Indiana International & Comparative Law Review

Vol.16 No. 1 2005

TABLE OF CONTENTS

ARTICLES

COMMENT

NOTES

THE SECURITY COUNCIL, THE INTERNATIONAL CRIMINAL COURT, AND THE CRIME OF AGGRESSION: HOW EXCLUSIVE IS THE SECURITY COUNCIL'S POWER TO DETERMINE AGGRESSION?

Mark S. Stein*

I. INTRODUCTION

One of the most contentious issues surrounding the new International Criminal Court (ICC) is what role the Security Council should play in prosecuting the crime of aggression. In the negotiations that led to the adoption of the Rome Statute of the International Criminal Court,[1] the participants could not agree on the Security Council's role, and they also could not agree on how to define the crime of aggression. Accordingly, these issues were postponed. Article 5(2) of the ICC Statute states that the ICC "shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."[2] Such an amendment, Article 5(2) directs, "shall be consistent with the relevant provisions of the Charter of the United Nations."[3]

Some contend that under the U.N. Charter, the Security Council must determine the existence of an act of aggression as a precondition to any prosecution for the crime of aggression.[4] They point to Article 39 of the U.N. Charter, which states: "The Security Council shall determine the existence of

---

*Adjunct Assistant Professor, University of Missouri-St. Louis, Dept. of Political Science. Ph.D. 2001, Yale University; J.D., 1983, University of Michigan. Financial support for this article was provided by the Lentz Peace Research Association and the University of Missouri-St. Louis. I acknowledge with thanks the comments of Don Ferencz and Leila Nadya Sadat. Mistakes are my own.

1. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), corrected through Jan. 16, 2002, *available at* www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (last visited Sept. 26, 2005) [hereinafter ICC Statute].

2. *Id.* at art. 5(2).

3. *Id.*

4. This was the view of the International Law Commission. *Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court*, U.N. GAUR, 49th Sess., Supp. No. 10 at 86, U.N. Doc. A/49/10 (1994) [hereinafter ILC Draft Statute] ("Any criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a State had been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the Charter to make.") For similar views, see Matthias Schuster, *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*, 14 Criminal Law Forum 1, 35-39 (2003); Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1, 13-14 (2001).

any threat to the peace, breach of the peace, *or act of aggression* and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[5] Others believe that in the context of an ICC case, the Security Council's power to determine the existence of aggression is not exclusive; they believe that in the ICC context, the Charter permits other bodies, such as the ICC, the International Court of Justice (ICJ), or the General Assembly, to determine the existence of aggression.[6]

The Preparatory Commission of the ICC attempted, unsuccessfully, to resolve issues over the crime of aggression before the entry into force of the ICC Statute in 2002.[7] Negotiations continue in the Special Working Group on the Crime of Aggression of the Assembly of States Parties to the ICC Statute. Under Article 121 of the ICC Statute, the Statute can be amended to deal with the crime of aggression, at the earliest, seven years after its entry into force (*i.e.*, 2009).[8] Article 123 of the ICC Statute provides for a Review Conference seven years after the treaty's entry into force "to consider any amendments to this Statute."[9]

While the ICC is not currently exercising jurisdiction over the crime of aggression, it is exercising jurisdiction over war crimes, crimes against humanity, and the crime of genocide. As to these crimes, the ICC Statute already grants the Security Council considerable power over ICC proceedings. Under ICC Article 16, the Security Council can suspend an ICC proceeding for a period of twelve months, and such suspensions can be renewed indefinitely.[10] Under ICC Article 13, the Security Council can refer a case to the ICC, enabling the ICC to exercise jurisdiction over a conflict even if no state involved in that conflict has accepted the ICC's jurisdiction.[11]

Many believe that the Security Council's already-considerable powers under the ICC Statute should be even greater in the context of the crime of aggression.[12] I share this view. Nevertheless, I argue in this Article that the

---

5. U.N. CHARTER, art. 39 (emphasis added).

6. Andreas L. Paulus, *Peace through Justice? The Future of the Crime of Aggression in a Time of Crisis*, 50 WAYNE L. REV. 1, 21-22 (2004). *See also* the contributions by Giorgio Gaja, Saeid Mirzaee Yengejeh, Paula Escarameia, Marja Lehto, and Luigi Condorelli, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 121-163 (Mauro Politi and Giuseppe Nesi eds., 2004)(all essentially rejecting the exclusivity of the Security Council's Article 39 power).

7. For an overview of discussions at the PrepComm stage, see Silvia A. Fernandez de Gurmendi, *Completing the Work of the Preparatory Commission: The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDHAM INT'L L.J. 589 (2002); Roger S. Clark, *Rethinking Aggression as a Crime and Formulating its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court*, 15 LEIDEN J. INT'L L. 859 (2002).

8. ICC Statute, *supra* note 1, at art. 121.

9. *Id.* at art. 123.

10. *Id.* at art. 16.

11. *Id.* at art. 13(b).

12. For a description of views, see Gurmendi, *supra* note 7, at 603.

U.N. Charter permits ICC prosecutions for the crime of aggression where the Security Council has not previously determined the existence of an act of aggression. Indeed, I argue, schemes in which a Security Council determination of aggression is not a precondition are more consistent with the Charter than schemes in which a Security Council determination is a precondition.

Proposals for the involvement of the Security Council in prosecutions for the crime of aggression can be categorized in various ways.[13] For my purposes, a four-fold categorization is useful. First, there are schemes in which a Security Council determination of aggression is a precondition to prosecution; I will refer to these as exclusive determination schemes.[14] Second, there are schemes in which the Security Council is given a limited amount of time to determine the existence of aggression. If the Security Council fails to make a determination, one way or the other, a different body may do so – perhaps the ICC itself, perhaps the General Assembly, and perhaps the ICJ in an advisory opinion. I will refer to these various arrangements as time-limited determination schemes.

Most proposals thus far discussed are exclusive determination schemes or time-limited determination schemes. Two other kinds of arrangements are also worthy of consideration, however. The Security Council might not be asked to determine aggression in a case before the ICC, but it might be given the exclusive authority to refer such cases to the ICC. I will refer to arrangements of this type as exclusive referral schemes. Though exclusive referral schemes have not been much discussed, they are in many ways preferable to exclusive determination schemes, while still meeting the political objectives of those who support exclusive determination schemes (*i.e.*, they allow permanent members of the Security Council to veto ICC prosecutions).

Finally, there are arrangements under which the Security Council is not asked to make a determination of aggression in cases before the ICC and also does not have exclusive referral authority. I will refer to these arrangements as independent schemes. An independent scheme may make ICC prosecutions depend on a determination by the ICJ or the General Assembly, but a

---

13. For a consolidated text of some of the major proposals, see *Discussion Paper on the Definition and Elements of the Crime of Aggression, Prepared by the Coordinator of the Working Group on the Crime of Aggression*, Report of the Preparatory Commission for the International Criminal Court, Part II, U.N. Doc. PCNICC/2002/2/Add.2 (2002), *available at* http://www.un.org/law/icc/documents/aggression/aggressiondocs.htm (last visited Sept. 5, 2005). For discussion of the proposals, see Gurmendi, supra note 7; Clark, supra note 7; Schuster, supra note 4; Jennifer Trahan, *Defining "Aggression": Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum*, 24 LOY. L.A. INT'L & COMP. L. REV. 439 (2002).

14. The ILC Draft Statute for an International Criminal Court made use of an exclusive determination scheme. Article 23(2) of that Statute provided, "A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint." ILC Draft Statute, *supra* note 4, at 84.

determination by the Security Council is not required or even sought. In my opinion, an independent scheme would be most consistent with the Charter.

In addition to unresolved issues over the role of the Security Council, there remain difficult issues concerning the definition of the crime of aggression. Many proposals for the definition of aggression in the ICC Statute are based on General Assembly Resolution 3314, the "Definition of Aggression" resolution,[15] which in turn is based on Article 2(4) of the U.N. Charter. Article 1 of the Definition annexed to General Assembly Resolution 3314 states: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."[16] Article 2(4) of the Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[17]

One outstanding definitional issue is how serious a use of force must be in order to qualify as aggression. There is consensus that "the use of force should be of a certain magnitude or gravity,"[18] but there is disagreement over how to establish the proper threshold.[19] Another outstanding issue is whether aggression must be committed by a state to give rise to individual criminal liability, or whether aggression by sub-state groups, not imputable to any state, can also be prosecuted. In most proposed definitions, aggression cannot be prosecuted unless it is imputable to a state, but this omission has been criticized.[20]

Much valuable scholarship on the crime of aggression addresses both the role of the Security Council and the various definitional issues. In this article, I am less ambitious. I focus on the role of the Security Council, and I discuss the definitional issues only to the extent they bear on the role of the Security Council.

In Part II of this article, I argue that exclusive determination schemes – those in which a Security Council determination of aggression is a precondition to prosecution for the crime of aggression – are in tension with several

---

15. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp No. 31, at 142, U.N. Doc. A/9631 (1974).

16. *Id.* at 143.

17. U.N. CHARTER, art. 2(4). Charter Article 2(4) is in turn based on Article 10 of the Covenant of the League of Nations, which states, in part: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." LEAGUE OF NATIONS COVENANT, art. 10 (1926), reprinted in RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 982 (1958).

18. Gurmendi, *supra* note 7, at 597 (reporting views in the Preparatory Commission).

19. *Id.*

20. Schuster, *supra* note 4, at 23; Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 413, 444 (2000).

important Charter-based principles. Such schemes erode the sovereign equality of states, push the Security Council into an inappropriate judicial role, and even threaten the Security Council's core Article 39 power to determine the existence of aggression in the context of its own decisions. In Part III, I respond to the argument that Article 39 of the U.N. Charter nevertheless mandates an exclusive determination scheme. Article 39 does disable all bodies but the Security Council from determining aggression as a way of triggering the Security Council's own responsibility and power to suppress aggression. However, Article 39 cannot be interpreted to disable all bodies but the Security Council from determining aggression outside the context of the Security Council's suppression of aggression. There are several situations in which the Charter provides for the determination of aggression by some body other than the Security Council; Article 39 itself indicates that the Security Council cannot be expected to determine the existence of stale aggression; and the ICJ has in the past determined the existence *vel non* of aggression, by way of determining the existence *vel non* of an "armed attack" under Article 51 of the Charter.

In Part IV, I offer some of my own proposals, based on the analysis previously given. I advocate a scheme in which the ICC seeks an advisory opinion from the ICJ in aggression cases, but in which failure to obtain such an opinion does not prevent further proceedings. I also propose additional powers for the Security Council in aggression cases, going beyond the Security Council's power to suspend ICC proceedings under ICC Article 16.

Unfortunately, it may be politically impossible to incorporate into the ICC Statute an independent scheme that leaves the five permanent members of the Security Council with no power to block prosecutions for the crime of aggression. There might have to be some compromise to protect the political interests of the permanent members. Against that eventuality, I offer a compromise proposal in which aggression cases can proceed through preliminary stages without Security Council approval, but in which Council approval is required before there can be a trial. Finally, I make an obvious proposal for resolving the legal issue over the exclusivity of the Security Council's power to determine aggression: That issue should be resolved by the ICJ in an advisory opinion.

II. CHARTER-BASED ARGUMENTS AGAINST EXCLUSIVE DETERMINATION SCHEMES

In discussions of the role of the Security Council in prosecutions for the crime of aggression, it is often assumed that the ICC Statute could only be inconsistent with the U.N. Charter if the ICC Statute were amended to deny the Security Council an exclusive role in determining aggression for the ICC; if the ICC statute were amended to grant the Security Council an exclusive role, it is assumed, the ICC Statute would be fully consistent with the Charter. In fact, there are powerful Charter-based arguments against exclusive determination schemes.

A. *Sovereign Equality*

First, an exclusive determination scheme would contravene the principle of sovereign equality set forth in Article 2(1) of the Charter. Article 2(1) states: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.... The Organization is based on the principle of the sovereign equality of all its Members."[21] Article 2(1) may be viewed with cynicism, in some quarters, because of the obvious tension between its principle of sovereign equality and the veto power granted to the permanent five members of the Security Council under Articles 23 and 27.[22] Nevertheless, sovereign equality is the first-listed Principle on which the United Nations is based. It would be disrespectful to the Charter, and to the United Nations, to assume that this principle is a joke, to be disregarded in considering whether various arrangements are consistent with the Charter.

The debate over the Security Council's role in prosecutions for the crime of aggression is not a debate about Security Council supremacy. Under Article 16 of the ICC Statute, the Security Council is already supreme in its authority over all pending prosecutions. The Security Council can prevent the ICC from proceeding with any case for a period of one year, and it can renew these one-year "stop" orders indefinitely. Most proposals on the crime of aggression, including my own proposals discussed below, would give the Security Council even more extensive authority over ICC prosecutions for the crime of aggression. The real issue, then, is not Security Council supremacy, but veto supremacy. Will one permanent member, by exercising its veto, be able to shield its citizens and those of its allies from ICC prosecution? Will the five permanent members of the Security Council ("P5") acquire an effective immunity from prosecution for the crime of aggression, an immunity that will further set them apart from all other members of the United Nations?

Under the Charter, the P5 have effective immunity from enforcement action by the Security Council. They do not have effective immunity from adverse actions or recommendations by other organs of the United Nations, such as the International Court of Justice and the General Assembly. In practice, the question of Security Council exclusivity boils down to whether the P5 should be given an additional immunity from a new international institution, one they do not now possess.

The veto right of the permanent members of the Security Council is an obvious departure from pure sovereign equality. As Fassbender observes in his commentary on Article 2(1),

---

21. U.N. CHARTER, art. 2(1).

22. On tension between sovereign equality and the veto, see Bardo Fassbender and Albert Blechman, *Article 2(1), in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 77, 87 (Bruno Simma et al. eds., 2d ed. 2002).

> The records of the San Francisco Conference and the preceding diplomatic negotiations demonstrate that the prerogatives which the leading powers were given in the UN Charter – in particular permanent membership in the Security Council and the right of veto according to Art. 27(3) – were regarded as a painful, albeit necessary, exception to a true equality of status of all member States in the new organization. So much was even admitted by the major powers themselves[23]

The general principle of sovereign equality in Article 2(1) cannot of course be relied on to question the legality of the specific veto rights granted in the Charter. However, Article 2(1) can and should be used to resist further unnecessary departures from sovereign equality.

Many have commented on how unfair and unequal it would be if the five permanent members of the Security Council were allowed to shield their leaders from prosecution for the crime of aggression.[24] It is important to realize that exclusive determination, with its consequent immunity for the P5, would contravene not only general principles of fairness and equality, but also the principle of sovereign equality in Article 2(1) of the Charter. The core of sovereign equality is juridical equality, or equality in law.[25] If the P5 alone were allowed to block legal proceedings against their leaders, the damage to sovereign equality would be severe. Article 2(1) counsels against giving a major new juridical immunity to the P5, unless the Charter clearly requires this further departure from sovereign equality.

B. Inappropriate Judicial Role

A second Charter-based argument against exclusive determination schemes is that they would push the Security Council into an inappropriate judicial role. This argument, unlike the previous one, does not also apply to exclusive referral schemes. It does, however, apply to time-limited determination schemes.

---

23. *Id.* at 87.

24. *See, e.g.*, Schuster, *supra* note 4, at 41; Paulus, *supra* note 6, at 21-22; Leila Nadya Sadat and S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 443 (2000).

25. The Report of the committee charged with drafting what became Article 2(1) states: "The Subcommittee voted to keep the terminology 'sovereign equality' on the assumption and understanding that it conveys . . . that states are juridically equal . . . ." *Report of Rapporteur of Subcommittee I/1/A to Committee I/1*, Conference on International Organization, Doc. 723, June 1, *in* THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SELECTED DOCUMENTS 483 (1946). On juridical equality as the core of sovereign equality, see Fassbender and Blechman, *supra* note 22, at 85.

The Security Council is a political body, and it has used the term "aggression" in its resolutions in a political way. The Security Council has not found the existence of aggression where aggression was most obvious, and it has found aggression in borderline cases. It has used the term "aggression" to describe behavior by very few states, though it has repeatedly cited two states (South Africa and Rhodesia) for aggression, and it has labeled Israel an aggressor twice.[26] The only consistent theme running through the Security Council's determinations of aggression is that the Security Council has used these determinations to send the message that it is angry at politically disfavored states or groups.

In 1990, Iraq invaded, occupied, and attempted to annex Kuwait. This was surely the most flagrant act of aggression in the post-World War II era, especially if we exclude acts by permanent members of the Security Council that the Security Council could not be expected to brand as aggression. Yet the Security Council did not label the invasion, occupation, and attempted annexation of Kuwait an act of aggression. In Resolution 660, the Security Council determined that "there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait."[27] It was only when Iraq ordered the closure of foreign embassies in Kuwait that the Security Council passed a resolution "[s]trongly condemn[ing] aggressive acts perpetrated by Iraq against diplomatic premises and personnel in Kuwait, including the abduction of foreign nationals who were present in those premises."[28]

In the 1980's, the leadership of the Palestine Liberation Organization operated out of Tunisia. In 1985, Israel bombed the headquarters of the PLO in Tunisia, killing a reported 67 people.[29] In 1988, Israel sent a military team to assassinate a PLO official in Tunisia. The Israeli team killed the official and three other people.[30] After both the 1985 incident and the 1988 incident, the Security Council passed resolutions condemning Israel's "aggression,"[31] but taking no enforcement action against Israel.

The Security Council has once used the term "aggression" to describe the activities of a non-state group. In 1977, a group of mercenaries made an unsuccessful attempt to overthrow the government of Benin. In Resolution 405, the Security Council "strongly condemn[ed]" this "act of armed aggression

---

26. For a detailed summary of Security Council practice with respect to aggression, see *Historical Review of Developments Relating to Aggression, Prepared by the Secretariat*, 115-121, Doc.PCNICC/2002/WGCA/L.1 (2002), *available at* http://www.un.org/law/icc/documents/aggression/aggressiondocs.htm (last visited Sept. 27, 2005).

27. U.N. SCOR, 45th Sess., 2932nd mtg., U.N. Doc. S/RES/660 (1990).

28. U.N. SCOR, 45th Sess., 2940th mtg., U.N. Doc. S/RES/667 (1990).

29. Bernard Weinraub, *White House, in Shift, says Raid by Israel 'Cannot be Condoned'*, N.Y. TIMES, October 3, 1985, at A1.

30. Loren Jenkins, *PLO Figure to be Buried in Damascus; Move Seen as an Effort to Heal Arafat-Assad Rift*, WASH. POST, April 19, 1988, at A21.

31. U.N. SCOR, 40th Sess., 2615th mtg. At 23, U.N. Doc. S/RES/573 (1985); U.N. SCOR, 43th Sess., 2810th mtg. At 15, U.N. Doc. S/RES/660 (1988).

perpetrated against the People's Republic of Benin."[32] One or more states may have been complicit in the mercenary attack on Benin, and the Security Council, in Resolution 405, reaffirmed a previous resolution in which it had condemned "any State which persists in permitting or tolerating the recruitment of mercenaries and the provision of facilities to them."[33] But the Security Council's use of the term "armed aggression" in Resolution 405 did not appear to depend on the premise that the activities of the mercenaries could be imputed to some state.

So it is not aggression, under Security Council practice, when one state invades, occupies and annexes a neighboring state, but it is aggression when a state kills four people in a raid targeting a group that is waging an armed struggle against the state. The Security Council's use of the term "aggression", in the first 60 years of its existence, has been very far from the use one would expect from a judicial body. Yet if the ICC statute is amended to make a Security Council determination of aggression a prerequisite to any prosecution for aggression, the Security Council would be called upon to assume the functions of a judicial body. The Security Council would then determine a major issue of international criminal liability when it determined the existence of an act of aggression under Article 39. Inevitably, there would be great pressure on the Security Council to function as a court. The accused state would demand additional time to present its case. The Security Council would be called upon to view evidence and possibly hear witnesses. There would be extended legal arguments about the meaning of "aggression" and about historical precedents.

The Security Council could establish fact-finding commissions, as it has done in the past. Nevertheless, an ongoing responsibility to decide the major factual and legal issues in one species of international criminal case would be unlike any quasi-judicial responsibility the Security Council has thus far assumed.

The Security Council would not perform well if it were forced into a judicial role. Consistency is more important in a judicial body than in a political body.[34] The political nature of the Security Council would make it difficult for the Security Council to make consistent decisions on aggression; the veto power would make consistency impossible. The Security Council could not label one of the permanent members an aggressor, even if that member had committed aggression that was, in every objective sense, far more blatant and grievous than the aggression committed by some other state that had been labeled an aggressor.

---

32. U.N. SCOR, Res. 405, Dec., 32nd Sess., 2005th mtg. At 18, U.N. Doc. S/INF/33 (1977).

33. *Id.*

34. While Article 59 of the ICJ Statute makes ICJ decisions non-precedential, the ICJ has displayed great consistency in its decisions, especially as compared to the Security Council.

The veto power would also enable each of the permanent members to be the sole judge of a case against its leaders – in effect, to be the sole judge of its own case.[35] The principle that no one should be the judge of his or her own case (*nemo debet esse judex in propria causa*) is a bedrock principle of fair judicial procedure.[36] Concededly, this principle is not as fully respected on the international plane as in some national legal systems.[37] Probably the most serious compromise of the *nemo judex* principle concerns the enforcement of ICJ judgments. Under Article 94 of the Charter, the enforcement of ICJ judgments is entrusted to the discretion of the Security Council, so that the P5 are able to prevent the enforcement of judgments against them.[38] Even here, however, the P5 cannot prevent ICJ cases from being brought against them in the first place (if they have in some way consented to jurisdiction). Article 94's departure from the *nemo judex* principle is perhaps necessary; a further and even more serious departure should not be permitted unless it is also necessary.

The defect of pushing the Security Council into an inappropriate judicial role characterizes time-limited determination schemes as well as exclusive determination schemes. Suppose that the Security Council has a limited amount of time (six months or a year) to determine aggression, but that some other body can determine aggression if the Security Council makes no decision. The Security Council would still be subject to pressure to assume a judicial role. And while inaction by the Security Council would be easier in a time-limited determination scheme, it is unlikely that the Security Council would completely ignore a request that it determine aggression in a pending ICC case. There are now approximately 100 parties to the ICC Statute, including two permanent members of the Security Council, Britain and France.[39] A request by the ICC that the Security Council determine aggression would undoubtedly be placed on the agenda of the Security Council and receive great attention.

My discussion of Security Council practice in determining the existence of aggression should not be taken as a general indictment of the Security Council. The Security Council undoubtedly plays a positive role in maintaining international peace and security, as compared to a world with no Security

---

35. Sadat and Carden, *supra* note 24, at 443.

36. In re Murchison, 349 U.S. 133, 136 (1955)("[N]o man can be a judge in his own case.").

37. *See* Tapio Puurunen, *The Legislative Jurisdiction of States Over Transactions in International Electronic Commerce*, 18 J. MARSHALL J. COMPUTER & INFO. L. 689, 736 n. 196 (2000); Christopher A. *Ford, Judicial Discretion in International Jurisprudence*, 5 DUKE J. COMP. & INT'L L. 35, 81-82 (1994).

38. Article 27(3) of the Charter states that "in decisions under Chapter VI . . . a party to a dispute shall abstain from voting." U.N. CHARTER, art. 27(3). However, the Chapter VI abstention rule does not apply to the enforcement of ICJ decisions under Article 94. *See* Stefan Brunner, *Article 27*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 503 (Bruno Simma et al. eds., 2d ed. 2002).

39. International Criminal Court, *Assembly of States Parties: The States Parties to the Rome Statute*, *available at* http://www.icc-cpi.int/asp/statesparties.html (last visited Sept. 28, 2005).

Council. Given the realities of the international political system, the Security Council is also best suited to determine aggression in the context of the Security Council's own suppression of aggression (which, as discussed below, is the context of Article 39). The Security Council is not, however, well suited to determine aggression in the context of an ICC case.

The U.N. Charter established the Security Council and the General Assembly as political bodies and the ICJ as a judicial body. It would be inconsistent with the Charter to push the Security Council into a judicial role to which it is not at all suited.

To be sure, the behavior of the Security Council will probably change somewhat when the ICC begins to exercise its jurisdiction over the crime of aggression, even if the Security Council is not called upon to make determinations of aggression in the context of ICC cases. Until now, the use of the term "aggression" by the Security Council has had little or no practical significance. The Security Council has the same vast enforcement powers under Chapter VII whether it determines the existence of a threat to the peace, a breach of the peace, or an act of aggression. It is far preferable to be called an aggressor and have the Security Council wag its finger at you (as with Israeli raids on PLO targets in Tunisia) than to be called a breacher of the peace and have the Security Council impose economic sanctions and authorize the use of force against you (as with the Iraqi invasion of Kuwait).[40]

When there is a real possibility of prosecution for the crime of aggression, the Security Council's use of the term "aggression" is bound to be affected. There may be less inclination to find aggression in borderline cases. Inevitably, though, there will still be inconsistency and political self-judging, due to the political character of the Security Council and the veto of the permanent members.

It might be thought that the objections I have thus far raised to exclusive determination schemes are in reality one objection: the veto. I would say, rather, that the veto makes exclusive determination objectionable on more than one Charter-based ground. The veto makes exclusive determination a violation of sovereign equality, and the veto also makes it particularly inappropriate to entrust a judicial decision to a political body. These objections to exclusive determination are, however, mutually reinforcing. As noted, the core of sovereign equality is juridical equality. By inappropriately allowing for the use of the veto to bar a judicial proceeding, exclusive determination schemes would cause one of the most serious possible violations of sovereign equality.

C. Prescribing Standards for the Security Council

Another Charter-based argument against exclusive determination schemes is that they would threaten the Security Council's own genuine Article

40. Presumably, the United States would have vetoed the resolutions calling Israel an aggressor if those resolutions could have led to international criminal liability for Israeli leaders.

39 role of deciding for itself, in the context of its own decisions, what constitutes aggression. Once again, this objection applies as well to time-limited determination schemes, but not to exclusive referral schemes.

What standards would the Security Council use in determining aggression in an ICC case? One never knows, but there would be great pressure on the Security Council to apply the definition in the ICC Statute, once that definition is finally thrashed out. Those members of the Security Council who are parties to the ICC Statute could certainly be expected to support using the ICC definition. If the Security Council did not attempt to apply the ICC Statute, it would find itself triggering prosecution in cases that should not be prosecuted under the ICC Statute, and withholding from prosecution cases that should be prosecuted. Of course, the Security Council could not be expected to apply the standards in the ICC Statute if a permanent member was accused of aggression, but in cases in which no veto is exercised, the ICC Statute would seem the most likely source of standards.

I argue below that Article 39 of the Charter cannot bear the meaning that the Security Council must be the sole body to determine aggression in every context. Surely, however, the Security Council must determine the existence of aggression in the context of its *own* decisions. The phrase, "The Security Council shall determine..." in Article 39 does not prohibit any body except the Security Council from determining aggression, but it does prohibit any body except the Security Council from determining aggression *for* the Security Council. Inaugurating a procedure that would predictably lead to the Security Council applying some other body's definition of aggression (where it applies any definition at all) is in tension with Article 39. Moreover, it is hardly deferential or respectful to the Security Council to deputize it to apply ICC law.

The General Assembly's 1974 "Definition of Aggression" resolution was intended as a guide for the Security Council. However, Article 4 of the Definition annexed to Resolution 3314 states: "The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter."[41] A similar provision in the ICC Statute's definition of aggression is unlikely in the extreme, as it would violate the principle of no crime without law (*nullum crimen sine lege*), recognized in Article 22 of the ICC Statute.[42] Also, the Security Council has essentially ignored the General Assembly's definition of aggression. The Security Council could easily ignore the General Assembly's definition, as it was not called upon to determine aggression for the General Assembly's purposes. The Security Council would not be able to ignore the ICC's definition of aggression if it is called upon to determine aggression as an issue in ICC cases.

41. G.A. Res. 3314, *supra* note 15, at 143.
42. ICC Statute, *supra* note 1, art. 22.

III. ARTICLE 39 DOES NOT MAKE THE SECURITY COUNCIL THE SOLE DETERMINER OF AGGRESSION

While exclusive determination schemes are in tension with important Charter-based principles, that tension might have to be borne if Article 39 truly required an exclusive determination scheme. Fortunately, it does not.

The argument for exclusive determination presents itself as something close to a syllogism. Under Article 39, the Security Council "shall determine the existence of any . . . act of aggression . . . ."[43] Therefore, by negative implication, no other body may determine the existence of aggression. But the implication of exclusivity from Article 39 is not nearly as broad as the advocates of exclusive determination would like to believe. A straightforward analysis of the Charter reveals that the Security Council's authority to determine the existence of aggression cannot be completely exclusive. There are two circumstances in which the Charter explicitly calls for some body other than the Security Council to determine the existence of aggression; Article 39 itself indicates that the Security Council cannot be expected to determine the existence of stale aggression; and the dispute-resolution provisions of the Charter indicate that the ICJ must be able to determine aggression in at least some cases. Under Article 39, the Security Council's power to determine the existence of aggression is tied to the Security Council's power to *suppress* aggression. The true negative implication of Article 39 is that no body other than the Security Council may determine aggression as a step toward the Security Council's own suppression of aggression.

A. *Determination of Aggression Under Article 53 and Article 51*

Article 53 of the Charter states that no enforcement action shall be taken under regional arrangements without the authorization of the Security Council. However, there is a now-obsolete exception for "regional arrangements directed against *renewal of aggressive policy* on the part of [the defeated Axis powers in World War II], until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state."[44] Under this exception, there could be enforcement action under regional arrangements against the Axis powers, without the approval of the Security Council, and the Security Council would have no authority to review these actions without the consent of the victorious Allied powers.

