock seeks to gain U.S. citizenship through their mother, 8 U.S.C.S 1409 imposes certain residency, nationality, and maternity requirements.[66] If, on the other hand, citizenship is sought through the father, the same statute not only requires residency, nationality, and paternity, but also mandates that the claimant "produce a written statement of support prior to the child's eighteenth birthday and … formally legitimate or acknowledge paternity prior to the child's eighteenth birthday."[67] The Court's decision in *Miller*, which allowed the law to stand on the basis that it reflected real differences between "mothers' and fathers' opportunities to transmit the value of citizenship,"[68] may merit criticism for its reasoning. However, it is more noteworthy for what it fails to cite, distinguish, or even acknowledge: that a then-recent Canadian case, directly on point, came to the opposite conclusion.

In *Benner v. Canada*,[69] the Canadian Supreme Court held that a law that distinguished between fathers and mothers in a child's citizenship claim reflected unwarranted stereotypes, not real differences meriting gender discrimination.[70] In contrast to U.S.

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64. *See e.g.* Printz v. United States, 521 U.S. 898, 921 n.11, 977 (1997) (J. Breyer dissenting) (dismissing Justice Breyer's argument that, even though the Court was interpreting the U.S. Constitution, foreign "experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem").

65. Miller v. Albright, 523 U.S. 420 (1998).

66. 8 U.S.C.S 1409 (2003); Davis, *supra* note 34, at 434.

67. Davis, *supra* note 34, at 434. *See also* 8 U.S.C.S 1409 (2003).

68. *Miller*, 523 U.S. at 438.

69. [1997] 1 S.C.R. 358.

70. *See id.* at 365.

law,[71] the Canadian law at issue made it easier to establish citizenship through paternity rather than maternity, a difference that only emphasizes the absurdity of the Supreme Court's ignorance of *Benner*.[72] While the Supreme Court may think "a comparative analysis [is] inappropriate to the task of interpreting a constitution,"[73] such blatant disregard for informative international case law offers a glimpse of the latent isolationism that lurks beneath the surface of Supreme Court jurisprudence.[74] Cases like *Lawrence v. Texas,*[75] where Justice Kennedy used international precedents to support the expansion of the right of privacy to cover consensual sexual conduct, offer hope that the Supreme Court will look to international law for guidance in uncertain domestic issues. *Benner,* on the contrary, shows the degree to which domestic myopia and judicial disinterest in international precedents can infect the U.S. court system.

Notwithstanding judicial disinterest in international law, the Bush Administration is attempting to widen the gap between international law and domestic practice through recent efforts to undermine the ATCA. Even though the ATCA has been a powerful tool in the enforcement and solidification of human rights law in the United States, the Executive branch, in a recent brief submitted by the Department of Justice (DOJ) in *Unocal*,[76] states that the courts should "reconsider" their approach to the statute.[77] In an attempt to "undo 20 years of legal precedent,"[78] the DOJ suggests that

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71. 8 U.S.C.S 1409 (2003).

72. *See* Davis, *supra* note 34, at 435.

73. Printz v. United States, 521 U.S. 898, 921 n.11, 977 (1997) (J. Breyer dissenting) (dismissing Justice Breyer's argument that, even though the Court was interpreting the U.S. Constitution, foreign "experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem").

74. Davis, *supra* note 34 at 435-36, makes a similar argument:

> Placed side by side, the Canadian law and United States law demonstrate that both laws rest on culture-bound stereotypes rather than biological truths. No country is closer to the United States in temperament or social practices, yet Canada assumed that fathers as patriarchs were best able to transmit the values of citizenship while the United States assumed that mothers, as caretakers, were best able to. Taking this into account, the members of the Supreme Court would be hard-pressed to find that the United States law did not reflect gender-based stereotypes, a finding that would in all likelihood change the result of the case.

75. Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003).

76. The same brief was filed by the defendants in Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

77. Brief of Amici Curiae Department of Justice at 4, *Unocal*, 248 F.3d 915 (2001) (Nos. 00-56603, 00-56628) [hereinafter DOJ Brief], *available at* http://www.lchr.org/Issues/ATCA/atca_02.pdf.

78. *Justice Department Seeks to Reverse Two Decades of Progress Under Important U.S. Human Rights Law,* LAWYERS COMMITTEE FOR HUMAN RIGHTS (May 23, 2003), *at* http://www.lchr.org/media/2003_alerts/0523.htm.

foreign policy concerns and the War on Terrorism,[79] among other issues, merit changing the course of human rights litigation in the United States. This stance has emerged despite the DOJ's active support of the ATCA in *Filartiga* and many other human rights cases.[80]

Even as the Bush Administration pursues a war in Iraq to bring relief from tyranny and oppression abroad, it simultaneously seeks to undermine the limited avenues of domestic enforcement of international humanitarian norms at home. In the face of executive opposition to the International Criminal Court (ICC) and other international judicial bodies, ATCA litigation is one of the few high-profile forums in which the United States demonstrates its underlying belief in humanitarian law. By attempting to remove the cause of action implied in the ATCA since *Filartiga*,[81] the Bush administration shows the chameleon nature of U.S. human rights policy. Eliminating the efficacy of the ATCA will only further erode judicial acceptance of CIL and the perceived legitimacy of U.S. courts.

In addition to attacks on ATCA jurisprudence, the White House is also undermining efforts to bring the accused to justice in foreign courts. Shoring up the waning impunity of world leaders for human rights abuses, the United States recently pressured Belgium into revising its universal jurisdiction law, thus altering the provision that allowed Belgian courts to prosecute war crimes committed in other countries.[82] Protesting complaints filed against western leaders, including former President George Bush Sr., Tony Blair, and Ariel Sharon, the United States succeeded in convincing Belgium to further restrict the application of the war crimes law, even though Belgian courts had already dismissed many suits brought against foreign leaders.[83] The Belgian law "has brought little but headlines and political embarrassment,"[84] but the U.S.

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79. DOJ Brief at 3.

80. *See* Brief Amici Curiae of International Law Scholars and Human Rights Organizations in Support of Plaintiffs at 1, Presbyterian Church of Sudan, 244 F. Supp. 2d 289 (2003) (No. 01 Civ. 9882), *available at* http://www.lchr.org/workers_rights/wr_other/ATCA%20Talisman%20Amici%20Brief.pdf.

81. *Id*. at 4.

82. *Belgian Lower House Approves Revision of War Crimes Law*, HAARETZ, July 30, 2003 (on file with the Florida State University Journal of Transnational Law & Policy).

83. *See id*.; Ian Black, *Judges Decide Belgian War Crimes Law Cannot Be Used to Try Sharon*, THE GUARDIAN, June 27, 2002, *available at* http://www.guardian.co.uk /international/story /0,3604,744644,00.html. In the ten years since its inception, the Belgian war crimes law has only tried and sentenced four individuals (all of whom were involved in the Rwandan genocide). *Id.*

84. Black, *supra* note 83.

pressure dealt the fatal blow, eliminating universal jurisdiction from one of the few countries willing to exercise it.[85]

Opposition by the United States to human rights prosecutions continues on other fronts as well. As part of a program designed to limit the reach of human rights law and protect American interests and military personnel abroad,[86] Congress passed the American Servicemembers' Protection Act (ASPA).[87] Popularly known as "The Hague Invasion Act,"[88] the ASPA authorizes the use of force to secure the release of any American held by the ICC.[89] Championed by Senator Helms,[90] the ASPA passed as a response to the growing support for the ICC within the international community.[91] Going beyond a measured response to fear of politically motivated prosecutions, the ASPA prohibits all U.S. involvement in the ICC, even minimal cooperation with investigations and extraditions.[92] In public, the White House says that concern over American soldiers being subject to prosecution under a politicized process is the impetus behind its opposition to the ICC, but privately the government suggests that it is more concerned about claims against public officials.[93]

In another move aimed at undermining international adjudication of human rights abuses, the United States announced

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85. *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 82-86 (2001). Universal jurisdiction is the only legal theory that allows a domestic court to prosecute CIL crimes that have no "nexus" or connection with the forum state. *See* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323 (2001). The *Nuremburg*, *Pinochet,* and *Argentina* cases all involved elements of universal jurisdiction. *Id*. at 324.

86. *See* Roseann M. Latore, Note, *Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court,* 25 B.C. INT'L & COMP. L. REV. 159, 160 (2002).

87. American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, §2001-2012, 116 Stat. 899 (2002).

88. Jonathan D. Tepperman, *American Opposition to the International Criminal Court*, CRIMES OF WAR PROJECT (Mar. 6, 2002), *at* http://www.crimesofwar.org/onnews/news-Tepperman.html.

89. Latore, *supra* note 86, at 169-170; Remigius Chibueze, *United States Opposition to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANN. SURV. INT'L & COMP. L. 19, 48-49 (2003).

90. *See* Press Release, American Servicemembers' Protection Act Receives Approval, Coalition for the International Criminal Court (Dec. 11, 2001), *at* http://www.iccnow.org/html/pressrelease20011211.pdf.

91. *See* Chibueze, *supra* note 89, at 48.

92. § 2004, 116 Stat. 899.

