AGUINDA v. CHEVRONTEXACO: MANDATORY GROUNDS FOR THE NON-RECOGNITION OF FOREIGN JUDGMENTS FOR ENVIRONMENTAL INJURY IN THE UNITED STATES

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"At the end of the day, it might be a situation where a U.S. court enforces the judgment, and the marshals have to go to Chevron and seize their assets."[1]

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1. *60 Minutes*, *Amazon Crude* (CBS television broadcast May 3, 2009) (quoting Steven Donziger, co-counsel for the plaintiffs in *Aguinda v. ChevronTexaco*).

INTRODUCTION

In May 2003, forty-six residents of Sucumbios, Kichwa and Orellana Provinces of Ecuador (plaintiffs) filed a lawsuit against Chevron Corporation (Chevron) in the Superior Court of Justice of Nueva Loja in the Sucumbios Province.[2] The plaintiffs' claims arose from past and ongoing environmental contamination resulting from oil and natural gas operations conducted by a consortium in which Texaco, Inc. (Texaco) participated from 1964 through 1992.[3] The amount of damages sought by the plaintiffs grew from $16.3 billion in April 2008 to $27.3 billion by November 2008.[4] The plaintiffs' attorneys have described the case as an opportunity to "re-allocate some of the costs of globalization . . . from the most vulnerable rainforest dwellers to the most powerful energy companies on the planet."[5] The breadth of the litigation characterized by this statement, the length of time associated with the prosecution of the claims and the amount of damages have caused *Aguinda* to be labeled as "the world's largest environmental lawsuit."[6]

The value of any resultant judgment depends upon its recognition in the United States. The United States is perhaps the most receptive of any state to the recognition of foreign judgments.[7]

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2. Plaintiffs' Complaint Addressed to the President of the Superior Court of Justice of Nueva Loja (Lago Agrio), Aguinda v. ChevronTexaco Corp., Superior Court of Justice of Nueva Loja (Lago Agrio), No. 002-2003 (filed May 7, 2003) (Ecuador) [hereinafter Lago Agrio Complaint]; *see* Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and* Aguinda v. Texaco, 38 N.Y.U. J. INT'L L. & POL. 413, 629, 631 (2006) (setting forth a comprehensive history of the Ecuadorian litigation through 2006). Residents of Sucumbios, Kichwa and Orellana Provinces are known as "the afectados" ("affected peoples") and include members of the Cofan, Huaorani, Kichwa, Secoya, and Siona indigenous groups and colonists. *Id.* at 629, 631.

3. Lago Agrio Complaint, *supra* note 2, at 4, 9-14. Chevron was named as a defendant as a result of its October 2001 acquisition of Texaco. *Id. at* 8, 19.

4. CHEVRON CORP., 2008 ANNUAL REPORT 47 (2008), *available at* http://www.chevron.com/annualreport/2008/documents/pdf/Chevron2008AnnualReport_full.pdf [hereinafter ANNUAL REPORT] (noting that a mining engineer appointed by the court suggested damages in the amount of $8 billion for environmental remediation, restoration of natural resources, medical monitoring and negative health effects, disease and death allegedly cause by prolonged human exposure to hydrocarbons and $8.3 billion for unjust enrichment in April 2008, which amounts increased to $18.9 billion and $8.4 billion respectively by November 2008).

5. Steven R. Donziger, *Rainforest Chernobyl: Litigating Indigenous Rights and the Environment in Latin America*, HUM. RTS. BRIEF, Winter 2004, at 1, 1.

6. *See* Simon Romero & Clifford Krauss, *A Well of Resentment*, N.Y. TIMES, May 15, 2009, at B1.

7. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, ch. 8, introductory note (1987); Richard J. Graving, *The Carefully Crafted 2005 Uniform Foreign-Country Money Judgments Recognition Act Cures a Serious Constitutional Defect in its 1962 Predecessor*, 16 MICH. ST. J. INT'L L. 289, 290 (2007). For purposes of this article, a "foreign-country judgment" is defined as "a judgment of a court of a foreign country." UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (2005) § 2(2), 13 U.L.A. pt. II 7 (Supp. 2009) *available at* http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.pdf

However, there are no applicable federal statutes or U.S. treaty obligations. Rather, the issue of whether to recognize a foreign judgment is governed by state law.[8] The majority of states have addressed this issue through two statutes. Thirty states, plus the District of Columbia and the U.S. Virgin Islands have adopted the Uniform Foreign Money Judgments Recognition Act of 1962 (1962 Act)[9] while thirteen states have adopted its successor, the Uniform Foreign-Country Money Judgments Recognition Act of 2005 (2005 Act).[10] These competing statutes and resulting patchwork of case law have rendered the area of recognition of foreign judgments in the United States unpredictable.[11]

This article examines the status of any potential judgment in the context of mandatory grounds for non-recognition pursuant to the 1962 and 2005 Acts. The article initially examines the history of Texaco's investment in Ecuador's petroleum industry, the environmental impacts allegedly resulting from this investment, and the procedural history of resultant U.S. and Ecuadorian litigation. The article then examines the mandatory grounds for non-recognition in the Acts and their application to any potential judgment that may be rendered in Ecuador. The article concludes that Chevron may be able to establish several significant defenses

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[hereinafter 2005 ACT]; *see* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962) § 1(2), 13 U.L.A. pt. II 39 (2002) *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.pdf [hereinafter 1962 ACT].

8. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (extending Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) to conflicts of law issues); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), pt. IV, ch. 8, introductory note.

9. 1962 ACT, *supra* note 7. The 1962 Act has been adopted by Alaska, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, and U.S. Virgin Islands, Virginia, and Washington. Uniform Law Commissioners, A Few Facts About the Uniform Foreign Money Judgments Recognition Act, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ufmjra.asp (last visited Apr. 13, 2010).

10. 2005 ACT, *supra* note 7. The 2005 Act has been adopted by California, Colorado, Hawaii, Idaho, Iowa, Michigan, Montana, New Mexico, Nevada, North Carolina, Oklahoma, Oregon, and Washington; *see* Uniform Law Commissioners, A Few Facts About the Uniform Foreign-Country Money Judgments Recognition Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufcmjra.asp (last visited Apr. 13, 2010). The remaining nineteen states rely upon the common law doctrine of comity. *See infra* note 143 and accompanying text.

11. Saad Gul, *Old Rules for a New World? The Constitutional Underpinnings of U.S. Foreign Judgment Enforcement Doctrine*, 5 APPALACHIAN J.L. 67, 70 (2006); *see* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 255 (1991) (stating that there are few areas of law that are "in a more unreduced and uncertain condition" than enforcement of foreign judgments in the United States); Violeta I. Balan, Comment, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. MARSHALL L. REV. 229, 250 (2003) (referring to the different approaches to the recognition of foreign judgments in the United States as "a scholar's delight").

to recognition. However, Chevron's burden is substantial and presents significant risks for the company.

I. TEXACO IN ECUADOR: A BRIEF HISTORY

A. Hydrocarbon Exploitation and Texaco's Investment

Petroleum exploration in Ecuador dates back to the late nineteenth century.[12] Petroleum exploration in the Oriente, the eastern lowlands, including the eastern slopes of the Andes and a portion of the Amazon River basin, began in the 1920s and continued on a sporadic basis until 1961.[13] In 1964, the Ecuadorian government invited Texaco and Gulf Oil Corporation (Gulf) to conduct exploratory activities in the Oriente.[14] Texaco and Gulf formed a consortium (Consortium) with equal ownership rights through their Ecuadorian subsidiaries to conduct this exploration.[15] The Consortium discovered oil in commercial quantities in 1967 and began export operations in 1972 after completion of a pipeline to Ecuador's Pacific coast.[16] By the end of 1973, production had reached 200,000 barrels of oil per day, and Ecuador's Gross National Product more than doubled in a six year period.[17] Texaco served as the operator on behalf of the Consortium throughout this period of time.[18]

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12. In 1878, Ecuador's National Assembly granted "exclusive [development] rights to M.G. Mier and Company for the extraction of petroleum, tar [and] kerosene . . . in the Santa Elena Peninsula." Texaco, Inc., Texaco in Ecuador: Background on Texaco Petroleum Company's Former Operations in Ecuador, http://www.texaco.com/sitelets/Ecuador/en/history/background.aspx (last visited Apr. 13, 2010) [hereinafter Background on Texaco].

13. Phoenix Can. Oil Co. v. Texaco, Inc., 658 F. Supp. 1061, 1064 (D. Del. 1987) (discussing unsuccessful oil exploration in the Oriente in the 1920's and 1940's and the granting of a concession to Minas y Petroleos del Ecuador to conduct oil exploration in the Napo, Pastaza, and Morona Santiago provinces of the Oriente in 1961); *see* Background on Texaco, *supra* note 12 (discussing the grant of oil concessions to Shell Oil Company in the Oriente in 1937).

14. Lisa Lambert, Note, *At the Crossroads of Environmental and Human Rights Standards:* Aguinda v. Texaco, Inc. *Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in U.S. Courts*, 10 J. TRANSNAT'L L. & POL'Y 109, 112 (2000).

15. The Consortium agreement was between Compania Texaco de Petroleos del Ecuador, an Ecuadorian subsidiary of Texaco Ecuador, and Gulf Ecuatoriana de Petroleo, an Ecuadorian subsidiary of Gulf Ecuador. *See Phoenix Can. Oil Co.*, 658 F. Supp. at 1065. Compania Texaco de Petroleos del Ecuador's interest in the Consortium was acquired by Texas Petroleum Company, a subsidiary of Texaco in 1973. Jota v. Texaco, Inc., 157 F.3d 153, 156 n.3 (2d Cir. 1998).

16. Kimerling, *supra* note 2, at 414-15.

17. *Id.* at 417. Ecuador's Gross National Product increased from $2.2 billion in 1971 to $5.9 billion in 1977. *Id.*

18. Lago Agrio Complaint, *supra* note 2, at 5 (alleging that Texaco "had under its responsibility, the design, construction, installation and operation of the infrastructure and necessary equipment for the exploration and exploitation of the crude oil"); *see* Kimerling,

The Consortium underwent significant changes in the 1970's. In September 1971, the Ecuadorian government enacted a new hydrocarbons law that limited the size of concession areas granted to foreign oil companies, increased the royalty payable to the government, and decreed that "[t]he deposits of hydrocarbons and accompanying substances, in whatever physical state, located in the national territory . . . belong to the inalienable . . . patrimony of the State."[19] The hydrocarbons law became effective in June 1972 after the military seized control of the government.[20] As a result, Texaco and Gulf were required to relinquish a portion of the concession area to the state-owned oil company Compania Estatal Petrolera Ecuatoriana (CEPE).[21] A new concession agreement was executed in August 1973.[22] This agreement provided that CEPE would begin participating in the Consortium in 1977.[23] However, in January 1974, the Ecuadorian government issued a decree commencing CEPE's participation in June 1974.[24] Texaco and Gulf were thus required to execute another agreement granting CEPE a 25% interest in the Consortium.[25] Two and one-half years later in December 1976, Gulf transferred its remaining 37.5% interest to CEPE.[26]

From 1977 to 1990, the Consortium operated with Texaco and CEPE/Petroecuador as the only participants and Texaco as the operator.[27] On July 1, 1990, Petroamazonas, a subsidiary of Petroecuador, replaced Texaco as the operator.[28] The concession agreement expired on June 6, 1992.[29] Ecuador elected not to renew the

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supra note 2, at 435.

19. *Phoenix Can. Oil Co.*, 658 F. Supp. at 1066 (citing LEY DE HIDROCARBUROS [Hydrocarbons Law], art. 1 (Ecuador)).

20. *Id.* (discussing Supreme Decree No. 430 (June 6, 1972) (Ecuador)).

21. CEPE was subsequently reorganized and became Petroecuador. Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 339 (S.D.N.Y. 2005) (discussing CEPE's organization and operations).

22. *Phoenix Can. Oil Co.*, 658 F. Supp. at 1070 (discussing the negotiation and execution of the August 1973 concession agreement).

23. *Republic of Ecuador*, 376 F. Supp. 2d at 339-40 (discussing the effective date of the August 1973 concession agreement).

24. *Id.* (discussing Supreme Decree No. 9 (Jan. 10, 1974) (Ecuador)).

25. *Id.* at 340 (discussing the negotiation and execution of the June 1974 concession agreement).

26. *Id.* (discussing the transfer of Gulf's interest to CEPE); *Phoenix Can. Oil Co.*, 658 F. Supp. at 1076. The agreement transferring Gulf's interest to CEPE was signed on May 27, 1977 but was effective on December 31, 1976 and required the payment of $82.1 million to Gulf. Kimerling, *supra* note 2, at 420 n.17.

27. *See* Kimerling, *supra* note 2, at 420.

28. *See Republic of Ecuador*, 376 F. Supp. 2d at 340-41. A new operating agreement appointing Petroamazonas as operator was executed on March 25, 1991 effective on July 1, 1990. *Id.* The agreement provided that Petroamazonas would remain the operator in the concession area until the expiration of the 1973 concession agreement. *Id.*

29. *Id.* at 341.

agreement and assumed complete control of the concession area.[30] At the time of the termination of Texaco's interest, the Consortium had operations on more than one million acres, had 339 wells, 18 production stations, 1500 kilometers of pipelines, and had extracted more than 1.4 billion barrels of oil.[31]

B. The Environmental Legacy

The Consortium's operations have exacted a heavy toll on the environment and people of the Oriente region. Oil production and pipeline operations were alleged to have resulted in the discharge of twenty-six million gallons of crude oil and toxic wastewater into the surrounding environment.[32] Approximately 2.5 million acres were impacted by oil-related discharges into wetlands, streams and rivers and leeching into soil and groundwater as well as by combustion of crude oil and the flaring of natural gas.[33] The plaintiffs also alleged that the Consortium dug and operated hundreds of unlined pits, which were used to store toxic chemicals utilized in drilling operations as well as other runoff.[34] Of particular concern in this regard is so-called "production water" and "formation water."[35] The amount of production and formation waters discharged

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30. *Id.*; *see* Texaco, Inc., Texaco in Ecuador: A Timeline of Events, http://www.texaco.com/sitelets/ecuador/en/history/chronologyofevents.aspx (last visited Apr. 13, 2010).

31. Complaint at 22, Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. Apr. 11, 1994) [hereinafter New York Complaint]; Kimerling, *supra* note 2, at 449-50 (utilizing production estimates from Ecuador's Ministry of Energy and Mines); Debra Abelowitz, Note, *Discrimination and Cultural Genocide in the Oil Fields of Ecuador: The U.S. as a Forum for International Dispute*, 7 NEW ENG. INT'L & COMP. L. ANN. 145, 146 (2001).

32. *See* Abelowitz, *supra* note 31, at 146 (estimating that 10 million gallons of crude oil were discharged as a result of operations associated with exploration and drilling activities and 16 million gallons were discharged as a result of pipeline ruptures); *see* AMAZON DEFENSE COALITION, RAINFOREST CATASTROPHE: CHEVRON'S FRAUD AND DECEIT IN ECUADOR 4 nn.8, 11 (2006) *available at* http://www.amazonwatch.org/amazon/EC/toxico/downloads/FraudInvestReportNov8.pdf (stating that millions of gallons of crude oil were discharged as a result of exploration and drilling activities and as a result of pipeline ruptures).

33. Abelowitz, *supra* note 31, at 146 (based upon estimates provided by the Rainforest Action Network).

34. Lago Agrio Complaint, *supra* note 2, at 9, 11. The plaintiffs alleged that the Consortium dug and operated 916 open air unlined pits. Amazon Watch, Environmental Impacts, http://chevrontoxico.com/about/environmental-impacts (last visited Apr. 13, 2010). However, this number has been difficult to verify given the possibility of other undiscovered pits and the absence of a master list. *See 60 Minutes*, *Amazon Crude*, *supra* note 1.

35. "Produc[tion] water" is defined as a mixture of "crude oil, formation water, and chemicals that have been injected down a well or used in the separation process." Kimerling, *supra* note 2, at 452. Chemicals contained in production water may include "biocides, fungicides, coagulants, cleaners, dispersants, paraffin control agents, descalers, foam retardants and corrosion inhibitors." *Id.* at 452 n.106. "Formation water" is defined as "water [contained] in underground geologic formations, . . . [including] hydrocarbon-bearing forma-

directly into the environment as a result of the Consortium's operations is disputed, in part due to difficulties in distinguishing between them and the absence of reliable records.[36] In any event, the amount of such discharged waters was substantial. Additional sources of environmental contamination included the burning of crude oil, gas flaring, and spraying of roads with crude oil for maintenance and dust control.[37]

The consumption of contaminated water and livestock, inhalation of polluted air and exposure to hydrocarbons in the soil were alleged to have severely affected the health and life expectancy of residents.[38] The plaintiffs contended that eighty-three percent of the population of the Oriente suffered one or more diseases attributable to hydrocarbon contamination, including cancer, the mortality rate for which was three times higher than the general population and five times higher than in other Amazon provinces.[39] According to the plaintiffs, seventy-five percent of Oriente residents had suffered a total or partial loss of their crops, and ninety-four percent suffered the loss of animals as a result of hydrocarbon contamination.[40] Indigenous populations were alleged to have suffered in particular through "the violent destruction of their natural habitat and, consequently, of their subsistence means, their way of life and habits."[41]

Ecuador and Texaco attempted to address these environmental and health issues upon the termination of the Consortium. In

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tions," that is brought to the surface in recovery operations. *Id.* at 452. Formation water contains hydrocarbons, including benzene and polycyclic aromatic hydrocarbons, heavy metals (such as cadmium and mercury) and significant concentrations of salt. *Id.*

36. *See*, *e.g.*, Lago Agrio Complaint, *supra* note 2, at 11 (estimating that the Consortium "contaminated the soil, estuaries, swamps, rivers and natural streams with 464,766,540 barrels of formation waters"); AMAZON DEFENSE COALITION, *supra* note 32, at 16 n.8 (alleging that "Chevron had admitted to discharging roughly 18.5 billion gallons of toxic 'water of formation' in Ecuador"); Kimerling, *supra* note 2, at 450 (alleging that the Consortium "deliberately dumped tons of toxic drilling and maintenance wastes, in addition to an estimated 19.3 billion gallons of oil field brine, into the environment without treatment or monitoring—contaminating countless rivers and streams that served as rich fisheries and water sources for local communities" (citations omitted)); Amazon Watch, *supra* note 34 (alleging that the Consortium discharged 18 billion gallons of "produced water" into surface streams).

37. *See* Lago Agrio Complaint, *supra* note 2, at 11-12 (estimating that Texaco flared 235 billion cubic feet of natural gas during its time as operator of the Consortium and "systematically and continually [spread] crude debris onto the roads"); Kimerling, *supra* note 2, at 451 (alleging that natural gas "was flared, or burned as a waste, without temperature or emission controls, depleting a nonrenewable natural resource and polluting the air and rain with greenhouse gases . . . and other contaminants"); Amazon Watch, *supra* note 34 (identifying the "[r]elease of contaminants through gas flaring, burning and spreading oil on roads" as major sources of pollution).

38. Lago Agrio Complaint, *supra* note 2, at 12.

39. *Id.* at 13.

40. *Id.*

41. *Id.* at 14.

1992, Petroecuador and Texaco retained two environmental consulting firms to conduct an audit of the Consortium's facilities.[42] The results of the audit remain in dispute. Critics contend that the audit was controlled by representatives of Petroecuador and Texaco who limited its scope to environmental impacts, were required to approve personnel conducting inspections as well as inspection sites, and selected the applicable laws and practices that the auditors were to verify in their reports.[43] Furthermore, forty percent of the auditors' fees were contingent upon approval of the results by designated Texaco and Petroecuador representatives.[44] Despite these limitations, it has been alleged that the auditors observed oil or chemical spills at 158 of the 163 sites that they visited and found contamination in every sample of subsurface soils and groundwater that was analyzed for hydrocarbons.[45] By contrast, Texaco claimed that the audits "independently concluded that [it] acted responsibly and that there is no lasting or significant environmental impact from the former consortium operations."[46]

In May 1995, Texaco, Ecuador and Petroecuador entered into "Contract For Implementing Of Environmental Remedial Work and Release From Obligations, Liabilities and Claims" (Remediation Agreement) wherein Texaco agreed to perform work on designated sites in return for a release of claims from Ecuador and Petroecuador.[47] The Remediation Agreement released Texaco and all related companies from claims arising from environmental degradation associated with the Consortium's activities other than those arising from the remediation Texaco was obligated to perform.[48] Texaco began remediation work in 1995 and completed this work

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42. Texaco, Inc., Texaco in Ecuador: Remediation, http://www.texaco.com/sitelets/ecuador/en/remediation/default.aspx (last visited Apr. 13, 2010) [hereinafter Remediation]. Petroecuador retained AGRA Earth & Environmental, Ltd., and Texaco retained Fugro-McClelland to conduct the environmental audits. Press Release, Chevron Corp., Inspection by Environmental Experts Confirms that Texaco Conducted an Effective Cleanup in Full Compliance with its Obligations to the Government (Mar. 24, 2004), *available at* http://www.chevron.com/news/press/Release/?id=2004-03-24.

43. Kimerling, *supra* note 2, at 468-71.

44. *Id.* at 471.

45. *Id.* at 473.

46. Remediation, *supra* note 42. Texaco noted that the Fugro-McClelland audit concluded that "fully 70% of the hydrocarbon contamination in the production installations, and 50% of the soil hydrocarbon contamination in the drilling platforms and of the pools '. . . was attributable to the operations of PetroAmazonas . . . from 1990 to 1992.' " Chevron Corp., *supra* note 42.

47. Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 341-42 (S.D.N.Y. 2005) (summarizing the Remediation Agreement). The Remediation Agreement has been subject to criticism on the basis that it granted Ecuador's Ministry of Energy and Mines only fifteen days to inspect remediated sites and inform Texaco of any "significant deviations" and lacked "independent oversight of remedial activities, long term monitoring, public comment, or transparency in the approval process." Kimerling, *supra* note 2, at 496.

48. *Republic of Ecuador*, 376 F. Supp. 2d at 342.

in 1998.[49] Texaco spent $40 million in this effort, which included closing and remediating 161 waste pits and seven overflow areas, plugging and abandoning eighteen wells and remediating soil at thirty-six sites.[50] Texaco also made two payments of $1 million each for socio-economic projects[51] and made payments totaling $4.6 million to the municipalities of Lago Agrio, Shushufindi, Joya de los Sachas and Francisco de Orellana in return for their withdrawal of lawsuits and a release from all current and future liability.[52] Despite criticism of Texaco's efforts,[53] in September 1998, the Ecuadorian government and Petroecuador signed the "Act of Final Liberation of Claims and Equipment Delivery" (Final Act) in which they recognized that Texaco had fulfilled its obligations pursuant to the 1995 agreement and released it from current and future liability.[54]

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49. Texaco contracted with Woodward Clyde International and Smith Environmental Technologies to prepare an action plan to be utilized in conducting remediation. Kimerling, *supra* note 2, at 497-98, 497 n.223.

50. Press Release, Chevron Corp. *supra* note 42. Texaco also installed three produced water treatment and reinjection systems, provided Petroecuador with equipment for ten additional systems, designed three oil containment systems, and conducted extensive replanting of native vegetation at the remediated sites. *Id.*

51. CHEVRONTEXACO, CORP., 2002 CHEVRONTEXACO CORPORATE RESPONSIBILITY REPORT 50 (2003), *available at* http://www.chevron.com/documents/pdf/corporateresponsibility/Chevron_CR_Report_2002.pdf.

52. *See* Kimerling, *supra* note 2, at 511-12.

53. *See* AMAZON DEFENSE COALITION, *supra* note 32, at 5 (contending that Texaco paid less than 1% of the cost of remediation, hid the existence of more than 200 waste pits, failed to follow legal and customary standards for performing the remediation, failed to treat 92 waste pits that it agreed to remediate, and submitted misleading laboratory results to the Ecuadorian government in order to obtain certification of its efforts). The Amazon Defense Coalition also claimed that the remediation constituted "a legal admission that [Texaco] created harmful levels of contamination in Ecuador . . . . [as it] was under no legal obligation to pay damages to the Ecuadorian government, and the Ecuadorian government had neither sued Texaco nor claimed that Texaco was liable for clean-up." *Id.* at 6. *See also* Kimerling, *supra* note 2, at 502-03 (criticizing Texaco's remediation efforts as failing to address contamination at hundreds of well sites and waste pits and adequately remedy contaminated soils and sludge by covering them with dirt without further action). *But see* Defendant's Motion to Dismiss at 12, Aguinda v. ChevronTexaco Corp., Superior Court of Justice of Nuevo Loja (Lago Agrio), No. 002-2003 (filed Oct. 8th, 2007) (Ecuador) [hereinafter Defendant's Motion to Dismiss] (contending that Texaco performed environmental remediation at 41% of the sites in use during its tenure as operator, which was in excess of its ownership interest in the Consortium); Press Release, Chevron Corp. *supra* note 42, (claiming that Texaco's remediation efforts were conducted in accordance with standards established by the U.S. Environmental Protection Agency and the American Petroleum Institute and were certified as free of hydrocarbon contamination by URS Corporation and the Universidad Central de Ecuador).

54. *See* Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 342 (S.D.N.Y. 2005) (quoting the Final Act as declaring that Texaco's obligations pursuant to the 1995 agreement were "fully performed and concluded" and that the government and Petroecuador "proceed[ed] to release, absolve, and discharge [Texaco and its related companies] from any liability and claims by the Government of the Republic of Ecuador, Petroecuador and its affiliates, for items related to the obligations assumed by [Texaco] in the 1995 Settlement"); Letter from Ivonne A-Baki, Ecuadorian Ambassador to the United States, to Jed S. Rakoff, U.S. District Court Judge (Nov. 11, 1998) (on file with the author) (describing the

II. TEXACO IN ECUADOR: THE RESULTING LITIGATION

A. Litigation in the United States

In November 1993, seventy-four Ecuadorians filed a class action lawsuit against Texaco in the U.S. District Court for the Southern District of New York.[55] The plaintiffs purported to represent more than 30,000 persons residing in the Oriente region who had suffered damages from hydrocarbon contamination as a result of the Consortium's operations.[56] The plaintiffs alleged numerous tort claims and a claim pursuant to the Alien Tort Statute.[57] The claims were ultimately dismissed on the basis of *forum non conveniens*, and the dismissal was upheld by the U.S. Court of Appeals for the Second Circuit.[58] Although detailed discussion of the U.S. litigation is beyond the scope of this article, the litigation is important to the subsequent proceedings in Ecuador and the potential recognition of any judgment.

The initial important result emerging from the litigation is the

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Final Act as having "absolved, liberated and forever freed [Texaco], its employees, principals and subsidiaries of any claim or litigation by the Government of the Republic of Ecuador concerning the obligations acquired by [Texaco] in the [May 4, 1995] contract").

55. *See* New York Complaint, *supra* note 31.

56. *Id.* at 4, 11, 14-15, 17-19.

57. The plaintiffs stated causes of action sounding in negligence, public and private nuisance, strict liability, trespass, and civil conspiracy. *Id.* at 27-35. In addition, the plaintiffs stated a cause of action pursuant to the Alien Tort Statute. *Id.* at 35. The Alien Tort Statute provides that "[t]he 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." 28 U.S.C. § 1350 (2006).

58. Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002). Texaco initially moved for dismissal on the basis of the plaintiffs' failure to join the Republic of Ecuador, *forum non conveniens*, and comity. Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 U.S. Dist. LEXIS 4718, at *2 (S.D.N.Y. Apr. 11, 1994). The district court ordered discovery as to whether Texaco's U.S. headquarters directed the activities of its Ecuadorian subsidiaries and the necessity of utilizing evidence located in Ecuador to prove the plaintiffs' claims. *Id.* at *3. The district court subsequently granted Texaco's motion to dismiss on the basis of *forum non conveniens*. Aguinda v. Texaco, Inc., 945 F. Supp. 625, 627 (S.D.N.Y. 1996) (citing Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994)). However, this dismissal was reversed by the U.S. Court of Appeals for the Second Circuit due to the absence of a requirement that Texaco submit to personal jurisdiction in Ecuador. Jota v. Texaco, Inc., 157 F.3d 153, 155 (2d Cir. 1998). Upon reconsideration, the district court again dismissed the complaint on the basis of *forum non conveniens*, but only after obtaining Texaco's written consent to "being sued on these claims (or their Ecuadorian equivalents) in Ecuador, to accept service of process in Ecuador, and to waive for 60 days after the date of this dismissal any statute of limitations-based defenses that may have matured since the filing of the instant Complaints." Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 539-554 (S.D.N.Y. 2001). The Second Circuit Court of Appeals affirmed this dismissal with the modification that Texaco "waive any defense based on [the] statute of limitations for limitation periods expiring between the date of filing these United States actions and one year (rather than 60 days) following the dismissal of these actions." *Aguinda*, 303 F.3d at 478-80.

viewpoints of the U.S. courts, Texaco and the Ecuadorian government regarding potential forums. The U.S. courts were unanimous in their ultimate conclusion that Ecuador was adequate at least for purposes of *forum non conveniens* analysis. This conclusion was based upon existing precedent[59] as well as the Second Circuit and district court's independent inquiries.[60] This conclusion was endorsed by Texaco, which praised the dismissal and concluded that Ecuador was the appropriate forum due to the location of the plaintiffs, Petroecuador, the operations, and the evidence.[61] Texaco also noted that the remedies sought by the plaintiffs could only be awarded by Ecuadorian courts.[62]

The adequacy of the Ecuadorian judicial system was echoed by the Ecuadorian government, albeit in a different manner. The government contended that U.S. courts were an inadequate forum and that the claims could only be tried in Ecuador. As all natural resources and land, including that upon which the Consortium conducted its operations, were owned by the government, any decision by a foreign court with respect to rights and duties associated with such resources and land was an affront to national sovereignty.[63] According to the Ecuadorian government, private citizens had no right to seek damages for environmental harm to public lands.[64] As a result, the government condemned "the . . . plaintiffs' attorneys in this matter [for] attempting to usurp rights that belonged to the

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59. *See*, *e.g.*, Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1359-60 (S.D. Tex. 1995) (mass tort litigation arising from pesticide exposure); Ciba-Geigy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111, 1117 (Fla. 4th DCA 1997) (tort litigation arising from fungicide exposure). *But see* Phoenix Can. Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 455-56 (D. Del. 1978) (concluding that Ecuador was not an adequate alternative forum due, in part, to military control of the judiciary).

60. *See Aguinda*, 303 F.3d at 478 (agreeing with the lower court's conclusion that Ecuador was an adequate alternative forum due to the absence of impropriety by Texaco or the Consortium in any prior judicial proceeding in Ecuador; the pendency of numerous claims against multinational enterprises without evidence of corruption; the adoption of measures to further judicial independence; and the existence of close public and political scrutiny of the plaintiffs' claims, which would prevent the application of undue influence upon the court); *Aguinda*, 142 F. Supp. 2d at 539-45 (concluding that Ecuador was an adequate alternative forum due to the successful prosecution of tort claims by oil workers against the Consortium; the absence of impropriety by Texaco or the Consortium in any prior judicial proceeding in Ecuador; the pendency of numerous claims against multinational enterprises without evidence of corruption; the adoption of measures to further judicial independence; and the existence of close public and political scrutiny of the plaintiffs' claims).

61. *See* Press Release, ChevronTexaco Corp., ChevronTexaco Issues Statement on U.S. Circuit Court Decision Affirming Dismissal of Ecuador Litigation (Aug. 19, 2002), *available at* http://www.chevron.com/news/press/Release/?id=2002-08-19a; Press Release, Texaco Corp., Texaco Statement re: 01/31/00 Order of the U.S. District Court (Jan. 31, 2000), *available at* http://www.chevron.com/news/Press/Release/?id=2000-01-31&co=Texaco.

62. *See* Press Release, Texaco Corp., *supra* note 61.

63. *See* Defendant's Motion to Dismiss, *supra* note 53, at 16.

64. *Id.*

government of the Republic of Ecuador under the Constitution and laws of Ecuador and under international law."[65]

The second important result is the district court's holding with respect to the relationship between Texaco and its Ecuadorian subsidiaries. The district court concluded that the plaintiffs had "come up bone dry" and failed to establish "a meaningful nexus" between the United States and the decisions and practices at issue in the litigation.[66] The plaintiffs were unable to establish "parental control or direction over the pipe design, waste disposal, and other allegedly negligent practices of the Consortium."[67] Rather, the plaintiffs were only able to demonstrate the exercise of general oversight regarding expenses and finances, the rendering of advice on operational decisions previously made in Ecuador, and the provision of technical information on "the maximum safe levels of salt and oil in water and how to clean up oil spills."[68] This evidence fell far short of that needed to establish direction and control of Texaco's subsidiaries such as to impose liability upon the parent corporation.[69] As a result, in July 1995, the plaintiffs stipulated that they had no knowledge, information, or documents having any tendency to prove or lead to the discovery of information or documents that might tend to prove "events relating to the harm alleged by plaintiffs occurring in the United States [including directions, communications, discussions, assistance, or guidance] and . . . the extent, if any, to which conduct *in the United States* caused actionable harm."[70]

The conditions imposed upon Texaco with respect to the dismissal of the complaint are also significant.[71] These conditions are commonly imposed in cases in which dismissal is sought pursuant to *forum non conveniens*, including cases involving environmental harm.[72] However, neither the Second Circuit nor the district court

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65. *Id.* (quoting Letter from Edgar Terán, Ecuadorian Ambassador to the United States, to Jed S. Rakoff, U.S. District Court Judge (June 10, 1996) (alteration in original)).

66. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 550 (S.D.N.Y. 2001).

67. *Id.* at 549.

68. *Id.* at 550.

69. The district court concluded that:

> [T]he record before the Court, when scrutinized in terms of admissible evidence, establishes overwhelmingly that Texaco's only meaningful involvement in the activities here complained of was its indirect investment in its fourth-tier subsidiary . . . which is not a party here and which conducted its participation in the activities here complained of almost exclusively in Ecuador.

Id. at 548.

70. *Id.* at 550.

71. *See supra* note 58 and accompanying text.

72. *See*, *e.g.*, *In re* Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 203-04 (2d Cir. 1987) (affirming the district court's dismissal of the complaint pursuant to *forum non conveniens* on the condition that Union Carbide Corporation consent to personal jurisdiction

conditioned their dismissals upon Texaco's consent to be bound by a judgment resulting from the proceedings in Ecuador. As held by the Second Circuit in the Bhopal litigation, the imposition of such a condition would be premature, predicated on "an erroneous legal assumption" that foreign judgments are not otherwise enforceable in the United States and in disregard of applicable state law.[73] Furthermore, a dismissal on the basis of *forum non conveniens* is not an endorsement of the procedural protections of an alternative forum and does not guarantee recognition of a future judgment. This is an important distinction as the plaintiffs in the Ecuadorian litigation claimed that Texaco had to "agree to pay any judgment imposed against it."[74]

Finally, the outcome in related U.S. litigation may have an impact upon the recognition of any Ecuadorian judgment in the United States. In a decision predating *Aguinda,* the U.S. District Court for the Southern District of Texas dismissed similar claims utilizing *forum non conveniens*.[75] The court found Ecuador to be an adequate alternative forum maintaining "an independent judicial system with adequate procedural safeguards."[76] Secondly, claims asserted by Oriente residents alleging that hydrocarbon pollution caused them to develop cancer were dismissed by the U.S. District Court for the Northern District of California in 2007.[77] In its dismissal order, the district court concluded that the cancer claims were baseless, "manufactured by plaintiffs' counsel," and "likely a smaller piece of some larger scheme against defendants."[78] The district court subsequently imposed Rule 11 sanctions on three of plaintiffs' counsel for failure to conduct adequate inquiry with respect to the cancer claims prior to initiating litigation.[79] In so

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in India and waive the statute of limitations as a defense). The Second Circuit described these conditions as "not unusual." *Id.* at 203.

73. *Id.* at 205 (setting aside the portion of the district court's order conditioning dismissal on the basis of *forum non conveniens* on consent to recognition of any judgment entered in India).

74. Donziger, *supra* note 5, at 3.

75. Sequihua v. Texaco, Inc., 847 F. Supp. 61, 65 (S.D. Tex. 1994).

76. *Id.* at 64.

77. Gonzalez v. Texaco, Inc., No. C 06-02820WHA, 2007 U.S. Dist. LEXIS 56622, (N.D. Cal. Aug. 3, 2007).

78. *Id.* at *9.

79. Gonzales v. Texaco, Inc., No. C 06-02820WHA, 2007 U.S. Dist. LEXIS 81222, at *33 (N.D. Cal. Oct. 16, 2007). Federal Rule of Civil Procedure 11 provides, in relevant part, that:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney . . . [is certifying] that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable oppor-

doing, the district court described the claims as "bogus claims that should never have been on the books."[80]

B. Litigation in Ecuador

The plaintiffs initiated litigation against Chevron in Ecuador in May 2003.[81] The plaintiffs based their lawsuit upon provisions of the Ecuadorian Constitution[82] and the Environmental Management Law of 1999 that recognized a "popular action to denounce the breaching of the environmental laws [and] . . . [obtain] damages . . . for the deterioration of . . . health [and] damage to the environment."[83] The primary relief sought by the plaintiffs was "elimination and removal of . . . contaminating elements that still threaten the environment and health of the inhabitants" and "the repair of . . . environmental damages."[84] Additionally, the Complaint sought remittance of ten percent of the cost of remediation work to Frente de Defensa de la Amazonia (Frente).[85] The amount of damages was not specified.

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tunity for further investigation or discovery . . .

FED. R. CIV. P. 11(b)(3). The district court ordered sanctions in the amount of $45,000. *Gonzalez*, 2007 U.S. Dist. LEXIS 81222, at *41. It bears noting that the plaintiffs' attorneys in the California litigation are different from Plaintiffs' counsel in Ecuador.

80. *Gonzalez*, 2007 U.S. Dist. LEXIS 81222, at *40. The claims of the remaining two plaintiffs in the California litigation were subsequently dismissed pursuant to the applicable statute of limitations. Gonzales v. Texaco, Inc., No. C 06-02820WHA, 2007 U.S. Dist. LEXIS 84523, at *23-24 (N.D. Cal. Nov. 15, 2007).

81. Lago Agrio Complaint, *supra* note 2, at 27.

82. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR arts. 23, 86-88, 90-91 (guaranteeing citizens the right to live in a healthy environment, declaring that environmental protection and the preservation of biodiversity are in the public interest, requiring public consultation and approval of decisions that affect the environment, requiring the government to regulate the production, distribution, and use of substances dangerous to human life and the environment, and placing responsibility for environmental damage occurring during the delivery of public services upon the government). All references to the Ecuadorian Constitution contained herein shall be to the 1998 version, which was in force and effect at the time of the filing of the plaintiffs' complaint.

83. Lago Agrio Complaint, *supra* note 2, at 21-22 (citing LEY DE GESTIÓN AMBIENTAL [Environmental Management Law], Law No. 99-37, arts. 41, 43 (Ecuador)).

84. *Id.* at 22-25. The Plaintiffs' claims with respect to "elimination and removal of contaminating elements" included requests for removal, treatment and disposition of contaminants in waste pits, the removal of contaminants from all waterways, the removal of all structures and equipment in the vicinity of closed wells and facilities, and the "clearance of the terrains, plantations, crops, streets, roads and buildings where there may still exist contaminating residuals produced or generated as a consequence of the operations directed by Texaco, including the contaminating debris deposits built as a part of the wrongly [sic] environmental cleaning tasks." *Id.* at 23. The Plaintiffs' claims with respect to the "repair of the environmental damages" included requests to "recuperate the characteristics and natural conditions of the soil and of the adjacent terrains" in proximity to waste pits, institute recuperation and regenerative plans for flora, fauna, and aqueous life and formulate and implement a plan for monitoring and improving the health of affected inhabitants of the Oriente region. *Id.* at 24.

85. *Id.* at 25.

Chevron asserted numerous defenses which are perhaps best summarized in its Motion to Dismiss filed in October 2007. Chevron initially contended that there was no valid claim against it or Texaco, as the Environmental Management Law could not be applied retroactively to Texaco's operations in Ecuador.[86] Furthermore, the claims were barred by the remediation agreement and "Final Acta."[87] Additionally, Chevron claimed that it was not a proper party to the litigation.[88] This defense was based on a number of separate arguments. First, Chevron claimed that the plaintiffs sued the wrong entity by failing to assert claims against Texaco.[89] Second, Chevron alleged that the Superior Court lacked per-

86. Defendant's Motion to Dismiss, *supra* note 53, at 10, 13-14. The Environmental Management Law permits qualified individuals directly affected by environmental contamination to act on behalf of their communities to compel remediation and recover damages. LEY DE GESTIÓN AMBIENTAL [Environmental Management Law], Law No. 99-37, art. 43. The right to bring such an action did not exist prior to 1999. The Ecuadorian Constitution, Civil Code and applicable case law prohibit retroactive application of laws in general and the Environmental Management Law in particular. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 24(1) (stating that "[n]o one may be judged for an act or omission that at the time of perpetration, was not classified legally as a . . . [violation, nor shall a person be judged except in accordance] with the preexisting laws"); CÓDIGO CIVIL art. 7 (Ecuador) (providing that "[t]he law provides only for the future; it has no retroactive effect"); Defendant's Motion to Dismiss, *supra* note 53, at 17 (citing Calva v. Petroproduccion, Case No. 349-2000 (Superior Court of Nuevo Loja, Aug. 20, 2001) (Ecuador) (holding that the Environmental Management Law could not be applied retroactively against a production subsidiary of Petroecuador with regard to pollution that occurred prior to the law's adoption as private individuals did not possess such rights before 1999)). The only similar actions existing prior to 1999 were to prevent or report violations of environmental laws, intervene in administrative proceedings and request reversal of governmental actions that threatened environmental harm. *See* ESTATUTO DEL RÉGIMEN JURÍDICO ADMINISTRATIVO DE LA FUNCIÓN EJECUTIVA [Statute on the Legal-Administrative Rules for the Executive Branch], No. 411, art. 115(b) (Mar. 31, 1994) (Ecuador); LEY DE PREVENCIÓN Y CONTROL DE CONTAMINACIÓN AMBIENTAL [Law for Prevention and Control of Environmental Contamination], Supreme Decree No. 374, art. 29 (Ecuador). Individuals were empowered to bring actions to demand compensation for specific personal and property injuries suffered as a result of another's intentional or negligent acts. CÓDIGO CIVIL art. 2214. The Civil Code also created a cause of action for nuisance in which individuals could seek an injunction against the current owner or operator of the offending property. *Id.* art. 2236. Neither of these provisions authorized a collective action seeking money damages against a multinational corporation for past operations.

87. Defendant's Motion to Dismiss, *supra* note 53, at 13.

88. *Id.* at 18.

89. *Id.* at 18-19. Chevron contended that it did not acquire Texaco in 2001 and thus did not assume its liabilities, including responsibility for environmental injury in Ecuador. Rather, Texaco was merged with a wholly-owned subsidiary of Chevron called Keepep, Inc. *Id.* at 19 & n.14. According to Chevron, Texaco survived the merger because it fully absorbed Keepep. *Id.* As a result, Texaco maintained a separate legal identity and separate responsibility for the Plaintiffs' alleged injuries. *Id.* Furthermore, there was no provision of Ecuadorian law by which to hold Chevron responsible for Texaco's conduct in Ecuador. *See id.* Finally, even assuming that the court found that Chevron and Texaco were in fact one entity for purposes of the litigation, a U.S. court previously held that Texaco could not be held liable for the conduct of its Ecuadorian subsidiaries in the course of operating the Consortium. *See* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 548-50 (S.D.N.Y. 2001); *supra* notes 66-70 and accompanying text.

sonal jurisdiction.[90] The third element of this defense was that the plaintiffs' claims were barred by the applicable statute of limitations.[91] Finally, Chevron contended that the plaintiffs lacked standing.[92]

The Superior Court deferred ruling on these defenses and commenced trial in October 2003.[93] The conduct of the trial has been the cause of considerable controversy and has provided Chevron with additional defenses. The initial source of controversy has been the procedures employed by the Superior Court. At the beginning of the trial, the court accepted a joint plan for the collection of evidence consisting of judicial inspections of designated well sites to determine the presence of environmental contamination followed by expert determination of the cause of any contamination and the cost of remediation.[94] Pursuant to this procedure, the parties requested judicial inspections of 122 well sites to be conducted pursuant to negotiated sampling and analysis plans.[95] Forty-seven of the 122 designated well sites were ultimately inspected.[96] Chevron submitted reports on forty-five of these sites, which purportedly demonstrated that Texaco's remediation met all applicable standards and there was no ongoing risk to human health.[97] How-

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90. Defendant's Motion to Dismiss, *supra* note 53, at 19-20. This defense was based upon the fact that Texaco's consent to personal jurisdiction in Ecuador was not binding on Chevron, which was not a party to the *Aguinda* litigation in the United States. *See* Aguinda v. Texaco, Inc., 303 F.3d 470, 478-80 (2d Cir. 2002). This consent to personal jurisdiction was also inoperative against Chevron as it was not Texaco's successor-in-interest. Defendant's Motion to Dismiss, *supra* note 53, at 20. There were no other grounds for the exercise of personal jurisdiction as Chevron had never operated in Ecuador. *Id.*

91. Defendant's Motion to Dismiss, *supra* note 53, at 19-20. This defense was based upon the fact that Texaco's consent to toll the statute of limitations was not binding on Chevron. *See Aguinda*, 303 F.3d 470, 478-79 (2d Cir. 2002). As a result, the Plaintiffs' claims asserted in 2003 arising from conduct that occurred at the latest with the completion of remediation work in 1998 were barred by Ecuador's four year statute of limitations. *See* CÓDIGO CIVIL art. 2235.

92. Defendant's Motion to Dismiss, *supra* note 53, at 20-21. This defense was based upon the Environmental Management Law, which requires plaintiffs bringing an action on behalf of the public demonstrate individualized harm. *Id.* at 20 (Stating that "[t]he natural or juridical persons or human groups, linked by common interest and affected directly by the harmful act or omission, may file . . . actions for damages and losses and for deterioration caused to health or to the environment. . ." (quoting LEY DE GESTIÓN AMBIENTAL [Environmental Management Law], Law No. 99 37, art. 43)). Chevron contended that the Plaintiffs failed to plead or identify individualized personal injury or property damage as to permit them to seek compensation for "the broadest of communal environmental harms." *Id.* at 20-21.

93. *Id.* at 10.

94. *Id.* at 22-23.

95. *Id.* at 23-24.

96. *Id.* at 24.

97. *Id.* at 25. These conclusions were based upon 1344 water and soil samples analyzed by accredited laboratories in the United States. *Id.*; *see* Rebuttal Brief for Chevron Corporation at 7, Aguinda v. Chevron Texaco Corp., Superior Court of Justice of Nueva Loja (Lago Agrio), No. 002-2003 (filed Sept. 15, 2008) (Ecuador), *available at*

ever, Chevron contended that the plaintiffs' experts failed to report data on more than half of the 465 soil and water samples they collected during the first nineteen inspections, submitted only five of these samples to an accredited laboratory for analysis, and submitted the remainder to an unaccredited laboratory in Ecuador, which failed to conduct scientifically appropriate analyses.[98] Chevron moved the court to expunge this evidence from the record on eleven separate occasions, but the court failed to conduct a hearing as required by Ecuador's Code of Civil Procedure.[99]

In March 2007, the plaintiffs obtained a court order waiving further inspections by experts appointed by both parties and appointing a single expert to conduct inspections and report to the court.[100] Chevron objected to this order as inconsistent with the previously-agreed procedures, and as a violation of the Code of Civil Procedure.[101] Nevertheless, the court appointed Richard Cabrera (Cabrera) to determine the existence and source of environmental damage, if any, and specify the nature of the work to be completed to remediate locations where contamination was discovered.[102] In preparing his report, Cabrera visited forty-eight well sites and one

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http://www.chevron.com/documents/pdf/texacoexecutivesummaryecuador.pdf [hereinafter Rebuttal Brief] (claiming that ninety-eight percent of the waste pits remediated by Texaco met the standards established by the Ecuadorian government and ninety-nine percent of the drinking water samples met safety standards established by the World Health Organization and the U.S. Environmental Protection Agency).

98. Defendant's Motion to Dismiss, *supra* note 53, at 27-28. For example, Chevron contended that the Plaintiffs' laboratory reported the presence of contaminants for which it did not test, attributed all metals found in soil samples to the Consortium's activities rather than accounting for their natural presence and took samples in areas that were Petroecuador's responsibility to remediate. *Id.* at 29.; *see* Texaco, Inc., Plaintiffs' Myths, Distortions and Fabrications, http://www.texaco.com/sitelets/ecuador/en/PlaintiffsMyths.aspx (last visited Apr. 13, 2010) [hereinafter Plaintiff's Myths] (alleging that Plaintiffs' experts failed to test 201 out of 648 samples, failed to report all laboratory results, utilized an unqualified laboratory to conduct such tests and failed to follow accepted chain of custody procedures with respect to such samples).

99. Defendant's Motion to Dismiss, *supra* note 53, at 29-30; *see* CÓDIGO DE PROCEDIMIENTO CIVIL [Code of Civil Procedure] arts. 256, 258 (Ecuador) (requiring experts to "carry out [their] duties faithfully and lawfully," that essential errors in an expert's report be corrected by another expert, that the court conduct a hearing in the event an expert is deemed to have committed such errors in the course of preparation of a report, and that the court expunge expert reports that contain gross factual errors).

100. Defendant's Motion to Dismiss, *supra* note 53, at 37.

101. *Id.* at 35-38 (citing CÓDIGO DE PROCEDIMIENTO CIVIL [Code of Civil Procedure] arts. 252, 292, which states that the parties may "by mutual agreement select the expert or request the appointment of more than one expert to carry out the [expert examination], which agreement shall be binding on the judge" and that litigants' requests "whose objective is to alter the meaning of . . . orders . . . or to maliciously prejudice the other party, shall be dismissed and sanctioned").

102. *Id.* at 37. Chevron objected to Cabrera's appointment due to his lack of experience in hydrocarbon chemistry, epidemiology, hydrogeology, remediation technologies, and oil and gas operations practices. *Id.* at 38.

production station and reviewed aerial photographs.[103] Based upon this review, Cabrera concluded that eighty percent of waste pits and one hundred percent of the production station pits needed to be remediated.[104] Chevron disputed these conclusions, took issue with Cabrera's methodology[105] and accused him of disregarding his mandate[106] and misconduct.[107] As a result, Chevron concluded that Cabrera's report was "a fraud on the court,"[108] and its utilization would be a violation of Ecuador's Constitution.[109]

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103. Rebuttal Brief, *supra* note 97, at 10.

104. Press Release, Chevron Corp., Ecuador Lawsuit Report Has Fabricated Evidence, Tainted by Political Pressure (Sept. 15, 2008) (on file with author), *available at* http://www.chevron.com/news/press/release/?id=2008-09-15. Chevron claimed that these findings were made without determining whether specific sites required remediation and overreliance on erroneous aerial photographs. *See* Rebuttal Brief, *supra* note 97, at 16.

105. *See* Rebuttal Brief, *supra* note 97, at 4, 11 (expressing "grave concerns" regarding Cabrera's "superficial and inappropriate" methodology and procedures, including failing to differentiate between environmental damages that occurred before and after 1990); *see also* Defendant's Motion to Dismiss, *supra* note 53, at 40, 43 (accusing Cabrera of conducting sampling at a limited number of well sites and extrapolating results over the entire area of the Consortium's operations and failing to maintain a chain of custody documentation for samples); David Baker, *Chevron Lawyers Indicted In Pollution Case*, S.F. CHRON., Sept. 13, 2008, at C1; Clare Bolton, *Rumble in the Jungle*, LATIN LAWYER, Mar. 28, 2008, at 7, *available at* http://www.chevron.com/documents/pdf/texacorumble.pdf (presenting Silvia Garrigo's accusation of Cabrera's failure to take water samples in the course of his inspection of well sites and production stations); Randy Woods, *Interviews: Sylvia Garrigo/Kent Robertson, Attorney/Media Relations Advisor/Chevron*, BUS. NEWS AMS., Mar. 24, 2008, *available at* http://www.chevron.com/documents/pdf/texacointerviews.pdf.

106. *See* Rebuttal Brief, *supra* note 97, at 5-6 (accusing Cabrera of failing to perform a detailed assessment of the 335 well and production sites in the former concession area and assessing social and economic conditions in the Oriente in violation of his mandate); *see also* Defendant's Motion to Dismiss, *supra* note 53, at 40 (accusing Cabrera of assessing social and economic conditions in the Oriente in violation of his mandate).

107. *See* Rebuttal Brief, *supra* note 97, at 4-6, 8, 11-14 (accusing Cabrera of manipulating and altering evidence "with the purpose of justifying false conclusions," failing to disclose his methodology in order to prevent verification of and challenges to his results, acting in complicity with the Plaintiffs, "whose claims he uniformly accepted with no valid explanation and often in the absence of supporting data," utilizing unqualified personnel to conduct sampling and testing, barring Chevron representatives from locations while sampling was occurring, pledging to assist the Plaintiffs with the gathering of evidence and collaborating with Plaintiffs' attorneys in the preparation of his report); *see also* Defendant's Motion to Dismiss, *supra* note 53, at 42-44 (accusing Cabrera of failing to notify Chevron representatives of dates and times for sampling, discarding visibly clean soil samples, and destroying exculpatory evidence and concluding that the inspection process was "marked by rank amateurism, disregard for scientific protocol, and irredeemable bias" which could not serve as the basis for "legitimate expert determination of the environmental impact [of hydrocarbon operations in the Oriente] or its source"); Press Release, Chevron Corp. *supra* note 104, (accusing Cabrera of backdating photographs of waste pits constructed by Petroecuador in the 1990's to the 1970's in order to make them appear to have been dug by the Consortium).

108. Press Release, Chevron Corp., Federal Court in San Francisco Dismisses Ecuadorean Cancer Claims Against Chevron as Knowingly False (Aug. 7, 2007) *available at* http://www.chevron.com/news/press/Release/?id=2007-08-07; *see* Rebuttal Brief, *supra* note 97, at 4.

109. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR arts. 13, 22, 24, 192 (providing, in part, that foreigners have the same rights as Ecuadorians, that the state is liable for "judicial error . . . [and] the inadequate administration of justice," that every per-

Perhaps the most controversial of Cabrera's conclusions is his calculation of damages. In April 2008, Cabrera assessed the plaintiffs' damages at $16.3 billion, which included claims for wrongful death, environmental remediation, the establishment of health care facilities, the construction of infrastructure for Petroecuador, and the disgorgement of profits earned by Texaco in the course of its operations in Ecuador.[110] Cabrera revised this estimate to $27.3 billion in November 2008.[111] This revision included $9.5 billion for cancer deaths resulting from hydrocarbon contamination, $3.2 billion for groundwater remediation, $1 billion for soil remediation, $8 billion to fund health care and potable water systems in the region and an unjust enrichment penalty of $8.3 billion.[112] This damages calculation exceeded Chevron's net earnings in 2008 and was almost twice the amount of net earnings derived from its international operations.[113]

Chevron has vigorously contested Cabrera's damages estimates. Chevron contended that the estimates greatly exceeded the scope of Cabrera's mandate by assessing damages for alleged injuries beyond environmental injury.[114] Of particular concern in this regard were Cabrera's assessments relating to cancer deaths and unjust enrichment. Chevron criticized the assessment for cancer deaths on the basis that it not only exceeded Cabrera's mandate but also failed to identify the alleged victims, produce supporting documentation, distinguish between types of cancer, and provide an explanation for its inconsistency with official Ecuadorian statistical data on cancer mortality.[115] The court's failure to strike this portion of the damages assessment was particularly egregious giv-

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son is entitled to due process, including "the right to access to [sic] the judicial organs and to obtain the effective, impartial and expedited protection of their rights and interests," and that "the procedural systems [of the state] shall . . . enforce the guarantees of due process").

110. ANNUAL REPORT, *supra* note 4, at 47.

111. *Id.*

112. Amazon Watch, $27 Billion Damages Assessment, http://chevrontoxico.com/about/historic-trial/27-billion-damages-assessment.html (last visited Apr. 13, 2010).

113. ANNUAL REPORT, *supra* note 4, at 34, 38 (stating that Chevron had net earnings of $23.93 billion in 2008, of which $14.58 were derived from its international operations).

114. *See* Rebuttal Brief, *supra* note 97, at 6, 17-18 (criticizing Cabrera's estimates on the basis that they "assessed billions of dollars to compensate for alleged personal injuries, to improve public services, to foster indigenous cultures, to modernize Petroecuador's equipment, and to take away alleged 'unfair profits' " and accusing Cabrera of going "on a roving patrol and, using innuendo and speculation, attempt[ing] to ascribe to [Texaco] endemic social problems that are plainly not of its making").

115. Rebuttal Brief, *supra* note 97, at 17; *see* CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON 10 (2009), *available at* http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf [hereinafter ECUADOR AND THE LAWSUIT]; Press Release, Chevron Corp., Chevron Cites New Instances of Misconduct Marring Trial in Ecuador (Feb. 12, 2009) (on file with author) *available at* http://www.chevron.com/news/press/release/?id=2009-02-12; Press Release, Chevron Corp., *supra* note 108.

en its refusal to permit Chevron to depose Cabrera with respect to his methodology, and the fact that similar claims were deemed frivolous in related litigation occurring in the United States.[116] These shortcomings led Chevron to conclude that the damages assessed for cancer deaths were "completely fabricated."[117] The unjust enrichment penalty was criticized as beyond Cabrera's mandate, lacking a basis in Ecuadorian law, grossly excessive in comparison to the actual profits derived by Texaco from the Consortium's operations and, in any event, not requested in the Complaint.[118]

Those damages estimated within the scope of Cabrera's mandate were, according to Chevron, grossly inflated.[119] Chevron accused Cabrera of including more than $1 billion in soil remediation costs for locations that he did not visit or waste pits that do not exist.[120] This assessment also estimated the cost of remediation of waste pits at $3.08 million per pit when Petroecuador, with the government's approval, was remediating its pits at a cost of $85,000 per pit.[121] Chevron also alleged that the estimate relating to the improvement of Ecuador's potable water system was tainted by Cabrera's failure to take a single drinking water sample.[122] Similar estimates with respect to groundwater remediation were not supported by sufficient data.[123] Chevron concluded that Cabrera's "sole interest was to facilitate the result sought by plaintiffs' counsel and the Government of Ecuador: a windfall damages judgment against a U.S. oil company that never operated in Ecuador and had nothing to do with the Consortium."[124]

Chevron also claimed that the Superior Court was influenced

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116. *See* Rebuttal of Chevron to the Supplemental Expert Report, at 6, Aguinda v. Chevron Texaco Corp., Superior Court of Justice of Nueva Loja (Lago Agrio), No. 002-2003 (filed Feb. 12, 2009) (Ecuador), *available at* http://www.chevron.com/documents/pdf/cabrerarebuttalexecutivesummary.pdf [hereinafter Rebuttal to the Supplemental Expert Report].

117. Press Release, Chevron Corp., *supra* note 104.

118. *See* Rebuttal to the Supplemental Expert Report, *supra* note 116, at 7; *see also* ECUADOR AND THE LAWSUIT, *supra* note 115, at 10; Press Release, Chevron Corp., *supra* note 104; Plaintiff's Myths, *supra* note 98. Chevron claimed that Texaco's "total profits over the 28-year life of the Consortium were approximately $490 million." Rebuttal to the Supplemental Expert Report, *supra* note 116, at 7.

119. *See* Rebuttal Brief, *supra* note 97, at 17.

120. *See* Rebuttal Brief, *supra* note 97, at 6; *see also* ECUADOR AND THE LAWSUIT, *supra* note 115, at 10.

121. *See* ECUADOR AND THE LAWSUIT, *supra* note 115, at 10. According to Chevron, Cabrera's assessment also improperly lowered acceptable levels of contaminants in ground soil in contravention of Ecuadorian law and arbitrarily expanded the area requiring remediation surrounding each waste pit by fifty percent in surface area and twenty-five percent in depth. *See* Rebuttal Brief, *supra* note 97, at 16; *see also* Press Release, Chevron Corp., *supra* note 104.

122. ECUADOR AND THE LAWSUIT, *supra* note 115, at 10.

123. *Id.*

124. Rebuttal to the Supplemental Expert Report, *supra* note 116, at 3.

by political pressure.[125] The primary source of this pressure was Ecuadorian President Rafael Correa.[126] According to Chevron, President Correa has attempted to influence Cabrera and the court since assuming office in January 2007.[127] These efforts include a visit to the former concession area in order "verify the environmental, social, and cultural impacts caused by hydrocarbon exploitation, in particular that of the U.S. company Texaco," statements referring to the plaintiffs' counsel as "compañeros," offering the government's support to the plaintiffs, pledging to assist in evidence gathering and calling upon Ecuador's Prosecutor General to indict persons involved in the Remediation Agreement and Final Act.[128] Additional sources of pressure include members of Ecuador's Constituent Assembly[129] and protestors allegedly organized by the plaintiffs.[130] As a result, Chevron concluded that "the thumbs of politics are weighing heavily on the scales of justice."[131]

Closely related to the exertion of improper political pressure is concern regarding the integrity of the presiding judge Juan Evangelista Nuñez Sanabria (Nuñez). In August 2009, Chevron revealed the existence of taped conversations between Nuñez, private contractors, and Ecuadorian government officials regarding the outcome of the litigation.[132] According to Chevron, the video-

125. ECUADOR AND THE LAWSUIT, *supra* note 115, at 7.

126. *Id.*

127. *Id.*

128. ECUADOR AND THE LAWSUIT, *supra* note 115, at 2, 7-8 (describing President Correa as "a revolutionary man of the people crusading against foreign economic interests" and quoting statements referring to the Plaintiffs' counsel as "compañeros" and calling upon Ecuador's Prosecutor General to indict the "miserable Mafiosi" involved in the Remediation Agreement and Final Act); *see* Rebuttal Brief, *supra* note 97, at 8 (quoting statements by President Correa offering government support to the Plaintiffs, pledging to assist the Plaintiffs in evidence gathering and labeling Texaco's representatives who signed the Remediation Agreement and Final Act as "traitors . . . who for a few dollars are capable of selling souls, country [and] family"); *see also* Bolton, *supra* note 105, at 1 (describing President Correa's visit to the Oriente to "be the witness of the atrocities caused by Texaco," his offer of state support to the Plaintiffs for evidence gathering and call for criminal prosecution of government officials who approved the Remediation Agreement and Final Act).

129. *See* Rebuttal Brief, *supra* note 97, at 8-9 (referring to statements by two members of the Constituent Assembly endorsing the Plaintiffs' lawsuit and placing the economic, social and cultural impacts of hydrocarbon exploitation entirely on Texaco).

130. ECUADOR AND THE LAWSUIT, *supra* note 115, at 7 (alleging that the Plaintiffs organized a courtroom protest on June 14, 2006 in which the presiding judge was assailed in his chambers by demonstrators demanding expedited proceedings). Donziger described these tactics as "something you would never do in the United States, but Ecuador . . . this is how the game is played, it's dirty." *Id.*

131. Juan Forero, *In Ecuador, High Stakes in Case Against Chevron*, WASH. POST, Apr. 28, 2009, at A12 (quoting Chevron spokesman James Craig).

132. *See* David R. Baker & Tyche Hendricks, *Tapes Show Judicial Misconduct, Chevron Says*, S.F. CHRON., Sept. 1, 2009, at A1; *see also* Steven Mufson & Juan Forero, *Chevron Alleges Bribery in Ecuador Suit*, WASH. POST, Sept. 1, 2009, at A8; Press Release, Chevron Corp., Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit (Aug. 31, 2009) (on file with author) *available at* http://www.chevron.com/

taped meetings between the Ecuadorian government officials and the contractors established that: (1) the Ecuadorian government was "managing Judge Nuñez;" (2) Chevron will lose the trial; (3) the Ecuadorian government "provided lawyers to help craft the opinion against Chevron;" (4) President Correa's legal advisor "instructed Judge Nuñez on how to route the judgment money;" and (5) Carlos Patricio Garcia Ortega, a political coordinator for President Correa's Alianza Pais political party, would "give the Judge his share of the bribe money."[133] Chevron further alleged that the two videotaped meetings in which Nuñez participated established that: (1) Nuñez decided to hold Chevron liable for the environmental damage that has occurred in the Oriente; (2) the award would be more or less than $27.3 billion to be determined in his sole discretion; (3) a portion of the award would be directed to the Ecuadorian government; (4) the ruling would be issued in October or November 2009; (5) any appeal initiated by Chevron would be "a formality;" and (6) "[t]he American government [would] tell Chevron: You lost the trial, so pay up."[134] Based upon these disclosures, Chevron called upon Ecuador's Prosecutor General to conduct a full investigation, that Nuñez be disqualified from further participation in the case and that his previous rulings be vacated.[135] Nuñez recused himself on September 4, 2009 at the request of the Prosecutor General, and the case was reassigned to Judge Nicolás Zambrano.[136] Chevron's request to annul Nuñez's rulings was

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news/press/release/?id=2009-08-31. The four recorded meetings occurred in May and June 2009 and involved Carlos Patricio Garcia Ortega, a political coordinator for President Correa's Alianza Pais political party; Juan Pablo Novoa Velasco, a lawyer representing the Ecuadorian government; Aulo Gelio Servio Tulio Ávila Cartagena, a lawyer with alleged connections to Nuñez; Pablo Almeida, an environmental remediation contractor; Rubén Dario Miranda Martinez, an assistant to Patricio Garcia; Diego Borja, a former Chevron contractor; and Wayne Hansen, an American businessman. Letter from Thomas F. Cullen, Jr., Attorney, Jones Day, to Washington Pesántez Muñoz, Prosecutor General of Ecuador (Aug. 31, 2009) (on file with author). Nuñez participated in two of these meetings in Lago Agrio and in Quito. *Id.* at 2.

133. Letter from Thomas F. Cullen, Jr. to Washington Pesántez Muñoz, *supra* note 132, at 2.

134. *Id.*

135. *See id.*; *see also* Baker & Hendricks, *supra* note 132 (referring to Chevron's request to disqualify Nuñez from the case and annul his previous rulings); Simon Romero & Clifford Krauss, *Chevron Offers Evidence of Bribery Scheme in Ecuador Lawsuit*, N.Y. TIMES, Sept. 1, 2009, at A4 (quoting Charles James, Chevron's general counsel, as stating that "[w]e think this information absolutely disqualifies the judge and nullifies anything that he has ever done in this case"); Press Release, Chevron Corp., *supra* note 132 (calling upon the Ecuadorian government to "conduct a full investigation of this matter—focusing not only on the conduct of Judge Nuñez, but also on the very serious indications of political interference in this case"). On August 31, 2009, the Ecuadorian government issued a statement that it found no "corrupt acts" on the part of the government but nevertheless promised that the matter would be "thoroughly, aggressively and fairly investigated." Mufson & Forero, *supra* note 132.

136. *See* David R. Baker, *Judge Recuses Himself in Suit Against Chevron*, S.F. CHRON.,

pending at the time of the preparation of this article.[137]

There are other sources of controversy regarding the conduct of the trial and the plaintiffs' tactics. For example, despite a provision of the Code of Civil Procedure that requires courts to rule upon motions that raise purely legal issues within three days of filing, the Superior Court has yet to rule on Chevron's numerous motions dating back to 2003.[138] Additionally, in May 2009, the New York Attorney General's office issued a letter to Chevron inquiring as to whether it had adequately warned shareholders about the risks it faces in the Lago Agrio litigation, asking it to explain its defenses, provide an estimate of damages and state whether it had established adequate financial reserves.[139] In responding to this inquiry, Chevron stated that it presumed the inquiry was "a result of a campaign by the American trial lawyers behind this case that seeks to pressure Chevron into a settlement."[140] Chevron has resisted this pressure despite the growing damages estimates, the increasing number of procedural obstacles to a fair trial, the incurrence of significant costs and fees defending the litigation over the course of the past six years and the distinct possibility of a signifi-

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Sept. 5, 2009, at DC-1; *see also* Simon Romero & Clifford Krauss, *Under Pressure, Ecuadorean Judge Steps Aside in Suit Against Chevron*, N.Y. TIMES, Sept. 5, 2009, at A8.

137. The Plaintiffs accused Chevron of engaging in a "sting" and a "dirty-tricks operation." Mufson & Forero, *supra* note 132 (quoting Steven Donziger); Romero & Krauss, *supra* note 135 (quoting Steven Donziger). The Plaintiffs called for an investigation of Chevron's role in the videotaping but concluded that the incident would have a minimal impact on the litigation. *See* Romero & Krauss, *supra* note 135 (quoting Steven Donziger as stating that "there needs to be an investigation into Chevron's role in this as much as the judge's" and that "[a]t the end of the day this will not affect the underlying case, . . . other than it might cause a short delay if the judge needs to be replaced").

138. Defendant's Motion to Dismiss, *supra* note 53, at 10 (citing CÓDIGO DE PROCEDIMIENTO CIVIL [Code of Civil Procedure] art. 835).

139. David R. Baker, *N.Y. Asks Chevron to Explain Pollution Case*, S.F. CHRON., May 7, 2009, at C1. New York Attorney General Andrew Cuomo was quoted as stating:

> In recent weeks, we have received complaints regarding Chevron's disclosures of the potential litigation risks and Chevron's characterization of available legal defenses. Given the fact that both New York State and New York City public pension funds hold substantial Chevron shares . . . this office has an interest in ensuring that public statements about the litigation are accurate and complete.

Id. In its 2008 Annual Report, Chevron stated that it did not expect future costs for known environmental obligations that are probable and reasonably estimable to have "a material effect on its consolidated financial position or liquidity. . . [or] any significant impact on the company's competitive position relative to other U.S. or international petroleum or chemical companies." ANNUAL REPORT, *supra* note 4, at 48. However, Chevron also stated that it was "not possible to predict with certainty the amount of additional investments in new or existing facilities or amounts of incremental operating costs to be incurred in the future to . . . remediate and restore areas damaged by prior releases of hazardous materials." *Id.* at 50. Nevertheless, Chevron did not deem such costs to have "a material effect on the company's liquidity or financial position." *Id.*

140. Baker, *supra* note 139 (quoting Chevron spokesman Kent Robertson).

cant verdict in favor of the plaintiffs.[141]

III. THE RECOGNITION OF FOREIGN JUDGMENTS IN THE UNITED STATES

A. Introduction

Recognition of foreign money judgments in the United States is a matter governed by one of three sources of state law.[142] These sources are statutes based upon the 1962 and 2005 Acts and comity.[143] The following section will discuss the mandatory bases upon which foreign money judgments may be disregarded pursuant to the Acts.

B. The Uniform Foreign Money Judgment Recognition Act

The 1962 Act was a product of the National Conference of Commissioners on Uniform State Laws. The Act was intended to increase the likelihood of recognition of U.S. state court judgments abroad by codifying practices applied by the majority of U.S. courts.[144] The 1962 Act has been adopted in thirty states at the

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141. *See* Debra J. Saunders, *Oil and Water Mix in Ecuador*, S.F. CHRON., June 21, 2009, at H6 (quoting Mitch Anderson of Amazon Watch that Chevron should settle the litigation because it has become "a legal Vietnam").

142. In 1941, the U.S. Supreme Court extended its holding in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) to the area of conflict of laws. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). As a result, it has been assumed that federal courts must apply principles of law from the states in which they sit to conflict of laws issues. However, the U.S. Supreme Court has never directly resolved the issue of whether state law governs the recognition of foreign judgments. *See* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 22.35 n.5 (3d ed. 2000); *see also* R. Doak Bishop & Susan Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT'L LAW. 425, 429-30 (1982); Gul, *supra* note 11, at 87; Susan L. Stevens, Note, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 126 (2002).

143. Although beyond the scope of this article, states that have not adopted the 2005 or 1962 Acts rely upon the common law doctrine of comity. Comity is defined as "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." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). In the context of foreign judgments, comity provides that "[n]o sovereign is bound . . . to execute within his dominions a judgment rendered by the tribunals of another state; and if execution be sought . . . the tribunal in which the suit is brought, . . . [is free] to give effect to it or not, as may be found just and equitable." *Id.* at 166; *see* Bank of Augusta v. Earle, 38 U.S. 519, 589 (1839) (defining comity as "the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests"). However, "a procedurally regular and non-fraudulently obtained foreign judgment" is entitled to comity, and the losing party is not permitted to retry the case on the merits or avoid enforcement on the grounds that the judgment was based on an error in law or fact. Balan, *supra* note 11, at 235; *see Hilton*, 159 U.S. at 203.