Article 53 alone is not very helpful in gauging the exclusivity of the Security Council's power to determine aggression under Article 39. When the United Nations was founded, there was unfinished business from World War II. Even though the Allies were given authority to determine aggression, or

43. U.N. CHARTER, art. 39.

44. U.N. CHARTER, art. 53., ¶ 1 (emphasis added).

renewal of aggressive policy, by the Axis, this could theoretically be the only exception to the Security Council's exclusive power to determine aggression under Article 39. It is noteworthy, however, that the Allies' power to determine aggression under Article 53, through regional arrangements, is the *only* place in the Charter where there is a power to determine aggression, binding on other states, and that power actually makes a difference. As noted, it has thus far made no real difference, under Article 39, whether the Security Council determines the existence of a threat to the peace, a breach of the peace, or an act of aggression: The Security Council's enforcement powers are the same upon all three determinations. By contrast, the extra authority of "regional arrangements" under Article 53 depends on a determination by the Allies that there has been a "renewal of aggressive policy" by an Axis power, or that the regional arrangements are directed against such renewal.

The second explicit Charter exception to Article 39 exclusivity is more important. Under Article 51, states retain the right of individual or collective self-defense "if an armed attack [French: agression armée] occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[45] Thus, states themselves make an initial determination of aggression under Article 51, subject to review by the Security Council.[46] States can defend themselves, and they can even go to war on behalf of other states that have been attacked, based on their own initial determination that an armed attack has occurred.

There is some debate over whether the term "armed attack" in Article 51 has the same meaning as the term "aggression," or "act of aggression," in Article 39.[47] In the *Nicaragua* case,[48] discussed below, the ICJ treated the term "armed attack" as synonymous with the term "aggression." In the French text of the Charter, the term corresponding to "armed attack" in Article 51 is "*agression armée,*"[49] further suggesting that armed attack and aggression are the same thing (or at least, that armed attack and armed aggression are the same thing).

In my opinion, the main difference between the "armed attack" of Article 51 and the "act of aggression" of Article 39 is that the term "act of aggression" has whatever meaning the Security Council, for political reasons, chooses to give it, while the term "armed attack" has a more definite legal meaning, especially after the *Nicaragua* case. But insofar as we try to give a more objective, juridical meaning to the term "act of aggression" in Article 39, that

---

45. U.N. CHARTER, art. 51.

46. *See* Luigi Condorelli, *Conclusions Générales*, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 160 (Mauro Politi & Giuseppe Nesi eds., 2004).

47. *See* Albrecht Randelzhofer, *Article 51*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 795 (Bruno Simma et al. eds., 2d ed. 2002) (denying identity of terms).

48. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (June 27, 1986).

49. CHARTE DES NATIONS UNIES, art. 51, *available at* http://www.un.org/french/aboutun/charte/index.html (last visited Sept. 28, 2005).

term is obviously very close, if not identical, to the term "armed attack" in Article 51.

It might be thought that no matter how close in meaning the two terms are, the initial determination of states as to armed attack under Article 51 does not rebut Article 39's implication of exclusivity because the precise term "aggression" is not used in the English text of Article 51. I will return to this objection later.

Under Article 51, the Security Council's power to determine aggression is supreme, but not exclusive. Pending a determination by the Security Council, states can make their own determination of aggression. This arrangement makes it more plausible that the ICC can determine aggression, consistent with the Charter, especially given the Security Council's authority to suspend ICC proceedings under Article 16 of the ICC Statute.[50]

B. Stale Aggression Outside Article 39

Article 53's exception to exclusive determination is interesting, and Article 51's exception is telling, as argued further below. But the main obstacle to total exclusivity is Article 39 itself. Read fairly, Article 39 indicates that the Security Council cannot be expected to determine the existence of stale aggression, aggression that has occurred in the past and as to which the Security Council sees no need for action. Article 39 states, in full: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression *and* shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, *to maintain or restore international peace and security.*"[51]

Article 39 is the gateway to Chapter VII of the Charter, which is titled "*Action* with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression."[52] Article 39 has a Determination Clause ("The Security Council shall determine...") and an Enforcement Clause ("... and shall make recommendations, or decide what measures shall be taken...") Those who advocate exclusive determination focus on the Determination Clause. I question whether the Determination Clause, even if read in isolation, could be interpreted to mean that no body but the Security Council shall ever determine aggression in any setting. But when the Determination Clause is read in the context of the Enforcement Clause, it is clear that the Security Council's authority to determine aggression is tied inextricably to the Security Council's authority and responsibility to suppress aggression.

Under the literal language of Article 39, the Security Council cannot determine the existence of aggression without making recommendations or

---

50. In Part IV, I propose that the ICC Statute be amended to give the Security Council additional authority over ICC proceedings involving the crime of aggression

51. U.N. CHARTER, art. 39 (emphasis added).

52. U.N. CHARTER, ch. VII (emphasis added).

taking measures to maintain or restore international peace and security. Conversely, if the Security Council sees no need to make recommendations or take measures to maintain or restore international peace and security, it would seem that the Security Council cannot determine the existence of aggression under Article 39.

Consider a hypothetical case of alleged aggression, loosely modeled on Argentina's invasion of the Falklands but occurring after the ICC begins exercising jurisdiction over the crime of aggression. State A invades State B's territory. State B repulses the invasion. This military defeat leads to the collapse of the military dictatorship in State A and to the restoration of democracy in that country. State A gives up any claim to the territory of State B (something that has not happened with Argentina and Britain.) Every possible threat to international peace and security from State A's invasion of State B has disappeared. Now the ICC prosecutor wants to charge the former military leaders of State A with the crime of aggression.

In such a case, the Security Council might see no reason to do anything to maintain or restore international peace and security. Arguably, then, the Security Council could not legitimately determine, in retrospect, the existence of aggression under Article 39. So if a determination of aggression under Article 39 were a precondition to prosecution for the crime of aggression before the ICC, this hypothetical alleged aggression could not be prosecuted, even if all members of the Security Council supported prosecution – as long as they took seriously the literal requirement of Article 39 that a determination of aggression be followed by recommendations or measures to maintain or restore international peace and security.

It could be argued that even in the most tranquil peace, prosecution of those responsible for past aggression is a measure to "maintain" peace and security. This seems a strained reading of Article 39, especially in light of the reference in Article 1(1) to the "suppression of acts of aggression or other breaches of the peace."[53] A more natural reading is that the Security Council acts under Article 39 in response to some disruption. Indeed, the most natural reading of Article 39 may be that the Security Council does not "maintain" international peace and security in response to an act of aggression; the Security Council "maintains" peace in response to a threat to the peace, but it "restores" peace in response to a breach of the peace or an act of aggression.[54]

Granted, the Security Council would have the power to give a strained interpretation to the Enforcement Clause of Article 39, just as it has the power

53. U.N. Charter, art. 1(1) "The Purposes of the United Nations are... To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace." *Id.*

54. In Article 1(1), the suppression of aggression is done in order to "maintain international peace and security," but the context of Article 39 ("maintain or restore") suggests that the word "maintain" may be used there in a narrower sense.

to give what some consider a strained interpretation to the Determination Clause, finding threats to the peace where some believe there are no threats to the peace.[55] But despite arguments over the Security Council's application of Article 39, the Security Council has not completely drained Article 39's terms of their ordinary meaning. While the Security Council may have the power to determine that a ham sandwich poses a threat to the peace, the Security Council has not yet done so. It is perfectly conceivable that some members of the Security Council may take the view, in a case of stale aggression, that if there is no need to suppress aggression, there is no occasion to determine aggression.

Many proposals for the ICC's exercise of jurisdiction over the crime of aggression require that the Security Council act under Chapter VII when making a determination of aggression precedent to an ICC prosecution for aggression. This requirement is included in both exclusive schemes and non-exclusive schemes. The foregoing discussion suggests that if Security Council action must be a prerequisite, the requirement of action under Chapter VII is a mistake. If the Security Council is called upon (as I think, inappropriately) to make a determination of past aggression, it should be able to do so even when the Council's members see no need for enforcement action.[56]

C. *Dispute Resolution Under Chapter VI*

While Article 39 appears to disable the Security Council from determining the existence of stale aggression under Chapter VII, the provisions of Chapter VI of the Charter appear to *enable* the ICJ and other adjudicative bodies to determine the existence of aggression in at least some cases. Article 33(1) provides: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[57] Article 36 provides that in making recommendations in cases under Chapter VI, the Security Council "should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties," and that the Security Council "should also take into consideration that legal disputes should as a general rule be referred

---

55. On controversies over the Determination Clause, see Inger Osterdahl, THREAT TO THE PEACE: THE INTERPRETATION BY THE SECURITY COUNCIL OF ARTICLE 39 OF THE UN CHARTER (1998).

56. A requirement that the Security Council act under Chapter VII is already included in existing provisions of the ICC Statute. Article 16 requires that the Security Council act under Chapter VII when suspending an ICC proceeding, and Article 13 requires that the Security Council act under Chapter VII when referring a case to the ICC. The requirement of action under Chapter VII for an Article 16 "stop" order makes sense: The Security Council should not be able to stop ICC proceedings unless the Security Council believes there is a threat to the peace. The requirement of Chapter VII action for an Article 13 referral may indicate an expectation that the Security Council will use Article 13 referrals to deal with ongoing conflicts.

57. U.N. Charter, art. 33(1).

by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."[58]

The existence of aggression can certainly be an issue in a legal dispute governed by the provisions of Chapter VI. In some cases, discussed below, a legal dispute over aggression may overlap with Security Council treatment of a conflict under Chapter VII. But in other cases, there can be a legal dispute over aggression where Chapter VII is not in the picture. A number of treaties prohibit aggression; a tribunal might be called upon to determine the existence of past aggression when applying or interpreting such a treaty. Aggression can also be an issue in legal disputes over title to territory.

In 2001, the ICJ resolved boundary disputes between Bahrain and Qatar.[59] Bahrain claimed, in that case, that Qatar had obtained the territory of Zubarah in 1937 through "aggression."[60] Not even the most ardent defender of Security Council prerogative, I trust, would say that the Security Council alone may determine, in a boundary dispute, whether aggression occurred in 1937.

D. Has the ICJ Ever Determined the Existence of Aggression?

Aggression clearly can be a legal issue, to be resolved by adjudicative bodies under Chapter VI of the Charter rather than by the Security Council under Chapter VII. For this reason alone, therefore, the argument for total exclusivity is unconvincing. The argument for total exclusivity would be even less convincing if the ICJ had ever actually determined the existence of aggression.

It is easy to find, in ICJ cases, allegations by states that other states have committed aggression. It is harder to find ICJ determinations of aggression. The ICJ generally does not frame the issue as whether a state has committed aggression, even if the issue is so framed by one of the parties. In cases involving the use of force, the ICJ generally frames the issue, not surprisingly, as whether a state has used force in violation of Article 2(4) of the Charter.

Undoubtedly, there is considerable overlap between aggression and a use of force in violation of Article 2(4). Any definition of aggression in the ICC statute is likely to be based on Article 2(4) or on the General Assembly's "Definition of Aggression" resolution,[61] which itself was based on Article 2(4). Aggression, however, is generally taken to be a narrower category than unlawful use of force; it is so taken by the ICJ itself, as noted below. So it

---

58. U.N. Charter, art. 36.

59. Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 2001 I.C.J. 40 (Mar. 16, 2001).

60. "Bahrain maintains that Qatar's 'aggression' against Zubarah was an unlawful use of force from which no legal rights could arise, supporting its contention by reference to various international instruments from the relevant period dealing with the illegal use of force." *Id.* at 76.

61. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 19, U.N. Doc. A/9619 (1974).

cannot be said that in determining the existence *vel non* of an unlawful use of force, the ICJ has necessarily determined the existence of aggression.

Nevertheless, the ICJ has determined the existence *vel non* of an armed attack within the meaning of Article 51, and it has identified armed attack with aggression. Therefore, in my view, the ICJ has determined aggression.[62] The three most relevant cases here are the *Nicaragua* case,[63] the *Oil Platforms* case,[64] and the *Armed Activities* case.[65]

1. Nicaragua Case

In its 1986 judgment in the *Nicaragua* case, the ICJ held that the United States had used unlawful force against Nicaragua in violation of international customary law that was, in essence, identical to Article 2(4) of the Charter. The United States had used unlawful force, the Court held, by mining Nicaraguan ports and by several naval attacks "on Nicaraguan ports, oil installations and a naval base."[66] These operations were conducted or organized by the CIA.[67] In addition, the Court held that the United States had unlawfully used or threatened force by arming and training the Nicaraguan "Contras" who were seeking to overthrow the government of Nicaragua.[68]

It has been suggested that the ICJ determined, in the *Nicaragua* case, that the United States committed aggression against Nicaragua.[69] I disagree with this assessment, for reasons explained below. The Court's determination of aggression in the *Nicaragua* case came, rather, in the course of its evaluation of Nicaragua's conduct.

The United States contended, before it stopped participating in the proceedings, that its actions against Nicaragua had been justified under a theory of collective self-defense. The United States claimed that it had been defending El Salvador, Honduras and Costa Rica against attacks and subversion from Nicaragua. In evaluating this American defense, the ICJ applied international customary law that it once again found to be identical, in essence, to a provision of the Charter, in this case the provision in Article 51 that states retain the right

---

62. For a less opinionated discussion that covers some of the same ground as my own, *see generally*, *Historical Review of Developments Relating to Aggression, Prepared by the Secretariat* 128-135, U.N. Doc. PCNICC/2002/WGCA/L.1 (2002), *available at* http://www.un.org/law/icc/documents/aggression/aggressiondocs.htm (last visited Sept. 1, 2005).

63. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (June 27, 1986).

64. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6, 2003).

65. Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Merits, 2005 I.C.J. (Dec. 19, 2005).

66. *Nicaragua*, Merits, 1986 I.C.J. 14, at ¶¶ 227, 292(4), 292(6).

67. *Id.* at ¶¶ 76-86.

68. *Id.* at ¶¶ 228, 292(4).

69. Linda Jane Springrose, *Aggression as a Core Crime in the Rome Statute Establishing an International Criminal Court*, 1999 ST. LOUIS-WARSAW TRANS'L L.J. 151, 167 (1999).

to individual or collective self-defense against an "armed attack."[70] The Court therefore undertook to determine the existence of an armed attack by Nicaragua. As it stated, "For the Court to conclude that the United States was lawfully exercising its right of collective self-defence, it must first find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica."[71]

It was in connection with this inquiry that the ICJ, in my view, determined the existence of aggression in the relevant sense. The Court equated armed attack with aggression in two parts of its opinion. In paragraph 195, it stated that the "Definition of Aggression" in General Assembly Resolution 3314 "may be taken to reflect customary international law" on what constitutes an *armed attack.*[72] Therefore, according to the Court, an armed attack includes "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State" of sufficient gravity.[73] This is an armed attack, the Court decided, because it is defined as *aggression* in General Assembly Resolution 3314.[74]

In paragraph 191, the Court referred to another General Assembly resolution, Resolution 2625, the "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations."[75] The Court stated that Resolution 2625 includes a description of "less grave" violations of the customary-law prohibition on the use of force, in addition to a description of more grave violations that constitute armed attack or aggression.[76] In discussing Resolution 2625, the Court once again equated armed attack and aggression:

> As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an *armed attack*) from other *less grave forms.* In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625(XXV), referred to above). As already observed, the adoption by

---

70. *Nicaragua*, Merits, 1986 I.C.J. 14, at ¶¶ 193-195.

71. *Id.* at ¶ 229.

72. *Id.* at ¶ 195.

73. *Id.* (quoting G.A. Res. 3314, U.N. GAOR 29th Sess., Supp. No 19, U.N. Doc A.9619 (1974)).

74. *Id.*

75. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No 18, U.N. Doc. A/8018 (1970).

76. *Nicaragua*, Merits, 1986 I.C.J. 14, at ¶ 191.

> States of this text affords an indication of their opinio juris as to customary international law on the question. Alongside certain descriptions which may refer to *aggression*, this text includes others which refer only to *less grave forms* of the use of force . . . .[77]

Thus, the terms "armed attack" and "aggression" are used, interchangeably, to refer to more grave forms of the use of force, as opposed to less grave forms that do not constitute armed attack or aggression.

In the *Nicaragua* case, the Court refused to find that Nicaragua had engaged in an armed attack against El Salvador, Honduras, or Costa Rica.[78] The Court held that Nicaragua's alleged assistance to rebels in El Salvador, "in the form of the provision of weapons or logistical or other support," did not constitute an armed attack.[79] Nicaragua had also made some transborder military incursions into Honduras and Costa Rica. As to these incursions, the Court indicated that there was insufficient evidence to determine whether they amounted to an armed attack.[80] The Court also found that the behavior of Honduras and Costa Rica, at the time of the challenged U.S. actions, did not support the view that these states had seen themselves as victims of an armed attack by Nicaragua and had asked the United States to come to their defense.[81] Based on these rulings, the Court rejected the U.S. claim of collective self-defense and determined that the United States had used unlawful force.

Did the Court in the *Nicaragua* case determine that the United States had committed aggression? In my view, no. The Court emphasized the distinction between an armed attack (equated to aggression) and the mere unlawful use of force.[82] Therefore, the Court's determination that the United States had used unlawful force was not a determination that it had committed aggression. The Court did, however, determine the existence *vel non* of aggression by Nicaragua, by determining whether Nicaragua had engaged in an armed attack that justified the United States' use of force.

2. *Oil Platforms Case*

In *Oil Platforms*,[83] the ICJ once again undertook to determine whether the United States had faced an armed attack and had therefore been justified in taking military action in self-defense.[84] This time the target of U.S. military

---

77. *Id.* (emphasis added).
78. *Id.* at ¶¶ 195, 231.
79. *Id.* at ¶ 195.
80. *Id.* at ¶ 231.
81. *Id.* at ¶¶ 232-234.
82. *Id.* at ¶¶ 191, 195.
83. *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161.
84. For an overview of this case, see Pieter H.F. Bekker, *The World Court Finds that U.S. Attacks on Iranian Oil Platforms in 1987-1988 Were Not Justifiable as Self-Defense, but the*

action was Iran. The *Oil Platforms* case grew out of the 1980-1988 Iran-Iraq war. Toward the end of that war, Iran began attacking neutral shipping in the Persian Gulf. These attacks led to military friction between the United States and Iran. In 1987 and again in 1988, the United States destroyed Iranian oil platforms. The United States claimed at the time that it was acting in self-defense.

Iran brought a case against the United States before the ICJ, basing jurisdiction on a 1950's treaty of friendship between Iran and the United States, and claiming that the U.S. attacks had violated the treaty. In the course of resolving issues under the U.S.-Iran treaty (not discussed here), the ICJ evaluated the U.S. claim of self-defense.[85] The ICJ ruled that this claim depended, *inter alia*, on whether Iran had made an armed attack on the United States within the meaning of Article 51 of the Charter. The Court quoted with approval a statement from the *Nicaragua* decision that in evaluating claims of self-defense, "it is necessary to distinguish 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.'"[86]

The ICJ held that the United States had not proved that Iran made an armed attack on it. In defense of its 1987 military action, the United States relied on a number of incidents, including a missile strike on a U.S.-flagged ship; purported fire on U.S. helicopters from Iranian oil platforms; and the mining of a U.S.-owned ship and a U.S.-flagged ship. In defense of its 1988 military action, the United States relied on the mining of a U.S. warship, resulting in injuries to the crew and damage to the ship. As to some of the incidents relied on by the United States, the ICJ held that the United States had not proved Iran's involvement. As to some, the Court held that the United States had not proved that Iran was specifically targeting the United States (unlike in the *Nicaragua* case, the United States in *Oil Platforms* was claiming only individual self-defense, not collective self-defense). The ICJ also expressed some doubt that the incidents that preceded each American military operation were "grave" enough, alone or in combination, to constitute an armed attack.[87] The Court therefore rejected the U.S. claim of self-defense, though it ruled in favor of the United States, on the merits of Iran's treaty claim, on other grounds.

In my opinion, the ICJ determined the existence *vel non* of aggression in *Oil Platforms*, by way of determining the existence *vel non* of an armed attack by Iran. In *Nicaragua*, the ICJ had equated armed attack and aggression. In *Oil Platforms*, the ICJ adhered to the concept of armed attack it had laid down

---

United States Did Not Violate the Applicable Treaty with Iran, ASIL Insights (November, 2003).

85. In the terms of the treaty, the U.S. claim was that its actions were "necessary to protect essential security interests", but the ICJ applied Charter law to evaluate this claim. *Oil Platforms*, 2003 I.C.J. 161 at ¶ 32.

86. *Id.* at ¶ 51, (quoting *Nicaragua*, Merits, 1986 I.C.J. 14 at ¶ 191).

87. *Oil Platforms*, 2003 I.C.J. 161 at ¶¶ 64, 72. However, the Court did say that it "does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence.'" *Id.* at ¶ 72.

in *Nicaragua*, and therefore, it is fair to assume, continued to equate armed attack and aggression.

3. *The Armed Activities case*

Shortly before this Article went to press, the ICJ handed down its judgment in *Armed Activities on the Territory of the Congo (Congo v. Uganda)*.[88] In this case, the Court once more equated armed attack and aggression, en route to denying Uganda's claim of self-defense: "The attacks [on Uganda] did not emanate from armed bands or irregulars sent by the [Democratic Republic of the Congo] or on behalf of the DRC, within the sense of ... General Assembly resolution 3314... on the *definition of aggression*...."[89] The *Armed Activities* case is therefore yet another instance in which the ICJ has, in my opinion, determined the existence *vel non* of aggression.

4. *The Tehran Case and The Wall Case*

Two other ICJ cases are also worth mentioning in this connection. In *United States Diplomatic and Consular Staff in Tehran*,[90] the ICJ referred to the 1979 seizure of the American embassy in Tehran, by a mob of Iranians, as an "armed attack."[91] This, however, was before the ICJ had equated armed attack and aggression in *Nicaragua*. I therefore would not claim that the ICJ determined the existence of aggression in the *Tehran* case.

In its 2004 advisory opinion on Israel's construction of a wall (or separation barrier) in the West Bank,[92] the ICJ addressed Israel's claim that in building a wall to keep out suicide bombers, it was exercising its right of self-defense under Charter Article 51. Israel did not participate in this case. However, in a General Assembly debate on the same issue, Israel had relied on Security Council resolutions 1368 (2001) and 1373 (2001), which explicitly recognized the U.S. right of self-defense in response to the September 11, 2001 attacks.

In its advisory opinion, the ICJ rejected Israel's claim of self-defense.[93] The Court opined that as any attacks on Israel originated in Israeli-controlled

---

88. Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Merits, 2005 I.C.J. (Dec. 19, 2005).

89. *Id.* at ¶ 146 (emphasis added).

90. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

91. *Id.* at ¶¶ 14, 57, 64, 91.

92. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J., 43 I.L.M. 1009 (July 9, 2004). [hereinafter, *Wall*].

93. Wall, at ¶¶ 138-141. The ICJ did note that "Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens." But, said the ICJ, "[t]he measures taken are bound... to remain in conformity with applicable international law." *Id.* at ¶ 141.

territory, they could not be armed attacks within the meaning of Article 51.[94] The Court also suggested that an armed attack, within the meaning of Article 51, must be an attack by another State, or one imputable to another State.[95] The ICJ therefore seemed to imply, remarkably, that the September 11 attacks on the United States were armed attacks, within the meaning of Article 51, only to the extent that those attacks were imputable to Afghanistan. The ICJ's suggestion in the *Wall* case that an armed attack can be committed only by a state may be inconsistent with its use of the phrase "armed attack," in the *Tehran* case, to describe the attack on the American Embassy in Tehran.

In any event, it is clear that the ICJ has determined the existence *vel non* of an armed attack, within the meaning of Article 51. Let us therefore return to the issue of whether "armed attack" and "aggression" are the same thing. If they are the same thing, then the ICJ has determined aggression, and the argument that no entity except the Security Council may determine aggression is further weakened.

It might be argued that however much the ICJ equated armed attack and aggression in the *Nicaragua* case, the term "armed attack" in Article 51 does not contain the word "aggression," whereas the term "crime of aggression" in ICC Article 5 does contain the word "aggression." Therefore, it might be argued, the case for exclusive determination by the Security Council is stronger with respect to the crime of aggression than with respect to an armed attack.

There are a number of problems with this philological maximalism. First, the French term for armed attack, *agression armée*, does appear to contain the word aggression. Second, while the term "act of aggression" in Article 39 is different from the term "armed attack" in Article 51, the term "act of aggression" in Article 39 is *also* different from the term "crime of aggression" in ICC Article 5. Third, and relatedly, the term "crime of aggression" in ICC Article 5, when defined, will probably be *closer* in meaning to the term "armed attack," in Charter Article 51, than to the term "act of aggression" in Charter Article 39. Therefore, the ICJ's determination of armed attack is an even stronger precedent for ICC determination of the crime of aggression than might initially appear.

As previously suggested, the main difference between the "armed attack" of Article 51 and the "act of aggression" of Article 39 is that the ICJ has given the term "armed attack" a fairly definite meaning, while the Security Council has not given the term "act of aggression" anything approaching a definite meaning.[96] When the term "crime of aggression" in ICC Article 5 is defined, it

---

94. *Id.* at ¶ 139.

95. "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State." *Id.*

96. As outlined above, any inconsistency the ICJ may have displayed in applying the term "armed attack" is nothing compared to the vast inconsistency the Security Council has displayed in applying the term "aggression."

will probably have a fairly definite meaning, like "armed attack" and unlike "act of aggression." Moreover, the definition of "crime of aggression" will probably align that term with the term "armed attack," as interpreted by the ICJ. There will probably be a gravity threshold for the crime of aggression, just as there is, the ICJ has stressed, an important gravity threshold for an armed attack under Charter Article 51. By contrast, in the practice of the Security Council, and especially its resolutions on the Israeli raids on Tunisia,[97] it is hard to discern a gravity threshold for an act of aggression under Article 39. The term "crime of aggression" may also be defined so as to require that aggression be committed by a state. It appears, based on the ICJ's 2004 advisory opinion on the Israeli wall, that the ICJ may now believe that an armed attack, under Article 51, can only be committed by a state. In Security Council practice regarding acts of aggression, however, it is hard to discern a requirement of state responsibility, given Resolution 405 regarding the mercenary attack on Benin.[98] Thus, it is quite likely that when the term "crime of aggression" is defined, that term will be closer in meaning to the term "armed attack," as interpreted more or less consistently by the ICJ, than to the meaning of the term "act of aggression," as interpreted sporadically by the Security Council.[99]

E. Alternatives to Total Exclusivity

As previously argued, there are many reasons to reject the view that the Security Council's Article 39 power to determine the existence of aggression means that no other body can ever determine the existence of aggression. I have dealt at length with the ICJ's practice, seeking to demonstrate that the ICJ has determined the existence of aggression, in the relevant sense. I emphasize, however, that my main arguments are not based on the decisions of the ICJ; my main arguments, outlined above, are based on the Charter itself.

It will be conceded, I hope, that the Security Council cannot possibly be the sole determiner of aggression in every context in which aggression is determined. Once the position of total exclusivity is rejected, for the reasons given above, two plausible interpretations of Article 39 are left. My own interpretation (which I consider the more plausible) is that Article 39 only disables bodies other than the Security Council from determining aggression when they purport to determine it *for the Security Council*, thus triggering the Security Council's power and responsibility to suppress aggression under Chapter VII. I will refer to this position as Chapter VII enforcement-exclusivity. An alternative interpretation is that bodies other than the Security

97. *Supra* Part II(B).

98. *Supra* Part II(B).

99. Suppose the philological maximalist persists, claiming that the meaning of terms is not important; only the use of the word "aggression" matters. If this is really the problem, perhaps the ICC Statute should be amended to remove jurisdiction over the crime of aggression and to provide instead jurisdiction over the crime of "shmaggression."

Council are barred from determining aggression, in any context, when the Security Council has in some way asserted its Chapter VII powers, making a determination under Article 39 that there exists a threat to the peace, a breach of the peace, or an act of aggression. I will refer to this position as Chapter VII case-exclusivity.

As previously noted, the Security Council's power to determine aggression is tied to the Security Council's power to suppress aggression. Once the Security Council makes an Article 39 determination, it *must* do something to maintain or restore peace and security ("... and *shall* make recommendations, or decide what measures shall be taken....")[100] The most natural interpretation of Article 39 is that the negative implication of its Determination Clause is also tied to the Security Council's power to suppress aggression: No one but the Security Council may trigger that power.

The drafting history of the Charter shows that this is not an empty interpretation. At the founding conference of the United Nations, there were some unsuccessful attempts to limit the discretion of the Security Council to determine aggression. Schuster and others see this drafting history as bolstering the total-exclusivity interpretation of Article 39.[101] However, the failed proposals to limit the discretion of the Security Council were proposals to define aggression *for the Security Council*, so as to trigger the Security Council's enforcement responsibility. The existence of these proposals, and their ultimate failure, tell in favor of the interpretation of Article 39 that I advocate, *i.e.*, Chapter VII enforcement-exclusivity. The report of the committee charged with drafting what became Article 39 states:

> Various amendments proposed on [the determination of aggression] recalled the definitions written into a number of treaties concluded before this war but did not claim to specify all cases of aggression. *They proposed a list of eventualities in which intervention by the Council would be automatic.* At the same time they would have left to the Council the power to determine the other cases in which it should likewise intervene.
>
> Although this proposition evoked considerable support, it nevertheless became clear to a majority of the Committee that a preliminary definition of aggression went beyond the possibilities of this Conference and the purpose of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression. It may be noted that, the list of such cases being necessarily incomplete,

100. U.N. CHARTER, art. 39 (emphasis added).
101. Schuster, *supra* note 4, at 36.

> the Council would have a tendency to consider of less importance the acts not mentioned therein; these omissions would encourage the aggressor to distort the definition or might delay action by the Council. Furthermore, in the other cases listed, *automatic action by the Council might bring about a premature application of enforcement measures.*
>
> The Committee therefore decided to adhere to the text drawn up at Dumbarton Oaks and to leave to the Council the entire decision as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression.[102]

The phrase "The Security Council shall determine" should be read in the context of this history.[103] That phrase represents a rejection of "eventualities in which intervention by the Council would be automatic."[104] As a determination of aggression by the ICC would in no way purport to trigger the enforcement powers of the Security Council, such an independent determination is not barred by Article 39.