93. Elizabeth Becker, *Kissinger Watch #10-02: On World Court, U.S. Focus Shifts to Shielding Officials,* INTERNATIONAL CAMPAIGN AGAINST IMPUNITY (Sept. 7, 2002), at http://www.icai-online.org/68735,KW_Detail.html. In most of their public utterances, administration officials have argued that they feared American soldiers might be subject to politically motivated charges. But in private discussions with allies, officials say, they are now stressing deep concerns about the vulnerability of top civilian leaders to international legal action. *Id*.

in 2002 that it no longer supports the U.N. system of international war crimes tribunals.[94] Citing a desire to have the accused tried in the country where the abuses occurred,[95] the United States wants the tribunals phased out because "they foster 'a dependency on international institutions.'"[96] Although the United States continues to profess its support for humanitarian law, in its opposition to the ICC, it now stands firmly with such other champions of human rights as China, Iran, Iraq, Israel, and Libya.[97]

V. JUSTICE FOR HUMAN RIGHTS VIOLATORS: IT'S NO LONGER JUST FOR LOSERS

Ever since the Nuremberg trials, international justice is most often meted out by the winners and suffered by the losers, delivered by the righteous, the powerful, and received by the wicked, the weak. These "losers" have always faced universal condemnation, their punishment and public prosecution well deserved; yet, the winners have never faced similar castigation for their abuses. Similarly, leaders and regimes are often not punished until they *become* losers in one sense or another, as in Iraq with Saddam Hussein and Liberia with Charles Taylor. The international community did little to castigate Saddam Hussein when he murdered thousands of Kurds in Northern Iraq at the end of the Iran-Iraq War.[98] Rather, only after he had outlived his usefulness, through the invasion of Kuwait, did the United States and world leaders highlight his human rights record.[99] Similarly, an international judicial body did not indict Charles Taylor[100] until he was on the verge of political and military defeat, even though he began his reign of violence more than ten years ago.[101] Regardless

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94. Stacy Sullivan, *United States Calls for Dissolution of U.N. War Crimes Tribunals*, CRIMES OF WAR PROJECT (Mar. 6, 2002), *at* http://www.crimesofwar.org/onnews/news-dissolution.html.

95. *Id.*

96. *Id*. (quoting Pierre-Richard Prosper, U.S. Ambassador for War Crimes).

97. *See* Chibueze, *supra* note 89, at 21; Ruth Wedgwood, Harold K. Jacobson & Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124 (2001).

98. *See* Aryeh Neier, *Putting Saddam Hussein on Trial*, NEW YORK REVIEW OF BOOKS, Vol. 40, No. 15, (Sept. 23, 1993) *at* http://www.nybooks.com/articles/2466; *Iraq: Crimes Against Humanity, Leaders as Executioners*, U.S. DEPARTMENT OF STATE, *at* http://usinfo.state.gov /regional/nea/iraq/crimes/.

99. *See Michael Wines, Confrontation in the Gulf; U.S. Aid Helped Hussein's Climb; Now, Critics Say, the Bill is Due,* N.Y. TIMES, Aug. 12, 1990, at A1; A. M. Rosenthal, *On My Mind; The Iraqi Nightmare,* N.Y. TIMES, Nov. 6, 1990, at A23.

100. Taylor was indicted by the Special Court for Sierra Leone, "an independent treaty based institution, established by an Agreement between the United Nations and Sierra Leone." Official Web Site of the Special Court for Sierra Leone, *at* http://www.sc-sl.org/.

101. Press Release, Testimony of Janet Fleischman, Washington Director for Africa, on the Human Rights Situation in Liberia Before the Congressional Human Rights Caucus (July 9,

of the body count on either side, the individual acts of cruelty and disregard for human life evoke the same abhorrence whether the perpetrator is a winner or a loser when the conflict, political or military, ceases.

This is not to argue that any modern international criminal tribunal is unjust or that the punishment of individuals responsible for human rights abuses is illegitimate. Simply put, human rights abuses perpetrated by one side are no less evil because worse abuses were committed on the other. The Japanese deprived of their liberty by the U.S. during WWII were not comforted by the knowledge that the Jews in Europe were deprived of their liberty *and* their life — both acts were based on racism. Punishing the bank robber does not make the pickpocket less guilty of being a thief.

Despite inconsistent enforcement and continued U.S. opposition, the cost to governments directly responsible for jus cogens violations is increasing through efforts by foreign and international courts. Although justice for regimes defeated in armed conflicts is often swift, the impunity of former and current leaders not so defeated is ever more uncertain, even for those who have significant political insulation within their own country.[102] Beginning with Spain's extradition request for Augusto Pinochet,[103] the former dictator and "senator for life" of Chile, a few foreign courts have shown an increasing willingness to indict former and current leaders accused of human rights abuses using universal jurisdiction.[104] Spain failed to secure Pinochet's extradition,[105] but the international attention the case garnered was arguably the impetus behind legal proceedings against him in his own country.[106] The court presiding over Pinochet's prosecution in Chile suspended the case due to his health,[107] but the case arguably fueled other prosecutions of former leaders.

2003), *available at* http://hrw.org/press/2003/07/liberia-test070903.htm.

102. *See, e.g.,* Bill Cormier, *Argentina OKs "Dirty War" Extraditions*, ASSOCIATED PRESS (July 25, 2003), *available at* http://www.herald-sun.com/nationworld/14-374977.html. Following in Argentina's footsteps, Peru also appears to be laying the groundwork for prosecution of past human rights abuses. *See* Monte Hayes, Peru *Truth Panel Report Upsets Military*, ASSOCIATED PRESS (Aug. 28, 2003), *available at* http://news.findlaw.com/wires /apwires.html.

103. *See* R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3), [1999] 2 All E.R. 97 (H.L.) [hereinafter "*Ex Parte Pinochet*"]; Amnon Reichman, *"When We Sit to Judge We Are Being Judged:" The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation*, 9 CARDOZO J. INT'L & COMP. L. 41, 71-74 (2001).

104. *See supra* note 85.

105. *Ex Parte Pinochet*, 2 All E.R. at 85.

106. *See Pinochet Decision Lamented, But Rights Group Says Case a Landmark*, HUMAN RIGHTS WATCH (July 9, 2001), *at* http://www.hrw.org/press/2001/07/pino0709.htm.

107. *Id*.

Following the *Pinochet* trend, Argentine President Nestor Kirchner eliminated the immunity of military leaders involved in Argentina's "dirty war" and allowed their extradition to Spain,[108] providing another sign of the growing legitimacy of human rights prosecutions. Although Kirchner's decision did not display the same degree of domestic accountability seen in the *Pinochet* case, the trend toward prosecution of jus cogens violations in foreign jurisdictions may provide more of a deterrent to future regimes. Even though some commentators warn that universal jurisdiction has the potential to be used illegitimately,[109] foreign venues are in some ways more legitimate than domestic ones. A foreign court is uniquely capable of providing legitimacy because of its physical and political distance from the country where the alleged abuses occurred. While the exercise of universal jurisdiction in Belgium may be near political failure, the movement is by no means dead.

In contrast to Pinochet and Argentina's military junta leaders, who were not indicted until they left office and suffered a fair degree of political isolation, perhaps placing them in the "loser" category, efforts to prosecute and highlight the abuses of leaders while they are in office are growing. Such efforts began with the indictment of Slobodan Milosevic during his tenure as head of state,[110] and continued through the recent indictment of Charles Taylor by the Special Court for Sierra Leone.[111] Both Milosevic and Taylor were near the losing point of their international and internal conflicts. However, the timing of the charges against them demonstrates increased international support for leader accountability and appears to bring prosecutions of jus cogens violations closer to the abuses and the abuser. It is unlikely that an abusive leader who enjoys broad international support will be similarly indicted while in office, but the willingness to indict sitting presidents begins the divorce of such prosecutions from the political or military defeats that often accompany them. This divorce in turn makes the

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108. Cormier, *supra* note 102. Although the Spanish government aborted the extradition proceedings against Argentina's former military leaders at the end of August 2003, Argentina appears to be seeking similar accountability efforts in its domestic courts. *See* Oscar Serrat, *Top Former General Detained in Argentina*, ASSOCIATED PRESS (Sept. 23, 2003), *available at* http://news.findlaw.com/ap_stories/i/1102/9-23-2003/20030923133008_15.html. This is arguably another instance of foreign pressure leading to domestic prosecution of human rights abuses.

109. *See, e.g.,* Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86 (Jul.-Aug. 2001); Curtis A. Bradley, *The "Pinochet Method" and Political Accountability*, 3 THE GREEN BAG 2d 5 (1999).

110. *See* Bassiouni, *supra* note 85, at 84.

111. Press Release, Human Rights News, West Africa: Taylor Indictment Advances Justice, Liberian President Must Be Arrested (June 4, 2003), *at* http://hrw.org/press/2003/06/westafrica060403.htm.

prosecutions themselves more legitimate by removing the precondition of defeat from the enforcement paradigm, thereby ratcheting up the pressure on all world leaders to conform to international human rights norms. Whether this pressure will begin to function as a significant deterrent remains unclear, but international movement to bring abusive leaders to justice is a growing force in world politics.[112]

VI. TOWARDS GREATER LEGITIMACY: EXTERNAL INFLUENCES ON THE INCORPORATION OF CIL INTO U.S. LAW

In the move towards greater U.S. legitimacy through the incorporation and recognition of CIL and international human rights norms, the United States need only yield to existing domestic and international influences. Even as the Supreme Court turns a blind eye to many international precedents, certain members of the Court are beginning to recognize the need to look beyond national boundaries.[113] As Ruth Bader Ginsburg recently noted in a lecture on affirmative action, "[e]xperience in one nation or region may inspire or inform other nations or regions in this area, as generally holds true for human rights initiatives."[114]

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112. *See id.*

113. *See* Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-first Cardozo Memorial Lecture: Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 281-82 (1999); Davis, *supra* note 34, at 419. *See also Lawrence*, 123 S. Ct. at 2481 (discussed *supra* Part IV); *Printz*, 521 U.S. at 977 (J. Breyer dissenting) (described *supra* note 73).

114. Ginsburg & Merritt, *supra* note 113, at 281-2. Ginsburg & Merritt describe the use of international law in foreign jurisdiction, as compared to Supreme Court disinterest in CIL:

> India's Supreme Court, for example, has considered United States precedents when judging the constitutionality of affirmative action measures. Defenders of Germany's tie-breaker preferences invoked several international covenants before the European Court of Justice. Opponents of affirmative action, too, have referred to U.S. decisions noting, pointedly, that "affirmative action seems to be [in] a state of crisis in its country of origin." (Quoting Case C-450/93, Kalanke v. Freie Hansestadt Breman, 1995 E.C.R. I-3051, I-3058 n.10 (1995) (opinion of Advocate General Tesauro).
>
> The same readiness to look beyond one's own shores has not marked the decisions of the court on which I serve. The United States Supreme Court has mentioned the Universal Declaration of Human Rights a spare five times, and only twice in a majority decision. The most recent citation appeared twenty-eight years ago, in a dissenting opinion by Justice Marshall. Nor does the U.S. Supreme Court invoke the laws or decisions of other nations with any frequency. When Justice Breyer referred in 1997 to federal systems in Europe, dissenting from a decision in which I also dissented, the majority responded: "We think such comparative analysis inappropriate to the task of interpreting a constitution." (Quoting Printz v. United States, 521 U.S. 898, 921 n.11 (majority opinion).