144. 1962 ACT, *supra* note 7, prefatory note.

time of preparation of this article.[145]

The 1962 Act applies to final, conclusive and enforceable judgments entered in foreign states.[146] Enforceability is limited to judgments "granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters."[147] A foreign judgment meeting these requirements is deemed conclusive between the parties and subject to recognition in the same manner as judgments of sister states.[148] Despite these restrictions, the 1962 Act allows states to recognize foreign judgments not covered by the Act, such as those granting equitable relief, through utilization of comity.[149]

Section 4 of the 1962 Act sets forth three circumstances in which a foreign judgment will not be deemed conclusive. Initially, foreign judgments are not deemed conclusive if the judgment "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[150] The second circumstance is if the foreign court did not have personal jurisdiction over the defendant.[151] The final circumstance is if the foreign court lacked subject matter jurisdiction.[152]

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145. *See supra* note 9 and accompanying text.

146. 1962 ACT, *supra* note 7, § 2. A "foreign state" is defined as "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands." *Id.* § 1(1). A judgment is deemed final, conclusive and enforceable despite the pendency or possibility of an appeal. *Id.* § 2. However, a U.S. court may stay recognition proceedings until such time as the appeal has been fully determined or the period of time in which an appeal may be prosecuted has expired. *Id.* § 6.

147. *Id.* § 1(2).

148. *Id.* § 3. The 1962 Act does not prescribe a uniform procedure by which states are to recognize foreign judgments but leaves this to individual determination utilizing rules applicable to judgments of sister states. *Id.* at prefatory note.

149. *Id.* § 7.

150. *Id.* § 4(a)(1).

151. *Id.* § 4(a)(2). A foreign court will be deemed to possess personal jurisdiction under a wide array of circumstances, including personal service in the foreign state, a voluntary appearance in the foreign state, or an agreement to submit to the personal jurisdiction of the foreign court prior to the commencement of the litigation. *Id.* § 5(a)(1)-(3). An appearance is not deemed voluntarily if it was for the purpose of protecting property from actual or threatened seizure or contesting personal jurisdiction. *Id.* § 5(a)(2). Personal jurisdiction may also exist if the defendant was domiciled in the foreign state or maintained its principal place of business in the state at the time of commencement of the litigation, the defendant had a business office in the foreign state and the foreign proceedings arose from business conducted through such office, or the defendant operated a motor vehicle or airplane in the foreign state and the proceedings arose from such operation. *Id.* § 5(a)(4)-(6). Section 5 also permits courts to recognize other bases for the assertion of personal jurisdiction. *Id.* § 5(b).

152. *Id.* § 4(a)(3). Section 4 also sets forth six instances in which states may refuse recognition of foreign judgments. *Id.* § 4(b)(1)-(6) (providing that a U.S. court may refuse to recognize a foreign judgment due to lack of notice, fraud, public policy, conflict with another final and conclusive judgment or an agreement between the parties, or if the forum was "seriously inconvenient"). These discretionary grounds for non-recognition are beyond the

C. The Uniform Foreign-Country Money Judgments Recognition Act

The National Conference of Commissioners on Uniform State Laws updated the 1962 Act in 2005.[153] The 2005 Act was designed to address four shortcomings of the 1962 Act. These were: (1) clarification of the distinction between recognition and enforcement of foreign judgments, including the difference between foreign judgments and judgments entered within the territory of the United States; (2) allocation of the burdens of proof with respect to the entitlement of a foreign judgment to recognition and establishment of defenses to recognition; (3) designation of procedures by which to seek recognition of a foreign judgment; and (4) establishment of a statute of limitations for recognition proceedings.[154] The Commissioners urged states to adopt the 2005 Act as soon as possible in the interest of promoting uniformity of state law and dissuading the U.S. Congress from preempting the field.[155]

In a manner similar, but not identical to its predecessor, the 2005 Act applies to final, conclusive and enforceable judgments[156] granting or denying recovery of a sum of money[157] entered in a for-

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scope of this article.

153. National Conference of Commissioners on Uniform State Laws, Summary of the Uniform Foreign-Country Money Judgments Recognition Act, http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-ufcmjra.asp (last visited Apr. 13, 2010) (stating that the 2005 Act is "not a radically new act . . . [but rather] a necessary upgrade for the 21st Century").

154. *Id.*

155. *Id. But see* Melinda Luthin, *U.S. Enforcement of Foreign Money Judgments and the Need for Reform*, 14 U.C. DAVIS J. INT'L L. & POL'Y 111, 145-46 (2007) (concluding that the individual states have long established practices with respect to the enforcement of foreign judgments and thus have little incentive to unify their practices through adoption of the 2005 Act). According to Luthin, true uniformity can only be achieved through adoption of federal legislation preempting state law. *Id.* The 2005 Act has been adopted by thirteen states. *See supra* note 10 and accompanying text.

156. 2005 ACT, *supra* note 7, § 3(a)(2). Unlike the 1962 Act, the 2005 Act defines when a judgment is final, conclusive and enforceable. A judgment is final "when it is not subject to additional proceedings in the rendering court other than execution." *Id.* § 3 cmt. 3. A judgment is deemed conclusive when "it is given effect between the parties as a determination of their legal rights and obligations." *Id.* "A judgment is enforceable when the legal procedures of the state to ensure that the judgment debtor complies with the judgment are available to the judgment creditor to assist in the collection of the judgment." *Id.* As in the 1962 Act, a judgment is final, conclusive and enforceable even if it is appealable, but a U.S. court may stay recognition proceedings until such time as the appeal has been fully determined or the period of time in which it may be prosecuted has expired. *Id.* § 8.

157. *Id.* § 3(a)(1). The 2005 Act clarifies the issue of recognition of a foreign court judgment granting or denying recovery of a sum of money and providing for some other form of relief. In such circumstances, the 2005 Act is applicable to the portion of the judgment granting or denying monetary relief but not to that portion of the judgment providing for some other form of relief. *Id.* § 3 cmt. 2. U.S. courts remain free to recognize the non-monetary portion of any foreign judgment through the application of comity. *Id.* §§ 3 cmt. 2,

eign country.[158] A foreign judgment meeting these requirements is recognizable in the same manner as judgments of sister states.[159] The 2005 Act diverges from the 1962 Act by including definitions of fines and penalties[160] and assigning the burden of proof to the party seeking recognition.[161]

Section 4 sets forth three circumstances in which a foreign judgment may not be recognized. These circumstances are identical to the three circumstances set forth in Section 4(a) of the 1962 Act.[162] There are, however, two important distinctions. Initially,

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11. In a manner similar to its predecessor, the 2005 Act does not apply to judgments for taxes, fines, penalties and money judgments arising from domestic relations proceedings. *Id.* § 3(b)(1)-(3).

158. *Id.* § 2(1)-(2). The definitions in this section of the 2005 Act are different than those set forth in the 1962 Act. The 2005 Act no longer utilizes the term "foreign state" but rather uses "foreign country," which it defines as:

> (1) "Foreign country" means a government other than:
> (A) the United States:
> (B) a state, district, commonwealth, territory, or insular possession of the United States; or
> (C) any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the United States Constitution.

Id. § 2(1)(A)-(C); *see also id.* § 2 cmt. 1. A "foreign-country judgment" is defined as "a judgment of a court of a foreign country." *Id.* § 2(2). The Commissioners deemed these changes necessary for several reasons. First, substitution of the terms "foreign country" and "foreign-country judgment" for "foreign state" and "foreign judgment" were necessary in order to clarify that the Act does not apply to recognition of sister-state judgments. *Id.* § 2 cmt. 1; *see also* Eagle Leasing v. Amandus, 476 N.W.2d 35, 38 (Iowa 1991) (commenting on the error of the lower court's application of the 1962 Act to a judgment entered by a West Virginia court and noting that the term "foreign judgment" is a term of art normally applied to sister-state judgments). Second, the addition of the reference to the Full Faith and Credit Clause was designed to prevent confusion between recognition and enforcement. A judgment entitled to full faith and credit may be immediately enforced through state registration procedures. 2005 ACT, *supra* note 7, § 2 cmt. 1. Conversely, a "foreign-country judgment" must be recognized prior to enforcement. *Id.* The reference to a court in "foreign-country judgment" clarifies that the judgment must be of an adjudicative body within the foreign country and specifically excludes alternative dispute resolution procedures. *Id.* § 2 cmt. 3. Nevertheless, foreign-country judgments subject to recognition need not take a particular form and include judgments rendered in proceedings in which a government entity is a party. *Id.* § 2 cmts. 3-4.

159. 2005 ACT, *supra* note 7, § 7(1)-(2).

160. *Id.* § 3 cmt. 4. A foreign-country judgment will be deemed a fine or penalty based upon a determination of whether its purpose is "remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice." *Id.* However, U.S. courts remain free to recognize foreign judgments imposing fines, penalties or liability for taxes through the application of comity. *Id.* §§ 3 cmt. 4, 11.

161. *Id* § 3(c). This allocation is based upon case law interpreting the 1962 Act, which placed the burden of proof upon the party seeking recognition. *See*, *e.g.*, Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 285 (S.D.N.Y. 1999); S.C. Chimexim, S.A. v. Velco Enters., Ltd., 36 F. Supp. 2d 206, 212 (S.D.N.Y. 1999); Mayekawa Mfg. Co. v. Sasaki, 888 P.2d 183, 189 (Wash. Ct. App. 1995).

162. *See supra* notes 150-52 and accompanying text. In their comments to the 2005 Act, the Commissioners elaborated upon the non-recognition of a judgment rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due

the presence of any of these circumstances renders a foreign judgment non-conclusive pursuant to the 1962 Act.[163] By contrast, the presence of any of these circumstances does not render a foreign judgment non-conclusive pursuant to the 2005 Act but does render such judgment nonrecognizable.[164] Section 4 also provides that "[a] party resisting recognition of a foreign-country judgment has the burden of establishing . . . a ground for nonrecognition."[165] This section was designed to resolve the conflict between different courts interpreting the 1962 Act.[166]

Sections 6 and 9 of the 2005 Act address procedural issues. Section 6 requires the filing of an original action seeking recognition of a foreign judgment or as a counterclaim, crossclaim, or affirmative defense in pending litigation.[167] This new requirement was imposed in order to prevent plaintiffs from using registration and enforcement procedures reserved for judgments of sister states for foreign country judgments.[168] This requirement was not imposed, however, to allow defendants to relitigate the merits of foreign proceedings in U.S. courts.[169] Section 9 establishes a statute of limitations for the filing of recognition proceedings in the United

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process of law. Specifically, the Commissioners noted that the focus of this inquiry was on the basic fairness of the foreign proceedings rather than procedural differences such as the absence of a jury trial or different evidentiary rules. 2005 ACT, *supra* note 7, § 4 cmt. 5. The U.S. Supreme Court's holding in Hilton v. Guyot, 159 U.S. 113 (1895) was particularly useful in this regard. According to the Commissioners, "impartial administration and basic procedural fairness" are provided by a system that grants:

> a full and fair trial . . . before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of . . . [the United States] should not allow it[s] full effect.

Id. (quoting *Hilton* 159 U.S. at 202).

163. 1962 ACT, *supra* note 7, § 4(a)(1)-(3).

164. 2005 ACT, *supra* note 7, § 4(b)(1)-(3).

165. *Id.* § 4(d).

166. *Id.* § 4 cmt. 13 (citing Bridgeway Corp., 45 F. Supp. 2d at 285 (placing the burden of proof to demonstrate the absence of a mandatory basis for non-recognition on the plaintiff), Courage Co. v. ChemShare Corp., 93 S.W.3d 323, 331 (Tex. Ct. App. 2002) (requiring the party seeking to avoid recognition to prove grounds for non-recognition)). Section 4 also sets forth eight discretionary instances in which states may refuse recognition of foreign judgments. 2005 ACT, *supra* note 7, § 4(c)(1)-(8) (providing that a U.S. court may refuse to recognize a foreign judgment due to lack of notice, fraud, public policy, a conflict between the foreign judgment and another final and conclusive judgment or an agreement between the parties, the foreign court was "a seriously inconvenient forum," the judgment was "rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment" or the specific foreign proceeding resulting in the judgment was inconsistent with the requirements of due process).

167. *Id.* § 6(a)-(b).

168. *Id.* § 6 cmt. 1.

169. *Id.* § 6 cmt. 3.

States.[170]

The Acts do not mention any requirement of reciprocity. Inclusion of such a requirement in the 1962 and 2005 Acts as adopted by the states has been subject to much criticism.[171] Nevertheless, a handful of states have included reciprocity as a basis for non-recognition.[172]

IV. *AGUINDA* RETURNS TO THE UNITED STATES: MANDATORY GROUNDS FOR NON-RECOGNITION

A. The Existence of a Recognizable Foreign Money Judgment

1. Introduction

The initial issue in determining whether a U.S. court should recognize a judgment entered by the Superior Court is whether there is a money judgment that is final, conclusive, and enforcea-

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170. *Id.* § 9. The statute of limitations is "the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country." *Id.* This section is intended to eliminate disparities in case law interpreting the 1962 Act. *Id.* § 9 cmt. (citing La Societe Anonyme Goro v. Conveyor Accessories, Inc., 677 N.E.2d 30 (Ill. App. Ct. 1997) (applying the statute of limitations applicable to domestic judgments to foreign judgments), Vrozos v. Sarantopoulos, 552 N.E.2d 1053 (Ill. App. Ct. 1990) (applying Illinois' general statute of limitations to proceedings to enforce foreign judgments)).

171. *See*, *e.g.*, SCOLES ET AL., *supra* note 142, §§ 24.33-.38 (noting the absence of reciprocity in English common law and U.S. statutes and common law); William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 230 (2002) (criticizing reciprocity requirements as holding the interests of private litigants hostage to the government's interest in promoting reciprocity); Friedrich Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 9-10 (1988) (noting the absence of reciprocity in English common law and U.S. statutes and common law, and cited by Stevens, *supra* note 142, at 118, 120); Vishali Singal, Note, *Preserving Power Without Sacrificing Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments*, 59 HASTINGS L.J. 943, 971-72 (2008) (criticizing reciprocity requirements as resulting in renvoi as the United States and foreign states refuse to recognize one another's judgments due to failure to reciprocate).

172. *See* FLA. STAT. § 55.605(2)(g), (2009) (stating that a foreign judgment need not be recognized if "[t]he foreign jurisdiction where judgment was rendered would not give recognition to a similar judgment rendered in this state"); GA. CODE ANN. § 9-12-114(10) (2008) (prohibiting the recognition of a foreign judgment if "[t]he party seeking to enforce the judgment fails to demonstrate that judgments of courts of the United States and of states thereof of the same type and based on substantially similar jurisdictional grounds are recognized and enforced in the courts of the foreign state"); ME. REV. STAT. ANN. tit. 14, § 8505(2)(G) (2009) (stating that a foreign judgment need not be recognized if "[t]he foreign court rendering the judgment would not recognize a comparable judgment of this State"); MASS. GEN. LAWS ch. 235, § 23A (2008) (prohibiting recognition of foreign judgments if "judgments of this state are not recognized in the courts of the foreign state"); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (2009) (stating that "a foreign judgment need not be recognized if . . . it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of 'foreign country judgment' ").

ble in Ecuador that does not constitute a fine or penalty. The burden of proof with respect to these issues rests with the plaintiffs.[173] Assuming that Ecuadorian courts would recognize a judgment issued by the Superior Court as final, conclusive, and enforceable, the only issues with respect to recognition in the United States are the existence of a money judgment and the absence of a fine or penalty. These issues present significant obstacles for the plaintiffs.

2. Legal and Equitable Relief

Foreign money judgments are not automatically entitled to recognition. Rather, the judgment must refer to a "specific sum of money."[174] A finding of liability with the damages phase of the trial or the determination of specific amounts deferred to a later date is not a foreign judgment entitled to U.S recognition. Equally unrecognizable is any judgment that grants the plaintiffs an award of undetermined costs and fees incurred in the litigation.[175]

The plaintiffs did not request a specific sum of money in the Complaint.[176] Presumably the Superior Court will award a specific sum of money and designate portions of this award to the various claims for relief. However, it is possible that the Superior Court may defer a decision on damages, in whole or in part, for later resolution. A deferral of the damages phase of the litigation would have the advantage of allowing the court to more closely examine all aspects of the plaintiffs' claims. Additionally, a deferral would allow Chevron to pursue an appeal on the issue of liability alone without complicating such proceedings with the thorny issue of damages. The Superior Court's interest would be further served from the standpoint of judicial economy should an appellate court

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173. *See*, *e.g.*, 2005 ACT, *supra* note 7, § 3(c); *see also supra* note 161 and accompanying text.

174. *See*, *e.g.*, Kreditverein der Bank Austria Creditanstalt für Niederösterreich und Burgenland v. Nejezchleba, No. 04-72(JRT/JSM), 2006 U.S. Dist. LEXIS 47011, at *9-10 (D. Minn. June 30, 2006) (denying recognition of an Austrian judgment in which the appellate court had affirmed the defendant's liability but remanded the issue of damages to the lower court for precise determination); Nicor Int'l Corp. v. El Paso Corp., 292 F. Supp. 2d 1357, 1365 (S.D. Fla. 2003) (refusing to recognize a Dominican judgment that failed to award a specific sum of money); *In re* Transamerica Airlines, Inc., No. 1039-VCP, 2007 Del. Ch. LEXIS 68, at *67-68 (Del. Ch. May 27, 2007) (denying recognition to portions of a Nigerian judgment that determined the plaintiff was entitled to damages for breach of contract but failed to reduce such damages to a specific amount); Bianchi v. Savino Del Bene Int'l Freight Forwarders, Inc., 770 N.E.2d 684, 696-98 (Ill. Ct. App. 2002) (refusing to recognize an Italian judgment that did not award the plaintiff a specific sum of money).

175. *See*, *e.g.*, Farrow Mortgage Serv. Pty Ltd. v. Singh, No. 93-7171, 1995 Mass. Super. LEXIS 495, at *11-12 (Mass. Super. Ct. Mar. 30, 1995) (refusing to recognize an Australian judgment to the extent it awarded undetermined litigation costs).

176. Lago Agrio Complaint, *supra* note 2, at 26 (stating that "[t]he amount of the claim, in view of the nature of it, is at this time, undetermined").

determine that Chevron has no liability.

This approach also would provide the parties with the opportunity to reach a settlement. This outcome would be preferable to the plaintiffs and the court. The plaintiffs would receive some amount of compensation without having to expend time and money and risk the uncertainties associated with a U.S. recognition action. The court's interest in its reputation and the sanctity of its judgments would be preserved by an outcome in which a review of its determinations by a U.S. court could be avoided. Nevertheless, a complete deferral of any award of damages would render the foreign judgment unrecognizable in the United States. A partial deferral would render recognizable only those portions of the judgment for which specific amounts of money had been awarded.[177] At the very least, such an outcome would cause a U.S. court to stay any recognition action pending future proceedings in Ecuador.[178]

U.S. recognition of other relief sought by the plaintiffs in Ecuador presents a clearer issue. In their Complaint, the plaintiffs requested significant equitable relief.[179] This relief may not be recognized by a U.S. court should it be granted by the Superior Court. Rather, only the monetary portion of a foreign court judgment consisting of both legal and equitable relief is entitled to recognition utilizing the Acts.[180] However, no provision of either Act prevents recognition of foreign judgments other than those granting or denying monetary relief. The Acts establish a floor for the recognition of foreign judgments but not a ceiling. States are free to recognize foreign court judgments utilizing comity.[181] This freedom applies to injunctive relief such as that sought by the plaintiffs.[182]

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177. *Farrow Mortgage Serv. Pty Ltd.*, 1995 Mass. Super. LEXIS 495, at *11-12 (refusing to recognize only those portions of an Australian judgment that were not reduced to specific sums of money); *see also In re Transamerica Airlines, Inc.*, 2007 Del. Ch. LEXIS 68, at *67-68 (determining that a portion of a Nigerian judgment that did not award a specific sum of money for breach of contract was not recognizable).

178. *See, e.g.*, *Kreditverein der Bank Austria*, 2006 U.S. Dist. LEXIS 47011, at *10 (ordering that a U.S. recognition action be stayed "[in] the interests of judicial economy and the prevention of piecemeal litigation" pending a determination and award of a specific sum of money by an Austrian court).

179. *See supra* note 84 and accompanying text.

180. 2005 ACT, *supra* note 7, § 3 cmt. 2 (stating that "[i]f a foreign-country judgment both grants or denies recovery of a sum [sic] money and provides for some other form of relief, this Act would apply to the portion of the judgment that grants or denies monetary relief, but not to the portion that provides for some other form of relief").

181. *Id.* §§ 3 cmt. 2, 11 (stating that "U.S. court[s] . . . would be left free to decide to recognize and enforce the non-monetary portion of the judgment under principles of comity or other applicable law" and providing that "[t]his [act] does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this [act]").

182. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'antisemitisme, 433 F.3d 1199, 1213-14 (9th Cir. 2006) (in which the Ninth Circuit concluded that the 1962 Act as adopted by California neither expressly authorized or prevented the enforcement of foreign injunc-

Despite this freedom, it is unlikely that a U.S. court applying comity would enforce injunctive relief that imposes the enormous obligations sought by the plaintiffs. As will be discussed later in this article, Chevron possesses significant defenses to recognition of the monetary portion of any judgment entered by the Superior Court let alone any provision granting equitable relief.[183] Recognition of any equitable portion of the Superior Court's order is further problematic to the extent U.S. courts require reciprocity as a precondition to recognition.[184]

Additionally, U.S. courts have expressed reluctance to recognize and enforce injunctive relief entered in foreign proceedings.[185] Recognition of any such relief must either adhere exactly to the provisions of the foreign injunction or risk leading to inconsistent interpretation and enforcement. Furthermore, any U.S. amendment to the foreign injunction is an expression of disrespect for the issuing court and would unnecessarily interfere with ongoing foreign proceedings. Any interference would offend rather than advance the interests recognized by comity.[186] U.S. case law recognizing foreign injunctions is distinguishable as having narrow application[187] and requiring the foreign proceedings to be "orderly, fair and consistent with United States policy," a conclusion which is in significant doubt with respect to the proceedings against Chevron in Ecuador.[188]

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tive relief); *see also* Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 161 (2001) (noting that "[n]othing . . . prevents recognition or enforcement of judgments other than money judgments").

183. *See infra* Part IV.A.2-B.3.

184. For a discussion of *Hilton's* reciprocity requirement, see *supra* note 162 and accompanying text.

185. *See*, *e.g.*, Pilkington Bros. P.L.C. v. AFG Indus., Inc., 581 F. Supp. 1039, 1046 (D. Del. 1984) (refusing to issue a preliminary injunction prohibiting the defendant from violating an injunction issued by an English court on the bases that a U.S. injunction might interfere with the foreign proceedings and lead to inconsistent interpretation and enforcement of the English injunction).

186. *See* Hilton v. Guyot, 159 U.S. 113, 166 (1895) (noting that the interests advanced by comity are utility, convenience and the establishment of usages amongst states by which final judgments of their courts are executed); *see also* Somportex, Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (stating that the underlying interests served by comity are "practice, convenience, and expediency").

187. *See*, *e.g.*, Clarkson Co. v. Shaheen, 544 F.2d 624, 632 (2d Cir. 1976) (issuing an injunction granting a trustee in a Canadian bankruptcy proceeding access to documents located within the United States).

188. *See*, *e.g.*, Murray v. British Broad. Corp., 906 F. Supp. 858, 865 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 287 (2d Cir. 1996) (concluding that the United Kingdom provided an adequate alternative forum as an injunction entered by an English court preventing copyright infringement would be enforceable in the United States). The holding in *Murray* is further distinguishable as it was entered in the context of the defendant's motion to dismiss on the basis of *forum non conveniens*, a significant determination but nevertheless lacking the gravity of a judicial determination of whether to recognize a judgment entered by a foreign

3. The Prohibition upon Fines and Penalties

The award of a specific sum of money to the plaintiffs is only the starting point for the recognition of a foreign judgment. The Acts exclude judgments imposing penalties or fines from recognition.[189] This exclusion is based upon the long-standing rule that states will not enforce one another's public laws.[190]

Both Acts fail to define the terms "penalty" and "fine." However, a common definition may be found in case law applying the Acts as well as comity.[191] According to these cases, the test for whether a judgment is a fine or penalty focuses on its "essential character."[192] The specific issue is whether the judgment is "a punishment of an offence against the public, or a grant of a civil right to a private person."[193] A judgment which benefits private persons and compensates them for individual harm is remedial in nature and generally does not constitute a fine or penalty.[194] By contrast, a judgment that punishes an offense against public justice is more likely to be deemed a fine or penalty.[195] Such actions are penal to the extent they award "a penalty to the state, or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong."[196]

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court. *See id.*

189. *See* 2005 ACT, *supra* note 7, § 3(b)(2).

190. 2005 ACT, *supra* note 7, § 3 cmt. 4; *see also* Huntington v. Attrill, 146 U.S. 657, 673-74 (1892) (wherein the Court stated that "a penal law, in the international sense . . . cannot be enforced in the courts of another State"); The Antelope, 23 U.S. 66, 123 (1825) (wherein Chief Justice Marshall stated that "[t]he Courts of no country execute the penal laws of another"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 483, reporters' n.2 (1987).

191. *See* Java Oil Ltd. v. Sullivan, 86 Cal. Rptr. 3d 177, 183 (Cal. Ct. App. 2008).

192. *Id.*

193. *Huntington*, 146 U.S. at 683.

194. The U.S. Supreme Court has summarized this test as follows:

> [t]he question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.

Id. at 673-74; *see also* Erbe Elektromedizin GMBH v. Canady, 545 F. Supp. 2d 491, 497 (W.D. Pa. 2008) (applying *Huntington* to the recognition of an English judgment for patent infringement utilizing the 1962 Act); Chase Manhattan Bank, N.A. v. Hoffman, 665 F. Supp. 73, 75-76 (D. Mass. 1987) (applying *Huntington* to the recognition of a Belgian judgment for embezzlement and related offenses utilizing the 1962 Act); *Java Oil Ltd.*, 86 Cal. Rptr. 3d at 183 (applying *Huntington* to the recognition of a Gibraltar judgment for attorneys' fees utilizing the 1962 Act and stating that, in order to be deemed penal, "[t]he purpose must be, not reparation to one aggrieved, but vindication of the public justice").

195. *See Hoffman*, 665 F. Supp. at 75-76.

196. Loucke v. Standard Oil Co., 120 N.E. 198, 199 (1918).

However, these characterizations are not conclusive. Rather, courts must carefully examine each foreign judgment to determine whether they more closely implicate remediation for individual plaintiffs or punishment for breaches of public justice.[197] Thus, a civil judgment based upon criminal activity yet purporting to compensate affected individuals for actual losses suffered may be entitled to recognition.[198] Similarly, a civil action brought by the government seeking compensation or restitution for the benefit of private individuals should not automatically be deemed penal.[199] Conversely, a judgment rendered in litigation brought by individuals to vindicate rights possessed by the public at large may be penal.

Despite this flexibility, the definition of fines and penalties presents serious obstacles to the recognition of any judgment entered by the Superior Court. Initially, any damages assessed against Chevron relate to the vindication of public rather than private rights. Ecuador's Constitution recognized environmental protection as a societal right consisting of the right to "live in a healthy environment, ecologically balanced and free from pollution."[200] Those areas within the scope of this right included environmental preservation, the conservation of ecosystems and biodiversity, the sustainable development of natural resources, the prevention of pollution and restoration of contaminated sites.[201] The government was designated as the protector of these rights and was required to undertake precautionary measures with respect to any activities that could negatively impact the environment and assume responsibility for environmental injuries.[202] Of particular importance in this regard was the requirement of governmental regulation of all aspects of hydrocarbon exploration and exploitation, including production, distribution, and use of toxic sub-

197. *See* Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 202 (1932) (stating that "civil claims should never be denied extrastate enforcement merely because the epithet penal can be attached to them").

198. *See*, *e.g.*, *Hoffman*, 665 F. Supp. at 76 (concluding that a Belgian judgment was not penal despite the criminal nature of the underlying activity and proceeding as the associated damage petition sought a civil remedy. The judgment was not based on a violation of public justice and the benefit of the judgment accrued to private individuals).

199. 2005 ACT, *supra* note 7, § 2 cmt. 4; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 89, cmt. a (1971) (stating that "actions brought by a private person or public body to recover compensation for a loss" are not penal for purposes of enforcement of foreign judgments).

200. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 23(6); *see also* Xavier Sisa Cepeda, *Legal Perspectives on the Debate Concerning Social-Environmental Issues and Petroleum Development in Ecuador*, 10 SW. J. L. & TRADE AM. 41, 43 (2004).

201. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 86.

202. *Id.* art. 91.

stances.[203]

The purpose of the Lago Agrio Complaint and the relief sought by the plaintiffs is the vindication of these societal rights. The fundamental claim underlying the Complaint is an assumption of the Ecuadorian government's constitutional obligations to preserve and protect the environment, prevent pollution and restore contaminated sites. The remedies sought by the plaintiffs are also the responsibility of the Ecuadorian government. This is particularly true of the equitable relief seeking remediation and restoration of the concession area, affirmative acts which are clearly within the state's constitutional obligations.

The same conclusion holds true with respect to the damages sought by the plaintiffs. The plaintiffs are serving as a collection agency for the Ecuadorian government whose responsibility includes the performance of the requested remediation and incurrence of the costs associated therewith. The plaintiffs' characterization of the litigation as a popular action on behalf of "undetermined people" is further evidence that the litigation was filed and prosecuted in the interest of the whole community to redress a public wrong.[204] In so doing, the plaintiffs, although private individuals, are seeking to vindicate rights possessed by the public at large. The result will be a judgment that is penal in nature and thus incapable of recognition.

This conclusion is further bolstered by the identity of the parties receiving the primary benefit of any damages award. The plaintiffs have made no effort to identify affected individuals, the injuries they suffered or the specific amounts of damages sought as compensation. The Complaint did list forty-eight individuals but failed to describe their injuries with any degree of specificity. These failures, despite repeated opportunities to present the Superior Court with specific injuries and claims on behalf of identified individuals, strengthens the conclusion that the litigation seeks the imposition of a penalty as vindication for public rights rather than compensation for documented individual loss.[205]

Furthermore, the Complaint seeks payment of ten percent of

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203. *See* Phoenix Can. Oil Co. v. Texaco, Inc., 658 F. Supp. 1061, 1071-72 (D. Del. 1987) (quoting Ecuador's then Minister of Natural Resources, Gustavo Jarrin Ampudia, as stating that "the country is the owner of its resources. All of the wealth of the subsoil according to the law, is the inalienable and inprescribable [sic] patrimony of the State").

204. *See* Lago Agrio Complaint, *supra* note 2, at 21; *see also supra* note 86 and accompanying text.

205. *See* Porter v. Montgomery, 163 F.2d 211, 215 (3d Cir. 1947) (noting that "[a] civil action is for damages if it is brought for the compensation of the injured individual" rather than those who have not suffered a direct injury).

the total damages awarded to Frente.[206] This remittance was requested despite the fact that Frente was not named as a plaintiff and has no experience with environmental remediation or the provision of medical services.[207] The requested remittance, which may total $2.7 billion should the plaintiffs succeed on all of their claims, has been characterized as an effort to "claim a monopoly of representation of all people affected by Texaco and manage local politics in an undemocratic fashion."[208] The absence of a demonstrable interest by Frente and the potential size of the damages award which bears no relationship to actual injury suffered by the organization strengthen the conclusion that the litigation seeks the imposition of a penalty as vindication of public rights.[209]

The public purpose behind the litigation is also reflected in a statement made by the plaintiffs' counsel Steven R. Donziger.[210] Donziger's description more closely resembles a penalty for success in the global marketplace or a tax designed to shift the burden associated with globalization than an effort to compensate affected individuals that have suffered demonstrable loss as a direct result of Chevron's activities in Ecuador.

Even more indicative of the public interests served by the litigation was a statement by Cabrera. Cabrera described his mandate as to "achieve change in the overall economic, political and social paradigm to a new view of equality of entitlements, with economic solidarity that has as its ultimate goal benefiting the population as a whole instead of elitist profiteering."[211] According to Cabrera, his mandate could be achieved by a result that values rational and sustainable use of the environment and energy and food supply independence.[212] Cabrera's understanding of his mandate more closely resembles the vindication of public rights rather than an effort to compensate individuals negatively impacted as a direct result of Texaco's activities in Ecuador. Cabrera's description carries considerable weight given his role as the sole expert designated by the Superior Court to determine issues of injury, causation and liability.

Finally, the size of the recommended award more closely resembles a penalty or fine rather than compensation for actual in-

206. Lago Agrio Complaint, *supra* note 2, at 25.
207. Kimerling, *supra* note 2, at 631-32.
208. *Id.* at 632.
209. *See Porter*, 163 F.2d at 215 (noting that a civil action "is for a penalty if it seeks to obtain a sum of money for . . . an entity which has not suffered direct injury by reason of any prohibited action").
210. *See* Donziger, *supra* note 5 and accompanying text.
211. Rebuttal to the Supplemental Expert Report, *supra* note 116, at 8.
212. *Id.*

jury. Courts confronted with judgments, including double and treble damages, have held such awards to be unrecognizable penalties.[213] At $27.3 billion, Cabrera's recommended award is the largest civil damages award ever proposed and is equal to approximately half of Ecuador's gross domestic product.[214] The amount is more than fifty-five times Texaco's net profits derived from its operations in Ecuador and bears no relation to Texaco's ownership interest in the Consortium.[215] If awarded in its entirety, the damages would exceed Chevron's net income for 2008 by more than $3 billion and would be almost double the amount of its net international earnings.[216] According to Chevron, more than ninety percent of the recommended award has no relation to the environmental issues that Cabrera was ordered to assess.[217] Although Chevron's estimate may overstate the amount of damages attributable to items outside of Cabrera's mandate, it may nevertheless be concluded that a significant portion of these damages do not arise from demonstrable injuries suffered by any of the plaintiffs.

The specific elements constituting Cabrera's damages estimates suffer from similar flaws. For example, the assessment of damages for cancer deaths failed to identify the alleged victims, produce supporting documentation, distinguish between types of cancer, or provide an explanation for its inconsistency with official Ecuadorian statistical data on cancer mortality.[218] Other estimates also were grossly inflated. These estimates included the cost of remediation of waste pits, the improvement of potable water systems, and remediation of groundwater contamination.[219] Other damages claims imposed costs on Chevron rather than served a compensatory purpose such as those associated with creation of a healthcare system, raising the standard of living of indigenous populations and funding improvements in Petroecuador's infrastructure.[220] These costs are not insubstantial and total more than $1.2 billion.[221]

Cabrera's damages estimate includes disgorgement of $8.3 billion in alleged profits earned by Texaco in the course of its partici-

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213. *See*, *e.g.*, Java Oil Ltd. v. Sullivan, 86 Cal. Rptr. 3d 177, 183 (Cal. Ct. App. 2008).
214. Rebuttal to the Supplemental Expert Report, *supra* note 116, at 1.
215. *See supra* notes 19-30, 118 and accompanying text.
216. *See supra* note 113 and accompanying text.
217. Rebuttal Brief, *supra* note 97, at 6, 17.
218. *See supra* note 115 and accompanying text.
219. *See supra* notes 120-24 and accompanying text.
220. *See* Press Release, Chevron Corp., *supra* note 104.
221. *Id.* (estimating the cost of creation of a healthcare system at $480 million, efforts to raise the standard of living of indigenous populations at $430 million, and improvement of Petroecuador's infrastructure at $375 million).

pation in the Consortium.[222] This amount, which constitutes more than thirty percent of the total damages estimate, clearly serves a punitive rather than compensatory purpose and was characterized as such by Cabrera himself.[223] This conclusion is further bolstered by the absence of such a remedy in Ecuadorian law, a fact acknowledged by the lack of an unjust enrichment claim in the Complaint.[224] Even assuming such a claim would be recognized under Ecuadorian law, it has no relation to compensating any of the Plaintiffs for injuries resulting from Texaco's activities. Rather, this claim and the amount sought pursuant thereto more closely resemble an attempt to vindicate rights through disgorgement of corporate profits alleged to have been earned through unlawful exploitation of a public resource. When combined with the previously-referenced estimates, a strong case may be made that a significant portion of the damages award would provide a windfall for the plaintiffs against a U.S. company that never operated in Ecuador and had nothing to do with the Consortium.[225]

If these damages are deemed penal rather than compensatory, their recognition in the United States may also be thwarted by restrictions on punitive damage awards. The Due Process Clause of the U.S. Constitution imposes substantive limits on the ability of U.S. courts to impose and, by extension, recognize punitive damages.[226] Awards imposing "grossly excessive" punishments are constitutionally prohibited.[227] Although the Court has not annunciated a bright line test for determining when such awards are constitutionally impermissible, it has indicated that few awards exceeding a single digit ratio between compensatory and punitive damages will satisfy due process.[228] Thus, the Court has struck down judgments where the punitive damages awarded by the trial court were 90, 145 and 500 times the amount of compensatory damages.[229] Furthermore, the permissible ratio must be smaller as

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222. *See* Amazon Watch, *supra* note 112 and accompanying text.

223. Rebuttal to the Supplemental Expert Report, *supra* note 116, at 7 (quoting Cabrera as conceding that the unjust enrichment damages are not intended to compensate for any alleged harm but rather might be imposed as a "punitive" measure).

224. *Id.*; *see also* ECUADOR AND THE LAWSUIT, *supra* note 115, at 10; Press Release, Chevron Corp., *supra* note 104; Plaintiff's Myths, *supra* note 98.

225. *See* Rebuttal to the Supplemental Expert Report, *supra* note 116, at 3.

226. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001).

227. *Id.* at 434.

228. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

229. *Id.* (punitive damages awarded in bad faith case were 145 times the amount of compensatory damages); *Cooper Indus., Inc.*, 532 U.S. at 441-42 (punitive damages awarded in unfair competition case were ninety times the amount of compensatory damages); BMW of N. Am. v. Gore, 517 U.S. 559, 582 (1996) (punitive damages awarded in fraud case were five hundred times the amount of compensatory damages).

the size of the compensatory award increases.[230] Awards in excess of a single digit ratio are also suspect as unconstitutional attempts to redistribute wealth, especially if they are entered against a large nonresident corporation.[231] Equally suspect are large awards purporting to punish a wrongdoer on behalf of nonparty victims.[232]

These standards increase the plaintiffs' burden with respect to recognition. Utilizing Chevron's calculation that ninety percent of the claimed damages do not serve a compensatory purpose, the maximum amount of the compensatory award would total $2.7 billion, and the punitive portion of the award would be $24.5 billion. This ratio exceeds nine times and would thus draw close to the constitutional prohibition upon double digit punitive awards. Furthermore, applying the Court's reasoning in *State Farm Mutual Automobile Insurance Co. v. Campbell,* the ratio should be far less given the size of the compensatory award. Any such punitive award also falls within Justice O'Connor's warning regarding attempts to redistribute wealth through punitive damages awards against large nonresident corporations. This warning is particularly relevant in this case given the descriptions of the purpose of the litigation by plaintiffs' co-counsel and Cabrera. This punitive purpose is further suspect as the litigation seeks billions of dollars on behalf of thousands of unnamed nonparty victims residing in the Oriente. Any U.S. court confronted with a recognition action cannot accept the judgment on its face, but instead will need to carefully review each separate award on a de novo basis.[233] Although it may ultimately prove unsuccessful in denying recognition in whole or in part, this re-examination may provide Chevron with an opportunity to relitigate the merits of the damages portion of the judgment.

Despite these difficulties, recognition of a portion of the monetary award contained within any judgment entered against Chevron cannot be categorically dismissed. Foreign judgments are entitled to a strong presumption of validity in U.S. courts.[234] Fur-

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230. *Campbell*, 538 U.S. at 425.

231. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 464 (1993) (O'Connor, J., dissenting) (stating that undue focus on the wealth of the purported wrongdoer and financial disparities between the parties increase "the risk that the award may [be] . . . influenced by prejudice").

232. Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007) (concluding that such awards "add a near standardless dimension to the punitive damages equation").

233. *See Cooper Indus., Inc.*, 532 U.S. at 435.

234. *See, e.g.*, Samyang Food Co. v. Pneumatic Scale Corp., No. 5:05-CV-636, 2005 U.S. Dist. LEXIS 25374, at *12 (N.D. Ohio Oct. 21, 2005); Soc'y of Lloyd's v. Anderson, No. 3-03-MC-112-D, 2004 U.S. Dist. LEXIS 7351, at *6-8 (N.D. Tex. Apr. 27, 2004); Kam-Tech Sys. Ltd. v. Yardeny, 774 A.2d 644, 649 (N.J. Super. Ct. App. Div. 2001); Maxwell Schuman & Co. v. Edwards, 663 S.E.2d 329, 331-332 (N.C. Ct. App. 2008).

thermore, the plaintiffs need not meet the differing requirements of all fifty states in order to gain recognition of any judgment entered in Ecuador. Rather, all that is required is for the plaintiffs to meet the requirements for recognition and overcome any objections raised by Chevron in a single state. Once this has been achieved, the resulting state judgment is entitled to full faith and credit throughout the United States.[235]

It thus behooves the plaintiffs to seek recognition in the state with the least restrictive standards in which Chevron assets may be located. This strategy immediately excludes states requiring reciprocity such as Georgia and Massachusetts. However, given Chevron's size and the extensive nature of its operations throughout the United States, it should not be difficult for the plaintiffs to locate at least one jurisdiction in which Chevron possesses assets that does not present insurmountable hurdles to recognition. Given the presumption in favor of recognition of foreign judgments and the fact that the plaintiffs need but prevail only once, it is more likely than not that they will meet their burden of proof with respect to at least a portion of any monetary award entered by the Superior Court.

B. Mandatory Grounds for Non-Recognition

1. Due Process of Law

The Acts deny recognition to foreign judgments entered in the absence of due process.[236] A party resisting recognition must demonstrate that the judgment was rendered under a system that does not provide due process.[237] Due process depends upon the circumstances in each individual case.[238] Nevertheless, this determination

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235. Gul, *supra* note 11, at 83 (concluding that an international litigant need only find a single U.S. jurisdiction willing to recognize his foreign judgment, thereby converting it to a domestic judgment entitled to full faith and credit throughout the United States); *see also* Friedrich K. Juenger, *An International Transaction in the American Conflict of Laws*, 7 FLA. J. INTL. L. 383, 398-99 (1992).

236. *See supra* notes 150, 162 and accompanying text. Despite differences in wording, the effect of the Acts is identical. The 1962 Act denies such judgments recognition on the basis that they are not conclusive. 1962 ACT, *supra* note 7, § 2. The 2005 Act holds such judgments to be conclusive but nevertheless denies them recognition. 2005 ACT, *supra* note 7, § 4, cmt. 4.

237. Soc'y of Lloyd's v. Siemon-Netto, 457 F.3d 94, 105-06 (D.C. Cir. 2006) (reviewing procedures in English courts pursuant to the 1962 Act); Soc'y of Lloyd's v. Reinhart, 402 F.3d 982, 994 (10th Cir. 2005) (reviewing procedures in English courts pursuant to the 1962 Act); Soc'y of Lloyd's v. Mullin, 255 F. Supp. 2d 468, 472-73 (E.D. Pa. 2003) (reviewing procedures in English courts pursuant to the 1962 Act).

238. Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 479 (7th Cir. 2000); *see also* Soc'y of Lloyd's v. Webb, 156 F. Supp. 2d 632, 641(N.D. Tex. 2001).

begins with an examination of the procedural protections granted by the foreign legal system.[239] The system must provide an opportunity for a "full and fair trial . . . before a court of competent jurisdiction conducting the trial upon regular proceedings," an appearance by the defendant either voluntarily or by citation, and "a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries."[240]

The foreign legal system need not provide due process protections identical to those of the United States.[241] To require identical protections would result in the non-recognition of all foreign judgments as no foreign jurisdiction has adopted "every jot and tittle" of U.S. due process.[242] Furthermore, such a requirement would grant every party disappointed with the outcome in the foreign jurisdiction the opportunity to relitigate the merits in a U.S. court.[243] Thus, some procedural protections deemed essential to U.S. notions of due process are not required of foreign legal systems. The 2005 Act identifies these protections as the absence of jury trials and differences in evidentiary rules.[244] Additional unnecessary protections include oral testimony, cross examination, and compul-

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239. *See* Soc'y of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (examining the fundamental fairness of the English legal system pursuant to the 1962 Act); *see also Ashenden*, 233 F.3d at 477, 480 (examining the fundamental fairness of the English legal system pursuant to the 1962 Act); Kreditverein der Bank Austria Creditanstalt für Niederösterreich und Burgenland v. Nejezchleba, No. 04-72, 2006 U.S. Dist. LEXIS 47011, at *7 (D. Minn. June 30, 2006) (examining the fundamental fairness of the Austrian legal system pursuant to the 1962 Act); *Kam-Tech Sys. Ltd.*, 774 A.2d at 651 (examining the fundamental fairness of the Israeli legal system pursuant to the 1962 Act).

240. 2005 ACT, *supra* note 7, § 4, cmt. 5 (quoting Hilton v. Guyot, 159 U.S. 113, 202 (1895)). Similar requirements hold true for the 1962 Act; *see*, *e.g.*, Soc'y of Lloyd's v. Edelman, No. 03 Civ. 4921, 2005 U.S. Dist. LEXIS 4231, at *12-13 (S.D.N.Y. Mar. 22, 2005) (defining due process required by the 1962 Act as consisting of notice and an opportunity to be heard); *Webb*, 156 F. Supp. 2d at 640 (defining due process required by the 1962 Act as consisting of notice, personal and subject matter jurisdiction, and an opportunity to be heard); Najas Cortés v. Orion Sec., Inc., 842 N.E.2d 162, 168 (Ill. App. Ct. 2005) (defining due process required by the 1962 Act as consisting of notice and an opportunity to be heard).

241. Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 687-88 (7th Cir. 1987); *see also Kreditverein der Bank Austria*, 2006 U.S. Dist. LEXIS 47011, at *6 (concluding that due process as required by the 1962 Act is "distinct from, and less demanding than, the concept of 'due process' as it has been defined in American case law"); *Webb*, 156 F. Supp. 2d at 641 (concluding that " 'international due process' is a less stringent due process than that required under American jurisprudence"); 2005 ACT, *supra* note 7, § 4, cmt. 5.

242. *Ashenden*, 233 F.3d at 478; *see also Webb*, 156 F. Supp. 2d at 641.

243. *Ashenden*, 233 F.3d at 477; *see also Ingersoll Milling Mach. Co.*, 833 F.2d at 688.

244. 2005 ACT, *supra* note 7, § 4, cmt. 5; *see also* Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991) (holding that the absence of the right to a jury trial did not render the Japanese legal system inadequate); Samyang Food Co. v. Pneumatic Scale Corp., No. 5:05-CV-636, 2005 U.S. Dist. LEXIS 25374, at *17 (N.D. Ohio Oct. 21, 2005) (holding that the absence of the right to a jury trial did not render the South Korean legal system inadequate).

sory process.[245] Lengthy delays in foreign legal proceedings also do not constitute a violation of due process.[246] Rather, there must be "serious injustice" or "outrageous departure from our own [notion] of civilized jurisprudence."[247] States whose legal systems have been deemed to have engaged in such injustice or departures include Iran, Liberia, Cuba, North Korea and the Democratic Republic of the Congo.[248]

U.S. case law provides a starting point to determining the adequacy of a particular state's legal system.[249] An examination of applicable case law with respect to the adequacy of the Ecuadorian legal system results in a mixed outcome. One court has found that Ecuador's judicial system lacked fundamental due process protections as the military government retained the right to overrule or intervene in judicial matters of national concern and asserted absolute control over all branches of government.[250] However, this case is distinguishable on the basis that it is more than thirty years old; the government changed in this intervening period of time and the determination of the adequacy of the forum related to the application of *forum non conveniens* rather than recognition of an Ecuadorian judgment.

The majority of cases that have examined the Ecuadorian legal system have found it to be adequate.[251] Nevertheless, these cases

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245. *See*, *e.g.*, *Ingersoll Milling Mach. Co.*, 833 F.2d at 686 (concluding that the absence of oral testimony, cross examination, and compulsory process did not mandate a finding that the Belgian legal system provided inadequate due process protections).

246. *See*, *e.g.*, *In re* Union Carbide Corporation Gas Plant Disaster, 809 F.2d 195, 199 (2d Cir. 1987) (concluding that lengthy delays and backlogs did not render India inadequate for purposes of *forum non conveniens* analysis); Patrickson v. Dole Food Co., No. 97-01516 HG, 1998 U.S. Dist. LEXIS 23661, at *68 (D. Haw. Sept. 9, 1998) (concluding that lengthy delays and backlogs did not render Costa Rica, Ecuador, Guatemala, and Panama inadequate for purposes of *forum non conveniens* analysis).

247. *Ingersoll Milling Mach. Co.*, 833 F.2d at 687 (holding that a finding of a lack of due process requires "serious injustice"); British Midland Airways Ltd. v. Int'l Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974) (holding that a finding of a lack of due process requires "outrageous departure from our own motion of 'civilized jurisprudence' "); *see also* Leon v. Millon Air, Inc., 251 F.3d 1305, 1312 (11th Cir. 2001) (holding that a finding of a lack of due process requires "extreme amounts of partiality or inefficiency"); 2005 ACT, *supra* note 7, § 4, cmt. 5 (requiring a finding of a lack of due process to be supported by "serious injustice").

248. *Ashenden*, 233 F.3d at 477 (opining that judgments entered in Cuba, North Korea, Iran, the Democratic Republic of Congo or "some other nation whose adherence to the rule of law and commitment to the norm of due process are open to serious question" would not be recognizable); *see also* Bridgeway Corp. v. Citibank, 201 F.3d 134, 137-38, 142-44 (2d Cir. 2000) (refusing to recognize a Liberian judgment); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410-13 (9th Cir. 1995) (refusing to recognize an Iranian judgment entered after the Islamic Revolution).

249. Kam-Tech Sys. Ltd. v. Yardeni, 774 A.2d 644, 651-52 (N.J. Super. Ct. App. Div. 2001) (holding that the absence of a judicial determination that a foreign legal system is fundamentally unfair is important to the determination of whether the system affords due process).

250. Phoenix Can. Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 455-56 (D. Del. 1978).

251. *See Leon*, 251 F.3d at 1314 (finding that the lack of financial resources devoted to

may be distinguishable on the basis that they relate to the adequacy of the Ecuadorian judicial system for purposes of determining the application of *forum non conveniens*, a far less consequential determination than whether to recognize a foreign judgment for the ultimate purpose of enforcement in the United States. However, it bears to note that U.S. courts in litigation relating to the Consortium's operations found Ecuador to be an adequate forum for resolution of claims relating to environmental contamination.[252]

Furthermore, the important role of *forum non conveniens* in the U.S. litigation may serve to estop any allegation that Ecuador is an inadequate forum or denies due process. Judicial estoppel arises where a party has "advanced an inconsistent factual position in a prior proceeding, and . . . the prior inconsistent position was adopted by the first court in some manner."[253] This doctrine may be applicable where a party succeeds in obtaining dismissal of a civil action in the United States utilizing *forum non conveniens* and then subsequently resists recognition of the resulting foreign judgment in the United States on the basis that the foreign forum was inadequate.

For example, in *Pavlov v. Bank of New York Co.,* the U.S. District Court for the Southern District of New York was confronted with a motion to dismiss a class action on behalf of depositors claiming that the defendants facilitated the looting and laundering of assets for several insolvent Russian banks.[254] In resisting the defendants' motion to dismiss on the basis of *forum non conveniens*, the plaintiffs alleged that any judgment entered in Russia would not be recognized in the United States. However, the district court concluded that the defendants' "staunch assertion" regarding

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the judicial system by the Ecuadorian government did not render its courts inadequate); *see also* Clough v. Perenco, L.L.C., No. H-05-3713, 2007 U.S. Dist. LEXIS 61198, at *8-9 (S.D. Tex. Aug. 21, 2007) (finding Ecuador to be an adequate forum despite the absence of the right to a jury trial); Valarezo v. Ecuadorian Line, Inc., No. 00 Civ. 6387 (SAS), 2001 U.S. Dist. LEXIS 8942, at *8-9 (S.D.N.Y. June 29, 2001) (finding Ecuador to be an adequate forum to resolve a suit alleging personal injury occurring aboard a cargo vessel); *Patrickson*, 1998 U.S. Dist. LEXIS 23661, at *60-61 (finding Ecuador to be an adequate forum as it provided its citizens with the right to recover a money judgment from employers for on-the-job injuries, guaranteed all parties the right to a fair trial, and provided for discovery procedures by which to gather evidence, obtain the testimony of witnesses and compel the production of documents); Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1359-60 (S.D. Tex. 1995) (finding Ecuador to be an adequate forum for the resolution of a mass tort suit for pesticide exposure); Ciba-Geigy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111, 1117 (Fla. 4th DCA 1997) (finding Ecuador to be an adequate forum for the resolution of a tort suit relating to exposure to fungicides).

252. *See, e.g.*, Aguinda v. Texaco, Inc., 303 F.3d 470, 478 (2d Cir. 2002); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 544-45 (S.D.N.Y. 2001); Sequihua v. Texaco, Inc., 847 F. Supp. 61, 64 (S.D. Tex. 1994); *see also supra* notes 60, 76 and accompanying text.

253. Wight v. Bankamerica Corp., 219 F.3d 79, 90 (2d Cir. 2000).

254. 135 F. Supp. 2d 426 (S.D.N.Y. 2001).

the adequacy of the Russian legal system would "quite likely" estop them from challenging a Russian money judgment in a subsequent U.S. recognition proceeding.[255] A challenge to recognition on due process grounds "probably would not be heard" if the defendants obtained a dismissal on the basis of *forum non conveniens* "on the premise that [the foreign forum was] adequate."[256]

A similar scenario exists in the *Aguinda.* Chevron may be estopped to deny the adequacy of the Ecuadorian legal system based upon Texaco's representations during the U.S. litigation.[257] These representations were sufficient to convince two U.S. courts to dismiss the litigation utilizing *forum non conveniens*.[258] A condition of this dismissal was that Texaco "unambiguously agreed in writing to being sued on these claims (or their Ecuadorian equivalents) in Ecuador."[259] As a result, Chevron, as Texaco's successor-in-interest, may be "completely strait-jacketed . . . when they go into a US court to argue that a judgment in a trial they sought over [the plaintiffs'] objection should not be enforced."[260] A contrary result would deprive the plaintiffs of all forums and means by which to obtain redress for legitimate grievances in contravention of traditional notions of fundamental fairness.[261]

Another important source for the determining the adequacy of foreign legal systems is reports prepared by U.S. and international bodies. Annual reports prepared by the U.S. State Department have been deemed to be a reliable source of information for determining whether foreign legal systems comport with due process standards.[262] The most recent State Department reports regarding Ecuador paint a bleak picture of its judicial system. In its 2008

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255. *Id.* at 435.

256. *Id.* at 435 & n.52; *see also* Rosemary Do, Note, *Not Here, Not There, Not Anywhere: Rethinking the Enforceability of Foreign Judgments with Respect to the Restatement (Third) of Foreign Relations and the Uniform Foreign Money-Judgments Recognition Act of 1962 in Light of Nicaragua's DBCP Litigation*, 14 SW. J.L. & TRADE AM. 409, 410 (2008) (contending that "U.S. defendants who successfully employ *forum non conveniens* against foreign plaintiffs should not be permitted to block the enforcement of unfavorable, yet valid, foreign judgments").

257. *See supra* notes 61-62 and accompanying text; *see also* Press Release, Texaco Corp., *supra* note 61, at 1 (in which Texaco stated that "[s]imply put, the appropriate forum for this litigation is Ecuador [as] [t]he plaintiffs are in Ecuador; [t]he operations were in Ecuador; [t]he state oil company . . . is in Ecuador; [t]he evidence is in Ecuador; [and] [t]he remedies sought by the plaintiffs can only be obtained in Ecuador").

258. Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002); *see also* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001).

259. *Aguinda*, 142 F. Supp. 2d at 539.

260. Bolton, *supra* note 105, at 7-8 (quoting Steven Donziger).

261. *See* Do, *supra* note 256, at 421.

262. *See*, *e.g.*, Bridgeway Corp. v. Citibank, 201 F.3d 134, 144 (2d Cir. 2000) (approving the district court's consultation of human rights reports prepared by the U.S. State Department in determining that the Liberian judicial system did not comport with international due process standards).

Human Rights Report, the State Department described continued problems with corruption and the denial of due process.[263] Although the constitution establishes an independent judiciary, the State Department concluded that "in practice the judiciary was at times susceptible to outside pressure and corruption."[264] Judges were susceptible to bribery and parceled out cases to lawyers who wrote opinions for the courts.[265] Media, political and economic pressure and bribery also influenced judicial decisions, including the speed in which decisions were rendered.[266]

Similar conclusions were reached by the State Department in its 2009 Investment Climate Statement relating to Ecuador. This report found that "[b]usiness disputes with U.S. companies can become politicized, especially in sensitive areas such as the energy sector."[267] The report identified "[s]ystemic weakness and susceptibility to political or economic pressures in the rule of law" as constituting "the most important problem faced by U.S. companies investing" in Ecuador.[268] The Ecuadorian judicial system was described as "hampered by processing delays, unpredictable judgments in civil and commercial cases, [and] inconsistent rulings."[269] Unpredictability was exacerbated by the more than 55,000 laws and regulations in force and effect, which are often conflicting and are interpreted by the courts in a contradictory fashion.[270] Of equal concern was uncertain enforcement of contract rights and equal treatment under the law.[271] Corruption remained a serious problem and is impervious to legislative oversight or internal judicial branch mechanisms.[272] These conclusions are consistent with other descriptions of Ecuador's legal system.[273]

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263. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, HUMAN RIGHTS REPORT: ECUADOR (2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119158.htm.

264. *Id.*

265. *Id.*

266. *Id.*

267. U.S. DEP'T OF STATE, BUREAU OF ECON., ENERGY & BUS. AFFAIRS, INVESTMENT CLIMATE STATEMENT - ECUADOR (2009), *available at* http://www.state.gov/e/eeb/rls/othr/ics/2009/117668.htm.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *See* Kimerling, *supra* note 2, at 569. Judith Kimerling mentions that Ecuador's 1999 Anti-Corruption National Plan describes corruption as 'systematized,' 'a thousand faced monster' affecting all Ecuadorian and foreign residents and a threat to democracy that results in 'unfairness and inequality in judicial resolutions.' *Id.* at 569-70. Additional problems included lack of independent controls and professionalism, intervention by politicians in pending cases, slow processing of lawsuits and the absence of information accessible to all parties. *Id.* at 570 & n.427. *See also* ECUADOR AND THE LAWSUIT, *supra* note 115, at 8 (quoting Ecuadorian President Rafael Correa as stating that Ecuador is " 'not living under the

U.S. courts directly involved in the *Aguinda* litigation acknowledged these concerns as far back as 2000. The district court expressed significant reservations about the Ecuadorian judicial system based upon its review of the State Department's 1998 Human Rights Report.[274] Nevertheless, it discounted these concerns and disregarded statements in the 1999 and 2000 Human Rights Reports by noting that the allegations of politicization, inefficiency and corruption largely related to cases involving confrontations between law enforcement and political protestors.[275] Additionally, numerous courts had found Ecuador to be an adequate forum, and no court had reached a contrary conclusion since Ecuador became a democratic constitutional republic in 1979.[276] Finally, the district court concluded that the public scrutiny and political debate associated with the case in Ecuador rendered the possibility of corruption or undue influence "exceedingly remote."[277] This prediction proved flawed but not for the reason anticipated by the district court, specifically, improper interference by Texaco in the judicial process. Rather, if any conclusion may be reached, it is that Texaco, and ultimately Chevron, have been victims of undue influence and bias throughout the litigation.

The issue of whether the Ecuadorian judicial system provides a level of due process sufficient to meet international standards for the purpose of recognizing the Superior Court's judgment is a close question. Undoubtedly, the system provides far fewer protections than the United States. However, any differences, assuming no substantial injustice or outrageous departure from fundamental fairness has occurred, are not determinative. Furthermore, the single case finding Ecuador to be an inadequate forum is more than thirty years old and relates to a government no longer in power. The remaining few cases considering the Ecuadorian judi-

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rule of law', and that 'the Executive Branch could exert pressure on the Judicial Branch to get the courts to 'respond to the needs of the country' ").

274. Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (JSR), 2000 U.S. Dist. LEXIS 745, at *9 (S.D.N.Y. Jan. 31, 2000) (noting the State Department's characterization of the Ecuadorian judicial system as "politicized, inefficient, and corrupt"). In his opinion, Judge Rakoff stated:

> [w]hile the evidence set forth in the report in support of this strong statement largely relates to criminal cases, the Court does not believe that, even in the very different context of the instant lawsuits, it can ignore without further inquiry a statement from a department of the U.S. Government that so fully casts doubt on the independence and impartiality of the principal courts to which the defendant seeks to remit these cases.

Id.

275. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 544-45 (S.D.N.Y. 2001).

276. *Id.* at 545 (citing Patrickson v. Dole Food Co., No. 97-01516 HG, 1998 U.S. Dist. LEXIS 23661, at *68 (D. Haw. Sept. 9, 1998); Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1359-60 (S.D. Tex. 1995); Sequihua v. Texaco, Inc., 847 F. Supp. 61, 64 (S.D. Tex. 1994); Ciba-Geigy, Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111, 1117 (Fla. 4th DCA 1997)).

277. *Aguinda*, 142 F. Supp. 2d at 545.

cial system have concluded that it comports with fundamental notions of due process. It would be a significant departure from precedent to decree that Ecuador's legal system did not satisfy due process. Furthermore, the system bears little resemblance to other legal systems deemed inadequate by U.S. courts. Finally, the failure to recognize the compensatory portion of a monetary judgment entered by the Superior Court would leave the Plaintiffs without a remedy.

These considerations must be offset against several factors. Recent allegations of political interference in the litigation by the Correa administration are cause for significant concern. Second, the cases finding Ecuador to be an adequate forum were *forum non conveniens* cases rather than cases in which a plaintiff sought recognition of an Ecuadorian judgment. Furthermore, it is unlikely that a U.S. court would estop Chevron from asserting a due process defense if the underlying judgment was the product of fundamental unfairness. Recent U.S. government reports also have concluded that the Ecuadorian judicial system continues to be plagued by issues that go directly to the heart of due process. Nevertheless, based upon the lack of irreparable harm given the replacement of Nuñez as the trial judge, U.S. case law finding Ecuador to be an adequate forum, the successful assertion of *forum non conveniens* by Texaco in the U.S. litigation and the high burden placed upon Chevron to demonstrate fundamental unfairness, it is likely that a U.S. court confronted with this issue in a recognition proceeding will determine that Ecuador's legal system as a whole is not so fundamentally flawed as to deny Chevron due process.

2. Personal Jurisdiction

The Acts deny recognition to foreign judgments entered in the absence of personal jurisdiction of the court issuing the judgment.[278] Both Acts define those circumstances in which personal jurisdiction will be deemed to exist for purposes of the recognition of a foreign judgment.[279] These grounds are not exclusive, and a U.S. court may recognize other grounds for personal jurisdiction.[280]

The basis for personal jurisdiction over Texaco consisted of two separate allegations. Initially, the plaintiffs alleged that the Texaco entities participating in the Consortium, specifically, Compania Texaco de Petroleos del Ecuador and its parent company Tex-

278. *See supra* notes 151, 162 and accompanying text. Despite differences in wording, the effect of the Acts is identical. *See supra* note 236 and accompanying text.

279. *See supra* notes 151, 162 and accompanying text.

280. 2005 ACT, *supra* note 7, § 5(b); *see also* 1962 ACT, *supra* note 7, § 5(b).

aco Ecuador, were "economically, technically, and administratively subjected to [Texaco], as well as to the policies and directives of its headquarters."[281] As a result, Texaco conceived of or knew and approved of the subsidiaries' exploration and production techniques.[282] Secondly, the plaintiffs alleged that Texaco's Ecuadorian subsidiaries were formed with "minimum working capital and stock, infinitely less than the real volume of their operations . . . with the evident purpose of limiting the impact of any claims derived from its activities in the country."[283] The plaintiffs concluded that the Ecuadorian subsidiaries were fronts for Texaco, who otherwise owned, managed, supervised and controlled them.[284]

These bases for asserting personal jurisdiction over Texaco in Ecuador have not withstood judicial scrutiny in the United States.[285] This failure to establish a meaningful nexus is not limited to the *Aguinda* litigation. Fourteen years prior to the district court's opinion determining the separateness of Texaco and its Ecuadorian subsidiaries, another U.S. district court reached a similar conclusion. In *Phoenix Canada Oil Co. v. Texaco, Inc.,* the U.S. District Court for the District of Delaware refused to find Texaco liable for actions of its Ecuadorian subsidiaries resulting in claims of breach of contract, unjust enrichment and intentional infliction of economic distress.[286] The court found that the boards of directors of Texaco's Ecuadorian subsidiaries were separate from Texaco's board, and each entity kept separate books, records, bank accounts and principal places of business.[287] Texaco and its subsidiaries paid their own taxes and were responsible for their own daily op-

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281. Lago Agrio Complaint, *supra* note 2, at 6.

282. *Id.*

283. *Id.* at 15.

284. *Id.*

285. *See supra* notes 66-70 and accompanying text. The relationship between a parent corporation and its foreign subsidiaries for purposes of inferring actions of the subsidiaries to the parent has been described as follows:

> When a wrong [has been] committed by a multinational in the host country, claims are made against the specific entity whose operations caused the harm. The corporate veil separates each corporate entity so that the parent is screened from the liability of a subsidiary or a joint-venture partner from liability of the joint venture's operations. Entities are separated by separate legal personality which is a "legal construct that separates each corporate entity from the other corporate entities within the same corporate 'family tree.'" The corporate veil is pierced only by a demonstration of the requisite amount of control . . . exercised by one corporate entity over another, thereby making the controlling entity liable for the operations of the other.

Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT'L L. & POL'Y 701, 727-28 (2004) (citations omitted).

286. 658 F. Supp. 1061 (D. Del. 1987).

287. *Id.* at 1085.

erations.[288] Furthermore, Texaco's subsidiaries, and not Texaco itself, were authorized to exploit hydrocarbon deposits in the Oriente.[289] The actions which were the subject matter of the plaintiff's complaint were intended to accomplish this mandate.[290] Based on these facts, it could not be concluded that Texaco exercised complete domination or control over its Ecuadorian subsidiaries, and thus Texaco could not be liable for their acts or omissions.[291]

This opinion is important for several reasons. First, it demonstrates that the conclusion that Texaco was separate from its Ecuadorian subsidiaries was reached by more than one court. Second, the opinion establishes this separateness in more than one context. Texaco and its Ecuadorian subsidiaries were separate not only with respect to environmental management but also in matters relating to contract negotiation and performance. Finally, the *Phoenix Canada Oil* determination of separateness is perhaps more important than that reached in the *Aguinda* litigation as it was a contemporaneous determination coinciding with Texaco's actual operations in Ecuador rather than an after the fact conclusion reached nine years after the termination of Texaco's participation in the Consortium.

However, Texaco's own actions served to bring it within the personal jurisdiction of the Ecuadorian judicial system. Texaco acknowledged that the Second Circuit's dismissal of the U.S. litigation on the basis of *forum non conveniens* vindicated its "longstanding position" that Ecuador was the appropriate forum for the litigation.[292] Furthermore, the district court and Second Circuit ordered Texaco to accept service of process and consent to being sued in Ecuador.[293]

Despite this conclusion, the crucial issue for any U.S. court considering whether to recognize the Superior Court's judgment is whether Texaco's actions are binding on Chevron. Chevron has no legal domicile in Ecuador, has never operated there and owns no real or personal property in the state.[294] Furthermore, Chevron was not a party to the U.S. litigation and is thus not bound by the

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288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. Press Release, ChevronTexaco Corp., *supra* note 61.
293. Aguinda v. Texaco, Inc., 303 F.3d 470, 478-80 (2d Cir. 2002); *see also* Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (VLB), 1994 U.S. Dist. LEXIS 4718, at *6 (S.D.N.Y. Apr. 11, 1994) (conditioning dismissal on Texaco's "binding acceptance of personal jurisdiction over it in Ecuadoran [sic] courts").
294. *See* Defendant's Motion to Dismiss, *supra* note 53, at 20.

district court's order requiring Texaco to submit to personal jurisdiction in Ecuador.[295] Furthermore, Chevron did not acquire Texaco in 2001 and thus is not subject to its waiver of objections to personal jurisdiction.[296] Finally, there is no provision of Ecuadorian law by which to hold Chevron responsible for Texaco's past conduct in Ecuador.[297]

If the plaintiffs were unable to demonstrate sufficient interconnectedness between Texaco and its subsidiaries in the U.S. litigation, it remains to be seen whether they will be able to prove a meaningful nexus between Texaco, its subsidiaries and Chevron such as to support a finding of liability. The plaintiffs have two significant obstacles to overcome in this regard. First, there was an absence of a sufficient connection between Texaco and its subsidiaries such as to subject Texaco to personal jurisdiction in Ecuador absent its explicit consent. If personal jurisdiction could not be obtained over Texaco through its subsidiaries, it cannot be obtained over Chevron, which is yet another layer removed from Texaco's Ecuadorian subsidiaries.

Second, even assuming personal jurisdiction could be asserted over Texaco through the actions of its subsidiaries, it is difficult to envision how such jurisdiction could be expanded to encompass Chevron. Regardless of how the transaction is characterized, Chevron did not acquire Texaco until 2001. The acquisition occurred nine years after the termination of the Consortium, six years after the execution of the Remediation Agreement and three years after the Final Act. Furthermore, as demonstrated by the filing of the U.S. litigation in 1993, the plaintiffs' claims arose from occurrences before Chevron acquired Texaco. Ecuador's jurisdictional reach ended either with Texaco's subsidiaries or with Texaco itself and does not extend as far as Chevron from both a corporate and chronological standpoint.

However, two doctrines may prevent Chevron from successfully challenging recognition of any judgment entered by the Superior Court. Initially, as previously noted with respect to due process objections to recognition, Chevron may be estopped to deny Ecuadorian jurisdiction. Although it contested personal jurisdiction throughout the course of the litigation in Ecuador, it also vigorously defended the litigation on the merits.[298] The inconsistency of

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295. *Id.*

296. *See supra* note 89 and accompanying text.

297. Defendant's Motion to Dismiss, *supra* note 53, at 19.

298. *See supra* notes 86-92, 97-101, 105-09, 114-30 and accompanying text. However, Chevron may have been compelled to defend the merits of the litigation based upon the Superior Court's failure to timely address the arguments set forth in its responsive pleadings. *See supra* note 138 and accompanying text.

these positions may prevent Chevron from resisting the recognition of a judgment entered by the Superior Court due to the absence of personal jurisdiction.

Second, Chevron's defense of the Ecuadorian litigation on the merits may constitute a waiver of its objection to personal jurisdiction. Procedural rights in foreign proceedings are subject to waiver to the same extent as procedural rights in domestic proceedings.[299] This includes objections to the exercise of personal jurisdiction by foreign courts.[300] To conclude otherwise would establish a different and stricter standard for procedural rights in foreign countries than in the United States.[301] Thus, Chevron's defense of the merits of the Ecuadorian litigation should be given force and effect in a U.S. recognition proceeding. It is quite possible that a U.S. court will conclude that Chevron waived its objections to Ecuador's assertion of personal jurisdiction, thus preventing this defense from being utilized as a bar to recognition.

3. Subject Matter Jurisdiction

The Acts deny recognition to foreign judgments entered in the absence of subject matter jurisdiction.[302] Neither Act defines those circumstances in which subject matter jurisdiction will be deemed to exist for purposes of recognition. As a result, this determination is based on the local law of the foreign jurisdiction.