Let us consider the other plausible interpretation of Article 39: that it establishes a regime of Chapter VII case-exclusivity, barring other bodies from determining aggression, in any context, when the Security Council has made an Article 39 determination.[105] This interpretation of Article 39 is less natural than the enforcement-exclusivity interpretation I favor. Moreover, the plausibility of the case-exclusivity interpretation is weakened by ICJ decisions on an analogous issue, by the permissibility of collective self-defense under Charter Article 51, and by the Security Council's power to halt ICC proceedings under ICC Article 16.

The ICJ has often encountered arguments that it should not hear the merits of a case because the case is within the exclusive competence of the Security Council. So far, the ICJ has rejected every such argument. In *Nicaragua*, the Court responded to an American argument of exclusive Security Council competence by stating: "The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with

---

102. Doc. 881, June 10, Report of Rapporteur of Committee III/3 to Commission III on Chapter VIII, Section B, in THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SELECTED DOCUMENTS 763 (1946) (emphasis added).

103. That phrase, of course, predated the attempts to change it, but the idea that aggression should be defined in advance had been in the air since the days of the League of Nations.

104. Doc. 881, *supra* note 102, at 763.

105. The ILC Draft Statute would have established a regime of Chapter VII case-exclusivity as to all crimes covered by the Statute.

respect to the same events."[106] The ICJ repeated this statement in the *Genocide Convention* case brought by Bosnia against Yugoslavia,[107] and repeated it yet again in the *Armed Activities* case brought by the Democratic Republic of the Congo against Uganda.[108]

The argument for exclusive Security Council competence in *Nicaragua* was not at all compelling. The Security Council had not made any Article 39 determination in that case; it had not found a threat to the peace, a breach of the peace, or an act of aggression. If there is a category of Chapter VII cases within the exclusive competence of the Security Council, the Security Council must presumably decide for itself when a case falls in that category, by making an Article 39 determination.

The ICJ left open, in *Nicaragua*, the possibility that it might be barred from proceeding with a case if the Security Council had in fact made an Article 39 determination as to that case.[109] However, in *Genocide Convention* and *Armed Activities (Congo v. Uganda)*, the ICJ rejected Chapter VII case-exclusivity argument, and granted provisional remedies, where the Security Council had made Article 39 determinations. Both of these cases involved ongoing armed conflict.

---

106. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction, 1984 I.C.J. 392, ¶ 95 (June 17, 1984).

107. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Yugo.), Provisional Measures, 1993 I.C.J. 3, ¶ 33 (April 8, 1993) [hereinafter Genocide Convention].

108. Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda), Provisional Measures, 2000 I.C.J. 111, ¶ 36 (April 11, 2000) [hereinafter Armed Activities].

109. *Nicaragua*, Jurisdiction, 1984 I.C.J. 392, ¶ 94.

> The United States argument is also founded on a construction, which the Court is unable to share, of Nicaragua's complaint about the United States use, or threat of the use, of force against its territorial integrity and national independence, in breach of Article 2, paragraph 4, of the United Nations Charter. The United States argues that Nicaragua has thereby invoked a charge of aggression and armed conflict envisaged in Article 39 of the United Nations Charter, which can only be dealt with by the Security Council in accordance with the provisions of Chapter VII of the Charter, and not in accordance with the provisions of Chapter VI. This presentation of the matter by the United States treats the present dispute between Nicaragua and itself as a case of armed conflict which must be dealt with only by the Security Council and not by the Court which, under Article 2, paragraph 4, and Chapter VI of the Charter, deals with pacific settlement of all disputes between member States of the United Nations. But, if so, it has to be noted that, while the matter has been discussed in the Security Council, no notification has been given to it in accordance with Chapter VII of the Charter, so that the issue could be tabled for full discussion before a decision were taken for the necessary enforcement measures to be authorized. It is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States, but one requiring, and indeed demanding, the peaceful settlement of disputes between the two States. Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement.

Id. As Gray has observed, this is an obscure passage. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 11 (2000).

In *Armed Activities*, the ICJ's provisional remedy was not particularly daring. The ICJ basically ordered both parties to comply with a Security Council resolution.[110] In *Genocide Convention*, the ICJ departed farther from commands that the Security Council had already laid down. It entered provisional relief against Yugoslavia that included the instruction: "The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any . . . armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide."[111] The Russian judge on the ICJ voted against this portion of the Court's order on the ground that it was "open to the interpretation that the Court believes that [Yugoslavia] is indeed involved in such genocidal acts, or at least that it may very well be so involved."[112]

Also relevant to the notion of Chapter VII case-exclusivity are the *Lockerbie* cases. In these cases, Libya ultimately sought relief from Security Council resolutions, passed under Chapter VII, that required Libya to turn over suspects in the Lockerbie bombing.[113] The cases were settled before judgment on the merits, and it seems likely the Security Council resolutions would have proved dispositive in the end. However, the ICJ did let the cases proceed past preliminary objections, rejecting arguments for dismissal that centered on the Security Council resolutions.[114]

In short, the ICJ has rejected a regime of Chapter VII case-exclusivity as far as its own proceedings are concerned. Is the argument for Chapter VII case-exclusivity any better, or any worse, regarding ICC prosecutions for the crime of aggression?

In some ways, the argument for Chapter VII case-exclusivity is better in the ICC context than in the ICJ context. The ICJ arguably has an obligation to decide cases that are properly before it, even if those cases overlap with matters under consideration by the Security Council under Chapter VII. As the ICC's jurisdiction over aggression has not yet been delimited, it is still possible to avoid such overlap between the ICC and the Security Council. Also, the ICJ, as

---

110. Both Parties must . . . refrain from any action . . . which might prejudice the rights of the other Party . . . Both Parties must . . .take all measures to comply with all of their obligations under international law . . . and with United Nations Security Council resolution 1304 (2000) . . . Both Parties must . . . ensure full respect . . . for fundamental human rights and for the applicable provisions of humanitarian law. Armed Activities, *supra* note 108, ¶ 47.

111. Genocide Convention, *supra* note 107, ¶ 52.

112. *Id.* (Tarassov, J., dissenting).

113. For an explanation of the complicated proceedings, see Pieter H.F. Bekker, *International Court of Justice Upholds its Jurisdiction in Lockerbie Cases*, ASIL INSIGHTS (Mar. 1998).

114. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1998 I.C.J. 9 (Feb. 27, 1998); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1998 I.C.J. 115 (Feb. 27, 1998).

the "principal judicial organ" of the United Nations,[115] may be coequal in status with the Security Council; the ICC, not being an organ of the United Nations, is inferior in status to the Security Council and the ICJ.

But there is also an important way in which the argument for Chapter VII case-exclusivity is *less* convincing in the ICC context than in the ICJ context. Under Article 16 of the ICC Statute, the Security Council has the power to stop all ICC proceedings in a Chapter VII case. By contrast, no Charter provision expressly gives the Security Council power to halt ICJ proceedings, and it is unclear whether the Security Council possesses such a power. An ICJ case concerning a matter under consideration by the Security Council could theoretically hamper or frustrate the Security Council in the exercise of its Chapter VII powers. In the ICC context, the Security Council can prevent any such result by suspending ICC proceedings under ICC Article 16. To my mind, the ability of the Security Council to suspend all ICC proceedings is the key consideration in concluding that the U.N. Charter does not bar the ICC from prosecuting the crime of aggression, even in a Chapter VII case.

It is in this connection that the right of individual and, especially, collective self-defense is most telling. Under Chapter VII, the Security Council has the role of suppressing aggression. Nevertheless, Article 51 permits a group of states, acting without the prior approval of the Security Council, to cooperate in identifying and suppressing aggression. The ability of states to make war on an aggressor, pending a decision of the Security Council, is far closer to the Security Council's core Chapter VII role than is an ICC prosecution for the crime of aggression. If states are able to suppress aggression, pending a contrary decision of the Security Council, it is hard to see how it could be inconsistent with the Charter for the ICC to prosecute aggression, pending a contrary decision of the Security Council.

To be sure, the procedural parallel between collective self-defense and an ICC case is not exact. Article 51 does not say that there is a right of self-defense until the Security Council explicitly extinguishes that right; Article 51 says that the Charter does not impair the right of self-defense "until the Security Council has taken measures necessary to maintain international peace and security."[116] Some believe that when the Security Council takes measures under Chapter VII, that action automatically extinguishes the right of self-defense, even if the Security Council does not explicitly say so, or does not order an end to further fighting.[117] Whatever the validity of this position with respect to self-defense, an analogous position cannot be accepted in the context of ICC prosecutions for the crime of aggression. If we are to reject Chapter VII case-exclusivity, ICC proceedings on the crime of aggression cannot be halted by a Chapter VII decision unless that decision explicitly orders a halt to ICC

115. U.N. Charter, art. 92.

116. U.N. Charter art. 51.

117. Albrecht Randelzhofer, *Article 51*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 804 (Bruno Simma et al., eds.) (2d ed. 2002).

proceedings. Nevertheless, the basic principle would be the same: Action against aggression is permitted, subject to the authority of the Security Council. And while the procedural authority of the Security Council over ICC proceedings is somewhat less, under ICC Article 16, than the procedural authority of the Security Council over international conflicts under Article 51, the Security Council's substantive need to stop a legal proceeding is presumably not as great as the Security Council's substantive need to stop a war.

IV. PROPOSALS

The Charter does not make the Security Council the exclusive determiner of aggression in a prosecution for the crime of aggression. As argued in Part II, exclusive determination would actually be in tension with a number of important Charter-based principles, including the sovereign equality of states, the nature of the Security Council as a political rather than a judicial body, and the exclusive authority of the Security Council to determine aggression in the context of its own decisions.

Those who believe the Charter requires exclusive determination read into Article 39 a broad negative implication – no body other than the Security Council may determine aggression in any context – that simply is not there. The true negative implication of Article 39 is that no body other than the Security Council may determine aggression *for* the Security Council, triggering the Security Council's responsibility and power to suppress aggression. As no scheme for the determination of aggression in ICC proceedings purports to trigger the Security Council's responsibility and power to suppress aggression, no such scheme violates Article 39. Ironically, exclusive determination schemes are the least consistent with Article 39, as they push the Security Council into applying the definition of aggression in the ICC Statute.

A. Increasing the Security Council's Power

A non-exclusive procedure for the determination of aggression in ICC proceedings is fully consistent with the Charter. However, to achieve maximum alignment between the ICC Statute and the Charter, the Security Council should be given additional powers in proceedings concerning the crime of aggression, beyond the powers it already possesses, under ICC Article 16, to suspend proceedings involving war crimes, crimes against humanity, and genocide. In prosecutions for the crime of aggression, the Security Council should be able to go beyond the one-year renewable suspension provided for in ICC Article 16; the Security Council should be able to call a permanent halt to ICC proceedings on the crime of aggression. Moreover, the Security Council should be able to undo ICC prosecutions for the crime of aggression. It should be able to vacate charges and even expunge convictions. These changes would make it clear that in matters concerning the crime of aggression, the ICC will be

completely subordinate to the Security Council as a body, though the ICC will not be subordinate to the veto of any one permanent member.

The aggression procedures should also guard against ICC decisions that are inconsistent with decisions of the Security Council or the ICJ. There are two perspectives from which an ICC decision might be judged inconsistent with a decision of the Security Council. One is the perspective of the Security Council itself. Preventing decisions that are inconsistent from the Security Council's own perspective is not a major problem, given ICC Article 16: The Security Council can itself prevent such decisions. The second perspective on how an ICC decision could be inconsistent with a decision of the Security Council is a more objective, juridical perspective. Suppose that the Security Council brands one state in a conflict as a wrongdoer (a threat to the peace, breacher of the peace, or aggressor). The ICC then investigates and prosecutes a leader of the opposing state for the crime of aggression.[118] It is conceivable that the Security Council could not pass a resolution to stop such ICC proceedings, for example, because of a change in the political views of one of the permanent members. Nevertheless, the prosecution should not go forward. And of course, there should be no ICC prosecution for aggression if the Security Council has made an explicit decision that the state in question did *not* commit aggression.

In my view, these are the only situations in which ICC proceedings would be inconsistent with a prior decision of the Security Council. It would not be inconsistent for the ICC to proceed on a case of aggression merely because the Security Council had failed to determine the existence of an act of aggression (this is, of course, another way of posing the exclusivity issue). It would not even be inconsistent for the ICC to acquit in a prosecution for the crime of aggression, where the Security Council had previously determined the existence of an act of aggression by the state in question. A determination by the Security Council that a state has committed aggression must have some preclusive effect. However, it should still be possible for the ICC to acquit the leaders of that state, if, for example, the gravity threshold in the ICC Statute has not been met.[119]

B. Bringing in the ICJ

The risk of inconsistent decisions is actually greater with respect to the ICJ than with respect to the Security Council. By the time the ICC proceeds to a verdict on a prosecution for the crime of aggression, it is likely that the

118. "[I]n theory at least . . . the ICC (if acting independently of the Security Council) might convict a person of the crime of aggression, even though the Council has ruled that the other side is the aggressor in the war." YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 111-112 (3d. ed. 2001).

119. For an illuminating discussion of possible divergences between a Security Council decision and a judgment of the ICC, *see* Clark, *supra* note 7.

Security Council will already have made every decision that could possibly conflict with the ICC's own decision. Therefore, it should be fairly easy to avoid inconsistency between decisions of the ICC and the Security Council.

The ICJ, however, often works more slowly than the Security Council. The ICJ could be in the early stages of a case alleging unlawful use of force at the same time the ICC is in the early stages of investigating an alleged crime of aggression. The ICJ is also more likely than the Security Council to decide that a given party either is or is not at fault in a conflict.

Avoiding conflict with a decision of the ICJ is one very good reason to seek an ICJ advisory opinion in ICC aggression cases. Another good reason is the widespread perception that the ICC needs the imprimatur of a principal organ of the United Nations in such cases. The ICJ is the logical choice, as it is a judicial body and has several times made determinations concerning the unlawful use of force.

A procedure requiring an opinion of the ICJ has none of the defects of a procedure requiring a decision of the Security Council. The ICJ precondition would not erode sovereign equality, would not entrust judicial issues to a political body, and would not push the Security Council into using a definition of aggression, for its own decisions, that has been devised by some other body.

Some proposals have it that if the Security Council does not make a determination in a limited period of time, the ICC will request that the General Assembly seek an advisory opinion from the ICJ.[120] But for the reasons given previously, it is best to avoid presenting to the Security Council, even on a temporary basis, legal issues involved in an ICC prosecution for aggression. In an appropriate case, the ICC should simply ask the General Assembly to seek an advisory opinion from the ICJ.

There are, however, potential problems with a scheme requiring ICJ participation. What if the General Assembly refuses to request an advisory opinion from the ICJ? The decision to request an ICJ advisory opinion is itself a political decision, one that could be blocked in the General Assembly for political reasons. Suppose that the ICC is investigating whether Israel has been the victim of aggression. The General Assembly might not cooperate in seeking an advisory opinion in such a case, or in other cases with unpopular alleged victims.

The other possible problem with an ICJ precondition is that the ICJ might theoretically refuse to give advisory opinions in ICC cases, even if such opinions are requested by the General Assembly. Given the ICJ's advisory opinion in the *Wall* case, it seems unlikely that the ICJ would so refuse,[121] but ICJ participation cannot be considered certain.

---

120. Gurmendi, *supra* note 7, at 603.

121. "Given its responsibilities as the 'principal judicial organ of the United Nations' . . . the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only 'compelling reasons' should lead the Court to refuse its opinion." *Wall*, *supra* note 92, ¶ 44. (Citations omitted).

In light of these possible obstacles to an ICJ advisory opinion, such an opinion should not be an absolute precondition. In all aggression cases, the ICC should request that the General Assembly seek an advisory opinion from the ICJ. But if the General Assembly refuses to seek an opinion, or the ICJ refuses to deliver it, the ICC should be able to proceed.

Assuming that the ICC is able to obtain ICJ participation, it would not be necessary to present to the ICJ the issue of whether one or another state in a conflict had committed aggression, as that term is ultimately defined in the ICC Statute. The better course might be to ask the ICJ to apply Charter-based standards to determine whether a state had used unlawful force or had made an armed attack. The ICC could then take these decisions into consideration, ensuring consistency but also reserving to itself any issues that might be specific to the ICC Statute. Even if the ICJ determines that a state has made an armed attack, within the meaning of Article 51 of the Charter, there might still be some grounds to conclude that the leaders of that state are not guilty of aggression. For example, there might be factual issues as to which the ICC would apply a more demanding standard of proof than the ICJ.

C. *Compromise with the Veto?*

The foregoing proposals would, in my view, best effectuate the purposes of the U.N. Charter and the ICC Statute. But the process of amending the ICC Statute is a political process, one that may require compromise to protect the interests of the permanent members of the Security Council. I therefore outline here a compromise on the role of the Security Council, one that would not be ideal, but would give something to both sides in the debate over the prerogatives of the permanent members.[122] Under this compromise, the ICC would be able to proceed in aggression cases, without Security Council approval, but only up to the point where charges against an accused are confirmed under Article 61 of the ICC Statute.[123] After confirmation of the charges, further proceedings would require approval of the Security Council, subject to veto by the permanent members.

As part of this compromise, the pretrial arrest procedures in the ICC Statute would have to be modified in aggression cases.[124] Individuals accused of the crime of aggression would not be subject to arrest without Security Council approval, but the ICC would be able to proceed to confirmation of charges in the absence of the accused.

---

122. My discussion of this proposed political compromise is reproduced, in large part, from Mark S. Stein, *The Role of the Security Council in Prosecutions for the Crime of Aggression*, 1 ACCOUNTABILITY: NEWSLETTER OF THE ASIL INTERNATIONAL CRIMINAL LAW INTEREST GROUP 8-10 (Fall, 2002).

123. *See* ICC Statute, *supra* note 1, art. 61.

124. *See* ICC Statute, *supra* note 1, arts. 58-61.

Why would supporters of an exclusive determination scheme accept this compromise? They might accept it because it achieves the major political objective of the permanent members of the Security Council: Those states would be able to shield officials accused of aggression from criminal liability. Why would opponents of an exclusive determination scheme accept this compromise? They might accept it because it allows an airing of the case against the accused and a preliminary determination that the charges are sufficient to warrant trial. Also, the confirmation of charges under Article 61 of the ICC Statute would place considerable political pressure on the Security Council to authorize further proceedings.

Such a political compromise over the role of the Security Council begs the question whether the Security Council's Article 39 power to determine the existence of aggression really is exclusive. In the terminology I offered earlier, there would be an exclusive referral scheme, not an exclusive determination scheme. The Security Council would not actually determine the existence of aggression; it would simply decide whether to allow cases to proceed.

But if a political compromise can be reached the legal issue may evaporate. In order to obtain their political goal of a procedure subject to veto, permanent Council members and those who support their prerogatives have pressed the legal argument for Article 39 exclusivity. It may be doubted, however, whether permanent members would truly be interested in making a determination of aggression in the context of ICC proceedings if they were offered some other way to veto a prosecution that threatened their interests.

My proposal for a political compromise is somewhat similar to one offered by Benjamin Ferencz.[125] Mine, however, is a little less deferential to the permanent members of the Security Council. Ferencz would make a determination of aggression by the Security Council a precondition to prosecution for the crime of aggression, except that "[f]ailure of the Council to respond to allegations of aggression within a reasonable time shall not prevent the court from investigating the charges and publishing its findings and recommendations."[126]

I reiterate that my proposal for a political compromise does not represent my view of how the ICC should ideally exercise its jurisdiction over the crime of aggression. Ideally, there should be an independent procedure, one in which the Security Council is not asked to determine aggression in the context of an ICC case, and in which a prosecution cannot be thwarted by the veto of a single permanent member of the Security Council.

---

125. Benjamin B. Ferencz, *Deterring Aggression by Law – A Compromise Proposal* (Jan. 11, 2001), *available at* http://www.benferencz.org/defined.htm (last visited Sept. 30, 2005).

126. *Id.*

D. Resolving the Exclusivity Issue

Finally, I offer a proposal as to the process of arriving at a resolution of the Security Council's role. Some believe that the Charter requires an exclusive determination scheme. Others reject this conclusion, and I have argued that exclusive determination would actually be less consistent with the Charter than independent determination. Given the importance of the issue, the obvious course would be for the ICC Assembly of States Parties to ask the General Assembly to seek an advisory opinion from the ICJ that would give guidance on which schemes are permissible under the Charter. The ICJ might be presented with several proposals and asked to decide whether each is consistent with the Charter. Alternatively, the ICJ might be presented with a simple question, for example: "Under the U.N. Charter, must the Security Council determine that there exists an act of aggression before there can be any prosecution for the crime of aggression before the International Criminal Court?"

Whatever one may think of proposals to involve the ICJ in individual aggression cases, surely there can be no principled objection to seeking an advisory opinion from the ICJ, the principal court of the United Nations, on what kinds of procedures are consistent or inconsistent with the Charter. There may be some political reluctance on both sides to seek such an advisory opinion, because of uncertainty over how the opinion will come out. But if the ICJ is going to have doubts about the Charter-legality of a scheme for the ICC's exercise of jurisdiction over the crime of aggression, it is best to discover such doubts before the scheme is written into the ICC Statute.

FINDING A HAPPY ENDING FOR FOREIGN INVESTORS: THE ENFORCEMENT OF ARBITRATION AWARDS IN THE PEOPLE'S REPUBLIC OF CHINA

Ellen Reinstein*

I. INTRODUCTION

Since China opened its doors to foreign trade in 1978, foreign businesspeople have increasingly become involved in Chinese economic development. Foreign investors have now formed partnerships with their Chinese counterparts involving licensing, trade, and direct investment. China, in turn, has embraced this economic development and the benefits it brings to its citizens.

While the global market welcomes the increased business opportunities available in China, foreign investors and privately-owned Chinese companies seek a stable environment and guarantees for fair trade. However, these guarantees are often hard to obtain due to China's cultural skepticism towards the law, its one-party political system, and its underdeveloped court system. Chinese and foreign investors often fear that Chinese courts will not provide adequate protection for their investments.

To avoid the unpredictable and sometimes corrupt Chinese court system, these investors might add a clause to their contracts which specifies that contractual disputes will be settled through arbitration. But when one party refuses to pay the arbitration award, and that party's assets are located in China, enforcement of that award must come through Chinese courts. Investors find themselves in the same court system they initially sought to avoid and may encounter tremendous difficulties in recovering the promised award.

Chinese leaders now recognize the importance of their country's judiciary in furthering economic development, and they have recently promoted several important changes in Chinese law and society. In particular, the highest Chinese court, the Supreme People's Court, passed numerous regulations in the last five years in an attempt to address the longstanding problems faced by foreign parties in the Chinese court system. Legislation now provides for domestic arbitration tribunals to accept arbitrable disputes involving a foreign party, which has increased the competition among, and perhaps the quality of, arbitral bodies in China. In addition, China recently opened the door to permitting the operation of foreign legal programs within its borders, increasing foreign dialogue and training among judges.

With these changes, it is important to determine whether there has been an objective increase in foreigners' ability to enforce arbitration awards in China during the past several decades, or whether these attempts at change are mere posturing and quick-fixes. Equally important, perhaps, is whether foreign

and Chinese parties sense an increasing fairness with regard to their treatment in China. Indeed, many scholars still insist on a complete overhaul of the Chinese judicial system, claiming that these changes provide a mere "band-aid" for the massive problems continuing to face Chinese courts. Regardless of whether one's view is optimistic or nay-saying, the future development of investment and business relations in China may hinge on China's ability to reform its court system, cultural attitudes, and reputation for successfully enforcing these awards and thereby increasing the confidence of foreign investors.

In Part A of this Article, I will briefly describe the history and development of arbitration in China and the reasons behind its amazing rise in popularity within contracts involving Chinese businesses. In Part B, I will discuss the different types of arbitration awards and the reasons why parties often encounter difficulties enforcing those awards in Chinese courts. In Part C, I will outline the Chinese judicial system and the traditional method of enforcing arbitral awards. Part D will address the attempts made by Chinese judges and lawmakers to confront these challenges, as well as the attempts to measure the improvements, if any, resulting from these changes. Finally, Part E will discuss changes that I believe are necessary to ensure the success of enforcing arbitral awards and possible vehicles to implement those changes.

II. DEVELOPMENT OF MEDIATION AND ARBITRATION IN CHINA

Mediation, or conciliation,[1] has been utilized in China to resolve civil disputes for over two thousand years. China's widespread preference for avoidance of the courts has led to its high utilization of arbitration. As a result, China has one of the biggest and most widely utilized foreign arbitration bodies in the world. China's preference for extra-legal means of resolving disputes is largely due to three factors: Confucian philosophy, an underdeveloped court system, and the influence of communism.[2] In addition, the relationship-based

---

*Ms. Reinstein would like to thank Mo Zhang, Adelaide Ferguson, John Smagula, and Bob Reinstein at the Beasley School of Law at Temple University for their incredibly helpful assistance, as well as the Chinese judges and attorneys who kindly contributed to this article. Ms. Reinstein is currently an associate in litigation at Morrison & Foerster in Palo Alto, CA. She attended U.C. Berkeley School of Law (Boalt Hall) and clerked for Chief Judge Anthony J. Scirica of the Third Circuit United States Court of Appeals.

1. There is very little distinction between "mediation" and "conciliation." One scholar stated, "The differences between the methods [in mediation and conciliation] are slight and the benefits or drawbacks accruing to either method seem negligible." James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83, 84 n. 1 (1997)(quoting Erik Langeland, *The Viability of Conciliation in International Dispute Resolution*, 50 OHIO ST. J. ON DISP. RESOL. 34 (1995)).

2. Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 123 (1996); *see also* Michael T. Colatrella, Jr., *"Court-Performed" Mediation in the People's Republic of China: A Proposed Model to*

systems of mediation provide insight into the extra-judicial means of enforcing arbitration awards, which will be discussed later in this Article.

Mediation is believed to have developed in China due to the influences of Confucian philosophy and social morality. Confucianism is a philosophic model that has dominated Chinese history. Confucius believed that "any conflict or litigation between people brings disharmony, which is harmful to social relationships."[3] Ethical behavior, known as *li*, was embodied in "moral and customary principles of polite conduct."[4] The alternative, *fa*, represented law and regulation; Confucius held a low view of the law.[5] While the law was useful to convict and execute people, Confucius did not believe that *fa* could teach people "humanity, kindness, compassion and benevolence."[6] Chinese law became mainly penal in nature, with highly developed criminal codes and procedures.[7] In contrast, civil law was not as common, as people tended to avoid pursuing *li*-disrupting litigation.[8] Compromise, or yielding (termed *jang*), became the preferred method of resolving conflicts, and mediation was widely utilized.[9]

The court system in China has traditionally been inaccessible and inadequate for most Chinese citizens.[10] The magistrates sometimes had no legal training and were often corrupt.[11] Litigants generally distrusted the courts, making popular the expression "win your lawsuit and lose your money."[12] Citizens embraced alternative dispute resolution as a way to avoid the corrupt court system.

Furthermore, Chinese leadership has traditionally embraced mediation. Until 1949, the village and family elders of each town generally took responsibility for dispute resolution in China. The elders sought to restore harmony and grant concessions through mediation.[13] Mao Zedong, the leader of Communist China, agreed with these principles of mediation, believing the promotion of social harmony and the common good of society should be emphasized over individual interests. Disputes were resolved through

---

Improve the United States Federal District Courts' Mediation Programs, 15 OHIO ST. J. ON DISP. RESOL. 391, 396-99 (2000).

3. Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People's Republic of China*, 10 TEMP. INT'L & COMP. L.J. 313, 315 (1996).

4. *Id.* at 314.

5. Urs Martin Lauchli, *Cross-cultural Negotiations, with a Special Focus on ADR with the Chinese*, 26 WM. MITCHELL L. REV. 1045, 1059 (2000); *see also* Perkovich, *supra* note 3, at 314-315.

6. Lauchli, *supra* note 5, at 1059.

7. *Id.* at 1060.