Even if American politicians remain opposed to all forms of international accountability for human rights abuses, the rest of the world may force the United States to begin to conform to international expectations. As the prosecution of jus cogens violations gathers momentum in foreign courts and the ICC, U.S. leaders are beginning to feel the same legal heat felt by leaders like Pinochet and Taylor. Although the United States continues to pressure governments like Belgium to remove legal methods for indicting U.S. officials, activities in a number of courts are opening the door to increased U.S. compliance with CIL. These pressures from abroad, compounded with the U.S. desire for international cooperation in the War on Terrorism, may force the United States to reconsider its unilateralism and trigger a shift in the realpolitik winds.

A. Nicaragua and Yugoslavia

Compliance with and participation in international courts is not entirely foreign to U.S. experience. For example, even though the United States was no less enamored of international judicial bodies in the 1980's than it is now, it was forced to comply with a ruling by the International Court of Justice, which held that the mining of a Nicaraguan harbor in support of the Contras was illegal under international law.[115] The ruling itself did not result in immediate U.S. compliance, but it indirectly caused the end of mining, thereby bringing the United States into compliance with international law.[116] More recently, the International Criminal Tribunal for the former Yugoslavia (ICTY) opened an investigation in response to a complaint filed against General Wesley Clark and NATO.[117] The central claim in the complaint was that "NATO's policy of targeting power generation and water systems was illegal under the Geneva Conventions."[118] The United States attempted to pressure the ICTY to end the investigation, but, when that effort failed, it was forced to respond with a legal, rather than a political, defense to the

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> In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.

115. Harold H. Koh, *Address: The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 644 (1998).

116. *Id*. Although the U.S. had veto power over all rulings issued by the International Court of Justice, the decision supporting the Nicaraguan claim galvanized efforts in Congress to stop the clandestine support of the Contras.

117. Nicole Barrett, Note, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429, 472-3 (2001).

118. *See id*.

charges.[119] The ICTY investigation threatened little more than political embarrassment, since it was unlikely that such a suit would succeed. Yet similar complaints filed against the United States in the future, such as allegations of war crimes in Iraq, may result in increased compliance with international law through fear of prosecution. Compliance is not certain, but rulings similar to the Nicaragua case may lead to further internalization[120] of international law.

B. Soering

The incorporation of international human rights into domestic practice may come through more subtle influences than the prosecution of leaders and presidents. In *Soering v. United Kingdom*,[121] for example, the European Court of Human Rights (ECHR) conditioned the extradition of the defendant to the United States on an agreement that he would not face the death penalty.[122] In the years after it was decided, *Soering* received significant attention for its potential to influence the use of the death penalty in the United States,[123] but "predictions that the case would spur change in U.S. policy or possible crisis have not become reality."[124] Though its ruling did not identify the death penalty itself as prohibited by CIL, the ECHR noted that the "very long period of time spent on death row" might violate the European Convention for the Protection of Human Rights and Fundamental Freedoms,[125] which prohibits inhuman or degrading treatment or punishment.

Although the United States can sidestep extradition conflicts by agreeing to not pursue the death penalty, as one commentator argues, *Soering* may signal a more fundamental challenge to the U.S. penal system.[126] "Read as a case about prison conditions… *Soering* becomes a much more intrusive basis for forcing the U.S. government to consider its criminal justice policies in light of international human rights norms."[127] While U.S. courts may still treat allegations of cruel and inhuman treatment as uncertain international law claims[128] and proscribe little beyond outright

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119. *See id.*
120. Koh, *supra* note 115, at 642-644.
121. 161 Eur. Ct. H.R. (1989).
122. Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions,* 67 BROOKLYN L. REV. 719, 732 (2002).
123. *See id.* at 721.
124. *Id.* at 738.
125. *Soering,* 161 Eur. Ct. H.R. at para. 44.
126. Sharfstein, *supra* note 122, at 723.
127. *Id.*
128. *See id.*

torture under the 8th Amendment,[129] extradition challenges based on prison conditions posit a significant challenge to U.S. practice. For the time being, the United States may successfully resist the pressure to conform to international standards in some areas. Yet a broader willingness to criticize U.S. prisons[130] and block extraditions because of prison conditions will force increased acceptance and incorporation of international definitions of cruel and unusual treatment, moving the prohibition closer to universal international support.

C. Henry Kissinger

Outside the realm of domestic incorporation of international standards, the prosecution of individual U.S. leaders for jus cogens violations may be on the horizon. Although the Belgian indictments of former President Bush and the ICTY investigation of General Clark were arguably aimed at promoting general compliance with CIL and the Geneva Conventions[131] and not the specific punishment of Bush and Clark, the movement to prosecute Henry Kissinger[132] for crimes against humanity offers evidence that impunity for dominant world leaders may soon end. Accused of a long list of jus cogens violations,[133] Kissinger is unlikely to be prosecuted any time soon, yet he is beginning to feel the heat of domestic and international vilification. Whether Kissinger feared being held for prosecution or being forced to reveal incriminating information, he fled Paris abruptly rather than respond to a warrant for his testimony in a French case.[134] He similarly eluded questioning from French and Chilean judges while he was in England.[135] "It is known that there are many countries to which he cannot travel at all, and it is also known that he takes legal advice before traveling anywhere."[136] He has yet to be formally charged by any foreign or

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129. *See* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989).

130. *See* Sharfstein, *supra* note 122, at 762.

131. *See* Barrett, *supra* note 117, at 473.

132. *See* Christopher Hitchens, *The Case Against Henry Kissinger*, HARPER'S MAGAZINE (Feb. 2001) *available at* http://www.icai-online.org/files/hitchens_harpers_kissinger.pdf.

133. *See id*. Christopher Hitchens, one of the leading critics of Kissinger, accuses him of directing and supporting a variety of war crimes and human rights violations in Vietnam, Cambodia, Laos, Bangladesh, Chile, and East Timor. *See also* CHRISTOPHER HITCHENS, THE TRIAL OF HENRY KISSINGER (2001).

134. Christopher Hitchens, *The Latest Kissinger Outrage*, SLATE (Nov. 27, 2002), *at* http://slate.msn.com/?id=2074678.

135. Jonathan Franklin & Duncan Campbell, *Kissinger May Face Extradition to Chile*, THE GUARDIAN (June 12, 2002), *available at* http://www.guardian.co.uk/international/story/0,3604,735723,00.html.

136. Hitchens, *supra* note 132.

international court[137] — he is dodging investigations, not indictments — and he is not on the run at home,[138] but he is at least finding no safe haven abroad.

Instead of seeking to alter U.S. foreign policy, present or future, the move to prosecute Kissinger seeks to extend punishment for human rights abuses to all world leaders who are complicit, not just those who are politically or militarily defeated.[139] The prosecution of Kissinger may only succeed in the court of public opinion, yet it provides support for international efforts to prosecute all human rights violations and violators, bringing punishment for jus cogens violations ever closer to the most politically immune. Just as the prosecution of Pinochet gathered steam in a foreign arena before moving to his home country, the move to hold U.S. officials accountable for war crimes and other human rights violations may begin in other countries, but it will eventually find greater support at home.

VII. CONCLUSION

While some victims and activists may seek a certain amount of retribution through human rights prosecutions, the goal of such prosecutions is not limited to punishment. Rather, it is aimed at achieving a long-term commitment to human rights through broader incorporation of normative international law into domestic practice. Greater acceptance of jus cogens norms would not necessitate a fundamental change in U.S. ideology because CIL and human rights law reflect many of the values and ideals already present in the cultural and political identities of American society. The gap between domestic acceptance and international practice does not exist because of an ideological disconnect between domestic and

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137. Kissinger might soon face at least one civil suit in connection with his (alleged) past involvement in human rights abuses. *See* CBS News, 60 Minutes, *Family To Sue Kissinger For Death* (Sept. 9, 2001), *available at* http://www.cbsnews.com/stories/2001/09/06/60minutes/main309983.html; *Kissinger Watch #9 - Chile: Complaint Against Kissinger,* INTERNATIONAL CAMPAIGN AGAINST IMPUNITY (July 22, 2002), *at* http://www.icai-online.org/60238,KW_Detail.html.

138. The most recent, high profile vilification of Kissinger came when he agreed to head the 9/11 independent investigation commission, then refused to comply with congressional financial-disclosure rules. These rules would have required him to disclose the names of international clients his firm, Kissinger & Associates, advises. Kissinger resigned the post rather than comply. *See* Romesh Ratnesar, Matthew Cooper, & Michael Weisskopf, *Kissinger's Fast Exit,* CNN.com (Dec. 16, 2002), *available at* http://www.cnn.com/2002/ALLPOLITICS/12/16/timep.kissinger.tm/. More a public-relations misstep than an admission of a guilty conscience, the refusal to identify his clients casts shadows of suspicion over Kissinger's current involvement with foreign governments.

139. *See generally Kissinger Watch #1, International Campaign Against Impunity*, *at* http://www.icai-online.org/54175,55541.html.

foreign cultures — it exists because of the preeminence of U.S. economic and military power. "The United States declines to embrace international human rights law because it can."[140]

Whether or not the United States maintains its dominance of world affairs may be irrelevant to future incorporation of CIL and U.S. acceptance of international judicial processes. To counteract the danger of international irrelevancy, U.S. courts may be forced to seek greater legitimacy through the recognition of foreign precedents that inform, distinguish, and support the American conception of justice. Further incorporation of CIL may come through enforcing the same CIL standards litigated in the ATCA and the TVPA against domestic actors as well as international actors. Short-term solutions that avoid addressing the underlying conflicts between domestic and international practice, such as individual extradition agreements, offer little hope of continued success when the challenges to U.S. policy become more fundamental.