The plaintiffs based their Complaint on three separate grounds. Initially, the plaintiffs alleged that their right to seek environmental remediation was protected by Article 86 of the Ecuadorian Constitution.[303] The second basis for the plaintiffs' Com-

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299. *See* Soc'y of Lloyd's v. Reinhart, 402 F.3d 982, 994 (10th Cir. 2005) (concluding that the waiver of procedural rights in foreign jurisdictions is "clearly permitted" in the context of a domestic action for recognition).

300. Dart v. Balaam, 953 S.W.2d 478, 481 (Tex. App. 1997).

301. *See* Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 834 (2004) (stating that "[i]t would be strange if the law that permits American citizens to waive constitutional rights did not allow them to waive nonconstitutional analogues of those rights in respect of foreign countries"); *see also* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003).

302. *See supra* note 152 and accompanying text. Despite differences in wording, the effect of the Acts is identical. Specifically, a denial of recognition of foreign judgments entered by a court lacking subject matter jurisdiction. *See supra* note 236 and accompanying text.

303. Lago Agrio Complaint, *supra* note 2, at 20-21. Article 86 of Ecuador's Constitution provided:

> [T]he State shall protect the right of the population to live in a healthy and ecologically balanced environment, that guarantees sustainable development. It shall provide oversight to make sure that this right is not affected and shall guarantee the preservation of nature. [These rights are] declared of public interest and shall be regulated in conformity with the

plaint was Article 2260 of the Ecuadorian Civil Code, which grants a popular action to affected individuals to demand cessation of injurious activities, including those contributing to environmental degradation.[304] Finally, the Complaint was based on the Environmental Management Law, which grants affected individuals or groups of individuals the right to initiate litigation to compel remediation and recover damages for general environmental harm.[305]

The plaintiffs' asserted bases for subject matter jurisdiction may be challenged on four primary grounds. Before 1999, Ecuadorian law granted redress only for individualized harm.[306] Article 86 of Ecuador's Constitution clearly placed responsibility for environmental protection on the government.[307] The Law for the Prevention and Control of Environmental Pollution (adopted in 1976) only empowered citizens to report activities resulting in environmental contamination to appropriate governmental authorities.[308] Ecuadorian citizens were also authorized to intervene in administrative proceedings and request reversal of administrative acts that threatened environmental harm.[309]

Ecuadorian law did not recognize "popular actions" brought on behalf of large groups of people seeking damages for environmental contamination from a former owner or operator of real proper-

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law:

> 1. The preservation of the environment, the conservation of ecosystems, biodiversity and the integrity of the genetic patrimony of the country.
> 2. The prevention of environmental pollution, the recuperation of degraded natural spaces, the sustainable management of natural resources and the requirements that public and private activities should comply with to achieve these goals.
> 3. The founding of a national system of protected natural areas that guarantee the conservation of biodiversity and the maintenance of ecological services in conformity with international agreements and treaties.

CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 86.

304. Lago Agrio Complaint, *supra* note 2, at 21; *see also* CÓDIGO CIVIL art. 2236.

305. Lago Agrio Complaint, *supra* note 2, at 21-22; *see also* LEY DE GESTIÓN AMBIENTAL [Environmental Management Law], Law No. 99-37, art. 41, 43.

306. Lago Agrio Complaint, *supra* note 2, at 20-21 (referring to CÓDIGO CIVIL arts. 2214, 2236 (permitting monetary recovery for specific personal injuries and property damage suffered by an individual from the person whose intentional or negligent act was the cause of the loss and permitting private actions against current owners and operators of property to enjoin a nuisance)) *See also* Defendant's Motion to Dismiss, *supra* note 53, at 15.

307. CONSTITUTIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 86.

308. Defendant's Motion to Dismiss, *supra* note 53, at 15 (discussing LEY DE PREVENCIÓN Y CONTROL DE CONTAMINACIÓN AMBIENTAL [Law for Prevention and Control of Environmental Contamination], Supreme Decree No. 374, art. 29).

309. *Id.* (discussing ESTATUTO DEL RÉGIMEN JURÍDICO ADMINISTRATIVO DE LA FUNCIÓN EJECUTIVA [Statute on the Legal-Administrative Rules for the Executive Branch], art. 115(b) (1994)).

ty.[310] Such remedies were the exclusive province of the Ecuadorian government as was clearly acknowledged in the U.S. litigation. Ecuadorian government representatives asserted that private parties could not seek compensation as the government was the "legal owner of the rivers, streams and natural resources and all public lands where the . . . oil producing operations" occurred.[311] The plaintiffs in the U.S. litigation were thus "attempting to usurp rights that [belong] to the government of the Republic of Ecuador under the Constitution and laws of Ecuador and under international law."[312] However, this argument may be weakened to the extent that the Ecuadorian government changed its position and claimed that the plaintiffs possessed private rights of action that could be determined by a U.S. court.[313]

The sole jurisdictional basis for the plaintiffs' collective monetary claims is the Environmental Management Law. However, this law cannot be utilized against Texaco let alone Chevron. The Environmental Management Law was adopted seven years after Texaco ceased its participation in the Consortium, four years after the Remediation Agreement and one year after the Final Act.

In creating new rights and an accompanying claim for relief, the Environmental Management Law is not merely a procedural mechanism but also represents a substantive change in the law.[314] As such, it cannot be given retroactive effect and serve as a jurisdictional basis for the Complaint. Such a result is prohibited by three separate sources of Ecuadorian law. Article 24 of the Constitution provided, in part, that "[n]o one may be punished for an act or omission that at the time of perpetration was not classified as a . . . infraction, nor . . . . [may one punish] a person in a manner that is not in conformance with the preexisting laws."[315] This prohibition is reiterated in the Ecuadorian Civil Code, which states that "[t]he law provides only for the future; it has no retroactive

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310. *See id.*

311. *Id.* at 16 (quoting Letter from Edgar Téran, Ecuadorian Ambassador to the United States, to Jed S. Rakoff, U.S. District Court Judge).

312. *Id.*

313. *See* Jota v. Texaco, Inc., 157 F.3d 153, 160 (2d Cir. 1998). Although there appears to be no U.S. precedent regarding the effect of a change in litigation position by a foreign sovereign regarding subject matter jurisdiction upon a U.S. judicial proceeding, the U.S. Supreme Court has permitted judicial reconsideration based upon a change in the U.S. government's position. *See*, *e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244 (1994). A similar result seems likely in cases involving foreign governments given the enhanced respect for sovereignty to which they are due in U.S. courts.

314. Defendant's Motion to Dismiss, *supra* note 53, at 16. The distinction between procedural and substantive law is crucial as purely procedural rules are exempt from prohibitions upon retroactivity. *Id.* (discussing CÓDIGO CIVIL art. 7).

315. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 24(1).

effect."[316] Finally, Ecuadorian case law has concluded that the Environmental Management Law cannot be given retroactive effect. In *Calva v. Petroproduccion,* the Superior Court of Nueva Loja held that the Environmental Management Law could not be applied to Petroecuador's production subsidiary with regard to environmental contamination occurring prior to its enactment.[317] The primary reason for this conclusion was that the Environmental Management Law constituted a substantive change in Ecuadorian law by creating an individual claim for relief where none previously existed.[318] The *Calva* decision is particularly important as it was issued by the same court designated to resolve the plaintiffs' claims against Chevron.

Even assuming the plaintiffs' claims were to survive a challenge on the basis of retroactivity, the Superior Court was deprived of subject matter jurisdiction by the Remediation Agreement and the Final Act. These documents purported to resolve all claims for environmental contamination resulting from Texaco's participation in the Consortium.[319] The plaintiffs have denied the applicability of these documents to their claims as they were not parties.[320]

The resolution of the issues concerning the effect of these documents is not as simple as merely asserting that the plaintiffs are not bound as they were not signatories. Rather, the effect of the documents turns on whether the Plaintiffs had a right to initiate a popular action seeking remediation and damages on behalf of residents of the Oriente prior to the adoption of the Environmental Management Law. If such a right did exist separate and apart from the rights of the government, then the plaintiffs are correct that the documents have no effect upon their independent right to initiate litigation. However, if the claims in the Complaint did not exist prior to 1999, then the documents are binding upon the plaintiffs. Under such circumstances, the Remediation Agreement and the Final Act represent a choice by the Ecuadorian government to settle and release common public rights. This choice is binding upon all Ecuadorian citizens regardless of their personal participation or lack thereof.[321]

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316. CÓDIGO CIVIL art. 7.

317. Defendant's Motion to Dismiss, *supra* note 53, at 17, (referring to Calva v. Petroproduccion, No. 349-2000 (Superior Court of Nueva Loja, Aug. 20, 2001) (Ecuador)).

318. Defendant's Motion to Dismiss, *supra* note 53, at 17.

319. *See supra* notes 47-54 and accompanying text.

320. *60 Minutes*, *Amazon Crude*, *supra* note 1 (in which Plaintiffs' co-counsel Steven Donziger stated "our clients never released Texaco. And that's a critical distinction. That was an agreement between the government and Texaco. We were not part of that agreement, and we're not bound by that agreement").

321. For a U.S. equivalent, see Satsky v. Paramount Communications, 7 F.3d 1464, 1470 (10th Cir. 1993) (holding that "[w]hen a state litigates common public rights, the citi-

An interpretation of the Ecuadorian Constitution and Civil Code reserving governmental sovereignty over environmental issues is important for two additional reasons. Such an interpretation supports the conclusion that the plaintiffs cannot utilize the Environmental Management Law to pursue their claims against Chevron. If the Ecuadorian government possessed such sovereignty and subsequently chose to exercise it in a manner that released Texaco from liability, then the government cannot have bestowed the right to proceed against Chevron upon the general public through the subsequently adopted Environmental Management Law.[322]

The second important point relates to any interpretation of the Environmental Management Law that is inconsistent with state sovereignty over environmental issues. Specifically, should the Environmental Management Law be interpreted as bestowing upon the plaintiffs the right to pursue Texaco despite the Remediation Agreement and Final Act, Ecuador must indemnify Chevron for the costs of any judgment awarded to the plaintiffs.[323] This conclusion is based upon the notion that "at least some of the claims brought in the Lago Agrio action effectively *are* claims by Ecuador, prosecuted on Ecuador's behalf by individual plaintiffs acting as private attorneys general under [the Environmental Management Law], and that such claims were intended to be included in the 1995 Settlement and 1998 Final Release."[324] The Ecuadorian government is free to legislate, interpret its laws or alter its legal positions as it sees fit. However, such actions should have financial consequences, especially when private parties have relied on previous governmental actions and would suffer a significant detriment as a result of any change in position.

Finally, an analysis of subject matter jurisdiction must include consideration of the effect of the applicable statute of limitations. Article 2235 of the Ecuadorian Civil Code imposes a statute of limitations on intentional and unintentional torts of four years from "the date on which the act was perpetrated."[325] An act is deemed perpetrated when "completed, 'regardless of the date on which the

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zens of that state are represented in such litigation by the state and are bound by the judgment").

322. *See* Republic of Ecuador v. ChevronTexaco Corp., 426 F. Supp. 2d 159, 163 (S.D.N.Y. 2006) (discussing the contention that Ecuador could not grant rights to the Plaintiffs through the Environmental Management Law that the government had previously bargained away in its settlement with Texaco).

323. *Id.*

324. Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 376 (S.D.N.Y. 2005).

325. Defendant's Motion to Dismiss, *supra* note 53, at 20 (citing CÓDIGO CIVIL art. 2235).

plaintiffs knew or could have known that they suffered harm.' "[326]

As a condition to the invocation of *forum non conveniens*, the expiration of the limitations period was tolled by the Second Circuit Court of Appeals for a period of time from the filing date of the U.S. litigation in November 1993 to one year after the final order of dismissal, specifically, August 2003.[327] The plaintiffs filed their complaint in Ecuador in May 2003 and were within this extended limitations period. However, applying the four year statute of limitations as extended by the Second Circuit to the Complaint leads to the conclusion that the only portion of the Consortium's activities within the statute occurred after November 1989. This would include the last three years of the Consortium's operations and Texaco's subsequent remediation efforts. Furthermore, to the extent Chevron and Texaco are recognized as separate entities, the tolling of the statute of limitations is not binding on Chevron.[328] As a result, the statute of limitations with respect to any claim against Chevron expired in September 2002, four years after the completion of environmental remediation and signature of the Final Act.

Nevertheless, a defense based on the statute of limitations may fail even assuming Chevron and Texaco are separate entities. Regardless of its merits, the statute of limitations is not a designated defense to recognition of a foreign judgment pursuant to either Act. As a result, at least one court has found that it had no authority to review the issue.[329] The assumption underlying this holding is that the statute of limitations defense is not contained within the subject matter jurisdiction defense to recognition. The same reasoning may hold true for the other shortcomings identified in this section of the article. As a result, a U.S. judicial determination that the Superior Court possessed subject matter jurisdiction with respect to the plaintiffs' claims would not be a surprising result.

CONCLUSION

The stakes for Chevron in the Ecuadorian litigation are extremely high. It is unlikely that Chevron will escape the litigation

326. Doe v. Texaco, Inc., No. C 06-02820 WHA, 2006 U.S. Dist. LEXIS 77251, at *4 (N.D. Cal. Oct. 11, 2006) (discussing the Ecuadorian statute of limitations for intentional and unintentional torts and the accrual of causes of action).

327. Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002).

328. Defendant's Motion to Dismiss, *supra* note 53, at 20.

329. Soc'y of Lloyd's v. Anderson, No. 3-03-MC-112-D, 2004 U.S. Dist. LEXIS 7351, at *9 (N.D. Tex. Apr. 27, 2004) (refusing to consider the defendant's argument that the claim upon which an English judgment was based was barred from recognition by the six year statute of limitations applicable to breach of contract actions in England).

unscathed. Although the ultimate judgment will most likely be less than the $27.3 billion claimed by the plaintiffs, it would not be surprising if the judgment was measured in billions rather than millions of dollars. Such an outcome will not bankrupt the company but will nevertheless deal Chevron a significant blow. In addition to the financial consequences is the incalculable loss of business reputation and goodwill. Although the case has not yet received the media exposure of other business-related environmental disasters, Chevron should tread lightly in order to avoid the indelible stain of permanent linkage of its name with environmental catastrophe as exemplified by Union Carbide and Bhopal and Exxon and the *Valdez*.

Texaco, and subsequently, Chevron's strategic choices throughout the litigation have led to a series of unforeseeable results. A nine year battle to dismiss the case in the United States ultimately proved successful only to result in the unanticipated filing of new litigation in Ecuador. Success in the United States also created a significant body of case law and admissions by Texaco affirming the adequacy of the Ecuadorian forum. Although initially willing to proceed in an orderly fashion to determine the existence and extent of environmental contamination attributable to the Consortium, the Superior Court subsequently jettisoned procedural protections as evidenced by its abandonment of the agreed upon sampling protocol, the appointment of a single expert whose methodology and damages assessments are subject to serious question, and refusal to determine whether the plaintiffs' claims and Chevron are properly before the court. Furthermore, a government that negotiated a full and final settlement of claims in return for the performance of specified environmental remediation and initially appeared sympathetic to Chevron has now allied itself with the plaintiffs' interests.

As a result, Chevron finds itself most likely faced with the uncertain prospect of proceeding through the Ecuadorian appellate court system while at the same time defending recognition actions throughout the United States. Absent reversal in Ecuador, Chevron is at a distinct strategic disadvantage. The plaintiffs arguably have fifty separate chances to secure recognition. A success in any one of these efforts may open the door to widespread recognition through operation of the Full Faith and Credit Clause. The provisions mandating the non-recognition of foreign judgments set forth in the Acts do not provide absolute protection and may prove to be a thin and undoubtedly costly reed upon which to base a national litigation strategy. Further pressure exists as a result of the close scrutiny that the case has received by multinational corporations,

who are seeking guidance with respect to the strategy of utilizing *forum non conveniens* to dismiss environmental and human rights claims in favor of forums in the developing world.[330]

However, the stakes are equally high for the plaintiffs. The plaintiffs have invested sixteen years in this litigation in courtrooms in three different states and Ecuador. In the meantime, hydrocarbon exploration and production activities continue to take a toll on the Oriente and its residents. Although likely to obtain a favorable judgment from the Superior Court, the amount may be less than that suggested by Cabrera. Obtaining this judgment is only half the battle. Given the likelihood of a time-consuming appeal, the possibility that the plaintiffs will receive compensation in the near future is remote.

In a manner similar to Chevron, the plaintiffs' strategic choices throughout the litigation have led to a series of unpredictable results. Unsuccessful in its nine-year battle to maintain the litigation in the United States, the plaintiffs nevertheless may benefit from U.S. judicial determinations regarding the adequacy of the Ecuadorian legal system in subsequent recognition proceedings. The plaintiffs have however become a victim of their own success in Ecuador. Their prodding led the Superior Court to abandon procedural protections in favor of an ad hoc process fraught with controversy and resulting in an oversized damages estimate that the plaintiffs could not have possibly predicted at the time of the filing of the Complaint in 2003. Furthermore, government opposition to the litigation has been replaced by the uncomfortable embrace of a new and partisan Ecuadorian administration eager to demonize multinational enterprises as the cause of the country's many economic and social woes.

Although favorable to the ultimate outcome in Ecuador, these developments do not bode well for recognition actions in the United States. The sheer size of the damages award, whatever it may be, will raise judicial skepticism and cast a shadow on its individual elements. U.S. courts will undoubtedly examine the procedures by which the Superior Court arrived at its award. U.S. courts may also question prior characterizations of the adequacy of the Ecuadorian legal system given the passage of time, the change in gov-

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330. *See, e.g.*, Brooke A. Masters, *Case in Ecuador Viewed as Key Pollution Fight: U.S. Legal Team Suing Chevron Texaco*, WASH. POST, May 6, 2003, at E1 (stating that the case is a test of multinational strategy to dismiss U.S. litigation in favor of foreign forums where plaintiffs lack the money or expertise to file suit or where recognition of resultant judgments can be resisted in the United States); *see also* Bolton, *supra* note 105, at 8 (quoting Steven Donziger as stating that "[t]his case is a bellwether case for the energy industry in Latin America, which will probably confront many more cases of this nature and magnitude in years to come").

ernment and the significantly higher stakes associated with the recognition of judgments as compared to *forum non conveniens* determinations. Although the plaintiffs arguably have fifty separate chances at securing recognition, a misstep in any recognition proceeding may create an unfavorable precedent for proceedings in other courts. Finally, as previously noted, the case is being closely watched by environmentalists and human rights advocates.[331]

Given this uncertainty, it is perhaps wisest for all sides to return to an opinion issued fifteen years ago by the original judge assigned to the *Aguinda* litigation in the United States. In denying the plaintiffs' motion to adopt compulsory settlement procedures, Judge Vincent L. Broderick stated that "[c]ourts cannot . . . coerce settlements in litigation, and must instead utilize their powers of adjudication where appropriate if agreement is lacking."[332] Settlement may be reached only by "voluntary acquiescence of both sides based upon intelligent self-interest."[333] In the judgment of this commentator, the time for the exercise of intelligent self-interest by both parties is long overdue.

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331. Masters, *supra* note 330, at E1 (quoting legal experts as characterizing the case as "groundbreaking" and "establishing a new way for environmental activists to force multinational corporations to pay for what activists say is environmental devastation").

332. Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (VLB), 1994 U.S. Dist. LEXIS 18364, at *5-6 (S.D.N.Y. Dec. 17, 1994).

333. *Id.* at *6.

PROTECTION OF LANGUAGES AND SELF-EXPRESSIONS UNDER ISLAMIC LAW

LIAQUAT ALI KHAN*

Islamic law recognizes two distinct divine rights, one applying to speech communities and the other to individuals. The divine right to language allows each speech community to preserve and celebrate its native language free of coercion and disrespect from other speech communities. Native languages are the assets of speech communities. Islamic law prohibits coercive degradation of native languages while at the same time it interposes no barriers in learning other languages. Closely related to the right to language is the divine right to individual self-expression or self-determination. Each human being is unique because God, the Master-Artist, shapes each human being with special attention. Social, economic, and legal barriers that suppress special talents or refuse to accommodate disabilities are incompatible with Islamic law. When individuals are given the liberty allowed under Islamic law to pursue sciences, arts, knowledge, sports, and spirituality, Muslim communities prosper. When Muslim states are oppressive, they undermine individual initiatives. This study recommends that Muslim states should recognize linguistic pluralism and the right to self-expression in their positive law, including national constitutions.

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* The author is Professor of Law at Washburn University School of Law, Topeka, Kansas. This Article is dedicated to Aamir Malik & Tariq Akbar.

"And among God's signs are the creation of the heavens and the earth, and the diversity of your languages and your colors, verily in all this (diversity) there are indications for persons of knowledge."[1]

INTRODUCTION

This article explores the concept of speech pluralism under Islamic law.[2] It first argues that each literate and preliterate speech community has a divine right to language.[3] This divine right recognizes and protects the diversity of languages.[4] The differences among languages may be traced back to dictates of geography, history, ethnicity, race, culture, means of communication, literacy, social and economic development, and a legion of other causal factors.[5] According to the Basic Code of Islam,[6] however, these differ-

1. Quran, sura ar-Rum 30: 22. It is my view that the Quran cannot be translated, it can only be understood. Normally, after conducting my own research, I adopt the translation that in my view best captures the meaning of the verse. I specifically consult translations by Abdullah Yusuf Ali, Marmaduke Pickthall, and Muhammad Asad. Unless otherwise specified, all translations of the Quran in this Article are mine.

2. The term Islamic law refers to the composite sources of the Quran, the Prophet's Sunnah, classical jurisprudence (*fiqh*), positive law (*qanun*), and international law (*as-siyar*). Liaquat Ali Khan, *Jurodynamics of Islamic Law*, 61 RUTGERS L. REV. 231, 232-33 (2009).

3. There exist roughly 6,000 languages in the world. UNESCO, *UNESCO Launches Register of Good Practices in Language Preservation*, July 18, 2005, http://portal.unesco.org/ci/en/ev.php-URL_ID=19434&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html. Experts estimate, however, that over 50% of languages face extinction. *Id.*

4. One may dispute whether primitive tribes engage in activities worthy of the name of religion or art, but no tribe has been found to be without a language. EDWARD SAPIR, LANGUAGE: AN INTRODUCTION TO THE STUDY OF SPEECH 21-22 (1921).

5. *See generally* DANIEL NETTLE, LINGUISTIC DIVERSITY (1999); Robert Nicolai, *Language Processes, Theory, and Description of Language Change, and Building on the Past*, *in* LINGUISTIC DIVERSITY AND LANGUAGE THEORIES 81 (Zygmunt Frajzyngier et al. eds., 2005).

6. The term Basic Code refers only to the Quran and the Prophet's Sunnah and excludes all other sources of Islamic law. Khan, *supra* note 2, at 232 n.3. For the purposes of this article, the terms Basic Code and Shariah are synonymous.

ences in languages are part of the divine plan. Although imperial languages, such as Arabic and Persian, rose to power and prestige, little evidence supports any finding that all speech communities ever spoke a single language at any historical juncture.[7] A future single language appears to be equally implausible.[8] Regardless of future possibilities, any imposition of a single language on speech communities of the world or any suppression of plurality of languages is contrary to the teachings of Islam. Islamic law requires that Muslim states enforce the divine plan of linguistic pluralism, respect minority and majority languages within their jurisdictions, and coordinate regional and global efforts to preserve the diversity of speech communities.[9]

Second, the article argues that each individual has a divine right to self-expression or personal self-determination.[10] According to Islam, each human being is vested with unique personal assets and disabilities that together constitute a personal identity.[11] While language facilitates communication among members of a speech community, self-determination allows each individual to unfold his or her vested being, including thoughts, dreams, talents, and countless other personal effects. Inwardly, self-expression is neither proprietary, nor predatory, nor overly acquisitive;[12] it is anchored in piety.[13] Outwardly, self-expression is neither tied exclusively to language nor synonymous with the right to free speech. An individual may speak two or more languages, or speak none. Individual self-expression may or may not use any script or language and, as such, it is not confined to any grammar, syntax, or vocabulary. Self-expression can be more extensive and robust than the spoken or written word. Silence, stuttering, lisps, voice variations, gestures, signs, signals, eye contacts, and facial expressions are among many additional speech tools that enhance, clarify, obfuscate, or decorate self-expression.[14] Furthermore, calligra-

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7. *See infra* Part II.A.

8. *See* Joshua A. Fishman, *The New Linguistic Order*, FOREIGN POL'Y, Winter 1998-99, at 26 (arguing that English, despite its worldwide dominance, will likely not become a world language).

9. *See infra* Parts IV.A-B. However, the Quran is a book not exclusively for Muslims; rather it is a book for all the peoples of the world. *See* Quran, sura al-Isra 17:106 (the Quran may be recited to all human beings). The Quran's ordainments are binding on believers. *Id.* sura al-Anfaal 8:24 (Obey God and His messenger).

10. The right to self-expression and personal self-determination are used synonymously for the purposes of this article.

11. *See infra* Part III.

12. Shahrough Akhavi, *Islam and the West in World History*, 24 THIRD WORLD Q. 545, 554 (2003).

13. Quran, sura al-Hujurat 49:13. The best person is the best in conduct. *Id.*

14. *See, e.g.*, Carolyn Ellis, *"I Hate my Voice": Coming to Terms with Minor Bodily Stigmas*, 39 THE SOC. Q. 517, 528 (1998) (author narrates a devastating childhood experience based on her lisp).

phy, architecture, drawing, painting, dancing, music, sports, and numerous other modes of expression fall within the domain of self-expression. Whereas language identifies speech communities, self-expression identifies individuals.

The right to language and the right to self-expression are distinct divine rights, and each must be separately recognized and protected. Yet, these two divine rights are related and reinforce each other, since personal speech is inherently part of individual self-expression. When a language is protected and promoted, the personal speech of its native speakers is correspondingly protected and promoted. But when a language is suppressed or denigrated, its native speakers cannot effectively exercise their right to personal speech. Even if one is multilingual, most individuals exercise their right to personal speech through their own native languages. Personal speech is, to a large extent, a utilitarian means for communicating with other members of a speech community. It is also an artistic and literary means by which to share joy and beauty. When native speakers are denied their right to personal speech, the speech community's right to language is impacted negatively. Correspondingly, when a native language is suppressed, the right to personal self-determination is diminished for its speakers. The Islamic law of speech diversity, therefore, protects both the speech community's right to language as well as the individual's right to self-expression.

The twin rights of language and self-expression function in a dynamic and evolutionary universe.[15] No language or mode of self-expression is motionless in time and space. Languages continually interact with each other, lending and borrowing words, phonology, syntax, idioms, and, indeed, life and cultural experiences.[16] Some languages develop and prosper while others decay and die.[17] The Quran itself refers to communities that were annihilated;[18] these communities disappeared along with their cultural and linguistic heritages. Per the Quran: "For every nation there is an appointed time. When their time comes [for disappearance], then they can

15. Quran, sura ar Rahman 55:29 (every day God manifests Himself in yet another wondrous way).

16. *See generally* GUY DEUTSCHER, THE UNFOLDING OF LANGUAGE: AN EVOLUTIONARY TOUR OF MANKIND'S GREATEST INVENTION (Metropolitan Books, 1st ed. 2005) (describing how language emerges, evolves, and decays). English, for example, despite its Indo-European rooting, borrowed heavily from Latin and French. *Id.* at 85.

17. Today, 40% of languages are dying at an unprecedented rate: "Languages are far more threatened than birds (11% threatened, endangered, or extinct), mammals (18%), fish (5%), or plants (8%). K. DAVID HARRISON, WHEN LANGUAGES DIE: THE EXTINCTION OF THE WORLD'S LANGUAGES AND THE EROSION OF HUMAN KNOWLEDGE 7 (1st ed. 2007).

18. Quran, sura al A'raf 7:4.

neither put it off by a single moment, nor hasten it."[19] Likewise, new nations with new languages and cultural heritages are established. In this evolutionary process of extinction and creation, the twin rights of language and personal self-determination do not lose validity or significance.

Any degradation of speech communities or individual self-expression is contrary to the Islamic law of speech diversity. No human system can be allowed to do what natural forces of evolution might do to the diversity of languages and individual self-expressions.[20] "To God belongs the command."[21] This point—the grundnorm of Islamic law that God alone is the core of normativeness[22]—distinguishes divine acts from human acts, particularly when the two acts are analogous. The divine obliteration of a language is not normatively equal to the human destruction of the same language.

Therefore, the Islamic law of speech diversity opposes both coercive monolingualism and stereotypism. Coercive monolingualism suppresses the diversity of languages, using economic, cultural, and legal tools.[23] In its extreme forms, it may also display hostility toward the propagation and celebration of diverse languages. Stereotypism[24] suppresses the diversity of individual self-determination, using normic standards,[25] stigmatism, racial and gender stereotypes, and notions of disability. It does not permit individuals to question what the Quran calls the beauty (*zeenat*) that God has bestowed on each one of them.[26] Each individual is endowed with personal beauty and, according to the Quran, no one may deny what God permits.[27] Whereas coercive monolingualism champions one language at the expense of other languages; stereo-

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19. *Id.* sura Yunus 10:49.

20. For example, natural forces such as tornadoes and hurricanes kill and maim human beings, sometimes in large numbers, but no human system can rely on natural law to maim and kill human beings.

21. Quran, sura ar-Rum 30:4; *see also id.* sura al-Qasas 28:88.

22. Ismail R. al Faruqi, *The Essence of Religious Experience in Islam*, 20 NUMEN 186, 194 (1973).

23. Monolingualism may be *de jure* or *de facto*. *De jure* monolingualism is established by law, such as in France and Germany, whereas *de facto* monolingualism is established by state practice, such as in the United Kingdom and the United States. Adeno Addis, *Constitutionalizing Deliberative Democracy in Multilingual Societies*, 25 BERKELEY J. INT'L L. 117, 143 (2007).

24. Stereotypism reduces certain individuals to performing certain socially allocated tasks. *See* Ali Khan, *The Dignity of Manual Labor*, 32 COLUM. HUM. RTS. L. REV. 289 (2001).

25. See Gerhard Schurz, *What is 'Normal'? An Evolution-Theoretic Foundation for Normic Laws and Their Relation to Statistical Normality*, 68 PHIL. OF SCI. 476 (2001) for a discussion of normic rules. Normic rules are distinguishable from universal rules in that normic rules admit exceptions whereas universal rules do not. *Id.*

26. Quran, sura al-A'raf 7:32.

27. *Id.*

typism restricts individuals from exercising the full range of self-expressive options. The Islamic law of speech diversity safeguards the variety of languages and self-expressions that communities and individuals mobilize for communication and cultural and artistic discourse.

While speech diversity is part of the divine plan as articulated in the Quran and the Prophet's Sunnah—the Basic Code of Islam or the Shariah[28]—Muslim states and communities have done little to protect the diversity of languages. Some states, such as Turkey, continue to impose a single language on all ethnic groups, refusing to recognize even the existence of other languages spoken in the country.[29] Pakistan faced language riots and eventually lost the Bengali-speaking East Pakistan when it imposed Urdu (a language identified with the liberation movement though only spoken by a small immigrant minority) as an official language of the entire nation.[30] In the Middle East and North Africa, Arabic gradually displaced numerous local languages as Muslims abandoned their native tongues to embrace Arabic, the language of the Quran and the Prophet's Sunnah.[31] Some Muslim states show tolerance for minority languages but do little to celebrate the riches of linguistic diversity.

The protection of individual self-determination is even more problematic in some Muslim states. Conceptually, the right to individual self-determination rebuffs the tyranny of normic standards, actively supports special talents, and proactively accommodates special needs (disabilities). Historical marvels of Islamic architecture, poetry, and art are testaments to the recognition of self-expression, though iconoclastic interpretations of the Basic Code have disapproved of figurative art.[32] And although individuals have always been encouraged to excel in calligraphy[33] and other

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28. *See* Ali Khan, *The Reopening of the Islamic Code*: *The Second Era of Ijtihad*, 1 U. ST. THOMAS L.J. 341, 341-348 (2003).

29. Lauren Fulton, *A Muted Controversy: Freedom of Speech in Turkey*, HARV. INT'L REV., Spring 2008, at 26 (reporting a history of abuse against the Kurds).

30. Tariq Rahman, *Language and Ethnicity in Pakistan*, 37 ASIAN SURV. 833, 836 (1997).

31. In some nations, such as Egypt, the pre-Islamic languages have disappeared; in others across North Africa, some pre-Islamic native languages, specifically Berber, persist, though Arabic is still the dominant language. Kees Versteegh, *Linguistic Contacts Between Arabic and Other Languages*, 48 ARABICA 470, 470-71 (2001). For an analysis of how Arabic replaced Greek and Aramaic in Palestine, see Sidney H. Griffith, *From Aramaic to Arabic: The Languages of the Monasteries of Palestine in the Byzantine and Early Islamic Periods*, 51 DUMBARTON OAKS PAPERS 11 (1997).

32. RICHARD ETTINGHAUSEN ET AL., ISLAMIC ART AND ARCHITECTURE 650-1250, at 6 (2001).

33. SHEILA S. BLAIR & JONATHAN M. BLOOM, THE ART AND ARCHITECTURE OF ISLAM 1250-1800, at 248 (1994). Calligraphy, the most traditional art in Islam, has continued to develop in quality and sophistication. *Id.*

revered activities, individual self-expression in broader social contexts finds fewer protections and outlets. Muslim women face unusual difficulty in personal self-determination,[34] and while persons with special abilities may break through barriers of normalcy, persons with disabilities face stigma and a lower quality of life.[35] For example, Muslim states offer little leadership in instituting, developing, and protecting speech systems for the deaf and the blind.[36] Variations from the ordinary are treated as abnormalities,[37] even objects of ridicule and stigma,[38] without any serious effort to provide therapeutic services, broaden the scope of communication, and integrate persons with special needs into the classroom,[39] workplace, and other communitarian places.[40] Children with disabilities are loved and respected, but sometimes denied the opportunity for development and self-determination.[41]

The thesis of this study is laid out in the following sequence. Part II analyzes the divine grammar of speech diversity, explaining three important ordainments. This part furnishes the rationale

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34. Contemporary Islam and Muslim nations face two formidable charges. First, Muslim nations are charged with oppressing Muslim women. *See* Aziza Yahia al-Hibri, *Muslim Women's Rights in the Global Village: Challenges and Opportunities*, 15 J. OF L. & RELIGION 37 (2000-01) (analyzing injustices against Muslim women in Muslim societies). Second, Islam is charged with being an inherently violent religion. *See* Liaquat Ali Khan, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47 (2006) (analyzing claims whether Muslim militants are addicted to spiritually-inspired violence).

35. *See*, *e.g.*, Atsuro Tsutsumi et al., *The Quality of Life, Mental Health, and Perceived Stigma of Leprosy Patients in Bangladesh*, 64 SOC. SCI. & MED. 2443 (2007). *But see* Fahad al Aboud & Khalid al Aboud, *Leprosy in Saudi Arabia*, 78 LEPROSY REV. 405, 405 (2007) (reporting the establishment of a special hospital for leprosy in Saudi Arabia).

36. *See infra* notes 37-41.

37. For an overview of speech disorders including stammering, dysphagia, dysphonia, dysarthria, cleft palate, and other speech disorders, see Pam Enderby & Joyce Emerson, *Speech and Language Therapy: Does it Work?*, 312 BRIT. MED. J. 1655 (1996).

38. Mah Nazir Riaz, *Pakistan*, *in* COMPARATIVE STUDIES IN SPECIAL EDUCATION 143, 146 (Kas Mazurek & Margret A. Winzer eds. 1994) (noting that disabilities are considered socially stigmatic).

39. Julie E. Dockrell & Geoff Lindsay, *Children with Specific Speech and Language Difficulties—The Teachers' Perspective*, 27 OXFORD REV. OF EDUC. 369 (2001) (explaining the difficulties that teachers experience in providing accommodation to children with special speech needs).

40. Historically, however, Muslims have taken care of the disabled. Souraya Sue El-Hessen, *Disabilities: Arab States in* 3 ENCYCLOPEDIA OF WOMEN AND ISLAMIC CULTURES 98 (Suad Joseph, ed. 2006). Muslim parents see children with disabilities as a gift from God. Disabilities were accommodated at the highest state level. *Id.* The education and training of deaf courtiers in the Ottoman Empire was sophisticated, and sign language was widely used. *Id.*

41. G. Ali Afrooz, *Islamic Republic of Iran*, *in* COMPARATIVE STUDIES IN SPECIAL EDUCATION 88, *supra* note 38, at 88, 92-93 (describing the treatment of the disabled children under Iran's Islamic government); *see also* Sayyed Ali Samadi, *Comparative Policy Brief: Status of Intellectual Disabilities in the Islamic Republic of Iran*, 5 J. OF POL'Y & PRAC. INTELL. DISABILITIES 129 (2008) (reporting that stigma is associated with intellectual disabilities in Iran and that there is limited opportunity for work and care for persons with intellectual disabilities).

that the Basic Code provides for protecting the diversity of languages and personal development. Part III explores the divine right to language, making important distinctions between native languages and gainful languages. It explains that in the evolutionary dynamics of human life, speech communities cannot be isolated from the rest of the world. While linguistic interactions are beneficial for communities, and developing communities may learn the languages of developed communities, any coercive extermination of languages is unacceptable. Part IV discusses the divine right to individual self-expression. This part argues that individual talents and disabilities are part of the divine plan and each individual has the God-given right to fully explore his or her talents. Persons with disabilities have no lesser right to live fully. Together, Parts III and IV conclude that both the right to language and the right to personal development are integral parts of the Islamic law of speech diversity. Part V analyzes the constitutions of seven major Muslim states to determine whether the positive law of those states incorporates the diversity of languages and self-expression. The study concludes by strongly recommending that Muslim states, whether secular or fusion states,[42] will most profoundly reflect the sentiments of people if the state proactively recognizes the divine rights of language and personal self-development.

I. DIVINE GRAMMAR OF SPEECH DIVERSITY

The Shariah reveals three basic elements that constitute the grammar of speech diversity. First, the Quran affirms the presence of diversity (*ikhtilaf*) among human speech communities as part of the divine plan.[43] Speech diversity is not an aberration, abnormality or primitive condition likely to disappear under the developmental force of evolution. *Ikhtilaf* (diversity) of languages is an ordained human condition. As explained below, even monolingual communities do not speak exactly the same language.[44] Second, the Quran intimates that diverse communities exist for forging meaningful fellowship (*ta'aaraf*) among their constituents.[45] *Ta'aaraf* is not aimed at creating detachment, envy, or rivalry between speech communities. It is not a divisive force, though it can

42. *See* L. ALI KHAN, A THEORY OF UNIVERSAL DEMOCRACY: BEYOND THE END OF HISTORY 43-48 (2003). In this book, I develop the concept of fusion states to distinguish them from secular states. *Id.* A fusion state merges the state law with divine law. *Id.*

43. Quran, sura ar-Rum 30:22.

44. *See infra* text accompanying notes 56-59.

45. Quran, sura al-Hujurat 49:13.

be so abused. The divine purpose of *ta'aaraf* is to establish positive group feelings so that the members of a speech community may establish interpersonal relationships, families, schools, and neighborhoods.[46] Third, the Quran states unambiguously that everything that God has created is empowered with intelligent speech (*nataqa*).[47] *Nataqa* is the universal language that manifests itself through diverse languages and speech forms, empowering all creatures, including animate and inanimate objects, to actively participate in the divine plan of creation. The power of intelligent speech belongs to communities as well as to individuals.

A. Ikhtilaf *or Diversity Ordainment*

The Quran states: "And among His Signs is the creation of the heavens and the earth, and the variations (*ikhtilaf*) in your languages and your colors: verily in that are signs for those who know."[48] According to this diversity ordainment, the existence of hundreds of languages is a sign of God's will and sovereignty. It is no accident that human communities develop and speak diverse languages. It is consistent with the divine plan of creation that diverse communities speak not one but many languages. For the uninformed, the diversity of languages might be confusing, threatening, or inefficient. But for those who seek knowledge, says the Quran, variations (*ikhtilaf*) in languages are indispensable elements of creation.[49] The diversity ordainment invites linguists, anthropologists, and other experts to explore the diversity of languages and speech forms, for only persons of knowledge can appreciate linguistic magnificence of the divine plan.

In explaining this diversity ordainment, Muslim exegetes reach the same conclusion. Ibn Kathir lists a number of speech communities, including Tartars, Franks, Berbers, Kurds, Persians, Indians, and Armenians, who speak their own languages.[50] Only God knows, says Ibn Kathir, the variety of languages spoken among the children of Adam.[51] Commenting upon the diversity ordainment, Maududi opines that linguistic variations defy the apparent logic of biology in that human beings furnished with the similar equipment of vocal chords, mouth, and tongue nonetheless culti-

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46. *See infra* Part I.B.
47. Quran, sura Fussilat 41:21.
48. *Id.* sura ar-Rum 30:22.
49. *See id.*
50. Tafsir ibn Kathir, sura ar-Rum 30:23, *available at* http://www.tafsir.com/default.asp?sid=30&tid=40245.
51. *Id.*

vate diverse languages, dialects, pronunciations, and accents.[52] This is so because God, the Master-Artist, has willed diversity (*ikhtilaf*) among human beings.[53] The diversity ordainment is founded on rich diversity, and not automated uniformity.[54] Languages and dialects may differ from nation to nation, city to city, and community to community, even though the people may belong to the same nation or racial stock.[55] Localized accents, pronunciations, and dialects are not necessarily the products of times when communications were scarce and communities lived in temporal and spatial enclaves.[56]

Modern research discloses that monolingualism itself contains intriguing and complex diversity. Accents and pronunciations, the essential parts of speech, vary even within the same language and dialect. In many monolingual speech communities, particularly Arabic, diglossia—a custom under which a prestigious variant of the language is spoken at formal occasions but colloquial vernaculars are used in mundane exchanges—is commonplace.[57] Even substantively, the same language may vary from district to district, the variants often described as dialects. Furthermore, the same language may also carry what are known as sociolects and ethnolects. The sociolect of the educated classes is different from that of the working class. In the United States, Black English is not the same as White English.[58] And even within white communities, the third generation descendants of German, Polish, and Italian Americans, who have lost their ancestral language, continue to carry in their respective English ethnolect their family's linguistic heritage.[59] These dialectal layers furnish insights into the divine plan of speech diversity.

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52. Sayyid Abul Ala Maududi, Tafheem ul Quran, sura ar-Rum 30:22, n.32 (Zafar Ishaq Ansari trans.), *available at* http://www.tafheem.net/main800.html.

53. *Id.*

54. *Id*. sura ar-Rum 30:22, n.31.

55. *Id.*

56. Even in the twenty-first century United States, a nation meshed together through extensive media including scores of television and radio channels, English is the language of the South and North, East and West, yet accents and usages of English are far from uniform across the nation. The same English words are pronounced and understood differently in different ethnic and immigrant communities.

57. Amin F. Malhas, *Jordan*, *in* MOTHER TONGUE PRACTICE IN THE SCHOOLS 181, 191 (Kurt Opitz ed., 1972); *see also* Peter Sutton, *Educational Language Planning and Linguistic Identity*, 37 INT'L REV. EDUC. 131, 134 (1991).

58. Walter F. Edwards, *Sociolinguistic Behavior in a Detroit Inner-City Black Neighborhood*, 21 LANGUAGE IN SOC'Y 93 (1992) (persons embedded in the neighborhood are more likely to speak the vernacular).

59. Peter Sutton, *Educational Language Planning and Linguistic Identity*, 37 INT'L REV. EDUC.133, 135 (citing Wolfgang Wolck, *The Linguistic Resolution of Urban Ethnic Conflict*, *in* PLURILINGUA VII, URBAN LANGUAGE CONFLICT 21, 23 (Peter H. Nelde ed., Dummler-Bonn 1989)).

Speech diversity is not confined to communities, but each individual is gifted with a unique and dynamic apparatus of speech. No two individuals exercise speech abilities in the same exact manner.[60] The choice of words, accent, pronunciation, quality of voice, speech rhythm, gestures, humor, facial expressions, sentence structure and numerous other variables, including speech disabilities, distinguish one speech act from the other. The diversity of speech acts is immeasurable even though individuals may be using the same language. The same individual may exercise diverse manners of speech in varying social contexts. Even stuttering may vary from one situation to another, depending on "effects of emotional and autonomic arousal, and linguistic and other cognitive processing demands."[61]

Languages are often associated with the ear and the tongue and not with the eyes. Only with the advent of scripts have languages become visual. But for centuries, and even today, language in its most robust and lively form involves speech and hearing. The word, spoken or written, has been the primary focus of the so-called "intellectual languages."[62] Visual languages are not necessarily texts. They could consist of numbers, figures, abstract symbols, and human gestures. The rise of hermeneutics is the rise of the word over visual images. In hermeneutic cultures, the truths of interpretation carry more value than the methods of observation.[63]

B. Ta'aaraf *or Fellowship Ordainment*

In order to further clarify the grammar of speech diversity, the Shariah intimates that the diversity of nations and communities is part of the divine plan. The Quran states: "O human beings! Lo! We have created you male and female and have made you nations and tribes that you may know one another (*ta'aaraf*)."[64] This fellowship ordainment recognizes two distinct diversities, gender and communal, which are mentioned together in the same verse to demonstrate their analogous rooting in natural law. Gender identity furnishes self-knowledge whereas communal identity supplies familiarity with others. Each identity, such as sisterhood or bro-

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60. *See* A. Daniel Yarmey, *Earwitness Speaker Identification*, 1 PSYCHOL. PUB. POL'Y & L. 792 (1995).

61. Christine Weber-Fox & Amanda Hampton, *Stuttering and Natural Speech Processing of Semantic and Syntactic Constraints on Verbs*, 51 J. SPEECH LANGUAGE & HEARING RES. 1058, 1058-59 (2008).

62. *See* Quran, sura al-Hujurat 49:13.

63. Martin Jay, *The Rise of Hermeneutics and the Crisis of Ocularcentrism*, 9 POETICS TODAY 307, 309 (1988).

64. Quran, sura al-Hujurat 49:13.

therhood that is derived from gender and camaraderie that is derived from meta-gender community, is both natural and authentic. It is natural for women to congregate with women and men with men, for such congregations furnish gender-specific knowledge. However, men and women cannot be imprisoned in their respective genders. Men and women must meaningfully and respectfully serve inter-gender communities to nurture social, cultural, artistic, and spiritual bonds.[65]

Most important, the Quran's ordainment clarifies the divine purpose of creating communal diversities. According to the divine plan, the *raison d'etre* of forming communities is fellowship (*ta'aaraf*).[66] The community supplies individuals with what Ibn Khaldun (d. 1406) described as "group feelings,"[67] which is yet another explication of *ta'aaraf*. While grandiose sentiments of connections with the entire human species or a big portion thereof are noble, individuals as a matter of reality derive an intimate sense of belonging from community affiliations. Ibn Khaldun argues that blood ties generate natural affection among members of a group.[68] The Basic Code obligates individuals to support and serve their extended families.[69] The sense of group fellowship, however, is not confined to blood relations. The Prophet disapproved of tribal and ancestral pride that disables persons from connecting with other people.[70]

In introducing the concept of fellowship (*ta'aaraf*), the Quran mentions two distinct meta-gender aggregative units: tribes and nations.[71] The sense of group solidarity may not be confined to a single aggregative unit but indeed may be simultaneously formed with both smaller and larger groups. An intimate sense of fellowship or "we-feeling" may exist in a smaller group, such as a neighborhood, town, or tribe, but individuals who forge an intimate rela-

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65. The Basic Code places restrictions on certain inter-gender behavior to avoid non-marital sexuality and treating women as sexual objects. *See* Rafida al-Hariri, *Islam's Point of View on Women's Education in Saudi Arabia*, 23 COMP. EDUC. 51 (1987). However, it does not prohibit women from participating in social, political, and economic life of the community. *Id.*

66. Quran, sura al-Hujurat 49:13.

67. IBN KHALDUN, THE MUQADDIMAH 264-65 (Franz Rosenthal trans., 1958). John Stuart Mill made a similar argument that unless the people speak the same language, establishing a representative democracy "is next to impossible." JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 120-121 (Longmans, Green and Co., 1919) (1861).

68. KHALDUN, *supra* note 67, at 264.

69. Quran, sura an-Nahl 16:90.

70. The Prophet said: "Allah, Most High, has removed from you the pride of the pre-Islamic period and its boasting in ancestors." Sunan Abu Dawud, bk. 41, Hadith No. 5097, http://www.searchtruth.com/book_display.php?book=41&translator=3&start=199&number=5085 (last visited Apr. 11, 2010).

71. Quran, sura al-Hujurat 49:13.

tionship with the inhabitants of a town or a tribe may also belong to a larger social group, such as a state or a nation.[72] This human ability to foster more than one aggregate bond, an ability emanating from the divine plan, demonstrates that human beings are not designed to pursue only narrow group identities but also possess the natural capacity to connect with peoples outside of their tribes and towns. The fellowship (*ta'aaraf*) ordainment must not be interpreted to defend any rigid or virulent tribalism.

Although tribes and nations mentioned in the fellowship ordainment are not defined through linguistics, language remains an integral part of group solidarity. Even modern scholars observe that the more intimate the group, the more solidarity occurs within the same speech community.[73] It is natural for an extended family, a tribe, or a town to speak the same language or the same dialect. Larger social units, such as states or nations, however, may or may not speak the same language. The contemporary phenomenon of official state languages is bringing diverse communities together through a common language. Official languages, however, rarely succeed in eliminating sociolects and ethnolects that continue to furnish intimate fellowship.

The fellowship ordainment does not justify group arrogance or linguistic factionalism. Analogous to social markers of race and color, language can be used as a tangible marker of group inferiority or superiority. In Pakistan, for example, minor languages spoken by poor and powerless speech communities are often saddled with inferiority, pressuring these communities to shift to Urdu or English. Even Punjabi, a major language spoken by over forty-four percent of the population, is associated with backwardness and the "village yokel," forcing Punjabi families to shift to Urdu.[74] The children educated at elitist English-medium schools, and coming from affluent or professional families, show little respect for Urdu.[75] These social hierarchies attributed to language cannot be justified under the fellowship ordainment.

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72. Terrance G. Carroll, *Islam and Political Community in the Arab World*, 18 INT'L J. MIDDLE E. STUD. 185, 192 (1986) (explaining that people identify with more than one group).

73. *See, e.g.*, Mark S. Nadel, *Customized News Services and Extremist Enclaves in* Republic.com, 54 STAN. L. REV. 831, 836-37 (2002) (book review) (arguing that fostering a common language is indispensable for the forming of a community).

74. Tariq Rahman, *Language Policy, Language Death and Vitality in Pakistan*, http://www.tariqrahman.net/lanmain.htm (follow hyperlink for article title) (last visited Apr. 11, 2010).

75. *Id.*

C. Nataqa *or Universality Ordainment*

The Hebrew Bible presents the idea that the "whole world had one language and a common speech."[76] Furthermore, human beings are inherently loquacious since Adam could name all things, an advantage he had over the angels. The first and only language was perfect, and could accurately describe reality. However, according to the Bible, this perfect language was lost when the Babylonians planned to build a city "with a tower that reaches to the heavens."[77] God confused the one, perfect language so that builders could not communicate with each other.[78] This confusion produced multiple languages and the dispersion of one people into many communities.[79] Exegetically, particularly in Christianity,[80] the diversity of languages is interpreted as a curse, a living reality of human arrogance, and a testimonial that man is confused, confounded and scattered.[81] Some argue that human speech has not been completely corrupted but each language contains some elements of truth.[82] Since the pre-confusion language was divine and perfect, the question remains whether the epistemologically perfect language can be retrieved or reconstructed.[83]

The Quran does not embrace the linguistic part of the Babel story.[84] Like the Bible, however, the Quran does offer the idea of a universal speech that informs the entire universe; a speech that has not been confused, lost, or taken away. In addition to instituting diverse languages among tribes and nations to foster social solidarity as opposed to punishing or to dispersing them, the Shariah intimates that God has empowered all creatures with universal

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76. *Genesis* 11:1 (New International Version).

77. *Genesis* 11:4 (New International Version).

78. *Genesis* 11:5-7 (New International Version).

79. *Genesis* 11:9 (New International Version).

80. In the Christian tradition, the Babel story is about human pride, but in the Jewish exegetical tradition the story is about dispersion since the people by building a vertical tower wanted to stay at the same place. *See* P.J. Harland, *Vertical or Horizontal: The Sin of Babel*, 48 VETUS TESTAMENTUM 515 (1998).

81. Einar Haugen, *The Curse of Babel*, DAEDALUS, Spring 1973, at 47, 47-48 (arguing that the Biblical story has reversed the cause and effect in that diverse languages surfaced because human beings were scattered and not vice versa). Even secular literature embraced the idea that the diversity of languages was a curse and can be remedied. *See* Clark Emery, *John Wilkin's Universal Language*, 38 ISIS 174 (1948).

82. Hans Aarsleff, *Origin of Universal Languages*, 6 LANG. IN SOC'Y. 281 (1977) (book review). *See generally* HANS AARSLEFF, FROM LOCKE TO SAUSSURE: ESSAYS ON THE STUDY OF LANGUAGE AND INTELLECTUAL HISTORY (Univ. of Minn. Press 1982).

83. *See* David S. Katz, *The Language of Adam in Seventeenth-Century England*, *in* HISTORY AND IMAGINATION: ESSAYS IN HONOUR OF H.R. TREVOR-ROPER 132, 132–45 (Hugh Lloyd-Jones et al. eds., 1981); *see also* JAMES KNOWLSON, UNIVERSAL LANGUAGE SCHEMES IN ENGLAND AND FRANCE 1600-1800, at 9-15 (Univ. of Toronto Press 1975).

84. *See* sura Ghafir 40:36-37. The Quran, however, does mention that the Pharaoh summoned the building of a tower to reach the God of Moses. *Id.*

speech, called *nataqa*. The Quran clarifies this point with the following illustration. On the day of accountability, says the Quran, human skins will speak to testify for and against the persons who resided in them.[85] The persons held accountable would ask their skins how they acquired the ability to express themselves.[86] The skins will reply: "The same God Who has given *nataqa* (intelligent speech) to everything has given it to us too."[87] This ordainment alerts human beings that all creations, human and non-human, possess *nataqa*.

Anthropocentric presumptions that languages are the unique property of human beings embrace a notion of speech that cannot be reconciled with *nataqa*. Likewise, human notions that animals are dumb or that inanimate objects are mute are incompatible with *nataqa*. According to the Quran, each distinct community, human and non-human, animate or inanimate, cultivates its own speech.[88] Each speech system, human and non-human, is an intelligent manifestation of *nataqa.* By participating through the intelligence of *nataqa*, diverse species, including angels, ants, birds, mountains, and animals communicate among themselves and with each other. Even God speaks through the universal medium of *nataqa*;[89] hence, *nataqa* is not anthropocentric.

With respect to human speech, whether spoken or written, *nataqa* is not confined to auditory or scriptory forms of communication. Among human beings, the sign language for the deaf is visual, and one for the deaf and the blind is tactile. Gestures constitute a significant part of communication. Even complete silence conveys meaning. All these diverse modes of communication—auditory, scripted, visual, tactile, gestural, silence, and many others—are manifestations of universal speech or *nataqa.*[90]

There exists no opposition between the universality of *nataqa* and diversity of human speech.[91] Over the centuries, human beings

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85. Quran, sura Fussilat 41:21.

86. *Id.*

87. *Id.*

88. In the nineteenth century, Louis Braille, who turned blind at the age of 3, invented a new language for the blind, now named Braille, which allows the person to read a text with his fingers. C. MICHAEL MELLOR, LOUIS BRAILLE A TOUCH OF GENIUS (2006). Braille can be used to write and read text in any human language. *Id.* at 112

89. I am developing the divine concept of *nataqa* in a forthcoming article. *See* Liaquat Ali Khan, The Islamic Concept of Universal Speech (unpublished manuscript, on file with author).

90. *Antaqa* may be distinguished from *aswat* (voices). Aswat are auditory whereas *antaqa* is much more than a collection of *aswat*. The Quran mentions *aswat* in several verses. *See*, *e.g.*, Quran, sura Luqman, 31:19 (lower thy voice).

91. In Western literature, important distinctions have been made between speech and language. Language is defined as the underlying structure whereas speech is the use of language for functional or literary purposes. *See* Edward MacKinnon, *Language, Speech,*

have developed hundreds of speech forms.[92] Most were spoken languages, though some were both spoken and written. In the relatively small area of New Guinea region alone, presently some 1200 languages are actively spoken.[93] Franz Boas explains that the present distribution of a few linguistic stocks[94] across vast geographical areas is a new historical phenomenon.[95] And as with other human elements, human languages rise and fall.[96] Some languages perish.[97] Others attain universal recognition.[98] New languages replace old languages.[99] Some languages merge with others to make new dialects and languages.[100] Some generously borrow from each other.[101] While languages as speech forms are transient, *nataqa* is permanent. Under no circumstances do human beings lose the ability to communicate with each other. This ability emanates from *nataqa*.

Anthropocentric linguistic research struggles with the notion of a universal language. Despite the extensive and dynamic diversity of human speech forms, linguists continue to discover various universal elements underlying human speech. A nineteenth-century observation captures a simple but spectacular truth that "[e]very people can learn the language of every other."[102] Franz Boas identifies phonetics, grammar, and vocabulary as three fundamental aspects of human speech.[103] Variations in these elements constitute the differences in conventional languages.[104] Each conventional

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and Speech-Acts, 34 PHIL. & PHENOMENOLOGICAL RES. 224 (1973). These distinctions are not made here to separate *antaqa* from languages.

92. Frederic W. Farrar, *Language and Ethnology*, 4 TRANSACTIONS OF THE ETHNOLOGICAL SOC'Y OF LONDON 196 (1866) (showing inaccuracy of the belief that there was only one primitive language from which all languages have branched off).

93. William A. Foley, *The Languages of New Guinea*, 29 ANN. REV. OF ANTHROPOLOGY 357, 358 (2000). Each language is spoken by a small number of speakers, roughly 3000. *Id.* at 359. The largest language, Enga, has only 200,000 speakers. *Id.* Some languages have fewer than fifty speakers. *Id.* The reasons for this unprecedented linguistic diversity are the time depth of human settlements and the political disunity of self-protective clans. *Id*. at 358.

94. A linguistic stock is a group of related languages that differ from another group of related languages. J.M.C., *Primitive Languages*, 1 PRIMITIVE MAN 17, 18 (1928). The Indo-European stock is in this sense distinct from the Semitic stock. *Id.*

95. Franz Boas, *The Classification of American Languages*, 22 AM. ANTHROPOLOGIST 367, 368 (1920).

96. *See* Foley, *supra* note 93, at 358-59.

97. *Id.* at 359.

98. *See* Fishman, *supra* note 8.

99. Boas, *supra* note 95, at 368.

100. Urdu, for example, is an amalgam of numerous languages and dialects. C. Shakle, *Punjabi in Lahore*, 4 MODERN ASIAN STUD. 239, 241 (1970).

101. Foley, *supra* note 93 at 359.

102. 1 FRIEDRICH RATZEL, THE HISTORY OF MANKIND 30 (A.J. Butler trans., 1896).

103. Boas, *supra* note 95, at 369.

104. Western colonization produced the unsupportable theory of primitive languages, arguing that European languages are superior. *See* JOEL SPRING, EDUCATION AND THE RISE

language cultivates its own phonetics, grammar, and vocabulary, yet cross-pollination of these elements has been a recurrent linguistic phenomenon.[105] Cross-pollination evidences *nataqa*. Noam Chomsky proposes the existence of a universal grammar rooted in human cognitive capacities and mental structures.[106] Neurological evidence suggests that the human brain is wired to comprehend the logic of real languages.[107] These insights might carry elements of divine truth, at least as far as the human species is concerned, that a fundamental intelligence informs diverse languages.

II. DIVINE RIGHT TO LANGUAGE

This part argues that speech communities have a divine right to language. The Islamic law of speech diversity protects native languages and values diverse dialects and scripts that speech communities develop to create and preserve stories, poems, proverbs, jokes, songs, insights, wisdom lessons, and numerous other oral and written linguistic assets. Opposed to the protection of native languages is "coercive linguistics" that threatens the survival of hundreds of minor languages. Coercive linguistics is an aggressive ideology that imposes a single language over diverse speech communities. Defended under the rubrics of nation-building, state unification, cultural assimilation, economic instrumentalism, or even blatant supremacist dogma, coercive linguistics aims to exterminate the diversity of languages, dialects, and scripts.[108] In defending native languages, Islamic law repudiates coercive linguistics as an ideology contrary to the divine plan of speech diversity. While Islamic law protects native linguistics, it does not oppose speech communities from learning a second or third language. In order to draw economic, scientific, or spiritual benefits, speech communities may encourage their members to learn other languages. The Islamic law of speech diversity is not opposed to the

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OF THE GLOBAL ECONOMY 13 (1998). However, primitive languages served their communities as effectively as do contemporary languages. *See* J.M.C., *supra* note 94, at 23. "[S]avages and barbarians are possessed of the same kind [and degree] of rational intelligence that civilized peoples possess." *Id*.

105. Foley, *supra* note 93, at 359.

106. NOAM CHOMSKY, RULES AND REPRESENTATIONS 28-30 (Colum. Univ. Press 1980) (1980).

107. *Id.*; *see also* MICK RANDALL, MEMORY, PSYCHOLOGY, AND SECOND LANGUAGE LEARNING 40 (2007)(discussing both universalist and modular approaches to languages).

108. *E.g.*, Rahman, *supra* note 74 ("Language policy in Pakistan is meant to strengthen the state."); *see also* CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN arts. 28, 251. For a case study of how a script containing religious literature meets extinction, see Ali S. Asani, *The Khojki Script: A Legacy of Ismaili Islam in the Indo-Pakistan Subcontinent*, 107 J. AM. ORIENTAL SOC'Y 439 (1987).

gainful usage of linguistics that does not threaten the existence of native languages. Islamic law is tied neither to monolingual ideologies nor to any presumed purism or exclusivity of native linguistics.

A. Native Linguistics

As discussed above, variation (*ikhtilaf*) in languages is part of the divine script. In other words, the Basic Code confirms the permanence of native linguistics—that is, a common language forges cultural solidarity among members of a speech community.[109] Sociolinguists may study the mechanics of language as a marker of identity. They may research how dialects sprout and subsist. They may analyze the special attributes of a speech community. They may explain how economic and cultural forces contribute to the construction of sociolects. They may investigate the role of law in promoting and suppressing languages. While these studies are instructive, "native linguistics" in this article refers to the divine plan under which macro- and microlinguistic variations are inevitable, beyond any human power to completely eradicate them.

Native linguistics is a manifestation of natural law. The emergence and disappearance of languages or the process of their mutual differentiation is no different than any other natural phenomenon that, for example, brings forth evolutionary variety in flora and fauna, in forms of life, and among stars and planets strewn in the universe.[110] Following the forces of natural law, native languages undergo complex transformation. Some languages face the threat of extinction. Others bear fruit and gain strength. Due to economic-driven globalization, languages are disappearing at a rapid pace.[111] Losing a language is losing the cultural assets of a speech community, including its ideas, stories, insights, and inferences drawn from experience.[112] Yet the natural disappearance of some languages is as much a part of the divine plan as is their survival.

1. Cultural Pluralism

Native linguistics is so sturdily wired into human nature that

109. Quran, sura ar-Rum 30:22.
110. *Id.* sura as-Saffat 37:6.
111. DANIEL NETTLE & SUZANNE ROMAINE, VANISHING VOICES: THE EXTINCTION OF THE WORLD'S LANGUAGES 10-23 (2000).
112. *See* HARRISON, *supra* note 17, at 3-12.

even a common religion cannot diminish its longing.[113] Hundreds of speech communities across the world continue to speak their native tongues after practicing Islam for many centuries and while knowing that the Basic Code was revealed in Arabic. National vernaculars among Arab states vary considerably and continue to flourish along with the immutable Arabic of the Quran. In the era of nation-states, the common faith of Islam could not furnish a strong rationale for diverse speech communities to band together under the same flag. Muslim Kurds living among Muslim Persians, Muslim Syrians, Muslim Iraqis, and Muslim Turks yearn for a separate nation-state where they can speak their own language. Pakistan, a state carved in the name of Islam out of a predominantly Hindu India, failed to override native languages of diverse speech communities[114] through the common faith of Islam. In contrast, East Pakistan, though largely Muslim but speaking *Bangla*, a language nowhere spoken in West Pakistan, seceded to establish a separate nation-state, called Bangladesh (the home of *Bangla*).

The divine plan of speech diversity affirms cultural pluralism. In each speech community, native or folk stories are the repositories of culture.[115] Stories convey the messages of good relationships with parents, family, neighbors, and community; they teach manners, morality, fairness, bravery, virtue, and things that must be done and things that must be avoided. Storytelling is an essential part of cultural education. No culture can survive without stories, and no stories are free of cultural intones. A speech community is degraded when its stories are assaulted, ridiculed, or simply ignored. A speech community is preserved when its stories are told, retold, staged, filmed, and set to music. "Through storytelling, the values and philosophies of particular cultural groups [are] passed on across the generations, thereby contributing to the maintenance

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113. Likewise, a common geography, economy, or legal system may not produce a monolingual community. Franz Boas explains that, at the earliest times, linguistic diversity had existed among genetically related racial groups. FRANZ BOAS, THE MIND OF PRIMITIVE MAN 137-48 (The Free Press 1965) (1911).

114. For a complete list of the living languages of Pakistan, see *Pakistan*, *in* ETHNOLOGUE: LANGUAGES OF THE WORLD 588-598 (M. Paul Lewis ed., 16th ed. 2009), *available at* http://www.ethnologue.com/show_country.asp?name=PK. Muslim Pakistan is home to over sixty native languages though six distinct major languages predominate. Tariq Rahman, *Arabic in Pakistan*, http://www.tariqrahman.net/lanmain.htm (follow hyperlink for article title) (last visited Apr. 11, 2010). The major languages are Punjabi, Pashto, Sindhi, Siraiki, Urdu, and Balochi. *Id.* In the flow of time, some Pakistani languages have died while others are rejuvenated. *Id.*

115. Language does not shape the entire culture since culture contains numerous nonlinguistic elements. WILLIAM BRIGHT, VARIATION AND CHANGE IN LANGUAGE: ESSAYS 3-5 (Anwar S. Dil ed., 1976). Nonetheless, language is an integral part of culture. *Id.*

of the group's cultural identity and sense of community."[116] Authentic cultural stories, told without bias and filters, may be incorporated into a shared curriculum of public and private schools so that children of diverse backgrounds can take pride in their own heritage and simultaneously learn about other cultures. Language is an experiential and existential narrative; it cannot be viewed mechanistically as a series of abstract morphemes and phonemes.[117]

Native languages spoken in Muslim communities are storehouses of the intangible cultural heritage. The heritage of a civilization is rarely limited to material manifestations of creativity and grandeur. The Moghul Taj Mahal in India, the Moorish Alhambra in Spain,[118] and the Umayyad Dome of the Rock in Jerusalem are monuments to Muslim conceptions of love, beauty, and commitment to share spiritual space with other peoples of faith. But the cultural heritage of Islam also resides in unknown native tongues. Dungans, the descendants of Chinese Muslims in the Ch'u Valley of Central Asia, migrated from China to escape the brutality of Manchu rule.[119] They were poor and illiterate.[120] They brought little with them except the Arabic Quran and native "stories, poems, legends, songs, proverbs, and riddles in oral form."[121] These linguistic treasures retained in the original Chinese dialect sustained Dungans as a speech community while they worked hard to build a new life.[122] These native treasures are also part of the Islamic cultural heritage.

2. Nativization of the Basic Code

Besides native languages, the Arabic of the Quran carries a

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116. Ella Inglebret, et al., *Integrating American Indian/Alaska Native Culture into Shared Storybook Intervention*, 39 LANGUAGE, SPEECH, & HEARING SERVICES IN SCHOOLS 521, 522 (2008); *see also* DONALD L. FIXICO, THE AMERICAN INDIAN MIND IN A LINEAR WORLD: AMERICAN INDIAN STUDIES AND TRADITIONAL KNOWLEDGE 21-37 (2003).

117. *See* Carola Conle, *Language, Experience, and Negotiation*, 22 CURRICULUM INQUIRY 165 (1992) (proposing to join the learning of a second language with students' personal practical knowledge).

118. Professor Karen Barron of Washburn University sent me the following note: "It was a great pleasure to revisit Alhambra in my mind again as you mention it. The tiles, the architecture, the gardens seem as heaven might be." Letter from Karen Barron to Ali Khan (Jan. 23, 2009) (on file with author).

119. Svetlana Rimsky-Korsakoff Dyer, *Karakunuz: An Early Settlement of Chinese Muslims in Russia*, 51 ASIAN FOLKLORE STUD. 243, 244 (1992).

120. *Id*. at 245.

121. *Id.*

122. *See id*. One riddle depicts a scorpion as follows: "A piece of meat is on the wall [but] no passerby touch it." *Id.* at 260 (alteration in original). Insect stories are also part of the Islamic intangible heritage. The thirtieth chapter of the Quran is named *al-Ankabut*, which means "the spider."

special place in the hearts of Muslims.[123] Arabic is the language that the Prophet spoke and the language in which he delivered legal opinions, called the Sunnah. Although Arabic dialects vary from one Arab nation to another and have evolved over the centuries, the immutable Arabic of the Quran binds Muslim communities across time and geography.[124] Even though most Muslims are unable to speak Arabic, they say the daily five prayers in Arabic. The call to prayer, said in Arabic, is a universal phenomenon. All Muslims wish to memorize the Quran in Arabic as much as they can. Almost all Muslim speech communities of the world individually produce several hundred persons who memorize the entire text of the Quran and recite it in special prayers during Ramadhan. When it comes to the sacred text of the Quran, the distinction between Arab and non-Arab ceases to exist as no one disputes that the Quran is revealed in Arabic. Listening to the Quran in Arabic is commonplace in Muslim states and in mosques and Islamic centers built in non-Muslim countries, including the United States. These practices, presenting the ritual unity of the Muslim world, are unlikely to change in the future. These practices invite Muslims of the world to add the Arabic of the Quran to their linguistic assets.

While the Quran is preserved in Arabic, it has now been translated and explained in numerous languages. Diverse speech communities, which exist under the divine plan, have every right to understand the Quran and the Sunnah in their native tongues. God's ordainment that "[w]e have made it a Qur'an in Arabic so that you may be able to understand"[125] was addressed to the Prophet and his Arabophone audience and not to non-Arabic speech communities. With reliable translations and explanations of the Basic Code, the center of exegetical gravity has begun to

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123. The languages in which scriptures have been written or revealed are known as truth or divine languages. Liaquat Ali Khan, *The Immutability of Divine Texts*, 2008 BYU L. REV. 807, 810. Sanskrit contains the truth of Gita and Puranas, the Hindu religious texts, Hebrew is the language of the Torah, Aramaic and Greek are the languages of the Gospels, Latin is the language of the Catholic Church, and Arabic is the language of the Quran. Communities show great respect for truth languages and believe that their deepest identity is derived from the truth language. It is no minor event that a sacred text is preserved in a particular language for centuries.

124. One of the most distinctive features of the Arab world is that Classical Arabic coexists with such national vernaculars as Egyptian, Syrian, Jordanian, and so on. The first is the language of writing, education, and administration, while the latter are the media of oral exchanges, nonprint media, poetry, and plays.

Niloofar Haeri, *Form and Ideology: Arabic Sociolinguists and Beyond*, 29 ANN. REV. OF ANTHROPOLOGY 61, 63 (2000). The Arabs are reluctant to translate the Quran in national vernaculars. *Id*. at 75.

125. Quran, sura az-Zukhruf 43:3.

shift away from the Middle East. For centuries, Arabophone communities have interpreted the Quran for the Muslim world. In these interpretations, the Arab culture informed the understanding of the Basic Code. The second era of *ijtihad,* which is underway throughout the Muslim world, is no longer tied to the Arabic language and Arab culture.[126] Muslims have always been multilingual, and now Islam will be too.[127] Arabophone communities will continue to contribute to the evolving understanding of the Basic Code, but now, perhaps more vigorously than ever before, diverse speech communities will understand and interpret the Basic Code in their native tongues, expanding the comprehension of God's ordainments and the Prophet's Sunnah. The nativization of the Basic Code will deepen the roots of Islam.