8. *See id.*

9. Perkovich, *supra* note 3, at 315; *see also* Ge, *supra* note 2, at 123.

10. Colatrella, *supra* note 2, at 397.

11. *Id.*

12. *Id.*

13. Amanda Stallard, *Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 463, 477 (2002).

mediation by People's Mediation Committees, which also had the responsibility to "educate" the people and help to implement party policy.[14]

Because of these influences, Chinese society does not focus heavily on promulgating individual rights through an adversarial system. Instead, mediation focuses on the good of the whole, seeking to understand the other party's position and reach an agreement beneficial to both parties.[15] Mediation is also based on social morality, appealing to the parties' reason and emotion rather than to laws or regulations. There are several examples of successful mediations where mediators found creative solutions to the problems based on social morality. Professor Stanley Lubman cites several of these examples:

> Two brothers disputed over the division of family property for fourteen years. The mediation committee director engaged in heart-to-heart talks with the brothers, assisted them with their needs and recalled their goodwill in the past. They reconciled and renounced their bitterness, and continued their business relationship.[16]
>
> An eighty-year-old woman intended to commit suicide because none of her four sons would support her. A mediator talked with them many times, but they would not listen to him. The mediator himself took care of the woman for months, and his deeds moved her sons to acknowledge their wrongdoing. They divided responsibility for their mother's care.[17]

Urs Martin Lauchli, an international dispute resolution consultant, also gave several examples of traditional dispute resolution in China:

> [I]n one dispute involving the marital problems of a husband and wife, which included allegations of abuse by the wife, the mediator suggested that the couple go to Beijing for a holiday. "The matter was resolved when the husband expressed regret that he abused his wife." In another instance, after mediation, an unmarried woman who had become pregnant agreed to write a "self-criticism" and pay a fine. In a third instance, a grandson was angry with his grandmother over her living

14. Colatrella, *supra* note 2, at 399.

15. Stallard, *supra* note 13, at 476.

16. STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 230, (Stanford University Press) (1999) [hereinafter BIRD IN A CAGE] (quoting Liu Guangan & Li Cun Peng, *Minjian Tiaojie Yu Quanli Baohu (Civil Mediation and the Protection of Rights),* in ZOUXIANG QUANLI DE SHIDAI: ZHONGGUO GONGMIN QUANLI FAZHAN YANJIU (TOWARD A TIME OF RIGHTS: A PERSPECTIVE OF THE CIVIL RIGHTS DEVELOPMENT IN CHINA) 285-326 (Xia Yong, ed., (1995)).

17. *Id.* at 231.

> arrangements. The neighborhood mediation "committee met with the disputants and reminded the grandson that his grandmother, who was ninety-four years old, did not have long to live and that he should therefore try to make her happy."[18]

Some traditional mediators did not adhere to the rule of law, but instead encouraged creative solutions to fit the individual parties' circumstances.

The use of mediation in China has recently been declining, while arbitration and judicial resolution have become more popular.[19] With an increase in globalization and an accompanying complexity in the form of disputes, mediation committees may not have the expertise to resolve the dispute or the required jurisdiction over the parties.[20] Contracts between foreign parties may not involve repeat players, and higher monetary values are at stake.[21] In addition, Chinese society has become more rights-conscious: parties are using courts to protect their rights and seek compensation for infringement of those rights.[22]

The decline in mediation may correspond to a recent increase in the use of arbitration in China. For most Chinese parties, arbitration strikes an appropriate balance between mediation and litigation.[23] Arbitration tribunals are viewed as less confrontational than litigation, thus appealing to the Confucian philosophy and Communist principles.[24] Further, the flexible nature of arbitration can allow parties to resolve disputes more easily.[25]

Many foreigners also prefer arbitration as a fair and efficient vehicle for resolving disputes. Foreign parties might view the Chinese judicial system as lacking the commercial expertise to resolve business contracts, adhering to slow and complex court procedures, and practicing local protectionism, as discussed below. Arbitration is usually cheaper and faster than the court system. [26] Equally important, foreign investors utilize arbitration clauses in an attempt to

---

18. *See* Lauchli, *supra* note 5, at 1066 (footnotes omitted).

19. *Id.* at 1067; *see also* Interview with Wang Chenguang, Dean, Tsinghua University School of Law, in Beijing, China (November 2, 2004)[hereinafter Interview with Wang Chenguang]; *Class Action Litigation in China*, 111 HARV. L. REV. 1523, 1531 at n. 66 (1998).

20. Interview with Wang Chenguang, *supra* note 19.

21. *Id.*

22. *Id.*

23. *Id.*

24. Fredrick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in The People's Republic of China*, 15 BERKELEY J. INT'L L. 329, 337 (1997).

25. *Id.*

26. *See* Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539, 539-540 (1995) [hereinafter Liu].

avoid the Chinese court system, which is widely perceived as corrupt and ineffective, tending to favor the Chinese party in the dispute.[27]

III. ARBITRATION BODIES AND AWARDS IN CHINA

China began to open its borders to international trade in the 1950s and then to the world in 1978-79. After more than a decade of experimental arbitration, the National People's Congress (NPC) passed the Arbitration Law of the People's Republic of China ("Arbitration Law"), effective September 1, 1995.[28] The Arbitration Law established uniformity between arbitral bodies, provided a procedural code, set a high standard for arbitration personnel, and gave arbitral awards more finality.[29] The law also outlined the relationship between arbitral bodies and the courts and defined arbitrable transactions.[30]

A. Awards in China

Several different types of arbitral awards exist in China: foreign, foreign-related, and domestic. Foreign arbitral awards are made outside of China,[31] while foreign-related awards are those made by international arbitration bodies in China and/or awards that involve a foreign element.[32] A foreign element may include a case where at least one party is a foreign person, organization, or enterprise; the creation, modification or termination of the contract between the parties occurred in a foreign country; or the action was brought in a foreign country.[33] Domestic awards involve Chinese parties and subject matter relating only to China. These disputes are beyond the scope of this Article, as they are regulated by different laws.

---

27. Interview with Zhao Shiyan, attorney at law, Jingtian & Gongcheng, in Beijing, China (Nov. 2, 2004).

28. The 9th Session of the Standing Committee of the 8th National People's Congress adopted the Arbitration Law of the PRC on Aug. 31, 1994. *Arbitration law of the PRC*, PEOPLE'S DAILY (Overseas Edition), Sept. 2, 1994, at 2.

29. Liu, *supra* note 26, at 552, 554, 556.

30. *Id.* at 552, 554.

31. Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People's Republic of China*, 1 ASIAN-PAC. L. & POL'Y J. 12, 11 (2003) [hereinafter *Evolving Regulatory Framework*].

32. *Id.* A dispute between two Chinese parties may be foreign-related when the object of the dispute is outside China or where the legal relationship between the parties was established, modified, or terminated outside China. *See also* Neil Kaplan, *Roundtable on Arbitration and Conciliation Concerning China: HKIAC's Perspective* (paper prepared for presentation at the 17th ICCA Conference, May 16-18, 2004) [hereinafter Kaplan]. Mr. Kaplan is the chairman of the Hong Kong International Arbitration Centre.

33. *See, Evolving Regulatory Framework*, *supra* note 31, at 11.

B. *Current Arbitration Bodies*

Two main international arbitration bodies in China handle foreign and foreign-related disputes: the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC).[34] In addition, Chinese domestic arbitration tribunals have greatly expanded within the last decade and now may accept foreign and foreign-related disputes. The rapid and extensive development of these domestic tribunals further demonstrates the demand for this type of forum within China and its importance to the Chinese government.

1. CIETAC

CIETAC underwent several changes in name and function before establishing itself as an international arbitration commission. In 1954, the China Council for the Promotion of International Trade (CCPIT) founded the Foreign Trade Arbitration Commission (FTAC) to handle trade disputes.[35] In 1980, FTAC was renamed the Foreign Economic and Trade Arbitration Commission, as its jurisdiction was broadened to include non-trade economic matters.[36] Then, in 1988, CCPIT further expanded the body's jurisdiction to encompass disputes arising out of international economics and trade. That same year, it also issued new rules that brought the body's procedures more in line with international practices. Reflecting the increased jurisdiction, CCPIT assigned the arbitration body its current name.[37]

CIETAC is now one of the largest commercial arbitration centers in the world, having arbitrated nearly 8,000 disputes between 1993 and 2003.[38] This high caseload and popularity is due to several factors. Until 1996, the Chinese government authorized CIETAC as the only international commercial arbitration center in China.[39] Chinese parties not familiar with international business practices are more likely to name CIETAC as the designated arbitration commission.[40] In addition, increasing trade with Chinese businesses may correspond with an increase in arbitrable disputes. Finally, Chinese regulations recommend that Chinese parties involved in certain types of disputes apply to CIETAC for arbitration.[41]

---

34. CMAC, created to resolve maritime disputes, only handles approximately twenty cases per year. Charles K. Harer, *Arbitration Fails to Reduce Foreign Investors' Risk in China*, 8 PAC. RIM L. & POL'Y 393 (1999). (quoting *China: Courts Handle Maritime Cases*, CHINA DAILY, Sept. 22, 1998.).

35. Liu, *supra* note 26, at 540.

36. *Id.* at 541.

37. *Id.*

38. *Id.* at 541-542.

39. *See id.* at 541.

40. *Id.* at 542.

41. *Id.*

2. *Domestic Arbitration Tribunals and the Beijing Arbitration Commission*

CIETAC and other foreign arbitration organizations are now encountering competition for foreign and foreign-related cases from domestic arbitration tribunals. China's current domestic arbitration system was created only ten years ago, through the passage of the Arbitration Law.[42] Among other things, the Arbitration Law mandated the establishment of local arbitration commissions.[43] In 1996, the State Council authorized domestic arbitration commissions to accept foreign-related cases.[44] The location and scope of these commissions have grown tremendously, from seven "trial cities" in 1995 to approximately 170 commissions now operating in cities throughout China.[45] The commissions vary widely in case experience, expertise among arbitrators, and independence from local government influences.[46] The commissions located in major cities are reported to be more financially independent.

The Beijing Arbitration Commission (BAC) is considered to be China's "flagship" domestic arbitration institution and is the national focal point for communication and training among the various domestic commissions.[47] The BAC is reported to be entirely self-sufficient, meeting its operating expenses from arbitration fees.[48] The BAC accepted 1,029 cases in 2003, and it has accepted over 4,000 cases in total since its inception in 1995.[49]

Although the vast majority of the BAC's cases involve domestic disputes, the cases involving foreign-related disputes and foreign parties are slowly growing. It now actively pursues foreign markets.[50] The BAC also has specialists in the International Federation of Consulting Engineers (FIDIC) among its arbitrators to address issues in international construction projects, particularly in light of the preparation for the 2008 Olympic Games in Beijing.[51] In addition, the BAC has an extensive and accessible website,

---

42. Jerome A. Cohen and Adam Kearney, *Domestic Arbitration: The New Beijing Arbitration Commission,* in DOING BUSINESS IN CHINA, § 3.02, IV-3.2 (Freshfields ed. 2000) [hereinafter *New BAC*].

43. *Id.*

44. *Evolving Regulatory Framework, supra* note 31, at 12.

45. *New BAC, supra* note 42, at IV-3.2; *See also Introduction to the Beijing Arbitration Commission*, 17th ICCA Conference (May 16-18, 2004) [hereinafter *Introduction to BAC*].

46. *New BAC, supra* note 42, at IV-3.3.

47. *Id. at IV-3.2.*

48. *Id.*

49. *Introduction to BAC, supra* note 45; DONALD CLARKE & ANGELA DAVIS, DISPUTE RESOLUTION IN CHINA: THE ARBITRATION OPTION, China (2000), *available at* http://www.asialaw.com/bookstore/china2000/ [hereinafter CLARKE].

50. Wang Hongsong, *Beijing Arbitration Commission 2001 Work Summary and 2002 Work Plan, available at http://www.bjac.org.cn/en/brow.asp?id=133* (last visited October 10, 2005) [hereinafter *2001 Work Summary*]; *see also Introduction to BAC, supra* note 45 ("The BAC has also been attaching prime importance to the building of arbitrator systems with reference to international practices.").

51. *See Introduction to the BAC, supra* note 50.

translated in English, that highlights its latest developments, including mandatory training sessions for newly appointed and untrained arbitrators, a recently compiled Arbitrators' Manual, and a publication stating the ethical standards for BAC arbitrators.[52] The BAC also appears willing to adjust its procedures to accommodate foreign parties. For example, after foreign parties objected to the BAC's limitation that only two attorneys representing a party are allowed in the courtroom at a time, the BAC agreed to relax that requirement.[53]

Arbitrating with the BAC might be preferable for several reasons. The BAC claims that the average duration of cases from formation to conclusion is a mere seventy-nine days.[54] In addition, parties might specify arbitration with a domestic tribunal that contains arbitrators they are familiar with or arbitrators with a particular specialization.[55]

3. Competition Between CIETAC and BAC

Given the recent addition of quality domestic tribunals such as the BAC, CIETAC faces stiff competition over foreign and foreign-related disputes. In addition, CIETAC practices have recently come under attack by scholars, particularly law professor and practitioner Jerome Cohen of New York University. CIETAC, realizing the necessity of addressing these critiques, has adopted some of the changes suggested by Professor Cohen, while disputing the necessity of other changes.

Professor Cohen has strongly criticized CIETAC practices for a variety of reasons. He claims that CIETAC permits the appointment of staff persons as presiding arbitrators, which could arguably allow for the exercise of administrative influence and control over the panel's decision.[56] It appears Professor Cohen's critique has been heeded, for Cao Lijun, a CIETAC arbitrator, maintains that CIETAC now requires that "all staff members . . . decline appointment by parties unless it is a joint appointment as a sole or presiding arbitrator."[57] Mr. Cao further asserts that CIETAC staff members can only be appointed by the CIETAC chairman when the parties have defaulted in making an appointment.[58]

---

52. *Id.; see also Ethical Standards for Arbitrators of the Beijing Arbitration Commission, available at* http://www.bjac.org.cn/en/brow.asp?id=699 (May 26, 2004).

53. *New BAC, supra* note 42, at 3.15.

54. *Introduction to BAC, supra* note 45.

55. Interview with Wang Chenguang, *supra* note 19; *see also Introduction to BAC, supra* note 45; *see 2001 Work Summary, supra* note 50.

56. Jerome A. Cohen, *International Commercial Arbitration in China: Some Thoughts from Experience*, 3 (paper prepared for presentation at the International Economic Law and China in its Economic Transition Joint Conference (Nov. 4-5, 2004)) [hereinafter *Int'l Address*].

57. E-mail from Cao Lijun, Arbitrator and Staff Member, CIETAC, China, to Ellen Reinstein (Jan. 31, 2005, 11:31 PST)(on file with author) [hereinafter Cao e-mail 1/31/05].

58. *Id.*

Professor Cohen also questions CIETAC's current practice of allowing its arbitrators to serve as advocates in other CIETAC cases on the basis that it breeds too much familiarity and diminishes institutional integrity, particularly given China's existing "guanxi" practices.[59] Instead, he suggests, CIETAC should amend its rules, as the BAC has, to require all those serving as arbitrators to cease serving as advocates in other CIETAC cases.[60] CIETAC has not directly addressed this concern. However, Dr. Wang Shengchang, Vice-Chairman of CIETAC, states that the statistics on the outcome of decisions by CIETAC arbitrators contradict Professor Cohen's claim of any resulting bias from CIETAC tribunals against foreign parties.[61]

Professor Cohen has also critiqued CIETAC for permitting arbitrators to assign the drafting of published opinions to the CIETAC staff.[62] Wang Chenguang, Dean of Tsinghua University and a member of the Advisory Committee to the Supreme People's Court, suggests that this situation is being addressed by CIETAC, as the CIETAC administration is now asking arbitrators to spend more time on the hearings, meeting two or three times if necessary, and to write the award judgments themselves.[63] Indeed, Mr. Cao claims that CIETAC encourages the tribunal to play a larger role in administering the case and now requires members of the tribunal, in particular the presiding arbitrator, to draft the award.[64]

Aside from these procedural issues, CIETAC and the BAC offer their own advantages and disadvantages. CIETAC is well-established in the business community and is generally well-respected, although there has been a slowly growing undercurrent of dissent from some foreign lawyers.[65] For almost twenty years, it has relied on income earned from administrative fees, instead of receiving funds from the government, demonstrating its independence from the government.[66] Parties are able to designate a specific foreign arbitrator to sit on CIETAC's panel of arbitrators, which includes 146 foreign nationals from nearly 30 different countries.[67] In comparison, the BAC claims to have "Chinese and foreign professional" experts, but it is uncertain

59. *See Int'l Address*, *supra* note 56, at 2, 4. Professor Cohen also notes that, while CIETAC will honor an arbitration clause specifying that the presiding arbitrator be from a third country, CIETAC does not advertise or encourage this option.

60. *Id.* at 4.

61. *See* Michael J. Moser, *Roundtable on Arbitration and Conciliation Concerning China: Commentary* (paper prepared for the 17th ICCA Conference, May 16-18, 2004) [hereinafter *Roundtable*]. Mr. Moser is a partner at Freshfields Bruckhaus Deringer.

62. *Int'l Address*, *supra* note 56, at 10. In comparison, the BAC requires arbitrators to do their own work.

63. Interview with Wang Chenguang, *supra* note 19.

64. Cao e-mail 1/31/05, *supra* note 57.

65. *Id.*

66. *See Roundtable*, *supra* note 61.

67. *Id.* at §1.4

whether the arbitrators are actually from foreign countries or are merely Chinese arbitrators authorized to hear foreign disputes.[68]

CIETAC claims to have new areas of expertise that could assist the resolution of certain types of contracts, having established the Domain Name Dispute Resolution Center in 2001 and the Future Transaction Dispute Resolution Center in 2003.[69] CIETAC officials claim that courts will give deference to CIETAC awards, given CIETAC's forty-year history and the courts' greater familiarity with the institution.[70] Furthermore, Chenguang mentioned that enforcement of CIETAC awards can be less problematic than enforcement of domestic awards, as the Supreme People's Court interpretations are more clearly applicable to CIETAC awards than to domestic awards.[71]

On the other hand, the BAC offers several potentially persuasive advantages over CIETAC, particularly for smaller commercial disputes.[72] The BAC's procedure is relatively speedy, with an average duration of two and a half months from the beginning to the conclusion of a case.[73] In addition, fees for BAC arbitration are generally lower than fees for CIETAC.[74] Choosing the BAC could benefit a smaller company that is already familiar with and specifies an arbitrator listed with the BAC.

Currently, there are no statistics indicating whether parties involved in foreign disputes are staying with CIETAC arbitration or switching to domestic tribunals, such as the BAC. It appears CIETAC has accepted fewer overall cases as a result of the 1996 Notice, which could potentially be caused by competition from the local arbitration commissions.[75] However, statistics are not available to decipher whether those involved in foreign disputes have chosen not to arbitrate with CIETAC, or whether they are specifying other international arbitration bodies or other dispute resolution methods, such as mediation.

---

68. *See Introduction to BAC*, *supra* note 45; *New BAC*, *supra* note 42, §3.03 at IV-3.5 ("Although there are currently six individuals from Hong Kong and two from Taiwan on the BAC roster, there are no foreign arbitrators on the list and no plans to appoint foreign arbitrators in the foreseeable future, primarily due to financial constraints.").

69. *See Roundtable*, *supra* note 61.

70. *See* Cao e-mail, *supra* note 57. Cao Lijun asserts:

It is true that CIETAC awards, whether domestic ones or foreign-related ones, receive more deference in the enforcement or annulment proceedings. Most of CIETAC arbitrators are distinguished legal scholars, practitioners or retired judges and their qualities are reflected in their decision-making. CIETAC is the most reputable institution in China. The awards are also subject to the scrutiny of CIETAC before they are officially rendered. I believe all these contribute to the deference.

71. *See* Interview with Wang Chenguang, *supra* note 19.

72. *See New BAC*, *supra* note 42, §3.10 at IV-3.22.

73. *See Introduction to BAC*, *supra* note 45.

74. *See New BAC*, *supra* note 42, §3.10 at IV-3.22.

75. Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 LAW & POL'Y INT'L BUS. 369, 392 (2002).

4. Ad-hoc Bodies

Chinese courts appear to have taken a new approach to the final type of arbitration within China, ad hoc arbitration. Chinese law has traditionally held as void arbitral agreements issued by a body that was not a recognized arbitral institution.[76] Furthermore, Article 18 of the Chinese Arbitration Law provides that if an arbitration clause does not select an arbitration commission or does not reach a supplementary agreement regarding the commission which is chosen, the arbitration agreement will be void.[77] Due to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), Chinese courts usually recognize and enforce ad hoc awards made in Convention States.[78] However, it is unclear whether Chinese courts will acknowledge and enforce ad hoc awards made within Mainland China.[79] Professor Randall Peerenboom predicts that CIETAC will oppose acknowledgement of ad hoc awards in an attempt to ensure its dominance in foreign-related arbitration cases in China.[80]

It is less certain whether arbitration clauses calling for "arbitration under UNCITRAL rules in China" may be enforced.[81] One unpublished, internal document of the Supreme People's Court (SPC) stated that an arbitration clause of this nature is ad hoc arbitration and is, therefore, unenforceable.[82] On the other hand, arbitration clauses that specify arbitration in China under the auspices of the International Chamber of Commerce and the Singapore International Arbitration Centre are supposedly valid and enforceable.[83]

It appears that the law in China is shifting towards a more open approach to ad hoc arbitrations. Article 27 of the December 31, 2003 draft of the Provisions of the Supreme People's Court Regarding People's Courts' Handling of Arbitration Cases Involving Foreign Elements and Cases Arbitrated Abroad states:

> An arbitration agreement is invalid in which the parties have agreed to submit their disputes to ad hoc arbitration, except when the parties concerned are citizens of member countries to the 1958 United Nations Convention on the Recognitions and Enforcement of Foreign Arbitral Awards and the laws of such countries do not prohibit ad hoc arbitration.[84]

---

76. *See* Kaplan, *supra* note 32.
77. Claver-Carone, *supra* note 75, at 390.
78. *Evolving Regulatory Framework*, *supra* note 31, at 13.
79. *Id.*
80. *Id.*
81. *See* CLARKE, *supra* note 49, at 9.
82. *Id.*
83. *Id.*
84. Kaplan, *supra* note 32, at 6.

Since China does not officially allow ad hoc arbitration, it is assumed that this provision applies only when both parties are citizens of foreign countries. However, some have argued that the SPC provision would only make sense if it were to also apply to the Chinese party.[85] This could indicate China's increased willingness to permit ad hoc arbitrations and enforcement of resulting agreements within China.[86]

IV. GENERAL PROCEDURE FOR ENFORCEMENT OF ARBITRATION AWARDS IN CHINA

Arbitration awards are considered final and enforceable.[87] If a party fails to pay an arbitration award, the party receiving the award must seek enforcement in the court system where the assets are located. For many parties, this leads to the situation they fear most - dealing with the Chinese court system.

A. *Chinese Court Structure*

A brief overview of the structure of the court system within China is necessary to understand the problems of enforcement, as well as potential solutions. There are about three thousand county-level Local People's Courts.[88] Above this are 389 Intermediate Level People's Courts (IPC), which sit in provincially-administered cities and centrally-administered cities.[89] The Local and Intermediate Level Courts have separate enforcement chambers. At the next level, there are thirty Higher People's Courts (HPC), one for each province, autonomous region, and centrally-administered city.[90] Finally, the Supreme People's Court (SPC) is the highest court in China.[91]

In addition, each court has an Adjudication Committee, which is comprised of the president of the court, the vice-president, the head of specialized chambers, and regular judges.[92] These Committees, usually comprised of members of the CCP, advise individual judges in cases deemed to be important.[93] This further detracts from judicial independence.

---

85. *Id.*

86. Indeed, there are isolated cases where courts in China have upheld ad hoc awards. For example, in 1990 the Guangzhou Maritime Court enforced three ad hoc awards made in London in Ocean Shipping Company. *See* JOHN SHIJIAN MO, ARBITRATION LAW IN CHINA 427 (Sweet & Maxwell ed., 2001) (discussing *Guangzhou v. Marships of Connecticut*).

87. BIRD IN A CAGE, *supra* note 16, at 246.

88. Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need For the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 22 (Fall 1996).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

B. Civil Procedure Law

Before 1982, China had no legal basis for enforcing foreign-related arbitral awards.[94] The awards depended on voluntary compliance by the losing party.[95] The Civil Procedure Law (CPL), passed in 1982, provided a legal basis for compulsory enforcement of arbitration awards. Article 195 of the CPL specified:

> When one of the parties concerned fails to comply with a ruling made by a foreign affairs arbitration organization of the PRC, the other party may request that the ruling be enforced in accordance with the provisions of this article by the courts at the place where the arbitration organization is located or where the property is located.[96]

The article did not consider ad hoc awards, and it did not contain a provision for the refusal of enforcement; all awards were final and enforceable.[97] The court would not perform the limited review allowed under the New York Convention, but was merely instructed to execute the award.[98] In addition, parties could seek enforcement at the place of arbitration or where the assets were located.[99]

The procedure for enforcing foreign arbitral awards under the 1982 CPL proved to be fairly confusing. PRC courts could only enforce final judgments or rulings, so arbitral awards had to be converted into a judgment or ruling to be enforceable.[100] Moreover, only a foreign court could request the enforcement of an award, not the victorious party, and some foreign courts did not have the jurisdiction to make this request.[101] The PRC court could also refuse to enforce the judgment if it would violate national or social interests.[102] Due largely to this confusion, no parties successfully enforced a foreign arbitral award under Article 195.[103]

In December 1986, the NPC determined that China would join the New York Convention.[104] China made the following declaration: First, the People's Republic of China will "apply the Convention" to the recognition and enforcement of arbitral awards rendered in the territory of another Contracting

94. *See Evolving Regulatory Framework, supra* note 31, at 13.
95. *Id.*
96. *Id.*
97. *Id.* at 14.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 14-15.
103. *Id.* at 15.
104. *Id.*

State "only on the basis of reciprocity"; and second, the People's Republic of China will apply the Convention only to disputes which have, according to the laws of the People's Republic of China, been determined as arising out of "commercial legal relationships of a contractual nature or a non-contractual nature".[105]

Once China became a party of the New York Convention, it was subject to the reciprocity and commercial reservations quoted above.[106] Over 100 countries, including most of China's major trading partners, are now parties to the New York Convention.[107] Reciprocity now applies to nearly all arbitral awards involving Chinese parties.[108]

In 1991, the NPC amended the 1982 CPL, specifying that courts must handle enforcement pursuant to international treaties to which China is a party.[109] The revision also provided standards for refusal to enforce domestic and foreign-related awards, to be discussed later in the paper. In addition, the revisions no longer provided jurisdiction based on the place of arbitration.[110] The venue for foreign-related awards can only be the respondent's legal domicile or where the property is located.[111]

C. *Obstacles to Enforcement of Foreign Arbitration Awards*

"An arbitral award is only as good as the court that is asked to enforce it."[112]

Chinese courts have the statutory authority to enforce arbitral awards. Whether based on anecdotal information, one or two poorly decided enforcement decisions, or a prevalent refusal by Chinese courts to enforce foreign awards, many foreign investors and commentators report that enforcement of foreign awards in China is often difficult or impossible.[113]

---

105. *Id.*

106. *Id.*

107. *Id.* at 27.

108. *Id.* ("To enforce under the principle of reciprocity would require that the award be rendered in a nation that was not a party to the New York Convention but had previously recognized and enforced arbitral awards or judicial judgments issued in the PRC. More than 100 countries are now parties to the New York Convention, including most of China's major trading partners.").

109. Liu, *supra* note 26, at 549-51.

110. *Evolving Regulatory Framework*, *supra* note 31, at 18.

111. *Id.*

112. *Roundtable*, *supra* note 61, at §3.

113. *See, e.g.*, Greg Rushford, *Chinese Arbitration: Can It Be Trusted?*, ASIAN WALL ST. J., Nov. 29, 1999; Harer, *supra* note 34, at 395 ("If the Chinese party to an arbitration agreement does not voluntarily participate and comply with an award, the arbitration agreement can be a no-win situation for a foreign party transacting business with a Chinese entity."); *But see* Sally A. Harpole, *Following Through on Arbitration*, CHINA BUS. REV., Sept.-Oct. 1998, at 33-38, *available at http://www.chinabusinessreview.com/public/9809/harpole.html.*

Combating this perception, PRC sources have cited to positive anecdotal information to downplay enforcement challenges.[114]

The difficulty in verifying the accuracy of these foreign reports is exacerbated by the lack of concrete measurable data. Several attempts have been made to ascertain the likelihood of successfully enforcing arbitration awards. In 1997, the Arbitration Research Institute (ARI) of the China Chamber of Commerce surveyed 134 applications made to People's Courts between 1991 and 1996 for enforcement of CIETAC awards.[115] According to this survey, ninety-seven awards were enforced and thirty-seven were denied enforcement by the courts.[116] The survey cited the principal reasons for denial of the awards. In several cases, the validity of the arbitration agreement itself was in question.[117] In other cases, parties were effectively denied the opportunity to participate in the arbitration proceedings.[118] In yet other cases, the courts found that the arbitrators exceeded their authority by acting outside the jurisdictional limits of the arbitration body or the scope of the arbitration agreement.[119]

Professor Randall Peerenboom claims the ARI's survey suffered from "methodological problems and poor responsiveness by the courts."[120] He conducted his own independent survey of eighty-nine CIETAC and foreign arbitral award enforcement cases.[121] Calculating enforcement rates from seventy-two of these cases, Peerenboom painted a substantially bleaker picture than the official CIETAC statistics, finding that 52% of the foreign awards and 47% of the CIETAC awards were enforced.[122] Investors could expect to recover 50 to 75% of the award amount in 34% of the cases and half of the award amount in over 40% of the cases.[123]

What accounts for this relatively low recovery rate for arbitration awards? Many different factors may be involved, including the lack of an independent Chinese judicial system, corruption, and the insolvency of Chinese parties.

---

114. *See, e.g.*, Wang Guiguo, *One Country, Two Arbitration Systems: Recognition and Enforcement of Arbitral Awards in Hong Kong and China*, 14 J. INT'L ARB. 5-42 (Mar. 1997) (claiming there are few reported cases where courts have refused to enforce a convention award).

115. CHENG DEJUN ET AL., INTERNATIONAL ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA 129 (Butterworths Asia 2000).

116. *Id.*

117. *Id.*

118. *Id.* at 130.

119. *Id.*

120. Randall Peerenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 251 (2001) [hereinafter *Seek Truth*].

121. *Id.* at 252.

122. *Id.* at 252, 254.

123. *Id.* at 254.