Apart from domestic internalization of international law, other influences may emerge in the realm of U.S. foreign policy, leading to further compliance with international norms. While the United States undermines efforts to bring former leaders to justice for their human rights violations, the War on Terrorism may force U.S. leaders to reconsider their objections to international courts (such as the ICC), given their desire for future cooperation in the apprehension and prosecution of terrorist suspects. American power may insulate Congress and the court system from criticism for promoting the human rights "double standard,"[141] but it will not protect the United States from reciprocated recalcitrance in the War on Terrorism and the pursuit of other foreign policy goals. In the past, a realpolitik approach to foreign policy may have justified U.S. unilateralism. The future, however, will require the United States to trade more than monetary and military aid for foreign support. In efforts to protect and sustain American society, U.S. politicians could be forced to reinvest in international legal processes, backing off their blanket opposition to international cooperation.

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140. Jack Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 THE GREEN BAG 2d 365, 371 (1998).

141. *Id*. at 369; "[T]he U.S. government uses the international human rights system to measure the legitimacy of foreign governmental acts, but it systematically declines to hold domestic acts to the same legal scrutiny."

BOOK REVIEW

ASSESSING THE CEC'S IMPACT ON NAFTA

Greening NAFTA: The North American Commission for Environmental Cooperation. Edited by David L. Markell[†] & John H. Knox.[††] Stanford, California: Stanford University Press, 2003, Pp. XV, 324. $45.00

ROBERT C. HALE[*]

Table of Contents

I. INTRODUCTION

With the North American Free Trade Agreement (NAFTA) recently celebrating its tenth birthday,[1] and talks currently ongoing to create a Free Trade Area for the Americas,[2] free trade is a hot topic in many academic circles. However, these discussions are incomplete without also considering the impact NAFTA and other like trade agreements have on the environment. To that end, *Greening NAFTA* is very timely in its assessment of the North American Agreement on Environmental Cooperation's (NAAEC)

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1. Lisa J. Adams, *NAFTA Marks Not-So-Happy 10th Birthday*, TAMPA TRIBUNE, Dec. 31, 2003, at MONEYSENSE 8.

2. Edith Brown Weiss, *Foreword* to GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, at xiii (David L. Markell & John H. Knox eds., 2003) [hereinafter GREENING NAFTA]

impact on NAFTA.[3] In this paper, I will offer a brief history of NAFTA, the NAAEC, and the North American Commission for Environmental Cooperation (CEC).[4] This history is crucial to understanding the critiques the book makes of the CEC. Next, I will lay out the book's basic structure and list chapter headings. The third section of the paper will address my overall impressions of the book, first addressing the book's structural aspect, and then some substantive issues of note. Finally, I will offer my conclusions and close by addressing the editors' concluding chapter.

II. HISTORY OF NAFTA, NAAEC, & CEC

It has been a decade since Canada, Mexico, and the United States entered into NAFTA.[5] While NAFTA dealt primarily with trade liberalization throughout the North American continent, the agreement also had an environmental component: the NAAEC.[6] The NAAEC established an organization, the CEC, [7] to address the environmental concerns involved in economic integration between the three countries.[8] *Greening NAFTA* assesses the CEC's impact on NAFTA over the last decade.[9] The book addresses some of the successes and failures of the CEC, and also suggests several areas where the Commission could be more aggressive.[10] Lastly, Professor Markell notes that the CEC Council has arguably acted ultra vires in the use of NAFTA Articles 14 and 15 dealing with the citizen submissions process by overstepping its bounds and infringing on the power of both the NAAEC Secretariat and the role of society as a whole.[11]

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3. *Id.*

4. For the purposes of this paper, North American Commission for Environmental Cooperation will be referred to as the CEC. However, it is also frequently abbreviated as the NACEC.

5. North American Free Trade Agreement, Dec. 8, 11, 14, & 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 [hereinafter NAFTA]. NAFTA went into effect on January 1, 1994. *See also* Adams, *supra* note 1, at 8.

6. North American Agreement on Environmental Cooperation, Sept. 8, 9, 12, & 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 [hereinafter NAAEC].

7. Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 508 (2003).

8. Weiss, *Foreword* to GREENING NAFTA, *supra* note 2, at xiii.

9. GREENING NAFTA, *supra* note 2.

10. *Id.*

11. David L. Markell, *The CEC Citizen Submissions Process: On or Off Course?*, *in* GREENING NAFTA, *supra* note 2, at 275-98.

A. NAFTA

NAFTA's origin dates back to the 1989 Canada-United States Free Trade Agreement (FTA).[12] This pact dealt exclusively with trade between the two countries and did not address any of the environmental issues raised by the agreement.[13] The following year, Carlos Salinas and George Bush, the Presidents of Mexico and the United States, began negotiating a free trade agreement between their two respective countries based, in large part, on the example provided for by the 1989 Canada-United States FTA.[14] NAFTA, as it became known after Canada joined the Mexico-United States talks, would not be able to follow the 1989 Canada-United States FTA as precedent.[15]

In the early 1990s, while the NAFTA negotiations were still ongoing, there was an increased recognition of the connections between increased economic development and protection of the environment.[16] In fact, in the summer of 1992, at the Earth Summit in Rio de Janeiro, Brazil, the United Nations Conference on Environment and Development pushed for sustainable development.[17] As the Conference noted, "'to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'"[18] As the *Greening NAFTA's* editors note, many came to "[see] NAFTA as an opportunity to improve international environmental cooperation among the North American nations."[19]

A 1991 ruling by a General Agreement on Tariff and Trade (GATT) dispute panel mobilized environmental groups in all three countries to oppose NAFTA by arguing that trade liberalization without adequately protecting the environment would further harm the environment.[20] The panel report stated that an American tuna

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12. Canada-U.S. Free Trade Agreement, Jan. 1, 1989, Can.-U.S., 27 I.L.M. 281 [hereinafter FTA].

13. GREENING NAFTA, *supra* note 2, at 1.

14. Matthew Goldstein, *Canada: Economic Development under NAFTA, Dominant Economic Player Under FTAA*, 7 LAW. & BUS. REV. AM. 183, 188 (2001).

15. GREENING NAFTA, *supra* note 2, at 1.

16. Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case*, 39 COLUM. J. TRANSNAT'L L. 395, 405 (2001).

17. Symposium, *The Road from Johannesburg*, 15 GEO. INT'L. ENVTL. L. REV. 809, 811 (2003).

18. Rio Declaration on Environment and Development, June 14, 1992, principle 4, 31 I.L.M. 874, *quoted in* GREENING NAFTA, *supra* note 2, at 1-2.

19. GREENING NAFTA, *supra* note 2, at 2.

20. General Agreement on Tariffs and Trade Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594 (1991). This ruling held that, under current international trade rules, nations cannot adopt laws that relate to natural resources located outside its national boundaries. *Id.*

law protecting dolphins violated international trade laws.[21] Several prominent environmental groups including the National Wildlife Federation (NWF)[22] jointly issued a statement identifying two concerns: that (1) NAFTA's passage would further degrade the environment along the United States-Mexico border, and (2) NAFTA would lead to foreign investment throughout Mexico that would be particularly harmful to the environment.[23] These organizations were concerned that Mexico would become a "pollution haven" as American and Canadian businesses left their respective countries' stricter environmental laws behind in exchange for Mexico's much more lax environmental regulation.[24]

The *maquiladora* program served as the primary basis of this concern.[25] *Maquiladoras* "are foreign-owned assembly and manufacturing facilities producing goods for export, which have proliferated on the Mexican side of the border."[26] This Mexican governmental program had attracted investment and created jobs within the Mexican economy.[27] However, this did not come without a price. Mexico's border communities were overwhelmed in their efforts to treat waste and provide clean water.[28] Environmental groups feared that similar problems would spread throughout Mexico once NAFTA was implemented.[29]

The editors briefly summarize the Environmental Community's six chief objections with NAFTA.[30] These objections were: (1) the need for cleanup along the United States-Mexico border; (2) the aforementioned fear that Mexico would become a "pollution haven;" (3) a possible threat to U.S. domestic environmental laws; (4) a similar threat to international environmental agreements; (5) the need for less secrecy and more public participation; and (6) the need

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21. Kibel, *supra* note 16, at 405-06.

22. Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 185 n.242 (2002). These organizations included the "American Lands Alliance, the Center for International Environmental Law, the Consumer's Choice Council, the Defenders of Wildlife, Earthjustice Legal Defense Fund, Friends of the Earth, the Institute for Agriculture and Trade Policy, [ ], Natural Resources Defense Council, Pacific Environment, Sierra Club and World Wildlife Fund." *Id.*

23. GREENING NAFTA, *supra* note 2, at 3.

24. Kibel, *supra* note 16, at 408; James A. Funt, *The North American Free Trade Agreement and the Integrated Environmental Border Plan: Feasible Solutions to U.S.-Mexico Border Pollution?*, 12 TEMP. ENVTL. L. & TECH. J. 77, 80 (1993).

25. GREENING NAFTA, *supra* note 2, at 3.

26. Sanford E. Gaines, *NAFTA as a Symbol on the Border*, 51 UCLA L. REV. 143, 162 (2003).

27. GREENING NAFTA, *supra* note 2, at 3; Jesus Silva & Richard K. Dunn, *A Free Trade Agreement Between the United States and Mexico: The Right Choice?*, 27 SAN DIEGO L. REV. 937, 955-58 (1990).