B. Coercive Linguistics

Coercive linguistics deploys language as a means of imposing a world viewpoint, a way of life, and cultural preferences, and, in its worst form, turns predatory to burgle natural and human resources. Most importantly, coercive linguistics suppresses minor languages to the extent of degradation. Empires, occupiers, and missionaries have deployed coercive linguistics to control, plunder, and convert populations considered barbaric, resourceful, or bereft of truth.[128] Lord Thomas Babington Macaulay, a humanist, the author of the Indian Penal Code, and the colonial champion of English language, believed that "a good European library [is] worth the whole native literature of India and Arabia."[129] He had serious doubts that Sanskrit or Arabic could absorb the modernity of the nineteenth century.[130] In order to effectively rule British India, Lord Macaulay proposed to educate "a class of persons, Indian in blood and colour, but English in taste, in opinions, in morals, and in intellect."[131] The Indian elites, Hindus more than Muslims, accepted Macaulay's invitation to race-laden linguistics.

Lord Macaulay was by no means atypical. "Colonial linguistics

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126. *See* Khan, *supra* note 28. "Intellectual and spiritual striving to find the path is *ijtihad*." *Id.* at 345.

127. Muslim speech communities must be careful against foreign conspiracies to divide Muslims on the basis of language. The French, for example, actively conspired to drive a wedge between Arabophone and Berberophone communities of Algeria. *See* ISLAM: STATE AND SOCIETY 185 (Klaus Ferdinand & Mehdi Mozaffari eds., 1988).

128. *See* FELIX MARTI ET AL., WORDS AND WORLDS: WORLD LANGUAGES REVIEW 80-83 (Colin Baker & Nancy H. Hornberger eds., 2005) (explaining how lingual racism identifies certain languages with poverty, superstition, and inferiority).

129. THOMAS BABINGTON MACAULAY, SPEECHES 349 (Oxford Univ. Press 1979) (1935).

130. *Id.* at 345-61.

131. *Id.* at 359.

. . . [was] a project of multiple conversion: of pagan to Christian, of speech to writing, and of the alien to the comprehensible."[132] Multilingual communities were seen as communities of the Biblical Babel, which had been confused through the loss of a single language, a state of linguistic bliss to be experienced in the Paradise, which is presumably monolingual.[133] Colonial missionaries perceived linguistic diversity as a curse[134] and not as a resource. "Linguistic diversity within and across communities [was] perceived in this way as a puzzling sign of barbarism."[135]

Coercive linguistics searched for verbal glue to bind societies.[136] Shaped by Spencer and Darwin, secular metrics surfaced to measure the survivability of languages in terms of their "conceptual precision" and "communicative efficiency."[137] The secular metrics paved the way for hierarchies, according less respect to some languages than to others.[138] Coercive linguistics conceptualized the progression of languages from senses to intellect. Primitive languages were presumably tied to the senses, whereas Western languages presumably flourished through intellect.[139] This presumptive ideology saw language as an instrument of social engineering rather than a cultural and literary asset of community.[140] Anthropologists argue that minority languages are suppressed when the majority centralizes power and enforces hegemonic state structures.[141] The reverse is also true. When the state centralization weakens, minority languages reappear and flourish again.[142] A minority language may meet extinction only if it is subordinated for a long period.[143]

The Muslim world, though conquered and degraded during colonial times, has not been immune to its own internal coercive linguistics. Although the extinction of minor languages was never a policy they favored or followed, Muslim empires spanning over a period of thirteen centuries did little to promote the diversity of languages. Arabic and Persian, the two dominant languages of

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132. Joseph Errington, *Colonial Linguistics*, 30 ANN. REV. ANTHROPOLOGY 19, 21 (2001).
133. *See id.* at 27.
134. KNOWLSON, *supra* note 83, at 9-15.
135. Errington, *supra* note 132, at 28.
136. *Id.* at 23-30.
137. *Id.* at 33-34.
138. *Id.* at 25-27.
139. *See id.* at 34.
140. *See id.* at 33-34.
141. *See generally* Jonathan Friedman, *Globalizing Languages: Ideologies and Realities of the Contemporary Global System*, 105 AM. ANTHROPOLOGIST 744 (2003).
142. *Id.*
143. *Id.*

most empires, monopolized creative and administrative functions, including literature, arts, jurisprudence, and judicial systems.[144] In fact, much of the Islamic linguistic history can be described as a fruitful duel between Persian and Arabic, to the exclusion of other languages.[145] For millions of Muslims, Arabic, the language of the Quran, has a competitive advantage over Persian. Even the Persian language abandoned its historical Pahlavi characters and adopted the Arabic script.[146] Yet Persian superseded Arabic in many parts of the Muslim world, including Central Asia, India, and Indonesia.[147] Even the Ottoman Empire could not resist the influence of Persian.[148] The royal language of the Mughal Empire was Persian, not Arabic.[149] The British colonization of Mughal India introduced English to replace Persian, and not Arabic, as the language of administration.[150]

The positive law of constitutions, statutes, and regulations can suppress native languages and may even succeed in perpetrating legal linguicide—that is, deliberate destruction of a specific language by means of law.[151] The phenomenon of official language, which gained currency and strength in the era of nation-states, is coercive by design. It excludes non-official languages from governmental affairs.[152] A nation-state may impose an official language for a variety of reasons, including convenience and efficiency.[153] Some argue that a state's administration and legislative proceedings will be "overtaxed, tangled, and inefficient" if transacted in

144. ALBERT HABIB HOURANI, A HISTORY OF ARAB PEOPLES 87-89 (2002). Major empires were as follows: Umayyad Empire (661-750); Abbasid Empire (750-945); Mughal Empire (1526-1858); Safavid Empire (1501-1722); Ottoman Empire (1280-1923). IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 45, 233, 250, 357, 499 (2d ed. 2002). While Arabic was the lingua franca of the first two empires, Persian was the royal language of the Mughal and Safavid empires. The Ottoman Empire was heavily influenced by both Persian and Arabic, although it retained the Turkish language. *Id.* at 319.

145. *Id*. at 153-56.

146. BERNARD LEWIS, THE MUSLIM DISCOVERY OF EUROPE 71-72 (2001).

147. *Id.*

148. *Id.* at 81-82.

149. Juan R.I. Cole, *Iranian Culture and South Asia, 1500-1900*, *in* IRAN AND THE SURROUNDING WORLD 17 (Nikki R. Keddie & Burzine K. Waghmar, eds. 2002).

150. ANNEMARIE SCHIMMEL, THE EMPIRE OF THE GREAT MUGHALS 259 (2004).

151. An impressive account of state-sponsored linguicide is portrayed in a play. *See* HAROLD PINTER, MOUNTAIN LANGUAGE (Faber and Faber 1988). Speaking to prisoners, a state official announces: "You may only speak the language of the capital. That is the only language permitted in this place. You will be badly punished if you attempt to speak your mountain language. . . . Your language no longer exists." *Id.* at 21.

152. Even the so-called concept of standard language is frequently a political choice. For example, standard Spanish is based on the Castillian variety whereas standard Italian is based on the Tuscan variety. MARTI ET al., *supra* note 128, at 84.

153. Jonathan Pool, *The Official Language Problem*, 85 AM. POL. SCI. REV. 495, 496 (1991) (providing a methodology to choose an official language that satisfies both the demands of fairness and efficiency).

multiple languages.[154] Some argue that equal treatment of languages cannot be a guiding normative principle since governments cannot practically allocate the same status to numerous assorted languages.[155] The state must choose a language to do its official business. In addition to these functional arguments, some scholars argue that representative democracy cannot prosper, and perhaps may not even survive, unless the people contemplate national issues using a single common language.[156]

The ideology of an official language may vary from extreme intolerance of other languages to reasonable accommodation. The most egregious experiment in linguistic engineering and the concomitant suppression of minority languages has occurred in Turkey. During the Ottoman Empire, which identified itself with Islam, the Turkish language, both in phonology and vocabulary, was profusely loaded with borrowings from Persian and Arabic.[157] At the dissolution of Empire and the institution of modern, secular Turkey, a number of steps were taken to cleanse the Turkish language of Arabic-Persian influences.[158] In 1928, the script was changed from the Arabic-Persian alphabet to the Latin alphabet.[159] In imposing the Turkish language on all speech communities, Turkish laws ruthlessly discriminated against the Kurdish language.[160] Even though the laws have softened on the Turkish linguistic ideology, the Kurds remain unsatisfied and aggrieved over the inferior status of their language.[161]

C. Gainful Linguistics

Gainful linguistics recognizes that socioeconomic dynamics influence the acquisition of an opportunity language other than the

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154. Heinz Kloss, *Types of Multilingual Communities: A Discussion of Ten Variables*, 33 SOC. INQUIRY 135, 135 (1966).

155. Vernon Van Dyke, *Human Rights Without Distinction as to Language*, 20 INT'L STUD. Q. 3, 5-6 (1976).

156. Alan Patten, *Political Theory and Language Policy*, 29 POL. THEORY 691, 701 (2001) (arguing that a common language is critical for political deliberations).

157. JACOB M. LANDAU, ATATURK AND THE MODERNIZATION OF TURKEY 133 (1984); CHARLES WELLS, A PRACTICAL GRAMMAR OF THE TURKISH LANGUAGE 1 (1880).

158. LANDAU, *supra* note 157, at 133.

159. ERIK J. ZURCHER, TURKEY: A MODERN HISTORY 188 (2004). With the change of the alphabet, many Persian and Arabic words, which had become part of the Turkish language, looked alien and even unintelligible in the new script. *Id.* at 189.

160. *See* KEVIN MCKIERNAN, THE KURDS: A PEOPLE IN SEARCH OF THEIR HOMELAND 28 (2006). Likewise, the Kurds living in predominantly Arabic speaking Iraq wish to preserve their language, even though Iraq governments have made no attempts to assimilate the Kurds. *Id.* at 38. McKiernan narrates the story of a Kurdish-American, a freedom fighter armed with a dictionary, who has devoted himself to the preservation of the Kurdish language. *Id.* at 16.

161. *See id.* at 306-07.

native language. Native speakers learn the opportunity language as a second language if economic and leadership prospects available in the native language are inferior or nonexistent. Conversely, native speakers have little incentive to learn a second language if the native language offers ample economic and leadership prospects. When speech communities residing in the same nation-state have developed mutually disparate economic and leadership resources, the language of the most successful speech community is likely to emerge as the opportunity language. Gainful linguistics thus plays a decisive role for native speakers to choose and learn a beneficial second language.

Tariq Rahman makes an important distinction between a language of utility and a language of identity.[162] If the language of identity does not bring good jobs or is excluded from the power circles, families are more interested in educating their children in the language of jobs and power.[163] Thus, utilitarian considerations outweigh concerns for identity. In Pakistan's tribal areas, for example, Pashto faltered as the medium of instruction because Urdu and English were the languages of jobs and power.[164]

An important feature of gainful linguistics is its tolerance, and even respect, for other languages. Multilingual communication promotes meta-linguistic awareness of cultural relativity and differences between form and substance, and the arbitrariness of linguistic signs carrying meaning.[165] Whereas coercive linguistics shows little respect for other languages and strives to suppress them, gainful linguistics invites speech communities to open up to a beneficial language and to draw commercial, intellectual, literary, and spiritual benefits from its resources. Whereas coercive linguistics by nature is subtractive, gainful linguistics adds to the linguistic assets of a speech community. Elements of coercion are nearly absent in gainful linguistics. Accordingly, gainful linguistics promotes bilingualism and even multilingualism. Speech communities do not give up their native languages or dialects. They simply add the beneficial language to the speech pool. Each speech community determines for itself to what extent it would adopt aspects of the beneficial language in its repertoire.

Islamic law does not outlaw gainful linguistics. In fact, Islamic

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162. *See* Tariq Rahman, *A History Survey of Language-Teaching Among South Asian Muslims*, http://www.tariqrahman.net/lanmain.htm (follow hyperlink for article title) (last visited Apr. 11, 2010).

163. *Id.*

164. *Id.*

165. Michael Clyne, *Towards an Agenda for Developing Multilingual Communication With a Community Base*, *in* MULTILINGUAL COMM. 19, 20 (Juliane House & Jochen Rehbein eds., 2004).

law encourages Muslims to seek refuge from domestic persecution, and find superior economic and leadership prospects available, in foreign speech communities. Migration, leaving native homes, is an essential strategy of survival that the Basic Code mandates. Muslims must seek refuge in safer lands if native communities have turned oppressive and genocidal.[166] The Prophet himself gave up his city of birth, Makkah, when its inhabitants were determined to kill him and his followers. Some of his followers sought refuge in Ethiopia, whose Christian King, Negus, enjoyed a reputation of kindness and hospitality.[167] Forced or voluntary migration in most cases would require learning a new dialect or language in order for refugees to survive and prosper in adopted speech communities and nations.[168]

Gainful linguistics has been an integral part of Islamic trade and commerce. Islam favors transactional commerce beyond speech borders. In prohibiting interest-laden lending, which could be highly localized within a speech community, the Basic Code recommends investments in domestic trading as well as in transactions across speech borders.[169] Before apostleship, the Prophet Muhammad himself was an international merchant who carried merchandise outside the country on a profit-sharing basis with a Makkan business woman, Khadija, who would later become his first wife.[170] International trading brought the Prophet in close contact with diverse speech communities.

The dynamics of gainful linguistics varies with the rise and fall of successful trading communities. The phonological, morphological, and syntactical influence of Arabic over indigenous speech communities of Sicily, Spain, Portugal, India, and Turkey may be traced back to the Arabophone Muslim empires.[171] However, the hegemony of Muslim empires does not tell the whole story. The Arabic language influenced numerous foreign languages through commerce and trade. Indonesia, now the largest Islamic country, has never been part of any Islamic empire.[172] Yet, Islam and the

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166. Quran, sura an-Nahl 16:41 (stating God promises a better home in this world and in the hereafter to refugees who leave their homes to flee from oppression).

167. Sahih Bukhari, bk. 58, Hadith Nos. 216, 217 (describing migration to Ethiopia; calling Negus a "pious man"), *available at* http://www.searchtruth.com/book_display.php?book=58&translator=1&start=91&number=210.

168. Sahih Bukhari, bk. 58, Hadith No. 214 (the Prophet using a word of the Ethiopian language (sanah) for praising the dress of a girl who returned from Ethiopia).

169. Quran, sura-al Baqara 2:275 (Quran recommends buying and selling, but prohibits charging interest).

170. ABU AL-FIDA ISMAIL IBN KATHIR, 1 THE LIFE OF THE PROPHET MUHAMMAD 189-90 (Mustafa Abd Al-Wahid, ed., Trevor Le Gassick, trans., 1998).

171. *See* Versteegh, *supra* note 31, at 471.

172. Robert W. Hefner, *Political Islam and the Problem of Democratization*, 62 SOC. RELIGION 491, 500 (2001).

Arabic language were introduced to Indonesia through international trade and commerce.[173] As early as the thirteenth century, Indonesian traders and royal families began to embrace Islam.[174] Similarly, the influence of Arabic on the local languages of Senegal and Gambia drew from trading and not conquest.[175] African traders and tribal leaders found it beneficial to learn Arabic.[176] Yet Arabic was rarely mobilized to suppress local languages or dialects.[177] African speech communities freely borrowed from Arabic to satisfy their literary, commercial, and spiritual needs.[178]

The concept of gainful linguistics is not tied to any single language. Muslim speech communities are free to adopt any beneficial language for meeting their lawful needs and purposes. For example, Muslims fleeing from domestic tyranny and seeking refuge in a foreign speech community may teach themselves and their children the language of the protective community.[179] Actively learning a foreign language that has developed beneficial intellectual or scientific assets will increase the knowledge of the Muslim world. Muslim speech communities must disregard the fact that the beneficial language belongs to non-Muslims or that it also carries morally harmful contents. Because all languages are part of the divine plan, Muslim speakers should exclude no beneficial language from learning, regardless of the faith or non-faith of its native speakers. Immigrant Muslim communities living in Europe, the United States, the Caribbean Islands and Latin America may retain their ancestral languages, but they must also actively learn the languages of their adopted communities.[180]

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173. KEES VERSTEEGH & C.H.M. VERSTEEGH, THE ARABIC LANGUAGE 226-229, 238 (1997). "[A]t least 3000 words [in modern Indonesian] may be traced back to an Arabic original." *Id.* at 238.

174. P.A. Hoesein Djajadiningrat, *Islam in Indonesia*, *in* ISLAM, THE STRAIGHT PATH 375 (Motilal Banarsidass Publ. 1987).

175. Sulayman S. Nyang, *Islam and Politics in West Africa*, ISSUE: A J. OPINION, 1984 at 20-21.

176. *Id.*

177. *See* AFRICANIZING KNOWLEDGE 130 (Toyin Falola & Christian Jennings eds., 2002). While French was imposed on the Senegalese people, the Wolof willingly accepted Arabic language and Arabic script. *Id.*

178. 2 FREDERICK WILLIAM HUGH MIGEOD, THE LANGUAGES OF WEST AFRICA 241-47 (Books for Libraries Press 1972).

179. Speaking more than one language contributes to cognitive fitness. *Speaking More Than One Language May Slow the Aging Process in the Mind*, SCI. DAILY, May 8, 2008, http://www.sciencedaily.com/releases/2008/05/080507152419.htm (last visited Apr. 11, 2010).

180. JANE I. SMITH, ISLAM IN AMERICA 55-60 (1999) (narrating the early establishment of Muslims in various cities of the United States). *See generally* Muhammed Abdullah al-Ahari, *The Caribbean and Latin America*, *in* ISLAM OUTSIDE THE ARAB WORLD 443-460 (David Westerlund & Ingvar Svanberg eds., St. Martin's Press 1999) (describing the arrival of Muslim immigrants in the Caribbean Islands and Central and South America).

III. DIVINE RIGHT TO SELF-EXPRESSION

This Part argues that according to the Basic Code of Islam, God, the Master-Artist, creates each individual as a unique being vested with the divine right to self-determination. In exercising self-determination, each individual is empowered with unique talents and tested through unique trials. Talents, in the language of the Quran, are adornments (*zeenat*) that God confers on individuals.[181] Trials are hardships that individuals face during life experiences. By design, God has created human beings *fi kabad* (in trial).[182] Consequently, suffering is an inevitable part of each life. As individuals live their personal stories vested with abilities and disabilities, each life negotiates a way between adornments and challenges—a struggle that defines self-determination.[183] The Islamic law of speech diversity promotes the self-determination of each individual.

While freedom of speech is an indispensable part of self-expression, this study does not focus on issues relating to permissible contents of personal speech. Generally, Islamic law instructs Muslims to speak the truth but refrain from lewd, disrespectful, and hurtful speech. Self-determination must therefore observe the laws of piety and self-purification. In any event, the right to self-determination is neither absolute, nor an invitation to engage in forbidden behavior. There is no divine right for individuals to express themselves through pornography, murder, theft, false accusations, marital infidelity, or through defamation of prophets, holy books, and faiths. Such substantive restrictions on self-expression, which some governments may lawfully impose, and others unlawfully abuse to control individuals, would require a separate study. The right to self-expression discussed in this study does not address substantive freedoms or restrictions. Just as the right to language exists independent of, and in addition to, freedom of speech, the right to self-determination is much broader than lawful restrictions on certain expressive conduct.

A. God as Master-Artist

According to the Basic Code, "He is God, the Creator, the Sha-

181. Quran, sura al-A'raf 7:32.

182. *Id.* sura al-Balad 90:4.

183. *See id.* sura al-Kahf 18:7 (stating that adornments (animals, plants, trees and so on) have been placed on earth to test mankind to see who is best in conduct).

per out of naught, the Master-Artist."[184] As the Master-Artist, God creates each individual with special talents, powers, and barriers. Even in the human world, a fundamental paradigm separates mass producers from artists. While mass producers multiply the same object without any variation, artists attend to details, constructing each object with imagination and uniqueness. Mass production thrives on repetition, duplication, and imitation. By contrast, artistic hands confer an irreplaceable identity on each object they create.[185] God as Master-Artist has created infinite variation in human beings, thereby granting each individual with a special visible identity,[186] even though the human species as a whole shares features that distinguish it from other creations. Furthermore, each human being is vested with a unique set of powers and barriers, a set rarely repeated in the exact same form for another individual. In body, mind, and soul, each individual is special. No individual is fungible or replaceable with the other.

God's Artistry infuses the principle of diversity into the plan of creation. The Quran constantly reminds believers to recognize differences and to avoid the deceptive allure of sameness or equality. For example, the Quran says: "Can the blind and the seer be deemed the same?"[187] The Quran poses this observational and intellectual challenge to the people who think and reflect[188] and, by implication, not to the people who dwell in ignorance or who lack imagination to appreciate diversity in creation. Of course, the divine purpose of highlighting the physical (and metaphorical)[189] difference between the blind and the seer is neither to ridicule the blind nor to sanction discrimination against persons with disabilities, something that ignorant social and legal systems might perpetrate. No believers who think and reflect on diversity will conclude that the blind ought to be treated unfairly or that persons with disabilities are worthless or that their lives are futile. A purpose of highlighting the difference is to repudiate the notion of sameness and to emphasize physical, intellectual, and spiritual diversity that informs the plan of creation. A prophet warns and teaches, but not even a prophet can bring all to the right path because non-believers—the spiritually blind—are part of a diverse

184. Quran, sura al-Hashr 59:24.
185. *See id.* sura Ta-Ha 20:50.
186. *Id.*
187. *Id.* sura al-An'am 6:50; *see also* sura Fatir 35:19; sura Ghafir 40:58.
188. *Id.* sura al-An'am 6:50.
189. Most explanations of this verse conclude that blindness refers to hardness of the heart in that certain persons cannot appreciate the truth. *See*, *e.g.*, Maududi, Tafheem, *supra* note 52, sura al-An'am 6:50 n.32.

universe.[190] No human system can undermine the plan of creation, undo diversity, and institute sameness.

The divine plan of diversity is closely related to viewpoint relativity. Accordingly, not all forms of self-expression can be mutually agreeable. Some people may resent a form of self-expression that others adopt and advocate. When the Prophet was conveying the divine message that there is only One God, the polytheists refused to turn away from many gods. The Prophet was sometimes dismayed. On such occasions, God would remind the Prophet that the plan of creation does not contemplate the elimination of false gods,[191] and that the Prophet's mission was limited to conveying the message of One God to the people and not converting them.[192] In fact, polytheists have God's permission to self-expression as do believers of monotheism. Under the plan of diversity, opposing viewpoints coexist in the realm of thoughtful debate but without persecution and resentment. This allowance for spiritual relativity does not deny the existence of truth but reaffirms a broader notion that no compulsion is justified to convert anyone from one faith-based viewpoint to another.

The approach of Islamic law to diversity mandates that disagreeable forms of self-expression be tolerated with patience and grace.[193] However, a caveat is called for. Islamic law does not encourage individuals or groups to adopt hateful modes of self-expression that gratuitously hurt the sentiments of racial, ethnic, or religious communities. Plurality of views is inevitable under the plan of diversity, which would require that believers take no aggressive action against persons or nations who deny the truth of their beliefs, show disrespect for their prophet, or harshly malign their religion. The critics of Islam are protected in their self-expression under the divine plan of diversity provided that they do not physically or materially harm any Muslim community. Muslims have no divine obligation to eradicate beliefs and practices contrary to Islam, for non-Islamic beliefs and practices are part of the divine plan.

B. Individual Form and Nature

Under God's artistic plan of diversity, each individual is gifted with a unique form and nature (*khalqahu*). When Moses and his

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190. Quran, sura al-Baqara 2:6 (warning has little influence on disbelievers).

191. *Id.* sura al-An'am 6:107.

192. *Id.*

193. *See id.* sura al-Kafiroon, 109:1-6; *see also* Ali Khan, *Free Markets of Islamic Jurisprudence*, 2006 MICH. ST. L. REV. 1487, 1507-09.

brother, Aaron—Moses with his speech disabilities and Aaron with his rhetorical abilities—delivered God's message, the Pharaoh asked: "Who, then, Moses, is the Lord of you two?"[194] Moses replied "Our Lord is He Who has given a distinctive form and nature (*khalqahu*) to everything."[195] This answer first affirms the diverse personalities of both Moses and Aaron. But it also captures a more profound line of reasoning about the uniqueness of each individual. The Pharaoh, who had subjected the entire nation of Israelites to slavery and drudgery, had no appreciation for individuals. Slavery of an entire people is the ultimate denial of personhood, since slavery refuses to recognize the distinctive form and nature of the enslaved individual. Moses came to the Pharaoh not only to liberate a nation from slavery but also to free each enslaved individual from the aggregative stereotype. Contextually, therefore, Moses' answer demonstrates God's artistry that differentiates individuals from each other, masters from slaves, brother from brother, Pharaohs from prophets, and empowers each person with unique internal and external attributes.[196]

According to the Shariah, each human being is not only vested with a distinctive form and nature, but has the divine right to self-expression. Poets, philosophers, and writers may express their form and nature through the medium of diverse languages. Artists may draw and paint, architects may imagine and build, athletes may display their physical skills, scientists may unlock the secrets of nature, farmers may till the ground, merchants may buy and sell, and physicians may treat the sick and the wounded. Each individual participates in the divine plan through self-determination. Self-determination submits to the divine law, without willful breaches or violations. In this ceaseless unfolding of individuals, the Basic Code permits no system to lawfully suppress or frustrate the diversity of self-determination. In contemporary normative discourse, individuals may exercise the right of self-determination without any distinctions of race, color, nationality, ethnicity, culture, language, wealth, or any other status.

More specifically, men and women are entitled to exercise the right of self-determination. Customs and practices that exclude Muslim women from creative modes of self-determination, including performing arts and sports, are contrary to the Islamic law of speech diversity. Any suggestion that the life of women is limited to reproduction or household management is contrary to the divine

194. Quran, sura Ta-Ha 20:49.

195. *Id*. sura Ta-Ha 20:50.

196. *Id*. n.31 (Muhammad Asad's commentary); *see also* Maududi, Tafheem, *supra* note 52, sura ar-Rahman 55:3, n.2.

plan of diversity. No one gender has a monopoly over talent or skill. True, men and women are not the same. Any ideology that disputes gender diversity is misguided. Any pressure on women to emulate men is oppression. Any burden that undermines motherhood is onerous. Gender diversity, however, does not mean that women are just physical beings[197] or that they are intellectually inferior or spiritually incompetent. The Shariah protects each woman's right to self-determination, a protection no less extensive than the one offered to men. Women have the right to deploy God-given talents to be writers, teachers, architects, calligraphers, painters, musicians, artists, or friends of God, in addition to being wives and mothers. God's guidance is available to both men and women.

Part of that guidance comes by way of warning against wasting special talents to pursue what the Quran calls "worldly ornaments."[198] The Shariah identifies numerous worldly ornaments, including wealth, children, and power, which can compromise natural endowments. Social formulae dictate lifestyles and self-expression. Instead of expressing their own special talents, individuals imitate each other in acquiring social goods defined in terms of affluence and influence. Writers and artists, for example, may lose their mind's eye if they squander away imagination in gathering wealth. Some individuals abandon families to seek power and some seek mediocrity without striving. Some find gratification in family lineage but do little to explore their own form and nature that the divine plan has bestowed on them. Almost always, the quest for worldly ornaments distracts individuals from spirituality and nearness to God, a point that the Basic Code emphasizes.

C. Tyranny of Normic Standards

As discussed below, the Basic Code repudiates the tyranny of normic standards. An obligation to achieve or maintain what is normal generates a normic standard. Ordinarily, normic standards are inevitable for the construction of social, legal, and even scientific systems. The concept of the "reasonable person" is a useful normic standard of law for purposes of dispute resolution. A zealous enforcement of normic standards, however, denies meaningful and inevitable exceptions. When any deviations from normic stan-

197. *See generally* Ali Khan, *The Hermeneutics of Sexual Order*, 31 SANTA CLARA L. REV. 47 (1990). The author no longer prescribes to prescriptive parts of this article.

198. *See* Quran, sura al Imran 3:14, 3:116.

dards are punished or degraded, normalcy turns into tyranny. When the right to self-determination is rigidly tied to normic standards, the tie discounts the value of diversity. Individuals are forced through social engineering or systemic pressures to conform to normic standards and adjust their self-determination. Thus normic standards, which otherwise serve social utility, begin to undermine the divine plan of diversity. Persons with disabilities who cannot meet normic standards are frequently excluded from the acquisition and enjoyment of social goods, and even human dignity. Their burdens are rarely accommodated.

The Quran, while prescribing normic standards, deliberately leaves open accommodation for persons with disabilities. Fasting, for example, is made mandatory.[199] Each year Muslims are required to fast roughly from sunrise to sunset each day for the entire lunar month of Ramadhan.[200] This prescription, however, is relaxed if a Muslim is ill or travelling.[201] The person with a disability may meet the obligation by fasting at another time or by feeding the indigent.[202] If the disability is permanent, such as a diabetic condition, feeding the indigent is the appropriate replacement obligation.[203] If the disability is temporary, the person is accommodated by postponement of fasting and not complete exemption.[204] In providing accommodation to fasting, the Quran specifically provides a rationale by intimating that "God desires for you ease, and does not desire hardship for you."[205]

Contrary to the Quran's vivid accommodation of disabilities, spurious arguments assert that the disabled are disadvantaged under the divine plan of creation.[206] True, the Quran uses disabilities as metaphorical devices to highlight persons who refuse to listen to God's voice and dissolve relationship with spiritual intelligence.[207] These are the persons whose "hearts are sealed, so are their ears; and a thick veil covers their eyes."[208] Such verses can be interpreted to show that God disfavors the dumb, the blind, and

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199. Quran, sura al-Baqara 2:183, 2:185.
200. *Id.* sura al-Baqara 2:185.
201. *Id.*
202. *Id.* sura al-Baqara 2:184.
203. *Id.*
204. *Id.*
205. *Id.* sura al-Baqara 2:185.
206. *See* MAJID TURMUSANI, DISABLED PEOPLE AND ECONOMIC NEEDS IN THE DEVELOPING WORLD: A POLITICAL PERSPECTIVE FROM JORDAN 52-53 (2003) (showing that the Basic Code can be interpreted to conclude that it disfavors disabilities).
207. Quran, sura Ya-Sin 36:65-67. The concept of disability serves numerous instructive purposes in Islam. AMOS YONG, THEOLOGY AND DOWN SYNDROME: REIMAGINING DISABILITY IN LATE MODERNITY 145-47 (2007).
208. Quran, sura al-Baqara 2:7.

the deaf.[209] Any such interpretation of the verse, though cursorily maintainable, does not match with the Quran's profound compassion for the disabled. In relying on metaphorical disabilities, the Quran identifies three distinct processes through which individuals may receive spiritual intelligence that permeates God's universe.[210] They can use ears to listen to spiritual intelligence. They can use eyes to observe the beauty of spiritual intelligence. Or, they may experience spiritual intelligence through their hearts. The reception of spiritual intelligence can be auditory, ocular, or heartfelt. Ordinarily, individuals are empowered with all three channels to receive spiritual intelligence, but even the metaphorically deaf and blind persons are not denied their share. They may use their heart—a mode of communication given to all human beings—to directly experience spiritual intelligence. Only when individuals deliberately close down all channels of communication with God do they go astray and inflict on themselves non-communicative disabilities. The Quran's graphic parables draw attention to the diversity of possibilities, above and beyond normic standards, through which human beings can connect with God.

In analyzing normic standards, natural disabilities must not be confused with manmade disabilities that diminish the rights of designated groups. While natural disabilities, such as blindness or dysphonia, must be accommodated, manmade disabilities invented to deny benefits to target groups must be dismantled. In some Muslim states, for example, a social disability has been created to deny women the facility to drive motor vehicles.[211] This disability is manmade since women can learn to drive as they do in most Muslim states. Likewise, manmade disabilities created on the basis of race or immigration status deny opportunity and benefits to target groups.[212] Manmade disabilities impact the right to self-determination, sometimes more severely than natural disabilities. A Muslim state willing to accommodate natural disabilities may be adamant about enforcing disabilities of its own creation.[213]

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209. In another verse, the Quran compares the limitations of the dumb person with the strengths of a spiritually enlightened person. Quran, sura an-Nahl 16:76.

210. *See id.* sura al-Baqara 2:18 ("Deaf, devoid of intelligence, and blind, they cannot retrieve (understanding).)."

211. *Female driving instructor leaves gender bias in her dust*, DAILY STAR (Beirut, Leb.), Apr. 11, 2008, at 5, *available at* NewsBank, Record No. 11FFB4C9F9E57CC8.

212. In the United Arab Emirates, for example, foreign workers complain of discrimination and abuse. *See* Human Rights Watch, *UAE*: *Draft Labor Law Violates International Standards*, Mar. 24, 2007, http://www.hrw.org/en/news/2007/03/24/uae-draft-labor-law-violates-international-standards (last visited Apr. 11, 2010).

213. In Saudi Arabia, for example, the state assumes the obligation to accommodate natural disabilities. However it, refuses to relax restrictions on female driving, thus creating a legal disability. PETER W. WILSON & DOUGLAS GRAHAM, SAUDI ARABIA: THE COMING

The Islamic law of speech diversity does not sanction discrimination. Diversity is part of the divine plan, but the attendant discrimination is human gloss. This distinction is critical. Accommodation, not prejudice, is the proper response to disabilities. Just because a person is blind or deaf or bears a speech barrier does not mean that the person lacks the ability of self-determination. The concept of disabilities, which are deviations from what is most familiar and abundantly found in most human beings, presupposes a socially constructed regime of normic standards. Variations in personal effects, including standard deviations from normic standards, may be labeled as disorders, pathologies, or impairments. In the scheme of creation, however, each individual is gifted with distinctive assets and burdens that may vary from the mean in more than one aspect. These variations from the mean are signs of a complex divine plan that incorporates the Quran's intimation that, "God is the one who shapes you in the wombs as He wills."[214] No disability can weaken the individual right to self-determination and self-expression.

1. Moses' Speech Disability

The story of Moses and his brother, Aaron, told in the Quran, highlights the divine accommodation of Moses' speech disability. God summons Moses to go to the Pharaoh, the King of Egypt, to seek the release of the Israelites, who had been enslaved and subjected to forced labor.[215] Moses is reluctant to accept the ministerial responsibility because he doubts the truth of his own prophetic credentials for three distinct reasons.[216] First, Moses faces the charges of murder for administering a fatal blow to an Egyptian who was fighting with an Israelite.[217] Moses is apprehensive that he would be executed for the crime of murder even before he delivers God's message to the Pharaoh.[218] Second, Moses was raised as a child in the Pharaoh's household.[219] He fled the royal family after

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STORM PETER W. WILSON & DOUGLAS GRAHAM, SAUDI ARABIA: THE COMING STORM 248-50 (1994). For a discussion of the developmental status of women in Saudi Arabia, see RODNEY WILSON ET AL, ECONOMIC DEVELOPMENT IN SAUDI ARABIA 108 (2004).

214. Quran, sura aal-Imran 3:6. This verse also uses the word "yusawwir" to affirm God as Artist.

215. For a narrative of the story of Moses in the Quran, *see* William Griffiths, *Abraham, Moses, Jesus, and Gabriel in the Quran*, 12 OLD & NEW TESTAMENT STUDENT 272, 274-76 (1891). A similar story, though variant in details, is presented in the Old Testament. *Exodus* 2-6.

216. Quran, sura as-Shu'ara 26:10-19.

217. *Id.* sura as-Shu'ara 26:14.

218. *Id.*

219. *Id.* sura as-Shu'ara 26:18.

committing the murder.[220] Nurturing the guilt of a runaway child, Moses feels ungrateful[221] to return to the Pharaoh after leaving the house, committing a crime, and bringing shame to the foster family. Third, and most important for the purposes of personal speech, Moses suffers from a speech disability.[222] Moses is concerned that he will falter in delivering God's message.[223] Moses seeks accommodation for his speech disability and pleads to God to send Aaron with him.[224] God grants the accommodation and allows Aaron to accompany Moses to speak to the Pharaoh and his people.[225]

According to popular Jewish literature, Moses is known to have burned his tongue on a coal in infancy and thus suffered from a physiological speech impediment.[226] In pointing out Moses' speech difficulties, some older interpretations of the Old Testament paint Moses as "heavy of mouth and heavy of tongue" and "uncircumcised of lips."[227] These interpretations support the popular view that Moses suffered from a physical impediment and not mere rhetorical difficulty.[228]

Moses' speech difficulty is mentioned thrice in the Quran. In one chapter of the Quran, Moses prays to God in the following words: "And loosen the knot from my tongue."[229] Although "the knot in the tongue" may be interpreted to suggest ineloquence, the expression is better read to mean physical disability which causes

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220. *Id.* sura as-Shu'ara 26:19-21.

221. *Id.* sura as-Shu'ara 26:19.

222. *Id.* sura Ta-Ha 20:27.

223. *Id.* sura as-Shu'ara 26:12-13.

224. *Id.*

225. *See supra* notes 194 -196 and accompanying text.

226. LOUIS GINZBERG, 2 THE LEGENDS OF THE JEWS: BIBLE TIMES AND CHARACTERS FROM JOSEPH TO THE EXODUS 274 (Henrietta Szold, trans.,1983) (1920). Moses' speech impediment is mentioned in the Old Testament. It is unclear from the Biblical literature, however, whether Moses' speech disability is physiological or rhetorical. Physiological speech disability might involve stammering or some other physical disability that obstructs the clarity and fluidity of speech. Rhetorical speech disability means that Moses lacks eloquence even though he bears no physiological speech defect. In the worst case scenario, Moses might be suffering from both physiological and rhetorical disabilities.

227. Jeffry H. Tigay, *"Heavy of Mouth" and "Heavy of Tongue" on Moses' Speech Difficulty*, 231 BULL. AM. SCH. ORIENTAL RES. 57, 57 (1978).

228. Disputing Moses' physical speech problems, some scholars argue that Moses had forgotten the Egyptian language, the language of the Pharaoh, and therefore, as a foreign speaker, lacked fluency and persuasion. SIGMUND FREUD, MOSES AND MONOTHEISM 53-54 (Ernest Jones ed., Katherine Jones trans., The Hogarth Press 1951) (1932). Some scholars point out that Moses was deficient in debating skills. *See*, *e.g.*, LORIN WOOLFE, THE BIBLE ON LEADERSHIP: FROM MOSES TO MATTHEW-MANAGEMENT LESSONS FOR CONTEMPORARY LEADERS 106 (2002) (stating that in modern terminology Moses had a 'communication disorder'). More recent interpretations of the Exodus express Moses' speech difficulties in rhetorical rather than medical terms: "Moses said to the Lord, 'O Lord, I have never been eloquent, neither in the past nor since you have spoken to your servant. I am slow of speech and tongue.' " *Exodus* 4:10. Rhetorical rather than physical speech impediments are read in other parts of the Exodus as well. *Exodus* 6:12, 6:30 ("I speak with faltering lips").

229. Quran, sura Ta-Ha 20:27.

a speech impediment.[230] Maududi disagrees with exegetes who interpret the verse to mean physiological defect and rules out the possibility that Moses suffered from any physical speech disability, arguing that God would not appoint a lisper or stutterer as His messenger.[231] This argument is unpersuasive because physical disability can neither discount the inherent worth of persons nor their achievements.[232]

The story of Moses assigns the most formidable task to a person with manifest disability. In addition to seeking the release of the Israelites, Moses must deliver the iconoclastic message to the Pharaoh and his followers that there is only One God in the entire universe, "the Lord of the heavens and the earth and of all that is between them,"[233] One God "the Lord of you [the Pharaoh] and your forefathers who ruled before you."[234] The release of the captives, a pragmatic objective, is inextricably intertwined with a more formidable ideological message of One Powerful God, a message that threatens the metaphysical foundation of the Pharaohs' kingdom. On hearing this defiant message, Pharaoh declares Moses to be a madman[235] and threatens to cast Moses "among those who are rotting in the prison."[236] Issuing threats of force is emblematic of powerful rulers who lose in rational discourse, particularly if the opponent suffers from a manifest disability.

2. Zechariah's Sign Language

While the story of Moses accentuates a speech impediment, the story of Zechariah, described in the Gospel and the Quran, affirms

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230. Compare the translations of sura Ta-Ha 20:27 by Asad, Piktall, and Yusuf Ali. Whereas Asad and Piktall refer to loosening the knot from the tongue, Yusuf Ali translates the verse as removing impediment from speech. Quran Search, http://www.islamicity.com/QuranSearch/ (select "20-Ta-Ha" from Chapter Index, then select "English - M Asad," "English - Yusuf Ali," and "English - Picktall" from Available Translations).

231. Maududi, Tafheem, *supra* note 52, sura Ta-Ha 20:28 n.15.

232. While Moses' physical impediment is controversial, the Quran clarifies that Moses did nurture doubts about his advocacy skills. In another chapter, Moses expresses his advocacy deficiency to God in the following words: "And I shall be embarrassed, and my tongue will not speak plainly, therefore commission Aaron (to help me)." Quran, sura as-Shu'ara 26:13 (Piktall). A person who suffers from a physical speech disability is rarely eloquent. Therefore, these verses can be read together to conclude that Moses was unsure about his advocacy skills partly because of physical disability.

233. Quran, sura as-Shu'ara 26:24.

234. *Id.* sura as-Shu'ara 26:26.

235. *Id.* sura as-Shu'ara 26:27. Moses, however, persists in his defiance and repeats that there is only One Powerful God, "the Lord of the East and the West and of all that is between them, if you [the Pharaoh] apply any power of reasoning." *Id.* sura as-Shu'ara 26:28.

236. *Id.* sura as-Shu'ara 26:29. Note that while the Pharaoh calls Moses a mad man, Moses too challenges the Pharaoh's power of reasoning. *See supra* note 235 and accompanying text.

that the sign language is a form of speech that deserves recognition and respect.[237] Zechariah was an old man and his wife, Elizabeth, was old and barren.[238] They had no children.[239] Zechariah prayed to God: "O my Sustainer! Bestow upon me out of Your grace the gift of goodly offspring; for indeed You are Hearer of prayer."[240] One day, an angel appears to Zechariah and delivers the good news that God has accepted his prayer and that Elizabeth would bear a son whose name would be Yahya (John the Baptist),[241] a chaste man who would confirm God's Speech and be a prophet.[242] Upon hearing this, Zechariah requests confirmation of the news.[243]

From this point onward, the Gospel and the Quran present different versions of the story. According to the Gospel, Zechariah was punished with speechlessness for seeking confirmation of the news.[244] According to the Quran, however, Zechariah did not challenge the good news but asked for God's sign to express his gratitude.[245] Whether Zechariah's silence was punitive or prayerful and whether it lasted for three days or more, the fact remains that Zechariah did not lose all speech during the period of his verbal moratorium.[246] When Zechariah came out of the temple after hearing the good news, he could not speak to the people.[247] The Quran confirms that the silent Zechariah was allowed communication by means of gestures.[248] This prophetic story clarifies that verbal speechlessness bears God's approval. Even when verbal speechlessness is involuntary, the divine plan does not close down all

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237. Both the New Testament and the Quran indicate that when Zachariah was ordered not to speak for three days, he was allowed to communicate with gestures, signs, or signals. *See Luke* 1:20-22; Quran sura aal-Imran 3:41.

238. Quran, sura aal Imran 3:40.

239. *Id.*

240. *Id.* sura aal Imran 3:38.

241. *Id.* sura aal Imran 3:39. For a thorough discussion of the life of John the Baptist as mentioned in the Bible, see Clayton Raymond Bowen, *John the Baptist in the New Testament*, 16 AM. J. THEOLOGY 90 (1912) (comparing the comings of John the Baptist and Jesus and finding parallels between the two prophets).

242. Quran, sura aal Imran 3:39.

243. *Id.* sura aal Imran 3:41.

244. *Luke* 1:18-20. The angel says to Zechariah: "And now you will be silent and not able to speak until the day this happens, because you did not believe my words, which will come true at their proper time." *Luke* 1:20.

245. Quran, sura aal Imran 3:41.

246. Zechariah was instructed to remain silent for three days and celebrate the praises of your Lord again and again, and "glorify [Him] in the evening and in the morning." *Id.* According to the Gospel, Zechariah would remain speechless until Elizabeth became pregnant. The Gospel and the Quran could be reconciled if Elizabeth became pregnant three days after the angel brought the good news. *But see* 3 HENRICUS OORT ET AL., THE BIBLE FOR LEARNERS 45 (Philip H. Wicksteed, trans., 1898) (Zachariah did not get his speech back until after John was born and so named).

247. *Luke* 1:22. "They realized he had seen a vision in the temple, for he kept making signs to them but remained unable to speak."

248. Quran, sura aal-Imran 3:41.

means of communication. More specifically, the story of Zechariah established that sign language enjoys God's blessing when it replaces verbal speech.

3. Dignity of Blindness

A gripping disability story in the Quran endorses the dignity of blindness. Abdullah ibn Umm Maktum, a blind man and a relative of the Prophet Muhammad's first wife, Khadija, came to the Prophet and said: "O Muhammad, show me a place near you (where I can sit)."[249] At the time, the Prophet was engaged in a conversation with Al-Walid, an influential pagan leader, in the hope the leader would embrace Islam and strengthen Muslims.[250] Per the Quran, the Prophet frowned and turned away from the blind man.[251] This treatment of the blind man was unacceptable to God who rebuked the Prophet by revealing several verses of the Quran.[252] In teaching the Prophet that the blind man's speech was valuable, the Quran draws a comparison between the influential leader and the blind man. The leader was proud of his wealth and influence and resistant to embrace the purity of truth. The blind man, though humble in his social station and suffering from a visible handicap, was eager to seek knowledge so that he could grow more in the purity of truth.[253] Yet the Prophet, says the Quran, paid his entire attention to the influential leader and disregarded the blind man.[254]

By teaching the Prophet that the blind man's speech is no less worthy than that of the socialite, the Quran is issuing a broader "reminder"[255] to shun discrimination against persons with disabilities. In social hierarchies, the speech of the wealthy and the powerful carries more credence than the speech of persons with social and physical disabilities. In customary calculus, the focus shifts from the content of speech to the person of speech. The bias against disabilities turns into an unexamined presumption that persons with disabilities are intellectually inferior or simply incompetent for a profitable exchange of views. The bias might also

249. Malik, Muwatta, bk. 15, No. 15.4.8, *available at* http://www.searchtruth.com/book_display.php?book=15&translator=4&start=0&number=0; Maududi, Tafheem, *supra* note 52, sura Abasa 80:2, n.1.

250. 2 ABU AL-FIDA ISMAIL IBN KATHIR, THE LIFE OF THE PROPHET MUHAMMAD 36 (Mustafa Abd Al-Wahid, ed., Trevor Le Gassick, trans., 1998).

251. Quran, sura Abasa 80:1-2.

252. Malik, *supra* note 249. bk.15, No.15.4.8,

253. Maududi, Tafheem, *supra* note 52 sura Abasa 80:10, n.2.

254. Quran, sura Abasa 80:5-10.

255. *Id.* sura Abasa 80:11.

contend that persons with disabilities are slow learners or cannot learn at all. When persons with disabilities are frowned upon and excluded from participating in gainful conversations, educational gatherings, or learning opportunities, the tyranny of normic standards is established. Islam prohibits prejudicial presumptions against persons with disabilities, dignifies their unique being, and rates their self-expression no less worthy than that of prominent leaders.[256]

IV. QANUN ON SPEECH DIVERSITY

This Part discusses whether positive law (*qanun*)[257] in Muslim states enforces the Shariah of speech diversity. Whereas the Shariah is the divine law, *qanun* is the positive law that a Muslim state makes to conduct internal and external affairs.[258] *Qanun* consists of the constitution, statutes, regulations, international law, and case law.[259] The *qanun* of a Muslim state may or may not be in compliance with the Shariah.[260] This section discusses whether Muslim states have made any constitutional and international law commitments to protect diverse languages and self-expressions. Implicit in this discussion is an appeal to Muslim states that they develop positive law to enforce the Shariah of speech diversity. Through adoption of constitutional norms as well as by adherence to international law, Muslim states can and must safeguard native languages and promote professions, performing arts, and sport activities for both Muslim men and Muslim women for the maximization of individual self-expressions.[261]

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256. While prejudice against the blind lingers in Muslim and non-Muslim societies, periodic stories continue to remind us that the blind are gifted with precious talents. Geoffrey Yunupingu, born blind in a remote island of indigenous population in Northern Australia, has been received as a gifted singer with a voice of "transcendental beauty." Barbara McMahon, *Aboriginal Singer Beats Poverty and Prejudice to Top Australian Charts*, THE GUARDIAN (London), July 17, 2008, at 18. He has not learned Braille and does not have a guide dog or use a stick. *Id.* A number of persons with remarkable achievements, including Homer (the Greek poet), John Milton (the English poet), Ray Charles (the Jazz pianist), Stevie Wonder (the pianist), and Helen Keller, (the prolific writer), all were either born blind or turned blind due to illness.

257. *See* Khan, *supra* note 2 (distinguishing between the Basic Code (Shariah), classical jurisprudence (*fiqh*), and positive law (*qanun*)).

258. *Id.* at 272-73.

259. *Id.*

260. *Id.* at 274.

261. Several Muslim states are signatories to international treaties that protect linguistic diversity and cultural expressions. *See*, *e.g*, Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 35. This convention, which protects linguistic diversity, is heavily subscribed by Muslim states. UNESCO, States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage, http://portal.unesco.org/la/convention.asp?language=E&KO=17116&order=alpha (last visited Apr. 11, 2010); *see also* Convention on the Protection and Promotion of the Diversity of

More than a billion Muslims living in all parts of the world, both as natives and immigrants, speak nearly all languages of the world. No one language unites the Muslim world. Leading Muslim states, such as Indonesia, Saudi Arabia, Iran, Turkey, Senegal, and Pakistan, speak radically different languages. Even in a single Muslim country, the people may be speaking dozens of languages.[262] Very few Muslim states are monolingual.[263] Linguistic diversification is now a two-way street. Foreign languages, particularly English, have permeated Muslim states and millions of Muslims have immigrated to foreign lands, learning foreign languages. In Africa, native Muslims speak European languages, in addition to scores of tribal languages and dialects.[264] In Europe, millions of Muslim immigrants speak French, German, and Dutch, to name a few. The Quran, though revealed in Arabic, has been translated into numerous languages of the world, including Korean, Japanese, Chinese, Finnish, Russian, and Swahili. Europeans and Americans embracing Islam are turning their languages into native languages of Islam.

While non-Muslim states are under no duty to enforce the Sha-

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Cultural Expressions, Oct. 20, 2005, 45 I.L.M. 269. As of January 2009, among Muslim states, Bangladesh, Egypt, Jordan, Kuwait, Mali, Mauritius, Nigeria, Oman, Sudan, Syria, Tajikistan, and Tunisia are parties to the Convention. UNESCO, States Parties to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, http://portal.unesco.org/la/convention.asp?KO=31038&language=E&order=alpha (last visited Apr. 11, 2010).

262. In Pakistan, for example, each of its four provinces may promote the use of its provincial language. CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, art. 251(3). The percentages of the population that speaks each language are as follows: Punjabi 48%, Sindhi 12%, Siraiki (a Punjabi variant) 10%, Pashtu 8%, Balochi 3%. CIA, The World Factbook, https://www.cia.gov/library/publications/the-world-factbook/index.html (last visited Apr. 11, 2010). The national language is Urdu, though native speakers do not exceed 8%. *Id.* Other languages and their respective percentages are Hindko 2%, Brahui 1%, Burushaski and other 8%. English is the language of government, courts, and elite institutions. CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, art. 251(2). In Syria, half a dozen languages are broadly spoken, including Arabic, Armenian, Aramaic, Kurdish, Circassian, and French. *Id.* In Turkey, there are at least half a dozen languages as well, including Turkish, Dimly, Azeri, and Kabardian. Turkey Population Statistics, http://www.irantour.org/turkey/populationturkey.html. In Afghanistan, there are at least thirty three languages and numerous dialects. *Id.*; *see also* Richard F. Strand, *Notes on the Nuristani and Dardic Languages*, 93 J. AM. ORIENTAL SOC'Y 297 (1973).

263. In Saudi Arabia, for example, an overwhelming majority of native population speaks Arabic. However, millions of immigrant workers from Asia (Pakistan, India, Philippines, Bangladesh), and other countries speak non-Arabic languages in their own communities. In 1980s, foreign workers constituted about 30% of the population and 60% of the workforce. MADAWI AL-RASHEED, A HISTORY OF SAUDI ARABIA 150-153 (2002).

264. ALAMIN M. MAZRUI, THE POWER OF BABEL: LANGUAGE & GOVERNANCE IN THE AFRICAN EXPERIENCE 70, 71 (University of Chicago Press 1998). The languages spoken in Africa have been categorized in four categories: Afro-ethnic, Afro-Islamic, Western and Afro-Western. *Id.* Swahili, Somali, and Nubi in East Africa and Hausa, Fulfide and Mandinka are major Afro-Islamic languages that absorbed Islam ethos and Arabic vocabulary. *Id.* at 70.

riah of speech diversity, Muslim states may choose to do so.[265] Contrary to popular perceptions, the following discussion divulges that Muslim states that embrace constitutional secularism may impose monolingualism and curtail individual self-determination. Conversely, Muslim states that uphold constitutional supremacy of the Shariah may vigorously protect the diversity of languages and a more extensive right to self-determination. No bright line, however, separates Islamic states[266] from secular states. Islamic states that advocate supremacy of the Shariah fall short of recognizing the broad range of speech diversity, just as some secular Muslim states do.

No Muslim state may lawfully deny or suppress any community's divine right to language. Any such denial or suppression is not only a violation of the community's language and cultural rights but also a violation of God's ordainments. In compliance with the Shariah, Muslim states must revere and not resent speech diversity. Since the right to speech diversity is secured in the Basic Code, the right is neither a creation of positive law (*qanun*), nor is it a creation of international law (*siyar*), though both positive law and international law may reaffirm the right to speech diversity. Speech communities, whether as the majority or the minority, and whether Muslim or non-Muslim may, therefore, lawfully claim a divine right to language.

A. Commitments to Linguistic Diversity

The constitutions of Saudi Arabia, Turkey, Iran, Egypt, Pakistan, Indonesia, and Senegal offer a notable cross-section of the Muslim world[267] to determine whether Muslim states protect the

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265. Even though drafted under the occupation of the United States and NATO forces, the Afghanistan Constitution lists a number of languages spoken in the nation, including Pashto, Dari, Uzbeki, Turkmani, Baluchi, Pachaie (Pashai), Nuristani, Pamiri (Alsana), and Arabic, and declares Pashto and Dari as the official languages of the state. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN art. 16. The official recognition of Pashtu and Dari, the languages spoken by an overwhelming majority of major ethnic groups, however is not purposefully designed to suppress other languages or to create an assimilative culture forcing the extinction of minor languages. The Constitution mandates that the state adopt and implement effective plans for strengthening and developing all languages of Afghanistan. *Id.* Print media as well electronic media are permitted for the promotion of local and regional languages. *Id.*

266. Islamic state may be distinguished from Muslim state. An Islamic state is a Muslim state that upholds supremacy of the Shariah; whereas, a Muslim state is one where the majority of the population professes the faith of Islam. Thus, a Muslim state may or may not be an Islamic state.

267. As of July 2008, the seven states highlighted in this discussion are predominantly Muslim: Saudi Arabia, 100% Muslim; Turkey, 99% Muslim; Iran, 98% Muslim; Egypt, 90% Muslim; Pakistan, 95% Muslim; Indonesia, 86% Muslim; Senegal, 94% Muslim. CIA, *supr*a note 262.

Shariah of linguistic diversity. Of these seven leading Muslim states with diverse historical, ethnic, and cultural backgrounds, Turkey and Senegal have each made a constitutional commitment to secularism;[268] whereas Saudi Arabia, Iran, and Pakistan uphold the supremacy of the Shariah by way of their constitutions which require positive law to be in compliance with the Basic Code.[269] Although the Egyptian Constitution declares Islam to be the state religion and the Shariah to be the principal source of legislation, it carries no explicit statement that positive law contrary to the Basic Code lacks validity or enforceability.[270] Indonesia, the largest Muslim state, has made no constitutional commitment to either secularism or Shariah.[271]

Although the seven states mentioned above recognize official languages, four states espouse constitutional monolingualism. The constitutions of Saudi Arabia and Egypt declare Arabic as the official state language.[272] The constitutions of Turkey and Indonesia also advance monolingualism. Article 36 of the Indonesian Constitution declares that "[t]he national language shall be Indonesian (*Bahasa Indonesia*)."[273] Article 3 of the Turkish Constitution declares that Turkey is an indivisible state and that its language is Turkish.[274] In declaring a single language as the official language, the constitutions of Saudi Arabia, Egypt, Turkey, and Indonesia recognize the existence of no other languages. This official monolingualism is not descriptive, as other languages are spoken in each of these four countries. Their monolingualism appears to be instrumental in engineering national and cultural unity through the official imposition of a single language.

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268. CONSTITUTION OF THE REPUBLIC OF SENEGAL art. 1; CONSTITUTION OF THE REPUBLIC OF TURKEY art. 2. Since its independence in 1960, Senegal has drafted eight constitutions—including the last one in 2001—which have all been based on the principle of secularism. *See* Fatou Sow, *Fundamentalisms, Globalisation, and Women's Human Rights in Senegal*, 11 GENDER & DEV. 69, 72 (2003).

269. Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 1,2 [1980]; CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN pmbl.; BASIC SYSTEM OF THE CONSULTATIVE COUNCIL [Constitution] art. 7 (Saudi Arabia).

270. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 2. The Egyptian constitution does not restrict the definition of Shariah to the Quran and the Prophet's Sunnah but includes fiqh, juristic law mostly made in the early centuries of Islam.

271. FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 126 (2003).

272. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 2; BASIC SYSTEM OF THE CONSULTATIVE COUNCIL [Constitution] art. 1 (Saudi Arabia).

273. CONSTITUTION OF THE REPUBLIC OF INDONESIA. art. 36. Although over 400 languages are spoken in Indonesia, *Bahasa Indonesia* is promoted as the national language for cognitive, instrumental, integrative, and cultural purposes. P.W.J. Nababan, *Language in Education: The Case of Indonesia*, 37 INT'L REV. EDUC. 115, 116, (1991) (Neth.). *Bahasa Indonesia*, however, has not been designed to replace vernaculars. *Id.* Most Indonesians are bilingual or multilingual. *Id.*

274. CONSTITUTION OF THE REPUBLIC OF TURKEY art. 3.

Of the four monolingual constitutions, Turkey's militantly secular constitution is openly oppressive toward linguistic diversity. In enforcing a social monopoly of the Turkish language, the Turkish constitution states "No language other than Turkish can be taught as a mother tongue to Turkish citizens at any institutions of training or education."[275] While the constitutional provision is sweeping and universally biased against all local languages, it is specifically targeted at Kurds and Kurdish.[276] Language has been the principal emic marker of Kurdishness.[277] Since Kurds are Muslims, their language has also been the principal etic marker.[278] Stereotypes abound in Turkey that describe the Kurdish language as not sophisticated enough to express profound thought and that the first step in the mission to civilize the Turkish Kurds is to teach them the Turkish language.[279] The indivisibility of the Turkish state mentioned along with its official monolingualism within the same section of the constitution reflect sentiments for an oppressive form of ultra-nationalism, a course of action contrary to the Shariah principles of speech diversity.

Iran, Pakistan, and Senegal recognize linguistic diversity, even though each has adopted a national language. Iran's Islamic Constitution declares that Farsi, the lingua franca of its people, shall be the official Language and script of Iran.[280] Thus, Farsi is both the national and official language of Iran. In addition to Farsi, however, the constitution allows the use of regional and tribal languages in print and electronic media.[281] The literature written in regional and tribal languages may be taught in schools as well.[282] The Iranian Constitution states that Persian, the lingua franca of its people, is the official language and script of Iran.[283] Official documents, books, and textbooks are required to be in Persian language and script.[284] The constitution also recognizes Arabic, the language of the Quran and Islamic texts, a language that per-

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275. CONSTITUTION OF THE REPUBLIC OF TURKEY art. 42.

276. CHRISTOPHER PANICO, TURKEY: VIOLATIONS OF FREE EXPRESSION IN TURKEY 89 (1999).

277. Servet Mutlu, *Ethnic Kurds in Turkey: A Demographic Study*, 28 INT'L J. MIDDLE E. STUD. 517, 518 (1996). Kurdish as an Indo-European language is closely related to Persian. *See* George S. Harris, *Ethnic Conflict and the Kurds*, 433 ANNAL AM. ACAD. POL.& SOC. SCI. 112, 113 (1977). Although the Kurdish language could be the basis of Kurdish identity, various dialects spoken among Kurds living in Iran, Iraq and Turkey defy a unified language. *Id.*

278. Mutlu, *supra* note 277.

279. Martin Van Bruinessen, *The Kurds in Turkey*, MERIP REP., Feb. 1984 6, 6.

280. Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 15 [1980].

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

meates the Persian literature.[285] The teaching of Arabic is mandatory in all classes of secondary school and in all areas of study.[286] In addition to these two languages, the constitution allows the use of regional and tribal languages in the press and mass media.[287] The literature available in regional and tribal languages may also be taught in schools.[288]

Senegal's secular constitution adopts French as the official language but mentions several native languages as national languages. This is unique in that no national language is elevated to the status of an official language. Pakistan's Islamic Constitution recognizes Urdu and English as official languages but only Urdu as the national language.[289] The constitution contemplates a time in the future, though without setting a deadline, when Urdu shall be the only official language.[290] In addition to Urdu, the four provinces of Pakistan are authorized to teach, promote, and use their native languages.[291] Article 28 of the constitution shows even more respect for linguistic diversity by recognizing a right to language. It states that "any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and subject to law, establish institutions for that purpose."[292]

Pakistan and Iran specifically recognize Arabic in their constitutions as the language of Islam. Pakistan's Constitution promotes what it calls the "Islamic way of life."[293] The state undertakes to provide facilities, such as the learning of the Quran and Islamic studies, so that Muslims can "understand the meaning of life according to the Holy Quran and Sunnah."[294] Furthermore, the state shall endeavor "to encourage and facilitate the learning of Arabic language."[295] According to one study, in 1951 merely 10% of Muslims could read the Quran in Arabic; in 1998, this figure increased to more than 55%.[296] Iran's Constitution states: "Since the language of the Quran and Islamic texts and teachings is Arabic, and since Persian literature is thoroughly permeated by this language, it must be taught after elementary level, in all classes of secondary

285. *Id.* art. 16.
286. *Id.*
287. *Id.* art. 15.
288. *Id.*
289. CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN art. 251.
290. *Id.*
291. *Id.* art. 251(3).
292. *Id.* art. 28.
293. *Id.* art. 31.
294. *Id.* art. 31(1).
295. *Id.* art. 31(2)(a).
296. Rahman, *supra* note 114.

school and in all areas of study."[297]

Pakistan and Senegal have adopted foreign languages as official languages. Under the lingering influence of the British Raj, Pakistan's ruling elites and governmental officials speak English as a second language.[298] The experience of Senegal with the French language has been similar. The fact that both Pakistan and Senegal continue to embrace foreign languages is less of an ideological choice and more of a practical decision since the government machinery in each country has been running on its respective adopted foreign language since colonial times. The bureaucracy, the courts, and corollary paper work all exist in the adopted foreign language. No attempts, for example, have been made in Pakistan to translate high court cases into native languages. Thus English continues to be the language of high courts by the sheer force of inertia. Likewise, English is the default language of the bureaucracy.[299]

In both Pakistan and Senegal, there exists no one native language that can easily replace the adopted foreign language. In Pakistan, the majority of the people speak Punjabi.[300] But Punjabi is the language of the province Punjab, and it cannot be elevated to a national language because the other three provinces speak their own native languages.[301] Urdu, the national language, though more widely spoken than English, is primarily the language of Muslim immigrants from India.[302] A very small percentage of the population speaks Urdu as a mother tongue.[303] In Senegal, several distinct languages are spoken.[304] Wolof is a major language, which is also spoken in other parts of Western Africa, including Gambia

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297. Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 16 [1980].

298 *See* Rahman, *supra* note 114.

299. Article 251 of Pakistan's constitution states:

> (1) The National language of Pakistan is Urdu, and arrangements shall be made for its being used for official and other purposes within fifteen years from the commencing day.
>
> (2) Subject to clause (1), the English language may be used for official purposes until arrangements are made for its replacement by Urdu.
>
> (3) Without prejudice to the status of the National language, a Provincial Assembly may by law prescribe measures for the teaching, promotion and use of a provincial language in addition to the national language.

CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN art. 251.

300. CIA, *supra* note 262.

301. *See* ALYSSA AYRES, SPEAKING LIKE A STATE: LANGUAGE AND NATIONALISM IN PAKISTAN 47 map 2; IAN TALBOT, PAKISTAN: A MODERN HISTORY 25-27 (1998); Ian Talbot, *The Punjabization of Pakistan: Myth or Reality? in* PAKISTAN: NATIONALIZATION WITHOUT A NATION? 51, 60 (Christophe Jaffrelot, ed. 2002).

302. TALBOT, PAKISTAN: A MODERN HISTORY, *supra* note 301, at 25-26.

303. *Id.* at 26.

304. ELIZABETH L. BERG & RUTH LAU, SENEGAL 94-95 (2d ed. 2009). Pular, Serer, and Diola are spoken in parts of Senegal. *Id.*

and Mauritania, but less than forty percent of Senegalese speak Wolof as their mother tongue.[305] Even though Wolof is broadly understood and widely spoken as a second language, Senegalese are not prepared to abandon Fula, Diolo, and many of the other native languages spoken in different parts of Senegal.[306] By default, therefore, the adopted foreign languages in Pakistan and Senegal continue to mediate the competition among native languages.

The Shariah is not opposed to learning foreign languages because all languages are part of the divine plan. Practical wisdom, however, dictates that the people of a state must be able to speak an official language.[307] Anomalies arise when an official language lacks democratic rooting. While the adopted foreign languages connect the peoples of Pakistan and Senegal to Western nations, no evidence demonstrates that these two countries have been advantaged over Muslim states that have kept their native language for official business. Arabic speaking Saudi Arabia and the Gulf States have done much better in accumulating wealth through natural and entrepreneurial resources. Likewise, non-Muslim states, such as Japan and China, have developed leading world economies without officially adopting a foreign language.

In fact, the official adoption of a foreign language fosters hierarchical institutions of class, caste, and other imbalances, a development that cannot be justified under the Shariah egalitarianism. The people most likely to learn an officially adopted foreign language are bureaucrats, judges, lawyers, physicians, and other high professionals. Further, an adopted foreign language is almost always more dominant in cities than in rural areas, and even more so in affluent areas of cities.[308] Consequently, farmers, blue collar

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305. Fiona McLaughlin, *Dakar Wolof and the Configuration of Urban Identity*, 14 J. AFR. CULTURAL STUD. 153 (2001) (arguing that the rise of Dakar Wolof as a written urban language has created a new meta-ethnic identity).

306. Article 1 of Senegal's constitution states: "The official language of the Republic of Senegal shall be French. The national languages shall be Diolo, Malinke, Poular, Serer, Soninke, Wolof, and any other national language which shall be codified." CONSTITUTION OF THE REPUBLIC OF SENEGAL art. 1.

307. The rise of the United States as a super power coincided with the decline of the British Empire. Even though the decline of the British Empire may have caused the reappearance of Welsh and Scottish languages at home, the rise of the United States confirmed the imperial ascendancy of English as the world language. *See* ROBERT PHILLIPSON, LINGUISTIC IMPERIALISM 5-11 (1992). Whenever a regional or global superpower emerges on the international scene, its language receives a tremendous boost as the ruling elites, merchants, intellectuals, and other groups learn the dominant language in order to succeed, to make a difference, and to cope with reality. *See* Rahman, *supra* note 162 and accompanying text. This phenomenon may weaken local languages, as influential sectors of the population learn the new regionally or globally dominant language. *See id.*

308. *See, e.g.*, Kwame Botwe-Asamoah, *African Literature in European Languages: Implications for the Living Literature*, 31 J. BLACK STUD. 746, 761 (2001) (arguing that African literature produced in foreign languages does not connect with the masses and does not

workers, and the vast majority of people living in villages and remote areas are unlikely to learn an adopted foreign language.[309] Since many high paying jobs are available to individuals speaking the adopted foreign language, a great injustice is perpetrated and entrenched, in turn creating a small ruling class that draws the greatest benefit from the adopted foreign languages.[310]

The Universal Islamic Declaration of Human Rights (Islamic Declaration) contains no specific provision for the protection of linguistic diversity.[311] In its preamble, the Islamic Declaration proposes "to establish an Islamic Order wherein all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, colour, sex, origin or language."[312] The word "language" appears only one more time in the Declaration, again in the context of prohibiting discrimination.[313] While the prohibition of discrimination on the basis of language is discussed in broad terms in the inspirational preamble, the prohibition seems narrower in the operative text.[314] The narrower prohibition is related to the "opportunity to work" and exposure to "greater physical risk."[315] The Islamic Declaration protects an important right of workers who might be denied work or exposed to physically dangerous labor just because they speak a different or foreign language.[316] The Islamic Declaration, however, fails to establish an affirmative right to language diversity.[317] This failure demonstrates that Muslim states are reluctant to affirmatively embrace the diversity of languages, which the Shariah not only recognizes but celebrates as part of the divine plan.

B. Commitments to Self-Expression

As discussed in Part IV, the Shariah recognizes each individual

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promote local cultures).

309. *See id.*

310. Rahman, *supra* note 74 (arguing that the ruling elite, despite its lip service to Urdu as the national language, has maintained English medium schools to preserve privilege and class difference).

311. Islamic Council of Europe, *Universal Islamic Declaration of Human Rights*, Sept. 19, 1981, *reprinted in* MUSLIM WORLD LEAGUE J., Dec. 1981, at 25. [hereinafter *Islamic Declaration*].

312. *Id.* pmbl. For a critique of the origin or validation of human rights in Islam *see* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 50-52 (1989) (arguing that claims about the existence of human rights in Islamic law are almost entirely baseless).

313. *See Islamic Declaration*, *supra* note 311, art. III(c).

314. *See id.*

315. *Id.* art. III.

316. *Id.*

317. *See id.*

as a unique human being—a concept that finds support in scientific research.[318] The promotion of arts, literature, sports, sciences, professions, vocations, and other expressive modes is indispensable for individual self-expression. Suppressing individual talents through state neglect and social stereotypes are as much contrary to the divine plan of diversity as are state and social prejudices against persons with disabilities. Knowing this, the non-Muslim world would presume that, in adhering to Islam, Muslim states would comply with the Shariah and maximize opportunities for individual self-expression, and that Muslim states would proactively recognize, protect, and foster individual self-expression so that persons with special talents and disabilities may develop their natural competencies for the benefit of families and communities.

This section analyzes the constitutions of seven Muslim states to determine whether the Shariah ordainments for individual self-determination have been codified into rights and obligations of positive law (*qanun*). Here, a caution is pertinent. Because modern constitutions are drafted as fanciful documents trying to impress the world with a state's commitment to civil, political, economic, social, and cultural rights, they are rarely reliable indicators that governments indeed protect the rights superbly laid out in constitutional texts. As judiciaries in most Muslim states lack independence, governments can engage in gross violations of the right to self-determination with little accountability.[319] Some Muslim states resort to torture, while some blatantly subjugate women and minorities.[320] In some Arab states, discrimination against immigrants is open and brazen.[321] In light of the dismal human rights record of Muslim states, it might be that the right to self-determination, even if enumerated in the constitution, is much less

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318. Take speech, for example. Each individual possesses a unique manner of speech. Biological and cultural differences between individuals contribute to speech diversity in that individual voices differ in voice quality, pitch, and loudness, while speech varies in terms of pronunciation, accent, inflections, and pauses. *See* Yarmey, *supra* note 60, at 794. Even the same individual can exhibit speech variations due to "changes in mood, emotion, intentions, thought distractions, and situational demands." *Id.*

319. *See* Ali Khan, *Pakistan Elections and the Lawyers' Movement*, JURIST, Nov. 27, 2007, http://jurist.law.pitt.edu/forumy/2007/11/pakistan-elections-and-lawyers-movement.php (discussing the plight of the independence of the judiciary in Pakistan under military dictator Pervez Musharraf).