D. Lack of an Independent Judiciary: Influence from CCP and Local Government Officials

The Constitution of the PRC, effective since 1982, specifies that China is a unitary state based on a system of parliamentary supremacy.[124] In practice, however, the CCP exercises governance over China parallel to official State governing bodies.[125] The CCP Committee also exerts tremendous influence at all levels of the court system.[126] The Committee often selects judges, and the People's Congress at the corresponding level ratifies its choices.[127] These judges go on to serve on the adjudication committee of each court, wielding considerable power in determining the outcome of controversial cases.[128] Judges who are also CCP members sometimes discuss cases involving difficult legal issues with the Political-Legal Committee and accept general policies set by the CCP.[129]

Judges in China do not enjoy independent judicial decision-making. The government appoints judges, pays them a low salary, and does not grant them tenure.[130] The low salaries and financial dependence on the government could increase the instances of judges accepting bribes or favoring local parties.[131] In addition, judges' relatives and administrative superiors may influence their judicial decision-making.[132]

Corruption has often been cited as a deeply rooted problem in the Chinese court system. One judge reported that she refused a large number of bribes and banquet invitations, and as a result "was ridiculed by her neighbors, treated coldly by her friends and was even the object of revenge and abuse by scoundrels, but in the end . . . won the trust and praise of the masses."[133]

Courts in China have less power than their western counterparts, partly due to the current constitutional structure. Judges are appointed by local People's Congresses and are funded by local governments.[134] The judges rely on salaries and housing provided by the municipal government.[135] This dependence can give local governments leverage over the courts, and government officials have been known to make threats such as cutting off

---

124. James V. Feinerman, *The Give and Take of Central-Local Relations,* CHINA BUS. REV., Jan. 1, 1998.

125. *Id.*

126. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 302 (Cambridge University Press 2002) [hereinafter LONG MARCH].

127. *Id.* at 305-306.

128. *Id.* at 306.

129. *Id.* at 306-307.

130. BIRD IN A CAGE, *supra* note 16, at 252, 279; LONG MARCH, *supra* note 126, at 294.

131. Interview with Zhao Shiyan, *supra* note 27.

132. BIRD IN A CAGE, *supra* note 16, at 278; Interview with Zhao Shiyan, *supra* note 27.

133. BIRD IN A CAGE, *supra* note 16, at 279.

134. *Id.* at 252, 256.

135. *Id.* at 264.

needed funding to build housing for court staff.[136] Local courts might "choose" to protect the defendant business or government to safeguard the local financial needs of the courts or the government.[137]

Courts are also more dependent on local government due to a gradual decentralization that has taken place since 1985.[138] Local governments must often support themselves through local taxes, fees and charges collected from local businesses, creating an incentive for the court to propagate those steady sources of income.[139] The enforcement of an arbitration award against a local business could thus negatively impact the local economy and, in some cases, cause the business to shut down, resulting in a number of citizens losing their jobs and housing.[140] Local People's Courts recognize these detrimental effects and may seek to evade enforcement of the award.[141]

Decentralization has also affected the various levels of sophistication found within the local court systems. Provinces develop and adopt new regulations promulgated by the central government at different speeds, influencing the chances of effectuating enforcement of an award. Dean Wang Chenguang, notes that the court systems in the coastal areas are more highly developed, as lawyers trained in those areas tend to stay there to work. Thus, the level of education for judges and lawyers involved in the system is raised, and typically more interaction occurs with foreign parties.[142] On the other hand, rural areas often suffer a high attrition rate because many students move to the large cities to pursue a higher education, leaving a court system ill-prepared to handle conflicts with foreigners.[143]

E. Local Protectionism

Local protectionism has long been a problem in China. In an effort to fight protectionism, imperial China required its magistrates to rotate to new places every few years and prohibited them from serving in their home

136. *Id.*

137. CECILIA HÅKANSSON COMMERCIAL ARBITRATION UNDER CHINESE LAW 198 (Iustus Förlag 1999).

138. *Id.* at 198.; *See also* Pitman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 LAW & SOC. INQUIRY 465, 473 (2004) (noting that this interplay of central and subnational governments resembles the federalist system of the United States).

139. HÅKANSSON, *supra* note 137, at 198.

140. *Id.*

141. *Id.*; *But see Seek Truth, supra* note 120, at 277 (challenging the theory of higher enforcement in more sophisticated areas by finding more instances of local protectionism in major investment centers than in smaller cities).

142. *See* Interview with Wang Chenguang, *supra* note 19.

143. *Id.* Indeed, Wang Chenguang indicates the Supreme People's Court is considering whether to effectuate simpler court procedures in outlying areas to make the systems more accessible to the public and easier to use.

districts.[144] Local protectionism can appear at any stage in the judicial process, and it affects both foreign parties and parties from foreign provinces in China. Judges have required applicants who are seeking enforcement of arbitral awards to provide a number of documents not required by PRC law, including evidentiary documents that the arbitration tribunals relied on in making the awards.[145] Judges have also required parties to perform the costly and time-consuming effort of translating, notarizing, and consularizing the documents.[146]

In one form of protectionism, local governments may help companies to hide or transfer assets or dodge debts.[147] This appears to have taken place in the infamous RevPower case, where RevPower Limited received a $9 million arbitral award from the Stockholm Chamber of Commerce against a Chinese party. When RevPower attempted to enforce the award in the Shanghai People's Court, the court refused to acknowledge the award for two years, during which time the Chinese party had transferred its business and assets to its parent and grandparent companies, thus appearing to be insolvent.[148]

Chinese authorities recognize that local protectionism adversely affects long-term business dealings with foreign companies. One Chinese report stated, "[T]he hard-won respect of CIETAC is being squandered by a judicial system unable to make Chinese parties pay up."[149] In 1991, the President of the SPC, Ren Jianxin, acknowledged to the NPC the damage caused by local protectionism. He urged several prohibitions to counter local protectionism:

> (i) prohibiting local party cadres from interfering with the judicial process in an attempt to protect local interests;
>
> (ii) prohibiting government officials and other parties from making threats or launching campaigns against judicial officers carrying out the execution of court orders;
>
> (iii) prohibiting judicial organs from practicing favoritism towards local parties by making unfair rulings or avoiding their proper responsibilities;
>
> (iv) prohibiting officials of the public security and procuratorial organs from interfering with the adjudication of

144. *See First Public Hearing of the US-China Comm'n*, (D.C. June 14, 2001) [hereinafter *U.S.-China Comm'n Hearing*].

145. *See Seek Truth*, *supra* note 120, at 299, n.178.

146. *See Evolving Regulatory Framework*, *supra* note 31, at 19.

147. *Id.* at 46.

148. *See* Brown & Rodgers, *supra* note 24, at 341-42; *Seek Truth*, *supra* note 120, at 250, n.5.

149. *See* Stanley B. Lubman & Gregory C. Wajnowski, *International Commercial Dispute Resolution in China: A Practical Assessment*, 4 AM. REV. INT'L ARB. 107, 157 (1993) (quoting Matthew D. Bersani, *The Enforcement of Arbitration Awards in China*, 10(2) J. INT'L ARB. 47, 49 (1993)).

> economic cases by treating contract and debt disputes as offences; and
>
> (v) prohibiting any organ or individual from obstructing the execution orders of the People's Courts in any other way.[150]

Justice Ren urged that court personnel and government officials who repeatedly violate these prohibitions and engage in local protectionism be disciplined and possibly subject to criminal sanctions.

While the SPC has responded to the threat of local protectionism, as discussed later in this Article, it is uncertain whether these efforts have had an effect. The web site for the BAC contains an interesting editorial note concerning the continuing threat of local protectionism in relation to Chinese parties from outlying provinces. The editor writes:

> When I attended an international convention, hearing other countries talk about the severe regional protectionism of China Mainland justice, a so-called national self-respect made me hardly admitted [sic] I had heard about willingly and promptly even though I did not believed [sic] it to be absolutely unreasonable and irresponsible. Upon reading the following cases however, I was dropped into such agony that [the] ghost of the regional protectionism [was] broadening its magic trace around Chinese great ground.[151]

The situation is certainly alive and well, and it remains to be fully addressed.

F. Transfer of Assets and Resulting Insolvency of Chinese Party

1. Assistance of Courts, Officials

Peerenboom disagrees with critics who blame local protectionism for the lack of enforcement of awards. Instead he claims local protectionism has served as a scapegoat for judges, central government officials, and lawyers, where blame for failure to enforce the award is shifted to local government officials.[152] Peerenboom argues that the true challenge of enforcing an arbitration award is the insolvency of the respondent.[153] Of the thirty-seven

---

150. *See* CHENG DEJUN, *supra* note 115, at 128.

151. *See* Civil Ruling of Shanxi Jiexiu People's Court Against Enforcement of No. 199801276 Arbitration Award of Beijing Arbitration Commission , at http://www.bjac.org.cn/en/brow.asp?id=145 (last visited Sept. 29, 2005).

152. *See Seek Truth*, *supra* note 120, at 276.

153. *Id.* at 254.

non-enforcement cases in his 1997 survey, forty-three percent were unenforceable because the respondent did not have the necessary assets to pay the award.[154] In eleven of the sixteen no-asset non-enforcement cases, local counsel for the petitioners believed that the respondents were truly insolvent and lacked unencumbered assets.[155] In three other cases, the lawyers believed the respondents had fraudulently transferred their assets to other companies to avoid payment. The lawyers in the remaining two cases were unsure whether the respondent had assets.[156]

While Peerenboom downplays the role of local protectionism in the enforcement of awards, many cases of apparent insolvency could be a result of protectionism. For example, a local government official could warn a company of an upcoming application for enforcement, leading to a fraudulent transfer. Or a bank might aid the local party by delaying or refusing to provide bank account information or by freezing bank accounts.

If the property has been transferred or is no longer available, the plaintiff might need to bring a second suit to seize property to satisfy the award. For example, Wang Chenguang served as chief arbitrator in a case in Shenzhen.[157] Wang later spoke with the attorney of the winning party who said the enforcement was taking a long time because the other party had declared bankruptcy.[158] As a result, the attorney had to file another lawsuit to seize property in order to satisfy the award.[159]

An additional lawsuit was also necessary in the case of Guangzhou Ocean Shipping Company, in which the defendant American company failed to pay the remainder of an arbitration award.[160] The plaintiff Chinese company learned that a third party, located in China, owed the defendant a freight fee and was preparing to pay the fee.[161] The plaintiff submitted an application for recognition of the arbitral award and for a transfer of the above payment to the plaintiff to satisfy that award. The Guangzhou Maritime Court ordered the fee to be paid directly to the plaintiff.[162]

2. *Applicants Have the Responsibility to Locate Respondents' Assets for Collection*

In order to attach assets, courts must ascertain where the assets are located. Respondents are required by law to state the location of their assets;

---

154. *Id.* at 254, 273.
155. *Id.* at 274.
156. *Id.* at 274.
157. *See* Interview with Wang Chenguang, *supra* note 19.
158. *Id.*
159. *Id.*
160. *See* Zhao Shiyan, Enforcement of Foreign Arbitral Awards in the People's Republic of China 22 (2001) (unpublished LL.M. thesis, Vrije University, Amsterdam).
161. *Id.*
162. *Id.*

yet in practice, parties seeking enforcement bear the burden of providing this information to the courts.[163] Judges may decline to track down the assets for several reasons. They frequently have difficulty obtaining cooperation from banks and administrative agencies, due mainly to the low stature of the courts within the political structure. Banks may resist court orders to assist in enforcement because "the court is essentially just another bureaucracy, with no more power to tell [them] what to do than the Post Office."[164]

In the face of frequent mergers, reorganizations, and spin-off companies, China's rapidly changing economic landscape makes it difficult to determine asset ownership.[165] Inadequately documented transfers and mergers of various companies, as well as a rapidly-changing regulatory framework for land acquisition in China, have further added to the difficulty in finding clear title to many assets.[166]

With the burden on the applicant, information regarding the respondent's assets is even harder to obtain. Parties may have to work with professional investigation companies, whose members rely on connections with former ministry colleagues to find information on assets.[167] Under PRC law, Chinese companies are limited to one bank account for normal business activities,[168] yet some companies ignore this law and open multiple accounts to evade taxes.[169] It is often almost impossible to track down all of a company's accounts.[170]

Applicants seeking information on a respondent's assets may contact the Administration of Industry and Commerce (AIC). The AIC compiles a Registration Record Book, in which all companies' financial statements should be available.[171] These records are officially available to the public, but in practice they are closely guarded, and lawyers usually need to present a court notice before being granted access to the record books.[172]

Banks, for the most part, are reluctant to give out account information for fear of damaging relations with their customers.[173] Instead of immediately complying with a court order, banks might notify customers first to allow sufficient time for the customer to transfer money into another account before the bank attempts attachment.[174]

---

163. *See Seek Truth, supra* note 120, at 292.

164. *Seek Truth, supra* note 120, at 294 (quoting Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments,* 10 COLUM. J. ASIAN L. 1, 56 (1996)).

165. *See Evolving Regulatory Framework, supra* note 31, at 61.

166. *Id.* at 63.

167. *See Seek Truth supra* note 120, at 292.

168. *See* Commercial Banking Law of the PRC art. 48.

169. *Id.*

170. *See Evolving Regulatory Framework, supra* note 31, at 61.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

G. *Ambiguity in the CPL Regarding Grounds for Refusal of Enforcement*

Article 260 of the Civil Procedure Law of the People's Republic of China (for Trial Implementation) (CPL) provides specific procedural grounds for refusing to enforce foreign-related awards:

> (a) the parties have neither included an arbitration clause in their contract or subsequently reached a written agreement;
>
> (b) the respondent did not receive notification to appoint an arbitrator or to take part in the arbitration proceedings or the respondent could not state his opinions due to reasons for which he is not responsible;
>
> (c) the formation of the arbitration tribunal or the arbitration proceedings do not conform to the rules of arbitration;
>
> (d) the matter decided in the award exceeds the scope of the arbitration agreement or is beyond the authority of the arbitration institution.

Finally, a court may refuse to enforce an award if the enforcement is contrary to social public interests.

This final basis of refusal, where enforcement is contrary to the "social and public interests of China," could be problematic.[175] In the famous case *Dongfeng Garments Factory v. Henan Garments Import & Export Co.*, plaintiffs alleged that the defendant had breached the parties' joint venture contract.[176] A CIETAC arbitral tribunal accepted the case in April 1991 and awarded considerable damages to the plaintiffs in April 1992. The defendants did not pay the damages, so the plaintiffs commenced proceedings in an Intermediate People's Court for enforcement of the award. The court issued an order rejecting the plaintiffs' application.[177] The court held that "according to current State policies and regulations, enforcement . . . would seriously harm the economic influence of the State and public interest of the society and adversely affect the foreign trade order of the State." To compel the defendant to pay damages for its breach would disadvantage "social and public interests."[178]

The SPC subsequently overturned the lower court's decision in November 1992, holding "[I]t was incorrect for the Zhengzhou Municipal Intermediate People's Court to refuse to enforce the arbitral award on the

175. *See* HÅKANSSON, *supra* note 137, at 203.
176. *Id.*
177. *Id.*
178. *Id.*

grounds that enforcement would seriously harm the economic interests of the state."[179]

H. Lack of Court Funds

Court personnel must often travel to the non-performing party's local court to coordinate enforcement efforts and, lacking funds to do so themselves, they sometimes ask foreign parties to cover travel costs. However, many foreign parties would be punished in their home country if they were to comply with this request. American parties, for example, might be punished under United States law relating to corrupt overseas business practices if they give money to court personnel.[180] But if the parties refuse to comply, the court could delay or refuse to enforce the award.[181]

I. Shortage of Qualified, Experienced Judges

While there are over 200,000 judges in China, most of these judges have not earned a law degree.[182] Many have come to the courts after serving in the military or for Party organizations.[183] As of 1993, only two-thirds of all judges had post-secondary training in any subject, including non-legal subjects.[184] Furthermore, many young judges have been appointed to handle the recent judicial reforms, but they often lack the expertise required to effectuate the reforms.[185] This lack of legal expertise has resulted in a mishandling of applications for enforcement of arbitration awards.[186] Chinese judges may mistakenly apply PRC law to interpret the validity of an arbitration agreement, as happened in the Revpower case.[187]

Low salaries have exacerbated the shortage of skilled judges in China. Some of the highest-paid judges receive only RMB 2,000-3,000 Yuan per month (approximately USD 250-350 per month), whereas lawyers in China may earn RMB 10,000-30,000 Yuan per month (USD 1,200-3,600 per month),[188] so judges often abandon their post for the "greener pastures" of starting their own practice or joining large firms.[189] One SPC judge commented

---

179. *See* CHENG DEJUN, *supra* note 115, at 131.

180. *See* Brown & Rodgers, *supra* note 24, at n.86.

181. *Id.*

182. Susan Finder, *Inside the People's Courts: China's Litigation System and the Resolution of Commercial Disputes, in* DISPUTE RESOLUTION IN THE PRC: A PRACTICAL GUIDE TO LITIGATION AND ARBITRATION IN CHINA 68 (Asia Law & Practice Ltd. 1992).

183. *Id.*

184. Berkman, *supra* note 88, at 26.

185. *Id.*

186. *See* HÅKANSSON, *supra* note 137, at 194.

187. *See Seek Truth, supra* note 120, at 250, n.5.

188. HÅKANSSON *supra* note 137, at 195.

189. *See* Interview with Zhao Shiyan, *supra* note 27.

that in 1998-1999 alone, approximately fifteen percent of all People's Court judges left their positions for positions in law firms.[190]

J. Failure to Sanction Noncompliant Parties

Chinese courts have a range of contempt powers to sanction those who fail to comply with the terms of a court order or obstruct the enforcement process.[191] On August 23, 2002, the People's Congress adopted an interpretation of law imposing criminal sanctions on parties that attempt to evade enforcement of court judgments and arbitral awards.[192] In addition, Article 102 of the CPL prohibits forging or destroying important evidence; concealing, transferring, selling, or destroying property that has been sealed up or detained; and refusing to carry out legally effective judgments or orders of the people's court.[193] Under Article 104, courts may impose fines between RMB 1,000 and 30,000 on non-compliant companies and impose punitive damages in the amount of twice the interest from the time of default.[194]

In addition to financial sanctions, courts may detain respondents for refusing to comply with subpoenas. Article 313 of the Criminal Law[195] gives courts the ability to impose a sentence of less than three years on parties that seek to conceal, transfer, or intentionally destroy property, as well as voluntarily convey property or transfer property at an unreasonably low price, making the judgment or award unenforceable.[196] Under Article 221 of the CPL, courts may freeze or transfer the bank deposits of the losing party, as well as make inquiries to banks or other financial institutions.[197] Courts may also withhold or garnish wages or evict a respondent from his home under Article 222 of the CPL.[198]

With this wide array of sanction possibilities, one might expect Chinese courts to effectively control non-compliance.[199] But the measures are not often utilized and have sometimes proven ineffective.[200] According to Judge Lu

---

190. *Id.*

191. *See Evolving Regulatory Framework, supra* note 31, at 50-51.

192. Wang Sheng Chang, Roundtable on Arbitration and Conciliation Concerning China: CIETAC's Perspective 6 (paper presented at 17th ICCA Conference, May 16-18, 2004) [hereinafter Roundtable: CIETAC'S Perspective].

193. CPL art. 102.

194. *See Evolving Regulatory Framework, supra* note 31, at 51.

195. Effective October 1, 1997. But according to Jeffrey Berkman, Chinese judges do not have the authority to issue criminal contempt orders. *See* Berkman, *supra* note 88, at 25.

196. *See* Roundtable: CIETAC's Perspective, *supra* note 192, at 6.

197. *Evolving Regulatory Framework, supra* note 31, at 53, n.228.

198. *Id.* at 53, n.231.

199. Wang Sheng Chang, the Vice Chairman & Secretary General of CIETAC, stated, "It is expected that the law interpretation will extend a considerable assistance to curb the bad faith behavior attempting to evade the enforcement." Roundtable: CIETAC's Perspective, *supra* note 192, at 6.

200. *Evolving Regulatory Framework, supra* note 31, at 53.

Xiaolong of the Supreme People's Court, the SPC has never sanctioned non-compliant parties for not paying a damages award and has never held a non-compliant party in contempt of court.[201]

Local government officials may instruct managers of the respondent company to not comply with the court's orders. Because of the low stature of Chinese courts and lack of respect for the rule of law, judges fear their imposed fines or detention of non-complying officials will not be carried out.[202]

Courts might instead take creative extra-judicial measures to effect compliance. Some courts have had the name of a non-complying company published in the local newspaper.[203] This effectively puts pressure on the defaulting company to pay up, while providing notice to other companies of the defaulting company's potentially poor economic condition.[204]

K. Lack of Transparency in Judicial Process

Parties often have difficulty determining what actually happened during the enforcement proceedings, as they do not have a right to participate in hearings where higher courts decide whether or not to enforce an arbitration award.[205] The higher court need not notify the parties about the hearing or give them an opportunity to submit written documents to support their positions.[206] Some parties have complained that the higher court's reliance on the lower court's presentation of the facts and legal issues disadvantaged them.[207] Furthermore, the Enforcement Regulation does not require that the court state the reason for its decision or state the grounds for deciding to extend the allotted time for enforcement.[208]

V. WHAT STEPS HAS CHINA TAKEN TO ENSURE ENFORCEMENT?

Considering the infancy of the legal system and arbitration commissions in China, as well as the constitutional obstacles facing courts, Chinese officials and judges are attempting to change the current system to better enforce arbitration awards and allow foreign investors to feel safe when conducting business transactions. This section will analyze recent developments in award enforcement.

---

201. E-mail from Dr. Lu Xiaolong, Judge, Supreme People's Court, China (Jan. 19, 2005, 08:41 PST) (on file with author). Dr. Xiolong is the head of the SPC tribunal which reviews cases referred by the reporting mechanism.

202. *Evolving Regulatory Framework*, *supra* note 31, at 53.

203. *Id.* at 54.

204. Chinese law practitioners appear well-versed in using all resources, not just legal ones. As one Chinese attorney stated, one needs to "think of a problem in a less legal way!" Interview with Zhao Shiyan, *supra* note 27.

205. *See Seek Truth*, *supra* note 120, at 288.

206. *Id.*

207. *Id.*

208. *Id.* at 289.

A. *Party Members and Government Officials Are Speaking Up*

Many top leaders in the Chinese government recognize the importance of attracting foreign investment and are aware of the adverse effects of negative publicity resulting from cases such as Revpower.[209] As a result, the government has passed several laws that provide foreign investors with benefits and protection not given to domestic companies.[210] The CCP has supported government efforts to combat local protectionism through campaigns such as designating 1999 to be the "Year of Enforcement."[211] The CCP is not supposed to interfere with courts to influence the outcome of cases. Nevertheless, judges (often CCP members) continue to discuss specific cases with the CCP Political-Legal Committee. Furthermore, the "flurry of rule-making" by the Supreme People's Court, described below, can be seen as "testimony to the resolve of the Chinese Government to come to grips with this important matter."[212]

Indeed, Peerenboom concluded that Party interference did not affect enforcement of arbitral awards.[213] He found only one case where a party member blocked the enforcement of an arbitral award, and he reported that most lawyers surveyed felt that the CCP played a positive role in award enforcement.[214] Senior leaders attempting to attract foreign investment do not want the negative publicity that results from awards that are not enforced.[215] Peerenboom cited three cases where a senior member of the CCP Committee or the Political-Legal Committee helped secure enforcement.[216]

The bigger tension in China may arise between political and legal reform. Due to the authoritarian nature of a one-party regime, the Chinese government might feel that it cannot afford to lose cases. The government wants freedom of contract, yet it has not demonstrated its willingness to lose some cases and subject itself to the legal system. Without surrendering control over court decisions, it will be very difficult "to create a market economy that will inspire the confidence of foreign financial investors."[217]

B. *Statutory Interpretations Passed by the SPC*

Neither Arbitration Law nor Civil Procedure Law contain procedural rules for enforcing arbitral awards or challenging the validity of arbitration

---

209. *See Seek Truth, supra* note 120, at 279-280, 320-321.

210. *Id.*

211. *Seek Truth, supra* note 120, at 285. One source stated that the Year of Enforcement was actually proposed by the SPC, but embraced by government officials. Claver-Carone, *supra* note 75, at 392, n.157.

212. *See Roundtable, supra* note 61, at 11.

213. *See Seek Truth, supra* note 120, at 285.

214. *Id. at 286.*

215. *Id.*

216. *Id.*

217. *See US-China Comm'n Hearing, supra* note 144, at 5.

agreements.[218] These issues are instead addressed in several dozen judicial notices.[219] The most important of these notices are discussed below.

1. 1995 SPC Reporting Mechanism Notice

"In 1995, the SPC issued the Notice on Courts' Handling of Issues in Relation to Matters of Foreign-related Arbitration and Foreign Arbitration (1995 Notice)."[220] The Notice specifies that, if an IPC intends to refuse to recognize or enforce a foreign award, it must first submit a report to the Higher People's Court (HPC). If the HPC agrees with the IPC, the HPC must then report the case to the SPC.[221] The SPC has a special tribunal to review these cases. The tribunal reviews the validity of arbitral clauses or agreements and the resulting awards in both domestic and foreign-related arbitrations.[222]

The SPC generally reviews about 30 cases every year, although in 2004 it reviewed over 40 cases.[223] These cases result in either enforcement of the award or refusal to enforce.[224] Supreme People's Court Judge Zhang Jin Xian related two recent examples of SPC review under the reporting mechanism.[225] In one case, the London Sugar Association sought to have an arbitral award enforced against the China Sugar & Wine Group Company before the Beijing No. 1 Intermediate People's Court.[226] In a decree issued on August 6, 2001, the court refused to recognize and enforce the award, stating the award ran counter to public policy in China. On appeal, the Beijing High People's Court affirmed this decision. The case was then reviewed by the Supreme People's Court. In a decision on July 1, 2003, the SPC recognized and enforced the award, holding that while the transaction leading to the award was invalid according to Chinese law, the action was not equal to violating the public policy of China.[227]

In another recent case, the London Arbitration Tribunal granted an award on December 7, 2001 for contract violation against Wuhu Smeltery, Anhui, China, on behalf of Gerald Metals Inc. (GMI).[228] GMI sought to have the award enforced before the Anhui Province Higher People's Court, but the court found that the award went beyond the scope of the arbitration clause included

---

218. *See Roundtable*, *supra* note 61, at 9.

219. *Id.*; *See also* Lu Xiaolong, The Recognition and Enforcement of Foreign Arbitral Award in China, Address at the 17th ICCA Conference (May 16-8, 2004).

220. *Evolving Regulatory Framework*, *supra* note 31, at 9.

221. CHENG DEJUN, *supra* note 115, at 128.

222. E-mail from Dr. Lu Xiaolong, Judge, Supreme People's Court, China (Jan. 19, 2005, 08:41 PST) (on file with author). Dr. Xiolong is the head of the SPC tribunal which reviews cases referred by the reporting mechanism.

223. *Id.*

224. *Id.*

225. E-mail from Zhang Jin Xian, Judge, Supreme People's Court, China (Jan. 25, 2005, 04:36 PST) (on file with author).

226. *Id.*

227. *Id.*

228. *Id.*

in the contract and refused to recognize the entire award.[229] On review, the SPC affirmed that the award went beyond the scope of the arbitration clause, but it found that the award could be separated into two parts: the section with the right to arbitrate and the section not under arbitration.[230] The SPC concluded that part of the award arose from the arbitrable section of the contract, and it recognized that portion of the award.[231]

2. *Interim Preservation of Assets and Evidence*

To prevent funds from being transferred for the purpose of evading enforcement of an arbitration award, a party may apply to the arbitration commission for preservation of the other party's assets. The arbitration commission must then file a request with the People's Court, as per Article 28 of the Arbitration Law.[232] A party can also move for property preservation under Article 258 of the Civil Procedure Law.[233] The People's Court then rules on the request for interim intervention. [234]

While these provisions certainly indicate a willingness by the court system to preserve property, these methods may fail for the same reasons discussed above; the same local court ruling on the interim request could have already facilitated local protectionism. As previously stated, the local court may deny the application out of fear that enforcement might interfere with the defendant's ability to operate a company or in response to pressure from local governments.