28. Funt, *supra* note 24, at 86.

29. GREENING NAFTA, *supra* note 2, at 3.

30. *Id.* at 4-7.

for some kind of environmental assessment as is required for federal actions under the National Environmental Policy Act of 1969 (NEPA).[31] Congress also shared some of these concerns and demanded that the administration address environmental issues.[32] As the editors note, President Bush promised "'to develop and implement an expanded program of environmental cooperation in parallel with the free trade talks.'"[33]

B. NAAEC & CEC

After William Clinton was sworn in as President, he indicated that he would not sign off on NAFTA until similar environmental agreements were signed to compliment the trade agreement.[34] In response to the groups' demands and President Clinton's threats, the three governments were able to produce a supplemental agreement to NAFTA called the NAAEC.[35] This side agreement created the CEC to address the environmental concerns associated with North American economic integration.[36] The NAAEC requires each State to "ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations."[37] The agreement also requires the States to "effectively enforce its environmental laws and regulations through appropriate governmental action."[38]

Knox and Markell begin discussion of the NAAEC and CEC by laying out the NAAEC's structure.[39] The CEC is "composed of a Council of the Parties' environmental ministers, a permanent Secretariat, and an independent advisory committee."[40] The editors then examine how the NAAEC addressed, or in other cases failed to address, some of the initial concerns shared by the environmental groups.[41] Knox and Markell conclude this section by examining the Secretariat's and Council's mandates.[42]

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31. *Id.;* National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2000).
32. GREENING NAFTA, *supra* note 2, at 4.
33. *Id.* (quoting President George Bush to Lloyd Bentsen, chairman of the Senate Finance Committee; Richard A. Gephardt, House majority leader; and Dan Rostenkowski, chairman of the House Ways and Means Committee, 27 *Weekly Compilation of Presidential Documents* 536 (May 1, 1991).
34. Kibel, *supra* note 16, at 407.
35. GREENING NAFTA, *supra* note 2, at 7-9; NAAEC, *supra* note 5.
36. Block, *supra* note 7, at 508-09.
37. NAAEC, *supra* note 6, at art. 3.
38. *Id.* at art. 5.
39. GREENING NAFTA, *supra* note 2, at 9.
40. *Id.*
41. *Id.* at 9-11.
42. *Id.* at 11-12.

III. STRUCTURE

With this brief history complete, the article now turns to examining the book in earnest. *Greening NAFTA* begins with a foreword by Edith Brown Weiss, a Professor of International Law at the Georgetown University Law Center.[43] After a brief introduction, the book is arranged into three sections. These sections correspond to the three roles the CEC was envisioned to play. Part one analyzes the CEC as a regional organization solving regional problems.[44] Part two analyzes the CEC as an institution for dealing with the trade and environmental nexus existing in North America.[45] Part three assesses the CEC's role as a forum for public participation and government accountability.[46] Each section contains a number of articles written by various collaborators. These articles are:

PART 1: Regional Solutions to Regional Problems?

> The CEC Cooperative Program of Work: A North American Agenda for Action[47]
>
> North American Pollutant Release and Transfer Registries: A Case Study in Environmental Policy Convergence[48]
>
> The CEC's Biodiversity Conservation Agenda[49]
>
> The CEC and Transboundary Pollution[50]

PART 2: Trade and Environment in North America

> The CEC's Trade and Environment Program: Cutting-Edge Analysis but Untapped Potential[51]

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43. Weiss, *Foreword* to GREENING NAFTA, *supra* note 2, at xiii.
44. GREENING NAFTA, *supra* note 2, at 14.
45. *Id.* at 15.
46. *Id.* at 16.
47. Greg Block, *The CEC Cooperative Program of Work: A North American Agenda for Action, in* GREENING NAFTA, *supra* note 2, at ch. 2.
48. Mark S. Winfield, *North American Pollutant Release and Transfer Registries: A Case Study in Environmental Policy Convergence, in* GREENING NAFTA, *supra* note 2, at ch. 3.
49. Robert L. Glicksman, *The CEC's Biodiversity Conservation Agenda, in* GREENING NAFTA, *supra* note 2, at ch. 4.
50. John H. Knox, *The CEC and Transboundary Pollution, in* GREENING NAFTA, *supra* note 2, at ch. 5.
51. Mary E. Kelly & Cyrus Reed, *The CEC's Trade and Environment Program: Cutting-*

The CEC and Environmental Quality: Assessing the Mexican Experience[52]

The Environmental Impact of Mexican Manufacturing Exports under NAFTA[53]

Corn in NAFTA Eight Years After: Effects on Mexican Biodiversity[54]

Protecting Investors, Protecting the Environment: The Unexpected Story of NAFTA Chapter 11[55]

PART 3: Toward and International Civil Society.

Perspectives on the Joint Public Advisory Committee[56]

Coordinating Land and Water Use in the San Pedro River Basin: What Role for the CEC?[57]

Trade and the Environment: The Issue of Transparency[58]

Citizen Submissions and Treaty Review in the NAAEC[59] and

The CEC Citizen Submissions Process: On or Off Course?[60]

Edge Analysis but Untapped Potential, in GREENING NAFTA, *supra* note 2, at ch. 6.

52. Kevin P. Gallagher, *The CEC and Environmental Quality: Assessing the Mexican Experience, in* GREENING NAFTA, *supra* note 2, at ch. 7.

53. Claudia Schatan, *The Environmental Impact of Mexican Manufacturing Exports under NAFTA, in* GREENING NAFTA, *supra* note 2, at ch. 8.

54. Alejandro Nadal, *Corn in NAFTA Eight Years After: Effects of Mexican Biodiversity, in* GREENING NAFTA, *supra* note 2, at ch. 9.

55. Sanford E. Gaines, *Protecting Investors, Protecting the Environment: The Unexpected Story of NAFTA, in* GREENING NAFTA, *supra* note 2, at ch. 10.

56. John D. Wirth, *Perspectives on the Joint Public Advisory Committee, in* GREENING NAFTA, *supra* note 2, at ch. 11.

57. A. Dan Tarlock & John E. Thorson, *Coordinating Land and Water Use in the San Pedro River Basin: What Role for the CEC?, in* GREENING NAFTA, *supra* note 2, at ch. 12.

58. Donald McRae, *Trade and the Environment: The Issue of Transparency, in* GREENING NAFTA, *supra* note 2, at ch. 13.

59. Kal Raustiala, *Citizen Submisisons and Treaty Review in the NAAEC, in* GREENING NAFTA, *supra* note 2, at ch. 13.

60. David L. Markell, *The CEC Citizen Submissions Process: On or Off Course?, in*

The book closes with a conclusion written by the editors.[61] In addition to recapping the fourteen preceding articles, Knox and Markell offer some general observations on the CEC, including whether or not the CEC model could be used in other trade agreement contexts.[62]

IV. OVERALL IMPRESSIONS

A. Structural Aspects

One of the first things I found remarkable about the text was its readability. After noting the distinguished scholars who contributed chapters to the book, I initially thought that it would have all the earmarks of a law school text or law treatise. In other words, I believed that the book would be almost impossible to read cover to cover. In fact, that initial impression could not have been further from the truth. This book has appeal for everyone. Although written for members of the CEC, professors, scholars, and students alike can take something from this book. For the most part, the contributors avoid legalese, and aside from the numerous acronyms, readers will readily understand what the CEC has accomplished, what it has failed to accomplish, and most importantly, what the future holds for the organization.

On an individual level, every contribution is structured in a manner that assists the reader in understanding the facts and observations that each author is relating to his or her audience. The chapters are highly structured, which aids a layperson in understanding the topic. Take Winfield's chapter on Pollutant Release and Transfer Registries (PRTR) as an example.[63] Winfield sets up his chapter with a couple of introductory paragraphs,[64] then provides a roadmap for his chapter.[65] The roadmap provides definitions and overviews of the PRTR concept, identifies the key uses and audiences for PRTRs,[66] and demonstrates the development of PRTR systems in Canada, Mexico, and the United States.[67] Winfield then assesses the CEC's role and impact on the evolution of the PRTR concept in North America.[68] Finally, Winfield

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GREENING NAFTA, *supra* note 2, at ch. 14.

61. GREENING NAFTA, *supra* note 2, at 299-311.
62. *Id.* at 300-11.
63. Winfield, *supra* note 48, at 38.
64. *Id.*
65. *Id.* at 38-39.
66. *Id.* at 39-40.
67. *Id.* at 40-46.
68. *Id.* at 46-50.

concludes with his opinion that the PRTR experience shows that the CEC can be successful as a regional environmental organization.[69]

Nadal's chapter focusing on NAFTA's effects on Mexican biodiversity in corn production is another example of this highly structured approach.[70] Nadal informs the reader that he will first describe the implementation of NAFTA's corn regime, then examine the potential impact of U.S. transgenic corn on Mexican corn genetic resources, and finally offer up several relevant policy recommendations.[71] He concludes that "the original NAFTA tariff rate quota (TRQ) system" must be implemented, that social welfare infrastructure must be improved along with structural infrastructure, and a price mechanism must be introduced to assist the poorer Mexican corn producers.[72]

Another positive aspect of the book is that it is replete with illustrative examples that aid the reader in grasping the material. In Gaines' chapter on the investment provisions of NAFTA, Chapter 11,[73] he describes several different environmental issues that have arisen in Chapter 11 arbitrations.[74] For the most part, these arbitrations have taken place in two scenarios: waste disposal services cases and regulation of products on public health grounds.[75] Rather than merely describing the types of arbitrations, Gaines offers detailed analysis of seminal cases.[76]

Schatan's chapter assessing the environmental impact of Mexican exports under NAFTA[77] contains several visual aids, including charts, that graphically illustrate difficult concepts such as how different export sectors have affected overall Mexican pollution, the dynamism of Mexican exports, how Mexican exports compare in the pollution context to Canadian exports, and how Mexican sectors importing into the United States have changed in ranking over the last nine years.[78] These aids are crucial to the laymen's understanding of sometimes hard to conceptualize differences between "scale effect" and "composition effect."[79]

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69. *Id.* at 51.
70. Nadal, *supra* note 53.
71. *Id.* at 154.
72. *Id.* at 168-69.
73. Gaines, *supra* note 54.
74. *Id.* at 178.
75. *Id.* at 178.
76. The Nafta claim site provides visitors with a number of these cases including: Azinian v. Mexico, Metalclad v. Mexico, S.D. Myers, Inc. v. Canada, Ethyl Corp. v. Canada, and Methanex v. United States. *Available at* http://www.naftaclaims.com.
77. Schatan, *supra* note 52.
78. *Id.* at 134, 140-42, 144-46.
79. *Id.* at 137.