320. Liaquat Ali Khan, *Friendly Renditions to Muslim Torture Chambers*, COUNTERPUNCH, June 6, 2005, http://www.counterpunch.org/khan06062005.html; *see also* Tayyab Mahmud, *Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT'L L.J. 40 (1995).

321. *See* U.N. Human Rights Council [UNHCR], *Addendum to the Report of Special Rapporteur on Trafficking in Persons, Especially Women & Children, Mission to Bahrain, Oman & Qatar*, ¶¶ 70-78, U.N. Doc. A/HRC/4/23/ADD.2, (April 25, 2007) (describing the deplorable living conditions of immigrant workers in Bahrain, Oman, and Qatar and the lack of legal protection provided to them).

guaranteed in reality.

1. Effective Recognition

The constitutional texts of seven Muslim states do not use any single phrase to recognize the individual right to self-expression. With varying qualifications, provisos, and claw-back clauses, most of the seven constitutions enumerate the rights to speech and expression.[322] The rights to speech and expression, however, are not the same as the right to self-determination. The right to expression is part of the right to self-determination. For meaningful self-determination, individuals must have the minimal right of expressing their thoughts and opinions. The right to self-determination, however, is much broader and includes the development of special talents, acquisition of abilities and capacities, and accommodation of disabilities through education, training, and opportunity. An artist, for example, expresses herself when she draws or paints. However, the artist's right to self-expression empowers the artist to learn the science and skills of drawing and painting, develop her vision of the art, share her work with a community of artists, and exercise her artistic imagination without undue social and legal impediments. Likewise, a person with a disability cannot effectively exercise his or her right to self-determination unless the disability is accommodated.[323]

Saudi Arabia's Constitution, adopted in 1992, is silent on the individual right to self-determination. It enumerates no conventional rights found in modern constitutions, though the constitution makes a broad normative statement that the state protects human rights in accordance with the Shariah.[324] The Saudi Constitution mentions the individual in only two contexts. First, every individual has the right to address public authorities in all matters affecting the individual.[325] Second, the state may encourage indi-

322. *See, e.g.*, CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN art. 34; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 47; CONSTITUTION OF THE REPUBLIC OF INDONESIA art. 28; Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 175 [1980]; CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN art. 19; CONSTITUTION OF THE REPUBLIC OF SENEGAL art. 8; CONSTITUTION OF THE REPUBLIC OF TURKEY art. 26.

323. For example, the Individuals with Disabilities Education Act (Act), 20 U.S.C. §§ 1400-1482 (2006), is the United States law most consistent with the Shariah on speech diversity. The Act requires the establishment of an Individualized Education Program (IEP) for each child with a disability through the cooperation of teachers and parents. 20 U.S.C. §§ 1414(d) (2006). The Act was first enacted in 1970 when disabled children in America were either excluded from schools or had no option but to drop out after unsuccessful integration in regular classrooms. Schaffer v. Weast, 546 U.S. 49, 51-52 (2005).

324. BASIC SYSTEM OF THE CONSULTATIVE COUNCIL [Constitution] art. 26 (Saudi Arabia).

325. *Id*. art. 43.

viduals to contribute in acts of charity.[326] Though a text of individual rights is missing, the constitution nonetheless obligates the state to provide education and combat illiteracy,[327] safeguard science, literature and culture,[328] and furnish job opportunities for whomever is capable of working.[329] The Saudi state also guarantees the rights of citizens in cases of illness and disability.[330] These significant state responsibilities benefit individuals and assist them in developing personal talents and skills that the divine plan has bestowed on them. Yet, the constitution supplies little confidence to legal analysts that the right to individual self-determination is sufficiently guaranteed.

By contrast, the Indonesian constitution, adopted in 1945, articulates the individual right to self-development in the most balanced phraseology. Article 28B assures children the right to live, to grow, and to develop without exposure to violence and discrimination,[331] Article 28C assures every individual, both men and women, the right to personal development.[332] Further, the constitution recognizes that no individual can develop without his or her basic needs being met.[333] But the satisfaction of basic needs alone does not guarantee the full development of a person. Accordingly, Article 28C provides that each person has the right to receive education and to benefit from science and technology.[334] According to the Indonesian government, outmoded education is thus insufficient to bring out the talents of a person in the contemporary context. Thus, the constitution makes an important philosophical point that the concept of self-determination is contextual; it is rooted in the context of the time and the state of civilization. But the learning of science and technology can alienate individuals, indeed an entire nation, from its arts and culture. To further assure that the individual is not alienated from his or her cultural roots, Article 28C contextualizes self-development not only in the realm of science and culture, but also in the moral realm of the

326. *Id*. art. 27.
327. *Id*. art. 30.
328. *Id*. art. 29.
329. *Id*. art. 28.
330. *Id*. art. 27. Similarly, the Turkish constitution states that persons with physical or mental disabilities will enjoy special protection in work related matters. CONSTITUTION OF THE REPUBLIC OF TURKEY art. 50.
331. CONSTITUTION OF THE REPUBLIC OF INDONESIA art. 28B. Egypt's constitution also provides that the state shall "take care of children and youth and provide suitable conditions for the development of their talents." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 10.
332. CONSTITUTION OF THE REPUBLIC OF INDONESIA art. 28C.
333. *Id.*
334. *Id.*

welfare of human race.

Note, however, that no constitutional right, under any legal system, not even the right to self-determination, is categorical. The right to self-determination may not be fully enforceable for a number of reasons, including lack of resources. More so than for other rights, the right to individual self-determination is related directly to social and economic development. A poor Muslim state may not have sufficient resources to open schools and colleges for the learning of arts, sciences, literature, sports, professions, and vocations. Market forces may also falter in creating opportunities in the private sector for individuals to discover and develop their special talents.

While resource constraints certainly impede opportunities, a constitutional right to self-determination is far from an empty commitment. This paper argues that when a Muslim state commits to the enhancement of individual talents and to the accommodation of persons with disabilities, the dynamics of social and economic development acquire new social energy. When hope and dignity are offered to everyone in the community, more individuals are likely to deploy their talents and abilities toward self-improvement, with consequential contributions to the larger community.

2. Women's Self-Determination

Critics of Islam often paint it as an overly oppressive religion towards women. Saudi Arabia is characterized as a state of gender apartheid.[335] Muslim fundamentalists are accused of imposing a singular religious identity on Muslim women, thus denying women the right to personal self-determination.[336] The Taliban regime forbade women, who constitute nearly seventy percent of the population due to the death of men in wars, from working outside of the home.[337] "British colonial officials in Egypt specifically invoked the veil and treatment of women under Islam as a justification for colonialism."[338] Feminist Susan Oakin makes a broader charge against religious oppression, arguing that Judaism, Christianity, and Islam all subordinate women to the authority of men.[339] The

335. *See* Recent Case, *General Court of Qatif Sentences Gang-Rape Victim to Prison and Lashings for Violating "Illegal Mingling" Law*, 121 HARV. L. REV. 2254, 2259-60 (2008).

336. Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1435-36 (2003).

337. Anastasia Telesetsky, Recent Development, *In the Shadows and Behind the Veil: Women In Afghanistan Under Taliban Rule*, 13 BERKELEY WOMEN'S L.J. 293, 296 (1998).

338. Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1196 (2001).

339. SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? 9-13 (Joshua Cohen et al., eds., 1999).

Muslim Middle East is described as "a desert of non-compliance within the human rights community."[340]

Pressed against this unrelenting criticism, Muslims and Muslim states engage in special efforts to deny the oppression of women. Some Muslim scholars emphasize the need to root women's rights in sacred texts for the continuity of Islamic traditions.[341] Historically, Islam can be viewed as a liberation theology for the rights of women.[342] Contemporary efforts to recognize the rights of women are reflected in the constitutions of Muslim states. For example, Senegal's secular constitution, promulgated in 2001, contains all the righteous rhetoric in support of individual self-determination. Borrowing the concept from the Universal Declaration of Human Rights, Article 7 proclaims that every individual has the right to "the free development of his or her personality."[343] In fact, Article 7 improves upon the text borrowed from the Declaration by introducing the word "her" to demonstrate that the Senegalese constitution is protective of both men and women.[344] This textual improvement is noble and compatible with the Shariah of speech diversity since both men and women are empowered to express their special talents in accordance with the divine plan of creation. To further underline gender equality, the constitution declares that "[m]en and women shall have equal rights."[345]

While these normative commitments to women's right to self-determination are commendable, the living reality tells another story. Linda Beck narrates that there exists what she calls a "hidden public" in Senegal that wields the power to influence policy and make legislation.[346] The hidden public is a network of influential men from powerful families who control the reins of power.[347] While the Parliament houses elected representatives, the power

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340. Naz K. Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM. RTS. J. 191, 192 (2006).

341. Iman Hashim, *Reconciling Islam and Feminism*, GENDER & DEV., Mar. 1999, at 7 (arguing for the need, and suggesting a way, to find women's rights in Islamic texts).

342. There is vast and controversial literature on this topic. *Compare* Leila Ahmed, *Women and the Advent of Islam*, 11 SIGNS 665 (1986) (arguing that Muslim women should not be forced to choose between religion and self-affirmation), *with* Anour Majid, *The Politics of Feminism in Islam*, 23 SIGNS 321 (1998) (responding to Leila Ahmed's critique of Islam), *and* Izzud-Din Pal, *Women and Islam in Pakistan*, 26 MIDDLE E. STUD. 449 (1990) (discussing the possible costs and benefits of the emancipation of women in Pakistan).

343. CONSTITUTION OF THE REPUBLIC OF SENEGAL art. 7. *Cf.* Universal Declaration of Human Rights, G.A. Res. 217A, art. 22, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].

344. Article 22 of the Universal Declaration of Human Rights reads: "the free development of his personality." Universal Declaration, *supra* note 343, art. 22.

345. CONSTITUTION OF THE REPUBLIC OF SENEGAL art. 7.

346. Linda J. Beck, *Democratization and the Hidden Public: The Impact of Patronage Networks on Senegalese Women*, 35 COMP. POL. 147, 148 (2003).

347. *Id.* at 147-48.

belongs to the executive branch as cohorts with the hidden public.[348] The challenge for women is not only to obtain more seats in the Parliament but to enhance their position within the hidden public.[349] Such has been the powerlessness of the Senegalese women that they were unable to play an effective role in obtaining a legal ban on the pre-Islamic cultural practice of female genital mutilation.[350] Even in family matters, though law requires a woman's consent to marriage, "[f]ear of disinheritance, of social ostracism, or of financial destitution" can effectively diminish the right.[351]

Turkey's 1982 secular constitution obligates the state "to provide the conditions required for the development of the individual's material and spiritual existence."[352] Ironically, this normative statement conforms to the Basic Code, which commands Muslims to strike a balance between material and spiritual pursuits. One of the most popular *dua* (meaning "supplication to God"), borrowed from the Quran, which Muslims throughout the world implore after daily prayers, says: "O our Sustainer! Grant us good in this world and good in the life to come."[353] In theory, the right to personal self-development is available to both men and women since the constitution espouses equality between men and women and holds the state responsible for ensuring that gender equality exists in practice.[354] Furthermore, the constitution promises the spread of sports among the masses.[355] It also obligates the state to "protect, promote and support works of art and artists, and encourage the spread of appreciation for the arts."[356] These provisions should help Turkish women attain a very broad right to personal self-determination.

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348. *Id.* at 151.

349. *Id.* at 151, 165.

350. *Id.* at 162. Though the country eventually enacted a ban against female genital mutilation, the final decision came from the presidency. *Id. See also* Peter Easton et al., *Social Policy from the Bottom up: Abandoning FGC in Sub-Saharan Africa*, 13 DEV. PRAC. 445 (2003) (highlighting a grassroots initiative experiment in Senegal that was effective in curbing female genital mutilation in villages).

351. Abd-el Kader Boye, et al., *Marriage Law and Practice in the Sahel*, 22 STUD. FAM. PLAN. 343, 346 (1991).

352. CONSTITUTION OF THE REPUBLIC OF TURKEY art. 5.

353. Quran, sura al-Baqara 2:201. In promoting a balanced life, Islam does not teach asceticism or renunciation of the world. It only warns believers that excessive engagement with worldly goods removes spiritual elements from life.

354. CONSTITUTION OF THE REPUBLIC OF TURKEY art. 10.

355. *Id.* art. 59. Evidence discloses that Turkish women are developing sports activities. *See also* Selcan Teoman, *Sports: Turkey*, *in* 3 ENCYCLOPEDIA OF WOMEN AND ISLAMIC CULTURES, *supra* note 40, at 448, 448.

356. CONSTITUTION OF THE REPUBLIC OF TURKEY art. 64; *see* Susan N. Platt, *Public Politics and Domestic Rituals: Contemporary Art by Women in Turkey, 1980-2000*, FRONTIERS: J. WOMEN STUD., 2003, at 19 (describing the works of Turkish women artists).

Despite generous words for the development of women, Turkey has been oppressive toward women in its own secular ways. Turkish laws prohibit women from wearing the Islamic headscarf in colleges, universities, government offices and national parliament.[357] The notion of modernity adopted at the dissolution of the Ottoman Empire imported a conception of female liberty that could not be reconciled with Islamic values. By adopting a fierce concept of secularism, state institutions including the armed forces took Islam as a force of backwardness and decay. Whereas the Taliban imposed a preliterate view of Islam on women, the Turkish secular establishment impresses a pseudo-European stamp on Muslim women. Consequently, Turkish women are denied the right to express their Islamic identity. Although secular laws are under social stress and the militant secularism of the twentieth century is yielding to a more balanced understanding of Islam, Turkish women have yet to be liberated from an imitational and anti-historical notion of modernity.

Iran's Islamic Constitution does not enumerate a general right to individual self-determination. However, it specifically lists such a right for women. Article 21 obligates the government to create a favorable environment for the development of woman's personality, and "the restoration of her rights, both the material and intellectual.[358] The favorable environment, however, must be in conformity with Islamic criteria.[359] Note that the Constitution of the Islamic Republic of Iran aims at the "restoration" of women's rights, which means that women draw rights of self-development from the Basic Code, not merely from positive law. Although no such right is framed for men, it is highly improbable that the constitution discriminates against men. The special emphasis on women's rights is meant to dismantle historical modes of discrimination that have prevented women from exercising their talents in sciences, sports, arts, and literature.[360]

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357. Ali Khan, *Suppressive Rulings*, NAT'L L.J., July 24, 2006. A recent ruling by the Turkish Constitutional Court upheld the ban on wearing Islamic headscarf at universities. *High Court in Turkey Rules Against Headscarves*, CHURCH & STATE, July-Aug. 2008, at 22.

358. Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 21 [1980].

359. *Id*. Some criticize the idea of subjecting human rights to the Islamic criteria. *See*, *e.g.*, Ann Elizabeth Mayer, *Islamic Rights or Human Rights: An Iranian Dilemma*, 29 IRAN. STUD. 269, 273 (1996) (U.K.) (accusing Iran of building one human rights system for men, and another much inferior one for women and minorities).

360. Evidence suggests, however, that women's rights in Iran have experienced both reduction and expansion. Valentine M. Moghadam, *Islamic Feminism and its Discontents: Toward a Resolution of the Debate*, 27 SIGNS 1135, 1137-42 (2002). In the early deconstructive stage of the Iranian revolution, the rights associated with the West were withdrawn. *Id.* at 1137-38. In the 1990s, however, more doors were open for women to actualize their self-expression in numerous professions. *Id.* at 1138.

Furthermore, women have constitutional rights to participate in the creation of wealth as well as in the acquisition of intellectual assets. Article 21 mentions both material and intellectual rights, repudiating the logic that women are merely reproductive machines.[361] A foundational constitutional principle underlines the systemic significance of "sciences and arts and the most advanced results of human experience, together with the effort to advance them further."[362] When this foundational principle is applied to a woman's right to self-development, women are entitled to deploy their talents and abilities to acquire material and intellectual resources. This freedom to self-development, however, cannot be corrupted by undermining family and motherhood. Consistent with the Basic Code, the right to self-development under the Iranian constitution, for both men and women, is not a freedom to abandon children or parents to frailty and helplessness.

3. Islamic Way of Life

One may ask whether the individual right to self-determination is compatible with a state-sponsored Islamic way of life. Most Muslim states are fusion states in that they fuse Islam with state, and do not separate them, to safeguard Islamic values. Some Muslim states make a much stronger constitutional commitment to Islam than others. Iran and Saudi Arabia, the two prominent fusion states, enforce the Islamic way of life both at state and social levels. Saudi Arabia's constitution provides that "[t]he state protects the Islamic Creed; carries out its Shariah; and undertakes its duty towards the Islamic call."[363] The communitarian principle of commanding the people "to do right and shun evil" is taken from the Quran.[364] Invoking the verbatim text of the communitarian principle, Iran's constitution obligates the government and the people to establish virtue and disestablish vice.[365]

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361. Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 21 [1980]; *cf.* Mehran Tamadonfar, *Islam, Law, and Political Control in Contemporary Iran*, 40 J. SCI. STUD. REL. 205, 208 (2001) (asserting that despite the constitutional language of equality, women's rights are interpreted under the Shia doctrines).

362. Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 2 [1980].

363. BASIC SYSTEM OF THE CONSULTATIVE COUNCIL [Constitution] art. 23 (Saudi Arabia); *see also* Rashed Aba-Namey, *The New Saudi Representative Assembly*, 5 ISLAMIC L. & SOC'Y 235, 236 (1998) (describing a historic reluctance by the Saudi government to adopt a constitution, as both the government and the people of Saudi Arabia believed that the Quran was the constitution).

364. The principle is repeated numerous times in the Quran. *See*, *e.g.*, Quran, sura aal-Imran 3:104; 3:110; 3:114, sura al-Araf 7:157, 7:199, sura at-Tauba 9:71, 9:112, sura al-Haj 22:41.

365. Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 8 [1980]. The constitution cites Quran, sura at-Tauba 9:71.

Furthermore, the state of Iran is obligated to institute a social environment "for the growth of moral virtues based on faith and piety and the struggle against all forms of vice and corruption."[366] The responsibility to preserve and transmit Islamic values is partly deferred to social institutions since the state alone cannot construct a community of believers if social structures play an oppositional or passive role. The Saudi Arabia constitution mandates that the family raise its members in the Islamic faith.[367] The Iran constitution also relies on families to inculcate Islamic values.[368] In both Iran and Saudi Arabia, state and social institutions are coordinated in promoting the Islamic way of life.

Although Pakistan's Constitution does not incorporate the Quran's communitarian principle to do right and shun evil, it explicitly uses the phrase "Islamic way of life" and obligates the state to take steps for ordering the lives of the people according to the principles and concepts of Islam.[369] The state owes this obligation to Muslims of Pakistan, individually and collectively.[370] In promoting the Islamic way of life, the state provides "facilities" so that individuals can "understand the meaning of life" according to the Basic Code.[371] One listed facility is the educational means to foster the Islamic lifestyle.[372] The teaching of the Quran, the Prophet's life and character, and the basics of Islam (*Islamiat*) are made compulsory parts of the education.[373] In addition to providing facilities, the state is burdened with a more diffused and general obligation to foster Islamic moral standards.[374]

From a secular viewpoint, the state sponsored promotion of the Islamic way of life limits individual choices of lifestyles and self-expressions. Although non-Muslims are not coerced into adopting Islamic values,[375] Muslims are ideologically engineered to seek self-expression within the realm of Islam. The communitarian

366. Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 3 [1980].

367. BASIC SYSTEM OF THE CONSULTATIVE COUNCIL [Constitution] art. 9 (Saudi Arabia).

368. Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 10 [1980].

369. CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN art. 31.

370. *Id.*

371. *Id.*

372. *Id.* art. 31(2)(a).

373. *Id.*

374. *Id.* art. 31(2)(b).

375. *See, e.g.*, CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN art. 22. (stating that no person can be required to take instructions in a faith other than his own). Enforcement of Islamic values, however, can benefit non-Muslims. For example, because of restrictions on alcohol and drugs, the United States troops stationed in Saudi Arabia suffered little substance abuse problems that plagued the troops in Vietnam. Phil Gunby, *Service in Strict Islamic Nation Removes Alcohol, Other Drugs from Major Problem List*, 265 J. AM. MED. ASS'N 560 (1991).

principle allows the government to adopt supervisory policies that further limit individual choices. Secular critics would argue that a more robust protection of the right to self-determination would allow individuals to explore personal talents without state paternalism or ideological constraints. While individuals should be free to adopt the Islamic way of life, the secular argument asserts that the government should stay out of teaching virtue and enforcing Islamic values.[376]

From a comparative perspective, therefore, the restricted right to self-determination available under Muslim constitutions is inadequate. In the United States, for example, the liberty of self-exploration available to individuals is extensive with few restrictions.[377] A person is free to invent or savor pornography, within certain bounds.[378] A performer may dance in strip clubs.[379] An artist or writer may satirize prophets and holy books.[380] An entrepreneur may assemble an empire of intoxicants. At the same time, however, individuals in the United States are free to pursue sciences, sports, spirituality, and religion as they wish. A scientist may research the cure for cancer or AIDS. An athlete may master the skills of ice-skating. An activist may advocate against gambling and drinking. A holy man may devote his life to reading the Quran and calling worshippers to prayer.[381] In sum, individuals may express themselves through vice or virtue. Each individual answers to God without fear of the other. This freedom to live or not to live under God's Law, available in the West but not in the Muslim world, is presumptively more supportive of the right to

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376. Muslims living in countries with more secular governments still tend to hold strong to Islamic values. *See* Monika Stodolska & Jennifer S. Livengood, *The Influence of Religion on the Leisure Behavior of Immigrant Muslims in the United States*, 38 J. LEISURE RES. 293 (2006). In the United States, for example, where families tend to be more independent, Muslim families engage in leisure behavior that emphasizes strong family ties and family oriented leisure, which excludes intoxicants, mix-gender interactions, dating, and alcohol. *Id.*

377. JON R. BOND & KEVIN B. SMITH, THE PROMISE AND PERFORMANCE OF AMERICAN DEMOCRACY 112-141(2007).

378. *See generally* Adil Mustafa Ahmed, *The Erotic and the Pornographic in Arab Culture*, 34 BRIT. J. AESTHETICS 278 (1994) (arguing that the Arab culture should allow the erotic in visual arts since the culture allows the erotic in literature); Phyllis Schlafly, *The Morality of First Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 95 (2008) (arguing that the United States Supreme Court protects pornography).

379. DAVID LAURENCE FAIGMAN, LABORATORY OF JUSTICE 325 (2004) (discussing zoning laws regulating strip clubs and their effect on the First Amendment liberties of free speech).

380. *See*, *e.g.*, Sohnya Sayres, *Accepted Bounds*, SOC. TEXT, No. 25/26, 1990, at 119, 120-21 (1990) (discussing the controversy over Salman Rushdie's, THE SATANIC VERSES, a novel condemned in the Muslim world but defended in the West).

381. Carol Zaleski, *Time Out For Allah*, CHRISTIAN CENTURY, June 15, 2004 at 371 (discussing the controversy over the Muslim call to prayer in Hamtramck, Michigan, near Detroit).

self-determination.

Even from the Islamic viewpoint, state enforcement of the communitarian principle "to do right and shun evil" raises an intriguing inquiry. Does state enforcement of the communitarian principle interfere with the divine contract that God has made with Satan, a contract under which Satan may freely tempt human beings away from virtue?[382] If God allows Satan to mislead individuals, can a Muslim state preempt Satan's temptations? Banning the sale of liquor, for example, preempts Satan from tempting Muslims to drink. While Satan is free to tempt, individuals and communities are also free to resist temptation. The state is under no divine obligation to collude with Satan to tempt believers away from the articles of faith. The state as a corporate may fight Satan on behalf of the people, just as the state safeguards the people against enemy aggression. Frustrating Satan's temptations at both individual and collective levels, therefore, does not interfere with Satan's contract with God. Indeed, Muslims are obligated to resist and defeat Satan. Here, caution is called for. If state enforcement of the communitarian principle is overly coercive, as was the case under the Taliban in Afghanistan, it might defame, and even undermine, the goodness of Islam.[383] Overly coercive enforcement might also establish a black market of sin, a market that breeds hypocrisy, health hazards, and a more corrosive form of subterranean vice.[384]

In Muslim states, the individual right to self-determination cannot function in a moral vacuum or contrary to mainstream religious ethos. The Basic Code prohibits certain behavior, including the consumption of intoxicants and pornography and engaging in non-martial intimacies.[385] It also forbids gambling and other enterprises of chance.[386] These prohibitions outlaw certain modes of self-determination. The prohibitions emanating from the Basic Code, even if ignored in the privacy of homes, cannot be publicly dismissed, for such public dismissal would undermine the Islamic

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382. See Liaquat Ali Khan, *An Islamic View of the Battlefield*, 7 BARRY L. REV. 21 (2006) for a thorough discussion of this point.

383. For a discussion of the Taliban rule, see generally FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN (William Maley ed., 1998); PETER MARSDEN, THE TALIBAN: WAR, RELIGION AND THE NEW ORDER IN AFGHANISTAN (Zed Books 1998); AHMAD RASHID, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA (2000).

384. Some Muslim states may deny the presence of prostitutes, thus limiting the availability of medical services and knowledge about sexually transmitted diseases. *See* J. Zargooshi, *Characteristics of Gonorrhoea in Kermanshah, Iran*, 78 SEXUALLY TRANSMITTED INFECTIONS 460 (2002).

385. *E.g.*, Quran, sura al Ma'idah 5:90 (prohibiting intoxicants); sura al-Isra 17:32 (prohibiting non-marital sex).

386. *Id.* sura al Ma'idah 5:90.

character of the community. A Muslim state is unlikely to build "sin cities" like Las Vegas.[387] While some individuals in a Muslim state may demand freedom from restrictions of the Basic Code, the nation as a whole would insist on preserving lifestyles consistent with the Basic Code. Consequently, the divine right to self-determination in a Muslim state functions within the freedoms of a religious framework.[388]

CONCLUSION

The Islamic law of speech diversity recognizes two distinct divine rights. The divine right to language allows each speech community to preserve and celebrate its own language free of coercion and disrespect from other speech communities. Native languages are the assets of speech communities, containing a view of life, a history, literature, folk songs, stories, moral lessons, jokes, lyrics, and laws. The divine plan maintains the diversity of languages so that each speech community may forge fellowship among its members. While native languages furnish the bonds of close familiarity, they do not prevent its speakers from learning other languages. No speech community is under any divine compulsion to rigidly enforce its own monolingualism. It is natural for speech communities to learn beneficial languages that bring intellectual, scientific, or material well being. Human beings have the inherent capacity to speak more than one language. In learning beneficial languages, however, native speakers need not abandon their own language. The Islamic law prohibits coercive degradation of native languages but at the same time, it interposes no barriers in learning other languages. In fact, millions of Muslims learn Arabic to recite the Quran. They also learn English and other dominant languages needed to be successful in global affairs.

Closely related to the right to language is the divine right to individual self-expression or self-determination. Each human being is vested with assets and disabilities. Each human being is unique for God, the Master-Artist, shapes each human being with special care. Although human beings share common features, no human being is replaceable with another. Accordingly, the Islamic

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387. For a discussion of the deregulation of gambling in Missouri, see Christopher T. O'Connor, Note, *A Return to the Wild West: The Rapid Deregulation of the Riverboat Casino Gambling Industry in Missouri*, 19 ST. LOUIS U. PUB. L. REV. 155 (2000).

388. Anouar Majid, for example, writes that Western conceptions of feminist emancipation cannot work in the Muslim world. Majid, *supra* note 342, at 345-46. And even if secularism is adopted at the state level, the deeper social and cultural realties will remain Islamic. *Id.* Only indigenous ideas of the right to self-expression will bring effective change. *See id.*

law of speech diversity grants each individual the divine right to personal development. Social, economic, and legal barriers that refuse to recognize special talents or refuse to accommodate disabilities are incompatible with the divine plan. In some Muslim states, gender barriers have been mounted to deny women the right to personal self-determination. The suppression of arts, sports, sciences, and other creative disciplines is contrary to the right to self-expression since individuals are forced to pursue lives through preapproved social models of success. While normic standards are critical for the functioning of a social and legal system, a zealous enforcement of normic standards results in the non-acceptance of individual diversity of talents and disabilities. Normic standards function with efficacy when a generous allowance is made for variations from the mean.

While most Muslim states respect linguistic diversity, some do not. Some deploy the model of the nation-state to impose assimilation and deny speech communities their divine right to preserve and speak native languages. Likewise, some Muslim states do not proactively appreciate the divine right to individual self-determination. A vigorous right to individual self-expression is not contrary to Islam. Nor does it demand that the state be secular. Muslim states need not follow the Western model of personal self-development. Observing the Islamic way of life and moral standards, Muslim men and women, naturally vested with abilities and disabilities, have the God-given right to explore and unfold their unique beings. When individuals are given the maximum liberty allowed under Islam to pursue sciences, arts, knowledge, sports, and spirituality, Muslim communities will prosper. This study recommends that Muslim states recognize linguistic diversity and the right to personal self-determination in their positive law, including national constitutions.

EMISSIONS TRADING ACROSS CHINA: INCORPORATING HONG KONG AND MACAU INTO AN URGENTLY NEEDED AIR POLLUTION CONTROL REGIME UNDER "ONE COUNTRY, TWO SYSTEMS"

LIN FENG AND JASON BUHI *

China's status as the world's largest sulfur dioxide emitter carries with it serious hazards to human and ecosystem health. The National People's Congress began to address this in 2000, when it promulgated national SO_2 emissions caps. By 2010, SO_2 emissions across the Mainland were supposed to stabilize at pre-set baselines. Rather than decreasing, however, emissions are reaching alarming new levels. China needs a more powerful mechanism, such as an emissions trading scheme (ETS), to achieve lower levels of emissions. The United States' Acid Rain Program provides an almost ideal model, but a unique variable is added when Hong Kong and Macau, the two Special Administrative Regions, are considered. Each region maintains exclusive jurisdiction over its own environmental policy under the constitutional matrix of "one country, two systems." Thus, a Chinese ETS incorporating the SARs would essentially operate in an international context. Hong Kong and neighboring Guangdong Province are negotiating a regional, transboundary ETS that could provide solutions, but the present conceptualization forming the basis for those negotiations is lacking in several critical regards and will likely prove ineffective. This article is novel in considering how to meaningfully encompass the SARs in an effective ETS framework. After an introduction to the issues, Part II establishes why ETS is necessary for China. Part III introduces the framework for environmental legislation in mainland China and the SARs, including the constitutional relationship between the SARs and other local governments in mainland China. Part IV will discuss the history of Chinese ETS pilot programs with a focus on lessons learned in Jiangsu Province. Part V analyzes the practical difficulties and shortcomings that have hampered other leading ETS regimes, highlighting the need for centralized authori-

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The authors of this paper thank the Research Grants Council General Research Fund of the HKSAR for sponsoring its "Cross-Border Air Pollution Control: Legal and Policy Solutions" grant under which this article was conceived and written.

ty. Part VI evaluates current prospects for regional and national ETS, based upon an analysis of existing regulatory frameworks. Finally, Part VII concludes by recapping the recommendations, especially the need for a powerful supranational compliance and enforcement mechanism to manage long-term, transboundary, environmental policy.

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INTRODUCTION

Emissions trading schemes (ETS) are successfully abating pollution deposition around the world, but one is yet to be installed where it is most needed, China. Though Chinese provinces have been conducting ETS experiments for over a decade,[1] a national program reflecting China's awesome industrial power has yet to be conceived.[2] Undeterred, the Governments of the Hong Kong Special Administrative Region (HKSAR) and the People's Government of Guangdong Province are negotiating a separate ETS agreement to control sulfur dioxide (SO_2) pollution.[3] Their apparent willingness to adopt an air pollution partnership is promising, but may prove difficult to implement in the constitutional context of "one nation, two systems." ETS is relatively easy to install in closed constitutional systems, where a single authority holds ultimate logistical and enforcement power. For example, the United States' Acid Rain Program (U.S. ARP) provides an almost ideal template for an ETS within a unitary state with adequate legal and institu-

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1. The first local ETS scheme was adopted in Shanxi Province for Taiyuan City in 2001. At that time, formal experiments with SO_2 emissions trading was carried out in seven provinces and municipalities through one state-owned electricity-generating group. Since 2007, ETS has rapidly expanded throughout mainland China as more local legislation has been enacted and various trading markets established.Experiments were contemporaneously carried out in Jiangsu, Henan, and Shandong Provinces as well as Shanghai Municipality. Corresponding trading markets were established at Jiaxin City in Zhejiang Province, Wuhan City in Hubei Province, Beijing, and Shanghai. Moreover, an experiment became regional in the case of the Yangtzi River Delta Region, an area including Jiangsu Province, Zhejiang Province, and Shanghai Municipality. *See* Wang et al., *Paiwu Jiaoyi Zhidu de Zuixin Shijian yu Zhanwang* [The Latest Practice of Emission Trading System and Its Future], 10 ENVTL. ECON. 31, 31-45 (2008) (translated by author).

2. *Id.*

3. H.K. ENVTL PROTECTION DEP'T, IMPLEMENTATION FRAMEWORK OF THE EMISSION TRADING PILOT SCHEME FOR THERMAL POWER PLANTS IN THE PEARL RIVER DELTA REGION (THE PILOT SCHEME), *available at* http://www.epd.gov.hk/epd/english/action_blue_sky/files/PRD_emission_trading_eng.pdf.

Sulfur dioxide is, along with nitrogen oxide (NOx) and carbon compounds a precursor to acid rain. More accurately described as acid deposition, acid rain occurs when emissions of these pollutants react with water, oxygen and oxidants naturally occurring in the atmosphere. Their reaction results in the formation of toxic chemical compounds, most notably sulfuric and nitric acids, which then fall to the Earth's surface as either wet precipitation (rain or snow) or in a dry form (gases or particles). Once deposited, the acids damage human health, destroy land and water ecosystems, and visibly corrode automotive finishes, buildings, bridges and statues. *See* Robert A. Goyer et al., *Potential Human Health Effects of Acid Rain: Report of a Workshop*, 60 ENVTL. HEALTH PERSP. 355, 355-59 (1985), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1568541/pdf/envhper00443-0343.pdf; *see also* U.S. Environmental Protection Agency, Effects of Acid Rain – Human Health, http://www.epa.gov/acidrain/effects/health.html (last visited Apr. 18, 2010) [hereinafter Effects of Acid Rain – Human Health]; Anthony J. Hedley et al., *Air Pollution: Costs and Paths to a Solution in Hong Kong - Understanding the Connections Among Visibility, Air pollution, and Health Costs in Pursuit of Accountability*, 71 J. TOXICOLOGY & ENVTL. HEALTH 544 (2008) (further explaining the detrimental effects of SO_2 pollution on human, plant and animal life).

tional capacity. This article suggests that the U.S. ARP model could eventually be transplanted and effective within mainland China, if the political will to administer it exists. However, the unique constitutional standing of the HKSAR and its sister, the Macau SAR, introduce new variables into the traditional equation. Although they are part of China and defer to Beijing in some matters, the SARs maintain exclusive jurisdiction over domestic environmental legislation.[4] Therefore, a constitutional compromise must occur if the SARs are to be included in an effective ETS regime with either their neighboring provinces or China, in its entirety. This article addresses the issue of how to meaningfully incorporate the two Chinese SARs in a transboundary ETS program.

A number of legal, structural, and institutional flaws undermine the current conception of a nationwide Chinese ETS. In lieu of national action, the HKSAR and Guangdong continue to plan a regional ETS.[5] Though it has potential to provide solutions to the constitutional issue, that regime as presently conceptualized, suffers from several fatal flaws. First, the environmental objectives achieved by the program are unclear. While mainland China has clear emissions reduction targets nationwide, including those applied to Guangdong, the HKSAR has no definite legislation on such targets. Second, it is unclear why the Macau SAR has been exempted from the planning phase. If ultimately excused from the actual ETS, Macau could become a safe haven for regional producers of SO_2 emissions. Third, the Chinese Constitution and Hong Kong Basic Law are silent regarding the relationship between the SAR and other local governments in mainland China. If a party were to breach the agreement between these government entities, presently, no mechanisms exist to settle the dispute. Fourth, there is no centralized planning, coordination, or enforcement authority between the jurisdictions. International experience proves that

4. The Hong Kong and Macau Basic Laws define the SARs as local governments directly under the Central People's Government, thus making them similar in constitutional standing to provincial governments. Yet, the Basic Laws also guarantee that the SARs enjoy higher degrees of autonomy, including their own legal system and domestic legislative authority. That autonomy extends to all areas except three: (1) foreign affairs, (2) central-local affairs between the Central Government and the SAR, and (3) other matters falling exclusively within the jurisdiction of the Central Government. Aomen ji ben fa [Basic Law of the Macao Special Administrative Region] arts. 2, 8, 18 (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 31, 1993, effective Dec. 20, 1999) LAWINFOCHINA (last visited Apr. 10, 2010) (P.R.C.); Xiangang ji ben fa [Basic Law of the Hong Kong Special Administrative Region] arts. 2, 8, 18 (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1990, effective July 1, 1997) LAWINFOCHINA (last visited Apr. 18, 2010) (P.R.C.).

5. Linden J. Ellis and Jennifer L. Turner, Environmental Cooperation Between Hong Kong and Guangdong, Apr. 29, 2008, http://www.wilsoncenter.org/ondemand/index.cfm?fuseaction=media.play&mediaid=A1FA8FC3-97DB-EA00-F18B1BFF78635CE9 (last visited Apr. 18, 2010).

these are the basic requirements of a successful ETS program.[6] While a Hong Kong-Guangdong Cooperation Joint Conference composed of representatives of both governments exists, it is merely consultative in nature and lacks authority.

A centralized delegation of regulatory powers is required for an effective ETS regime to function. Given China's unique constitutional structure, a supranational panel must be authorized to harmonize and oversee the cap fixing, market maintenance, compliance monitoring, and enforcement functions across all jurisdictions. This is true in the case of either a national or regional ETS that incorporates the SARs. Any non-binding substitute will result in a well-publicized and often criticized failure. Prior history indicates that executive agreements between the SARs and mainland China are feasible options for addressing bilateral issues, and their use to establish a permanent transboundary forum ensures flexibility and ongoing coordination among the three jurisdictions (Hong Kong, Macau, and the Guangdong Province) as implementation proceeds. This type of environmental panel would help integrate these three legal systems by serving as a portal through which ongoing implementation efforts can be directly undertaken. Even a transboundary panel with regional scope would be an exciting development. Though relatively small in geographic scope, the potential for cooperation between Hong Kong, Macau, and Guangdong Province in non-economic matters is enticing.[7] If all three could be made to co-exist and prosper within a successful public law framework, the resulting intercourse would provide a model for transboundary environmental cooperation to the world.

This article proposes that an effective Chinese ETS program that meaningfully includes the SARs must have supranational planning, monitoring, and enforcement capabilities and this article analyzes the legal and practical difficulties of designing an ETS program in both national and regional contexts. After this brief introduction, Part II establishes why ETS is necessary for China. Part III outlines the framework of environmental legislation in both mainland China and the SARs, with special emphasis upon the constitutional relationship between the two SARs and other local governments in mainland China. Part IV will discuss the history of emissions trading in China, focusing on the ETS experience

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6. See *infra* Part IV for a discussion of the strengths and weaknesses of the U.S. Acid Rain Program, EU Emissions Trading Program, and Kyoto Protocol.

7. Hong Kong developed under British common law. Macau is still heavily influenced by the European civil law tradition. Jorge A. F. Godinho, Macau Business Law and Legal System 20 (Feb. 28, 2006) (unpublished manuscript, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=887153). Guangdong is part of a developing socialist state. XIAN FA [Constitution] pmbl. (1982) (P.R.C.).

in Jiangsu Province. Part V will go beyond this provincial case study to analyze the practical difficulties and shortcomings that have hampered other leading ETS regimes, namely the U.S. ARP and European Union Emissions Trading System, drawing out the fundamental mechanisms an ETS must possess in order to be effective. Part VI evaluates current prospects for regional and national ETS regimes based upon a review of existing regulatory frameworks and the components discussed in Part V. Finally, Part VII introduces trading program in China, suggesting the need for a powerful supranational compliance and enforcement mechanism to help manage long-term transboundary environmental policy.

I. GOOD FOR THE GOOSE AND THE GANDER: WHY ETS IS NECESSARY FOR CHINA

China would benefit greatly from ETS because it provides the best policy tool for balancing two of the Chinese state's paramount concerns: providing public goods (in this case, environmental health and safety) and preserving economic growth potential. History proves that ETS, even strictly administered, can do both. By 1990, the environment of the United States of America had suffered decades of toxic pollutant deposition.[8] As scientific studies began echoing the adverse health effects of human exposure to air pollutants,[9] exponentially increasing demands for power were resulting in the unceasing construction of new power plants. Exist-

8. U.S. Environmental Protection Agency, Acid Rain in New England: A Brief History, http://www.epa.gov/NE/eco/acidrain/history.html (last visited Apr. 18, 2010). "In 1980, the U.S. Congress passed an Acid Deposition Act. This Act established a 10-year research program under the direction of the National Acidic Precipitation Assessment Program (NAPAP). . . . In 1991, NAPAP provided its first assessment of acid rain in the United States. It reported that 5% of New England Lakes were acidic, with sulfates being the most common problem. They noted that 2% of the lakes could no longer support Brook Trout, and 6% of the lakes were unsuitable for the survival of many species of minnow. Subsequent Reports to Congress have documented chemical changes in soil and freshwater ecosystems, nitrogen saturation, decreases in amounts of nutrients in soil, episodic acidification, regional haze, and damage to historical monuments." *Id.*

9. Much of the knowledge about the deleterious effects of sulfur and nitrogen oxides on human physiology have been derived from epidemiological, human clinical, and animal toxicology studies. *See* Committee of the Environmental and Occupational Health Assembly of the American Thoracic Society, *Health Effects of Outdoor Air Pollution*, 153 AM. J. RESPIRATORY & CRITICAL CARE MED. 3, 3-50 (1996). Possible short-term effects of air pollution exposure include nose, throat, and upper respiratory infections such as bronchitis and pneumonia, headaches, nausea, allergic reactions, and aggravation of asthma and emphysema. *Id.* Long-term health effects can include increased risk of lung cancer, chronic respiratory disease, heart disease, and damage to the brain, liver and kidneys. *Id.*; *see also* World Health Org. [WHO], *WHO Air Quality Guidelines for Particulate Matter, Ozone, Nitrogen Dioxide and Sulphur Dioxide: Global Update 2005*, U.N. Doc. WHO/SDE/PHE/OEH/06.02 (2006). *See generally* Effects of Acid Rain – Human Health, *supra* note 3; Goyer et al, *supra* note 3; Hedley et al., *supra* note 3.

ing regulatory methodologies of the era were simply inadequate to handle the massive challenge. It became so evident that something drastic must be done to reverse these trends that President George W. Bush steered a controversial program through a skeptical U.S. Congress, by a large margin.[10] In fact, the idea of employing market mechanisms to combat air pollution was nothing new in 1990. J.H. Dales proposed it over twenty years before in his seminal work, *Pollution, Property & Prices: An Essay in Policy-Making and Economics*.[11] Dales proposed that economic incentives could be designed to provide financial benefits for pollution reduction, thereby making their imposition more acceptable than the traditional regulatory approaches of the era.[12] The idea was developed into a theory through a series of pilot programs and scholarly commentaries,[13] culminating in its application in the U.S. ARP and later the EU Emissions Trading System and Kyoto Protocol. ETS is the only policy tool devised that is powerful and dynamic enough to combat the massive SO_2 problem that confronted the United States and

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10. The House of Representatives voted to pass the new Clean Air Act by a vote of 401-25 on October 26, 1990; the next day, the Senate passed the amendments by a margin of 89-10. Press Release, U.S. Environmental Protection Agency, Clean Air Act Amendments of 1990 Legislative Chronology, http://www.epa.gov/history/topics/caa90/02.htm (last visited Apr. 18, 2010).

11. J.H. DALES, POLLUTION, PROPERTY & PRICES: AN ESSAY IN POLICY-MAKING AND ECONOMICS (1968). *See generally* David W. Montgomery, *Markets in Licenses and Efficient Pollution Control Programs*, 5 J. ECON. THEORY 395 (1972); T.H. TIETENBERG, EMISSIONS TRADING: AN EXERCISE IN REFORMING POLLUTION POLICY (1985). Both Montgomery and Tietenberg built upon Dales' efforts at utilizing market mechanisms to combat air pollution.

12. DALES, *supra* note 11, at 99-100.

13. The most developed precursor program began in 1974 as a means to reduce airborne lead by reducing the lead content of gasoline. U.S. ENVTL. PROT. AGENCY, EPA-230-R-92-001, THE UNITED STATES EXPERIENCE WITH ECONOMIC INCENTIVES TO CONTROL ENVIRONMENTAL POLLUTION § 5.2 (1992). After several years of regulatory phase outs, the EPA implemented a transferable permit program pursuant to the CAA to completely eliminate lead in gasoline in 1982. *See* Richard G. Newell & Kristian Rogers, *The U.S. Experience with the Phasedown of Lead in Gasoline* 1-5 (Res. for the Future, Discussion Paper, 2003), *available at* http://web.mit.edu/ckolstad/www/Newell.pdf. By the early 1980's, the phasedown had led to an 80% reduction in gasoline lead content. *Id.* at 4. The U.S. program that implemented the Montreal Protocol of 1987 and 1990 update also included such a program. *See* Clean Air Act §§ 601-607, 42 U.S.C. §§ 7671-7671(f); *see also* Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 26 I.L.M. 1541; U. N. Env't Programme, *Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Doc. UNEP/OzL. Pro. 2/3 (1990), *reprinted in* 30 I.L.M. 537. A major intrastate ETS that predates the ARP is the Regional Clean Air Incentives Market ("RECLAIM"), that seeks to abate nitrogen oxides (NO[x]) in the greater Los Angeles area. *See* John P. Dwyer, *The Use of Market Incentives in Controlling Air Pollution: California's Marketable Permits Program*, 20 ECOLOGY L.Q. 103, 104 (1993); Alexander K. Wang, Comment, *Southern California's Quest for Clean Air: Is EPA's Dilemma Nearing an End?*, 24 ENVTL. L. 1137, 1151-52 (1994). A flurry of complimentary scholarship preceded the Congressional debate on the ARP. *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985); James T.B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 YALE J. ON REG. 369, 391 (1989).

now confounds China. There is no other instrument able to meaningfully address the pollution crisis while preserving China's economic growth potential. Whether the Chinese state has a sufficient institutional foundation to build an ETS upon it is a lively debate considered in Part IV, but its desirability is beyond reproach.

ETS represents a policy approach, designed to utilize market forces to engender a faster and less expensive allocation of resources among a group of polluters. The underlying theory is simple. First, an overall cap, or maximum amount of emissions per compliance period, is set for all sources under the program, based on the projected cuts needed to achieve a specific environmental goal.[14] Authorizations to pollute are allocated among the affected sources in the form of emission allowances, the total value of which amount to less than the cap ceiling.[15] The sources may tailor and implement their own pollution control strategies in consideration of their own special circumstances.[16] The polluters then have three basic choices from which to design their compliance strategies:

> One option is to limit their emissions to exactly what their permits allow, subject to penalties for exceeding these levels. Second, polluters may emit less than their permits authorize (known as "over control") and attempt to sell their excess permits to other polluters. Third, they may buy additional permits, thereby allowing more emissions.[17]

All sources must report their emissions and surrender the appropriate number of allowances at the end of the compliance period.[18]

Several economic arguments have been advanced to support the claim that ETS is more efficient than the alternatives presented by traditional regulatory approaches. First, ETS allocates reduction measures to the sources that can reduce both costs and pollution most efficiently.[19] Transferable credits encourage sources

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14. Evan Goldenberg, Comment, *The Design of an Emissions Permit Market for RECLAIM: A Holistic Approach*, 11 UCLA J. ENVTL. L. & POL'Y 297, 300 (1993).

15. *Id.*

16. *See generally* DALES, *supra* note 11 (describing the considerations that a polluter will typically take into account).

17. Jeffrey M. Hirsch, Student Article, *Emissions Allowance Trading Under the Clean Air Act: A Model for Future Regulations?*, 7 N.Y.U. ENVTL. L.J. 352, 354 (1999).

18. U.S. Environmental Protection Agency, Acid Rain Program SO_2 Allowances Fact Sheet, http://www.epa.gov/airmarkets/trading/factsheet.html (last visited Apr. 18, 2010) [hereinafter Fact Sheet].

19. Isabel Rauch, *Developing a German and an International Emissions Trading System—Lessons from U.S. Experiences with the Acid Rain Program*, 11 FORDHAM ENVTL. LAW J. 307, 315 (1999-2000).

that can control their emissions quickest and cheapest to do so because they can sell any extra credits for additional profit.[20] Plants that act slower to meet emissions targets can purchase those excess credits.[21] ETS also creates a market for the research and development of newer and cleaner products, as developers reap financial rewards for implementing new technologies and selling excess credits.[22] In addition, ETS results in faster compliance and enhanced judicial economy, as the temptation to sue in courts is reduced when the installation of specific technologies under harsh timetables is no longer mandated.[23] All in all, significant regulatory costs are saved.[24]

A government agency using the traditional regulatory approach achieves "pollution reduction through various regulations, allocates control responsibility among the polluters, and establishes an enforcement mechanism to ensure that the reductions are met."[25] Compliance with program goals requires uniform technological installations and/or emission reductions.[26] Thus, ETS proponents argue that traditional regulatory approaches are unresponsive to the specific characteristics of numerous facilities, and are therefore, unnecessarily expensive.[27] Firms may have to spend more money than normal for other technologies more suitable to their particular needs.[28] Daniel Dudek, an architect of the U.S.

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20. *Id.*

21. *Id.*; *see also Tradeable Emmissions: Hearing Before the J. Economic Comm.*, 105th Cong. 105 (1997) (written statement of Daniel J. Dudek. Senior Economist, Environmental Defense Fund).

22. U.S. ENVTL. PROT. AGENCY, *supra* note 13, § 2.3.

23. Rauch, *supra* note 19, at 322.

24. Daniel Dudek projected massive savings from utility compliance costs could be between $1.7 billion and $3.4 billion a year by 2010; that $14.3 billion in savings could result from greater efficiency spurred by increased incentives to reduce energy use; and that the use of market-based controls might save as much as 75% over the costs associated with the same controls under traditional regulation. *Clean Air Act Amendments of 1989: Hearings on Acid Rain Before the Subcomm. On Environmental Protection of the Senate Comm. On Enivronment and Public Works*, 101st Congress, 195, 273 (1989) (statements of John Heinz, U.S. Senator, Pennsylvania and Daniel J. Dudek, Senior Economist, Environmental Defense Fund); Hirsch, *supra* note 17, at 364-65. In reality, the savings proved to be much higher. A 2005 study calculated that the ARP will save over $122 billion in annual benefits in 2010, while costing only $3 billion annually to implement. U.S. ENVTL. PROT. AGENCY, ACID RAIN AND RELATED PROGRAMS: 2007 PROGRESS REPORT 2 (2007) [hereinafter 2007 ARP REPORT].

25. Christopher S. Hooper, Student Article, *Limiting the Use of Emissions Allowances: A Statutory Analysis of Title IV of the 1990 Amendments to the Clean Air Act*, 5 N.Y.U. ENVTL. L.J. 566, 569 (1996).

26. *See* Dallas Burtraw & Byron Swift, *A New Standard of Performance: An Analysis of the Clean Air Act's Acid Rain Program*, 26 ENVTL. L. REP. 10411, 10411 (1996).

27. Matthew Polesetsky, Comment, *Will a Market in Air Pollution Clean the Nation's Dirtiest Air? A Study of the South Coast Air Quality Management District's Regional Clean Air Incentives Market*, 22 ECOLOGY L.Q. 359, 366-67 (1995).

28. Rauch, *supra* note 19, at 317.

ARP, summarizes the disadvantages of traditional regulatory policies:

> Archetypal CAC [(command and control)][29] regulations rely on uniform, inflexible, technology-based standards issued by the central government. This approach results in high compliance costs, restricts innovation, and discourages efficient use of resources. These rules also require detailed central planning of economic activity. Because the cost of controlling pollution varies among those subject to regulation, a CAC policy requiring them all to meet the same target, or to install the same technology, means that some regulated entities could achieve the same environmental protection through less costly means, or more protection for the same cost. Consequently, a CAC approach forces society to pay more for relatively expensive environmental protection.[30]

Before the 1990 Amendment to the U.S. Clean Air Act, American policymakers relied primarily on similar schemes.[31] The Chinese still do today.

Though opponents expressed concerns that ETS will result in extra administrative expenses, attributable to the costs of increased monitoring of compliance and maintenance of a competi-

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29. Dudek used the term "command and control" to refer to the blunt old methods of pollution control. Ruth Greenspan Bell argued later that this is a misnomer that appeals to free market proponents by invoking memories of the centrally planned economy of the Soviet Union, and that "traditional" should be used instead in the American context. *See* Ruth Greenspan Bell, Organisation for Economic Co-operation and Development [OECD], *Choosing Environmental Policy Instruments in the Real World*, at 9, CCNM/GF/SD/ENV(2003)10/FINAL, (Mar. 17-18, 2003), *available at* http://www.oecd.org/dataoecd/11/9/2957706.pdf.

30. Daniel J. Dudek et al., *Environmental Policy for Eastern Europe: Technology-Based Versus Market-Based Approaches*, 17 COLUM. J. ENVTL. L. 1, 3 (1992).

31. Since 1970, the SO_2 emissions of electric utilities have been regulated in order to achieve federally mandated local air quality standards (the National Ambient Air Quality Standards). For plants in existence in 1970, these standards codified in State Implementation Plans, typically have taken the form of maximum emission rates (pounds of SO_2 per million Btus of heat input). Plants built after 1970 are subject to New Source Performance Standards (NSPS), set at the federal level. Since 1978, NSPS for coal-fired power plants have effectively required the installation of capital-intensive flue gas desulfurization equipment (scrubbers) to reduce SO_2 emissions, which was an attempt to protect the jobs of coal miners in states with high-sulfur coal.

Dallas Burtraw, *Innovation Under the Tradable Sulfur Dioxide Emission Permits Program in the US Electricity Sector*, *in* INNOVATION AND THE ENVIRONMENT, 63, 65 (2000).

tive market,[32] a decade and a half after implementation, the U.S. ARP proved an effective and efficient means of meeting ambitious environmental goals. In total, the U.S. ARP successfully reduced annual SO_2 emissions by 43% from 1990 levels (a difference of 6.8 million tons), while electricity generation increased by 40% over the same time period.[33] Regulated sources emitted less than 8.95 million tons in 2007, meeting the final 2010 goal three years in advance.[34] Accordingly, significant decreases in acid deposition have been observed. Ambient SO_2 concentrations have fallen by an average of 40% nationwide,[35] while wet sulfate deposition decreased 35% in the Northeast and 33% in the Midwest.[36] Furthermore, a 2005 study calculated that the U.S. ARP will save over $122 billion in annual benefits in 2010, while costing only $3 billion to implement.[37] Thus, benefits exceed costs by a ratio of over 40:1. This experience has definitively proven that ETS is a highly effective vehicle for achieving broad improvements in environmental quality. In the years to come, the U.S. is expected to tighten caps even further, creating ETS frameworks for other toxins such as carbon dioxide and mercury, and incorporate Canada into a transboundary regime.[38]

Meanwhile, China has an immense air pollution problem. Three decades of unprecedented economic growth and correspondingly great energy demand have led to massive increases in airborne pollutant concentrations since 1978.[39] The Tenth Five Year

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32. Hirsch provides an excellent recap of concerns expressed during the debate over the 1990 amendments. For example, he cited statements of opposition by leaders of several power companies and West Virginia Senator Robert Byrd. *See* Hirsch, *supra* note 17 at 365-66; *see also* Jeanne M. Dennis, Comment, *Smoke for Sale: Paradoxes and Problems of the Emissions Trading Program of the Clean Air Act Amendments of 1990*, 40 UCLA L. REV. 1101, 1137 (1993).

33. 2007 ARP REPORT, *supra* note 24, at 2, 5-6.

34. *Id.* at 2.

35. *Id.* at 4.

36. *Id.* at 2.

37. Figures in year 2000 U.S. dollars. *Id.* at 2; Lauraine G. Chestnut & David M. Mills, *A Fresh Look at the Benefits and Costs of the U.S. Acid Rain Program*. 77 J. ENVTL. MGMT. 252, 255-56 (2005).

38. In July 2009 the U.S. House of Representatives passed a bill calling for carbon cap-and-trade. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009). For a brief discussion of the current U.S.-Canada transboundary initiative, see Lin Feng & Jason Buhi, *The International Joint Commission's Role in the United States-Canada Transboundary Air Pollution Control Regime: A Century of Experience to Guide the Future*, 11 VT. J. ENVT. L. (forthcoming Fall 2009).

39. Historically, estimates of pollution concentration are expressed in terms of total suspended particulates (TSP). The average TSP concentration in these northern cities, where coal is burned for heating, is 337 $\mu g/m^3$. Although there has been improvement in many areas since the 1990s, the concentrations of particulate matter far exceed China's own standards. The average TSP concentration of major cities in China in 1990 was 379 $\mu g/m^3$ and by 2003 was still 256 $\mu g/m^3$, exceeding the Chinese national

Plan (2000-2005) sought a nationwide SO_2 emission reduction of 10%, but relied exclusively on command and control mechanisms to attain that goal.[40] These included: "(i) mandating installation of flue gas desulfurization units in power plants;[41] (ii) closing small, inefficient boilers;[42] (iii) strengthening regulations regarding coal washing; (iv) requiring increased use of low-sulfur coal; and (v) introducing total emissions control policies."[43] Unfortunately these means alone proved insufficient. "[E]missions increased by 27%, primarily because of a 64% expansion in coal-fired power plant capacity."[44] In 2005, China's total SO_2 emissions were 25.9 million tons, the highest in the world.[45] Hong Kong's efforts at SO_2 abatement using traditional methods have also been neutralized by the rapid increase of upwind emissions in Guangdong Province.[46] Thus, to encourage sustainable reductions, Beijing, Guangzhou, and Hong Kong have all acknowledged that ETS mechanisms need to be utilized to complement existing traditional mechanisms.[47]

> standard of 200 µg/m3. By comparison, on the eve of the landmark Clean Air Act signed by President Richard Nixon in 1970, the average TSP concentration in the United States was 70 µg/m^3. Even at the ninetieth percentile—the top tenth of most polluted areas—the U.S. concentration level in 1970 was only 106 µg/m^3.

Mun S. Ho & Dale W. Jorgenson, *Greening China: Market-Based Policies for Air-Pollution Control*, HARV. MAG., Sept.-Oct. 2008, at 32, 32.

40 ASIAN DEVELOPMENT BANK, DESIGN OF THE NATIONAL SULFUR DIOXIDE EMISSION TRADING SYSTEM: CHINA, PEOPLE'S REP. OF (2008), http://pid.adb.org/pid/TaView.htm?projNo=42056&seqNo=01&typeCd=2 (last visited Apr. 18, 2010) [hereinafter ADB].

41. "As of 2000, only 2% (5 GW) of thermal generation capacity had flue gas desulfurization units installed. By the end of 2007, this percentage had increased to 48.7% (270 GW), and it is projected to increase to 60% by 2010." *Id.*

> 42. Power generation in the PRC has historically been dominated by small, inefficient generating units, which tend to lack sophisticated emission-control equipment. In 2005, 29.4% of installed capacity was from units less than 100 MW, however, this share is expected to decrease due to (i) mandated policies on closing small boilers (25 GW were decommissioned in 2006 and 2007), and (ii) dominance of larger units for new installations.

Id.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* CH2M HILL (CHINA) LTD., STUDY OF AIR QUALITY IN THE PEARL RIVER DELTA REGION ¶ 1.1.3 (2002), *available at* http://www.epd.gov.hk/epd/english/environmentinhk/air/studyrpts/files/final_rept.pdf ("Another air pollution problem that HKSAR is facing is regional air quality pollution. . . . Contrary to the first acute street level pollution, which stems mainly from local vehicle emissions, the deteriorating air pollution is caused by both the local air pollution sources and the regional air quality problem in the Pearl River Delta Region . . . ."); D. Y. C. Leung et al., *An Overview of Emissions Trading and its Prospects in Hong Kong*, 12 ENVTL. SCI. & POL'Y 92, 92 (2009); HKSAR Environmental Protection Department, Air Pollution Control Strategies, http://www.epd.gov.hk/epd/english/environmentinhk/air/prob_solutions/strategies_apc.html (last visited Apr. 18, 2010) ("Notwithstanding the very substantial reduction in local [Hong Kong] emissions, the visibility has been deteriorating due to worsening of the regional background air quality . . . .").

47. The negotiations for a regional Pearl River Delta ETS between Hong Kong and

Working in concert, traditional and ETS elements have proven capable of achieving ambitious environmental goals. The question remains as to whether a sufficient legal and regulatory foundation exists on which to build such programs. If the answer is yes, how to meaningfully include the Chinese SARs in a transboundary regime must also be determined.

II. THE CONSTITUTIONAL SETTING FOR ENVIRONMENTAL LAW-MAKING IN THE PEOPLE'S REPUBLIC OF CHINA AND ITS SPECIAL ADMINISTRATIVE REGIONS

To help answer these questions, a review of China's constitutional matrix and environmental lawmaking in each of the applicable jurisdictions is necessary. The division of environmental lawmaking powers and a description of the associated legislative procedures will be discussed first in the context of mainland China, then the Special Administrative Regions (SARs).

A. Environmental Law-Making Authority in China

China's constitutional structure is underpinned by the People's Congress system. Accordingly, the National People's Congress (NPC) is the highest organ of national power and authority.[48] Since the NPC meets in full session for only about two weeks annually, in the interim, it establishes a Standing Committee (NPCSC) to perform its ongoing duties.[49] The NPC and NPCSC, as the national legislature, have authority to enact all national laws.[50] The 1982 Constitution and the Legislation Law divide authority between the two institutions and set out the scope of matters on which each enjoys exclusive jurisdiction.[51] The NPC is responsible for enacting

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Guangdong demonstrate the need for stronger measures, while Beijing has indicated that a more ambitious ETS may be part of the nation's next five-year plan. *See China Sees Emission Trading Pilot in Next Econ Plan*, REUTERS, Sept. 27, 2009, http://www.reuters.com/article/idUSTRE58Q0EA20090927 (last visited Apr. 18, 2010).

48. XIAN FA [Constitution] art. 57 (1982) (P.R.C.).

49. *Id.* art. 61; *see also* DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 87-96 (2003). "[I]n practice the Standing Committee is far more powerful than the NPC as a whole. . . . Much smaller, more professional, and meeting every two months usually for one week, the Standing Committee actually fulfills most of the functions of the NPC." *Id.* at 91-92.

50. XIAN FA [Constitution] art. 58. All other national constitutional organs, including the State Council, the President, the Central Military Commission, the Supreme People's Court, and the Supreme People's Procuratorate are established under and accountable to the NPC. *See id.* arts. 3, 58.

51. According to the XIAN FA [Constitution] arts. 62 and 67, the NPC will enact all fundamental laws of the nation, while the NPCSC will enact all other laws. Article 8 of the Legislation Law of the P.R.C. provides that only national laws can be enacted on the following categories of matters: (1) state sovereignty, (2) the establishment, organization and au-

and amending all fundamental laws in China, including the Constitution; all national laws concerning organization of various constitutional organs; and all national laws concerning various essential aspects of the legal system.[52] The NPCSC is responsible for enacting all other national laws, including environmental laws such as the Environmental Protection Law,[53] the Water Pollution Prevention and Control Law,[54] and the Air Pollution Prevention and Control Law (APPCL).[55] A common feature of many of these national laws is that they contain many general principles but few details; specifics are often provided by other sources of law.

Those laws may come from the second body which enjoys national legislative authority, the State Council.[56] The 1982 Constitution grants the State Council the ability to "adopt administrative measures, enact administrative rules and regulations, and issue decisions and orders in accordance with the Constitution and the statutes. . . ."[57] These are classified generally as administrative regulations. The State Council may adopt regulations for two types of matters: first, "matters that demand the enactment of an administrative regulation for the purpose of implementing a law,"[58] and

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thority of the People's Congresses, People's Governments, People's Courts and People's Procuratorates at all levels, (3) the autonomy of ethnic regions, governance of special administrative regions, and autonomy at the grass roots level, (4) crimes and criminal punishment, (5) deprivation of political rights of citizens, or compulsory measures and penalties that restrict personal freedom, (6) expropriation of non-state-owned assets, (7) basic civil systems, (8) fundamental aspects of the economic system and fundamentals concerning fiscal, taxation, customs, finance and foreign trade, (9) litigation and arbitration systems, and (10) other matters for which laws must be enacted by the National People's Congress or its Standing Committee. Li fa fa [Law on Legislation] art. 8 (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July. 1, 2000) 2000 STANDING COMM. NAT'L PEOPLE'S CONG GAZ. 112 (P.R.C.).

52. *See* XIAN FA [Constitution] art. 62; CHOW, *supra* note 49, at 257, 280, 311. For example, the NPC's work includes China's Criminal Law, Criminal Procedural Law, General Principles of Civil Law, Civil Procedural Law, and Contract Law. CHOW, *supra* note 49, at 257, 281, 311-12, 324-27, 337-41.

53. Zhonghua Renmin Gongheguo Huanjing Baohu Fa [Environmental Protection Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989) LAWINFOCHINA (last visited Apr. 18, 2010) (P.R.C.).

54. Zhonghua Renmin Gongheguo Shui Wuran Fangzhi Fa [Water Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., May 11, 1984, effective May. 11, 1984) (amended 1996, 2008) LAWINFOCHINA (last visited Apr. 18, 2010) (P.R.C.).

55. Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [Air Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 2000, effective Sept. 1, 2000) (amended 1987, 1995, 2000) LAWINFOCHINA (last visited Apr. 18, 2010) (P.R.C.).

56. XIAN FA [Constitution] art. 85. The State Council is defined in the Constitution as "the Central People's Government of the People's Republic of China," "the executive body of the supreme organ of state power," and "the highest organ of State administration." *Id.*

57. *Id.* art. 89(1).

58. Li Fa Fa [Law on Legislation] art. 56.

second, matters listed in Article 89 of the Constitution.[59] This authority has been exercised by the State Council to enact the Detailed Rules for the Implementation of the APPCL. The legal effect of these administrative regulations is lower than national laws but higher than the other sources of law yet to be introduced.

The Ministry of Environmental Protection (MEP) exists on the third-tier of legislatively authority, which includes all ministries and commissions directly under the State Council.[60] Such organs can issue departmental regulations, another formal source of law recognized under the 1982 Constitution and Legislation Law.[61] While departmental regulations can only be enacted to implement relevant laws or administrative regulations already in existence,[62] very often such regulations provide the most important and detailed provisions on environmental protection.

Finally, at the local level, two groups of institutions possess legislative authority: the local people's congress and the local people's government.[63] For example, the Guangdong Provincial People's Congress and its standing committee are the local legislature in Guangdong Province. They have authority to adopt legislation of local import that does not contradict higher sources of law.[64] Thus, Guangdong can adopt local environmental protection legislation to supplement national rules, on the condition that such new regulations do not contravene the higher laws.[65] In the area of air pollution prevention and control, the Methods for the Prevention and Control of Air Pollution in the Pearl River Delta Region of Guangdong Province were recently issued.[66] However, it is not certain whether such provincial or local legislation enjoys higher legal status than those departmental regulations issued by Ministry of Environmental Protection or vice versa.[67] If a conflict arises be-

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59. XIAN FA [Constitution] art. 89 (sets out the functions and powers of the State Council which altogether encompass 18 items).

60. *See* XIAN FA [Constitution] arts. 86, 89. The MEP was formerly known as the State Environmental Protection Administration (SEPA) which was restructured and renamed the Ministry of Environmental Protection in 2008. For a concise history of the MEP, see Yang Xi, *SEPA Gets Stronger*, CHINA.ORG.CN, Mar. 10, 2008, http://www.china.org.cn/environment/news/2008-03/10/content_12143406.htm (last visited Apr. 18, 2010).

61. XIAN FA [Constitution] art. 90; Li fa fa [Law on Legislation] art. 71.

62. *See* Li Fa Fa [Law on Legislation] art. 71.

63. XIAN FA [Constitution] art. 95.

64. XIAN FA [Constitution] art. 100. The higher sources of law include the Constitution, all national laws enacted by the NPC and NPCSC, and administrative regulations. *See* XIAN FA [Constitution] art. 100.

65. *Id.*

66. People's Government of Guangdong Province, Methods for the Prevention and Control of Air Pollution in the Pearl River Delta Region, http://www.gd.gov.cn/govpub/zfwj/zfxxgk/gz/200903/t20090330_88639.htm (last visited Apr. 18, 2010) (translated by author). They were adopted on February 27, 2009 and came into effect on May 1, 2009. *Id.*

67. In addition, at the municipal level some municipal people's congresses, their

tween the two sources, a final decision will be made by the NPCSC as to which should prevail.[68] The implication is that the NPCSC must make this decision on a case-by-case basis.

The distribution of legislative authority in China is unique in three aspects. First, the national legislature consists of two bodies, the NPC and NPCSC, with separate jurisdictions. Second, legislative authority has been granted to both legislative and executive organs by the Constitution. Third, two levels of local governments (provincial and municipal) enjoy legislative authority under the 1982 Constitution. The complexities do not end there, however, as China's constitutional structure also incorporates unique entities known as Special Administrative Regions within its complex aegis.

B. Environmental Law-Making in the Hong Kong and Macau SARs

The constitutional source of SAR legislative authority is Article 31 of the 1982 Constitution, providing that "[t]he State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions."[69] Under that authorization, the NPC has enacted the Basic Law of the HKSAR as well as the Basic Law of Macau, each the highest law in its respective region. The preambles of the Basic Laws make it clear that they are established under the principle of "one country, two systems."[70] Though China resumed sovereignty over Macau two years later than it did over Hong Kong, it did so under the same principle.[71] Thus, immediately forthcoming discussion concerning law-making authority in the

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standing committees, and municipal people's governments (executive branches) also enjoy legislative authority under the 1982 Constitution which will not be discussed in detail in this paper.

68. *See* Li Fa Fa [Law on Legislation] art. 86(2).

69. XIAN FA [Constitution] art. 31.

70. Aomen ji ben fa [Basic Law of the Macao Special Administrative Region] pmbl. (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 31, 1993, effective Dec. 20, 1999) LAWINFOCHINA (last visited Apr. 18, 2010) (P.R.C.). This ensures that the socialist system and policies as practiced in mainland China will not be applicable to the Hong Kong and Macau SARs. The basic policies concerning the governance of the HKSAR will be those elaborated on in the 1984 Sino-British Joint Declaration and later incorporated into the Basic Law at Article 5. The Joint Declaration is a bilateral treaty between China and the United Kingdom. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, U.K.-P.R.C., Dec. 19, 1984, 23 I.L.M. 1366 (1984), *available at* http://www.cmab.gov.hk/en/issues/jd2.htm.

71. *See* Aomen ji ben fa [Basic Law of the Macao Special Administrative Region] art. 5.

HKSAR also generally describes the procedure used in the Macau SAR.

The Basic Laws define the SARs as local governments directly under the Central People's Government,[72] thus making them similar in constitutional standing to provincial governments. Yet, the Basic Laws also guarantee that the SARs enjoy higher degrees of autonomy, including their own legal system and domestic legislative authority.[73] That autonomy extends to all areas except three: (1) foreign affairs, (2) central-local affairs between the Central Government and the SAR, and (3) other matters falling exclusively within the jurisdiction of the Central Government.[74] The local Legislative Council, (LegCo) can enact ordinances in any other areas of law, including environmental protection.[75] For example, the HKSAR LegCo has enacted an Air Pollution Control Ordinance (APCO).[76] To further this proclamation, the HKSAR LegCo may delegate authority to the SAR's executive branch (in the case of the APCO, the Environmental Protection Department) to adopt subsidiary legislation.[77]

Comparatively speaking, the legislative authority enjoyed by the SARs is formidable as compared to local governments in mainland China.[78] Provincial people's governments are only allowed to adopt laws for two categories of matters under the Legislation Law: (1) where a local regulation is required in light of actual circumstances of the jurisdiction for the purpose of implementing a law or administrative regulation or (2) for matters of local concern for which enactment of a local regulation is required.[79] The latter must be enacted according to specific circumstances and actual needs, with the added condition that it does not contravene any provision of the Constitution, national laws, or administrative reg-

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72. *Id*. art. 12; Xiangang ji ben fa [Basic Law of the Hong Kong Special Administrative Region] art. 12 (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1990, effective July 1, 1997) LAWINFOCHINA (last visited Apr. 18, 2010) (P.R.C.).