3. *1998 Regulation Clarifying Arbitration Fees and Establishing Time Limitations*

In 1998, the SPC issued the Regulations of the SPC Regarding the Issues of Fees and Investigation Periods for the Recognition and Enforcement of Foreign Arbitral Awards ("Regulations").[235] These Regulations clarified the standards regarding collection of fees for actions to enforce foreign arbitral awards and suggested time limitations within which courts should resolve such actions.[236] The Regulations apply nationwide, specifying that the People's Courts may collect an application fee of 500 yuan for each action.[237] In addition, the court may require that the party applying for enforcement of an

---

229. *Id.*
230. *Id.*
231. *Id.*
232. E-mail from Cao Lijun, Arbitrator and Staff Member of CIETAC, Beijing, China (Dec. 10, 2004, 02:04 PST) (on file with author) [hereinafter Cao Lijun e-mail *(12/10/04)*].
233. *Id.*
234. *See* HÅKANSSON , *supra* note 142, at 145.
235. CHENG DEJUN, *supra* note 115, at 137.
236. *Id.*
237. *Id.*

arbitral award pay an enforcement fee in advance, the amount of which is determined in accordance with the fee scale contained in the Measures Regarding Costs for People's Court Actions promulgated in 1989.[238] The Regulations thus prohibited the common practice of "double collection," where People's Courts charged parties separately for recognition and enforcement procedures.[239]

The Regulations also addressed "judicial purgatory" in handling applications for the recognition and enforcement of foreign arbitral awards.[240] Under the Regulations, the People's Court must issue its ruling within two months from the date of accepting the application.[241] Then the court must complete the enforcement proceedings within six months of the ruling granting recognition of the award.[242] If the court refuses recognition or enforcement, it must report to the SPC within two months from the date it accepted the application.[243]

4. 1998 Education Rectification Campaign

Xiao Yang, the President of the SPC, reportedly confirmed comments by President Jiang Zemin that law enforcement officials have participated in such wrongs as "eating free meals, taking without paying, imposing man-made barriers and soliciting favors, demanding and taking bribes, perverting justice for money, and bullying the common people ...."[244] In 1998, Chinese officials responded by ordering an "educational rectification campaign" that denounced these activities and focused on reducing judicial corruption, incompetence and inefficiency. As a result, 8,110 previously mishandled cases were corrected, and nearly 5,000 judges and prosecutors were disciplined.[245]

5. 2002 and 2003 SPC Regulations Limiting Jurisdiction Over Arbitration Awards with Foreign Elements to Specialized IPC Courts

On March 1, 2002, the SPC issued a directive stating that all civil and commercial cases involving foreign elements are under the jurisdiction of specific IPCs in capital cities of provinces and special economic zones.[246] This provision was handed down with the intent to lessen the potential local

---

238. *Id.*
239. *Id.* at 138.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 264 n.369 (2001).
245. *Id.*
246. *See* Xiaolong, *supra* note 219. The SPC solidified this rule in its Dec. 31, 2003, provisions.

protectionism of local courts, particularly protectionism aimed at foreign parties.[247] The SPC also intended to increase the quality of judgment by focusing foreign-element cases in courts with highly-educated and experienced judges.[248]

It is too soon to say whether this interpretation has reduced the local protectionism faced by foreign parties, both from other provinces and from other countries. SPC Judge Zhang believes that the interpretation has improved the Chinese legal environment. As an example, he cites to the Intermediate People's Courts in Guangdong province, which tried ten cases between foreign parties and local governments from 2002 to 2004. Judge Zhang claims that, due to the 2002 interpretation, the local government defendants were discouraged from interfering in the judicial process. The fact that none of the parties appealed the decisions provides evidence that the cases were decided fairly.[249]

6. SPC Regulation Imposing Liability for Failure to Enforce Awards

In 2000, the SPC issued two regulations to clarify jurisdictional issues and increase the sense of responsibility among enforcement personnel.[250] The regulations imposed liability for failure to enforce judgments and awards in accordance with the law.[251] However, the likelihood of judges using these regulations remains to be seen, particularly given the courts' current lack of interest in sanctions.

C. 1995 Judges Law

China now requires a basic standard of education for its judges. The 1995 Judges Law specifies that judges must be graduates of tertiary educational institutions in law or have specialized legal knowledge.[252] Judges appointed before the implementation of the Judges Law who do not meet these standards must attend a "Judges' College" to study law part-time.[253] The SPC has trained HPC judges at the National Judges Institute, and those judges are responsible for training other judges.[254] The SPC has provided specific training for judges on enforcement.[255]

---

247. *Id.*
248. *See Rountable*, *supra* note 61, at 11.
249. *See* Zhang Jin Xian, *supra* note 225.
250. *Evolving Regulatory Framework*, *supra* note 31, at 6.
251. *Id.*
252. Finder, *supra* note 182, at 68.
253. *See id.*
254. LONG MARCH, *supra* note 126, at 293.
255. *See* Finder, *supra* note 182.

D. *Changes in CIETAC Arbitration Rules*

CIETAC made a series of major changes to its arbitration rules in 1994, 1995, and 1998, bringing them more in line with recognized international standards.[256] CIETAC now permits foreign arbitrators to be included in the Panel of Arbitrators.[257] Arbitration can be carried out in English or other foreign languages, as agreed upon by the parties involved.[258] Foreign parties can also use their own non-Chinese attorneys in the proceedings.[259] The new arbitration rules set forth a nine-month time limit for a tribunal to conduct a hearing and render its award, although time extensions may be granted.[260] Arbitral awards are final and binding upon both disputing parties. Neither party may bring suit before a court or request alteration of the award from any other organization.[261]

The revised CIETAC rules now provide for new "fast-track" arbitration tribunals. In the "fast track," a single arbitrator appointed by the CIETAC chairman handles claims worth less than RMB 500,000 yuan (USD 60,000).[262] Under these proceedings, "[o]ral hearings need not take place."[263] The panel must render an award within ninety days from the appointment of the arbitrator or within thirty days from the conclusion of an oral hearing.[264] This type of tribunal particularly benefits parties with smaller claims and parties with time constraints.

VI. FURTHER SUGGESTIONS TO ASSIST ENFORCEMENT OF CHINESE ARBITRATION AWARDS

It is not yet clear whether the newly-promulgated SPC rules are having much impact on the enforcement of awards. Professor Jerome Cohen describes these measures as "band-aids for a patient that is severely ill," while the system needs "radical surgery and structural rehabilitation."[265] It is true that band-aids are easier to apply in China than larger, overarching structural transformations.[266] After all, China does not take quickly to changes, especially those changes that might threaten the primacy of the CCP. However, a

256. Ge, *supra* note 2, at 131-2.
257. *See* CIETAC Arbitration Rules, Art. 10.
258. *See id.* at Art. 85.
259. *See id.* at Art. 22.
260. *See id.* at Art. 52.
261. *See id.* at Art. 60.
262. *See* Ge, *supra* note 2, at 133.
263. *Id.*
264. *Id.*
265. Jerome Cohen, Opening Statement Before the First Public Hearing of the U.S.-China Commission, (June 14, 2001) *available at* http://www.uscc.gov/hearings/2001_02hearings/transcripts/01_06_14tran.pdf (hereinafter US-China Commission Hearing).
266. *See* Interview with Wang Chenguang, *supra* note 19.

combination of several additional "quick fixes" and deeper structural changes should help modify the current system and reassure foreign investors that they can ultimately achieve a happy ending in China.

A. *Publish Comprehensive Statistics on Enforcement*

Scholars and practitioners have urged the Chinese government to make Chinese arbitration more public and transparent. As a result, two volumes have been published containing written CIETAC awards.[267] These volumes help add transparency to the CIETAC process. In addition, Cheng Dejun and Wang Sheng Chang, both Vice Chairmen of CIETAC, and Michael Moser, a CIETAC arbitrator, published various case summaries in their recent volume "International Arbitration in the People's Republic of China: Commentary, Cases and Materials" (2nd ed. 2000).

While these publications are useful in introducing practitioners to CIETAC practices,[268] their helpfulness in determining the reasoning behind CIETAC awards and the enforceability of those awards is questionable. The awards often fail to state the applicable legal rules, focusing more on the fairness or equity of the awards than on the rules themselves.[269] The fact-specific awards, thus, offer little guidance to lawyers seeking to determine the reasoning behind CIETAC awards.[270]

Nevertheless, arbitration bodies such as CIETAC are in advantageous positions to determine whether their foreign-related awards are enforced by the court system. For example, through post-arbitration questionnaires and research, CIETAC could compile a database of awards, their enforcement rates, and reasons for non-enforcement. At least one CIETAC official has recognized the importance of such statistics and has indicated CIETAC's willingness to conduct these types of surveys in the near future.[271]

B. *Continue to Improve the Education of Chinese Judges*

As discussed earlier, many Chinese judges do not have a background in law, and most have never studied foreign legal systems. The fledgling court system, low political stature, and lack of historical precedents make it difficult for judges to know and follow any rule of law.

---

267. *See* SELECTED WORKS OF CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION AWARDS (1989-1995) UPDATED TO 1997 (Patricia Leung ed., Sweet & Maxwell, 1998).

268. *Id.*

269. *See* BIRD IN A CAGE, *supra* note 16. This may reflect the Chinese tendency to focus more on the solution of the dispute, the fairness of the solution and the factual situation than to the legal arguments presented by the parties. *Id.*

270. *See id.*

271. *See* Cao Lijun e-mail (12/10/04), *supra* note 232.

One recent development may assist the process of improving the legal system in China. In 1999, Temple University School of Law collaborated with Tsinghua University in Beijing to begin the first foreign LL.M. degree program in China.[272] As of November 2004, 141 lawyers and judges had graduated from this program. This 15-month, 30 credit program includes a summer semester at Temple's campus in Philadelphia.[273] Combined with several other legal programs in China, Temple has educated 411 legal professionals within just four years.[274]

After four years of running the only Western LL.M program in China, Temple is being joined by several other Western-style law programs. The University of Minnesota Law School is currently planning an LL.M. program to begin in Summer 2005, in collaboration with China University of Political Science and Law ("Fada") in Beijing. Through this program, Chinese lawyers will earn 24 credits in an 18-month period, which will be taught in English by the University of Minnesota faculty.[275] Additionally, in February 2004, Peking University Law School and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University in Sweden launched a three-semester Masters' program for Research Direction in Human Rights.[276] Twenty postgraduate students from Peking University are enrolled in this groundbreaking program.[277]

Several other programs in specialized legal areas have also begun in China. The University of Maryland and Tianjin University are offering a Masters degree in Judicial Justice, while the University of Australia is collaborating with Normal University in Shanghai to offer a Masters degree in International Business Transactions.[278] Additionally, Chinese judges and lawyers have increasingly been permitted to study abroad.[279]

---

272. Interview with John Smagula, Director of Asia Law Programs, Temple University School of Law, in Beijing, China (Nov. 2, 2004).

273. *Id.*

274. *Id.* Temple's other programs include a judicial education partnership with the Supreme People's Court, a prosecutorial education partnership with the Supreme People's Procuratorate, legislative drafting projects, scholarly roundtables promoting the development of law, and AIDS and public health law initiatives. *Id.*

275. Interview with Adelaide Ferguson, Assistant Dean for Post J.D. Programs, Temple University School of Law, in Beijing, China (Nov. 6, 2004); Mary Jane Smetanka, STAR TRIB., Dec. 5, 2004, *U and China: A shared passion for education, at* http://www.startribune.com/stories/1592/5119861.html (Published Dec. 5, 2005) (last visited Oct. 1, 2005); E-mail from Meredith M. McQuaid, Associate Dean and Director of International and Graduate Programs, University of Minnesota School of Law (Dec. 15, 2004, 14:33 PST).

276. *See* Interview with Adelaide Ferguson; *A Brief Introduction to the Human Rights Master Program*, at http://www.hrol.org/hrmp/english.php (last visited Oct. 7, 2005).

277. *Id.*

278. Interview with Mo Zhang, Professor, Temple University School of Law, in Beijing, China (Nov. 1, 2004).

279. For example, Temple Law School reports 20 LL.M. Chinese graduates from their main campus in Philadelphia. Johan Gernandt, Vice Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce, reports that several Chinese lawyers have studied or

C. *Develop a Special Judicial Division for Enforcement of Foreign-Related Awards*

While the SPC has already taken steps to ensure a judge's expertise in the field, namely by assigning foreign-related arbitration enforcement cases to specifically designated IPCs, the development of separate divisions specializing in enforcement of foreign-related awards will further help ensure judges' expertise and lessen local protectionism. This approach is already being tested in the intellectual property realm. Special courts dedicated to intellectual property matters were established in July 1993 as divisions of the Beijing HPC and IPC.[280] Judicial personnel in these divisions receive specialized training to improve their ability to handle difficult cases.[281] In a similar manner, China could develop specialized enforcement branches aimed solely at arbitration awards. This would ensure a high level of specialization within the divisions and would reassure foreign investors concerned about fairness and expertise.[282]

D. *Hire a Skilled Local Attorney to Help Develop "Guanxi" Relationships With Local Officials*

Attorney Zhao Shiyan notes that most of the barriers in enforcement are practical, not legal.[283] Accordingly, he suggests that foreign investors make good connections with local governments and banks. If a conflict arises, Shiyan suggests that the foreign party hire a competent local attorney, sit down with bank officials (or the potentially troubling party), and talk through the problem amicably.[284] Spoken like a true Confucianist, Shiyan suggests arbitration proceedings should be avoided if at all possible, and the problems should be addressed through relationships.[285]

---

practiced in Stockholm, Sweden during the last ten years. Johan Gernandt, *Round Table on Arbitration and Conciliation Concerning China* (paper prepared for presentation at the 17th ICCA Conf., May 17, 2004).

Furthermore, in 1997, the Solicitor-General of Hong Kong, Daniel Fung, announced the establishment of a model court in mainland China funded by the Hong Kong government, where judges and attorneys from Hong Kong would stage mock trials for observation by Chinese lawyers, judges and officials. *See* Interview by Kirsten Sylvester with Daniel Fung, Solicitor-General of Hong Kong, Washington, D.C. (1997), *available at* 1998 WL 10921709.

280. *See* Berkman, *supra* note 88, at 28.

281. *Id.*

282. *See* Kaplan, *supra* note 32, at 16. .Neil Kaplan has also proposed the development of specialized courts for arbitration awards: "There must be something to be said in favour of creating one body to deal with all arbitration issues coming into Chinese courts – these specialist institutions have the ability to establish consistency in their decisions."

283. *See* Interview with Zhao Shiyan, *supra* note 27.

284. *Id.*

285. *Id.*

E. Persevere

One American academic has "diagnosed" many foreigners with "forensic xenophobia," meaning they are unwilling to use the Chinese legal system.[286] He argues that foreigners should push through these "fears" and use the court system. By doing this, procedural obstacles and weaknesses in the legal code will be uncovered, continuing to alert the Chinese government of the need for further reforms. Also, the existence of several notorious cases, such as *Revpower*, will likely discourage local officials from utilizing protectionist methods.

VII. CONCLUSION

China's arbitration system is a fascinating case study in the recent development of a judicial system constrained by severe social and economic factors. Foreign investors desire a guaranteed return on their investment, yet social and political factors both encourage and thwart that certainty. Additional political pressure from other world powers may further shape China's legal system. For example, China's recent membership in the WTO requires it to establish an internationally-recognized independent legal system.

In order to further economic development, Chinese officials have slowly allowed increased independence of the Chinese judiciary. The judiciary, recognizing the importance of protecting foreign investors in China, has produced quite a few directives towards the lower courts and has attempted to provide education for lower-level judges. These steps, however, can only go so far. The political status quo does not permit the rapid expansion of judicial power, protecting the ultimate superiority of the Communist regime. The education and independence necessary for increased freedom of contract may also result in increased freedom of speech and religion. Scholars and practitioners alike eagerly await the effects of the recent foreign arbitration regulations, as well as further reforms that will be adopted in the Chinese arbitration system.

286. *See* Berkman, *supra* note 88, at 41.

MULTIDISCIPLINARY PRACTICE UNDER THE WORLD TRADE ORGANIZATION'S SERVICES REGIME

George C. Nnona*

ABSTRACT

This article isolates and addresses one of the key arguments made in support of lifting the ban on multidisciplinary practice (MDP) between lawyers and other professionals in the United States. This is the argument that U.S. obligations under the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) constrain the regulation of MDP in the United States. Such constraints have been stated to take the form of GATS restrictions on domestic rules that impede trade in legal services between the United States and other WTO members, the lawyers' rules of professional conduct that prohibit MDP being cited as examples of such domestic rules. This article challenges this view of the U.S. prohibition on MDP through an analysis of the structure of the GATS, the contours of U.S. treaty obligations under the GATS and the jurisprudence of the WTO Appellate Body and panels on the subject. It reaches the conclusion that GATS obligations leave the United States largely unfettered in its capacity to prohibit MDP.

I. INTRODUCTION

The age we currently characterize as the post-industrial, or the information-age, may well be ultimately characterized as the age of convergence. Not only are we witnesses to the great convergence of peoples and cultures inherent in globalization, we are also privy to rivulets of convergence in several discrete areas ranging from technical standards to corporate governance doctrine. The professions have not been immune to this phenomenon as moves have long been afoot in quest of professional combinations and convergence. In the medical field for instance, we see attempts to fuse hitherto discrete professions, as developments in technology have brought the question into the limelight among medical specialties such as surgery and radiology, not only with regard to their relationship *inter se*, but also with regard to their relationship to non-medical disciplines like computer science and robotics.[1]

---

* Associate Professor, Roger Williams University School of Law. The ideas explored in this article have benefited from discussions with Professors Ed Eberle, Detlev Vagts, William Alford and David Wilkins to all of whom I remain grateful. I am also indebted to participants at the Graduate Colloquia Series of the Harvard Law School where some of the ideas explored here were first presented. Any errors and omissions are mine alone.

While many physicians have expressed angst at the convergence of medical disciplines in circumstances in which the professional primacy of physicians would likely be undermined, their angst seems like a storm in the tea cup when juxtaposed with the anguish shown by lawyers at the prospect of convergence of the legal profession and other professions. Perhaps this difference is explained by the fact that physicians, unlike lawyers, have already been professionally humbled and undermined, at least since the 1990s, by the mighty Health Maintenance Organizations (HMOs).[2] The influence of HMOs and big pharmaceutical companies on modern medical practice is so much that

---

1. For instance, developments in Magnetic Resonance Imaging (MRI) now hold, clear prospects of dispensing with the traditional surgeon's scalpel in the bloodless execution of delicate surgery, using only high-energy precision beams in a non-invasive way. *See* Harbour Fraser Hodder, *Bloodless Revolution,* HARVARD MAGAZINE, Nov.-Dec. 2000, at 36-47. This has brought issues of turf war between different specialties and disciplines to the fore. *Id.* Such a technology threatens the surgeon with replacement by the specialty traditionally in charge of radioactive and related energy sources, i.e., the radiologist. *Id.* The radiologist is, in turn, threatened by other non-medical disciplines that are generally as knowledgeable in this and other relevant areas. *Id.* The latter includes robotics, which could actually be deployed to displace both surgeon and radiologist in the administration of high-energy precision beams, thus ultimately enthroning the robotics engineer, computer scientist and related fields at the head of precision surgery. *Id.* Aspects of this piece are instructive. On page 38, it quotes one of the major propagators of the new technology, Ferenc Jolesz, who speaks of "the inevitable restructuring of medicine and surgery that demolishes the traditional boundaries between specialties... [T]oday we have this sharp distinction between different specialties of surgeons and radiologists... But what we do here is multidisciplinary and interdisciplinary- we are working as a team. We're working not only with clinicians, but with computer scientists, physicists, engineers, and also multispecialty doctors." *Id.* Mirroring the MDP debate in relation to the legal profession, the article, at page 46 posits that, "one-stop cancer diagnosis and treatment at a radiologist's office would eliminate the need for operating rooms –or surgeons– which brings" up the question of threatened turf. *Id.* Ferenc Jolesz's ultimate response (on page 47) is most revealing: "My feeling is that in the operating room of the future the doctors will be different... Maybe there won't be radiologists and surgeons, but there will be a new type of specialty." *Id.*

2. *See* Lawrence Fox, Written Remarks of Lawrence Fox: You've Got the Soul of the Profession in Your Hand, Written Testimony before the ABA MDP Commission (February 4, 1999), *available at* http://www.abanet.org/cpr/fox1.html. Fox's words are instructive:

> First, look at our colleagues in the medical profession. A decade ago they relaxed the rules on physicians working for non-physicians. Suddenly a flood gate of pseudo-prosperity opened up and a tidal wave of cash spread across the land, offering the docs thousands, even millions for their practices. I remember myself looking longingly at my physician friends as they cashed out their patient lists. Why did I decide I hated the sight of blood, I thought.
>
> But where are the physicians today? Can you find a happy doc? Of course not and why would one expect to? Having sold out to Mammon they now find themselves acting as supplicants in endless phone calls with high school clerks who decide for the physicians which medicine to prescribe, which procedures to undertake and how soon their patients are thrown out of their hospital beds. If this is what happens to a vulnerable value -- professional independence -- when literally matters of life and death are on the line, can we expect a different result when the issue is the preservation of important, if less cosmic values like loyalty, confidentiality and client autonomy?

Id.

a significant number of physicians are finding disillusionment in their profession.[3] Beyond the HMOs, the increasingly capital-intensive nature of medicine, especially cutting-edge medical practice, has made inevitable the incursion of high finance into medical practice which has accordingly become subjected to the imperatives of the market, just like engineering before it.

The legal profession in the United States has had to confront its anxieties over professional convergence, in the context of the recent debate regarding the propriety of permitting multidisciplinary practice in the United States. The term "multidisciplinary practice" (MDP) may be defined as joint practice by lawyers and members of other professions, where their professional activities in pursuit of that joint practice involve the offer of legal services to the public. Depending on its context, the term may also mean the professional grouping or entity under which, or through which, such joint practice is undertaken, such as a multidisciplinary partnership.[4]

MDP is prohibited in the United States by Rule 5.4 of the American Bar Association (ABA) Model Rules of Professional Conduct and its ancillary provisions.[5] This rule has been adopted with modifications by various states, regulatory power over the professions primarily residing in states rather than the federal government.[6] The rule prohibits lawyers from sharing fees with non-lawyers, forming law partnerships with non-lawyers, and practicing law in a professional corporation owned or controlled by a non-lawyer. Although some states, such as New York, still use the predecessor of the Model Rules, the Model Code of Professional Responsibility, which was adopted by the ABA in 1969, the contents of the relevant provisions are, for the purposes of MDP,

---

3. Lawrence Fox, a major opponent of MDP between lawyers and other professions, considered this a major factor in his opposition to MDPs, given the potential for other professions, both established and pip-squeak, to control lawyers' discretion in such a setting. *See* Fox, *supra* note 2. *See also* Lawrence Fox, Written Comments of Lawrence J. Fox, Written Testimony before the ABA MDP Commission (July 8, 1999), *available at* http://www.abanet.org/cpr/fox4.html.

4. The term would be used in this article in these two senses only, even though generally, it can also encompass joint practice by persons belonging to any two or more professions, none of whom is a lawyer, as for instance the sort of medical practice referenced in note 1.

5. MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983). The basic prohibition in Rule 5.4 is reinforced by several other provisions that ensure lawyer independence and fidelity to client interests. These include Rule 1.6 on Confidentiality of Client Information; Rules 1.7, 1.8 and 1.9 on Conflicts of Interest; Rule 1.10 on Imputed Disqualification; and Rule 5.7 on Responsibilities Regarding Law-Related Services.

6. The District of Columbia is the only jurisdiction in the United States whose version of Rule 5.4 permits fee-sharing and partnership between lawyers and non-lawyers subject to certain restrictions. *See* DC MODEL RULES OF PROFESSIONAL CONDUCT R. 5.4 (b) (1991). MDP is thus technically permitted in the District of Columbia, though in practice this has not given any fillip to the formation of MDP in the United States primarily because of restrictions in other states that constrain the establishment of branch offices by law firms with non-lawyer partners. On some of ramifications of the DC Rules see George C. Nnona, *Multidisciplinary Practice in The International Context: Realigning the Perspective on the European Union's Regulatory Regime,* 37 CORNELL INTERNATIONAL LAW JOURNAL, 115, 145-146 (2004).

practically the same.[7] MDP must be distinguished from a situation involving an individual with dual professional qualifications who is accordingly licensed to practice law as well as one or more other professions.[8]

Proponents and opponents of MDP, including the "Big 5" global accounting firms,[9] have attempted to buttress their positions through arguments that draw on various sources of legitimacy. Central to both sides, for instance, has been an appeal to consumer interests and their protection. Each side has argued that its regulatory recipe is the optimal one for consumers of legal services.[10] Peculiar to MDP proponents, however, is the argument canvassing the de-proscription of MDP by reference to regulatory constraints imposed by the international trading system. By casting the opposition in trade-restrictive terms, this argument broadly seeks to tap into the legitimacy enjoyed by the liberal trade regime in regulatory circles. More specifically, this argument presents the ban on MDP as contrary to the disciplines emanating from the world trading system, –ostensibly the disciplines imposed by the WTO via the General Agreement of Trade in Services (GATS).[11]

While the value of convergence in many aspects of modern life can hardly be gainsaid, the case for MDP as an instance of that convergence within

---

7. *See* particularly MODEL RULES OF PROF'L CONDUCT R. 5.4(a), R. 5.4(b) and R. 5.4(d) (1983). These rules correspond respectively to MODEL CODE OF PROF'L RESP DR 3-102(A), DR 3-103(A) and DR 5-107(C) (1969).

8. Model Rule 5.7, dealing with a lawyer's responsibilities regarding law-related (ancillary) services, substantially governs such a professional; this rule is distinct from MDP, which primarily implicates Model Rule 5.4. *See* MODEL RULES OF PROF'L CONDUCT, R. 5.4, R. 5.7 (1983).

9. The term "Big 5," or "Big Five," has traditionally been used to refer to the five largest accounting firms: Arthur Andersen, Deloitte & Touche, Ernst & Young, KPMG and PricewaterhouseCoopers. The functional demise of Arthur Andersen LLP since 2002, in the wake of the Enron Corporation accounting scandals, has meant a reduction in this class of firms, now referred to as the "Big 4." This notwithstanding, the term "Big 5" will be used throughout this Article to refer collectively to the major global accounting firms, in order to maintain terminological continuity and consistency between this class of firms and the existing literature on them, which largely identifies them as the Big 5 rather than the Big 4, the latter term not having as having as yet become pervasive.

10. *See* Peter C. Kostant, *Paradigm Regained: How Competition From Accounting Firms May Help Corporate Attorneys to Recapture the Ethical High Ground*, 20 PACE L. REV. 43, 51 (1999); James C. Moore, *Lawyers and Accountants: Is the Delivery of Legal Services Through the Multidisciplinary Practice in the Best Interest of Clients and the Public?* 20 PACE L. REV. 33, 35 (1999); New York Bar Association, *Report of The Special Committee on Multi-Disciplinary Practice and The Legal Profession*, sec. III, para. 5 (January 8, 1999); Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1158 (2000). *But see* the statement of Professor Neil W. Hamilton to the Minnesota State Bar Association, quoted in Lowell J. Noteboom, *Professions In Convergence: Taking The Next Step*, 84 MINN. L. REV. 1359, 1376 n.90 (2000): "I urge you to make the decision regarding MDP not on the basis of what 'customers' want. Make it on the basis of how we can preserve one [of] the great learned professions that is committed (albeit imperfectly) to serving justice." *Id.*

11. *See* references *infra* note 12.

the broader system of professions is less than persuasive, to the extent that it rests on the imperatives of the WTO regime for trade in services. Indeed, whatever may otherwise be the merit of the position that MDP be legalized in the United States, the argument seeking to support that position by reference to the WTO regime for services is flawed. The aim of this article is to show the shortcomings of that argument by exploring the WTO regime for services especially as it applies to the United States and its prohibition of MDP.

This article therefore challenges the premise that United States obligations under the WTO regime for trade in services, including the jurisprudence of the WTO dispute settlement system, constrain it in its regulatory choices regarding MDP. In relation to this premise, arguments by MDP proponents typically assert or suggest that the rules of professional conduct prohibiting MDP (principally Rule 5.4 of the Model Rules) constitute barriers to trade in legal services between the United States and other countries, and thus contravene arrangements under the WTO agreements that are primarily aimed at trade liberalization between the United States and other nations.[12] Interestingly, the exact manner in which the rules of professional conduct contravene the WTO services regime and the manner in which such contravention constrains regulators within the United States in their regulatory choice regarding MDP are hardly ever articulated in any detail by MDP

---

12. *See* for instance Ward Bower, *Multidisciplinary Practices - The Future,* GLOBAL LAW IN PRACTICE 155, 162 (J. Ross Harper ed., 1997).

> The worldwide proliferation of MDP activity (*de facto and de jure*) is further confused by the apparent legal authority of the World Trade Organization (WTO) in Geneva to exert regulatory control over 'professional services' (including lawyers) as a result of the adoption of the Uruguay Round of the GATS (General Agreement on Trade in Services) in 1993. Even the most casual WTO observer recognizes an apparent bias against regulation, for *laissez-faire, caveat emptor* and free trade in everything emanating from the rule-making and dispute-resolution activities of that body. Protectionist regulation is anathema to the WTO and even regulation in the public interest is subject to severe scrutiny.

Id. This general declaration on the deregulatory impact on MDPs of the WTO system is not anchored on any specific provision of a covered agreement or pronouncement of a WTO body, but rather on vague notions of WTO as a harbinger of a *laissez-faire* trade environment for services. *See also* John H. Matheson & Edward S. Adams, *Not "If" but "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1300-01 (2000). Here, the authors state cursorily that "the GATT treaty, which governs most international trade matters claims jurisdiction over these professions through the World Trade Organization–an organization historically biased against self-interested regulation." *Id.* That the writers speak of the GATT when they apparently intend to refer to the GATS is perhaps further indication of the perfunctory character of these and similar assertions. For other suggestive remarks and allusions to the WTO/GATS disciplines, *see American Bar Association Commission on Multidisciplinary Practice, Reporter's Notes* (1999), *available at* http://www.abanet.org/cpr/mdpappendixc.html (last visited Nov. 13, 2005) especially in Section I(A), and the related notes 8-17; Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV., 1547, 1550 (2000); CHRISTOPHER ARUP, THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY, 168-69 (2000).

proponents. The assertions are often near-perfunctory in nature.[13] The perfunctory nature of these assertions and suggestions necessitates, by itself, a closer examination of the WTO regime for trade in legal services to ascertain its regulatory contours. Beyond that, however, such an examination is also apposite because the WTO is the largest multilateral trade arrangement in the world, whose regime potentially has tangential, if not direct, impact on other smaller regimes, especially by means of the operation of its now-famous dispute settlement system and the resultant jurisprudence. This article essentially argues that nothing in the WTO services regime requires the de-proscription of MDP, and the regime, as such, does not meaningfully constrain the regulatory authorities of the United States legal profession in their response to the MDP question.

Part I of this Article introduces the WTO's General Agreement on Trade in Services (GATS), the basic instrument covering trade in services. Part II explores the United States (U.S.) schedule of specific commitments under the GATS in order to shed light on the extent and limit of U.S. obligations. Part III analyzes the General Exceptions under the GATS, consistent with the existing jurisprudence of the WTO Appellate Body on the subject, the aim to show that these general exceptions can sustain derogation from the trade disciplines that are potentially applicable to the MDP issue. Part IV examines the GATS provisions on non-nullification violation for their potential to act as disciplines on the regulation of MDP, as well as their relationship to the General Exceptions. Part V embodies concluding remarks.