B. Substantive Issues

While the book's structure is extremely beneficial to the reader, it only seems to make *Greening NAFTA's* true strength — its substance — attainable to a variety of readers. One of the book's highlights is the third sections examination of the CEC as a forum for international civil society.[80] I found McRae's chapter comparing transparency within the WTO, NAFTA, and the CEC particularly useful.[81] McRae compares each of the three organizations' mechanisms for dealing with environmental issues and then includes a short section that examines five types of public participation.[82] He implies that the WTO and NAFTA offer almost no opportunity for public participation while the CEC offers significant public participation by allowing the public to initiate the complaint process, and obtain and provide valuable information.[83] McRae leaves open questions regarding the proper "level of public participation within the CEC process" and whether the "CEC process [is] appropriate for the WTO and NAFTA dispute settlement processes."[84] I would have liked McRae to be more explicit in his approval or disproval of the current level of public participation in each forum. McRae concludes by cautioning that perhaps high levels of public participation are not always desirable, but he stops short of truly taking a stand on where the CEC falls on the continuum.[85]

One of my favorite aspects of the book is the expression of views and opinions of these eminent scholars in each respective chapter. For example, Tarlock and Thorson examine the possibility of the CEC playing a role in settling land and water usage in the San Pedro River Basin.[86] The authors' assessment is that the CEC has been largely successful regarding its NAAEC Article 13 studies in the river basin.[87] This assessment is supported by a showing that the CEC's efforts have helped focus the discussion of sustainability to a more manageable level by using a tri-part process that allows for refinement of some of the more promising options.[88] Tarlock and Thorson highlight the CEC's successes, but they do point out that

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80. McRae, *supra* note 58.

81. *Id.*

82. *Id.* at 249-52. The five types of public participation were: "[1] initiating the process; [2] gaining access to information; [3] providing information; [4] having access to oral proceedings; and [5] being involved in actually making the decision." *Id.* at 249.

83. *Id.* at 252.

84. *Id.*

85. *Id.*

86. Tarlock & Thorson, *supra* note 56. The San Pedro River Basin begins in Sonora, Mexico, and flows northward into Arizona. *Id.* at 219.

87. *Id.* at 229-32.

88. *Id.*

the CEC process has resulted in very few real improvements to the San Pedro River Basin.[89] Tarlock and Thorson conclude that the CEC is best left to information gathering and dissemination, and that perhaps legislation such as the Endangered Species Act would be a better candidate to curtail and control development in the river basin.[90] Finally, the authors suggest that "ecosystem-wide solutions that involve the [area's] major stakeholders are the best long-run hope for effective biodiversity conservation."[91] This kind of discussion is readily applicable to a host of environmental issues, as most of these issues affect more than one locale. Take the seemingly local Apalachicola-Chattahoochee-Flint River System problem as a prime example. Protecting oysters in the Apalachicola Bay, one of the most biodiverse "hotspots" in the world,[92] is not as simple as focusing solely on how to protect the bay's oyster industry.[93] Rather, it involves assessing and balancing several additional competing interests including: the city of Atlanta's drinking and industrial water supply, hydroelectric dams on the Chattahoochee and Flint Rivers, the river system's small shipping industry, rural Georgia farm irrigation, and the Lake Lanier recreational economy.[94]

Markell's chapter on the citizen submissions process contained within NAFTA's Articles 14 and 15 is another highlight of the book[95] Markell assesses the process by examining the scope of the authority of the CEC Council, the Secretariat, and interested citizens. Markell does not hide the fact that, in his opinion, the CEC Council has acted ultra vires by usurping some of the Secretariat's authority.[96] Markell suggests that the CEC Council does not have the authority to change the Secretariat's recommendation as it did in four of five CEC resolutions.[97] Markell takes a look at each submission in turn, describing the initial citizen submission, the Secretariat's recommendation and the Council's ultimate resolution in each case.[98] For those readers who don't need the wealth of information and detail Markell includes about each submission in the text, he offers

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89. *Id.*

90. *Id.* at 230.

91. *Id.* at 232

92. JOHN COPELAND NAGLE & J.B. RUHL, THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT 623 (Foundation Press 2002). This casebook provides an introduction into the recently established field of ecosystem management law. *Id.*

93. *Id.* at 627.

94. *Id.* at 625-26.

95. David L. Markell, *supra* note 60.

96. *Id.* at 284-85.

97. *Id.* at 277-80. The four resolutions in which the Council changed the Secretariat's recommendation for a factual record were: Oldman River II, BC Mining, BC Logging, and Migratory Birds.

98. *Id.*

an appendix that summarizes the information in a quick-reference manner.[99] Markell concludes the chapter by noting several possible consequences of the CEC Council's arguably ultra vires actions.[100] Markell aptly points to the February 2002 submission regarding logging operations in Ontario, Canada, as an example of the problems with the citizen submission process.[101] Markell argues that this particular submission allows the Council to adjust its role and pursue broad-based allegations,[102] but, Markell notes that "it is too early to tell…whether or not the [Council] resolutions represent a temporary bump in the road" or whether they represent a larger threat to the citizen submissions process.[103] A conclusion on this issue will have to wait until more submissions reach a stage where the CEC Council takes action on a final factual record. Only then will a pattern be detectable. At that time, the citizen submissions process' status can be assessed.

V. CONCLUSIONS

While the technical aspects of *Greening NAFTA* are outstanding, I was not fond of the overall structure of the book. While this book is neither a history book that must be organized in chronological order, nor a book that merely describes how a single process works, a structure similar to that used by the editors in their conclusion would have been more valuable to the reader, because it explains how each topic interrelates. In its current state, the book reads like a law review symposium issue devoted to the assessment of the CEC. Aside from being arranged loosely in three sections corresponding to the roles the CEC is designed to play, few of the articles seem to build on one another or flow together.

Many of the articles are also repetitious — especially with respect to introductory information. The first chapter, an introduction written by the editors, begins with a brief history that leads the reader from the early origins of NAFTA to the inclusion of the NAAEC, and finally the CEC.[104] Several of the subsequent chapters rehash this information. It would have been far more

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99. *Id.* at 289-93.

100. *Id.* at 286-88. One of these consequences is that over a hundred NGOs, members of the public, and various actions have suggested that the governments were "'working together to undermine' the process." GREENING NAFTA, *supra* note 2, at 286. Markell lists two articles to bolster this point: Elizabeth Malkin, *Taking the Green out of NAFTA*, BUSINESS WEEK, May 29, 2000, *available at* http://www.businessweek.com/2000/00_22/b3683221.htm.; *How to Wreck Trade*, WASHINGTON POST (Editorial), June 10, 2000.

101. *Id.* at 288.

102. *Id.*

103. *Id.*

104. *Id.* at 1-17.

effective to confine the introductory material to the first chapter, and only restate information in later chapters when absolutely necessary. This would leave the authors free to devote the entirety of their respective articles to the specific topic in each article.

With this minor critique said, this book is remarkable in the breadth of experience each contributor brings to the collaborative effort.[105] Over half of the contributors have legal backgrounds. Most authors either worked directly for the CEC (as legal advisors or directors of individual CEC units) or served the CEC in some other capacity (as a Joint Public Advisory Committee member or a member of a CEC consultant group).[106] Two of the authors played critical roles in the negotiation of NAFTA and the NAAEC.[107] The book features articles from non-CEC related authors as well. These authors include professors (both legal and non-legal) and NGO members who have written extensively on environmental protection. With this broad range of experience, the book avoids the pitfall of appearing biased, and provides the reader with both an insider and outsider view of the CEC.

Knox and Markell close the book with a conclusion that summarizes the previous chapters.[108] The two editors also take this opportunity to offer their own thoughts on the progress and future prospects for the CEC. For the lay reader, this is without question the most useful part of the book. The editors mimic the overall structure of the book, dividing their conclusions into the CEC's three roles. Unlike the individual chapters themselves however, the editors demonstrate how each chapter compliments and interrelates with the other chapters in the book. Their conclusion applauds the CEC's efforts at sponsoring "innovative and important studies assessing NAFTA's environmental effects," but recognizes that the CEC has failed in its attempt to be an environmental presence within NAFTA's infrastructure.[109] The conclusion recognizes that the CEC has certain limitations (budgetary limitations being the most glaring), but still is an effective model for a regional environmental organization and as a forum for civil society.[110] The editors imply that the lessons learned thus far from the CEC experience have been and will continue to be of tremendous value to

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105. *Id.* at 313-18.

106. GREENING NAFTA, *supra* note 2, at 2-3.

107. Sanford Gaines served as Deputy Assistant U.S. Trade Representative. In this capacity, Gaines had responsibility for environmental issues during the NAFTA negotiations. *Id.* at 314. John Knox served as an adviser to the Department of State. In this position, he participated in the negotiation of the NAAEC. *Id.* at 315.

108. *Id.* at 299-311.

109. *Id.* at 310.

110. *Id.* at 310-11.

those countries and regions trying to balance environmental protection and economic integration.[111] The editors conclude by quoting John Wirth, who described the CEC's record as follows: "'[s]till a young organization, the CEC has made extraordinary progress in addressing environmental issues that until recently had little or no resonance across all three countries.'"[112] As Wirth concludes, this is "'[n]o small achievement.'"[113]

This book was a joy to read. The book provides a thorough informative analysis of the CEC's experience within NAFTA over the last ten years. It is an invaluable resource, especially with the current call for a Free Trade Area of the Americas. As Weiss concluded in her foreword, "[t]he book is well informed and highly relevant for all those interested in reconciling environment and trade and in promoting environmentally responsible development not only in North America but throughout the Americas and the world."[114] I concur with Weiss' assessment, and would add that this book has appeal beyond scholars. I would recommend this book to politicians, policy-makers and environmental law and business students alike, as well as anyone interested in the movement towards free trade in the Americas.