73. Aomen ji ben fa [Basic Law of the Macao Special Administrative Region] arts. 2, 8, 18; Xiangang ji ben fa [Basic Law of the Hong Kong Special Administrative Region] arts. 2, 8, 18.

74. Aomen ji ben fa [Basic Law of the Macao Special Administrative Region] art. 18; Xiangang ji ben fa [Basic Law of the Hong Kong Special Administrative Region] art. 18.

75. Aomen ji ben fa [Basic Law of the Macao Special Administrative Region] art. 71; Xiangang ji ben fa [Basic Law of the Hong Kong Special Administrative Region] art. 73.

76. Air Pollution Control Ordinance, (1997) Cap. 311 (H.K.).

77. For example, Air Pollution Control Ordinance §7(1) provides that "[t]he Secretary shall, after consultation with the Advisory Council on the Environment, establish for each air control zone air quality objectives or different objectives for different parts of a zone."

78. Professor Yash Ghai has observed that "HKSAR has more powers than any autonomous region or federal unit, but their exercise will be subject to closer scrutiny and supervision than powers elsewhere." YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 185 (2nd ed. 1999).

79. Li Fa Fa [Law on Legislation] art. 64.

ulations.[80] In contrast, the only consistent requirement for SAR legislation is that the legislation not contravene the Basic Law.[81] Thus, SAR legislation can be in open contravention of other national laws and even other provisions of the national Constitution. The authority of a SAR LegCo is subject to few conditions. All legislation adopted by the LegCo must be submitted to the NPCSC,[82] and the NPCSC has limited authority to veto any legislation on the ground that it is inconsistent with the Basic Law.[83] However, the NPCSC does not have the authority to make any amendments, nor may it apply any other national laws outside the scope of the Basic Law.[84] Thus, the NPC has, through the Basic Law, voluntarily restricted its legislative authority with regard to the SARs.[85]

Though the Basic Law includes provisions on the central-local relationship between the SARs and mainland China, it does not clearly state how transboundary issues, such as air pollution should be addressed, or what the relationship between the SARs and other governments in mainland China should be.

C. The Constitutional Relationship Between the Two SARs and Other Local Governments in Mainland China

The relationship between the two SARs and Central Governmental organs, including the various ministries and commissions, is not clearly spelled out in local constitutional law. Furthermore, the Basic Laws are silent regarding the relationship between the SARs and the other local and provincial governments. From a constitutional perspective, these entities exist at the same level, directly under the State Council.[86] No legal obstacles exist for the two local governments in China to enter into an agreement on any matters of common concern. What is not clear is the legal status of

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80. *Id.* art. 63.

81. *See* Xiangang ji ben fa [Basic Law of the Hong Kong Special Administrative Region] arts. 17, 18.

82. *Id.* art. 17.

83. Veto authority is limited to legislation concerning matters exclusively within the scope of the Central Government or matters of central-local relationship between the Central Government and the HKSAR. *See generally id.*

84. *Id.* arts. 17, 18.

85. *See id.* arts. 16-18. In addition, the Basic Law has also made it clear that the Central People's Government will be responsible for all foreign affairs matters. *Id.* art. 13. In those areas, the Central People's Government may enter into international treaties and may extend their application to the HKSAR after consulting with the HKSAR Government on the needs of the HKSAR. *Id.* art 153. Except for external matters, the Basic Law has granted authority to the HKSAR to enter agreements with foreign countries in the name of Hong Kong, China under article 151.

86. *See id.* art. 12; Aomen ji ben fa [Basic Law of the Macao Special Administrative Region] art. 12; *see also* XIAN FA [Constitution] art. 62(12)-(13).

such an agreement under the Constitution and how to enforce such an agreement if one party breaches it. No mechanisms exist at present if a dispute were to arise between one of the SARs and a local government in mainland China. This must be considered if the HKSAR is going to enter into an emissions trading scheme with its neighbor to the north, Guangdong Province.

Two bilateral precedents exist that are worthy of consideration as proof that establishing a transboundary tribunal is possible. The first is judicial. In accordance with Article 95 of the Basic Law of the HKSAR, "[t]he Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other." The Supreme People's Court in mainland China and the HKSAR judiciary have reached agreements with each other.[87] The second precedent is economic, as the Central Government and the HKSAR have signed the Closer Economic Partnership Arrangement (CEPA) and six supplements.[88] Though different views exist with regard to the legal status of the CEPA in international law (especially vis-à-vis WTO obligations) no challenges have been raised so far. Hence, history indicates that bilateral executive agreements between the SARs and mainland China are feasible options for addressing issues of common concern that are not jointly shared under the Constitution. This becomes an intriguing vehicle for establishing a transboundary forum in the context of pollution, especially as the need for uniform compliance and enforcement becomes clearer. However, neither of the two precedents provides a desirable dispute resolution mechanism that could be adopted.[89] The uncertainty of such an agreement under the Constitution and the likelihood of disputes that may arise between parties on two sides of the border provides compelling justifications for the incorporation of a

87. On July 14, 2006, the HKSAR and mainland China signed the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts in the Mainland and of the HKSAR. The text of the Arrangement can be found at http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandrej20060719e.pdf (last visited Apr. 18, 2010). On April 23, 2008, the LegCo passed the Mainland Judgments (Reciprocal Enforcement) Bill, which was promulgated by the Chief Executive on April 30, 2008. *See* Mainland Judgments (Reciprocal Enforcement) Ordinance, (2008) Cap. 597 (H.K.). Information on the Bill is also available at http://www.legco.gov.hk/yr06-07/english/bc/bc56/general/bc56.htm (last visited Apr. 18, 2010).

88. Mainland and Hong Kong Closer Economic Partnership Agreement (CEPA), H.K.-P.R.C., June 29, 2003, *available at* http://www.tid.gov.hk/tc_chi/cepa/legaltext/cepa_legaltext.html (translated by author).

89. Article 19(5) of CEPA provides that "[t]he two sides shall resolve any problems arising from the interpretation or implementation of the 'CEPA' through consultation in the spirit of friendship and cooperation." *Id.*

strong dispute resolution mechanism in any agreements between the SARs and the Mainland on cross-border air pollution.

III. THE HISTORICAL DEVELOPMENT OF EMISSIONS TRADING IN CHINA

Though China has yet to develop a national regime, the country has conducted emissions trading for nearly a decade in provinces and municipalities in the mainland. As it is common in China for new bureaucratic innovations to be tested at local and regional levels to gauge effectiveness before national adoption,[90] the local experiments have been successful enough to warrant broader application. The regional efforts of HKSAR and Guangdong are laudatory as possible constitutional solutions and for the pressure they put on Beijing to adopt a national ETS. While the regional governments should be encouraged to continue their efforts, the time has already arrived to implement a national ETS program. This section will trace the history of ETS as applied in China, focusing upon the reportedly successful program in Jiangsu Province.

Government regulation of various pollutants in mainland China did not start until the NPCSC enacted the Environmental Protection Law, on a trial basis, in 1979.[91] Several additional pollution prevention and control laws were enacted in the 1980's.[92] At that time their focus was ensuring that polluters met various pollutant discharge standards.[93] As China's rapid economic development exacerbated overall emissions, it became apparent that discharge standards alone were insufficient remedies. Limits on the total quantity of emitted pollutants had to be set to sustain ecosystem viability. Thus, following successful examples in the United States, various local ETS levels were implemented in the late 1980's.[94]

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90. Bell, *supra* note 29, at 13.

91. The Environmental Protection Law was made formal in 1989. Zhonghua Renmin Gongheguo Huanjing Baohu Fa [Environmental Protection Law].

92. *See, e.g.*, Haiyang Renmin Gongheguo de Zhongguo Huanjing Baohu Fa [Marine Environment Protection Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1983) LAWINFOCHINA (last visited Apr. 18, 2010) (P.R.C.); Zhonghua Renmin Gongheguo Shui Wuran Fangzhi Fa [Water Pollution Prevention and Control Law]; Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [Air Pollution Prevention and Control Law].

93. *See, e.g.,* Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [Air Pollution Prevention and Control Law], arts. 7, 11, 12, 18, 22, 25, 30.

94. The Chinese national authorities remained largely hesitant to accept foreign policy drafting advice for another decade, but this trend began to reverse in the 1990's, as evidenced during the early efforts of the NPC Environmental Protection and Natural Resource Conservation Committee to exchange views with foreign experts on significant legislative proposals. Richard J. Ferris & Hongjun Zhang, *Reaching Out to the Rule of Law: China's*

Their development can be divided into two main periods: a starting period and an experimental period.[95]

A. Starting Period (1987-2000)

As Professor Wang observes, Chinese ETS policy and practice developed gradually upon the adoption of basic national standards for environmental protection.[96] China's first ETS was implemented in 1987 when pollution-emitting sources in Shanghai began trading quotas allocated to them by the local environmental protection bureau for various water pollutants.[97] That experiment begot a national law in 1988, when the State Environmental Protection Agency (SEPA, the forerunner of the Ministry of Environmental Protection) promulgated the Interim Methods on Administration of Licenses for Discharge of Water Pollutants. The Interim Measures stipulated the total quantity of water pollutants permitted for each local government and allowed sources to trade their discharge permits.[98] In 1991, SEPA introduced a licensing system for the discharge of air pollutants in sixteen cities.[99] Beginning in 1994, ETS was employed in six of those cities in order to gain practical experience.[100] In 1996, the State Council approved a proposal by SEPA to set total emission caps and licenses for all major pollutants throughout mainland China during the Ninth Five-Year Plan Period (1996 to 2000).[101] When the APPCL was amended for the second time in 2000, setting caps on the emission of pollutants,[102]

Continuing Efforts to Develop and Effective Environmental Law Regime, 11 WM. & MARY BILL RTS. J. 569, 601 (2003). The practice is now well accepted to the point where consideration of international models is seen to bolster legislative proposals. *Id.* at 601-02.

95. Professor Wang Jinnan actually divided the development into three periods: a starting period from 1988-2000, an experimental period from 2001-2006, and a deepening period of the experiment from 2007 onwards. *See* Wang et al., *Paiwu Jiaoyi Zhidu de Zuixin Shijian yu Zhanwang* [The Latest Practice of Emission Trading System and Its Future], 10 ENVTL. ECON. 31, 31-45 (2008) (translated by author).

96. *Id.*

97. *Id.* at 36.

98. Dui Shui Wuran Wu Paifang Xuke Zheng Guanli Zhanxing Banfa [Interim Measures on the Management of Water Pollutants Discharge Permit] arts. 11, 21 (promulgated by the Nat'l Envtl. Prot. Agency., Mar. 20, 1988, effective Mar. 20, 1988) FAOLEX (last visited Apr. 18, 2010) (P.R.C.).

99. Li Zhiping, *The Challenges of China's Discharge Permit System and Effective Solutions*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 375, 377 (2005).

100. The six cities are Baotou, Kaiyuan, Liuzhou, Taiyuan, Pingdingshan, and Guiyan. *See* Wang et al., *supra* note 95, at 36.

101. *See* Wang Jinnan et. al., *Paiwu Jiaoyi Zhidu de Zuixin Shijian yu Zhanwang* [The Latest Practice of Emission Trading System and Its Future] at 10 (2008), *available at* www.csfee.org.cn/uploadfile/wangjn/排污交易制度的最新实践和展望.pdf (translated by author).

102. Barbara A. Finamore & Tauna M. Szymanski, *Taming the Dragon Heads: Controlling Air Emissions From Power Plants in China—An Analysis of China's Air Pollution Poli-*

the first requirement for implementing a national ETS was embraced.

B. Experimental Period (2001- Present)

The period from 2001 to 2005 marked the Tenth Five-Year Plan Period in mainland China, during which the environmental focus was on controlling the total quantity of pollutants through the implementation of licensing systems.[103] With the support of foreign expertise and funding from the United States Environmental Protection Agency (EPA), Resources for the Future, the Chinese Academy for Environmental Planning, and the Asian Development Bank, the first local ETS scheme was adopted in Shanxi Province for Taiyuan City in 2001.[104] At that time, SEPA formally experimented with SO_2 emissions trading in seven provinces and municipalities through one state-owned electricity-generating group.[105] During the same time period, ETS was also tried for water pollutants, but with less publicity.[106]

Since 2007, ETS has rapidly expanded throughout mainland China as more local legislation has been enacted and various trading markets established.[107] Experiments were contemporaneously carried out in Jiangsu, Henan, and Shandong Provinces as well as Shanghai Municipality. Corresponding trading markets were established at Jiaxin City in Zhejiang Province,[108] Wuhan City in Hubei Province, Beijing, and Shanghai. Moreover, an experiment became regional in the case of the Yangtzi River Delta Region, an area including Jiangsu Province, Zhejiang Province, and Shanghai Municipality.[109] Though one scholar is of the view that Chinese

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cy and Regulatory Framework, 32 ENVTL. L. REP. 11439, 11450 (2002).

103. Richard D. Morgenstern et al., *Emissions Trading to Improve Air Quality in an Industrial City in the People's Republic of China* 1 (Res. for the Future, Discussion Paper, 2004), *available at* http://ageconsearch.umn.edu/bitstream/10782/1/dp040016.pdf.

104. WANG JINNAN ET AL., CHINESE ACAD. FOR ENVTL. PLANNING, SULFUR DIOXIDE EMISSIONS TRADING IN CHINA: PILOTING PROGRAMS AND ITS PERSPECTIVE 6 (2001), *available at* http://www.caep.org.cn/english/paper/A-Framework-of-SO2-Emission-Trading-Program-in-China-2001.pdf.

105. They are Shandong, Shanxi, Jiangsu, and Henan Provinces, and Shanghai, Tianjin and Liuzhou Municipalities and Huaneng Power Group. *See* Wang et al., *supra* note 95, at 36.

106. *Id.*

107. Wang et al., *supra* note 101, at 14-16.

108. The Zhejiang market was the first established in China on November 10, 2007. Lin Boqiang, *Paiwuquan Jiaoyi: Shichanghua de Jineng Jianpai* [Emission Trading Scheme: the Use of Market to Achieve Energy-Saving and Emission Reduction], PEOPLE'S GOVERNMENT OF YUNAN PROVINCE, Dec. 25, 2007, http://www.yn.gov.cn/yunnan,china/76289622883172352/20071225/1161694.html (translated by author).

109. Jiang Ni, *Paiwuquan Jiaoyi: Lilun yu Xianshi Chaju Shenyuan* [Emission Trading: Big Difference Between Theory and Practice],10 ENVTL. ECON. 10, 14 (2007) (translated

ETS entered into a third period characterized by deepened experimentation in 2007,[110] the authors of this paper believe that only the geographic scope of the experiments expanded and no fundamental design changes occurred. The various Chinese ETS programs remain essentially experimental, and no national system exists. The authors of this paper are optimistic, however, both because the experiments are two decades old and because the State Council encouraged an expansion in its 2009 Annual Working Report to the NPC.[111] Though not ready for nationwide implementation, the Central Government is drafting legislation on SO_2 emissions trading for power plants, which is likely to be adopted in 2009.[112] Once that legislation takes effect, China may enter its third phase of emission trading.

C. The Case Study of Jiangsu Province

As it has been claimed that Jiangsu Province is leading the country in air pollutant emissions trading, this section will examine the local legislation and practice in Jiangsu as a case study.[113] Jiangsu Province boasts a relatively advanced economy and thus suffers from high SO_2 emissions and significant acid deposition.[114] In 2000, Beijing mandated a maximum ceiling of one million tons of emissions for the province,[115] and Jiangsu adopted an ETS program to achieve that goal. The legal basis for the program was established when the Jiangsu Province Environmental Protection Bureau (EPB) issued a set of Interim Methods on Administration of Trading of SO_2 Emission Permits for Electricity-generating Plants in Jiangsu Province (Interim Methods).[116] The

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by author).

110. *See* Wang et al., *supra* note 95, at 36.

111. *See Premier Wen Delivers Gov't Work Report*, CHINA VIEW, Mar. 5, 2009, http://news.xinhuanet.com/english/2009-03/05/content_10945972.htm (last visited Apr. 18, 2010); *China Outlines Plans for Energy Saving, Emissions Cut*, CHINA VIEW, Mar. 5, 2005, http://news.xinhuanet.com/english/2009-03/05/content_10947084.htm (last visited Apr. 18, 2010).

112. Wang Shiling, *Paiwuquan Jiaoyi Dianli Xianxing: Zhengce Kuangjia Chengxing Xijie Cun Zhengyi* [Emission Trading Scheme Begins with Electricity-Generating Plants: Policy Has Taken its Shape While Details Not Yet Finalized], 21ST CENTURY BUS. HERALD, Jan. 9, 2009, http://business.sohu.com/20090109/n261653878.shtml.

113. Ruth Greenspan Bell disputes that any reliable information can be gleaned from the experiments. *See* Bell, *supra* note 29, at 15-16, 20.

114. *See* WANG ET AL., *supra* note 104, at 6.

115. State Council, *Liangkongqu Suanyu he Eryanghualiu Wuran Fangzhi Shiwu Jihua* [The Tenth Five-year Plan for the Prevention and Control of Acid Rain and SO_2 Pollution in Two Control Zones], *available at* www.lyhb.cn/longyuan/upload/testg8y72YRq3m.doc (translated by author) [hereinafter Tenth Five-year Plan].

116. *Jiangsusheng Dianli Hangye Eryanghualiu Paiwuquan Jiaoyi Guanli Zanxing Banfa* [Jiangsu Provincial Electric Power Industry Interim Measures on Management of

Interim Methods cover all existing and future power plants situated in two control zones that have chimneys over eighty meters in height,[117] a total of 196 facilities.[118] One ton of SO_2 allocated to a polluting source is defined as one allowance, and trading of SO_2 allowances can be carried out between regulated plants.[119] The EPB, together with the Provincial Economic and Trade Department, determines the total quantity of permissible SO_2 emissions for all plants in Jiangsu Province, after taking into account the overall limit set by SEPA and local air quality conditions.[120] These departments determine the allocation of allowances to each power plant once every five years,[121] with the objective of gradually reducing the total quantity of SO_2 emissions.[122] Sources which have met the discharge standards while staying within their allocated emission allowances receive emissions licenses; those meeting discharge standards but exceeding allocated emission allowances shall receive interim emission licenses and receive a time limit in which to reduce their emissions to the allocated amount.[123] Only after the requirements are met will formal emission licenses be issued.[124] Otherwise, penalties shall be imposed.[125] The initial distribution of emission allowances was made without charge to the sources.[126] Trading of SO_2 emission allowances occurs on a voluntary basis subject to approval of the Provincial EPB and Economic and Trade Department,[127] and a public auction is encouraged.[128] The price for such allowances is assessed and determined by an independent third party, taking into account the cost for SO_2 reductions and market trends.[129] In order to facilitate operation, the environmental protection bureaus of people's governments, at the county level, are required to establish monitoring systems to record the total quantity of SO_2 emitted,[130] while the Provincial EPB is required to maintain supervision of the market.[131]

Sulfur Dioxide Emissions Trading], *available at* http://www.cet.net.cn/web/infodetail.action?id=13 (translated by author) [hereinafter Interim Methods].

117. *Id.* art. 2.
118. WANG ET AL., *supra* note 104, at 7 tbl.1.
119. Interim Methods, *supra* note 116, art. 3.
120. *Id.* art. 7.
121. *Id.* art. 8.
122. *Id.* art. 7.
123. *Id.* art. 14.
124. *Id.* art. 9.
125. *Id.* art. 28.
126. *Id.* art. 10.
127. *Id.* art. 18.
128. *Id.* art. 15.
129. *Id.* art. 17.
130. *Id.* art. 5.
131. *Id.* art. 6.

Several success stories have been reported in Jiangsu. One successful SO_2 allowance trade was carried out in Nantong City in 2001. The Nanjing Acetate Fiber Plant needed SO_2 emission allowances to legally expand their production scale. The Nantong Tianshang Port Power Generation Co., Ltd. had residual allowances after installing modern desulphurization equipment. With facilitation by the Nantong Municipal EPB, the two companies reached an agreement for trading allowances of 300 tons of SO_2 at the price of RMB 250/ton, per annum, for a period of six years.[132] The fiber plant later installed the most advanced technology in mainland China and accordingly earns residual SO_2 emission allowances.[133] Also upon facilitation by the local EPB, the fiber plant sold extra emission allowances to a Japanese company, planning to establish a subsidiary in Nantong.[134]

Another famous case involves the Nanjing Power Plant in Nanjing Municipality. It earned a residual 3000 allowances due to the installation of advanced desulphurization equipment.[135] The Taichang Port Environmental Power Corporation in Taichang, Suzhou Municipality, required 1000 tons of SO_2 emissions for compliance.[136] The two companies reached a sales agreement by which the Tai-chang industry would purchase 1700 allowances at the price of RMB 1.7 million from its Nanjing counterpart starting from July 2003.[137] A third major deal was struck between two power plants in Zhengjiang and Changzhou Municipalities. The deal was concluded in 2004 for the sale of 2,000 allowances per annum at the price of RMB 3 million for a period of five years, from 2006 to 2010.[138]

Recent deals showcasing such governmental facilitation seem to indicate a new model of emission trading. In November 2007, a company in Taixing Municipality wanted to increase its total quantity of SO_2 emission by 406.5 tons per annum and appealed directly to the government for help.[139] The Taixing Municipal EPB decided to allocate emission allowances of 206.4 per annum free of charge to that company, and sell an additional 200 allowances to the company at the price of RMB 1500/ton.[140] The company is re-

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132. Miao Kun & Jiang Ni, *Jiangsu Eryanghualiu Paiwuquan Jiaoyi Bulu Jiannan* [Making Progress in SO2 Emissions Trading is Difficult], 10 ENVTL. ECON. 19, 21 (2008).
133. *Id.* at 21.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 11.
138. *Id.*
139. *Id.*
140. *Id.*

quired to pay the total sum to a special account annually, which will be used exclusively for regional air pollution prevention and control.[141] The Taixing Municipal EPB obtained the 406.4 allowances through two means: taking back emission allowances due to the closure of other sources and repurchasing emission allowances from other polluters.[142] The involvement of administrative organs is not necessarily a bad thing, if they encourage and facilitate trading between different enterprises in a country which does not yet have a full market economy. Indeed, this model may provide an example of emissions trading with Chinese characteristics.

However, even with government assistance there are many concerns about the ongoing viability of the local programs. An official from the Jiangsu Provincial EPB made several observations about local ETS implementation challenges.[143] First, owing in part to the generous distribution of initial allowances, the market lacks active participants and prices were depressed to only RMB 0.2 per kilo of SO_2 when the first aforementioned deal was completed.[144] Second, in order to cover the cost of investment in desulphurization equipment, the price should stabilize at about RMB 5-6 per kilo of SO_2.[145] Prices have increased, but if prices were to increase to that level it would be difficult for sources to afford the allowances. Third, sources with residual emission allowances often hoard them, saving for future development.[146] Fourth, during the transition period from the Tenth Five-Year Plan Period (2001-2005) to the Eleventh Five-Year Plan Period (2006-2010), almost no deals occurred because emission allowances were readjusted and redistributed, destabilizing the market.[147] Furthermore, a deputy director of the Taixing EPB is not optimistic about the future of the municipal ETS. He worries that industrial investment will leave Taixing for other locales with lower environmental standards if there is not wider geographical application.[148] The same is true for any jurisdiction in China, so nationwide implementation becomes critical as stricter emissions caps are revealed. Without an effective, national ETS regime, it will likely prove impossible for any province to achieve ambitious targets.

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141. *Id.*
142. *Id.* at 22.
143. *Id.* at 11.
144. *Id.*
145. *Id.*
146. *Id.* This also took place in the early U.S. Acid Rain Program Market, but environmentalists were not concerned with this phenomenon because less allowances on the market means, in theory, means less pollution emissions and faster delivery of human and ecosystem health benefits.
147. *Id.* at 11-12.
148. *Id.* at 22.

IV. SUGGESTIONS FOR IMPLEMENTING EMISSIONS TRADING SYSTEMS FROM THE WORLD'S PREMIER TRADING MARKETS

The authors recognize that a nationwide ETS is essential for mainland China to meet its environmental goals and to safeguard the health of its citizens and ecosystems because ETS, provided that it is well administered, offers cheaper and more economically sound environmental results than traditional alternatives. The sooner one is established, the better for the health of the Chinese people. Nonetheless, the HKSAR and Guangdong must seriously pursue their regional response until such a program comes into effect.[149] A comparative review would be helpful for guiding implementation efforts in the Pearl River Delta (PRD) region and across mainland China, as the analysis reveals possible problems and solutions revealed through actual practice. Thus, this section seeks to expound upon the brief overview of the aforementioned Jiangsu program by contextualizing the similarities and differences between the potential Chinese and PRD emissions markets against other leading ETS regimes. For this exercise, the three main mechanisms of a successful ETS, as evinced from international practice, are considered: a firm overall cap, a sustainable emissions allowance market, and robust monitoring and enforcement institutions capable of ensuring compliance. These elements will be discussed in a constitutional context by pitting the hypothetical Chinese and PRD emissions trading schemes against an ETS regime managed by one sovereign, (i.e., the U.S. ARP), and ETS operating in international contexts (i.e., the European Union Emissions Trading System and the Kyoto Protocol).[150] Emphasis is placed upon the similarities between the technical mechanisms shared by all of the ETS regimes to meet their respective environmental goals, regardless of the type of pollutant they seek to regu-

149. A study undertaken in Hong Kong concluded that even relatively minor improvements in local air quality would save over 35,000 hospital bed-days, $131 million to $189.8 for direct health care costs and $ 30.1 million to $57.1 million for productivity losses. *See* Hedley et al., *supra* note 3, at 549-51.

150. These ETS regimes have been selected for important reasons. The U.S. ARP is the oldest and most successful major allowance market in the world and has resulted in steep declines in annual SO_2 and NO_x emissions since its initiation in 1995. U.S. Environmental Protection Agency, Acid Rain and Related Programs: 2008 Environmental Results, http://www.epa.gov/airmarkets/progress/ARP_3.html. The European Union Emission Trading System (EU ETS) represents the world's first large-scale effort to reduce the emissions of carbon dioxide (CO_2) linked to global warming because its reduction commitments have been designed to fulfill the requirements of the Kyoto Protocol. *See* A. Denny Ellerman & Barbara K. Buchner, *The European Union Emissions Trading Scheme: Origins, Allocation, and Early Results*, 1 REV. OF ENVTL. ECON & POL'Y 66, 66-87 (2007). Thus, these two international regimes will be considered to the extent they compliment each other.

late. The elements will be discussed within the U.S. ARP and EU Emissions Trading Scheme (EU ETS) contexts, followed by a synthesis and application to the Chinese contexts, in Part V. To foreshadow, please note that both proposed Chinese regimes presently lack most of these necessary elements.

A. Clear Regulatory Scope and Firm Emissions Cap in International Practice

The most fundamental element of an ETS is the overall emissions cap. This amount is based on the projected cuts needed to achieve a specific environmental goal. Deciding which industries and facilities should be regulated is a matter of substantial political consternation, presenting the first hurdle that ETS architects must clear.

In the United States, Title IV of the Clean Air Act Amendments of 1990 set a goal of reducing SO_2 emissions by ten million tons from 1980 emission levels.[151] The Act targets fossil-fuel burning power plants because they are the largest emitters of SO_2.[152] While the plants were granted allowances based on past fuel usages and statutory emission limitations, the total sum of those allowances was heavily debated during the congressional hearings.[153] Daniel Dudek, a primary architect of the U.S. ARP, argued that the number of initial utilities should be large (Governor Romer felt the number should be at least 100) in order to foster a sustainable trading market.[154] Congress agreed, as the first phase began in 1995 and mandated that 263 units at 110 of the most polluting electric utility plants—those producing over 100 megawatts (MW) of electricity—reduce their total SO_2 emissions by 3.5 million tons.[155] An additional 182 units joined as substitution or

151. CLEAN AIR ACT AMENDMENTS OF 1990 § 401(b), 42 U.S.C. § 7651(b) (2006). Title IV also mandates that NO_x emissions be reduced by two million tons from 1980 levels, but achieves this goal through conventional command and control techniques. *Id.* Thus, only the cap and trade SO_2 provisions will be discussed in this paper.

152. In 2007, electric power generation still accounted for 69% of total U.S. SO_2 emissions. *See* 2007 ARP REPORT, *supra* note 24, at 1.

153. *See* Hirsch, *supra* note 17, at 365-66.

154. *Clean Air Act Amendments of 1989: Hearings on Acid Rain Before the Subcomm. on Environmental Protection of the Comm. on Enironment and Public Works*, 101st Congress 208, 228 (1989) (statements of Daniel J. Dudek, Senior Economist, Environmental Defense Fund and Roy Romer, Governor, State of Colorado).

155. U.S. Environmental Protection Agency, Acid Rain Program, http://www.epa.gov/airmarkets/progsregs/arp/basic.html (last visited Apr. 18, 2010) [hereinafter Acid Rain Program]. These plants were targeted because they emit more than 2.5 pounds of SO_2 per million British Thermal Units (lbs/mmBTu) and are larger than 100 megawatts (MW). *See* 42 U.S.C. § 7651(e), tbl. A (2006); 40 C.F.R. pt. 73, tbl. 1 (2006); Larry B. Parker et al., *Clean Air Act Allowance Trading*, 21 ENVTL. L. 2021, 2027 (1991). Alternative or additional allowance allocations were made for various units, including affected units in Illinois,

compensating units, bringing the total of Phase I regulated units to 445.[156] The federal EPA allocated allowances directly to those sources based on an equation balancing heat input with the source's baseline fossil fuel consumption between 1985 and 1987.[157] Phase II began in the year 2000. The regulatory scope was expanded to include over 2,000 smaller plants that produce over 25 MW of electricity.[158] The EPA simultaneously tightened the emissions ceiling to 9.5 million tons.[159] Plants established after the year 2000 would not receive allowance allocations from the EPA, thereby forcing them to purchase allowances from existing units, further diluting the allowance pool.[160] In 2010 the cap will be reduced again to its final objective—8.95 million tons—a figure representing about half the 1980 total of 17.3 million tons.[161] Thanks in large part to the ease of implementation and enforcement within a closed, domestic system, that goal was achieved three years in advance of the projected deadline.[162]

The European Union ETS regime has had more difficulty achieving results. It seeks to regulate a far more demanding set of variables, including over 11,500 carbon-emitting sources,[163] collectively responsible for over 40% of the EU's total greenhouse gas emissions.[164] This requires regulating several diverse industrial sectors,[165] encompassing more than 11,500 sources, emitting over two billion metric tons of CO_2.[166] Significantly, the value of the allowances distributed under the EU ETS is equal to

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Indiana, and Ohio, which were allocated a pro rata share of 200,000 additional allowances each year from 1995 to 1999. 42 U.S.C. § 7651(e), tbl. A.

156. U.S. Environmental Protection Agency, SO_2 Reductions and Allowance Trading Under the Acid Rain Program, http://www.epa.gov/airmarkets/progsregs/arp/s02.html (last visited Apr. 18, 2010).

157. Fact Sheet, *supra* note 18.

158. Phase II encompassed smaller and cleaner plants that range between 25 MWe and 75 MWe. *See* 42 U.S.C. §§ 4651d(b)-(f), (h), (j).

159. U.S. Environmental Protection Agency, Cap and Trade: Acid Rain Program Basics, *available at* http://www.epa.gov/capandtrade/documents/arbasics.pdf.

160. *See* 42 U.S.C. § 4651b(e).

161. *See* 2007 ARP REPORT, *supra* note 24, at 5.

162. *Id.* at 10.

163. *See* Ellerman & Buchner, *supra* note 150, at 68. The EU ETS is also larger in terms of sheer pollution regulated: pre-policy emissions in the EU ETS were over two billion metric tons of CO_2, versus sixteen million tons of SO_2 regulated by the U.S. ARP. *Id.*

164. Press Release, European Union, Questions and Answers on the Commission's Proposal to Revise the EU Emissions Trading System, MEMO/08/35 (Jan. 23, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/35. Consider this as opposed to the U.S. ARP regulating fewer than 3,000 sources. Ellerman & Buchner, *supra* note 150, at 68.

165. These include mineral and oil refineries, coke ovens, smelting, and pulp processing facilities. *Id.* at 72.

166. *Id.* at 68.

about $41 billion versus about $5 billion under the U.S. ARP.[167] As in the U.S., the sum of the allowances represents the maximum pollutant emission level mandated by the cap, but the EU ETS countries must design their measures to meet the obligations recorded in the Kyoto Protocol.[168] Yet, it is not these logistical burdens, but a decentralized structure which has frustrated implementation. Whereas the initial cap fixing process in the U.S. is negotiated directly between the EPA and individual source units, the initial process was tripartite in Europe, with EU member state governments acting as intermediaries between the European Commission and the sources.[169] Responsibility was decentralized, as each member state was permitted to designate its own cap ceiling and determine how the allocations would be distributed to sources.[170] The European Commission would approve the proposals so long as the amount is the lesser of either the so-called "business-as-usual" emissions, or a level that would not preclude achievement of the member state's 2008–2012 Kyoto obligations.[171] However, this arrangement was unsuccessful in preventing an increase in overall emissions during the early years of EU ETS operation.[172]

Like the U.S. ARP, the EU ETS was initiated in two phases. Independent auditing concluded that both Phase I (2005 – 2007) and Phase II (2008-2012) were over-allocated to meet Kyoto obligations.[173] Thus, in January of 2008, the European Commission proposed that centralized planning and allocation responsibility be conferred to an EU authority.[174] This change will be implemented in 2013, when the third trading period begins.[175] Indeed, the over-

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167. Calculated at a rate of €15/metric ton and an exchange rate of U.S. $1.25 to €1.00. *Id*.

168. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

169. Ellerman & Buchner, *supra* note 150, at 70.

170. These are called National Allocation Plans, or NAPs. ALYSSA GILBERT ET AL., ECOFYS UK, ANALYSIS OF THE NATIONAL ALLOCATION PLANS FOR THE EU EMISSIONS TRADING SCHEME 2 (2004), *available at* http://www.ecofys.co.uk/com/publications/documents/Interim_Report_NAP_Evaluation_180804.pdf.

171. Ellerman & Buchner, *supra* note 150, at 71.

172. *Id.* at 83.

173. CLIMATE ACTION NETWORK EUROPE, NATIONAL ALLOCATION PLANS 2005-7: DO THEY DELIVER? KEY LESSONS FOR PHASE II OF THE EU ETS: SUMMARY FOR POLICY-MAKERS 2, 5 (2006), *available at* http://www.climnet.org/resources/archive/doc_download/1151-napsreportsummary0306.html. (stating that the NGO Climate Action Network called the EU ETS caps a "major disappointment," arguing that only two of the twenty-five EU states (UK and Germany) required sources to make necessary reductions); MAX RATHMAN ET AL., ECOFYS UK, INITIAL ASSESSMENT OF THE NATIONAL ALLOCATION PLANS FOR PHASE II OF THE EU EMISSIONS TRADING SCHEME 1 (2006), *available at* http://www.ecofys.com/com/publications/documents/Ecofys_Summary_InitialNAP2_Assessment.pdf.

174. Press Release, European Union, *supra* note 164.

175. Press Release, European Union, Questions and Answers on the Revised EU

allocation of permits tolerated in a confederative structure resulted in a catastrophic pricing failure that will be further discussed in the next section.[176] The lesson to be learned from this exercise is that centralized, long-term cap fixing, is essential to a successful ETS program.

B. Market Mechanisms in International Practice

This section will focus on the more technical aspects of ETS market functioning. The privilege to pollute must be securitized in a manner that creates incentive for sources to reduce emissions while allowing the flexibility to tailor their own compliance methods. The basic market mechanisms of the U.S. ARP and EU ETS will be briefly introduced herein, including major implementation problems in their respective settings.

In the United States, allowance holders have four defined rights (offsetting, bubbling, netting, and banking) to choose from when tailoring an effective compliance strategy and disposing of their allowances.[177] Sources reducing emissions below their allowance level may sell or trade the remainder of their allowances to any interested party. Furthermore, the EPA oversees an annual auction of emissions allowances to help generate and maintain a market, signal price information, and ensure that new sources have access to a pool of allowances once the final cap is achieved.[178]

Emissions Trading System, MEMO/08/796 (Dec. 17, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/796.

176. Almost all stakeholders supported a more harmonized cap-setting approach, thus illustrating an extremely broad consensus to improve cap setting. *See* EUROPEAN CLIMATE CHANGE PROGRAMME, FINAL REPORT OF THE 2ND MEETING OF THE ECCP WORKING GROUP ON EMISSIONS TRADING ON THE REVIEW OF THE EU ETS ON ROBUST COMPLIANCE AND ENFORCEMENT 2 (2007), *available at* http://ec.europa.eu/environment/climat/emission/pdf/070426.pdf [hereinafter ECCP FINAL REPORT].

177. Emissions Trading Policy Statement: General Principles for Creation, Banking and Use of Emission Reduction Credits, 51 Fed. Reg. 43,815 (Dec. 4,1986); Hirsch, *supra* note 17, at 360-61. These present a variety of options enabling the operator to tailor a flexible emissions reduction strategy. First, "offsetting" allows operators who are unsuccessful in reducing their emissions below required levels to purchase units from other sources, that have reduced their levels. *Id.* at 360. Second, "bubbling" allows plant operators managing a larger facility to increase emissions at one source in exchange for compensating decreases of emissions at other sources within the same plant. *Id.* Third, "netting" occurs when an expanding or modernizing source will not be subject to the administrative procedures for new plants if the source compensates for added emissions by reducing pollution from other existing emission sources within the same plant. *Id.* at 361. Finally, "banking" permits a source that emits less than their quota to keep its excess emissions reductions for future use. *Id.* at 360-61.

178. 42 U.S.C. § 7651o (2008). The Chicago Board of Trade has conducted that auction for the EPA since 1993. U.S. Environmental Protection Agency, Acid Rain Program Allowance Auction Fact Sheet, http://www.epa.gov/airmarkt/trading/factsheet-auction.html (last visited Apr. 18, 2010). Private sellers may also sell or purchase allowances at the EPA auction, but unlike the allowances that the EPA offers, private sellers may specify a minimum

Any person, including brokers or environmental groups, may participate in the market.[179]

It is worth noting that the U.S. allowance market, like that in Jiangsu, did not develop immediately. Only 12 utilities participated in 21 trades of 5,000 or more allowances in the period between April 1992 and September 1994.[180] The market began to pick up in 1995,[181] and blossomed with the introduction of online transfers in December 2001.[182] While the internet obviously lowered transaction costs and facilitated market growth, possible reasons why the allowance market remained anemic between 1992 and 1995 are worth investigating. First, it has been suggested that Congress or the EPA and industry may have over-allocated or otherwise overvalued the projected cost of emissions reductions.[183] Second, market uncertainty played a role, as the initial value of a SO_2 allowance was difficult to determine in comparison to the relatively stable prices of coal and scrubbers.[184] Third, sources were unsure how to incorporate the allowances into their ratemaking processes. After some petitioning, the Federal Energy Regulatory Commission issued a 1994 policy statement clarifying how to include the cost of emissions allowances in ratemaking for state utility commissions to achieve a fair rate of return.[185] Finally, the authors note that the early U.S. ARP was an experiment of unprecedented scale.[186] Participants may have experienced trepidation en-

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sale price. *Id.*

179. U.S. ENVTL. PROT. AGENCY, EPA430/F-92/017, ACID RAIN PROGRAM: ALLOWANCE AUCTIONS AND DIRECT SALES 2 (1992).

180. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-95-30, AIR POLLUTION: ALLOWANCE TRADING OFFERS AN OPPORTUNITY TO REDUCE EMISSIONS AT LESS COST 30 (1994), *available at* http://www.gao.gov/archive/1995/rc95030.pdf, *cited in* Rauch, *supra* note 19, at 338 [hereinafter GAO REPORT].

181. "The number of private transfers of emission allowances increased from almost zero in 1994 to more than 75 million in 1997." Rauch, *supra* note 19, at 338.

182. By 2007, nearly 4,700 private transfers of roughly 16.9 million allowances were recorded in the EPA Allowance Tracking System. 2007 ARP REPORT, *supra* note 24, at 11. About 9.1 million (54%) were transferred in economically significant transactions (i.e., "arms-length" transactions between economically unrelated parties). *Id.* at 12. Over 99% of those were conducted through the online transfer system. *Id.* at 11. Allowance transfers are posted and updated daily at http://www.epa.gov/airmarkets (last visited Apr. 18, 2010).

183. *See* Rauch, *supra* note 19, at 339.

184. Allowance prices dipped as the market prices of low-sulfur coal and industrial scrubbers dropped between 1990 and 1995, but rebounded as the cap was drawn down. Rauch, *supra* note 19, at 340. Indeed, the imposition of the 1990 amendments may have jump-started the market for cleaner coal and more efficient scrubbers, which is a positive side-effect. *See* GAO REPORT, *supra* note 180, at 28-29.

185. Policy Statement and Interim Rule Regarding Ratemaking Treatment of the Cost of Emissions Allowances in Coordination Rates, 59 Fed. Reg. 65,930 (Dec. 22, 1994) (to be codified at 18 C.F.R. pts. 2, 35).

186. As Rauch stated, "[a]lthough a number of trading programs have been developed in several countries, the Acid Rain Program in the U.S. is still the most comprehensive and complex allowance market." Rauch, *supra* note 19, at 309.

tering an uncertain new market, but the success of this national ETS means that new systems should not be viewed with undue suspicion.

A second major problem with the implementation of the U.S. market was unforeseen and undesirable geographic pollution redistribution. Midwestern industries enthusiastically purchased residual allowances, and the corresponding increase in emissions filled the wind with pollutants that ultimately deposited in the Northeast.[187] The continental United States, including the Great Lakes and New England region, are at a latitude where winds blow towards the poles in a generally west to east direction.[188] The EPA attempted to address this phenomenon by authoring the Clean Air Interstate Rule (CAIR), seeking to further slash the SO_2 emissions cap in 28 eastern states to a sum of just 2.5 million tons at full implementation, 73% below 2003 emissions levels.[189] However, the proposed CAIR was voided in litigation.[190] Until a proper legal solution can be drafted,[191] downwind states must rely on a traditional statutory right to petition for relief from unlawful interstate pollution.[192]

EU ETS allowance holders possess the same range of options as US ARP allowance holders to operate in the marketplace and tailor their compliance strategies, and were granted more options

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187. New York-based utility LILCO, for example, "sold more than 67,000 tons of pollution rights directly to Midwest companies, in addition to the 79,980 tons sold to brokers." Mike Vogel, *Retiring of Emission 'Credits' to Speed Battle on Acid-Rain*, BUFFALO NEWS, Aug. 27, 1997, at C16.

188. The strongest westerly winds in the middle latitudes can come in the "Roaring Forties" between 40 and 50 degrees latitude. Heather Catchpole, Roaring Forties, ABC Science, http://www.abc.net.au/science/articles/2007/09/20/2038604.htm (last visited Apr. 18, 2010) Although much stronger in the southern hemisphere than the northern, the heavily industrialized U.S. Great Lakes region is mostly within this region of the Northern Hemisphere. *See also* Rauch, *supra* note 19, at 350 ("Polluted air drifts with normal weather patterns from sources in Midwestern and Southern states over to the most populated areas of the East Coast.").

189. U.S. Environmental Protection Agency, Clean Air Interstate Rule Basic Information, http://www.epa.gov/CAIR/basic.html (last visited Apr. 12, 2010).

190. North Carolina v. Envtl. Prot. Agency, 531 F.3d 896, 901 (D.C. Cir. 2008) (per curiam) (the Court held that the EPA's approach—regionwide caps with no state-specific quantitative contribution determinations or emissions requirements—is fundamentally flawed. Therefore, the trading program was declared unlawful because it did not connect states' emissions reductions to any measure of their own contributions).

191. Several efforts by New York to pass laws prohibiting in-state sources from selling permits to Midwestern companies failed legal scrutiny under the supremacy clause of the U.S. Constitution. For example, in 1998, LILCO signed an agreement with the New York Governor's Office to not sell its excess SO_2 credits to fifteen upwind states. *See* Rauch, *supra* note 19, at 342-43. In the case of China, given that it is a unitary state and the Ministry of Environmental Protection and local governments have been given legislative authority, a similar local legislation is unlikely to encounter the same challenge as in the U.S.. Furthermore, a departmental legislation enacted by the Ministry of Environmental Protection can prevent such a constitutional challenge.

192. 42 U.S.C. § 7426 (2006).

through ascension to the Kyoto Protocol. The so-called "Linking Directive" allows EU ETS sources to apply a certain amount of allowances earned from Kyoto innovations such as Joint Implementation projects[193] and the Clean Development Mechanism (CDM)[194] to meet their targets. The CDM allows industrialized countries to invest in projects that reduce emissions in developing countries as an alternative to more expensive domestic reductions.[195] The architects of the EU ETS ensured that all of these allowances would be tradable, with one EU Certified Emissions Reduction (CER, or carbon credit) from the CDM mechanism and one Kyoto allowance unit each authorizing one ton of CO_2 emissions.[196] Thus, the EU ETS market is both a regional marketplace and an attempt to integrate the EU into a global ETS at once.

Despite these innovations, the EU ETS's initially decentralized command structure prevented a sustainable market from forming. The price of allowances had increased to a peak level of about €30 per ton CO_2 in April 2006,[197] but imploded in May 2006 to €10/ton when an announcement confirming that an absence of detailed emission data when setting the Phase I caps resulted in countries granting their industrial sources generous emission caps.[198] This price spiraled down to a mere €0.03 by December 2007.[199] The

193. *See* Kyoto Protocol, *supra* note 168, art.6.

194. *Id*. art. 12.

195. *Id*. "A CDM project activity might involve, for example, a rural electrification project using solar panels or the installation of more energy-efficient boilers. The mechanism stimulates sustainable development and emission reductions, while giving industrialized countries some flexibility in how they meet their emission reduction or limitation targets." United Nations Framework Convention on Climate Change, Clean Development Mechanism, http://unfccc.int/kyoto_protocol/mechanisms/clean_development_mechanism/items/2718.php.

196. *See* Council Directive 2004/101, 2004 O.J. (L 338) 18 (EC). *See also* Kyoto Protocol, *supra* note 168, art. 12.

197. Colin A. Scholes, *Putting a Price on Carbon*, CHEMISTRY IN AUSTRALIA, Feb. 2010, at 28, 29, *available at* www.raci.org.au/chemaust/docs/pdf/2010/CiA_Scholes_feb_2010.pdf (last visited Apr. 12, 2010); *Historic Prices: EUA OTC Assessment*, POINT CARBON, Sept. 4, 2009 (on file with author);.

198. *Historic Prices: EUA OTC Assessment*, *supra* note 197; *see* Michael Grubb & Karsten Neuhoff, *Allocation and Competitiveness in the EU Emissions Trading Scheme: Policy Overview*, 6 CLIMATE POL'Y 7, 19 (2006). "The lack of installation-specific emissions data was perhaps the biggest problem that Member States faced in the allocation process." Frank Convery et al., *The European Carbon Market in Action: Lessons From The First Trading Period, Interim Report*, 12 (Center for Energy and Envtl Policy Research, Interim Report No. 08-002, Mar. 2008).

199. Scholes, *supra* note 197, at 29; *Historic Prices: EUA OTC Assessment*, *supra* note 197. Meanwhile, according to the EPA, the 2008 U.S. allowance auction sale prices were "very much in line with expectations for this trading market." 2007 ARP REPORT, *supra* note 24, at 12. The average weighted price per allowance was $389.91, marking a major increase from where they were a decade ago, although they tumbled to $69.74 in 2009 with the deepening of the subprime financial crisis. U.S. Environmental Protection Agency, Annual Auction Results, http://www.epa.gov/airmarkets/trading/auction.html (follow "EPA Allowance

collapse demonstrates that an ETS market operates just as any private shares market, with jittery investors and hypersensitivity to trend indicators. An announcement by a small bloc of minor nations or a single large nation that its goals are insufficiently ambitious or that it will not fulfill its obligations can send the market into spasms, perhaps fatal ones. Given the catastrophic response, it is not surprising that for the EU countries for which data is available (all 27 member states minus Romania, Bulgaria and Malta), total CO_2 emissions actually increased by 1.9% between 2005 and 2007.[200] Such a contingency must be prevented in a transboundary environment, such as that between mainland China and the SARs. Indeed, in 2009 the EU centralized carbon credit allocation authority.[201] There are two very crucial lessons here: any trading scheme requires centralized authority and a solid data base when designing it; hastened or uneven implementation will facilitate over-allocation, as policymakers are averse to high economic costs.

C. Monitoring and Enforcement in International Practice

ETS must be accompanied by aggressive tracking and enforcement mechanisms to assure that the desired results are achieved. The U.S. ARP and Kyoto Regime both recognize the necessity of centralized functioning. It is feared that uneven enforcement will occur across the European Union's member states, adding to allowance market instability. Any transboundary regime must incorporate centralized monitoring and enforcement mechanisms to be effective.

The U.S. EPA mandates detailed continuous emissions monitoring systems (CEMS) be installed in the smoke stacks of regulated utilities.[202] The U.S. ARP requires an accounting of every ton of emissions released from every unit, and hourly emissions reports must be submitted quarterly to the EPA.[203] There are progressively stringent substitute data requirements for data loss to ensure continuous reporting.[204] At the end of the year an account-

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Auction Results" hyperlink for each respective year, then follow "Results: summary of total bids, winning bids, and prices" hyperlink) (last visited Apr. 18, 2009).

200. *See* Press Release, European Union, Emissions Trading: 2007 Verified Emissions from EU ETS Businesses, IP/08/787 (May 23, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/787.

201. Council Directive 2009/29, ¶ 14, 2009 O.J. (L 140) 63 (EC).

202. 40 C.F.R. pt. 75 (2009); 2007 ARP REPORT, *supra* note 24, at 22; U.S. Environmental Protection Agency, Continuous Emission Monitoring - Information, Guidance, etc., http://www.epa.gov/ttn/emc/cem.html (last visited Apr. 18, 2010).

203. Acid Rain Program, *supra* note 155.

204. *Id.*

ing occurs. Every unit is given a 60 day grace period in which it must purchase SO_2 allowances for every unit expended over its allotment.[205] If unsuccessful, the EPA automatically levies a fee assessed as equal to $2,000 in 1990 dollars, adjusted for inflation (i.e. $3,273 in 2007, a price significantly higher than the cost of an allowance), as well as offsets of future allowances.[206] The cost of penalties must be greater than cost of allowances or they will not have a deterrent effect. Compliance has been estimated at over 99% for the SO_2 program, while the NO_x program has met its goal every year since 2000.[207]

In the European Union, as under the U.S. ARP, pollutant sources must monitor and annually report their CO_2 emissions then redeem an amount of allowances equivalent to their emissions in that year.[208] Michael Wara, a Stanford Law School professor, has criticized the program for not requiring businesses to use monitoring instrumentation, but rather allowing them to determine their carbon emissions by internal calculation.[209] More frequent reporting, i.e. quarterly reports instead of annual ones, have been proposed,[210] though nothing nearly as stringent as the U.S. ARP's continual monitoring standard. Opponents point to costly administrative burdens,[211] but the U.S. and Finland use automatic, IT-based ways, to collect and distribute information efficiently. Some member state governments have stated that they favor a harmonized monitoring approach, based on EU regulation, because a centralized agency is perceived as apolitical, independent, and authoritative.[212] At present, it is feared that a number of member states will impose sanctions in the case of non-compliance, while others will not.[213] The EU ETS needs proper legal instruments for monitoring and enforcement, particularly in light of linking the EU ETS with other emissions trading schemes.

There are more stringent responsibilities for the EU ETS member states under the overlapping Kyoto regime. Recognizing

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205. *Id.*
206. 2007 ARP REPORT, *supra* note 24, at 11; Acid Rain Program, *supra* note 155.
207. 2007 ARP REPORT, *supra* note 24, at 11, 22.
208. These rules are promulgated in the EU Monitoring and Reporting Guidelines (MRG). Commission Decision 2007/589, 2007 O.J. (L 229) 1 (EC), Article 14 of the ET Directive required the Commission to elaborate on guidelines for the monitoring and reporting of greenhouse gas emissions under the ETS, which it did in January 2004, requiring Member States to ensure that emissions are monitored in accordance with these guidelines. Council Directive 2003/87, art. 14, 2003 O.J. (L 275) 32 (EC).
209. *See* Jennifer Barone, *The Carbon Trap*, DISCOVER, Dec. 2008, at 71, 71-72.
210. ECCP FINAL REPORT, *supra* note 176, at 2.
211. *See id.*
212. *Id.* at 3.
213. *Id.* at 8.

the need for logistical centralization, a global registry system is maintained at the UN Climate Change Secretariat to track and record every transaction.[214] Also, a Kyoto Compliance Committee exists to facilitate and enforce protocol compliance.[215] The enforcement branch has the responsibility of determining consequences for delinquent Parties.[216] If a state has exceeded its assigned emissions allowance it is forced to make up the difference, plus an additional deduction of 30% in the next commitment period.[217] Furthermore, the delinquent state must submit a plan of action to achieve compliance and the eligibility of the state to make transfers is suspended.[218] While strong in theory these mechanisms have never yet been tested, as the first Kyoto compliance period will end in 2012. They may never be, as the 2009 UN Climate Change Conference at Copenhagen fell short of expectations..[219]

From the brief discussion above, several general rules can be extracted. First, monitoring should be uniform to preserve program integrity. Second, more frequent reporting is better than none at all. Third, IT solutions are a cost-effective and reliable way to collect unbiased monitoring data. Fourth, sanctions will likely not be effective under a decentralized regime if each jurisdiction is responsible for separate determinations. There is fear that the EU ETS regime will not be effective in this regard, while it is the most important hallmark of the U.S. ARP. Thus, it has oft been proposed that the EU incorporate its monitoring and enforcement provisions into a revised EU Directive and create an agency to oversee these functions.[220] Kyoto has centralized functions, but whether they are used is yet to be seen. These should all be considered in the Chinese context, especially in the transboundary setting between the Mainland and the SARs.

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214. United Nations Framework Convention on Climate Change, Registry Systems Under the Kyoto Protocol, http://unfccc.int/kyoto_protocol/registry_systems/items/2723.php (last visited Apr. 18, 2010).

215. United Nations Framework Convention on Climate Change, An Introduction to the Kyoto Protocol Compliance Mechanism, http://unfccc.int/kyoto_protocol/compliance/introduction/items/3024.php (last visited Apr. 18 2010).

216. *Id*.

217. *Id*.

218. *Id*.

219. The UN Copenhagen Climate Change Conference took place in Copenhagen, Denmark in December 2009. Despite two years of advance diplomacy, the Parties failed to produce a binding post-2012 regime for mitigating carbon emissions. Arthur Max, *Post-Copenhagen Climate Talks Begin Amid Discord*, ASSOCIATED PRESS, Apr. 9, 2010, http://www.nytimes.com/
aponline/2010/04/09/world/AP-Climate.html?scp=10&sq=copenhagen&st=cse.

220. *See* ECCP FINAL REPORT, *supra* note 176, at 3.

V. THE CHINESE CONTEXTS

At present, plans for a national ETS are being discussed, while the HKSAR and Guangdong are developing a regional ETS program. The existing cap fixing, market mechanisms, and enforcement measures are insufficient to sustain an ETS in either Chinese context.

A. Current Status of National Regulatory Framework for an ETS in Mainland China

There is significant concern that mainland Chinese institutions are presently incapable and/or unwilling of managing a complex ETS mechanism. Ruth Greenspan Bell, among others, has critiqued imprudent and overly zealous attempts to install ETS in developing countries. She aptly points out that:

> Institutional inadequacies such as low functioning legal systems, historical experience (or inexperience) with markets, distorting and often institutionalised corruption, and public acceptance certainly can be fixed. But changing these fundamentals can be a long and arduous process. Those who advise governments to adopt reforms for which the institutional basis does not yet exist put the cart before the horse. . . .[221]

She suggests that a better approach is to find examples of small but promising traditional efforts that seem to be working and building on them, charging that insincere efforts diminish the environmental cause.[222] The authors prefer that the Chinese move forward with their national ETS efforts in concert with stringent traditional regulatory approaches, both because China has been actively engaged in a process of institution-building and because the scope of the environmental problem is so large and critical. Additionally, the shield of institutional inadequacy cannot be allowed to serve as a permanent excuse.

On the institutional front, China has made substantial progress since the rise of Deng Xiaoping, thirty years ago, marked the beginning of institutional reforms and the gradual move to a market economy.[223] Three stock markets now operate in China: the

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221. Bell, *supra* note 29, at 4.
222. *See id.*
223. CHOW, *supra* note 49, at 18, 32-38.

Shanghai and Shenzhen Stock Exchanges (both since 1990), and the Hong Kong Stock Exchange. The experience gained in these large markets has provided some practical basis for emission trading. Though historically suspect, there are solid trends in accounting and tax collection practices on the Mainland.[224] Reform of state enterprises has divided representation of state ownership between central and local governments, and also transformed them into quasi-limited liability companies.[225] Many are also publicly listed now, especially power companies. Courts are more active, increasingly aggrandizing powers in subtle ways.[226] Yet, there remains room for institutional improvement. Most importantly, it is highly improbable that a local government would strictly enforce environmental laws against a local industry if that threatened its operation. The health and well-being of the people should be a strong consideration, but the lack of a free press restrains transparency and public access. However, reporting of environmental issues enjoys a larger zone of freedom than other spheres.[227] Thus, implementation and compliance of a nationwide ETS may still face significant challenges in China but should not be rejected out of hand if complementing a traditional regime.

The APPCL indicates that most of China's efforts are conducted under the traditional approach; emission trading is not formally written into the law. Thus, the experiment is proceeding cautiously. The Ministry of Environmental Protection (MEP) and the local governments must each play important roles to be successful under the APPCL, as amended in 2000.[228] Specifically, the

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224. For example, China has begun using advanced technology to combat tax evasion. *China Battles Tax Evasion with Help of Computers*, PEOPLE'S DAILY, Dec. 4, 2000, *available at* http://english.peopledaily.com.cn/english/200012/04/eng20001204_56879.html.

225. *See* Frank Xianfeng Huang, *The Path to Clarity: Development of Property Rights in China*, 17 COLUM. J. ASIAN L. 191, 209 (2004). By the end of 2004, state-owned holding companies controlled over 71% of publicly listed companies in mainland China. Organization for Economic Co-operation and Development, Organisation for Economic Co-operation and Development [OECD], *Policy Dialogue on Corporate Governance in China: Overview of Governance of State-owned Listed Companies in China*, at 1, DRC/ERI-OECD 2005, (May 19, 2005), *available at* http://www.oecd.org/dataoecd/14/6/34974067.pdf.

226. A landmark example is the judicial interpretation issued by the Supreme People's Court in 2001, discussing whether constitutional provisions can be invoked in a civil case. That interpretation has been hailed by many Chinese scholars as China's *Marbury v. Madison*. 5 U.S. 137 (1803). Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case",* 12 PAC. RIM L. & POL'Y J. 199, 199 (2003) (Yuping Liu, trans.). *See generally* Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255 (2003) (discussing judicial reform in China).

227. *See* Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L.J. 71, 103-110 (2005) (discussing human rights, including freedom of the press).

228. *See* Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [Air Pollution Prevention and Control Law], art. 2.

Central People's Government is responsible for setting national air quality standards, which it has done.[229] Article 15 of the APPCL gives authority to both the central and provincial governments to set caps on air pollutants emissions for (1) regions where air quality has not met prescribed standards, and (2) acid rain control zones and SO_2 pollution control zones designated by the State Council.[230] Thus, the MEP can designate certain areas where there is acid rain or serious SO_2 pollution after obtaining approval from the State Council.[231] The MEP is also responsible for promulgating measures to gradually reduce the total quantity of air pollutants,[232] while local governments must implement that legislation.[233] For cities which do not meet specified air quality standards, time limits may be imposed by either the State Council or the MEP to create implementation plans and comply.[234] Although the APPCL does not explicitly provide that there will be a national ETS, it is observed that the total emissions cap as well as a licensing system for air pollutants—two of the essential bases for an ETS—already exist in mainland China.

China first attempted to limit the total quantity of national SO_2 emissions under the Tenth Five-Year Plan for Environmental Protection.[235] Chapter 3 of the APPCL, as amended in 2000, focuses attention on SO_2 emitted from all newly established or expanded power plants and other large to medium-sized enterprises.[236] Indeed, SO_2 rich coal is the principal energy source in China, used to meet approximately 69% of the nation's total energy needs.[237] Two key objectives were set: first, the release of SO_2 should meet new emissions standards and, second, that by 2010 the total quantity of SO_2 emission should be limited to 2000 le-

229. *Id.* art. 7. Local governments can also set their own standards, provided that the local air quality standards are more stringent than the national standards. *Id.*

230. The Acid Rain Control Zones consist of areas with average annual pH values for precipitation less than or equal to 4.5, sulfate deposition greater than the critical load, and high SO_2 emissions. The SO_2 Pollution Control Zones consist of areas with daily and annual average ambient SO_2 concentrations exceeding standards, and high SO_2 emissions. These areas receive priority for investment and management to control emissions. WANG ET AL., *supra* note 104, at 3. Furthermore, the State Council has authority, under Article 17, to designate important cities for air pollution prevention and control. Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [Air Pollution Prevention and Control Law], art. 17.

231. *Id.* art. 18.

232. *Id.* art. 3.

233. *Id.* art. 4.

234. *Id.* art. 17.

235. Tenth Five-year Plan, *supra* note 115.

236. *See* Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [Air Pollution Prevention and Control Law], arts. 24-29.

237. INT'L ENERGY AGENCY, WORLD ENERGY OUTLOOK 249 (2002), *available at* http://www.iea.org/textbase/nppdf/free/2000/weo2002.pdf.

vels.[238] China's total SO_2 emission in 2000 was 19,950,000 tons,[239] of which 13,160,000 tons were emitted in two designated types of concentrated pollution zones—one for SO_2, the other for acid rain.[240] The stated target was bringing the total quantity of SO_2 emissions down by 10% nationwide, and by 20% in the urgent control zones, by 2005.[241] China failed to achieve the stated targets, as SO_2 emissions increased by 27.8% to 25,490,000 tons at the end of 2005.[242] The Eleventh Five-Year Plan for National Environmental Protection states a new target: bringing the total quantity of SO_2 emissions down by 10%, nationwide, compared to 2005 emissions.[243] The provinces have no power to override these limitations once set.[244] However, a key reason for the success of the U.S. ARP is that planning was conducted well in advance; sources had from the program's adoption in 1990 and initial implementation in 1995 to prepare for the 2010 goal.[245] China's legislative method of devising five-year plans that include the planning, implementation, and goals makes achievement daunting and will serve to constrain market formation. Thus, China should begin devising its ETS goals based on a longer-term framework.

Most of the other market implementation problems discussed in the international context should not apply to China, if the country has learned from past experience. The authors anticipate that a well-planned and administered Chinese ETS market would be very fast to develop from sheer size and centralized administration

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238. In addition, by 2010 the concentration of SO_2 in cities should meet national environmental air quality standards and, in Acid Rain Control Zones, the occurrence of rain with a pH of below 4.5 should be significantly reduced. Tenth Five-year Plan, *supra* note 115, § III (SO_2 Emissions Control Targets) (translated by author).

239. *Id.* at § III (The Two Control Zones, Acid Rain and SO_2 Emissions – The Basic Situation) (translated by author).

240. *Id.* at § II (Background) (translated by author).

241. Wang Xin-Fang, Director of the State Environmental Protection Administration, *Guojia Huanjing Baohu shiwu Jihua* [Explanations on the Tenth Five-year Plan for National Environmental Protection], Jan. 11, 2002, http://big5.mep.gov.cn/gate/big5/www.zhb.gov.cn/epi-sepa/gzdt/wenzhang/y13.htm.

242. State Council General Office, *Guojia Huanjing Baohu Shiyiwu Guihua* [The Eleventh Five-year Plan for National Environmental Protection], Nov. 26, 2007, http://www.china.com.cn/policy/txt/2007-11/26/content_9293694.htm.

243. *Id.*

244. The Chinese Provinces are lower in the Chinese state structure than the central, national level government seated in Beijing. XIAN FA [Constitution] art. 30, 62 (12). The National People's Congress in Beijing is the "highest organ of state power." XIAN FA [Constitution] art. 57.

245. Title IV of the Clean Air Act, as adopted in 1990, set an ultimate goal of reducing annual SO_2 emissions by 10 million tons below 1980 levels. CLEAN AIR ACT AMENDMENTS OF 1990 § 401(b), 42 U.S.C. § 7651(b) (2006). A two-phase implementation program was designed for fossil fuel-fired power plants, initializing in 1995 and 2000, respectively. As such, the Phase I sources had five years to prepare for 1995; Phase II sources had ten years. *See* Acid Rain Program, *supra* note 155.

if made a national priority. However, the architects of a Chinese ETS should be very sensitive that free trade of allowances may permit undesirable pollution redistribution. For example, industrial interests in Guangdong would likely seek to purchase additional permits and release more pollutants, thereby exacerbating the southeastern flow toward Hong Kong. Whereas westerly winds blow across the middle latitudes of the Earth, easterly winds dominate the flow pattern across the poles and tropics.[246] Hong Kong, Macau, and Guangzhou are within the tropical zone, while large parts of middle and northern China are subject to westerly winds.[247] Likewise, the industrial Manchuria region may find its problem multiplied as New England did if local sources sell their allowances to sources in western longitudes. The best conceivable way to prevent this phenomenon from occurring would be to institute very strict national maximum emissions caps in concert with more stringent local and regional requirements. Tight emissions caps encourage sources to cut emissions through cleaner technology, rather than seek to cover their emissions with allowances. In addition, a Kyoto-inspired CDM mechanism may thrive in China, given the great developmental and resource inequality across the nation, provided it is not abused.[248]

Monitoring and enforcement issues are not particularly tricky in the Mainland context provided the requisite political will exists. China currently has a SO_2 emission and measurement reporting program in place that directs sources to "complete a 'Form of Emission Reporting' and provide all necessary data within the time specified by the local Environmental Protection Bureau (EPB)."[249] Such a requirement must be extended to the SAR source facilities. It has been observed, however, that the SO_2 emission data reported by sources was calculated based on coal consumption

246. SUSAN WILEY HARDWICK & DONALD G. HOLTGRIEVE, PATTERNS ON OUR PLANET: CONCEPTS AND THEMES IN GEOGRAPHY 102-09 (1990). Due to the low angle of the sun, cold air builds up at the poles creating high-pressure areas. *Id.* This forces a southerly outflow of air towards the equator, deflected eastward by a phenomenon known as the Coriolis effect. *Id.*

247. The tropics are limited to a maximum latitude of 23°26'22" N in the Northern Hemisphere by the Tropic of Cancer and 23°26'22" S in the Southern Hemisphere by the Tropic of Capricorn. Hong Kong is located at 15° N, Macau at 22°10'00" N, and Guangzhou, the capital city of Guangdong Province, at 23°06'32" N, placing all within the tropical region. CENT. INTELLIGENCE AGENCY, CIA WORLD FACTBOOK 291, 394 (2009).

248. Stanford's Michael Wara and his colleague David Victor recently investigated a group of offsets offered under the Kyoto CDM and determined that contributions to many projects in China are used to acquire the offsets, though no impact was made on their production schedules. *See* Barone, *supra* note 209, at 72, 74.

249. Jintian Yang & Jeremy Schreifels, Organisation for Economic Co-operation and Development [OECD], *Implementing SO_2 Emissions in China*, at 11, CCNM/GF/SD/ENV(2003)16/FINAL, (Mar. 17-18, 2003), *available at* http://www.oecd.org/dataoecd/11/23/2957744.pdf.

and the sulfur content of the coal.[250] This is insufficient for ETS because it assumes stable operating conditions over a long time period, not on a realistic or continuous basis. While others have concluded that the size of China's power sector makes it "neither feasible nor necessary to require all sources to install" continuous monitoring equipment, the authors of this paper disagree.[251] Quarterly reporting has been criticized in the EU, while continuous IT-based monitoring forms the backbone of successful programs in the U.S. and Finland.[252] The administrative burdens doubtlessly seemed overwhelming in those contexts as well, but proved worthwhile in ensuring long-term compliance. According to the MEP, most power plants are already reporting data on the internet.[253]

The closed domestic setting would permit domestic administrative and civil law authorities to enforce compliance in a rule of law state. The U.S. ARP succeeds because it has centralized enforcement authority. Chapter 3 of the APPCL states that if emissions from regulated sources exceed the prescribed discharge standards or total quantity, measures including the installation of desulphurization and dust-removing equipment must be taken.[254] It mandates that delinquent enterprises operating within specially designated acid rain or SO_2 control zones be forced to meet the emission discharge standards within a set time period or fines will be imposed by the local environmental protection bureau.[255] As has been repeated throughout this article, extending these essential measures to include the SARs is the challenge. While mainland China would not require a special transboundary regime, incorporating the SARs into a regional or national scheme will constitutionally require a transboundary consultation and dispute resolution forum, as Beijing can not legislate environmental standards to the SARs. No such discussion has yet occurred between Beijing and the SAR Governments.

In sum, some institutional prerequisites exist in China, though some are lacking. Though implementation will be challenging for practitioners to achieve, it is possible that China may develop a

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250. *Id.*

251. *Id.*

252. *See supra* Part IV.C.

253. It was reported early this year that more than 3,000 power plants, about 80% of all Chinese power plants using fossil fuel, have installed computerized monitoring system and have been connected to the monitoring system of local environmental protection departments. Wang Shiling, *Paiwuquan Jiaoyi Dianli Xianxing* [Emissions Trading Starts with Power Plants], JRJ.COM, Jan. 8, 2009, http://finance.jrj.com.cn/2009/01/0800003263607.shtml (last visited Apr. 18, 2010) (translated by author).

254. *See* Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [Air Pollution Prevention and Control Law, art. 30.

255. *Id.* arts. 30, 48.

system that works with some of its own characteristics. The inclusion of the SARs may, if carefully orchestrated, increase chances of success.

B. Current Status of Regulatory Framework for a Pearl River Delta ETS

Incorporating the HKSAR will strengthen any Chinese enterprise because Hong Kong is a rule of law territory. Its participants will take the ETS scheme seriously and demand that its counterparts do the same. Indeed, China began its modern practice of statutory interpretation due to the necessity to interpret the Basic Law for the HKSAR.[256] Guangdong is a rich industrial province with relatively high standards of living and bureaucratic efficiency. Furthermore, the Central Government would like to see a successful transboundary regime prosper in order to bolster its efforts to lure Taiwan into closer integration with the Mainland. However, an ETS program is difficult to implement in the "one country, two systems" context as Beijing is barred from legislating in purely domestic areas reserved to the SARs, including environmental policy. Practically speaking, however, Hong Kong has only two relatively modern power plants and sits downwind of its heavily industrialized neighbor to the north, Guangdong Province.[257] Thus, Hong Kong would likely benefit from any ETS, national or regional, that encompasses Guangdong.

Unfortunately, the proposed PRD ETS also has insufficient legal foundation on which to stand, but for different reasons. Perhaps because of its excellent rule of law institutions, the HKSAR has always been cautious about passing environmental legislation. The first major legislation on air pollution control in Hong Kong was the 1959 Clean Air Ordinance, replaced by the Air Pollution Control Ordinance (APCO) in 1983.[258] To its credit, the APCO in-

256. The first formal interpretation of a piece of national law by the NPCSC was done on June 26, 1999, examining Articles 22 and 24 of the Basic Law of the HKSAR. Since then, the NPCSC has issued dozens of interpretations of other national laws, especially criminal. Lin Feng, *The Constitutional Crisis in Hong Kong – Is it over?*, 9 PAC. RIM LAW & POL'Y J. 281, 281-82 (2000).