II. GENERAL AGREEMENT ON TRADE IN SERVICES

The basic WTO instrument regulating trade in services is the General Agreement on Trade in Services (GATS), introduced as Annex 1B to the Agreement Establishing the WTO of April 15, 1994. It establishes the basic structure for regulating trade in services by adopting a framework similar to that for trade in goods under the General Agreement on Tariff and Trade (GATT). Articles XVII and II respectively establish broad National Treatment and Most-Favored-Nation (MFN) obligations, subject to rather substantial rights of derogation under each country's Schedule of Specific Commitments and List of MFN Exemptions, respectively drawn up in line with further stipulations in Article XX of the GATS and the GATS Annex on Article II (MFN) Exemptions. Article XVI establishes a market access obligation somewhat akin to the provision on quantitative restrictions in Article XI of the GATT, which obligation is also subject to derogations under the Schedule of Specific Commitments. Despite these basic disciplines, the GATS is very much an inchoate agreement. In several respects, it is no more than an agreement to

13. *See* references *supra* note 12.

enter into further negotiations with reference to specific issues treated therein,[14] and more generally with reference to progressive liberalization under Article XIX thereof. This makes it, in several respects, a difficult agreement to enforce, since several of the provisions effectively end up as expressions of intent to liberalize despite their not being worded as such. Beyond this, however, the negotiating technique adopted in drawing up the GATS further weakens it as a means of effectively constraining states' behavior in the services sector.[15] Unlike the GATT, which involves a negative list approach under which any item or sector not included in a schedule is deemed to be automatically covered by the agreement, the GATS involves a positive list approach, under which only those items specifically scheduled by a contracting party are covered. The latter approach is inherently more restrictive, since only those commitments and sectors which the parties have expressly considered are covered. This approach excludes, for instance, newly-emerged services that no one contemplated at the time of the negotiations.[16]

It is not surprising, therefore, that the GATS is viewed in many quarters as merely enthroning a standstill commitment - an obligation on the part of WTO members not to introduce more restrictive rules on the flow of services, thus preserving the degree of access provided under current domestic regulations.[17] Even this assessment may be unduly sanguine given that a meaningful standstill depends on the level of commitments undertaken in each member's Schedule of Specific Commitments, as modulated by the MFN exemptions. Following the scheme of Article XX, commitments in different service sectors on both market access (under Article XVI) and national treatment (under Article XVII) are inscribed in the schedule with such limitations and derogations as the inscribing contracting party deems necessary. These specific commitments effectively form the crux of the obligations currently undertaken by contracting parties under the GATS, since they determine the incidence of the wider, more general disciplines under the agreement. A GATS signatory is hardly constrained by the agreement if it has taken the broadest possible exemptions as to MFN and inscribed wide limitations on national treatment and market access in its schedule. This is true in spite of the existence of a few sectoral arrangements and disciplines in areas such as telecommunications, financial services and accountancy; which arrangements and disciplines are ostensibly aimed at achieving greater liberalization in these specific sectors by defining and facilitating the assumption of more robust commitments by the contracting parties in relation to

14. *See* Article VII(2) on recognition of qualifications, Article XV on subsidies, Article XVIII on additional commitments.

15. *See* Geza Feketekuty, *Assessing and Improving the Architecture of GATS, in* GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 85, 111 (Pierre Sauve & Robert M. Stern eds., 2000).

16. *See id.* at 87.

17. *See id.* at 97.

such sectors. Indeed, it has been stated in relation to the commitments that "the substance of the GATS depends to a very large extent on the specific commitments which WTO Members have actually offered. In the absence of substantive commitments, the GATS, although in principle embracing the entire services industry, remains more or less an empty shell."[18]

III. SPECIFIC COMMITMENTS

It is clear from the foregoing that to determine the extent to which the GATS constrains the United States or any other country in its regulation of the legal services market generally, and MDP in particular, an examination of the country's schedule of commitments is imperative. In the Uruguay Round, fifty-five members included legal services in their schedules of commitments.[19] The United States was one of them. A look at the U.S. schedule of commitments shows that it inscribed horizontal commitments and related limitations on market access and national treatment in relation to four areas: temporary entry and stay of natural persons, acquisition of land, taxation measures, and subsidies. None of these areas, however, are of exceptional importance to legal services, especially in the MDP context. With regard to sector-specific commitments, the U.S. split its commitments in the area of legal services into two broad categories: (1) practice as or through a qualified U.S. lawyer, which is clearly the more substantive and important category and therefore the focus of the discussions herein unless it is indicated otherwise, and (2) practice as a foreign legal consultant. Regarding the former category, the United States inscribed, for all states of the Union, market access limitations for all the four modes of services supply.[20] Notably, the United States restricted the supply of legal services through any of the modes to natural persons, thus precluding supply through artificial entities. Instructively, in relation to supply of legal services through commercial presence, the United States inscribed a market access limitation stipulating that partnership in law firms is limited to persons licensed as lawyers. The United States also inscribed a national treatment limitation in relation to the territory of some of the states: a requirement of in-state or U.S. residency for licensure in Hawaii, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New Hampshire, Oklahoma, Rhode Island, South Dakota, Vermont, Virginia and Wyoming. With regard to practice as a foreign legal consultant, the United States defined such consultancy to exclude court appearances, conveyances pertaining to real property located in the United States, preparation of trust or testamentary

18. *See* Robert F. Taylor & Philippe Metzger, *GATT and its Effect on the International Trade in Legal Services*, 10 N.Y. INT'L L. REV. 1, 23 (1997).

19. SYDNEY CONE, INTERNATIONAL TRADE IN LEGAL SERVICES, 2:20 (1996) (tbl. I gives a listing of these countries with an indication of the limitations in their respective schedules).

20. Under Article I(2) a-d of GATS, the modes include cross-border supply, consumption abroad, commercial presence, and presence of natural persons.

instruments pertaining to real estate located in the United States that is owned by a U.S. resident, and preparation of instruments pertaining to marital or parental relations/rights of a U.S. resident. For all states within its territory, the United States indicates the supply of foreign legal consultants' services through presence of natural persons to be unbound, this being the most pervasive and important mode of supply of such services in the United States.[21] For sixteen states[22] and the District of Columbia, the United States inscribed additional commitments in relation to foreign legal consultants, permitting them to practice international law at the minimum and, depending on the state, practice third country law, associate with local lawyers, and use the home-country firm name. For the more liberal states, including Alaska, Hawaii, New Jersey, New York, Ohio, Oregon and the District of Columbia, the additional commitments permit a foreign legal consultant to practice host-country (U.S.) law, provided the practitioner involves a local lawyer in one form or another. The MFN exemption list of the United States stipulates exemptions of indefinite duration in relation to movement of persons, banking and other services (excluding insurance), and transport services. The list also includes MFN exemptions for all sectors in relation to taxation measures and land use.[23]

By far the most important of the U.S. commitments in the context of MDP are those on market access. This is because MDP is fundamentally about the form of association or organization permissible within a jurisdiction for purposes of legal practice, an issue directly touched upon by Article XVI(2)(e) of the GATS on market access. This provision prevents a WTO member from adopting or maintaining, in sectors where market access commitments are undertaken, "measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service."[24] This obligation applies to measures adopted or maintained by the government of the member, as well as governments of regions, states or other sub-divisions of the member. MDP is not primarily an issue hinged on discriminatory treatment between U.S. providers of legal services and providers from other countries, nor is it about discrimination between service providers of third countries *inter*

21. A market access limitation is inscribed for thirty-five states, indicating that supply of the foreign legal consultant's services through commercial presence is also unbound.

22. Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Michigan, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Texas and Washington.

23. There is some difficulty in understanding the sense in which some of the scheduled items qualify as sectors or sub-sectors for scheduling purposes, both by their very nature and also by virtue of the Services Sector Classification List, GATT Secretariat, *Services Sector Classification List*, MTN.GNS/W/120 (March 10, 1991), which was published by the GATT Secretariat for use by contracting parties in scheduling commitments. While banking and transport services clearly qualify as sectors or sub-sectors under the classification list, movement of persons, taxation measures, and even land use hardly qualify as sectors for classification purposes. This sort of situation contributes to the difficulty of assessing the GATS schedules, a difficulty noted even by those well-acquainted with trade issues. *See* HAMISH ADAMSON, FREE MOVEMENT OF LAWYERS, 182 (1998).

24. GATS Art. XVI(2)(e).

se, these being fundamental forms of discrimination at which the national treatment and MFN obligations are respectively aimed. As such, in the absence of an express provision such as that in Article XVI(2)(e) of the GATS, one would be hard-pressed to find a directly applicable GATS provision potentially impinged upon by the MDP prohibition, in the context of the overall GATS scheme. The foregoing aside, the market access obligations are conceptually antecedent to the MFN and national treatment obligations, the latter two being considerably hinged on the market access obligations undertaken. Market access obligations embody substantive undertakings to open up a country's services industry to outside competition in readily quantifiable or determinable ways. MFN and national treatment on the other hand embody essentially procedural obligations to avoid discrimination between service providers of different countries in the administration of the sectors to which market access has been granted. That the scheduling scheme of GATS obligations did not conform to this distinction, often listing in the national treatment column the same limitations as are listed in the market access column, does not detract from the validity of this distinction. This is even more so considering that as important as the inscribed market access limitations are, they are but detractions from (i.e. limitations on) broad, substantive market access obligations automatically undertaken pursuant to Article XVI of the GATS upon the addition of a service sector to a country's schedule of commitments. They are not the commitments themselves; rather they are limitations thereto. Thus, national treatment and MFN, fundamental as they are to questions of international trade regulation generally, have a relatively circumscribed importance to the MDP question.

It is of course arguable that formally identical measures applied uniformly to domestic and foreign service suppliers can sometimes result in less favorable treatment of foreign suppliers, thus leading to *de facto* discrimination contrary to the national treatment obligations of the GATS. In the present context, this would mean in effect that the prohibition of MDP within the United States, though applied uniformly to foreign as well as domestic suppliers of legal services has a disproportionately unfavorable impact on the former. This could be a valid argument in the context of WTO/GATT jurisprudence, and would give national treatment primacy in and of itself as an obligation potentially precluding the prohibition of MDP. However, it would be a less direct and hence weaker argument, very dependent on the hermeneutic inclinations of WTO judicial bodies, when juxtaposed to the more express and direct provisions of Article XVI(2)(e) of the GATS on requirements of organizational and association forms as market access constraints. Furthermore, the success of such an argument would be dependent on side-issues, the judicial resolution of which has never been easy. Notably, a key component in arriving at a conclusion that the national treatment obligation has been breached in the context of Article XVII of the GATS would be a prior determination that the domestic supplier in question and the foreign supplier both supply "like services" and also that they both can be categorized as "like service suppliers."

Ignoring the possible ramifications of determining who qualifies as "like service suppliers" and focusing on the concept of "like services," the issue arises whether legal services provided by domestic U.S. lawyers practicing independently of other professionals in the context of stricter ethical rules and constraints of the legal profession are alike to legal services offered by professionals (be they U.S. or foreign) working collaboratively in the MDP context under manifestly different ethical rules and cultures. This readily implicates distinctions and arguments akin to those made in relation to the vexed issue of production-and-process-method (PPM) in relation to trade in goods: Is the method of production of a service or range of services to be considered a characteristic of such a service or range of services? Whatever the answer to the foregoing question, how do we distinguish between production methods for services and intrinsic constituents of such services, given the intangible nature and general characteristics of services? More specifically, should the attorney-client privilege (and the benefits flowing therefrom) be classified for instance, as intrinsic elements of lawyer-provided services or as a PPM? Are the broad ethical and professional contexts to be considered aspects of the production method, or should the definition of production method be more narrowly drawn and restricted to, for instance, the requirements for the completion of a particular piece of transactional legal work at the government agency having regulatory control of such transactions. The problems of PPM seem even more daunting in this context, given the peculiarities of services.[25]

Unlike an argument founded on breach of national treatment obligations, a claim founded on breach of market access obligations stands on seemingly firmer footing. The provisions of Article XVI(2)(e) apply to preclude the United States, in the context of the market access obligations it undertook in its schedule of specific commitments, from introducing or maintaining measures which "restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service."[26] A requirement that precludes legal services from being rendered through an MDP ordinarily qualifies as such a restriction. Even if MDP as a vehicle for offering legal services does not qualify as a specific type of legal entity *sui generis*, it very much qualifies as a form of joint venture under the express language of Article XVI(2)(e).

---

25. An indication of the intricacies of the PPM issue in the GATT context is given in MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE, 412-19 (1999) (particularly on page 413). The WTO Appellate Body in the Japanese Alcohol case has instructively noted, while construing Article III(2) of the GATT on National Treatment, that the concept of like products should "be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn." Appellate Body Report, *Japan –Taxes on Alcoholic Beverages*, WT/DS 8/R, WT/DS 10/R, WT/DS 11/R, AB-1996-02 at 19-20 (Oct. 4, 1996) (quoted in TREBILCOCK & HOWSE, *supra*, at 413). While this is clearly not dispositive, it does denote the precariousness of an argument dependent on the MDP prohibition qualifying as a national treatment violation under GATS.

26. GATS, Art. XVI(2)(e).

The clarity and apparent strength of the market access obligations notwithstanding, chinks exist in its armor. Such chinks are worthy of consideration as a possible first line of defense for the United States against claims that the state rules prohibiting MDP constitute measures which violate U.S. market access obligations. One such chink is the limitation that services must be supplied by a natural person with respect to all four modes of supply of services, as expressly inscribed in the U.S. schedule of specific commitments relating to practice as or through a qualified U.S. lawyer. An immediate issue that arises in connection with this limitation is whether it does not contemplate and exempt from the market access commitments, the U.S. rules prohibiting MDP, at least in a situation where a foreign MDP seeking to supply legal services in the United States is a juridical entity and not just a grouping (say, a partnership) of natural persons. (An MDP need not necessarily be constituted as a juridical entity, but could be a partnership of individuals or a joint venture of such partnerships.).

In the above scenario, with juridical personality present, the MDP would be distinct from the constituent individuals and thus would not qualify as a natural person supplying legal services for purposes of the requirement in the U.S. schedule that such legal services be supplied by natural persons. While such an argument may be sustainable in specific contexts with regard to MDPs that are structured as juridical entities, it clearly does not provide general, over-arching support for the U.S. prohibition on MDP. However, such support as it provides becomes considerably enhanced, when taken together with an oft-ignored provision inscribed as part of the U.S. limitations on practice as or through a U.S. lawyer through the third mode of supply of services, i.e. supply through commercial presence.[27] Here, the United States inscribed an additional limitation that "partnership in law firms is limited to persons licensed as lawyers."[28] This provision invites a conclusion that the United States can validly maintain a prohibition on MDPs, as partnerships that include persons who are not lawyers. The cumulative effect of these provisions would be that MDP, whether in the form of juridical entities or natural persons/partnerships, can be validly prohibited by the United States, relying on the limitations as to market access in its GATS schedule. The scope of these provisions would, however, obviously not cover the prohibition of MDP in relation to foreign MDPs structured as partnerships seeking to supply legal services into the United States through a mode of supply other than commercial presence.[29]

---

27. This is by far the most important mode of supply for international trade in legal services, not just because it gives the foreign-country entity involved a "permanent" establishment – and hence a foothold – in the host country, but also because it is the mode of supply which the host country has the greatest interest in regulating, given the higher level of intrusiveness involved. Thus, both the foreign country and the host country have a heightened interest in the regulation of this mode of supply.

28. The US Schedule of Sector- Specific Commitments paragraph 1(A) (a).

29. While countries have traditionally sought to control the consumption of foreign services supplied through such modes, their claim to jurisdiction and control over cross-border

Besides, a question can be raised as to whether the term "law firms" in the market access limitation under discussion encompasses MDP firms. In essence, is the term to be construed strictly in line with its traditional usage so as to encompass only firms of lawyers offering legal services, or construed broadly to include any firm that offers legal services to the public, even if the firm is, for instance, one made up exclusively of investment bankers[30] or an MDP comprising investment bankers and lawyers.? Unless it can be construed in the latter, broader fashion –which is clearly not certain– the market access limitation in question may not go as far as completely excusing the U.S. prohibition of MDP in relation to supply of legal services through commercial presence. This is because, if it is construed in the strict traditional sense, the limitation that partners in law firms be only licensed as lawyers would be inapplicable to MDPs, which would then not qualify as law firms for purposes of the limitation.

A closer examination would indicate, however, that the term "law firms" covers MDPs rather than merely traditional law firms. This flows from the requirement that the term be given an interpretation which does not render the provision, i.e. the limitation, absurd or largely inutile.[31] An interpretation that limits the term "law firms" to traditional law firms would have this effect. It would be absurd to adopt an interpretation preventing non-lawyers from acting as partners in a firm that renders legal services if that firm is characterized as a law firm, while permitting them to act as such partners merely by virtue of the firm's characterization as an MDP or some other sort of entity. The difference between a law firm in which lawyers are engaged in practice with non-lawyer partners (something expressly prohibited by the market access limitation in question) and an MDP involving lawyers in joint practice with non-lawyer partners is one of form, not substance. Indeed, the difference is less than one of form; a difference borne of mere semantics.[32] Because there is no substantive

---

supply and consumption abroad has in the information age not been, from both logistical and legal bases, as strong or important as the claim for jurisdiction and control over supply through commercial presence and presence of natural persons. Unlike jurisdiction over the supply of services through commercial presence and presence of natural persons, questions of the extraterritoriality of jurisdiction, for instance, weaken the claim of states to jurisdiction over the other modes. Similarly, the immense logistical difficulties implicated in reaching foreign service providers and in controlling emigration logistically constrain control over these modes of supply. Hence, supply through commercial presence is not only the most important mode of supply of services into a jurisdiction in terms of legitimate state interests implicated, but also the most amenable to state regulation.

30. In some countries it is permissible for non-lawyers to render legal advisory services to clients, provided they do not designate themselves as lawyers or hold themselves out as being lawyers; the United Kingdom provides an example of this scenario. *See* ADAMSON, *supra* note 23.

31. *See Shrimp/Turtle* case, *infra* note 47, at para. 121.

32. It may be argued in this regard that a substantial difference exists between the two situations because in one – the situation in which non-lawyers are permitted to be partners with lawyers in an MDP – what is involved is not just the offer of legal services to the public, but rather the offer of a composite or blend of services of which legal services form but one element. Such composite services justify a rule permitting the partnership of lawyers with non-lawyers.

difference between these two scenarios, it would be absurd to have an interpretation that excludes one but not the other. Besides, such interpretation reduces the efficacy of the limitation and renders it largely without force, since all that is needed to evade it is for one to claim that the firm involved is an MDP rather than a law firm.

Beyond the foregoing, a robust interpretation, one that gives effect to the spirit and context of the provision, would be broad enough to capture all firms that offer legal services to the public in whatever form since the offer of such services is the essence of a law firm. Such interpretation would be in line with the injunction in Article 31(1) of the Vienna Convention on the Law of Treaties[33] which requires that a treaty provision be interpreted in accordance with the ordinary meaning to be given to its terms in their context and "in the light of its object and purpose." The object and purpose of the limitation on market access under consideration is to ensure that foreigners who supply legal services via commercial presence in the United States do so on the same terms and under the same restrictions as U.S. suppliers of such services, i.e. U.S. lawyers; one of those restrictions being notably that in Model Rule 5.4 prohibiting U.S. lawyers from sharing profits or forming partnerships with non-lawyers. The broader context of this market access limitation is the insistence of the U.S. judicial system on lawyer independence, of which Rule 5.4 is but one expression. Taken together, the purpose and context of this U.S. market access limitation dictate the inclusion of all firms that render legal services within the ambit of the phrase "law firms", the result being that any firm, such as an MDP, the structure of which renders it incapable of meeting the terms of the limitation, cannot offer legal services via commercial presence in the United States.

IV. GENERAL EXCEPTION

The general exceptions in Article XIV of the GATS constitute perhaps the most resilient defence against claims that the rules prohibiting MDP violate U.S. obligations. Article XIV of the GATS provides, in pertinent part, as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or

---

A response to that argument would be that the fact of joint practice by lawyers and non-lawyers does not by itself assure us of a composite or blend of services. The essence of partnership is the sharing of profits and the concomitant mutual influence of partners on one another. Composite services would not necessarily be the result of a partnership arrangement between lawyers and non-lawyers. The lawyers may well continue to render their services from a discrete branch or department within the same firm while the non-lawyers continue to work separately in their own branch or department. They may actually share few, if any, joint clients thus further attenuating the possibility of delivering blended services, which is truly present only when they serve the same clients on the same matter contemporaneously.

33. *See infra* note 35.

> unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals or to maintain public order;[34]

Article XIV, borrowed from Article XX of the GATT, embodies the general exceptions under the GATS, the excerpted portion mirroring the chapeau and paragraph (a) of Article XX of the GATT. The notable difference between paragraph (a) of Article XX of the GATT and paragraph (a) of Article XIV of the GATS is the additional phrase "or to maintain public order" tagged on to the latter. This phrase is novel, not having been employed in any of the other provisions of the GATT or any other WTO agreement. Given its novelty, its interpretation should proceed through the use of general interpretative tools, giving ordinary meaning to the words of the treaty provision in their context and in the light of their object and purpose.[35] A note to this phrase (note 5) states that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."[36] While this note does not give the meaning of the new phrase, it does indicate that not just one but several "fundamental interests of society" can sustain the invocation of the "public order" exception, thus eliminating the possibility of a narrow construction of the exception that is limited to, for instance, situations where there is a breach (or threat of breach) of public law and order in the sense of civil strife or disorder. Indeed, the limited dimension of law and order in this narrow sense potentially excludes it from the ambit of the exception since it is arguable that threats to law and order in the narrow sense do not pose a serious threat to a fundamental societal interest. Adopting this expansive view of the term, it is clear that the fundamental interests that

---

34. GATS, Art. XIV(a).

35. Article 31(1) of the Vienna Convention on the Law of Treaties, 8 ILM 679 (1969), enunciates this rule of interpretation: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This general rule has now attained the status of a rule of customary or general international law. *See* OPPENHEIM'S INTERNATIONAL LAW 1271-75 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); International Court of Justice decision in *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, 33 I.L.M. 571, 581-82 (1994). The rule thus forms part of the "customary rules of interpretation of public international law," which the WTO Appellate Body has been directed by Article 3(2) of the Dispute Settlement Understanding to apply in seeking to clarify the provisions of the GATT and the other covered agreements of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"), dated April 15, 1994.

36. GATS, Art, XIV(a) n. 5.

can sustain an exception under this provision would be context-specific, varying from state to state depending on local peculiarities as to culture, politics, and the like. It then seems safe to assume that given the peculiarities of the United States as a nation under law,[37] a nation where the rule of law operating through the auspices of an independent and activist judiciary is supreme, the society has a fundamental interest in maintaining the institutional framework that supports the law's reign. Without doubt, the legal profession in the United States qualifies as a major component in the system of laws operated by the US, both on its own account and on account of its being fundamentally a creation and appendage of the judiciary. Any arrangement which threatens to erode the fundamental precepts upon which the profession is founded poses a genuine and serious threat to the fundamental interest of the U.S. society in the maintenance of the rule of law and, hence, the maintenance of public order. Social order in the United States flows directly from the law in a manner not replicated elsewhere. (In most other jurisdictions, subterranean codes and norms of behavior play a substantial role in social ordering, in a way not applicable to the United States given the different values that underpin the society.) Any measure designed to meet and contain the aforementioned threat would be justified under the terms of Article XIV(a) of the GATS as a measure necessary to maintain public order. The rules prohibiting MDP constitute such a measure, for they are aimed at maintaining the independence and other characteristics that are *sine qua non* for the legal profession's performance of its functions within the system of social ordering. The whole system of legal counseling, litigation and general representation, on which U.S. citizens and institutions rely as no other citizens elsewhere do, stands threatened by the dilution and erosion of lawyer values. Yet such erosion and dilution is intrinsic to the proper functioning of the very best MDPs.[38]

---

37. Mary Ann Glendon has indicated the pernicious dimensions of an overly law-minded society. But this criticism, while sound, does not vitiate the central place of law and the lawyers that are its high priests in the U.S. society. *See generally* MARY ANN GLENDON, A NATION UNDER LAWYERS (1994).

38. This is evident from the facts and circumstances surrounding the celebrated decision of the English House of Lords in *Prince Jefri Bolkiah (Appellant) v. KPMG (a Firm)* [1999] 2 A.C. 222 (U.K). The House of Lords in this case ruled that it was impermissible for KPMG, an international firm of accountants, to offer forensic accounting services to the Brunei Investment Agency (BIA) in litigation between BIA and Prince Jefri. This was because KPMG had previously offered similar forensic services to Prince Jefri for purposes of previous litigation between him and third parties, in the course of rendering which services KPMG had come into possession of confidential information pertaining to Prince Jefri's personal affairs. Just as an English solicitor (attorney) is precluded by the applicable rules of professional conduct from representing interests adverse to a former client's, where such representation poses a threat to the confidentiality of information entrusted to him by the former client, so also is an accountant precluded from doing so when he renders forensic accounting services –as he is permitted to render under applicable English professional rules– such forensic accounting services being analogous to services rendered by an attorney. To arrive at this decision, the English House of Lords had to discount KPMG's argument that its internal procedures, especially its use of Chinese walls (ethical screens) were such as to ensure the preservation of Prince Jefri's

Commenting on the peculiar character of the U.S. judiciary, Abram Chayes writes:

> The judicial department established by the framers was unique among nations in 1787 and, to a large extent, remains unique today. All modern societies have judges, and an independent judiciary is a hallmark of liberal democracy. In other countries, however, the judicial system is regarded primarily as a service provided by the government, much like education...with the workaday function of resolving the disputes that arise in the ordinary course of social and economic life. The courts in such societies are, of course, essential organs. Unlike the judicial branch brought to life by article III, [of the Constitution] however, they are not thought to be, nor are they in fact, engaged in the political process.[39]

This statement, by underscoring the place of the U.S. judiciary as an integral component of government at par with any other organ participating in the

---

confidential information, even while the firm served BIA in a litigation in which BIA's interests were diametrically opposed to Prince Jefri's. In so doing, the court showed an uncommon appreciation of the workaday realities of MDPs, especially of the Big 5 type. The lead Judgment of Lord Millet showed a keen awareness of the perpetual ebb and flow of personnel in a Big 5 firm, with employees constantly combining and recombining in an endless possibility of arrangements. *Id.* at 238-39. Such flexibility of staff usage plays a key role in the overall strategy of the Big 5 MDP. By being able to deploy staff flexibly, the Big 5 are able to attain efficiency levels which they otherwise might not have attained. Employee slack time or down time is reduced since, with constant rearrangements, it is possible to fit employees into the nooks where they are most needed, or at least where they can be gainfully occupied at any particular time. The centrality of such an approach to these organizations' overall strategy is such that it is bound to trump any other consideration, including questions of lawyers' confidentiality, in the day-to-day business of the organization, as the very facts of Prince Jefri's case demonstrate. Any observer who has paid attention to the workaday activities of Big 5 employees would confirm that in the hustle and bustle of their average work day, the confidentiality concerns and related questions that engage the attention of sedate lawyers are, as a matter of necessity, relegated to the background if not jettisoned.

Also instructive along these lines are the circumstances surrounding the violation by one of the Big 5, PricewaterhouseCoopers, in 1999, of auditor independence rules that prevent an auditor from investing in the securities of an audit client. *See* Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs,* 84 MINN. L. REV., 1097, 1100-01 (2000). When more than half of the firm's partners were found to be in violation of this rule, the Securities and Exchange Commission (SEC) declared that it had discovered widespread non-compliance reflecting serious structural and cultural problems in the firm. *Id.* Instructively, the response from some supporters of the firm was, among other things, a criticism of the very rules breached because the rules had not kept up "with the firm's evolving push into every market niche under the sun." *Id.*

39. *See* Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026, 1028 (1988).

political process, further reinforces the position of the legal profession, not as a discrete institution essential to the administration of law and maintenance of order in a relatively narrow sense, but as an element in the broader political superstructure of which the judiciary constitutes a central player, a political superstructure without which social order in the broadest sense would be lacking. Any situation or arrangement that threatens to impair the capacity of the legal profession to perform its functions in this context poses a threat to the fundamental interest of society in the maintenance of a viable, respectable political system, and any measure taken to meet that threat qualifies as a measure necessary for the maintenance of public order under Article XIV(a) of the GATS.

Related to the foregoing, but distinct from it, is the extent to which lawyers and their activities are woven into the general fabric of U.S. society. This intertwining is as extensive as it is *sui generis*. Not only are lawyers engaged in activities cardinal to political and social order in a direct sense, their activities are additionally relevant in an indirect way to social order through the pervasive influence on a society of lawyers and their ways. America is perhaps the only modern state where lawyers and judges are folk heroes by virtue of no more than their forensic exploits. From Daniel Webster and Oliver Wendell Holmes to fictional characters in television sitcoms, the American lawyer evokes inspiration and exercises influence far beyond the ken of lawyers in other jurisdictions, a point noted quite early by Alexis de Tocqueville.[40]

---

40. The penetration of law and lawyers into the social fabric in U.S. society is captured by Alexis de Tocqueville in a famous passage:

> In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy. . . . The influence of legal habits extends beyond the precise limits I have pointed out. Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habit to all classes. The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate. The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time and accommodates itself without resistance to all the movements of the social body. But this party extends over the whole community and penetrates into all the classes which compose it; it acts upon the country imperceptibly, but finally fashions it to suit its own purposes.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA vol. 1, ch. XVI 270, 280 (1835) (Alfred A. Knopf trans., 1994). Lawyers as a group and the society at large in the United States mutually

Inherent in such influence is the power to shape and reshape society; a power so capable of misuse that it ought to be subjected to prophylactic restrictions through rules such as those that secure lawyer independence by prohibiting MDP.