111. *Id.* at 311.
112. *Id.*
113. *Id.*
114. Weiss, *Foreword* to GREENING NAFTA, *supra* note 2, at xv.

BOOK REVIEW

Environmental Negotiator Handbook by Alexandre Timoshenko Kluwer Law International, 2003. Pp. xiv, 541. $162.00

DAVID W. CHILDS*

A detailed handbook on negotiating international environmental treaties is arguably overdue. International environmental law, which is primarily comprised of such agreements, blossomed into adulthood over a decade ago,[1] and its maturation spans the entire twentieth century. The growth of this increasingly significant area of law readily divides into three periods.[2] The first of these periods is one of nonexistence. Concerns about the degradation of our planet's resources were absent from state agreements until the United States and Great Britain agreed in 1909 that they would not pollute one another's waters.[3] This agreement failed to open any floodgates. Instead, the following sixty-year period witnessed a mere trickle of agreements containing any environmental components.[4] The formation of the United Nations Environment Programme (UNEP) in 1972, however, marked the beginning of the modern era of international environmental law.[5] Nations finally began to understand that environmental degradation fails to recognize political boundaries, and they responded with an astounding proliferation of conventions addressing a variety of environmental concerns,[6] including ozone depletion[7] and species

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1. "Adulthood" in this sense means that environmental law is firmly established in the still evolving field of international law. This view acknowledges that there is still significant room for augmentation. *See* John Knox, *Assessing the Candidates for a Global Treaty on Transboundary Environmental Impact Assessment*, 12 N.Y.U. ENVTL. L.J. 153 (2003); Laura Thoms, *A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Design*, 41 COL. J. TRANSNAT'L L. 795 (2003).

2. *See* Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 675-79 (1993) [hereinafter *Environmental Law: Contemporary Issues*].

3. Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448 (providing that their shared waters "shall not be polluted on either side to the injury of health or property on the other").

4. Less than three dozen international environmental agreements existed in 1972. *Environmental Law: Contemporary Issues*, *supra* note 2, at 675.

5. *Id.* at 678.

6. *Id.* The rate of creation of environmental laws actually increased significantly in the 1960s, but not nearly at the rates still seen today. *Id.* at 677.

7. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989).

protection.[8] Ancillary to this modern era was an emergence of international environmental law courses in the curricula of American law schools and a shift of scholarly attention from a basic need for international environmental agreements to the need for more efficient construction and implementation of environmental treaties.[9] Concerns for the condition of the international environment are now thoroughly ingrained in the laws and politics of the world's nations.

It was with this backdrop that Dr. Alexandre Timoshenko drafted the *Environmental Negotiator Handbook*.[10] Dr. Timoshenko's impressive career in international environmental law spans over thirty years and includes service as the Director of the Environmental Law Department at the USSR Academy of Sciences and as the Chief of the Environmental Law Branch at the United Nations Environment Program.[11] He declares that the purpose of his book is to "fill in the gaps in the preparedness of the actors who negotiate environmental agreements."[12] Of particular concern to the author is the preparedness of the convention's secretariat officials, non-government groups, and delegates from weaker countries that may lack the resources that enable them to be adequately prepared for the rigors of negotiations.[13] He leaves these parties largely to their own wits, however, in that his book principally focuses on the mechanics of the negotiation process, not the art of it. [14]

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8. *E.g.,* Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 12 I.L.M. 1085 (entered into force July 1, 1975); Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 15 (entered into force Nov. 1, 1983).

9. *See* David M. Driesen, *Thirty Years of International Environmental Law: A Retrospective and Plea for Reinvigoration*, 30 SYRACUSE J. INT'L L. & COM. 353 (2003); Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 262-263 (1992). Dr. Timoshenko also notes the increasing emphasis on effective implementation in the introduction of the handbook. ALEXANDRE TIMOSHENKO, ENVIRONMENTAL NEGOTIATOR HANDBOOK 21 (Kluwer Law International 2003) [hereinafter ENVIRONMENTAL HANDBOOK].

10. The book's North American distributor is Aspen Publishers and is available at www.aspenpublishers.com.

11. ENVIRONMENTAL HANDBOOK, *supra* note 9, at app.

12. *Id.* at xiv.

13. *Id.*

14. For example, the handbook fails to address ways of quelling the economic concerns inherent in negotiating environmental agreements. *See* DAVID PEARCE, ET AL., HANDBOOK OF BIODIVERSITY VALUATION: A GUIDE FOR POLICY MAKERS 81-88 (OECD 2002). There are a few instances where Dr. Timoshenko provides some insight into the techniques of treaty negotiation. ENVIRONMENTAL HANDBOOK, *supra* note 9, at 27 (addressing small nation delegates as to how they may overcome the fact that they will be outnumbered by other countries' multitudes of delegates); *Id.* at 37 (noting that "[m]aking a group position widely known through a political organization served as a powerful negotiating tool" in a number of conventions).

The book is separated into two parts: a hardback 274 page text and a CD-ROM containing a 251 page documentary supplement in PDF format. After a remarkably comprehensive introductory section that previews the text and summarizes some of the current issues in international environmental law, the main text is divided into six chapters, each covering a chronological stage of the treaty formation process:

> Pre-negotiation (Chapter 1)
>
> Negotiation (Chapter 2)
>
> Adoption and Signature (Chapter 3)
>
> Interim Implementation (Chapter 4)
>
> Entry into Force (Chapter 5)
>
> Implementation and Further Development (Chapter 6)

Dr. Timoshenko effectively uses headings and subheadings to further divide these chapters into individual topics. He illuminates the various facets of each topic with a myriad of official documents from previous environmental agreements and the occasional summary of such documents. These documents are referenced in the text and are located at the end of each chapter.[15] An examination of the variety of included agreements, resolutions, and decisions evidences Dr. Timoshenko's meticulous research efforts that must have included combing through a multitude of sources and carefully selecting only those documents which would be the most helpful to the reader.[16]

In addition to the main text of the book, there is a documentary supplement provided in PDF format on an enclosed compact disc.

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15. The following is an example of how the documents are referenced in the text: "The procedural rules are also very strict about the deadlines for the submission of the sessional documents, which should be circulated to delegations at least six weeks in advance of any meeting of the negotiating committee (*Document 5.2*)." ENVIRONMENTAL HANDBOOK, *supra* note 9, at 49. A reader may then turn to the end of the chapter and read an excerpt from "*The Rules of Procedure of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity*." *Id.* at 96.

16. For example, the handbook demonstrates the types of commentary common to the pre-negotiation stage of the process by including the wide variety of opinions given on the status of water and health in Europe from delegates to the European Protocol on Water and Health. *Id.* at 39-42.

The author states that the purpose of the supplement is "to equip the negotiators with various, available at hand, documentary sources and actual legal texts to help identify [the] norms of general international law and international environmental law that may substantiate the new legal rules proposed in the course of environmental negotiations."[17] The extensive 251-page supplement largely achieves this goal. With this CD-ROM, a delegate has a virtual library at his or her fingertips. The usefulness of the supplement is greatly aided by a ten-page introduction that explains the importance of each of the included materials.[18] The text is divided into five parts:

General International Law (section 1)

International Environmental Law (section 2)

United Nations Environment Programme (section 3)

Judicial Decision and Advisory Opinions (section 4)

Table of Web Links (annex)[19]

The General International Law section provides nine different documents, including materials such as the UN Charter[20] and the Vienna Convention on the Law of Treaties.[21] The International Environmental Law section provides fourteen different documents, including materials such as the Hague Declaration on the Environment[22] and the Johannesburg Declaration on Sustainable Development.[23] The United Nations Environment Programme section provides three documents: the United Nations General Assembly Resolution 2997 (XXVII) "Institutional and Financial Arrangements for International Environmental Co-operation,"[24] the Rules of Procedure of the Governing Council of the United Nations

17. *Id.* at 265.

18. *Id.* at 265-74.

19. The web links reference 36 "International Organizations" and 13 "Multilateral Environmental Agreements" *Id.* at 537-38.

20. U.N. CHARTER.

21. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

22. Declaration of the Hague, March 11, 1989, 28 I.L.M. 1308.

23. Johannesburg Declaration on Sustainable Development, A/ CONF.199/L.6/Rev.2 (2002), *available at* http://ods-dds-ny.un.org/doc/UNDOC/LTD/N02/578/83/PDF/N0257883.pdf?OpenElement.

24. *Institutional and Financial Arrangements for International Environmental Co-operation*, G.A. Res. 2997 (XXVII), U.N. Doc. A/RES/3004 (1972).

Environment Program,[25] and the Program for the Development and Periodic review of Environmental Law for the First Decade of the Twenty-First Century.[26] The Judicial Decision and Advisory Opinions section includes such important precedent as the *Trail Smelter Arbitration*[27] and the *Corfu Channel Case*.[28]

The documents and supplement combine to form an extensive treatment of the mechanics of the treaty formation process and an encyclopedic resource of international materials for the reader. Delegates negotiating multilateral environmental agreements, as well as practitioners and scholars wishing to better familiarize themselves with the technicalities of negotiating and implementing these treaties, will find this handbook enlightening. The discussion spans the entire process, from pre-negotiation to post-implementation developments. Each topic includes the norms as well as the exceptions to the process.[29] In addition to his own treatment, Dr. Timoshenko includes numerous references to other sources for the reader desiring more information about a specific issue.[30] Thus, one can utilize this book with confidence that it addresses nearly every possible turn that the negotiating process may take.

This comprehensiveness is quite a feat given the brevity of the handbook's description of the process. When one excludes the referenced documents and documentary supplement from consideration, the handbook is only 83 pages long.[31] Thus Dr. Timoshenko's discussion of the treaty negotiation process comprises less than one-fifth of the handbook's total number of pages. This observation is not made to criticize the relative volume of the included documents; however, because they greatly enhance the description of the different aspects of the process. Still, such a large

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25. *Governing Council*, *Rules of Procedure*, U.N. Environment Program, U.N. Doc. UNEP/GC/13 (1973).