257. Hong Kong's two power companies are the Hong Kong Electric Company Limited (HEC) and China Light & Power Co. Hong Kong Limited (CLP). Compared to the more primitive units in Guangdong Province, both are already relatively clean burning and little more can reasonably be done to limit their emissions, which have declined by 55% between 1992 and 2006. Leung et al., *supra* note 46, at 96.

258. Air Pollution Control Ordinance, (1983) Cap. 311 (H.K.). *See* Environmental Protection Department, A Concise Guide to Air Pollution Control Ordinance, http://www.epd.gov.hk/epd/english/environmentinhk/air/guide_ref/guide_apco.html (last visited Apr. 18, 2010).

cludes a comprehensive air pollution control strategy with planning, monitoring, and legislative enforcement provisions.[259] Part II of the APCO concerns planning and contains two essential elements. The first is the declaration of air control zones, of which the HKSAR Government has designated ten.[260] The second is the establishment of air quality objectives in respect of these zones.[261] In 1987, Air Quality Objectives (AQOs) for seven widespread air pollutants were established.[262] What should be noted is that these AQOs are the only objectives which the HKSAR Government currently intends to achieve. The HKSAR's first Chief Executive, Tong Chee Hwa, stated in his 2003 policy address that a goal would be "to reduce by 2010 the emission of four major air pollutants in the region by such levels as will enable Hong Kong to achieve the current air quality objectives."[263] However, that aspiration never yielded a statutory requirement, and it was never certain that Hong Kong could achieve its fanciful 2010 goal because no mechanisms to ensure attainment exist.[264] Though the APCO includes an obligation for the authorities to achieve the air quality objectives (AQOs) "as soon as reasonably practicable,"[265] it is

259. Edward J. Epstein, Comment, *Air Pollution Control in Hong Kong: Back to Square One?*, 13 H.K. .L.J. 365, 366 (1983).

260. Air Pollution Control Ordinance, (1997) Cap. 311E (H.K.).

261. Air Pollution Control Ordinance, (1997) Cap. 311 § 7 (H.K.).

262. The seven air pollutants are sulfur dioxide, total suspended particulates, respirable suspended particulates, nitrogen dioxide, carbon monoxide, photochemical oxidants, and lead. The HKSAR Government is currently considering an amendment of the AQOs to make them consistent with WHO requirements. HKSAR Environmental Protection Department, API and Air Monitoring Background Information, Air Quality Objectives, http://www.epd-asg.gov.hk/textonly/english/backgd/hkaqo.php (last visited Apr. 18, 2010). Furthermore, the "AQOs may be reviewed from time to time to include a wider range of air pollutants and, if necessary, to tighten the standards taking into account international developments for better protection of the health and well being of the community." *Id.* However, "the Hong Kong SAR and mainland air quality objectives (AQO) are long outdated and provide no health protection from pollution." Hedley et al., *supra* note 3, at 552. In 2007, the HKSAR Government began considering amending the AQOs to make them consistent with WHO requirements released in 2006. HKSAR Environmental Protection Department, A Study to Review Hong Kong's Air Quality Objectives, http://www.epd.gov.hk/epd/english/environmentinhk/air/air_quality_objectives/review_aqo.html (last visited Apr. 18, 2010); *see also* HKSAR ENVTL PROT. DEP'T, AGREEMENT NO. CE 57/2006 (EP) REVIEW OF THE AIR QUALITY OBJECTIVES AND DEVELOPMENT OF A LONG TERM AIR QUALITY STRATEGY FOR HONG KONG – FEASIBILITY STUDY, *available at* http://www.epd.gov.hk/epd/english/environmentinhk/air/prob_solutions/files/ea_panel_paper_annex0707e.pdf; WHO, *supra* note 9.

263. Tong Chee Hwa, Chief Executive, Policy Address: Environmentally Responsible Development (Jan. 13, 2003), *available at* http://www.policyaddress.gov.hk/pa03/eng/agenda5.htm.

264. *See* Air Quality Regulations, 1997, S.I. 1997/3043, explanatory n. (H.K.). In contrast, statutory deadlines have been set in similar legislation in the UK for the Government to achieve various AQOs. The Air Quality (England) Regulations, 2000, S.I. 2000/928, tbl. 1.

265. Environmental Protection Department, Air Quality Objectives, http://www.epd-asg.gov.hk/english/backgd/hkaqo.php (last visited Apr. 18, 2010).

doubtful that this obligation can be fulfilled, given that little power has been provided to the EPD Director to do so.[266]

The HKSAR did begin imposing emission caps on SO_2 in 2005 through licenses issued by the Government to the power plants.[267] Its second Chief Executive, Donald Tsang, pledged in his 2006 policy address that those emission caps would be progressively tightened to meet the 2010 targets and that the Government would not allow the targets to be compromised in any way.[268] Furthermore, in 2008, several provisions were added to the APCO to permit the HKSAR Government to set overall emissions caps,[269] but this measure will only be applied from January 1, 2010 onwards.[270] According to the amended APCO, the 2010 emission cap for existing power plants has been set at 25,120 tons of SO_2, a 54% reduction compared to 1997 baseline levels.[271] The criterion for allocation of emission allowances to power plants will also be different. At present, caps are set based upon the expected emissions from various power plants and differ widely according to fuel used.[272] Starting in 2010, emission allowances for SO_2 will be allocated on a pro-rata basis in accordance with a source's respective share of the total amount of electricity generated for local consumption.[273] Since emission allowances will be allocated to each power plant instead of each power company, trading may take place between local power plants, even if they belong to the same parent company. The amended APCO has incorporated a mechanism for allowing any

266. *See* Epstein, *supra* note 259, at 367.

267. For example, in its renewed license at the end of 2007, an emission cap of 520 tons was imposed for the years of 2008 and 2009 on Black Point Power Station. Press Release, Envtl. Prot. Dep't, Black Point Power Station Licence Renewed (Dec. 31, 2007), *available at* http://www.epd.gov.hk/epd/english/news_events/press/press_071231a.html; *see also* Legislative Council Panel on Environmental Affairs, A Proposal to Amend the Air Pollution Control Ordinance (Chapter 311), (proposed Dec. 17, 2007), *available at* http://www.epd.gov.hk/epd/english/news_events/legco/files/EAPanel_20071217_eng.pdf.

268. Donald Tsang, Chief Executive, H.K. Special Admin. Region, Proactive, Pragmatic, and Always People First: 2006-07 Policy Address ¶ 53 (Oct. 11, 2006), *available at* http://www.policyaddress.gov.hk/06-07/eng/pdf/speech.pdf.

269. Air Pollution Control Ordinance, (1997) Cap. 311 § 15 (H.K.).

270. *Id*. § 15(4)(b).

271. Envtl. Prot. Dep't, Technical Memorandum to Stipulate the Quantities of Emission Allowances for Power Plants, EP CR 9/150/21, ¶ 5 (November 2008), *available at* http://www.legco.gov.hk/yr08-09/english/subleg/brief/ss_no5-e.pdf.

272. "For example, in 2007, the natural gas-fired Black Point Power Station was allowed to emit only 520 tonnes of SO_2, while the predominantly coal-fired Lamma Island station was allowed to emit 29,500 tonnes." Christopher Tung, *Air at the End of the Tunnel, Part II*, Mar. 3, 2008, http://www.mallesons.com/publications/2008/Feb/9326049W.htm (last visited Apr. 18, 2010). The Castle Peak Power Station was allowed to emit 41,400 tons in 2008 and 39,400 tons in 2009, Press Release, Envtl. Prot. Dep't, Castle Peak Power Station's Licence Renewed with Tightened Emission Caps (July 18, 2007), *available at* http://www.epd.gov.hk/epd/english/news_events/press/press_070718a.html (last visited Apr. 18, 2010).

273. Legislative Council Panel on Environmental Affairs, *supra* note 267, ¶10.

regional power plant to purchase emission allowances from another power plant in the PRD region under the Pilot Scheme.[274] Under the proposed rules, each allowance purchased by a power plant in Hong Kong under the scheme will increase the purchaser's allocated allowance on a one-to-one basis, which will be subject to the approval of the EPD Director.[275] This arrangement is quite similar to the ETS adopted by the European Union for greenhouse gases.

Such innovations are necessary. An EPD study conducted in 2002 suggests that Hong Kong's first fifteen years of attempted AQO compliance failed and that various pollutants emitted by the energy sector are projected to increase in the future.[276] Unfortunately, despite the urgency of the situation, the proposed regime is being discussed in terms of regulating power plants on a voluntary basis. Whereas HKSAR sources are susceptible to political and consumer activism, it is highly unlikely that any source in Guangdong will willingly submit to a scheme that increases operating costs.[277] Guangdong is part of a developing country dependent upon on heavy industry, with relatively fledgling grassroots environmental activism. Even assuming that Hong Kong's two power companies subscribe, only twelve of Guangdong's plentiful source facilities are eligible for regulation under the currently proposed subscription criteria.[278] Without considerable incentives for them to join (or disincentives not to), it is highly unlikely that even those sources will subscribe. Furthermore, implicit in the ability to subscribe at will is the ability to withdraw at will. As the failure of the EU ETS demonstrates, caps must be narrowly tailored to exact

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274. *Id.* ¶¶ 15, 16.

275. *Id.*

276. CH2M HILL (CHINA) LTD., *supra* note 46, ch. 7. For example, the chapter summary on page 72 states succinctly, "[a] Regional air quality problem exists and air quality is deteriorating. The currently committed air pollution control measures in the Region are not adequate to curb the growth of emissions." Again, not all of the increase is Hong Kong's fault, as its environment suffers from the rapid industrialization of upwind Guangdong Province. *Id.* ¶ 1.1.3; *see supra* Part IV.B and note 188. Thus the HKSAR Government should be eager for the implementation of more effective and sophisticated abatement measures, including emissions trading. Target pollutants include VOC_s, RSP_s, NO_x, and SO_2. Leung et al., *supra* note 46, at 94.

277. Although there are numerous examples of voluntary ETS regimes—namely the Regional Greenhouse Gas Initiative, Chicago Climate Exchange, and Western Climate Initiative in the United States and the UK ETS in the United Kingdom—these were undertaken in the context of carbon dioxide emissions, in highly developed countries, with service economies and established environmental movements.

278. The current subscription encompasses power plants with at least one generator producing more than 100 MW. HKSAR Environmental Protection Department & Guangdong Provincial Government, *Zhujiang Sanjiaozhou Huoli Fadianchang Paiwu Jiaoyi Shiyan Jihua Shishi Fangan* [Implementation Proposal for the Trial Plan of Emissions Trading between Fossil Fuel-Fired Power Plants in the PRD Region] at app. I ¶ 2, *available at* http://www.epd.gov.hk/epd/tc_chi/news_events/legco/files/EAP_Emissions_Trading_070226_Annex_TC.pdf (translated by author).

system specifications. If a single source were to withdraw suddenly, allowance prices may collapse.

Also, a voluntary system will not help Guangdong achieve its environmental goals under the national and local reduction plans. Guangdong's SO_2 emissions totaled 1.29 million tons in 2005,[279] an increase of 70% from 2000.[280] Although they dropped slightly to 1.26 million tons in 2006,[281] provincial emissions should have been limited to 693,000 tons by 2005 under the national guidelines.[282] According to Guangdong's Eleventh Five-Year Plan for environmental protection, promulgated in 2007, SO_2 emissions should be capped at 1,100,000 tons by 2010.[283] This suggests that Guangdong is no longer as ambitious as it once was for environmental protection. The relaxed and non-binding caps mean that it is highly unlikely that the downwind HKSAR will be able to achieve its AQOs either.

It is also worth noting that the Macau SAR has been excluded inexplicably from the proposed PRD ETS. With a total capacity of 472 MW, Macau's only power supplier, the Companhia de Electricidade de Macau (CEM), would easily qualify it for regulation under the U.S. ARP scheme, which encompassed 100 MW facilities in Phase I and 25 MW in Phase II.[284] Interestingly, 68% of Macau's 2008 gross energy demand was imported, largely from Guangdong.[285] CEM must continue to expand its Macau operations or in-

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279. Yan Liang, *Guangdong Ends Ten-Year Increase of Sulfur Dioxide Emissions*, XINHUA, Jan. 8, 2007, http://english.gov.cn/2007-01/08/content_490178.htm (last visited Apr. 18, 2010).

280. WANG JINNAN ET AL., CHINESE ACAD. FOR ENVTL. PLANNING, PROPOSED SCENARIOS FOR TOTAL EMISSIONS CONTROL OF SO_2 EMISSIONS DURING THE TENTH FIVE-YEAR PLAN PERIOD IN CHINA 3 tbl.1, *available at* http://www.caep.org.cn/english/paper/Proposed-Scenarios-for-Total-SO2-Emissions-Control-in-2001-2005.pdf (SEPA statistics indicating that Guangdong Province's total SO_2 emissions in 2000 totaled 904,700 tons).

281. Yan, *supra* note 279.

282. WANG ET AL., *supra* note 280, at 9 tbl.3.

283. Office of Guangdong Provincial People's Government, *Guangdongsheng Huanjin Baohu yu Shengtai Jianshe Shiyiwu Guihua* [Eleventh Five-year Plan for Environmental Protection and Ecological Preservation in Guangdong Province], *available at* http://search.gd.gov.cn/detail?record=182&channelid=8907 (translated by author).

284. Companhia de Electricidade de Macau (CEM), Facilities Generation, http://www.cem-macau.com/-Facilities-Technology (last visited Apr. 18, 2010); *see* 42 U.S.C. §§ 4651d(b)-(f), (h), (j); Acid Rain Program, *supra* note 155; *supra* notes 156-58.

285. "In 2008, the gross energy demand was 3475 GWh of which 1103 GWh was produced by CEM and 2372 GWh has acquired from external suppliers. The energy breakdowns between CEM production and energy acquisition were respectively 32% and 68%." CEM, *supra* note 284. "[A]s Macao has become more dependent from importation and today nearly 70% of the power supply is imported." Press Release, CEM, Guangdong Power Grid to Raise Electricity Price by About 10% Starting from July 2008 (Dec. 23, 2008), http://www.cem-macau.com/Guangdong-Power-Grid-to-raise?var_recherche=guangdong (last visited Apr. 18, 2010). For more details on the power infrastructure encompassing Zhuhai, Guangdong Province and Macau, see CEM, CEM Held Ground Breaking Ceremony for the Third Interconnection Between Macau and Zhuhai, http://www.cem-

crease imports, as projections show an annual energy consumption growth rate estimated at 11%.[286] Thus, Macau's inclusion in a regional ETS is necessary: its one domestic power company produces four-times more energy than a U.S. ARP Phase I source and could ramp up production.

The previous discussion demonstrated several market maintenance problems in foreign contexts that could reoccur locally if a Pearl River Delta ETS is established. Among them, the market may be slow to develop, and allowance prices are more likely to collapse if the market is not centrally administered. New ETS regimes should not suffer from these same initial obstacles. ETS is no longer novel and is proven in reducing SO_2 emissions. Participants should feel no hesitation entering such a market, especially with the reduced transaction costs provided by the internet. Indeed, a well-planned ETS market may develop especially quickly in Hong Kong given the local expertise in securities trading. However, those experts would insist that the market must maintain stability while in operation. The total of the U.S. ARP caps were stipulated in advance of the entire program, allowing participants to plan accordingly for the entire length of the program, whereas the EU ETS member states and Jiangsu authorities were allowed to disrupt market practice midstream.[287] Planning must be centralized and long-term for the length of the program. While government has had a proactive role in facilitating deals in Jiangsu Province, an internet-based market would eliminate the need for such interventions while lowering public costs, increasing transaction speed, and eliminating the possibility of corruption. Implementation will also be aided if the authorities stipulate to their utilities in advance regarding how to include the cost of the program in the ratemaking process.

Furthermore, a CDM-like program based on the Kyoto model may prove especially useful if adapted to the local (or national) context. Given regional wind patterns and the overriding need to clean up the more primitively designed upwind sources in Guangdong Province, the HKSAR should seek the inclusion of such a mechanism. In 2003, the HKSAR's Advisory Council on the Environment concluded that the costs for further emissions reductions at the two local utilities would be very high and have a signif-

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macau.com/CEM-held-Ground-Breaking-Ceremony?var_recherche=guangdong (last visited Apr. 18, 2010) and CEM, Transmission and Distribution, http://www.cem-macau.com/Transmission-Distribution?var_recherche=guangdong (last visited Apr. 12, 2010).

286. CEM, *supra* note 284.

287. *See supra* Part IV.B.

icant impact on electricity tariffs for consumers.[288] On the other hand, most of the power plants in Guangdong are still relatively primitive in design, so reducing emissions from these plants through replacements or upgrading would be much cheaper.[289]

Monitoring and enforcement authorities also provides a unique challenge in the transboundary context; though progress is being made. At the second Hong Kong-Guangdong Cooperation Joint Conference held in September 1998, the Governments reached a consensus to enhance transboundary cooperation on environmental protection issues.[290] They also agreed to conduct a joint study on regional air quality with the intent to halt further deterioration.[291] That study, published in 2002, indicated that the air pollution problem in the PRD region is similar to that faced by other ecosystems worldwide, caused mainly by NOx, ozone, and respirable suspended particulates (RSPs).[292] The study anticipated that, by 2010, the regional economy, population, electricity consumption and vehicle mileage in the PRD region will grow by 150%, 20%, 130%, and 190% respectively.[293] In fact, these predictions proved extremely conservative.[294] With these growth trends, it is obvious that regional pollution emissions will continue to increase if the two Governments only rely upon existing abatement measures.[295]

Against that background, at the third meeting of the Hong Kong-Guangdong Cooperation Joint Conference in April 2002, the two Governments issued a Joint Statement on Improving Air Quality in the Pearl River Delta Region.[296] Through the Joint Statement, the Governments "have agreed to reduce by 2010, on a

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288. *See* Press Release, Hong Kong Government Information Centre, Progress of Emissions Trading Pilot Scheme (Dec. 10, 2003), *available at* http://www.info.gov.hk/gia/general/200312/10/1210253.htm. Given projected population and economic growth it will be difficult to locally reduce emissions further from their present level. Press Release, Hong Kong Government Information Centre, HK Spares No Efforts to Reduce GHG Emission (Oct. 29, 2003), *available at* http://www.info.gov.hk/gia/general/200310/29/1029203.htm.

289. *See* Leung et al., *supra* note 46, at 96.

290. Press Release, Hong Kong Government Information Centre, Joint Statement on Improving Air Quality in the Pearl River Delta Region (Apr. 29, 2002), *available at* http://www.info.gov.hk/gia/general/200204/29/0429128.htm.

291. *Id.*

292. *Id.*

293. *Id.*

294. Findings of the Report on the Mid-term Review of the Pearl River Delta Regional Air Quality Management Plan indicate that, in 2010, the economy, population, electricity consumption and vehicle mileage in the area will increase by 509%, 56%, 158% and 319% respectively, compared to the 1997 levels, which far exceed the assumptions made in 2002. ENVTL. PROT. DEP'T., REPORT ON THE MID-TERM REVIEW OF THE PEARL RIVER DELTA REGIONAL AIR QUALITY MANAGEMENT PLAN Annex E ¶ 8 (2008), *available at* http://www.epd.gov.hk/epd/english/news_events/legco/files/Eng-AnnexE-210108.pdf.

295. Press Release, Hong Kong Government Information Centre, *supra* note 290, para. 4.

296. *Id.*

best endeavor basis, regional emissions of sulphur dioxide, nitrogen oxides, respirable suspended particulates and volatile organic compounds by 40%, 20%, 55%, and 55% respectively, using 1997 as the base year."[297] The aim is noble. Achieving these targets will enable the HKSAR to meet its current AQOs, and most cities in the PRD region will be able to meet their relevant national air quality objectives.[298] The Governments subsequently designed a Regional Air Quality Management Plan.[299] A mechanized Regional Air Quality Monitoring Network was already in full operation across Hong Kong and Guangdong.[300] This record of cooperation indicates that Hong Kong and Guangdong are enthusiastic about forming an ETS, but an agreement must be reached enabling all three jurisdictions—Guangdong, Hong Kong and Macau—to subscribe to an enforceable regime.

Unfortunately, the political will is lacking. The present plans and mechanisms are non-binding, and the implementation of an enforceable transboundary pollution regime is not making progress. The most fruitful attempt at implementing a regional air quality regime was a 2005 Agreement reached between nine provinces in South China and the two SARs.[301] The Agreement contains seven articles. Article 2 sets out four principles for cooperation, one of which reiterates participation is on a strictly voluntary basis.[302] While Article 3 calls for reductions in the quantity of emitted air pollutants,[303] the Agreement does not contain any details on how to reduce emissions. The lack of these details means that, at present, a plan cannot be implemented and the voluntary nature of the scheme will ultimately frustrate its purpose. It is thus fair to say the Agreement merely offers a framework. Bringing that framework to life will require much more concentrated action,

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297. *Id.* para. 6.

298. *Id.*

299. LEGISLATIVE COUNCIL PANEL ON ENVIRONMENTAL AFFAIRS, LC PAPER NO. CB(1)547/08-09(01) BACKGROUND BRIEF ON THE PEARL RIVER DELTA REGIONAL AIR QUALITY MANAGEMENT PLAN (2009), *available at* http://www.legco.gov.hk/yr08-09/english/panels/ea/ea_iaq/papers/ea_iaq0113cb1-547-1-e.pdf; Press Release, HKSAR Envtl. Prot. Dep't, Pearl River Delta Regional Air Quality Management Plan Mid-term Review Report Announced Today (Jan. 8, 2008), http://www.epd.gov.hk/epd/english/news_events/press/press_080108a.html (last visited Apr. 18, 2010).

300. The Network has been in operation since 2005. HKSAR Government, Pearl River Delta Air Quality: Regional Air Quality Monitoring Network, http://www.gov.hk/en/residents/environment/air/raqi.htm (last visited Apr. 18, 2010).

301. The nine provinces are Fujian, Jiangxi, Hunan, Guangdong, Guangxi, Hainan, Sichuan, Guizhou and Yunnan. Guangdong Environmental Protection Bureau, Fan Zhu Sanjiao Guyu Huanjing Baohu Hezuo Xieyi [Pan-Pearl River Delta Regional Environmental Cooperation Agreement], Jan. 25, 2005, *available at* http://www.pprd.org.cn/huanbao/200504/t20050415_1340.htm (translated by author).

302. *Id.*

303. *Id.*

such as a legitimate ETS regime with the necessary centralized forums for long-term success. These will need to be established in either the regional or nationwide context if the HKSAR and Macau SAR are to be included in a meaningful way.

C. A Supranational Environmental Forum Encompassing Mainland China and Its Special Administrative Regions is Both Necessary and Attainable

As has been stressed repeatedly, there are overwhelming institutional advantages to having a unified and centralized authority overseeing an ETS program. While such a program has not yet been implemented on a nationwide basis in China, the requisite authority for such an institution certainly exists. The tricky part in the Chinese context is including the Special Administrative Regions. Under the "one country, two systems" framework, the SARs maintain their own separate constitutional dignities in the field of environmental law. The Governments of those SARs must be persuaded through domestic pressure as well as their desire for environmental self-preservation and regional integration to subscribe to a national program. While they could conceivably enjoy the benefits of a Mainland ETS as free-riders, it is just as likely that undesirable windborne pollution redistributions may exacerbate regional deposition. It would thus be in the interests of all parties to have an ongoing voice in the design and maintenance of the program. This will require an executive agreement or other binding subscription arrangement to establish an appropriate supranational mechanism.

Bilateral executive agreements between the HKSAR and Beijing have proven to be a viable option for creating intimate partnerships between the two Governments, as demonstrated by the cooperation under Article 95 and the Closer Economic Partnership Agreement.[304] This becomes an intriguing option in the context of transboundary pollution, especially as the need for uniform compliance and enforcement becomes clear. A trilateral arrangement could enable ongoing environmental cooperation between mainland China, Hong Kong, and Macau. On that foundation, a supranational institution with a complete delegation of regulatory powers can be established. Indeed, such a transboundary body must be created to harmonize and oversee the cap-fixing, market stabilizing, monitoring, and enforcement functions in the three PRD jurisdictions. Program conditions could be enforced directly, and

304. *See supra* notes 87-89 and accompanying text.

multi-party, binding arbitration procedures could be invoked in the event of irreconcilable or unforeseen legal differences or enforcement issues between the systems. Anything less is likely to result in well-publicized and oft-criticized failure.

Establishment should not be a major political obstacle in the context of mainland China and the SARs, where a strong relationship between the goals of ultimate regional integration and an institutional apparatus for environmental protection is desirable. An unwillingness by the parties to trust a transboundary apparatus with the exercise of regulatory duties, even in a tightly delegated and supervised form, would speak poorly of efforts for long-term integration and cooperation. Indeed, the development of a supranational environmental body between mainland China and its two SARs would serve as a portal through which cooperative efforts can be undertaken directly between representatives of the three systems. If the three diverse legal systems can agree to cooperate on an ongoing basis and be made to co-exist and prosper within a successful environmental framework, the resulting intercourse would provide a model of international cooperation heard around the world. It would not matter whether the initial effort is made at the regional or national level. Although the authors firmly believe the time has come for China to implement a national ETS program, a regional bloc consisting of Guangdong Province and the SARs would provide the same conceptual model while placing additional pressure on Beijing to institute a national program.

While a Hong Kong-Guangdong Cooperation Joint Conference exists, it is merely consultative in nature. Currently, there is nothing in the construction of this institution that suggests any move toward the development of an autonomous regulatory power. Thus, the PRD ETS will likely prove to be more of an EU ETS styled joint venture than an integrative body. Unfortunately, history proves that this arrangement will likely be insufficient to achieve the agreed upon goals. We suggest that this body be bolstered with independent and meaningful regulatory authority necessary to oversee the regional program. If successful, it will provide a model for more concerted action between the SARs and mainland China in the future.[305]

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305. For a more detailed example of how such an institution may function, please see our paper offering suggestions to empower the International Joint Commission, a bilateral environmental forum operating between the United States and Canada, to serve a similar role as in the proposed U.S.-Canada transboundary ETS. *See* Lin & Buhi, *supra* note 38.

CONCLUSION

This article reiterates the overwhelming needed for an ETS system to be installed in China to improve human and ecosystem health. Though still in the initial planning stages in mainland China, the Governments of the Hong Kong Special Administrative Region (HKSAR) and the People's Government of Guangdong Province (Guangdong) are moving ahead with a separate ETS agreement. However, the constitutional context of "one country, two systems" will frustrate a meaningful partnership unless authority is delegated to a transboundary, supranational institution. The Governments have an opportunity to find a solution on a limited basis by experimenting with such a mechanism on the regional level. However, that regime, as presently conceptualized, is hardly developed and suffers from several fatal flaws. The environmental objectives to be achieved are unclear, the Macau SAR has been inexplicably exempted, no mechanisms presently exist to settle a dispute arising between these governmental entities; and there is no centralized planning, coordination, or enforcement authority between the jurisdictions. International experience in emissions trading proves that these are the basic necessities of a successful ETS program. While a Hong Kong-Guangdong Cooperation Joint Conference composed of representatives of both Governments exists, it is merely consultative in nature and lacks authority to oversee the breadth of a viable ETS program.

A centralized delegation of regulatory powers is paramount for an effective ETS regime to function, as proven by the successful exercise of the U.S. ARP and shortcomings of the early EU ETS. Given China's unique constitutional structure, a supranational panel must be authorized to harmonize and oversee the cap-fixing, market maintenance, compliance monitoring, and enforcement functions across all jurisdictions. This is true in the case of either a national or regional ETS. Any non-binding substitute will result in well-publicized and oft-criticized failure. Practice indicates that executive agreements between the SARs and mainland China are feasible options for addressing bilateral issues. However, establishment of a permanent transboundary forum would ensure flexibility and ongoing cooperation among the three jurisdictions as implementation proceeds. Indeed, such an environmental panel would help to further integrate the three legal systems by serving as a portal through which ongoing implementation efforts can be directly undertaken. Program conditions could be enforced directly, and multi-party arbitration could be used in the event of irreconcilable or unforeseen legal differences between the systems. If all

three could be made to co-exist and prosper within a successful public law framework, the resulting intercourse would provide a model of international environmental cooperation to the world.

At the end of the day, conception can only take a supranational effort so far. The real value of a venture is the ability of the institution or mechanism, at its core, to achieve the stated results. At present, the abilities of the proposed PRD and national ETS to deliver results are suspect. More favorable laws currently exist for a national ETS in China, but they presently lack teeth given that enforcement requires political will and engagement by all institutions. A stronger rule of law society exists in the SARs, but they are slow to adopt environmental legislation because of the requisite of enforcement. In any event, a supranational forum is vital for meaningful inclusion of the SARs in a viable program. The authors implore the Governments of all respective parties to prioritize the development of such a forum and a corresponding ETS regime with all possible speed.

GETTING OVER THE HUMP: ESTABLISHING A RIGHT TO ENVIRONMENTAL PROTECTION FOR INDIGENOUS PEOPLES IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

TRAVIS THOMPSON*

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INTRODUCTION

Climate change is threatening the traditional way of life for

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indigenous peoples and the Inter-American Human Rights System[1] declines to combat this growing problem by refusing to acknowledge a right to environmental protection for indigenous peoples. The Inter-American Human Rights System has thus effectively cut off the possibility of remedying the harms suffered by indigenous peoples as a result of climate change. Because the problems that indigenous peoples face place them at the intersection of human rights and environmental law, an acknowledged right to environmental protection is crucial to their ability to sustain their customary way of life. Until recently, many scholars simply felt that a right to environmental protection did not exist.[2] Inaction based on this assertion, however, becomes increasingly difficult to justify given the number of treaties, declarations, and decisions by domestic, regional, and international bodies specifically acknowledging such a right.[3] Without acknowledging a right to environmental protection, and more importantly, without providing effective means to remedy environmental abuses in the international community, indigenous peoples will continue to be marginalized and ultimately may not be able to protect their time-honored way of life.

Using the Inuit tribe as a principal example, Part I of this paper will demonstrate the unique impact climate change has on indigenous peoples. Part I will begin by identifying the effects of climate change which already strain this indigenous community's relationship with its traditionally inhabited land After mentioning the anticipated challenges the Inuit face in moving forward, Part I will discuss the Inuit's efforts to combat climate change through the Inter-American Commission on Human Rights.

Part II will discuss indigenous peoples generally, first by defining indigenous peoples, and then explaining why indigenous peoples have more recently been afforded special protection with regard to human rights. Part III of this article will discuss the shortcomings of the Inter-American Human Rights System with regard to environmental protection of indigenous peoples. After briefly touching on the structure of the Inter-American Human Rights System, Part III will specifically set out the sources of law

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1. The Inter-American Human Rights System, comprised of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, is charged with protecting and promoting the human rights of persons in the Western Hemisphere. *See* Jo. M. Pasqualucci, *The Whole Truth and Nothing But the Truth : Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 360 (1994).

2. James T. McClymonds, Note, *The Human Right to a Healthy Environment: An International Legal Perspective*, 37 N.Y.L. SCH. L. REV. 583, 596-601 (1993).

3. *See infra* Parts III & IV.

that bind the Inter-American Human Rights System. More importantly, Part III will address Article 29 of the American Convention on Human Rights[4] and how it provides the textual opening for a recognized right to environmental protection for indigenous peoples. Part III also will consider the Inter-American Commission and Court's reluctance to tackle environmental problems unless they are specifically tied other human rights violations, such as the right to life or the right to property.

Using the provisions of Article 29 of the American Convention on Human Rights, Part IV of this article will set out the basis for establishing a right to environmental protection in the Inter-American Human Rights Regime. Part IV first will argue that the post-Kyoto framework, in addition to taking a strong stance on climate change mitigation, should more adequately develop the adaptation measures set out in the United Nations Framework Convention on Climate Change.[5] Specifically, Part IV argues that adaptation measures containing a strong articulated international commitment to environmental protection, including a need for judicial access and enforcement, will strengthen a claim for indigenous peoples in the Inter-American Commission and Court. Part IV also will address the various international bodies and treaties that, at least at a general level, recognize a right to environmental protection. Specifically, Part IV will discuss the grant of a right to environmental protection afforded by the United Nations Declaration on the Rights of Indigenous Peoples[6] and a similar grant that stands to come into being through the adoption of the American Declaration on the Rights of Indigenous Peoples.[7] Part IV also will argue that by not enforcing a right to environmental protection for indigenous peoples, the Inter-American Commission and Court severely limit the effect of the UN Declaration, the San Salvador Protocol,[8] and the American Declaration, and therefore are in violation of Article 29 of the American Convention on Human Rights.

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4. Organization of American States, American Convention on Human Rights art. 29, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

5. United Nations Framework Convention on Climate Change, May 21, 1994, S. TREATY DOC NO. 102-38, 1771 U.N.T.S. 107 (1992), [hereinafter UNFCCC].

6. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, 61st Sess., U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter U.N. Declaration].

7. Permanent Council of the Organization of American States, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.K/XVI GT/DADIN/doc.334/08 rev.5 (Dec. 3, 2009), *available at* http://www.oas.org/consejo/CAJP/Indigenous%20documents.asp [hereinafter American Declaration].

8. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156 (1989) [hereinafter San Salvador Protocol].

Despite the fact that the American Convention on Human Rights does not specifically grant a right to environmental protection, Part IV concludes that Article 29 of the American Convention on Human Rights allows for the evolution of international law and the expansion of the Commission and Court's jurisprudence in limited situations. Finally, this paper contends that because a post-Kyoto framework, which suggests legal enforcement as an adaptation measure, in conjunction with the textually grounded right to environmental protection for indigenous peoples satisfies the provisions of Article 29, the Inter-American Human Rights Commission and Court are positioned to establish and enforce a right to environmental protection for indigenous peoples.

I. THE PLIGHT OF THE INUIT

The Inuit are an indigenous people to the Arctic regions of Greenland, Alaska, Canada, and Russia.[9] The Inuit describe themselves as an international community sharing common language, culture, and a common land, and even though they are not a nation-state, as a people they do constitute a nation.[10] As an indigenous people to the Arctic regions, the Inuit have survived in the harsh conditions of the Arctic by developing and adapting to the region. "All Inuit share a common culture characterized by dependence on subsistence harvesting in both the terrestrial and marine environments, sharing of food, travel on snow and ice, a common base of traditional knowledge, and adaptation to similar Arctic conditions."[11]

However, this common base of traditional knowledge and ability to adapt to the Arctic conditions is being challenged by the ill-effects of global warming:

> Global warming refers to an average increase in the Earth's temperature, causing changes in climate that lead to a wide range of adverse impacts on plants, wildlife, and humans. There is broad scientific con-

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9. Earthjustice, Inuit Human Rights and Climate Change, http://www.earthjustice.org/library/background/inuit-human-rights-and-climate-change.html (last visited Jan. 18, 2010).

10. Inuit Circumpolar Council, ICC's Beginning, http://inuitcircumpolar.com/section.php?ID=15 (last visited Jan. 24, 2010).

11. Petition to the Inter Amer. Comm'n on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the U.S. 1 (Dec. 7, 2005), *available at* http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf [hereinafter Petition].

> sensus that global warming is caused by the increase in concentrations of greenhouse gases in the atmosphere as a result of human activity.[12]

The effects of global warming are threatening the relationship the Inuit have developed with their Arctic surroundings. The Inuit fear they will no longer be able to survive on the already scarce resources given the changes to their environment in the past twenty years.[13] "The culture, economy and identity of the Inuit as an indigenous people depend upon the ice and snow[,]"[14] but, due to climate change, ice and snow are becoming less and less prevalent in the Arctic regions traditionally inhabited by the Inuit.[15] Because of these changes, the Inuit are being forced to adapt to their constantly changing surroundings.

Among the changes already experienced by the Inuit are less snow-fall annually, leading to an inability to build igloos for shelter in some areas; loss of sea ice, leading to more violent storms hitting the coast line; and increased flooding and coastal erosion.[16] Cumulatively, "[e]rosion, storms, flooding and slumping harm homes, infrastructure, and communities, and have damaged Inuit property, forcing relocation in some cases and requiring many communities to develop relocation contingency plans."[17] For the Inuit, the effects of climate change are not only a concern for the future, but a problem that is forcing them to adapt their way of life presently.

While the impacts already experienced by the Inuit are severe and significant, "projected impacts are expected to be much worse."[18] Continued reductions in sea ice will severely shrink marine habitats for polar bears, seabirds, and seals, all animals the Inuit rely on, potentially pushing some species toward extinction.[19] "For Inuit, warming is likely to disrupt or even destroy their hunting and food sharing culture as reduced sea ice causes the animals on which they depend on to decline[,] become less accessible, and possibly become extinct."[20] Additionally, "[s]evere coastal erosion will be a growing problem as rising sea level and a reduction in sea

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12. *Id.*
13 *Id.* at 1-5.
14. *Id.* at 1.
15. *Id.* at 2-4.
16. *Id.*
17. *Id.* at 3.
18. *Id.* at 4.
19. *Id.*
20. *Id.* at 4-5.

ice allow higher waves and storm surges to reach shore[,]" potentially causing many coastal Inuit tribes to relocate from their traditionally inhabited areas.[21] "In some cases, communities and industrial facilities in coastal zones are already threatened or being forced to relocate, while others face increasing risks and costs."[22] At current projections, the Arctic could be ice-free as early as 2040.[23] Confronted with both current problems and concerns about the future associated with climate change, the Inuit are left to wonder if their ancient way of life is destined to become a footnote in the history of globalization.[24]

While the Inuit are presently suffering from the effects of climate change, until recently, there were reservations about the impacts of climate change. To this day, many of those same reservations continue to persist.[25] Richard Lindzen, a professor at Massachusetts Institute of Technology, claims "[t]here is no solid scientific evidence to back up the models used by climate scientists who warn of dire consequences if warming continues."[26] While skepticism still remains, scientific evidence gathered in the past decade suggests that the effects of climate change are a real and present threat.[27]

Despite growing evidence regarding the effects of climate change, international regulatory and judicial bodies have been reluctant to weigh in on matters such as those presented by the Inuit.[28] The Inuit submitted a formal petition to the Inter-American

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21. *Id*. at 4.

22. *Id.*

23. Sandra Hines, *Ice-free Arctic Ocean Possible in 30 Years, not 90 as Previously Estimated*, U. WASH. NEWS, Apr. 2, 2009, http://uwnews.org/article.asp?articleID=48419 (last visited Jan. 24, 2010); *see also Study: Arctic Sea Ice Melting Faster Than Anticipated*, FOXNEWS.COM, Apr. 3, 2009, http://www.foxnews.com/story/0,2933,512244,00.html (last visited Apr. 3, 2010).

24. Sheila Watt-Cloutier, Remarks at Climate 2050: Technology and Policy Solutions (Oct. 24, 2007), *available at* http://www.youtube.com/watch?v=GlSh4XeoLBA.

25. *See* Andrew C. Revkin, *Skeptics Dispute Climate Worries and Each Other*, N.Y. TIMES, Mar. 9, 2009, at A12, *available at* http://www.nytimes.com/2009/03/09/science/earth/09climate.html ("The meeting participants hold a wide range of views of climate science. Some concede that humans probably contribute to global warming but they argue that the shift in temperatures poses no urgent risk. Others attribute the warming, along with cooler temperatures in recent years, to solar changes or ocean cycles.").

26. *Id*.

27. *See generally* Intergovernmental Panel on Climate Change, *Fourth Assessment Report*, http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm (last visited Apr. 3, 2010). Further, the United States Environmental Protection Agency has declared that greenhouse gases are a health threat, calling the gases "a serious problem now and for future generations." *U.S. Declares Warming Gases are Health Threat*, MSNBC, Apr. 17, 2009, http://www.msnbc.msn.com/id/30264214/ (last visited Jan. 24, 2010).

28. Marguerite E. Middaugh, Comment, *Linking Global Warming to Inuit Human Rights*, 8 SAN DIEGO INT'L L.J. 179, 180 (2006); *see also* Jorge Daniel Taillant, Environmental Advocacy and the Inter-American Human Rights System 28 (Feb. 2001) (working paper

Commission on Human Rights in December 2005, with hopes of preventing further environmental harms resulting from climate change.[29] "What we want is the United States to stop violating our rights. To do that the United States needs to lead the international effort for absolute reductions in emission of greenhouse gases. Without absolute reductions Inuit hunting and food sharing culture will not survive."[30] In this petition, the Inuit alleged several human rights violations committed by the United States, which was the largest emitter of greenhouse gases in the world at the time.[31] The violations include: the right to life and physical security, the right to personal property, the right to health; the right to practice their culture; the right to use land traditionally used and occupied, and the right to means of subsistence.[32] Not included in this list of human rights violations is a right to environmental protection. This is because the Inter-American System for the protection of human rights is bound by the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, neither of which acknowledges that a right to environmental protection exists.[33] In November 2006, the Commission notified the Inuit that it would not be able process their petition, stating "the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration."[34]

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commissioned by Center for International Environmental Law, on file with author) (explaining that very few cases have been decided by the Inter-American Court and that States generally attempt to avoid the Inter-American Court, opting instead to pursue redress through the Inter-American Commission).

29. *See* Petition, *supra* note 11.

30. Shelia Watt-Cloutier, Chair, Inuit Circumpolar Conference, Presentation at Eleventh Conference of Parties to the UN Framework on Climate Change (Dec. 7, 2005), *available at* http://inuitcircumpolar.com/index.php?ID=318.

31. *See* Petition, *supra* note 11, at 1, 5-6. In 2006, when the Inuit Petition was filed, the United States was the largest emitter of greenhouse gases in the world. Recently, however, China has taken surpassed the United States and is now the largest gross emitter of greenhouse gases. *China Overtakes U.S. in Greenhouse Gas Emissions*, N.Y. TIMES, June 20, 2007, http://www.nytimes.com/2007/06/20/business/worldbusiness/20iht-emit.1.6227564.html (last visited Apr. 3, 2010).

32. *Id*. at 5-6.

33. *See generally* Organization of American States, American Convention on Human Rights, *supra* note 4; Organization of American States, American Declaration on the Rights and Duties of Man, Mar. 30-May 2, 1948: OAS Res XXX, OAS Off Rec OEA/Ser.L./V/I.4 Rev.

34. Svitlana Kravchenko, *Right to Carbon Right to Life: Human Rights Approaches to Climate Change*, 9 VT. J. ENVTL. L. 513, 535 (2008) (quoting Letter from Ariel E. Dulitzky, Assistant Executive Sec'y, Org. American States, to Paul Crowley, Legal Representative (Nov. 16, 2006) *available at* http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf).

II. INDIGENOUS PEOPLES

The United Nations has estimated that there are over three hundred million indigenous peoples living in more than seventy countries around the world.[35] Yet, much like the Inuit, this significant population is having its traditional way of life threatened more and more each day as a result of climate change.[36] Simply defined, indigenous peoples are the groups of people "who inhabited a country or geographical region at the time when people of different cultures or ethnic origins arrived."[37] However, the relevant characteristics of indigenous peoples extend far beyond simply being in a certain place at a certain time. Indigenous peoples historically "[p]ractic[e] unique traditions, they retain social, cultural, economic, and political characteristics that are distinct from those of the dominant societies in which they live."[38] Rather than define indigenous peoples, the United Nations contends that a better approach is to identify indigenous peoples based on the following characteristics: (1) self-identification as indigenous peoples; (2) historical continuity with pre-colonial and/or pre-settler societies; (3) strong link to territories and surrounding natural resources; (4) distinct social, economic, and political systems; (5) distinct language, culture, and beliefs; (6) form non-dominant groups of society; and (7) resolve to maintain and reproduce their ancestral environments and systems as distinct peoples and communities.[39] While a precise definition of indigenous peoples may not be readily attainable, one characteristic they all seem to share is the common experience of traditionally being treated differently from the general population.[40]

Historically, indigenous peoples, to a large extent, have not been afforded the same protections as the general population with

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35. SVITLANA KRAVCHENKO & JOHN BONINE, HUMAN RIGHTS AND THE ENVIRONMENT 147 (2008).

36. Randall S. Abate, *Climate Change, The United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A STAN. J. INT'L L. 3, 4 (2007). Similar to the Inuit, "inhabitants of low lying island nations face potentially catastrophic consequences because of sea level rise triggered by melting sea ice in the polar regions." *Id.*

37. Press Release, United Nations Permanent Forum on Indigenous Issues, Who are Indigenous Peoples?, (May 12, 2006), *available at* http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf [hereinafter Who are Indigenous Peoples?].

38. *Id*. The dominant societies became dominant through conquest, occupation, settlement, or other means. *Id.*

39. *Id.*

40. W. Michael Reisman, Editorial Comment, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350, 350 (1995).

regard to human rights.[41] However,"[o]ne of the most notable features of the contemporary international human rights regime has been the recognition of indigenous peoples as special subjects of concern."[42] The International Work Group for Indigenous Affairs (IWGIA) states among its convictions that:

> Indigenous peoples, belonging to the most marginalized and impoverished groups in the world, have the right to be recognized and to have their basic human rights respected. In particular indigenous peoples have the right to be able to survive as peoples and to maintain and develop their cultures based on their own aspirations, visions and identity.[43]

Even though indigenous peoples are viewed as special subjects of concern, there remains a vast disconnect between what rights are acknowledged and what protections indigenous people are actually afforded. "Even though the international human rights program has recognized the need to protect indigenous peoples . . . adjustments taking account of these changes have not been carried over into other parts of international law."[44] As the IWGIA has recognized, one of the main focuses of protections for indigenous peoples is the right to maintain and develop their cultures as they see fit.[45] However, indigenous peoples' ability to maintain and develop their cultures is being impaired by both the effects of climate change and the lack of protection afforded to them in international law.[46] Because of their unique position, indigenous peoples are placed at the middle of the convergence of human rights and environmental law.[47]

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41. *Id*.

42. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 33 (2001).

43. International Work Group for Indigenous Affairs, IWGIA's Mission Statement, http://www.iwgia.org/sw17673.asp (last visited Jan. 24, 2010).

44. Reisman, *supra* note 40, at 362.

45. *See* International Work Group for Indigenous Affairs, *supra* note 43.

46. JAN SALICK & ANJA BYG, INDIGENOUS PEOPLES AND CLIMATE CHANGE 7-11 (2007), *available at* http://www.tyndall.ac.uk/publications/other-tyndall-publications/2007/indigenous-peoples-and-climate-change; NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES 318-19 (1997) (noting that "the essential difference is that indigenous peoples are still an object rather than a subject of international law; at best they can be identified as an emerging subject.")

47. Jennifer A. Amiott, Note, *Environment, Equality, and Indigenous Peoples' Land Rights in the Inter-American Human Rights System:* Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 32 ENVTL L. 873, 875-76 (2002).

"Indigenous peoples are particularly vulnerable to environmental threats, as they often live in resource-rich areas and are closely dependent on the natural environment for their cultural and physical survival."[48] "[Indigenous peoples] have a special relation to and use of their traditional land. Their ancestral land has a fundamental importance for their collective physical and cultural survival as peoples. Indigenous peoples hold their own diverse concepts of development, based on their traditional values, visions, needs and priorities."[49] Throughout the world, indigenous peoples find themselves fighting to maintain their way of life in opposition to governments and businesses that look to these resource-rich areas as a means of broader development measures specifically targeted at turning a profit.[50] "As these developing states struggle for economic stability on an international plane, they are increasingly driven to exploit fresh resources, and tend to respond to that pressure by further dispossessing indigenous peoples of their land and resources."[51] This is not simply to say that governments and businesses are wholly self-serving and that they quickly dismiss environmental and human rights concerns. Rather, this cross-section where governments and businesses intersect with indigenous peoples highlights a larger policy consideration that permeates environmental law generally: environmental protection versus economic growth. To the extent that economic concerns typically prevail, the indigenous communities suffer.[52]

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48. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1432 (3d ed. 2007).

49. Who are Indigenous Peoples?, *supra* note 37.

50. Matthew F. Jaksa, Comment, *Putting the "Sustainable" Back in Sustainable Development: Recognizing and Enforcing Indigenous Property Rights as a Pathway to Global Environmental Sustainability*, 21 J. ENVTL. L. & LITIG. 157, 183-85 (2006); *see* International Work Group for Indigenous Affairs, Indigenous Peoples and Land Rights, http://www.iwgia.org/sw231.asp (last visited Jan. 24, 2010) ("In the name of national economic development, various policies are being put in place, which dispossess indigenous peoples of their lands and natural resources and threaten to undermine their cultures and survival as distinct peoples.").

51. Michael Holley, Comment, *Recognizing the Rights of Indigenous People to Their Traditional Lands: A Case Study of an Internally-Displaced Community in Guatemala*, 15 BERK. J. INT'L. L. 119, 126 (1997). Actions by governments and business that threaten indigenous peoples are easily identifiable when the harm is direct, concrete, and tangible, as in the case of the Awas Tingni. *See* Amiott, *supra* note 47. The Awas Tingni, an indigenous people located on the Atlantic Coast of Nicaragua, faced the threat of deforestation of their lands when the Nicaraguan government gave permission to a foreign timber company to log more than 62,000 hectares of tropical forest claimed by the indigenous community. *Id*. at 877. In the case of the Awas Tingni, it is clear that by granting this right, the government threatens the traditional lands and natural resources that the indigenous community has long relied on. *See id.*

52. David C. Baluarte, Note *Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169*, SUSTAINABLE DEV. L. & POL'Y, Summer 2004, at 9, 9.

Additionally, indigenous peoples are often politically marginalized and are thus subject to the oppression and domination of the majority who make decisions that ultimately affect indigenous lands.[53] "Indigenous peoples often have much in common with other neglected segments of societies, i.e. lack of political representation and participation, economic marginalization and poverty, lack of access to social services and discrimination."[54] Complicating matters further for indigenous peoples is the fact that they generally comprise a small percentage of a region, state, or country's population.[55] As alluded to by the Inter-American Commission on Human Rights, "because of their vulnerable conditions vis-à-vis majority populations, indigenous groups may require certain additional protections, beyond those granted to all citizens, in order to bring about true equality among the nationals of a state."[56] Because many indigenous communities, like the Inuit, constitute such a small minority of the population, they simply do not have the option of altering their situation through the traditional political process.[57] Therefore, protection from harms—like climate change—will often happen only as a result of special protection being afforded outside the traditional political process.

The Intergovernmental Panel on Climate Change has determined that adverse effects from continued climate change will lead to increased flooding and the depletion of resource-rich ecosystems, which will result in the displacement of millions of people in the process.[58] While many of these environmental concerns are not specific to the indigenous populations of the world, it is important to acknowledge the fundamental interconnectedness of human rights, the environment, and indigenous peoples.[59] Because of this interconnectedness, human rights violations specifically tied to environmental abuses, like climate change, stand to affect indigenous peoples more than the population at large. As the United Nations has acknowledged, "while [climate change] affect[s] individuals and communities around the world, the effects . . . will be felt most acutely by those segments of the population who are already in

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53. HUNTER ET AL., s*upra* note 48, at 1432.

54. Who are Indigenous Peoples?, s*upra* note 37.

55. International Fund for Agricultural Development, Indigenous People, http://www.ifad.org/english/indigenous/index.htm (last visited Jan. 24, 2010).

56. Anaya & Williams, *supra* note 42, at 74.

57. Who are Indigenous Peoples?, s*upra* note 37; Svitlana Kravchenko, *The Myth of Public Participation in a World of Poverty*, 23 TUL. ENVTL. L.J. 33, 43-45 (2009).

58. MEINHARD DOELLE, FROM HOT AIR TO ACTION? CLIMATE CHANGE, COMPLIANCE AND THE FUTURE OF INTERNATIONAL ENVIRONMENTAL LAW 215 (2005).

59. *See e.g.,* Abate, *supra* note 36.

vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status, and disability."[60] Because the outlook for indigenous peoples regarding climate change is so bleak, failure to legally protect indigenous people's traditional environments ultimately threatens the survival of individuals in the indigenous community and potentially the viability of the community altogether.

III. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The Inter-American Human Rights System is the principal mechanism outside domestic law for protecting the human rights of people in North America, South America, Central America, and the Caribbean.[61] The Organization of American States (OAS) is the region's governing body and "principal multilateral forum for strengthening democracy, promoting human rights, and confronting shared problems . . . ."[62] More specifically, the Inter-American Commission on Human Rights (Commission) and the Inter-American Court of Human Rights (Court), both organs of the OAS, function as a two-tiered system for legally addressing alleged human rights violations that take place in the western hemisphere.[63] While both bodies are charged with the same goal—protecting human rights—the two bodies function in very different ways.[64] However, at its very core, "[t]he primary difference between the two bodies is that the Court has the authority to make judgments that are binding on member states, while the Commission only can publish recommendations."[65]

A. The Inter-American Commission on Human Rights

Under the Inter-American Human Rights system, all human rights complaints must initially be brought to the Commission.[66]

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60. U.N. Human Rights Council, *Human Rights and Climate Change*, at 2, U.N. Doc. A/HRC/10/L.30 (Mar. 20, 2009), *available at* http://ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_10_L_30.pdf.

61. *See* Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration of the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51, 52 (2009).

62. U.N. High Commissioner for Refugees, Organization of American States, http://www.unhcr.org/refworld/publisher/OAS.html (last visited Apr. 3, 2010).

63. Inter-American Commission on Human Rights, What is the IACHR?, *available at* http://www.cidh.oas.org/what.htm (last visited Jan. 24, 2010).

64. *Id*.

65. Inara K. Scott, Note, *The Inter-American System of Human Rights: An Effective Means of Environmental Protection?*, 19 VA. ENVTL. L.J. 197, 200-01 (2000).

66. DOELLE, *supra* note 58, at 231.

As such, there is no right for individual application to the Inter-American Court on Human Rights; claims may only be referred to the Court by the Commission in certain limited circumstances.[67] The Commission represents all member states of the OAS, thus all countries in North, South, and Central America are subject to the jurisdiction of the Commission.[68] Therefore, because of the broad jurisdiction granted to the Commission, "any person, group of persons or non-governmental entity may submit a petition, as long as the petition is with respect to an alleged violation of a human right recognized under the [Inter-American Human Rights] regime."[69] While there seems to be a broad grant of jurisdiction for matters being brought to the Commission, there are several limitations.[70] The most significant limitation is that before a petition may be brought to the Commission, the petitioner must have exhausted all potential remedies under domestic law.[71]

Once a claim is deemed as admissible by the Commission,[72] the Commission has the opportunity to conduct hearings, on-site investigations, and ultimately has the authority to render a decision on the merits of the claim.[73] After a decision on the merits, the Commission is required to submit a report of its findings to the accused Member State "[identifying] whether or not there have been violations [of human rights]."[74] In cases where a violation has been established, the Commission sets forth recommendations to be im-

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67. Scott, *supra* note 65, at 209.

68. Rules of Procedure of the Inter-American Commission on Human Rights, OAS Special Res., art. 1(2), 109th Sess., (Dec. 4-8 2000, amended Oct. 7, 2002 and Oct. 7, 2003) *available at* http://www.oas.org/xxxivga/english/reference_docs/Reglamento_CIDH.pdf (last visited Jan. 24, 2010) [hereinafter Rules of Procedure]. "[A]rticle 49 provides that the Commission has jurisdiction to receive and review petitions with respect to alleged violations by States who are not Parties to the American Convention on Human Rights. These petitions will be considered in the context of the American Declaration of the Rights and Duties of Man." DOELLE, *supra* note 58, at 234.

69. DOELLE, *supra* note 58, at 231. See *infra* Part III as to whether the right to a healthy environment or environmental protection is a recognized human right under the Inter-American Human Rights regime. Although the grant of standing to the Commission is extremely broad, the Commission will not entertain theoretical or hypothetical cases. Scott, *supra* note 65, at 207.

70. *See* Rules of Procedure, *supra* note 68, tit. II, ch. II. "A claim brought before the Commission therefore must be brought against a Member State bound by the substantive obligation under the IAHR regime that the claimant alleges has been violated." DOELLE, *supra* note 58, at 232.

71. Rules of Procedure, *supra* note 68, art. 31. However, the exhaustion of remedies provision is generally read favorably for the petitioner. DOELLE, *supra* note 58, at 233.

72. Admissible means that it meets the requirements of the Rules of Procedure of the Inter-American Commission on Human Rights. Rules of Procedure, *supra* note 68, tit. II ch. II.

73. *Id*.

74. DOELLE, *supra* note 58, at 234.

plemented by the State.[75] These recommendations are generally aimed at securing a full investigation of the facts, prosecuting and punishing those determined responsible, and taking action to repair the consequences suffered by the victim.[76] Subsequently, the Member State is given the opportunity to submit a report back to the Commission regarding its efforts to comply with the Commission's initial recommendations.[77] At this point, the Commission has the opportunity to refer cases to the Inter-American Court on Human Rights if the Commission feels the Member State has not done an adequate job of complying with its initial recommendations.[78] However, if the Commission chooses not to refer the case to the Court, the Commission will publish a final report of its findings and then may elect to "adopt a follow-up program to monitor the implementation of its recommendations or otherwise take measures to monitor whether the violation continues."[79]

B. The Inter-American Court on Human Rights

Because of the constraints placed on the Inter-American Court's jurisdiction, the Court is even less likely to hear a claim based on violation of a right to environmental protection. The Inter-American Court on Human Rights, which derives its jurisdictional authority solely from the American Convention on Human rights, is strictly limited to hearing disputes between OAS Member States that are parties to the Convention.[80] Therefore, only State Parties, consenting to the jurisdiction of the Court, and the Commission can submit a case for review by the Court.[81] However, much like an individual party, a State Party cannot circumvent the procedures of first petitioning the Commission before having their case potentially referred to the Court.[82] While the Court is bound by the American Convention on Human Rights, the Convention itself does not provide any direction as to which cases should

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75. Inter-American Commission on Human Rights, *The Human Rights Situation of the Indigenous People in the Americas*, Ch. I(2)(C), OEA/Ser.L/V/II.108, Doc. 62 (Oct. 20, 2000), *available at* http://cidh.org/Indigenas/TOC.htm.

76. *Id.*

77. *Id.*

78. DOELLE, *supra* note 58, at 234. Referral to the Court can only happen when the member state has consented to the jurisdiction of the Court by ratifying the American Convention on Human Rights. *Id.*

79. *Id.*

80. Scott, *supra* note 65, at 205.

81. *Id.* at 208-09

82. *Id.*

be referred by the Commission to the Court.[83] Through an advisory opinion, the Court has attempted to provide some guidance in the matter by stating that the Commission should refer cases with "controversial legal issues that have not been previously decided by the Court, conflicting domestic proceedings, and subject matter of special importance to the hemisphere."[84] While the bar to get a case before the Court can be quite high, the practical implications of doing so can be significant to successful parties, especially because of the Court's ability to assess reparations and issue binding judgments against member states.[85] Thus, parties who proceed with successful claims in front of the Court are more likely to have their violations meaningfully remedied.

C. Sources of Law Under the Inter-American Human Rights System

Under the Inter-American Human Rights regime, there are several potential sources of law, each carrying different weight, both in terms of the rights they protect and the Member States which are ultimately bound by their respective provisions. In short, there are three primary sources which ultimately bear on the Commission and the Court in their interpretation and protection of human rights with respect to the possibility of protecting the environmental human rights of indigenous peoples.[86] These three sources are: the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, and The San Salvador Protocol.[87] "Collectively, these provisions. . . are at the heart of any consideration of the state of recognition between the health of the environment and human rights under the [Inter-American Human Rights] regime."[88]

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83. *Id*.

84. *Id*. Environmental harms suffered by indigenous peoples as a result of climate change arguably fit within the guidelines prescribed by the Court in the advisory opinion.

85. *Id*. at 207; *see also* American Convention on Human Rights, *supra* note 4, arts. 67, 68. "Therefore, while a decision by the Commission may be significant for the development of international and human rights law, only a decision by the Court is likely to make an immediate difference for the victims." Scott, *supra* note 65, at 205. Additionally, "[c]leaning up environmental disasters can be costly. Unless a case goes before the Court, victims cannot receive reparations to allow them to heal damaged lands." *Id.*

86. DOELLE, *supra* note 58, at 236.

87. *Id.* Additionally, the Organization of American States Charter and the American Declaration on the Rights of Indigenous Peoples also provide guidance to the Inter-American Court with regard to human rights disputes. *Id*.

88. *Id*.

1. The American Declaration on the Rights and Duties of Man

The American Declaration on the Rights and Duties of Man[89] and the original OAS Charter[90] are the only agreements under the Inter-American Human Rights system which are binding on all OAS Member States.[91] The Declaration on the Rights and Duties of Man itself does not recognize a right to a healthy environment or a right to environmental protection.[92] However, the Declaration on the Rights and Duties of Man does recognize several rights that can be indirectly linked to environmental concerns and therefore can protect human environmental rights in limited circumstances.[93] These rights include: the right to life, liberty, and security of the person; the right to residence and movement; the right to preservation and well-being; the right to benefits of culture; and the right to property.[94] The Declaration on the Rights and Duties of Man serves as "the principle instrument for determining the applicable substantive rights for those countries in proceedings before the Inter-American Commission."[95]

2. The American Convention on Human Rights

Because the American Convention on Human Rights created the Inter-American Court of Human Rights, the Court is strictly bound by its provisions.[96] The American Convention on Human Rights (Convention) was adopted in 1969 and entered into force in 1978.[97] The Convention has ultimately been ratified by twenty-five of the thirty-five member states of the OAS.[98] Because the Convention established the Inter-American Court on Human Rights, not only does a member state have to ratify the Convention, but the state must also has to formally accept the jurisdiction of the Court

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89. American Declaration, *supra* note 7.

90. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (hereinafter "Charter"). The OAS charter does not specifically define the rights and duties of Member States, rather the OAS charter provides the procedure and structure that governs the OAS. DOELLE, *supra* note 58, at 236.

91. DOELLE, *supra* note 58, at 228.

92. *See* American Declaration, *supra* note 7.

93. DOELLE, *supra* note 58 at 235-36.

94. *Id*.

95. Anaya & Williams, *supra* note 42, at 41.

96. Scott, *supra* note 65, at 205

97. Andrew T. Guzman & Jennifer Landslide, *The Myth of International* Delegation, 96 CAL. L. REV. 1693, 1720 (2008).

98. DOELLE, *supra* note 58, at 229. Notably, neither the United States nor Canada have ratified the Convention. *Id*.

before that state would be subject to the court's jurisdiction.[99] Additionally, because claims that are eventually heard by the Court must first go through the Commission, the rights articulated in the Convention are also enforceable by the Commission to the extent that a member state has ratified the Convention.[100]

Much like the American Declaration on the Rights and Duties of Man, the Convention makes no mention of a right to environmental protection, but similarly does include rights that can be indirectly linked to environmental human rights protections for indigenous people.[101] Among those rights are: the right to life, the right to personal liberty and security, the right to property, the right to freedom of movement and residence, and the right to progressive development in accordance with the OAS Charter.[102] "Substantively, while there are clearly differences between the Declaration and the Convention, in practice they have often not resulted in different standards for human rights."[103]

> Although neither the American Convention nor the American Declaration specifically mentions indigenous peoples, both include general human rights provisions that protect traditional indigenous land and resource tenure. . . . Thus, provisions of the American Declaration [on the Rights and Duties of Man] and the American Convention [on Human Rights] affirm rights of indigenous peoples to lands and natural resources on the basis of traditional patterns of use and occupancy, especially when viewed in light of other relevant human rights instruments and international developments concerning indigenous peoples.[104]

However, even though the Convention does not purport to protect a right to environmental protection, it does not mean that the possibility is entirely cut off.

Importantly, Article 29 of the Convention provides "a mechanism that allows the American Convention to adapt itself to the evo-

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99. Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 991 (2008).

100. Cesare P.R. Romano, *The Shift from the Consensual to Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT'L L. & POL. 791, 819-20 (2007).

101. *See* American Convention on Human Rights, *supra* note 4, pt. I.

102. *Id.* arts. 4, 7, 21, 22, 26.

103. DOELLE, *supra* note 58, at 229.

104. Anaya & Williams, *supra* note 42, at 41.

lution of international law."[105] Article 29 states that the provisions of the Convention as a whole should not be interpreted as "precluding other rights or guarantees that are inherent in the human personality" or "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."[106] These provisions of the Convention require "the adoption of the trends in effect in international law concerning the violation of rights."[107] While the Convention does set forth human rights that are to be protected by the Commission and Court, it is not a static document, rather it is a document that specifically contemplates the evolution of law and the likelihood that new human rights issues will emerge and therefore need legal protection.

3. The San Salvador Protocol

The San Salvador Protocol[108] likely provides the greatest justification for recognizing and enforcing a right to environmental protection for everyone in the Inter-American Human Rights System. The San Salvador Protocol, adopted in 1988, entered into force in 1999 as an extension of the American Convention on Human Rights.[109] As an additional protocol to the American Convention on Human Rights, the San Salvador Protocol is only binding on states that have ratified it.[110] To date, only fourteen of the thirty-five member states have ratified the protocol.[111] However, even without ratification by all member states, the San Salvador Protocol potentially represents the beginning of a key shift in human rights law with respect to environmental protection. This protocol is the first, at least with respect to agreements that affect the Inter-American

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105. Taillant, *supra* note 28 (working paper at 32).

106. American Convention on Human Rights, *supra* note 4, art. 29(c), (d).

107. Taillant, *supra* note 28 (working paper at 32).

108. San Salvador Protocol, *supra* note 8.

109. Jennifer Cassel, Comment, *Enforcing Environmental Human Rights: Selected Strategies of US NGOs*, 6 NW. J. INT'L HUM. RTS. 104, 104 (2007).

110. *See* Tara J. Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 171, 337 (noting that "litigants wishing to invoke the Protocol of San Salvador must verify that the defendant state has in fact ratified the treaty, that their claims are limited to articles 8.1.a and/or 13, and that the alleged injury giving rise to the claim occurred *after* the Protocol entered into force for the state at issue" (emphasis added)).

111. *See* Organization of American States, General Information to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, http://www.oas.org/juridico/English/sigs/a-52.html (last visited Jan. 24, 2010). Most notably, the United States and Canada have not ratified the San Salvador Protocol. *Id*.

Human Rights regime, which specifically grants a right to health and a healthy environment.[112]

> While it is not clear from the Protocol whether the right to health and a healthy environment is seen as an extension or evolution of existing rights or alternatively as a new human right, there is a clear trend within the [Inter-American Human Rights] regime to recognize the right to a healthy environment as a human right.[113]

The right to a healthy environment granted by the Protocol is granted to all persons, not just indigenous peoples.[114] However, the delineated right to environmental protection is severely undercut by the limitations of the Protocol. Most importantly, while the San Salvador Protocol does highlight human rights regarding environmental preservation, the procedural components of the protocol limit an individual's ability to bring claims based on this right before the Inter-American Court.[115]

D. The Commission's and Court's Approach to Indigenous Rights and Environmental Harms

Recently, the Commission and Court have expanded their jurisprudence with regard to indigenous peoples.[116] Specifically, the Commission and Court have focused on protecting the property rights of indigenous peoples, noting that "the effective enjoyment of this land implies not only the need to protect the land as an economic unit, but also to protect the human rights of a collective community that bases its economic, cultural and social development on its relationship with its land."[117] This heightened awareness has proved beneficial in protecting indigenous human rights

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112. San Salvador Protocol, *supra* note 8, arts. 10-11 ("Everyone shall have the right to live in a healthy environment and to have access to basic public services." *Id*. art. 11. "States Parties shall promote the protection, preservation, and improvement of the environment." *Id.*). For the purposes of this paper, a right to a healthy environment and a right to environmental protection will be used interchangeably.

113. DOELLE, *supra* note 58, at 229-30.

114. *See* San Salvador Protocol, *supra* note 8, pmbl., art. 3.

115. *Id*. With respect to rights set out in the San Salvador Protocol, the Commission and in some cases the Court can only receive individual petitions alleging violations of rights based on articles 8(a) (protecting trade union rights) and 13 (protecting a right to education). *Id*. art. 19(6).

116. Isabel Madariaga Cuneo, *The Rights of Indigenous Peoples and the Inter-American Human Rights System*, 22 ARIZ. J. INT'L & COMP. L. 53, 54 (2005).

117. *Id*. at 56.

for communities like the Awas Tingni of Nicaragua and the Yanomami Indians of Brazil, both of which have prevented major private development efforts on their native lands through the Inter-American System.[118] However, the Commission's and Court's special attention to indigenous peoples stops short of recognizing a right to environmental protection.

Because neither the Declaration on the Rights and Duties of Man nor the American Convention on Human Rights explicitly mentions a right to environmental protection for the general population, much less indigenous peoples, and because the right to environmental protection is not considered a customary protection at the international level, the Inter-American Commission and Court have traditionally been very reluctant to hear claims based on solely environmental harms.[119] Therefore, the Commission and Court have historically been willing to hear and settle environmental disputes involving indigenous peoples only when they can be tied to a specifically enumerated right under the Declaration or Convention, such as the right to life or the right to property.[120] These types of claims often employ the transformation approach to environmental harms which "essentially strives to transform environmental claims into human rights claims."[121] Because the Commission and Court have strictly held to the rights articulated in the Declaration and the Convention, claims alleging only human rights violations strongly tied to protection from environmental

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118. *See generally id.*; Amiott, *supra* note 47.

119. *Cf.* Taillant, *supra* note 28 (working paper at 29-30) (noting that "[t]he [Inter-American Human Rights System] will heed a plea for a violation of environmental abuse, if and only if, the abuse can be shown to violate a human right in one of the legal instruments it defends").

120. *See* Amiott, *supra* note 47; *see generally* Mayangna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (Ser. C) no. 70 (Aug. 31, 2001), *available at* http://www.oas.org/dil/XXXV_Course_IACHR_Case_Mayagna_v_Nicaragua_Luis_Toro.pdf. Additionally, in the case of the Huarorani Indians of Ecuador, the Commission recognized the relationship between the environment and the right to life. "The realization of the right to life . . . in some ways [is] dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated." Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L./V/II.96, doc. 10 rev. 1, ch. VIII (Apr. 24, 1997), *available at* http://www.cidh.org/countryrep/ecuador-eng/Index%20-%20Ecuador.htm.

121. Taillant, *supra* note 28 (working paper at 31). In addition to the Transformation Approach, Taillant also provides reinterpretation and interpretation approaches as alternative means by which to get environmental cases before the Commission and Court. The Reinterpretation Approach "reinterprets basic human rights to include environmental rights." *Id.* An example would be broadening the understanding of a right to life so as to include the right to live in a healthy environment as part of the right to life. *Id.* The Interpretation Approach "allows for the inclusion of other national and international laws, treaties, declaration, etc. into the system." *Id.* (working paper at 32).

harms, like the claims alleged by the Inuit, have been unsuccessful.[122]

However, the Commission's and Court's limited treatment of environmental harms with regard to indigenous peoples does not completely foreclose the possibility of a right to environmental protection being established for indigenous peoples. The Inter-American Human Rights Regime is viewed as a progressive body willing to expand the scope of human rights protections for indigenous peoples.[123] Further, while not ultimately recognizing a right to environmental protection, the Commission "ha[s] previously recognized the connection between human rights and a state's environmentally hazardous actions."[124] Additionally, while ultimately rejecting the Inuit petition, the Commission was responsive to a request to conduct hearings on the connection between human rights and climate change.[125] Given the progressive views of the Commission and Court with regard to indigenous peoples, an increased commitment to environmental protection both regionally and internationally could stand to get the Inter-American Human Rights System over the hump and provide the basis for establishing an enforceable right to environmental protection.

IV. ESTABLISHING A RIGHT TO ENVIRONMENTAL PROTECTION FOR INDIGENOUS PEOPLE IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

As demonstrated, indigenous peoples stand to have their lives transformed dramatically as a result of climate change. Possibly the most frustrating aspect to indigenous communities, such as the Inuit, is the fact that there is simply nothing they can do to stop or even lessen the harm.[126] Domestically, legislative pleas to curb

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122. *See* Kravchenko, *supra* note 34, at 535.

123. Middaugh, *supra* note 28, at 181.

124. Timo Koivurova, *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects*, 22 J. ENVTL. L. & LITIG. 267, 287 (2007); *see* Yanomami Indians v. Brazil, Case 7615, Inter-Am. C.H.R., Report No 12/85, OEA/Ser. L/V/II.66, doc.10 rev. 1 (1984-85), *available at* http://www.cidh.oas.org/annualrep/84.85eng/Brazil7615.htm.