26. Program for the Development and Periodic review of Environmental Law for the First Decade of the Twenty-First Century, U.N. Environment Program, U.N. Doc. UNEP/ Env.Law/4/4 (2000).

27. Arbitral Tribunal, 1941. 3 R.I.A.A 1905, 1907 (1949) (holding that state responsibility attaches when interstate damages result from intrastate activity).

28. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, at 22 (April 9) (holding that "the laying of [a] minefield" in Albanian waters "could not have been accomplished without the knowledge of the Albanian Government," and thus Albania was obligated to warn the British vessels of the danger).

29. For example, Dr. Timoshenko provides the different possible times and locations of the adoption of treaties, noting the norms and exceptions. ENVIRONMENTAL HANDBOOK, *supra* note 9, at 141-42.

30. *See id.* at 143 (referencing the UN Office of Legal Affairs website for more information on accreditation); *Id.* at 15 (referencing a UNEP article on "sustainable development").

31. The referenced documents and the supplementary material comprise 458 pages of the 541 page handbook.

disparity shines a spotlight on the shortcomings of Dr. Timoshenko's overly succinct writing style.

Delegates who attempt to read the book cover-to-cover on a plane ride to the host country of an environmental conference may have a tough task ahead of them. The different sections of the handbook often come across like a series of terse abstracts. The author fails to draw from his thirty years of experience to share any measured editorial comments or anecdotes. Perhaps he believes that a handbook is not the proper forum for any personal observations or that the conciseness of the book would suffer. Some readers may be of the same opinion and might find such inclusions annoying or a waste of space, but surely the benefit of learning from the personal experiences of one so versed in the process would offset any detriments caused by such inclusions. After all, the purpose of the book is to "fill in the gaps in the preparedness of the actors who negotiate environmental agreements."[32]

These shortcomings would largely evaporate if the entire book simply and fully incorporated the conversational tone and theoretical discussions included in its "Introductory Article."[33] In addition to previewing the subject matter of the main chapters, the Introductory Article briefly, but adequately, describes such crucial underpinnings to international environmental law as the "precautionary principle"[34] and "sustainable development."[35] The author expresses concerns about treaty "congestion" due to the modern explosion of environmental agreements[36] and the need to harmonize environmental treaties with the WTO and GATT agreements.[37] If only the main chapters had included similar discussions within the context of each stage of the negotiation process, the handbook would have benefited greatly. For example, Chapter Two contains a discussion of the "scientific background" of environmental agreements and its place in negotiations.[38] No mention is made at this point, however, of how the precautionary principle affects the interpretation of scientific data.[39] Such an inclusion could be perceived as redundant given the principle's

32. ENVIRONMENTAL HANDBOOK, *supra* at xiv.
33. *Id.* at 1-31.
34. *Id.* at 15-16.
35. *Id.* at 19.
36. *Id.* at 21.
37. *Id.* at 25-26.
38. *Id.* at 45-139.
39. Some scholars are quite hostile towards the precautionary principle's current role in evaluating scientific data. *See, e.g.,* Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1027-28, 1044-54 (2003) (arguing that the precautionary principle often fails to make economic sense).

treatment in the introduction,[40] but its omission demonstrates my major complaint about this handbook: Dr. Timoshenko too often holds back on sharing his personal expertise beyond explaining the technicalities of the negotiating process. The text and referenced documents do provide an excellent tool for one preparing for and participating in multilateral negotiations because they meticulously portray the process with all of its twists and turns. They fail, however, to portray the thoughts and impressions of Dr. Timoshenko, which would be invaluable to most readers of the handbook.

In addition to my critique of the main text, I have concerns about the documentary supplement. Each of the first three sections on the CD-ROM contains a substantial array of pertinent resources for environmental negotiators. However, the fourth section, Judicial Decision and Advisory Opinions, I found incomplete. Dr. Timoshenko limits the subject matter of this last section to four cases pertaining to a state's duty not to harm another state due to activities within its own boundaries.[41] These cases serve as important precedent for international environmental law because of the transboundary nature of environmental issues. I was surprised, however, to discover the absence of more general international cases concerning the legal effect of verbal agreements or unilateral statements. I was particularly surprised by the omission of the two cases; *Legal Status of Eastern Greenland*[42] and the *Nuclear Tests.*[43] The *Legal Status of Eastern Greenland* provided that an exchange of statements by the foreign ministries of Denmark and Norway amounted to a binding verbal agreement.[44] The court in the *Nuclear Tests* went further in holding that a unilateral statement given with the intent to be bound by a high ranking French official created a legal obligation.[45] While it is important to note that these cases did not arise out of the negotiating process outlined in Dr. Timoshenko's handbook, these

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40. ENVIRONMENTAL HANDBOOK, *supra* note 9, at 15-16.

41. *See supra* notes 27-28.

42. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 71 [hereinafter *Greenland Case*].

43. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

44. *Greenland Case*, *supra* note 42. The court found the statement by the Minister of Foreign Affairs that "I told the Danish Minister today that the Norwegian Government would not make any difficulty in the settlement of this question" to signify an affirmative "obligation to refrain from contesting Danish sovereignty." *Id*.

45. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, at 267-72 (Dec. 20). The court found that a series of public statements by the French Minister of Foreign Defense concerning France's intention to cease nuclear atmospheric testing created a legal obligation to stop such testing. *Id.*

cases still serve as an important precedent for one participating in such negotiations. State representatives must be careful not to disserve their nation's interests by forming verbal agreements with another government or by making promises in front of television cameras. While being mindful of their own tongues, delegates will also want to monitor other nations' government officials for such agreements and promises. [46] Thus, although these cases do not fall within the neat process detailed in the handbook, state representatives should be aware of their holdings. Hopefully, later editions of the handbook will expand the scope of included judicial precedent and incorporate them in the supplement. With these cases added, an already useful collection of regulations, conventions, and judicial precedent will serve as a more complete resource for negotiators.

My discussion now turns to the handbook's format, because in the realm of handbooks, format is nearly as important as content. An effective handbook must be configured in a way that allows the reader to quickly reference pertinent information. The format of the *Environmental Negotiator Handbook* generally serves this purpose. Of particular benefit is Dr. Timoshenko's use of headings and subheadings to divide chapters into bite-sized sections. These sections guide the reader logically along the chronological path to treaty implementation. Equally important is Dr. Timoshenko's astute placement of the referenced documents at the end of each chapter. This sensible location allows the reader to thumb to the end of a chapter for those documents of interest without having his/her reading stifled by lengthy documents within the text.[47]

The size of the book, aided by Dr. Timoshenko's decision to provide the documentary supplement on an included CD-ROM, also facilitates the handbook's usability. At 274 pages of written text, the book is small enough to fit neatly in a briefcase or travel bag. The book provides a pocket on the inside of its back cover for the documentary supplement disk. Of course, a negative of including the supplement in software form is that one must have a computer with a CD-ROM drive to utilize it. This inconvenience, however, fails to outweigh the benefit of keeping the book from reaching an unruly size or weight. I know I would rather carry a 274-page book in my briefcase than a 541-page tome.

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46. A number of scholars have noted the possibility of citing these cases to prove the existence of binding international agreements. *E.g.,* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 118 n.175 (2000); John Quigley, *The Israeli-PLO Interim Agreements: Are They Treaties?* 30 CORNELL INT'L L.J. 717, 722 (1997).

47. See *supra* note 15 for an example of how documents are referenced within the text.

I do have a couple of suggestions which I believe would significantly improve later editions of the book. My major submission is to greatly expand the handbook's index, as I found it largely incomplete. Important terms such as "depositary" and "secretariat" are absent from the index, despite their in-depth treatment in the text. One may be able to determine the location of the terms by utilizing the book's table of contents, but the absence of a thorough index impairs the handbook's function as a quick reference guide. Also, the table of contents does not always list every location of the term's discussion. For example, the term "secretariat" is discussed in depth in the introduction (where it is also first defined) as well as in numerous sections in which it does not appear in the section title. [48] Thus, the table of contents does not help one find these discussions of the term. Meanwhile, other important terms, such as "interpretative declaration," are not found in the table of contents or the index. A delegate wishing to issue an interpretative declaration about a treaty would have no choice but to search the text to find the location of its discussion.[49] I would much rather the book had a thorough and redundant index, such as the one found in the *Bluebook*, as compared to the *Environmental Negotiator Handbook's* emaciated version. [50]

In addition to a more thorough index, the book would benefit significantly from a glossary.[51] Dr. Timoshenko defines possibly confusing terms within the body of the book, but a brief glossary would end the frustration of searching the text for the definition. Minus these two suggestions, I found nothing objectionable about the format of the handbook.

In sum, Dr. Timoshenko drafted a skeletal, yet comprehensive, handbook on negotiating international environmental agreements. Delegates to multinational conventions would likely find it to be an adequate means for preparing themselves for their negotiations. They can use the handbook to confidently anticipate the entire course of the negotiating process and will have a wealth of international law sources on the enclosed documentary supplement.

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48. ENVIRONMENTAL HANDBOOK, *supra* note 9, at 9, 52, 67-68, 142.

49. The handbook discusses making interpretive declarations in chapter three's "Final Act" section. *Id.* at 145-47.

50. I chose *The Bluebook* as an illustrative example because it is one most readers are familiar with. There are multiple ways to get to the same location through the Bluebook's index, which is 36 pages longer than the Environmental Negotiator Handbook. *Compare* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17th ed. 2000), *with* ENVIRONMENTAL HANDBOOK, *supra* note 9, at 539-41.

51. The United Nations has a "Treaty Handbook" available online which provides a helpful glossary. United Nations — Office of Legal Affairs, Glossary, *available at* http://untreaty.un.org/English/TreatyHandbook/hbframeset.htm.

Likewise, scholars and practitioners wishing to familiarize themselves with the methods of negotiating international environmental agreements will find it equally informative. I believe, however, that the handbook could be markedly better with a few minor changes. The most notable of which would be dropping the overly objective and succinct writing style for something a bit more engaging and adding a more thorough index.