125. Andrew C. Revkin, *Inuit Climate Change Petition Rejected*, N.Y. TIMES, Dec. 16, 2006, *available at* http://www.nytimes.com/2006/12/16/world/americas/16briefs-inuitcomplaint.html (last visited Apr. 3, 2010). Press Release, Earthjustice, Inter-American Commission on Human Rights to Hold Hearing on Global Warming (Feb. 6, 2007), *available at* http://www.earthjustice.org/news/press/007/inter-american-commission-on-human-rights-Hearing-on-Global-Warming.html.

126. *See supra* Part I.

greenhouse gas emissions fall on deaf ears and legal challenges in courts are rarely enforced.[127] Similarly, the Inter-American Commission and Court currently maintain that they cannot address environmental harms resulting from climate change for indigenous peoples because a right to environmental protection does not exist or is not explicitly articulated by their binding sources of law.[128] However, Article 29 of the American Convention on Human Rights provides a glimmer of hope for indigenous peoples in the Inter-American Human Rights System. Article 29 demonstrates that the drafters of the American Convention on Human Rights left the door open to acknowledge the evolution of human rights and to therefore adjust their jurisprudence accordingly.[129] Given Article 29's expansionist properties, the key for establishing a right to environmental protection for indigenous peoples in the Inter-American Human Rights System will be demonstrating that such a protection is either "inherent in the human personality," or, alternatively, that failure to recognize such a right would unduly limit the effect of other international acts.[130]

A. The Post-Kyoto Framework: Mitigation and Adaptation

To demonstrate that environmental protection for indigenous peoples is "inherent in the human personality," there must be a clear global consensus that such a protection should be afforded. One opportunity for conveying such a global commitment to the Inter-American Commission and Court is through the framework being established to continue fighting climate change upon the expiration of the Kyoto Protocol. The United Nations Framework Convention on Climate Change (UNFCCC)[131] and the Kyoto Protocol[132] comprise the first and only international agreements aimed

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127. Abate, *supra* note 36, at 8-9; John S. Gray, *'A Glorious Mess': Congress' Creation if its Inaction Forces EPA to Regulate Climate Change Under Existing Laws*, HOUSTON LAWYER, Nov.-Dec. 2008, at 30, 31.

128. Taillant, *supra* note 28 at 29 (stating that "the [Inter-American Human Rights System] will heed a plea for a violation of environmental abuse, if and only if, the abuse can be shown to violate a human right in one of the legal instruments it defends.").

129. American Convention on Human Rights, *supra* note 4, art. 29(c), (d)

130. *Id*. Alternatively, one could argue that enforcement of a right to environmental protection for indigenous peoples or for the greater population could also be required if the right is viewed as customary international law. For a detailed argument that a right to a healthy environment has been elevated to customary international law, see John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283 (2000).

131. UNFCCC, *supra* note 5.

132. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

at the global reduction of greenhouse gas emissions to combat human-induced climate change.[133]

However, in its effort to combat climate change, the Kyoto Protocol has emphasized a mitigation approach. This approach identifies a strictly scientific measure, creating obligations for developed states to reduce greenhouse gas emissions by 2012.[134] Climate change reports that induced the Kyoto Protocol warned that failure to reduce greenhouse gas emissions would have devastating effects: glacial melting leading to sea-level rise, increased risk of extreme weather events, and negative impacts relating to food production capacities.[135] While the goals of the Kyoto Protocol are certainly commendable and necessary, the scientific nature of the targets and obligations created focus primarily on the long-term effects of a failure to address global warming.

In addition to the mitigation goals of the Kyoto Protocol, the UNFCCC provides for adaptation measures to be taken.[136] Adaptation measures seek to reduce or moderate the negative effects of climate change. Specifically, the UNFCCC sets out general adaptation guidelines for parties to follow, including "[f]ormulat[ing], implement[ing] . . . national and, where appropriate, regional programmes containing measures . . . to facilitate adequate adaptation to climate change."[137] The UNFCCC further provides more generally that parties shall "[c]ooperate in preparing for adaptation to the impacts of climate change."[138] However, the long-term mitigation focus of Kyoto has seemingly set aside the short-term adaptation goals of the UNFCCC and therefore also set aside the short-term harms felt by the indigenous communities as a result of climate change.[139] This is not to say that Kyoto does not recognize the incremental damage caused by climate change in the short term. Rather, the Kyoto Protocol's primary focus is to prevent catastrophic damage to the Earth that is estimated to occur by 2050 and 2100 at current greenhouse gas emission levels.[140]

Viewing Kyoto's mitigation efforts from the Inuit perspective demonstrates how the Kyoto compliance goals both aim to help long term and fall short in emphasizing the UNFCCC adaptation

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133. DOELLE, *supra* note 58, at xv.
134. *Id*. at xviii.
135. *Id*. at 17-23.
136. UNFCCC, *supra* note 5, arts. 4(e), 11, 41(b).
137. *Id.* art. 4(1)(b).
138. *Id*. art. 4(1)(e).
139. *See, e.g.*, Dr. James D. Ford, *Supporting Adaptation: A Priority for Action on Climate Change for Canadian Inuit*, 8 SUSTAINABLE DEV. L. & POL'Y 25, 27-29 (2008).
140. DOELLE, *supra* note 58, at 21-22.

goals aimed at protecting indigenous peoples in the immediate future. As discussed earlier, Kyoto's emissions goals strive to slow or even eliminate: (1) glacial melting and (2) loss of sea ice, both of which are of the utmost importance to the Inuit people. A failure to slow or eliminate glacial melting and sea ice losses over the long term would certainly force the Inuit to abandon their traditional arctic hunting lifestyle as the habitats of animals the Inuit rely on would be nonexistent. Further, without mitigation efforts, severe weather, sea-level rise, and coastal erosion would most likely force the Inuit inland, potentially rendering their traditional way of life non-existent. While not diminishing the necessity of Kyoto's long term goals, it is also easy to see how, without further adapting to the current effects of climate change, even with long term reductions in greenhouse gas emissions, indigenous peoples like the Inuit cannot be fully protected from the environmental harms of global warming.[141]

> Adaptation to climate change is vital: its impacts are already happening, and will worsen in the future. Shortages of water and food, increased strength of tropical storms, coastal inundation and changing spread of disease vectors will all lead to greater risks to health and life for billions of people, particularly in developing countries.[142]

While symbolically important, reducing emissions "will have limited impact on the speed, magnitude, or effects of climate change."[143] Adaptation, however, "offers a tangible way in which the impacts of current and future climate change can be reduced."[144] Even with successful mitigation efforts, indigenous ways of life will continue to be threatened absent increased adaptation measures.

Importantly, with the first commitment period of the Kyoto Protocol set to expire in 2012, efforts are currently underway to negotiate Kyoto's successor protocol.[145] To demonstrate a global

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141. *See supra* Introduction.

142. Asia-Pacific Gateway to Climate Change, *What is Integrated Adaptation to Climate Change?* http://www.climateanddevelopment.org/Adaptation/index.html (last visited Apr. 3, 2010).

143. Ford, *supra* note 139, at 28.

144. *Id.*

145. *See* Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, art. 3(1); United Nations Framework Convention on Climate Change, Kyoto Protocol, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Jan. 24, 2010); Robert Stavins, *Three Pillars of a New Climate Pact*, BELFER CENTER, Sept. 21, 2009,

commitment to environmental protection both for indigenous peoples and the general population, Kyoto's successor protocol needs to more fully develop the adaptation goals previously set out in the UNFCCC. In addition, the successor document should strive to create obligations aimed at further mitigating greenhouse gas emissions. A post-Kyoto framework which more fully develops adaptation measures and continues mitigation efforts demonstrates a commitment to both long and short term goals by the global community to combat the environmental effects of climate change. It therefore also signals to the world a consensus in the international community that environmental protection measures must be taken to both adapt and mitigate.

Current discussions indicate that adaptation strategies will play a larger role in post-Kyoto negotiations. The UNFCCC and the Action Plan from the Conference of Parties to the UNFCCC have both recently called for "enhanced action on adaptation" with regards to a post-Kyoto framework.[146] However, few adaptation strategies, like the Bali Action Plan, mention a need for judicial access and enforcement for indigenous peoples suffering from the effects of climate change. Adopted in 2007, the Bali Action Plan[147] suggests several adaptation measures. These measures include risk management and risk reductions strategies, providing incentives to countries for implementing adaptation measures, and developed countries sending support in the form of financial and technological assistance to developing countries.[148] While not diminishing the necessity of such adaptation efforts, a post-Kyoto framework that does not articulate the need for judicial access for indigenous peoples will fall woefully short of providing a meaningful adaptation strategy. Such access will be of the utmost importance for indigenous peoples moving forward, especially in cases where national governments fall short in providing adequate assistance to indigenous communities having to relocate or alter their

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http://belfercenter.ksg.harvard.edu/analysis/stavins/?p=274 (last visited Apr. 3, 2010).

146. Ford, *supra* note 139, at 27.

147. The Bali Action Plan is the UN process that charts the course for a new negotiating process under the UNFCCC with the aim of completing a post-Kyoto climate change response framework by 2009. Conference of the Parties to the Thirteenth Session of the United Nations Framework Convention on Climate Change, Bali, Indon., Dec. 3-15, 2007, *Report of the Conference of the Parties: Decisions Adopted by the Parties*, 3-6, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008), *available at* http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf. To learn more about the plan, please consult United Nations Development Programme [UNDP], Environment & Energy Group, *The Bali Action Plan: Key Issues in the Climate Negotiations, Summary for Policy Makers* (Sept. 2008) (*prepared by* Chad Carpenter), *available at* http://www.undp.org/climatechange/docs/UNDP_BAP_Summary.pdf. (hereinafter "United Nations Development Programe")

148. *See* United Nations Development Programme *supra* note 147 at 10-11.

traditional ways of life in order to meet the demands of a changing environment. An articulated need for judicial access in a post-Kyoto framework stands to significantly aid adaptation efforts, as it would strengthen claims for judicial access and ultimately judicial enforcement for a segment of the population which arguably experiences the effects of climate change more than the general population.

Such an adaptation measure articulated in the post-Kyoto framework could potentially have profound effects on the Inter-American Commission's and Court's jurisprudence, as it would become increasingly difficult to argue that environmental protection for indigenous peoples is not "inherent in the human personality". Given the vast international cooperation needed to bring the Kyoto Protocol into existence, similar international cooperation will be needed to effectuate a meaningful plan to continue combating climate change. Therefore, a strong commitment to environmental protection for indigenous peoples by the post-Kyoto framework would suggest that by not enforcing such a right in the Inter-American Human Rights System would be to preclude a guarantee that is "inherent in the human personality."

B. Textual Support: Moving Past Moral Force

Alternatively, to demonstrate that a right to environmental protection exists for indigenous peoples under the auspices of Article 29 of the American Convention on Human Rights, the Court and Commission would need to acknowledge that failure to do so would unduly limit the effect of other international acts. To reach such a conclusion, these bodies would need to draw on textual support for a right to environmental protection in the international community. While less than fifteen years ago there appeared to be little to no textual support for such a right, recent developments in international law, like the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, demonstrate a steady increase in textual acknowledgement of such a right. Further, at the regional level, in addition to the San Salvador Protocol, the potential adoption of the American Declaration on the Rights of Indigenous Peoples only stands to strengthen the already significant textual support for establishing and protecting a right to a healthy environment for indigenous peoples in the Inter-American Human Rights System.

1. The United Nations Declaration on the Rights of Indigenous Peoples

On September 13, 2007 the United Nations adopted the Declaration on the Rights of Indigenous Peoples. [149] Les Malezer, Chair of the International Indigenous Peoples' Caucus, described the significance of the Declaration in a statement made to the UN General Assembly upon adoption of the Declaration:

> The Declaration does not represent solely the viewpoint of the United Nations, nor does it represent solely the viewpoint of the Indigenous Peoples. It is a Declaration which combines our views and interests and which sets the framework for the future. It is a tool for peace and justice, based upon mutual recognition and mutual respect.[150]

Although somewhat indirect, the UN Declaration demonstrates the international community's recognition of the special protection needed for indigenous peoples. Article 26 specifically provides that "[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[151] Article 26 goes on to state that "[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."[152] While this is not an explicit grant of environmental protection, the provisions of Article 26 demonstrate an understanding of the relationship that indigenous communities have with their traditionally owned lands. When read in the light of prevailing environmental concerns like climate change, it is easy to see the interrelationship and interdependence of land rights and the environment; specifically it can be seen how environmental abuses threaten indigenous people's ability to rely on their traditionally owned lands.

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149. U.N. Declaration, *supra* note 6. The Declaration was passed by an overwhelming majority with 143 votes in favor and only 4 votes case against. U.N. GAOR, 61st Sess., 107th plen. mtg. at 19, U.N. Doc. A61/PV.107 (Sept. 13, 2007). Parties voting against adoption were Canada, United States, Australia and New Zealand. *Id.*

150. International Work Group for Indigenous Affairs, Declaration on the Rights of Indigenous Peoples, http://www.iwgia.org/sw248.asp (last visited Jan. 24, 2010).

151. U.N. Declaration, *supra* note 6, art. 26(1).

152. *Id*. art. 26(2).

2. The American Declaration on the Rights of Indigenous Peoples

Possibly the most important step toward acknowledging a right to environmental protection for indigenous peoples in the Inter-American Human Rights System is the potential adoption of the American Declaration on the Rights of Indigenous Peoples. The Draft Declaration was approved by the Inter-American Commission on Human Rights in 1997; however, the Draft Declaration has not yet been adopted and therefore has not been made available for ratification by Member States.[153] Similar to the San Salvador Protocol, the proposed American Declaration on the Rights of Indigenous Peoples specifically provides a right to environmental protection.[154] However, "[w]ith respect to environmental rights, the declaration [extends] further than the San Salvador Protocol in that it recognizes the special relationship between indigenous peoples and the environment and their cultural, social and economic dependence on the environment."[155] Even if adopted, it is possible that Member States, like the United States and Canada, will not ratify the Declaration[156]

Unfortunately, without ratification by a member state, neither the United Nations Declaration on the Rights of Indigenous Peoples nor the American Declaration on the Rights of Indigenous Peoples is binding law.[157] However, adoption of this Declaration in conjunction with other international agreements, specifically the recently passed United Nations Declaration on the Rights of Indigenous Peoples, stands to have a profound effect on the jurisdiction of the Inter-American Commission and Court alike. With regard to the UN Declaration, the International Working Group for Indigenous Affairs has observed that "[w]hile this Declaration will not be legally binding on States, and will not, therefore, impose legal obligations on governments, the declaration will carry considerable moral force." [158]

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153. Abate, *supra* note 36, at 39.

154. American Declaration, *supra* note 7, art. 18.

155. DOELLE, *supra* note 58, at 230.

156. Indian Law Resource Center, *Scant Progress of OAS Declaration on the Rights of Indigenous Peoples*, INDIGENOUS NOTES, 2008, http://www.indianlaw.org/node/293. ("The United States and Canada have stated a refusal to approve a strong declaration at this time, reflecting the same position they took in refusing to vote in favor the [sic] UN Declaration on the Rights of Indigenous Peoples . . . .").

157. *Id.*

158. International Work Group for Indigenous Affairs, Background Information on the Declaration on the Rights of Indigenous Peoples, http://www.iwgia.org/sw356.asp (last visited Jan. 24, 2010).

It is important not to underestimate the role that moral force plays in the development of international law. As "soft law,"[159] documents such as the UN Declaration and the American Declaration on the Rights of Indigenous Peoples are not legally binding on member states. However, it is often "soft law" which helps communicate the standards of good behavior that are expected from a "well-governed State."[160] These agreements serve "as reference models which anticipate internationally-grounded State obligations emerging in the near future."[161] Without textually rooted international acts displaying a commitment to the establishment of a right to environmental protection for indigenous peoples, the Inter-American Commission and Court are not defying Article 29's mandate. Specifically, while only "soft law," international acts, such as the UN and American Declarations on the Rights of Indigenous Peoples and the San Salvador Protocol, provide the basis for arguing that failing to enforce a right to environmental protection for indigenous peoples unduly limits the effect of these acts.

Using the Inuit's struggle with climate change as an example, it is easy to see how the Inter-American Commission and Court's failure to affirmatively protect, or even recognize, a right to environmental protection for indigenous peoples severely limits the effect of the UN and American Declarations on the Rights of Indigenous Peoples and the San Salvador Protocol. At the broadest level, the San Salvador Protocol states that everyone has the right to live in a healthy environment and further states that "State Parties shall promote the protection, preservation, and improvement of the environment."[162] Yet the Inuit are watching sea ice melt away and their coasts erode. Regrettably, they are forced to sit idly by as nations continue to emit greenhouse gases, an action that is arguably in direct opposition to the goals of protection, preservation, and improvement. The proposed American Declaration

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159. Soft law refers to "international obligations that, while not legally binding themselves, are created with the expectation that they will be given some indirect legal effect through related binding obligations under either international or domestic law." Timothy Meyer, *Soft Law as Delegation*, 32 FORDHAM INT'L L.J. 888, 890 (2009). Further, "the Draft U.N. Declaration will only be a nonbinding, 'soft law' instrument. However, it is upon this document that indigenous peoples rely in order to safeguard their rights and interests and to improve their status in international law." Alessandro Fodella, *International Law and the Diversity of Indigenous Peoples*, 30 VT. L. REV. 565, 588 (2006). Similarly, "[a]lthough the [American] Declaration is properly characterized as 'soft law,' the principles it states figure prominently in the decisions of the Commission and Court, and may ultimately become binding as customary international law." Jaksa, *supra* note 50, at 203-04 (citation omitted).

160. Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 434 (1990).

161. *Id*.

162. San Salvador Protocol, *supra* note 8, art. 11.

on the Rights of Indigenous Peoples specifically grants indigenous peoples "the right to the conserve, restore, recover, manage, use, and protect the environment and to the sustainable management of their lands, territories and resources."[163] Yet the Inuit cannot conserve, restore, or protect those resources most fundamental to their survival. As a result of climate change, this group is losing the productive capacity of their lands.

Finally, the UN Declaration provides "the right to own, use, develop and control the lands, territories and resources that [Inuit] possess by reason of traditional ownership."[164] Yet it is impossible for the Inuit to use and develop lands that no longer exist because of the effects of climate change. By not recognizing or enforcing a right to environmental protection, the Inter-American Commission and Court are not only limiting the effect of these international acts, but also rendering these provisions effectively meaningless.

CONCLUSION

Establishing that a right to environmental protection for indigenous peoples exists would be significantly strengthened by a post-Kyoto framework that advances the adaptation principles set forth in the UNFCCC in addition to continuing mitigation efforts. Most importantly, an articulated commitment to environmental protection for indigenous peoples in conjunction with articulated need for judicial access and enforcement could significantly alter the way regional human rights systems, like the Inter-American Commission and Court, choose to handle the adverse effects of climate change. Specifically, given the overarching international cooperation surrounding the Kyoto Protocol and assuming a continued cooperation in Kyoto's successor, an emphasis on adaptation principles in the post-Kyoto regime demonstrates that protecting the environmental rights of indigenous peoples is inherent in the human personality.

Further, the textual support presented by the recently adopted United Nations Declaration on the Rights of Indigenous Peoples, the proposed American Declaration on the Rights of Indigenous Peoples, and the San Salvador Protocol demonstrates that failure to recognize such a right in the Inter-American Commission and Court not only unduly limits the effect of other international acts but has the potential to render certain provisions worthless. There-

163. American Declaration, *supra* note 7, art. 18(2).
164. U.N. Declaration, *supra* note 6, art. 26(2).

fore, a post-Kyoto framework with an emphasis on both adaptation and mitigation in conjunction with the textual support provided by international acts, such as the UN Declaration and the American Declaration on the Rights of Indigenous Peoples, provide a concrete example as to how Article 29 can be used to establish a right to environmental protection for indigenous peoples. As such, an established right to environmental protection for indigenous people should arguably expand the jurisprudence of the Inter-American Commission and Court, and ultimately provide a meaningful channel for redressing harms already suffered and potentially an avenue for minimizing the impacts of climate change in the immediate future.

A TURN FOR THE WORSE: IS THERE ANY HOPE FOR A "BENEFIT OF THE DOUBT" STANDARD IN ASYLUM CREDIBILITY ASSESSMENTS POST-REAL ID ACT?

ANA MARIA BARTON*

Asylum law practitioners face few challenges more difficult than clearing the evidentiary hurdles standing between their asylum-seeking clients and the formidable immigration judge controlling their case. The greatest of these hurdles is that of garnering initial credibility in the immigration judge's eyes. Unfortunately, the United States has made this task even more daunting for asylees by adopting the inflexible standards embodied in the REAL ID Act of 2005. By contrast, the Office of the United Nations High Commissioner for Refugees (UNHCR) promotes affording asylum applicants the "benefit of the doubt." This paper compares these two models for determining asylum credibility, and proposes ways in which U.S. immigration judges can practice giving the benefit of the doubt under the constraints of the new legislation.

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INTRODUCTION

It is no small secret that credibility assessments in asylum and refugee law are perhaps the most crucial and outcome-determinative element of an asylum applicant's case.[1] Credibility is the initial hurdle that must be cleared before the merits of an applicant's case are ever reached. Yet, credibility calculations are some of the most unpredictable and elusive determinations that an immigration judge (IJ) must make, due to the inherently subjective nature of what ultimately conveys trustworthiness and believability in an applicant's asylum story. It is sometimes difficult to understand why one applicant may be credible while the next, describing virtually the same pattern of persecution, is not. The challenge of consistency in making these decisions[2] is surely not taken lightly from either side of the bench.

Concerns over the significant weight that credibility plays in asylum cases and the lack of uniformity in measuring this quality are not unique to the United States—these concerns have been registered internationally as well. The Office of the United Nations High Commissioner for Refugees (UNHCR), in response to requests by state parties to the 1951 United Nations Convention relating to the Status of Refugees (Refugee Convention),[3] provides guidelines for implementing international refugee law at a national level in its *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Handbook).[4] The Handbook, rooted in the spirit of the Refugee Convention, takes into account the humanitarian concerns at the heart of refugee law.[5] As such,

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1. Gregory Laufer & Stephen Yale-Loehr, *Straining Credibility: Recent Developments Regarding the Impact of the REAL ID Act on Credibility and Corroboration Findings in Asylum Cases*, 12 BENDER'S IMMIGR. BULL. 74, 74 (2007). *See also* Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 129 (2006).

2. *See* Tania Galloni, *Keeping it Real: Judicial Review of Asylum Credibility Determinations in the Eleventh Circuit After the REAL ID Act*, 62 U. MIAMI L. REV. 1037, 1040-42 (2008).

3. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

4. U.N. HIGH COMM'R FOR REFUGEES [UNHCR], HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter HANDBOOK], *available at* http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf.

5. Brian Gorlick, *Common Burdens and Standards: Legal Elements in Assessing*

the UNHCR espouses a liberal and asylum-applicant-friendly standard, erring on the side of giving asylum seekers "the benefit of the doubt" when they are unable to meet evidentiary burdens.[6]

Despite this articulated international standard, however, the United States has never explicitly embraced the notion of giving asylees the benefit of the doubt,[7] and U.S. courts have instead resorted to creating their own divergent tests and precedent.[8] Recently, the separation between U.S. and international practice has grown even wider due to national security concerns. In reaction to the ease with which terrorists gained access to the United States via asylum status, Congress enacted the REAL ID Act of 2005, and for the first time set into law uniform credibility guidelines to be applied in asylum cases.[9] Proponents of the REAL ID Act claim that Congress simply codified the existing common law,[10] but in doing so, it flatly eliminated alternative credibility standards that had been developed among federal sister circuit courts. Most importantly, though, for issues where there was a split in precedent, the REAL ID Act consistently adopted the more stringent position.[11] The effect this law will have on the future of credibility determinations, if any, has generated a lot of scholarly debate[12] and is beginning to come to light as the first wave of cases under the REAL ID Act is decided.

This paper juxtaposes the practice of asylum credibility determinations within the United States with the internationally recognized methods endorsed by the UNHCR; more specifically, it pits the REAL ID Act against the UNHCR's "benefit of the doubt" standard.[13] As will be demonstrated, key changes in U.S. law under the REAL ID Act push the United States further away from

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Claims to Refugee Status 2 (UNHCR Reg'l Office for the Baltic and Nordic Countries, Working Paper No. 68, 2002) *available at* http://www.unhcr.org/research/RESEARCH/3db7c5a94.pdf.

6. HANDBOOK, *supra* note 4, ¶ 196.

7. *See* Joanna Ruppel, *The Need For a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1, 38-39 (1992).

8. Galloni, *supra* note 2, at 1037-53.

9. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-23 (codified as amended in scattered sections of 8 U.S.C. and 49 U.S.C. (2006)); H.R. REP. NO. 109-72, at 160-61, 166-68 (2005), *reprinted in* 2005 U.S.C.C.A.N. 285-87, 291-94.

10. H.R. REP. NO. 109-72, at 165-67, *reprinted in* 2005 U.S.C.C.A.N. 290-93.

11. *See infra* Part II.

12. *See, e.g.*, Deborah Anker et al., Any Real Change? Credibility and Corroboration After the REAL ID Act, in IMMIGRATION & NATIONALITY LAW HANDBOOK 357, 357 (2008) ("[T]he bill's authors largely encoded existing case law relating to credibility and corroboration."); Cianciarulo, *supra* note 1, at 103 ("[T]he Real ID Act has the potential to have a severely negative impact on the U.S. asylum system . . . .").

13. This paper only addresses IJ credibility assessments as reviewed by federal circuit courts; it does not discuss credibility analyses that take place during other stages of refugee and asylum law, such as in expedited removals and credible fear interviews.

parity with the more generous protocol of giving asylum seekers the benefit of the doubt. Where there used to be judicial flexibility and rigorous review of unfavorable credibility rulings, the REAL ID Act now provides IJs with more grounds on which to uphold adverse holdings.

The first section of this paper describes the UNHCR's benefit of the doubt standard. Because the United States is a party to the Refugee Convention[14] and U.S. courts have looked to the Handbook as persuasive authority,[15] it is the base against which the United States' deviation will be measured. Next, the key legal changes for asylum seekers in the wake of the REAL ID Act are highlighted by way of statutory language and relevant case law. The third section then compares where the United States currently stands in relation to the benefit of the doubt standard, and makes suggestions for how to shrink the growing gap between U.S. and international law. In the fourth and final section, this paper explains why it is still better policy for the United States to follow the benefit of the doubt framework rather than the REAL ID Act's harsher credibility criteria.

I. THE BENEFIT OF THE DOUBT: AN INTERNATIONAL STANDARD

Refugee and asylum law is a relatively new body of international law which developed out of the need to address changing international circumstances giving rise to groups of displaced persons. The United Nations confronted this evolving trend with the 1951 Refugee Convention[16] and 1967 United Nations Protocol relating to the Status of Refugees (Protocol).[17] Having ratified the Protocol in 1968, the United States incorporated much of its language into Congress' 1980 Refugee Act[18] in order to comply with the international treaty.[19] However, the Refugee Convention is silent on how state parties must internalize its provisions procedurally; it leaves the design and implementation of refugee law to individual governments.[20] In an effort to create consistent standards and approaches to refugee law across state parties, the UNHCR espouses international standards for assessing refugee

14. Ruppel, *supra* note 7, at 30-31.
15. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987).
16. United Nations Convention Relating to the Status of Refugees, *supra* note 3.
17. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577, 606 U.N.T.S. 267.
18. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. (2006)).
19. Ruppel, *supra* note 7, at 30-31.
20. Gorlick, *supra* note 5, at 1.

and, by extension, asylum status.[21] Clearly, it is not possible to have identical mechanisms of refugee law around the world, but the UNHCR has grown in importance as an authority in creating a common understanding of what the Refugee Convention requires of its member states.[22] A principal way in which the UNHCR has furthered this goal of international harmony is through the dissemination of its policy papers and Handbook, which was prepared in order to assist parties to the Refugee Convention and has been recognized as persuasive authority by several judicial systems, including the U.K. House of Lords[23] and U.S. federal courts.[24]

Much of the UNHCR's legal doctrine is modeled after and influenced by the development of international human rights law, which overlaps with refugee law in many respects.[25] The UNHCR emphasizes that, as a general matter, refugees should be afforded a more lenient standard when it comes to meeting legal burdens of proof in establishing their status in a foreign country: "the humanitarian nature of international refugee law and the obligation of states to make good on the protection of refugees *a fortiori* requires that the refugee definition and determination procedures should be interpreted and applied in a liberal manner."[26] The burden naturally falls on an applicant to show why he or she meets the definition of refugee,[27] but the special circumstances from which a refugee emerges should be taken into account as well as the evidentiary limitations that necessarily follow in the aftermath of a hurried escape from persecution. One way in which to do this is by granting refugees and asylum seekers the benefit of the doubt.

The UNHCR adopts this benefit of the doubt standard throughout its Handbook. Paragraph 196 states that

> [o]ften . . . an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. . . . In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.[28]

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21. *Id.*
22. *Id.* at 2.
23. *Id.*
24. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
25. Gorlick, *supra* note 5, at 1.
26. *Id.* at 3.
27. HANDBOOK, *supra* note 4, ¶ 196.
28. *Id.* The notion of leniency for evidentiary burdens is reiterated in Paragraph 197: "The requirement of evidence should thus not be too strictly applied in view of the difficulty

Paragraph 203 goes on to state that "[a]fter the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. . . . It is therefore frequently necessary to give the applicant the benefit of the doubt."[29] The Handbook then summarizes what an examiner should do when it comes to establishing facts, stressing that he or she should "[a]ssess the applicant's credibility and evaluate the evidence (if necessary giving the applicant the benefit of the doubt), in order to establish the objective and the subjective elements of the case."[30] The UNHCR does, however, limit granting the benefit of the doubt to those situations where the presented evidence comports with generally known facts and the examiner is satisfied with the applicant's general credibility.[31]

Importantly, this article would be remiss not to recognize that the Handbook does not explicitly call for the application of the benefit of the doubt standard when making credibility determinations per se.[32] However, the reasoning for applying the benefit of the doubt standard to evidentiary burden issues should extend with the same vigor to the credibility stage of an asylum case. The UNHCR already implicitly endorses leniency when it comes to credibility, not only through the spirit of the treaty, but also in its language: "[i]f we accept that the concept of 'persecution' should be interpreted and applied in a generous manner, then there is an inherent logic in not setting too high of a standard in order for a victim of persecution to *prove* his or her claim."[33] An essential element of a successful asylum seeker's claim is that he or she be deemed credible;[34] therefore, by extension of the UNHCR's aforementioned vision, the relevant credibility standard should not be too great. Because the benefit of the doubt is already at play when there is a lack of evidence, it is easily transposed to the question of credibility. Moreover, certain training materials created by the UNHCR "provide that '[w]hen the credibility of [a] claimant is in

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of proof inherent in the special situation in which an applicant for refugee status finds himself." *Id.* ¶ 197.

29. *Id.* ¶ 203.

30. *Id.* ¶ 205(b)(ii).

31. *Id.* ¶ 204.

32. A UNHCR report states that "[g]iven the difficulty or impossibility in establishing all the facts of a refugee claim, and in consideration that the claim presented satisfies the refugee definition, then the benefit of the doubt may be properly exercised *provided a certain credibility threshold is met*." Gorlick, *supra* note 5, at 9 (emphasis added). Thus it follows from this statement that the benefit of the doubt is afforded to those asylum seekers that have already satisfied a credibility minimum.

33. *Id.* at 3.

34. *Id.* at 12.

doubt, the claimant will receive the benefit of the doubt.' "[35]

In addition, the UNHCR is explicit when it comes to disapproving of strict methodologies for determining credibility, calling instead for a balancing test that includes a number of factors such as reasonableness, coherence, internal and external consistency of a story, and demeanor.[36] Although particular aspects of a case may, upon first impression, seem to reduce credibility, they "may be capable of rational explanation and should be assessed in each individual case in the broader context of refugee status determination."[37] Further, the UNHCR specifically rejects basing an adverse credibility finding on immaterial inconsistencies: "Inconsistencies, misrepresentations or concealment of certain facts should not lead to a rejection of the asylum application where they are not material to the refugee claim."[38] This approach mirrors giving an applicant the benefit of the doubt and being receptive to clarifications. This open-mindedness should be afforded to instances of questionable behavior by an applicant, such as the withholding of personal information when initially asked, the destruction of passports and other identification, and the inability to list other countries visited while in transit.[39]

Taken as a whole, the international standard is one of understanding and leniency towards refugee and asylum applicants. Even though the UNHCR does not couch its credibility guidelines in terms of giving the benefit of the doubt, that is exactly what it seems to encourage.[40] It is not difficult to see that the Refugee Convention already leans toward a more inclusive definition of who counts as a refugee.[41] Without drowning out the importance and role of credibility, the UNHCR suggests that the examiner of an applicant's case should exercise discretion in favor of the asylum seeker rather than against him.

II. THE REAL ID ACT: A U.S. CREDIBILITY STANDARD

The track record of credibility determinations in the United States is not one of consistency but one that more closely resem-

35. Ruppel, *supra* note 7, at 32 (quoting The Interview and the Decision-Making Process, *in* Supplementary Refugee/Asylum Adjudication Guidelines on Refugee Definition and Assessment of Credibility for INS Training Oct 1989, app. A, ¶ 13 (UNHCR, Washington, D.C.).

36. Gorlick, *supra* note 5, at 12-13.

37 *Id.* at 13.

38. *Id.*

39. *Id.* at 12.

40. *See* Ruppel, *supra* note 7, at 32.

41. *See* United Nations Convention Relating to the Status of Refugees, *supra* note 3.

bles jurisdictional roulette. Courts and individual judges have developed varying patterns of assessing credibility, some of which are significantly harsher for asylum applicants than others.[42] This variation is possible because, until recently, IJs operated without set credibility guidelines and under minimal judicial review.[43] The ad hoc nature of these determinations is largely a function of the "personal biases and degrees of cross-cultural competency" of IJs as well as "the amount of persuasion required by each."[44] Ultimately, "[i]t is within the adjudicator's discretion either to resolve her doubts in favor of the applicant or to reject the claim."[45]

Concerns over the consistency and accuracy of credibility findings in asylum adjudication gave rise to the newest wave of legislation on the matter.[46] This stage of asylum proceedings has been reformed under the REAL ID Act of 2005,[47] as signed into law by the President on May 11, 2005, and applies to all asylum cases filed after that date.[48] The REAL ID Act, however, is really a product of national security concerns. One of its primary goals is to eliminate fraudulent asylum claims and thereby prevent terrorists from using asylum as a means of access to the United States.[49]

The REAL ID Act has not escaped controvery. While proponents of the REAL ID Act state that it merely codifies the common law,[50] many organizations protested the passing of the bill because of the detrimental effect it would have on valid asylum claimants.[51] The consequences of this new law are expected to hit hardest on

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42. Galloni, *supra* note 2, at 1040-42. Notorious for its harshness, the Eleventh Circuit is "the only circuit court never to have reversed an adverse credibility finding in a published opinion" as of the writing of this paper. *Id.* at 1038.

43. Ruppel, *supra* note 7, at 3.

44. *Id.* at 4.

45. *Id.* at 26.

46. H.R. REP. NO. 109-72, at 167 (2005), *reprinted in* 2005 U.S.C.C.A.N. 292; Anker et al., *supra* note 12, at 357.

47. The REAL ID Act encompasses more than amendments to asylum credibility proceedings, but the other provisions are not relevant for the purposes of this paper and so will not be discussed.

48. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-23 (codified as amended in scattered sections of 8 U.S.C. and 49 U.S.C. (2006)); Laufer & Yale-Loehr, *supra* note 1, at 74.

49. Anker et al., *supra* note 12, at 357; MICHAEL JOHN GARCIA, ET AL., CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 2 (2005) [hereinafter CRS REPORT], *available at* http://www.fas.org/sgp/crs/homesec/RL32754.pdf. The House Report which discusses the Act states: "As the 9/11 Commission determined, terrorist aliens have exploited our asylum laws to enter and remain in the United States." H.R. REP. No. 109-72, at 160 (2005), *reprinted in* 2005 U.S.C.C.A.N. 285.

50. Anker et al., *supra* note 12, at 357.

51. Letter from over eighty organizations and individuals, to Senate Conferees (Apr. 21, 2005) (urging the Senate to oppose Sections 101 and 105 of the REAL ID Act), *available at* http://www.humanrightsfirst.org/asylum/realid/pdf/sign-on-letter-042105.pdf.

bona fide asylum seekers,[52] who already have an uphill battle to prove their cases, starting from the moment they are detained.[53] Furthermore, the hurried manner in which the REAL ID Act was pushed through the House of Representatives before reaching the Senate, which in turn considered attaching the bill to a supplemental appropriations bill, raised brows as this may have left little time for due consideration before being passed.[54]

The remainder of this section describes the differences in asylum credibility standards in the United States pre- and post-REAL ID Act. The comparison spotlights (1) the basic credibility factors available to an IJ in reaching a determination, (2) the extent to which corroborative evidence may be required, and (3) judicial review of these holdings. Although much of the language of the REAL ID Act indeed reflects the existing asylum common law, the legislation embodies a handful of significant departures from preceding practices which will result in an undeniable negative effect upon the fate of future asylum seekers—an effect that moves the United States away from parity with the UNHCR.

A. Credibility Factors

Prior to the REAL ID Act of 2005, there were no set standards for how to determine an asylum applicant's credibility; rather, the criteria emanated from the Board of Immigration Appeals (BIA) and federal court case law.[55] The following list of factors were most often cited as indicative of credibility: demeanor, specificity of the applicant's testimony, internal consistency of statements (written and oral), plausibility of the story, consistency with the commonly known facts and conditions of the country of origin, as well as other evidence presented in the case.[56]

In contrast to the loosely structured system of determining credibility that had been developed by the courts, the REAL ID Act lays out a concrete method of analysis. It includes all of the factors previously relied upon by IJs, but organizes these criteria under a

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52. *See* AMNESTY INT'L, USA, THE REAL ID ACT OF 2005 AND ITS NEGATIVE IMPACT ON ASYLUM SEEKERS, ISSUE BRIEF, (2005), *available at* http://www.amnestyusa.org/uspolicy/pdf/realid_0305.pdf.

53. Rachel L. Swarns, *U.N. Report Cites Harassment of Immigrants Who Sought Asylum at American Airports*, N.Y. TIMES, Aug. 13, 2004, at A11, *available at* http://www.nytimes.com/2004/08/13/world/threats-responses-immigration-un-report-cites-harassment-immigrants-who-sought.html. A United Nations study found that "many inspectors held negative views of asylum seekers, viewing them as frauds . . . result[ing] in instances where inspectors intimidated asylum seekers or treated them with derision." *Id.*

54. AMNESTY INT'L, USA, *supra* note 52.

55. Anker et al., *supra* note 12, at 361.

56. *Id.* at 361; Ruppel, *supra* note 7, at 6.

totality of the circumstances test:

> Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (*whenever made and whether or not under oath*, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, *without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim*, or any other relevant factor.[57]

Naturally, the REAL ID Act does not completely eliminate all subjectivity on the part of the examiner; this would be impossible given that credibility is, at heart, a calculation of believability. However, by setting the factors IJs may consider—many of which can be measured objectively—into statutory language, the REAL ID Act narrows the margin for arbitrary results. In addition, because IJs must now apply a totality of the circumstances test, no one factor carries greater importance than the next.

At first blush, it may seem like there are no glaring differences between the REAL ID Act and the common law it is modeled after. However, there is a significant deviation that cannot be overlooked. Namely, the REAL ID Act allows for *any* inaccuracies in an applicant's account to be taken into consideration, "without regard to whether [the] inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim."[58] This represents a drastic departure from the case law.[59]

As a general trend, prior to the REAL ID Act, "federal courts of appeals . . . rejected a black-and-white consistency analysis and . . . issued decisions instructing the lower courts to approach these

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57. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (emphasis added).

58. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

59. Jill A. Apa & Sophie I. Feal, *Two Steps Forward, One Step Back: The Future of Credibility Findings by Circuit Courts in Asylum Cases Under the REAL ID Act of 2005*, 11 BENDER'S IMMIGR. BULL. 376, 379 (2006).

perceived discrepancies in a more rational manner."[60] In this light, "[i]nconsistencies [that did] not enhance an applicant's claim of persecution" had "little to no bearing on an applicant's credibility."[61] In other words, only inconsistencies central to a claim were detrimental to a credibility finding;[62] most circuits held that if an inconsistency did not go to the heart of the claim, it was insufficient to support an adverse credibility finding.[63] For example, the Ninth Circuit held in *Paramasamy v. Ashcroft* that a rape victim's failure to volunteer details concerning her sexual assault to a male airport interviewer, even though this information later surfaced during her merit hearing, did not amount to an inconsistency supporting an adverse credibility determination.[64]

The BIA's approach to inconsistencies within an asylum case was similar, yet more approving of the use of less significant discrepancies in assessing credibility. As described in *In re A-S-*,[65] the BIA only required the presence of an actual inconsistency within the record of a case, that said inconsistency provide a cogent reason for an adverse credibility finding, and that the applicant have failed to explain the inconsistency when given the opportunity.[66]

The drafters of the REAL ID Act incorporated the BIA's position into federal law,[67] thereby rejecting and overruling circuit court holdings such as *Paramasamy v. Ashcroft*, which dismissed minor or trivial inconsistencies or omissions.[68] The effect of this change in the law can be harmful to asylum applicants, as seen in *Chen v. U.S. Attorney General*, where the applicant was deemed not credible based on a few trivial inconsistencies.[69] In *Chen*, the applicant would have likely prevailed under the pre-REAL ID Act standards of the Eleventh Circuit.[70]

Interestingly, even though the REAL ID Act adopted the BIA's approach, the statute does not precisely mirror the *In re A-S-* test;

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60. *Id. See, e.g.*, Pergega v. Gonzales, 417 F.3d 623, 627 (6th Cir. 2005) (reversing an adverse credibility finding based on the principle that "[i]f discrepancies cannot be viewed as attempts by the applicant to enhance his claims of persecution, they have no bearing on credibility.").

61. Ruppel, *supra* note 7, at 10 (citations omitted).

62. Laufer & Yale-Loehr, *supra* note 1, at 75-76.

63. Galloni, *supra* note 2, at 1047 n.64. Galloni cites cases from the First, Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits. *Id.* Even the Eleventh Circuit, known for its narrow review of credibility determinations, followed this standard, although it never expressly adopted it. *Id.* at 1047.

64. 295 F.3d 1047 (9th Cir. 2002).

65. 21 I. & N. Dec. 1106 (B.I.A. 1998).

66. *Id.* at 1109; Anker et al., *supra* note 12, at 363.

67. Anker et al., *supra* note 12, at 364.

68. 295 F.3d 1047 (9th Cir. 2002). *See also* AMNESTY INT'L, USA, *supra* note 52, at 2.

69. 463 F.3d 1228 (11th Cir. 2006).

70. Laufer & Yale-Loehr, *supra* note 1, at 80.

that is, it fails to include the requirement that an applicant be given the opportunity to explain an inconsistency in the record before the rendering of a final credibility determination.[71] It is not yet clear whether this rehabilitative measure will continue to be regularly afforded to asylees under the REAL ID Act.[72]

B. Corroborative Evidence

Another change in asylum law brought about by the REAL ID Act has to do with corroborative evidence for an asylum seeker's testimony. Although corroborative evidence is not necessarily an element of credibility, these concepts run in tandem and therefore should be discussed together. Even if an asylum seeker is deemed to be credible, he or she might still be required to produce factual corroboration of his or her testimony; alternatively, corroboration can serve to secure an IJ's wavering credibility assessment. Because the extent to which corroboration may be required is a function of the degree of credibility manifested by an asylee, corroboration presents yet another credibility-related hurdle for an asylum-applicant to overcome**.**

Before the REAL ID Act, no explicit standard existed for determining whether and when corroborative evidence was needed to support an applicant's testimony;[73] rather, judicially fostered guidelines helped resolve this issue. The BIA and circuit courts all agreed that while the failure to provide corroborative evidence might affect an applicant's credibility, a lack of corroborative evidence alone could not justify an adverse ruling.[74] Disagreement arose, however, with respect to the next phase of asylum proceedings, namely, the burden of proof and sufficiency of the evidence determinations. Although it was universally accepted that credible testimony alone could, in some cases, suffice to sustain an applicant's burden of proof, the BIA and circuit courts differed as to when that testimony alone was sufficient to carry the burden of proof versus when corroboration was necessary.[75] In other words, there was disagreement between the BIA and circuit courts as to when personal testimony alone satisfies the burden of proof and

71. *Compare* 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) *with* 21 I. & N. Dec. at 1109.

72. Apa & Feal, *supra* note 59, at 384-85. *See, e.g.*, Xue v. B.I.A., 439 F.3d 111 (2d Cir. 2006) (holding that the IJ's failure to allow the petitioner to explain inconsistencies "contravenes basic principles of asylum law established by our prior holdings, and requires us to vacate the adverse credibility determination").

73. Laufer & Yale-Loehr, *supra* note 1, at 76.

74. *Id.*

75. CRS REPORT, *supra* note 49, at 4.

when an adjudicator could appropriately require corroboration.[76]

The BIA's position on this issue is described in the governing case of *In re S-M-J-*.[77] The BIA there stated that, where it would be reasonable to expect corroborating evidence, such evidence *must* be provided or an explanation given for its absence.[78] The applicant was expected to provide evidence of country conditions as well as of the specific facts being relied upon.[79] The BIA explained that the absence of requested corroborative evidence could result in a ruling that an applicant did not meet his or her burden of proof.[80]

Conversely, the Ninth Circuit took the position that an applicant's testimony always fulfills his or her burden of production if it is unrefuted, credible, direct, and specific.[81] Although a lack of corroborating evidence may support an adverse credibility finding, it may not be grounds for a denial based merely on insufficiency of evidence.[82] In *Ladha v. INS*,[83] the court reiterated its "consistent rule" that when an applicant is deemed credible, then his or her testimony "is sufficient to establish the facts testified without the need for any corroboration."[84] This position was reaffirmed five years later in *Unuakhaulu v. Gonzales*.[85]

Not all circuits followed the Ninth Circuit's lead—the Second, Third, and Seventh Circuits held that corroborating evidence may still be required in both the credibility and burden of proof phases of an asylum proceeding.[86] Even so, the Second Circuit attempted to correct the BIA's corroboration approach in order to better comport with regulations and international standards by emphasizing that a lack of corroborative evidence does not automatically defeat an asylum claim, and requiring lower courts to explain both why corroboration was reasonably expected and why the applicant's explanations for the absence of such evidence were dismissed.[87]

The REAL ID Act addresses this split in authority and clearly

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76. Laufer & Yale-Loehr, *supra* note 1, at 76.

77. 21 I. & N. Dec. 722 (B.I.A. 1997).

78. *Id.* at 725.

79. *Id.*

80. *Id.*

81. CRS REPORT, *supra* note 49, at 14 (citing Ladha v. INS, 215 F.3d 889 (9th Cir. 2000); Victor P. White, *U.S. Asylum Law Out of Sync with International Obligations: REAL ID Act*, 8 SAN DIEGO INT'L L.J. 209, 245-46 (2006).

82. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 34.02(9)(d)(i) (2009).

83. 215 F.3d 889 (9th Cir. 2000).

84. *Id.* at 901.

85. 416 F.3d 931, 938 (9th Cir. 2005) (stating that corroborating evidence is not required if the petitioner is credible).

86. Susan Houser, *Asylum Documentation under the REAL ID Act*, IMMIGRATION LITIGATION BULL. (U.S. Dep't of Justice, Washington, D.C.) June 30, 2005, at 1, 4.

87. Apa & Feal, *supra* note 59, at 377-78.

lays out when corroborative evidence is necessary for an asylum applicant to sustain his or her burden of proof:

> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, *but only if* the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.[88]

Now, corroboration is always required unless the applicant is deemed credible, persuasive, and specific, or if the applicant cannot reasonably obtain such evidence.

The REAL ID Act resolved the conflict between the BIA and the Ninth Circuit by adopting the BIA's position—the more burdensome position for asylum applicants. Its language "refutes *Ladha*'s ruling that no corroboration should be required for credible testimony, and . . . codifies *In re S-M-J-*."[89]

Additionally, Congress did not incorporate into the REAL ID Act the limitation imposed by some courts that this corroborative requirement be limited to those facts central to the asylum claim.[90] Some academics also note that the legislation's "drafters failed to explicitly include the 'reasonableness' requirement found in leading case law," thus creating an opportunity for abuse of discretion "in deciding when to require corroboration by making patently unreasonable corroboration demands on asylum applicants."[91] However, others read the REAL ID Act as having embedded this rea-

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88. 8 U.S.C. § 1158(b)(1)(B)(ii) (2006) (emphasis added). The REAL ID Act does not address corroboration in the credibility phase of an asylum hearing directly; but, because credibility is a totality of the circumstances test under the REAL ID Act and an IJ's request for corroborative evidence presumably makes such evidence "other evidence of record," it continues to be a factor in credibility determinations. *See* Houser, *supra* note 86, at 15.

89. Cianciarulo, *supra* note 1, at 126 (citation omitted).

90. Apa & Feal, *supra* note 59, at 383. *See, e.g.*, Diallo v. INS, 232 F.3d 279, 288 (2d Cir. 2000) (stating that "specific documentary corroboration is required only for 'material facts which are central to [the applicant's] claim' " (quoting In re S-M-J-, 21 I. & N. Dec. 722 (B.I.A. 1997)) (alteration in original)).

91. Cianciarulo, *supra* note 1, at 116 (citation omitted).

sonableness requirement.[92]

C. Judicial Review

Judicial review is an important step in the asylum process, for it is "a vital safeguard both for the individual asylum seeker . . . and for the United States, which has committed to protect asylum seekers and refugees from persecution," thus each decision must be "lawful and consistent with this commitment."[93] Previously, courts of appeal demonstrated "skepticism toward the credibility determinations made by the IJs and BIA,"[94] in part because of the latter's tendency to rubberstamp IJ opinions without engaging in an independent analysis of each case's record.[95] While judicial review per se was not greatly altered under the new legislation, it remains highly deferential to an IJ's holding. As of now, the question remains whether this skepticism will be erased or exacerbated given the changes under the REAL ID Act.

Adverse credibility rulings prior to the REAL ID Act's adoption in 2005 were subjected to a substantial evidence standard of review.[96] Thus, as long as a lower court's determination was sufficiently specific and cogent, it was affirmed.[97] Even so, boilerplate language that an applicant's testimony was vague, unresponsive, or simply inconsistent was deemed unacceptable, as it did not provide enough reasoning for reviewing courts to updhold.[98] The Ninth Circuit further required that adverse findings be legitimate and substantial, as opposed to based on speculation.[99] Although seldom done due to the highly deferential standard of review, reviewing courts had a history of overturning credibility findings that violated these judicially enacted standards[100]—an IJ's reluctance to make a clear credibility ruling may have left his or her decision vulnerable to reversal.[101] However, determinations based on an applicant's unfavorable demeanor during his or her hearing

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92. Galloni, *supra* note 2, at 1060-61. Galloni is optimistic that the REAL ID Act's provisions regarding corroborating evidence include the same reasonableness limits as the case law preceding it. *Id.*

93. *Id.* at 1039-40.

94. Apa & Feal, *supra* note 59, at 376.

95. *See*, *e.g.,* Paramasamy v. Ashcroft, 295 F.3d 1047 at 1048, 1050-52 ("The integrity of the adjudicative process depends on judges reviewing each case on its merits. That integrity is called into question when boilerplate findings masquerade as individualized credibility determinations.").

96. Galloni, *supra* note 2, at 1047-49.

97. Apa & Feal, *supra* note 59, at 376-77.

98. *Id.* at 377.

99. Laufer & Yale-Loehr, *supra* note 1, at 76 n.22.

100. *Id.* at 76.

101. Apa & Feal, *supra* note 59, at 377.

logically received greater deference on appeal since an IJ, as a first-hand witness to the testimony, is in the best position to assess the intangible qualities that ultimately generate credibility.[102]

The REAL ID Act preserves this standard of review for credibility determinations, that is, it requires substantial evidence and specific reasons for an adverse finding.[103] Moreover, for judicial review regarding the availability of corroborating evidence, there can be no reversal of these findings of fact unless the reviewing judge "finds that a reasonable adjudicator is compelled to conclude that such evidence is unavailable."[104] Thus, a substantial evidence standard of review also applies to corroboration determinations.[105] Furthermore, the trier of fact is still responsible for articulating how he or she came to his or her credibility opinion,[106] and courts operating under the REAL ID Act should also expect IJs to explain why requiring corroborative evidence is not an unreasonable demand upon an asylum applicant[107]—this expectation of corroboration must continue to rest on more than just an IJ's hunch.

One difference in judicial review presents itself in terms of presumptions of credibility. The REAL ID Act states: "There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal."[108] This differs slightly from the Ninth Circuit's holding that, in the absence of an explicit credibility finding, an applicant's statements are deemed truthful.[109] The REAL ID Act simply clarifies that this presumption is rebuttable.

In sum, while the REAL ID Act does not represent a radical change from existing asylum law as a whole, each of the individual departures from precedent marks the parameters of a new standard for credibility determinations in the United States. It is evident that Congress consistently adopted the hard-line position when it came to the significance of immaterial inconsistencies, corroboration requirements, and judicial review, thus making it more difficult for asylum applicants to pass this initial credibility qualification for protection. Unfortunately, the United States turned further away from the more lenient credibility standards embraced

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102. Ruppel, *supra* note 7, at 11 n.40.
103. Galloni, *supra* note 2, at 1057.
104. CRS REPORT, *supra* note 49, at 13.
105. Anker et al., *supra* note 12, at 367.
106. *Id.* at 361.
107. H.R. REP. NO. 109-72, at 165-66 (2005), *reprinted in* 2005 U.S.C.C.A.N. 290-92; Apa & Feal, *supra* note 59, at 383.
108. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).
109. CRS REPORT, *supra* note 49, at 8; Apa & Feal, *supra* note 59, at 377.

by the international arena.

III. CLOSING THE GAP BETWEEN THE REAL ID ACT AND THE BENEFIT OF THE DOUBT

The specific internal changes in U.S. law highlighted above reveal the REAL ID Act's impact upon credibility determinations, making them more severe and difficult to survive. One take on these changes is that the cumulative effect of the REAL ID Act "place[s] an even more onerous burden on asylum applicants, . . . broaden[s] the grounds on which asylum adjudicators may validly deny asylum claims, and . . . further insulate[s] IJ decisions relating to credibility and corroboration findings from appellate review."[110] Putting the thorny issues of the REAL ID Act aside, however, the United States is in greater compliance with the UNHCR's guidelines than its reputation would lead one to believe. Nevertheless, as will be developed below, the fact that the United States now magnifies the significance of minor inconsistencies in an applicant's record and is also more likely to require corroboration than before, coupled with its highly deferential judicial review, further widens the gap between these national policies and giving asylum seekers the benefit of the doubt. The remainder of this section focuses on the individual elements that play a part in credibility determinations in the United States and analyzes how each fares against the UNHCR's benefit of the doubt standard, culminating with suggestions for how the United States can best close the gap between the REAL ID Act and international expectations.

A. Totality of the Circumstances Framework

The overarching method for determining an asylum applicant's credibility in the United States is currently a totality of the circumstances test, for which the UNHCR advocates.[111] Furthermore, each of the credibility factors identified by the UNHCR[112] is also incorporated into the REAL ID Act, a positive indication that the United States is striving to embrace the international standard. Now that credibility is statutorily codified, there will hopefully be less variance between the BIA and circuit courts—a mutually

110. Laufer & Yale-Loehr, *supra* note 1, at 77.

111. Gorlick, *supra* note 5, at 12-13. *See supra* Sections I, II.

112. *See supra* Section I. Gorlick, *supra* note 5, at 12 (listing criteria such as "the reasonableness of the facts alleged; the overall consistency and coherence of the applicant's story; corroborative evidence adduced by the applicant in support of his or her statements; consistency with common knowledge or generally known facts; and the known situation in the country of origin").

shared goal at the national and international level.

However, the new legislation does not adequately take into account or address the possibility that credibility determinations are still subject to error based on cultural differences and inconsistencies not truly indicative of credibility.[113] The risk that a high degree of subjectivity and possible bias may influence an IJ's ruling under the REAL ID Act endures since it gives IJs the ability to base decisions on criteria such as demeanor and responsiveness, whereas prior to the REAL ID Act, judicial precedent forbade credibility determinations premised on wholly subjective grounds.[114] For this reason, granting asylees the benefit of the doubt is crucial—it prevents these traits and issues common to asylum seekers from being unfairly prejudicial to an applicant.

Some academics read the REAL ID Act as including a catchall by allowing for the consideration of "all relevant factors." This category can take into account variables such as language barriers, trauma, and other mitigating factors.[115] But the extent to which IJs will take the time to consider these practical background circumstances, which are not always evident or clearly delineated by the law, will inevitably vary. Thus, while creating a totality of the circumstances framework for asylum credibility analysis represents a step in the right direction, Congress missed its opportunity to comply with the UNHCR and direct IJs to give asylum seekers the benefit of the doubt throughout their proceedings when it wrote the REAL ID Act.

B. Weight Given to Trivial Inconsistencies

Perhaps the greatest difference between the United States and the UNHCR is the importance attributed to small or trivial inconsistencies or omissions in a case which do not go to the heart of an applicant's claim—this can be the decisive factor under the REAL ID Act. The UNHCR directly condemns this kind of scrutiny by asylum examiners[116] as it is the diametric opposite of affording the benefit of the doubt. There is a concern that the REAL ID Act "do[es] not take into account that refugees fleeing torture, rape, and other forms of persecution may be traumatized and may not recall or feel comfortable discussing every detail of the abuses they

113. These may include, for example, inconsistencies due to language barriers and poor translation, post-traumatic stress, and cultural norms regarding authority figures. Galloni, *supra* note 2, at 1045-46.

114. AMNESTY INT'L, USA, *supra* note 52, at 3.

115. Anker et al., *supra* note 12, at 363.

116. Gorlick, *supra* note 5, at 13.

suffered in their first encounter with an immigration officer."[117]

While one could argue these inconsistencies make up only a portion of the totality test, the risk that these minor inconsistencies will be weighed detrimentally against an asylum applicant is too great. There is no protection against any single factor being assigned undue significance under the REAL ID Act,[118] thereby permitting unfavorable first impressions of an asylum seeker to overshadow the remaining particulars of a case. Even supporters of the REAL ID Act reluctantly agree that the statute technically allows for adjudicators to base a decision on *any* inconsistencies.[119] More troubling is that, as previously mentioned, it remains unclear whether asylum seekers will continue to have the opportunity to explain and correct these inconsistencies; thus they might detract from credibility more than deserved. Against this backdrop, it is valuable and instrumental to remind IJs that they should give asylees the benefit of the doubt in order to fulfill the spirit of asylum and refugee law and extend protection to those most in need. Otherwise, the REAL ID Act arms IJs with more reasons for throwing cases out before reaching the merits and symbolizes a dividing wedge between the United States and international standards.

C. Use of Statements Not Made Under Oath

Within the subsection dealing with inconsistencies, the REAL ID Act also encourages IJs to consider the consistency between an applicant's written and oral statements "whenever made and whether or not under oath."[120] This category includes statements made to border officials or immigration and customs officials in airports. For many of the same reasons minor inconsistencies should not provide a basis for adverse credibility findings, unsworn statements are equally undeserving of excessive importance.

This provision of the REAL ID Act is problematic because applicants are rarely forthright with information important to their cases or frequently lie because of trauma or distrust of officials.[121] If discrepencies of this nature are then used to impeach an applicant—which is unreasonable practice in the first place[122]—he or

117. Human Rights Watch, *Immigrants' Rights under Attack in House Bill (H.R. 10) 156*, Oct. 5, 2004, http://www.hrw.org/en/news/2004/10/05/immigrants-rights-under-attack-house-bill-hr-10.

118. *See* Cianciarulo, *supra* note 1, at 135.

119. Anker et al., *supra* note 12, at 363.

120. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

121. Cianciarulo, *supra* note 1, at 131.

122. AMNESTY INT'L, USA, *supra* note 52, at 2.

she starts off with a losing battle even if the applicant can compellingly explain the inconsistency. In effect, this punishes asylum applicants for not knowing any better than to hesitate when questioned upon detainment or for behaving as they would in their native country. The UNHCR Handbook anticipates this dodgy behavior on the part of refugees and encourages examiners to find explanations.[123] Clearly, the "whenever made and whether or not under oath" clause of the REAL ID Act contravenes the spirit of leniency permeating the Refugee Convention and fails to promote the belief in giving the benefit of the doubt.

D. Discretion Over the Corroborative Evidence Requirement

The REAL ID Act's position on corroboration requirements further removes the United States from close alignment with international standards. The statute does not require corroboration of testimony so long as an applicant is deemed credible, persuasive, *and* specific.[124] Furthermore, the benchmarks within the rule are couched in terms of the trier of fact's discretion, indicating that a certain degree of subjectivity persists.[125] Although the Ninth Circuit was most in line with the spirit of refugee and asylum protection,[126] Congress ultimately codified the BIA's more stringent standards under the REAL ID Act,[127] thus curtailing all judicial progression toward giving the benefit of the doubt.[128]

Because corroboration requirements under the REAL ID Act hinge on a threefold inquiry (credibility, persuasiveness, and specificity) and non-core inconsistencies carry greater weight than before, thus triggering more opportunities for incredulity on behalf of the IJ, corroboration will likely be required of asylum applicants more frequently.[129] In fact, there are already signs that this predic-

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123. HANDBOOK, *supra* note 4, ¶¶ 198-99.

124. 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).

125. *See* Laufer & Yale-Loehr, *supra* note 1, at 78.

126. Cianciarulo, *supra* note 1, at 126.

127. The case law embraced by the REAL ID Act, specifically *In re S-M-J-*, was not particularly sympathetic toward asylum seekers. Cianciarulo, *supra* note 1, at 125. Other authorities view the BIA's approach to corroboration standards (now the U.S. standard) as contrary to international standards because it does not give the benefit of the doubt. CRS REPORT, *supra* note 49, at 4.

128. One supporter of the REAL ID Act believes Congress instilled the benefit of the doubt standard, as proposed by the UNHCR, into its legislation. Anker et al., *supra* note 12, at 366. This paper disagrees with that assessment and finds that *In re S-M-J-* and the REAL ID Act are not in line with giving the benefit of the doubt because the international standard requires more than simply eliminating unreasonable corroborative evidence demands—it is an attitude and a message that should transgress the entirety of asylum proceedings.

129. Laufer & Yale-Loehr, *supra* note 1, at 78.

tion is panning out, as "increased expectations and demands for corroboration of applicants' claims" have been noted.[130] This places a greater strain on asylum applicants since corroborative evidence can be very difficult to obtain.[131] This increased strain would not take place if IJs were giving applicants the benefit of the doubt.

Additionally, the REAL ID Act's corroboration requirement can be exercised broadly by IJs since it is not limited only to facts central to an asylum applicant's claim. On this note, one scholar cautions that the REAL ID Act "contains none of the limitations that have recently developed in the federal case law," and this "absence of reasonable limitations on an immigration court to demand corroborating evidence may lead to troubling rulings with respect to . . . credibility."[132] The sum effect of the REAL ID Act's corroboration burden upon asylum seekers is to grant IJs with virtual control over the fate of any case, which may lead to a greater number of denials of asylum cases and frustrate the purpose of the Refugee Convention.

The benefit of the doubt standard does not (and should not) eliminate the requirement that applicants supplement their asylum claims with available evidence—this is not what the UNHCR Handbook urges. Rather, it reduces the role that corroborative evidence should ultimately play in the credibility and burden of proof stages of an asylum case based on the uniquely weak position of refugees and asylees.

E. Highly Deferential Judicial Review

Another way in which the REAL ID Act drives the United States away from comity with international standards is by undermining the appellate process. Currently, lots of deference is owed to IJs, awarding them "essentially unfettered discretion,"[133] and the REAL ID Act has only "strengthen[ed] an immigration judge's ability to make a negative credibility finding"[134] with its compelled-to-conclude standard of review. Moreover, because the BIA is authorized to give "summary affirmances" of IJ rulings without revealing its decisionmaking,[135] the REAL ID Act's limitations on judicial review further narrow the possibility for reversal

130. Anker et al., *supra* note 12, at 358.
131. Ruppel, *supra* note 7, at 2 n.3.
132. Apa & Feal, *supra* note 59, at 383 (citation omitted).
133. Nicole S. Thompson, Comment, *Due Process Problems Caused by Large Disparities in Grants of Asylum: Will New Department of Justice Recommendations Solve the Problem?*, 22 EMORY INT'L L. REV. 385, 400 (2008).
134. White, *supra* note 81, at 245.
135. *Id.* at 231.

of an adverse credibility finding on appeal. The danger that "insulating credibility determinations from judicial review will lead to inconsistent results sometimes resulting in the arbitrary denial of asylum"[136] would effectively thwart the UNHCR's mission of enhancing uniformity across refugee and asylum determinations.

Without a sound appellate process where applicants have the opportunity to have their case reheard by an impartial judge, the United States cannot be regarded as abiding by the general principles of the UNHCR or the spirit of the Refugee Convention. If a fair opportunity for proving an asylum case is not initially had, then this standard of review makes it very difficult to reverse the injustice at a later stage.

Moreover, because the REAL ID Act also provides IJs with the tools to find an asylum applicant incredible based on minor inconsistencies that do not go to the heart of a claim, the law now forecloses reviewing courts from engaging in an analysis of what constitutes a material falsehood or omission.[137] This in turn shrinks the number of issues reviewing courts can examine and will result in fewer reversals of adverse credibility findings, as exemplified in *Lin v. Mukasey*, where the court reluctantly affirmed an adverse credibility finding because it did not have the power to weigh the inconsistencies relied upon by the IJ for itself.[138]

F. A Rebuttable Presumption of Credibility

Prior to 2005, the Ninth Circuit automatically accepted a lower court's credibility determination as valid; now, however, the REAL ID Act reduces this to a rebuttable presumption. This means an asylum seeker's credibility can be attacked for the first time on appeal, creating even more opportunities for an adverse ruling. The Ninth Circuit's position was truer to international standards than the REAL ID Act. Although perhaps a trivial and meaningless distinction, this is yet another example of how the United States continues to move away from international harmony when it comes to refugee and asylum law.

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136. *Id.* at 254.

137. Laufer & Yale-Loehr, *supra* note 1, at 76. *See, e.g.*, Chen v. U.S. Att'y Gen., 463 F.3d 1228 (11th Cir. 2006).

138. 534 F.3d 162, 164 (2d Cir. 2008) (concluding that "an IJ may rely on omissions and inconsistencies that do not directly relate to the applicant's claim of persecution as long as the totality of the circumstances establish that the applicant is not credible"). *Id.* at 164.

G. Suggestions for Incorporating the Benefit of the Doubt into the REAL ID Act

Even though the United States has distanced itself from the UNHCR and the notion of giving asylum applicants the benefit of the doubt when it comes to credibility and corroboration requirements, it is still possible to inject this theme into the REAL ID Act. The following list provides suggestions for accomplishing this goal.

1. Asylum law training. The first step in promoting the benefit of the doubt in the United States is to train asylum adjudicators regarding its meaning and to teach them how to incorporate it into their practice. Without providing this background, it will be difficult for a judge to recognize that he or she may be subconsciously influenced by personal biases. Once this mindset is shared among the community of asylum law experts and adjudicators, applying the benefit of the doubt standard in credibility determinations will become a routine and self-perpetuating procedure.

2. Play up the totality of the circumstances. A key way in which the benefit of the doubt can be exercised under the auspices of the REAL ID Act is by taking advantage of its totality of the circumstances framework. Each criteria identified under the REAL ID Act, including the catchall provision "all relevant factors," can be considered in the broader context of giving the benefit of the doubt. Breathing this standard into the totality test is not farfetched as examiners must already engage in a case-by-case analysis.

Along these lines, an IJ should be sure not to let any one factor weigh more heavily than a combination of other factors.[139] This presents a way in which to offset the detrimental effect that the REAL ID Act can have on asylees by allowing minor inconsistencies to play such a dominant role in credibility assessments.

3. Specify "all relevant factors." This catchall in the REAL ID Act should be better qualified. During asylum law training, officials and IJs should be instructed to use this category for factors such as language barriers and faulty translations, trauma stemming from the persecution and flight from applicants' native countries to the United States, and other cultural characteristics, such as customs that make it disrespectful to look an authority figure in the eye.[140] By making this term more explicit, concerns about unfair personal biases being held against asylum applicants are mitigated.

4. Only consider corroborative evidence for facts central to an asylum claim. As previously mentioned, prior to the REAL ID Act,

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139. *See* Galloni, *supra* note 2, at 1054-59.

140. *See* Anker et al., *supra* note 12, at 363.

some courts only required corroborative evidence for facts central to an asylum claim. Although the REAL ID Act did not adopt this provision per se, there is no reason for IJs to discontinue this practice. As one commentator notes:

> Adjudicators who favor [a more lenient] approach . . . can still employ a common-sense methodology in cases involving applicants who do not present corroborating evidence. However, an adjudicator who favors the BIA approach or who adopts a purposivist tack, noting that the spirit of the REAL ID Act aims to impose stricter evidentiary standards on applicants, might employ a less expansive reading and require corroborating evidence in the majority of cases.[141]

IJs should be encouraged to engage in this commonsense methodology rather than go down the stricter evidentiary path.

IV. WHY THE UNITED STATES SHOULD ADOPT THE BENEFIT OF THE DOUBT STANDARD

Thus far, this paper has focused the ways in which the United States has effectively rejected the UNHCR's benefit of the doubt standard for asylum proceedings. However, in consideration of the fact that national laws are at stake, it is important to ask, practically and realistically, whether giving the benefit of the doubt is truly a better legal policy for the United States. The simple answer is yes. The benefit of the doubt standard is superior to the REAL ID Act's heightened burdens for those seeking asylum protection in the United States. This is the right conclusion for several reasons.

First, the goals of the REAL ID Act—to eliminate ease of access for terrorists to enter the country via asylum status[142]—are not effectively furthered by these changes to U.S. asylum law. Terrorists masked as asylum seekers will be flagged during the rigorous background checks all applicants are subject to, and other legal provisions making terrorists ineligible for asylum status in the United States already exist.[143] Instead, the greater effect of the REAL ID Act is to make it more difficult for those fleeing real per-

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141. GORDON ET AL., *supra* note 82, § 34.02(9)(d)(iii)(B).

142. *See supra* Section II.

143. Letter from Robert D. Evans, Director, Amer. Bar Ass'n Gov'tl Affairs Office, to Congressional Representative (Feb. 9, 2005), *available at* http://www.humanrightsfirst.org/asylum/pdf/realid/HR-418-ltr-House-020905.pdf.

secution to be granted protection because of disqualifications based on superficial credibility analyses. Thus, if the United States were to accept the benefit of the doubt standard, it would actually further two public interests: national security (by way of the positive changes it has already made as a result of the REAL ID Act, such as codifying a totality of the circumstances test) and promoting the humanitarian principles the country stood for when it acceded to the Refugee Convention.[144]

Second, a system rooted in giving asylum applicants the benefit of the doubt and complying with international standards is not an unobtainable ideal, as Canada has illustrated.[145] As a leading world power, the United States should be setting the example for other states to follow. Moreover, refugee and asylum law is not meant to be an adversarial process, rather it presents a unique crossroads of national and international law and humanitarian interests; thus there is no need for strict evidentiary burdens. The ease of applying a cut-and-dry law does not outweigh the detrimental effect the law has on asylum seekers, and it does not necessarily mean there will be less variation in credibility outcomes.

Third, and finally, the United States must endeavor to reduce the number of erroneous credibility findings it renders because of the risks at stake for those applicants who are denied asylum and forced to return to their native countries.[146] Society places great value in "the interests of litigants and the furtherance of fair and equitable adjudication through minimization of erroneous outcomes," even more so when it comes to the claims presented by an asylum seeker.[147] The best way to minimize erroneous credibility rulings is to err on the side of overinclusiveness at the credibility stage of the process, and weed out fraudulent cases on the merits. This will ensue naturally once the United States follows the guidance of the UNHCR and begins practicing a benefit of the doubt standard.

144. *Id.*
145. Ruppel, *supra* note 7, at 35-37.
146. *See id.* at 33-35.
147. *Id.* at 33.