While Article XIV(a) of the GATS is *sui generis*, to the extent that it provides a general exception for measures necessary to maintain public order, it nevertheless forms part of a provision, the general contours of which have been explored by GATT and WTO panels and the Appellate Body. The existing jurisprudence in this regard merits some examination.

One of the principles enunciated by GATT/WTO panels and tacitly endorsed by the Appellate Body in relation to the interpretation of the related provisions in Article XX of the GATT is that the language of "necessity" means that the state relying on an exception would have to show that it has exhausted all options less restrictive of trade before resorting to the measure sought to be justified under the Article XX GATT exceptions.[41] In the panel decision in *United States – Standards for Reformulated and Conventional Gasoline* ("*U.S. Gasoline case*"), the panel indicated that the United States could not justify, under Article XX(b) of the GATT, the environmental measure in issue therein since there were other "measures consistent or less inconsistent with the General Agreement that were reasonably available to the United States to further its policy objectives of protecting human, animal and plant life or health."[42] For such a measure to be justified under the terms of Article XX(b) of the GATT, the United States was required to show necessity, i.e. that the measure was "necessary" for the protection of human, animal or plant life. The language of necessity is similarly key in the GATS Article XIV(a) exception, since the measure sought to be justified thereunder has to be "*necessary*...to maintain public order."[43] This means that the United States has to show that the measure restricting MDP is the least restrictive option open to it in safeguarding the interests protected through that measure. This test is a factual one which takes into consideration the context and circumstances of the

---

shape and interpenetrate each other in a pattern that is as true (if not more so) today as it was in De Tocqueville's time.

41. See the following *GATT/WTO Panel decisions: Canada – Measures Affecting Exports of Unprocessed Herring And Salmon*, March 22, 1998, GATT B.I.S.D. (35th Supp.) at 12 (1988); Thailand –Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 21, para. 75 (1990); GATT Dispute Settlement Panel Report on United States *Restrictions on Imports of Tuna*, Aug. 16, 1991, 30 I.L.M., 1594, 1620 (1991) (unadopted) [hereinafter *Tuna/Dolphin I*]; *United States –Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996) [hereinafter *U.S. Gasoline* case]. *See also* the WTO Appellate Body decision on appeal in the U.S. Gasoline case, WT/DS2/AB/R (April 29, 1996).

42. *See* Panel decision in the *U.S. Gasoline* case, *supra* note 41, at para. 6.25. This part of the Panel's ruling was not appealed by the United States, whose appeal focused instead on paragraph (g) of Article XX and the "relating to" language therein. Indeed, the Appellate Body noted the Panel's enunciation of the principle in passing with no indication of disapproval. See also the Appellate Body decision in *U.S. Gasoline* case, *supra* note 41, at parts II(A) and part III.

43. GATS, Art. XIV(a).

measure in question. In the *U.S. Gasoline case,* the panel rejected the U.S. measure in question because there were other definite, substantive approaches through which the United States could have achieved its aim of reducing gasoline-related emission without adopting a different, discriminatory, and more onerous standard for assessing the emission capacity of foreign-supplied gasoline. The United States, reasoned the panel, could for instance have employed existing systems for tracking the origin of goods in international trade in determining the source of each supply of gasoline, in order to tie that supply to a specific baseline reflecting the production history of the facility from which the supply originated.[44] The panel also reasoned that the United States could simply have used for domestic suppliers, the same general baseline it applied to foreign suppliers, thus obviating the need to set specific baselines for foreign suppliers while achieving the desired level of emission across the board.

Considering the MDP prohibition in the light of this ruling, it is clear that the panel's second instance of a less-restrictive measure is inapplicable, since the prohibition of MDP, unlike the gasoline emission measure, is a facially-neutral non-discriminatory measure, applied alike to domestic and foreign suppliers of legal services.[45] This element being absent, a search for other less-restrictive approaches to safeguarding the interest of the United States in maintaining social order through a bar that is independent of lay influence is inherently speculative, potentially inviting a revision of the basic issues and questions that structure the discourse on MDP: What are the ramifications of lawyer independence? Are some of the ramifications more fundamental to the maintenance of social order than others? Given its ramifications, what are the possible approaches to safeguarding lawyer independence? Would Chinese walls between the different professions in an MDP suffice in ensuring lawyer independence? Clearly, these are not questions with simple answers. Howbeit, the U.S. prohibition of MDP is in the circumstances strengthened by the basic

---

44. This was in response to the claim of the United States that it could not set individual baselines for different foreign suppliers as it had done for U.S. suppliers due to the difficulty, if not impossibility, of determining with confidence, the sources of the gasoline imported into the United States from different foreign suppliers.

45. That a facially-neutral measure such as this can also sustain a claim of de facto discrimination under the national treatment provisions does not detract from its sufficiency for purposes of determining whether the least-restrictive approach has been adopted under Article XX of the GATT or Article XIV of the GATS. The least-restrictive approach is intrinsically a less-exacting standard since the focus is not on the prevention of any objective, specific result – as is the case with national treatment where the focus is on the prevention of discrimination per se– but rather a comparison of different results or effects in order to determine whether some are less-trade-disruptive than others. Thus, a measure that has the effect of discriminating between domestic and foreign suppliers is per se in breach of the national treatment test, but is not so for the less-restrictive-measure test, since the latter is not an absolute ban on discrimination or any other negative, trade-inhibiting result, but rather a ban on levels of trade disruption not justified by the results sought. As significant, national treatment and similar substantive obligations are conceptually antecedent to the less-restrictive-measure test, since the latter is triggered only in the context of exploring a general exception to a prior determination or concession that a substantive breach has occurred.

procedural requirement that a party who asserts the existence of a fact has the onus of proving the same. As such, it would be up to the proponents of MDP to show alternative measures less restrictive of trade than the current ban on MDP. The factual speculation entailed would primarily have to be conducted by such proponents.

A key principle enunciated by the WTO Appellate Body, in relation to the construction of the preambular portion –the chapeau– of Article XX of the GATT is cardinal to an interpretation of the same portion of Article XIV of the GATS, the latter being essentially a reproduction of the former. Appellate Body jurisprudence on the chapeau indicates a two-pronged approach to its interpretation. The first prong is a provisional justification of the specific measure under consideration, by showing it to fall within one or more of the exceptions specified in the various paragraphs of Article XX of the GATT. This step has already been followed in relation to the MDP prohibition by showing above, that the measure falls within the class of measures contemplated by Article XIV(a) of the GATS. The second prong involves a further determination that the measure does not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail,[46] or a disguised restriction on international trade." A measure is saved under the general exception only if it meets the requirements of both prongs.[47] The object of the chapeau is to prevention abuse of the exceptions.[48] As such, it addresses arbitrariness and absence of justification, both in relation to the detailed operating provisions of the measure and in relation to the manner in which the measure is applied. The dimensions are both substantive and procedural.[49]

In interpreting the chapeau in the *U.S. Gasoline* case, the Appellate Body noted that "arbitrary discrimination," "unjustifiable discrimination" and "disguised restriction" on international trade may be read side by side, and that they impart meaning to one another.[50] Thus, "disguised restriction," whatever else it may cover, may properly be read as extending to restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the ambit of the general exceptions. "The fundamental theme," it said, was "to be found in the purpose and object of

46. The related portion of Article XIV of the GATS differs from this in that instead of "countries where *the same* conditions prevail," it speaks of "countries where *like* conditions prevail." This difference, though generally significant, is not important to the present analysis.

47. *See* Appellate Body decision in the *U.S. Gasoline* case, *supra* note 41, part IV (where the Appellate Body enunciated this approach to interpreting the chapeau). *See also United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Oct. 12, 1998, at paras. 118-19 [hereinafter *Shrimp/Turtle* case] (where the Appellate Body further confirmed and reiterated the importance of this approach, building generally upon the principles established in the former decision).

48. *See* Appellate Body decision in the *U.S. Gasoline* case, *supra* note 41, at part IV.

49. *Shrimp/Turtle* case, *supra* note 47, at para. 160.

50. *See* Appellate Body decision in *U.S. Gasoline* case, *supra* note 41, at part IV.

avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[51] The Appellate Body having thus indicated a combined and interactive reading of the terms, proceeded to apply them to the U.S. measures in question in that case in a manner indicating that the terms substantially overlapped. While not expressly stating so, the Appellate Body appeared to depart from this combined reading of the terms in the *Shrimp/Turtles* case. There, the Appellate Body approached the terms separately, attempting to show their distinctiveness by isolating aspects of the measures that respectively qualify as "arbitrary discrimination" or "unjustifiable discrimination."[52] It deemed it unnecessary, however, to similarly consider "disguised restriction" in the context of the case.[53]

Notwithstanding this attempt at separating the two terms, the distinction is anything but clear given that there was no express delineation of the conceptual difference between them by the Appellate Body, the focus under its discussion of both terms being simply the related acts of discrimination by the United States, especially as between shrimp producers from different countries, in relation to whom the U.S. measure had been applied differently. It would appear however that the conceptual difference between "unjustifiable discrimination" and "arbitrary discrimination" lies in the idea that the latter, unlike the former, involves something akin to recklessness in the administration of a measure, such recklessness being reflected for instance in the absence of consideration for the disparate impact of same measures on different countries. In this wise, the words of the Appellate Body are instructive:

> We next consider whether Section 609 has been applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail." We have already observed that Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification ... adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. In our view, this rigidity and inflexibility also constitute "arbitrary discrimination" within the meaning of the chapeau.[54]

51. *See* Appellate Body decision in the *U.S. Gasoline* case, *supra* note 41, at part IV.
52. *Shrimp/Turtle* case, *supra* note 47, at paras. 161-82.
53. *Id.* at para. 184.
54. *Id.* at para. 177.

This apparently implicates the idea that same or similar treatment of different countries can, in the context of the chapeau, amount to *de facto* discrimination, so that what is actually required to avoid such discrimination is dissimilar treatment. There is, however, a measure of circularity in this line of reasoning, given that the essence of the chapeau, at least a cardinal dimension thereof, is that discrimination, whether of the unjustifiable category or of the arbitrary kind, does not result from the application of a measure "between countries where the same conditions prevail."[55] To proceed then on the assumption that a country applying a measure should take into consideration such disparate effects of the measures as result from the different situations or conditions of the countries does strain somewhat the logic of the chapeau. It is possible, however, to see the Appellate Body's reasoning here as resting not just on the fact that the disparate effects of the measure ought to be taken into consideration for countries where different conditions exist, but also on the fact that the U.S. measure in question envisaged the adoption by other countries of a comprehensive regulatory program that is essentially the same as that in the United States. In promulgating a measure so extraterritorial in nature, the United States might reasonably be expected to consider the specific conditions in the other territories affected. Beyond such disparate impact, however, the Appellate Body further hinged its conclusion as to the arbitrary character of the discrimination on the absence of due process and transparency in the administrative implementation of the U.S. measure by the agencies involved, some essential determinations having been made *ex parte,* for instance, without regard to basic principles of fair hearing, thus effectively resulting in discrimination between those shrimp exporting countries who receive benefits, i.e. certification, under the U.S. measures in question and those who are denied such benefits.[56] These shortcomings in basic due process provide a firmer ground for a conclusion that the discrimination is arbitrary, the result of recklessness as to basic procedures.

Another significant principle enunciated by the Appellate Body in the *U.S. Gasoline* case is, that the exercise of applying the general exceptions in Article XX of the GATT would be unprofitable, if it involved no more than applying the same standard used in finding that a measure was inconsistent with a substantive provision of the GATT, say, by virtue of its being discriminatory contrary to national treatment obligations of Article III. It stated that, "[t]he provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."[57] Thus, while the basic elements of discrimination in the case were the more onerous requirements imposed on foreign gasoline vis-à-vis domestic gasoline, the additional elements required to show unjustifiable discrimination and disguised restriction on international trade for purposes of the chapeau were: (i)

55. GATS Art. XIV.

56. The *Shrimp/Turtle* case, *supra* note 47, at paras. 180-81.

57. *U.S. Gasoline* case, *supra* note 41, at part IV.

the omission of the United States to explore in conjunction with other countries involved (Venezuela and Brazil) cooperative means of mitigating the administrative problems relied on by the United States as a basis for failing to permit individual baselines for foreign gasoline suppliers as it had done for U.S. suppliers, and (ii) U.S. failure to consider the costs for foreign suppliers that would result from the imposition of across-the-board statutory baselines.[58] It is noteworthy however that these additional elements correspond somewhat to the requirements relevant to a showing that a country has exhausted all options less restrictive of trade before resorting to the measure sought to be justified under an Article XX GATT exception in relation to which the language of "necessity" applies. Thus an element of circularity still dogs the application of the general exceptions to specific facts, even when the underlying logic appears clear.

Further application of this WTO/GATT jurisprudence to the question of MDP in the context of the related provision of Article XIV(a) of the GATS, requires an examination of the conformity of the MDP prohibition with the second leg of the two-tiered process prescribed by the Appellate Body. In essence, this invites a response to the following question: Is the U.S. prohibition of MDP applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on trade in services? The claimed exemption under Article XIV(a) of the GATS can be sustained only if this question can be answered in the negative.

A significant distinction between the measures in issue in both the *U.S. Gasoline* and *Shrimp/Turtles* cases on the one hand, and the measure prohibiting MDP on the other hand is the fact that unlike the latter, the former are, on the whole, complex measures administered by agencies charged with conferring or denying benefits under the scheme of the measures, thus necessitating the agencies' active interaction with stakeholders. Thus, they elicit intricate procedures necessary to determine and delimit the interests of various stakeholders in the measures. In contrast, the MDP measure is not a measure that invites such intense administrative activity, being a simple, non-complex and primary measure under which no benefits are administered or conferred on any party, irrespective of country of origin. This singular difference makes the measure less vulnerable to attack on the basis of its application, since it does not lend itself to the complexity and multiplicity of circumstances to which the other measures are subject. Indeed, a mechanism suggested by the Appellate Body in the *U.S. Gasoline* case, by which the United States could have eliminated the discriminatory manner in which the measure in question was applied, is the adoption of the same statutory baseline for assessing emission both for foreign and domestic gasoline.[59] The MDP

58. *Shrimp/Turtle* case, *supra* note 47, *at* last paragraph.

59. *U.S. Gasoline* case, *supra* note 41, *at* part IV. *See also supra* text accompanying note 53.

measure, as a measure that applies to foreign and domestic lawyers and legal services alike, meets the parameters indicated by this suggestion. The requirements of the chapeau are essentially requirements that concern the *application* of a measure, and where that application is simple, unlayered and straightforward, there exists less room for a finding of discrimination, –whether arbitrary or unjustified– of the sort necessary to sustain a challenge to the measure under the chapeau. It is important to note that, in line with Appellate Body jurisprudence on the matter, the discrimination necessary to impugn the MDP measure, for purposes of the chapeau, must go beyond that initially necessary to find a substantive violation of the provision of the GATS. Thus, where the antecedent finding of substantive violation is *de facto* discrimination in breach of national treatment obligations under Article XVII of the GATS,[60] the same acts or omissions on which *de facto* discrimination is founded would not suffice to show that the discrimination is arbitrary or unjustified under the language of the chapeau. One is however hard-pressed to discover in the present circumstances the alternative sources of such second-level discrimination, given the character of the MDP measure as a rather bare measure with a strict, rigid application; which application would be very difficult to adjust or render more nuanced without effectively dispensing with the measure itself altogether.

The strictness and rigidity with which the MDP measure is applied invites a possible conclusion that in effect, it arbitrarily discriminates between countries by failing to inquire into the appropriateness of its program for the conditions prevailing in the exporting countries, as suggested by the Appellate Body's pronouncement in the *Shrimp/Turtles* case.[61] However, such a conclusion can only be reached if one were to lose sight of salient differences between the circumstances of the measure in that case and the MDP measure. The pronouncement in that case was made in relation to the administrative machinery put in place to administer the benefits and burdens of the primary measure by, *inter alia*, examining the efforts made by various countries to avoid or minimize sea turtle mortality in the course of commercial shrimp harvesting. They were not made in relation to the primary measure banning shrimps harvested with commercial fishing technology harmful to sea turtles. Section 609(b), paragraph (1) of The Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990 contained the primary measure banning the importation of shrimps harvested using technology harmful to sea turtles. It provided:

> IN GENERAL. -- The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea

60. *See supra* paragraph accompanying note 25, for an explanation of the potentials for such de facto discrimination.

61. *See supra* text related to note 53.

> turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).[62]

Paragraph (2) of the same section, on the other hand, provides:

> CERTIFICATION PROCEDURE. -- The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that -- (A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and (B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or (C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.[63]

It was in the details of the certification procedure –details relating to the active administration of the measure– rather than the primary measure in section 609(b) paragraph (1) that the problem lay in this case. Indeed, the recklessness that forms the hallmark of arbitrary discrimination can both conceptually and actually be located in the details of a measure's implementation and administration, rather than the bare measure itself. The absence of procedural due process loomed large in the *Shrimp/Turtles* Appellate Body's conclusion that the application of the United States' measures was arbitrarily discriminatory. Procedural due process is however largely irrelevant, where a primary measure of a narrowly-drawn nature is, without more, in issue. In both the *U.S. Gasoline* and *Shrimp/Turtles* decisions, the Appellate Body based its determination that the measures in question were arbitrary in *application* on the administrative rules and details by which the measures were *applied.* This is quite logical and in concert with the text and character of the chapeau. A measure such as the MDP measure, which is so structured that it lacks these elaborate administrative rules in its application, is largely not amenable to impeachment as being arbitrarily discriminatory. This is not to say that it is

---

62. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 101-162, 103 Stat. 988 (1990) (subsequently codified as 16 U.S.C § 1537). Section 609(a) merely mandated the U.S. Secretary of State in consultation with the Secretary of Commerce to enter into certain broad international negotiations with a view to the conservation of sea turtles, to encourage international agreements towards same purpose, and to report back to Congress on certain issues related to such conservation.

63. *Id.*

impossible for such a primary measure to sustain a charge of discrimination in other respects, for instance, with regard to basic national treatment or MFN obligations. Rather, it is to say the primary measure is *factually* incapable of sustaining a claim of arbitrary discrimination under the chapeau, given the detailed principles enunciated by the Appellate Body. This is more so given that Appellate Body jurisprudence indicates that *in principle,* a different, extra element of discrimination is necessary to prove that a measure in its application offends the chapeau. "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."[64] The same facts, i.e. the primary measure, justifying an initial finding of substantive discrimination under the GATT or GATS would not suffice for a finding of discrimination under the chapeau.

The MDP measure is primarily embodied in Rule 5.4(b) and 5.4(d) of the American Bar Association's Model Rules of Professional Conduct of 1983 (as adopted by various state judiciaries) and the corresponding provisions in Disciplinary Rules (DR) 3-103(A) and 5-107(C) of the American Bar Association's Model Code of Professional Responsibility of 1969. The Model Rules provide in paragraphs (b) and (d) as follows:

> (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
>
> (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
>
> (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
>
> (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

64. *See supra* text accompanying note 57.

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.[65]

These provisions have no elaborate administrative mechanisms, if any. Arguably, the procedural rules of the bar disciplinary bodies in the various states of the United States may qualify as the administrative mechanisms for these rules. However, even if they are accepted to be so, they provide no advantages to lawyers within the United States. They effectively make for stricter enforcement of the blanket MDP prohibition against U.S. lawyers vis-à-vis foreign lawyers in respect of whom such disciplinary bodies have and claim no jurisdiction over their non-U.S. activities.[66] Putting aside substantive adequacy, and focusing on operative or procedural adequacy, it is clear that the approach *actually* used by the bar authorities in administering the MDP measure does not implicate arbitrary or unjustifiable discrimination. The U.S. measure prohibiting MDP as embodied in the provisions is, by virtue of the provisions' structure, not amenable to application in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail. The provisions simply provide no room for such application.

The existence of operating provisions is a cardinal element in assessing the substantive adequacy of a measure for purposes of determining whether arbitrary or unjustifiable discrimination exists. Recall that in the *Shrimp/*

---

65. The recent revision of the rules by the ABA's Ethics 2000 commission did not change these provisions. While other provisions of the Model Rules and Model Code aim at the protection of lawyer independence from lay interference, these are the rules that do so by way of prohibiting MDP. Rule 5.4(a) prohibiting the sharing of legal fees with non-lawyers is effectively covered by Rule 5.4(b) since the legal essence of a partnership is the sharing of profits and loss from a joint enterprise. Rules 1.7-1.8 on conflict of interest and a variety of other rules also seek to reinforce and protect lawyer independence, though not primarily by means of prohibiting joint practice with non-lawyers. The American Bar Association, promulgator of the model rules and model code, has no legislative authority. However, the rules and code are influential and have been adopted in one form or another in most of the states within the United States, jurisdiction over professional regulation lying primarily within the legislative competence of the states. The District of Columbia is the only U.S. jurisdiction that has modified Model Rule 5.4 to permit, in limited circumstances, partnership with non-lawyers in the practice of law. MODEL RULES OF PROF'L CONDUCT R. 5.4 (Discussion Draft 1933).

66. The possibility exists, however, for such a claim where "foreign" lawyers are also licensed to practice within a U.S. state. Such a state potentially has disciplinary jurisdiction over the out-of-state activities of the "foreign" lawyers. (See in this wise, Rule 8.5 of the ABA Model Rules of Professional Conduct, dealing with disciplinary authority and related choice of law issues.) In this scenario, however, it becomes debatable whether the state is indeed exercising jurisdiction over foreign lawyers, given that a jurisdiction's definition of "foreign lawyer" would not ordinarily encompass any lawyer admitted to its own bar, irrespective of his national origin. *See* MODEL RULES OF PROF'L CONDUCT R. 8.5 (Discussion Draft 1933).

A review of the intricacies of multi-state jurisdiction over lawyers in their cross-jurisdictional activities may be found generally in: Detlev Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution,* 13 GEO. J. OF LEGAL ETHICS 677 (2000).

Turtles case, the Appellate Body emphasized the substantive and procedural dimensions of the chapeau, noting:

> that the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirements.[67]

It would seem that the potency of the substantive dimensions of this requirement is circumscribed in the context of the MDP measure, given the leanness of the *provisions* embodying the measure and its operative parts, if an operative part can be said to actually exist. Nor is the situation much different in relation to the *actual* manner of application of the measure, given the transparency and uniformity that has attended the MDP prohibition over the decades.

A cardinal aspect of the chapeau is the requirement that the arbitrary or unjustified discrimination, necessary to disqualify a measure that otherwise falls within the specific exceptions listed in the paragraphs of Article XIV of the GATS, occur between countries where like conditions prevail.[68] In both the *U.S. Gasoline* and *Shrimp/Turtles* cases, the Appellate Body failed to examine the concept in any meaningful depth beyond its ruling –with the acquiescence of the parties themselves– that the phrase "between countries where the same conditions prevail" contemplates the conditions in the domestic jurisdiction vis-à-vis other countries, as well as the conditions in such other countries vis-à-vis one another. Since it is axiomatic that effect should be given to this portion of the chapeau, it is indisputable that any party intent on showing that the MDP measure in the United States does not qualify as a general exception under Article XIV of the GATS has the onus of showing that the conditions in the United States, for purposes of this measure, are like those in any other country in respect of which the claim of arbitrary or unjustifiable discrimination is made. Conceptually, there could be a claim that such discrimination has been effected by the United States as between one foreign country and another where like conditions exist. However, this scenario is largely irrelevant for present purposes, since that is not how the MDP measure has been designed as a provision, nor does it reflect the way it has actually been implemented. Proving that conditions related to the production and consumption of legal services in

---

67. *See Shrimp/Turtle* case, *supra* note 47, para. 160.

68. The related portion of Article XX of the GATT chapeau actually speaks of countries where "the same" conditions prevail. This difference is, however, not material to the present discussion.

the United States, are alike to those in other countries is predictably a difficult task, given the sharp peculiarities of the U.S. legal and political processes.[69]

In both the *U.S. Gasoline* and *Shrimp/Turtles* cases, the Appellate Body did not clearly indicate the elements of the term "disguised restriction on international trade" either by conceptually delineating its contours or by specific examples drawn from the facts of the cases. In *U.S. Gasoline*, the Appellate Body, reflecting its belief that the key operative terms of the chapeau impart meaning to one another, interpreted "disguised restriction on international trade" to include disguised discrimination in international trade, as well as concealed or unannounced restriction or discrimination. For the Appellate Body, "the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination,' may also be taken into account in determining the presence of a 'disguised restriction' on international trade."[70] The Appellate Body in its decision in *Shrimp/Turtles,* as already indicated, declined to rule on this element of the dispute, even though there is indication in the structure of its judgment that the element was to be treated distinctly from the others. However, aspects of the ruling in *Shrimp/Turtles* provide insight into the construction of this element. In that case, the Appellate Body declared that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states."[71] This good faith requirement in the construction of the chapeau suggests that the term "disguised restriction," as an element of the chapeau, is amenable to meaningful application only through an examination of the circumstances of a case with the mind-set of a court of equity rather than a court of law. No rigid principle seems applicable in this wise. For, in the words of the Appellate Body:

> The task of interpreting and applying the chapeau is . . . essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT. . . . The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.[72]

---

69. *See supra* text accompanying notes 33-35.

70. *U.S. Gasoline* case, *supra* note 41, at part IV; *see also supra* text accompanying note 47.

71. *See Shrimp/Turtle* case, *supra* note 47, at paragraph 158.

72. *Id.* at para. 159.

In this connection, whether a measure qualifies as a disguised restriction on international trade in services or not is largely a contingency, and attempts at prediction would be largely speculative. Notions of fairness and equity implicate a high level of indeterminacy. That said, aspects of the MDP measure make a strong case for it as a bona fide measure applied with no intent on trade restriction. These aspects include its pedigree as a measure –whether in the form of provisions in the earlier ABA Model Code of Professional Responsibility of 1969, the ABA Canons of 1908, or antecedent common law principles– substantially predating the current concern with the liberalization of trade in services. Equally included is the absence of covert extraterritoriality in the application of the measure. In ruling against the United States in the *U.S. Gasoline* case, the Appellate Body, after reviewing two possible approaches that the United States could have adopted to mitigate the impediments claimed to justify the discriminatory application of the measure in issue, concluded that "[t]he resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable."[73] This suggests that the existence of an opportunity for forward planning in the design of a measure to achieve disguised restriction is an important consideration in determining the good faith of a measure and its application. Where a measure is one of reasonable vintage, the possibilities for a conclusion that such an opportunity existed becomes considerably attenuated. Likewise, the extraterritorial dimension seemed cardinal in the Appellate Body's decision in the *Shrimp/Turtles* case, where it deprecated the extraterritoriality manifest in the application of the U.S. measure under review in the case.[74] This measure appeared, from the conclusions drawn by the Appellate Body, to be essentially a unilateral attempt to deal with a global issue –in this case the mortality of migratory sea turtles– thus implicating impermissible extraterritoriality. The MDP measure is quite different, being a more narrowly-drawn measure that lacks any element of extraterritoriality in its design and implementation. It embodies no expressed or covert policy objective of getting other countries to effect policy (or even isolated structural) changes within their jurisdictions as did the measures in the *Shrimp/Turtles* and *U.S. Gasoline* cases.

---

73. *U.S. Gasoline* case, *supra* note 41, at part IV.

74. *See Shrimp/Turtle* case, *supra* note 47, paras. 164-165, where the Appellate Body declared:

> It is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.... This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers....

V. NON-VIOLATION NULLIFICATION OR IMPAIRMENT

The GATS provision on non-violation nullification is embodied in Article XXIII(3), which provides:

> If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.[75]

This provision is reinforced by the transitional provisions of Article VI(5) of the GATS, which provide as follows:

> 5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:
>
> (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c);[76] and

---

75. GATS Art. XXII(3).

76. Sub-paragraphs 4(a), (b) and (c) of Article VI provide:

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:
>
> (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
>
> (b) not more burdensome than necessary to ensure the quality of the service;
>
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

GATS Art. VI(5).

(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations[77] applied by that Member.[78]

In the context of the broader MDP debate, these GATS provisions provide a possible avenue for challenging the prohibition of MDP in the United States. In this regard, a credible case can be made that notwithstanding its facial neutrality and conformity with the substantive provisions of the GATS, the measure prohibiting MDP leads to nullification or impairment of WTO members' expectations of enhanced access to the U.S. market for legal services, both generally and in the light of specific commitments undertaken. These provisions thus merit an examination in the light of the related GATT provisions and jurisprudence.

The provisions of Article XXIII(3) of the GATS broadly reflect those of Article XXIII(I)b of the GATT. Though the former appears more peremptory, its scheme is effectively the same as the latter's. Both provisions essentially reflect the need felt by trade regime designers to provide avenues for the management of trade-distorting impact of measures that are otherwise formally within the scope of the respective agreements. They envisage the use of some consultative or conciliatory means either after a formal finding of non-violation nullification or impairment, but before the adoption of retaliatory or punitive counter-measures by the aggrieved party –as is the case with Article XXIII(3) of the GATS– or before (or as part of) such a formal finding –as is the case with Article XXIII(I)&(2) of the GATT.

Non-violation nullification or impairment under Article XXIII of the GATT and the GATS is the most direct application of the reasonable expectations principle (also referred to as "reasonable assumptions" or "reasonable anticipation" principle) first enunciated by the GATT Panel in *The Australian Subsidy on Ammonium Sulphate* decision.[79] Although the principle

77. Footnote 3 to Article VI(5)(b) provides: "The term 'relevant international organizations' refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO." GATS Art. VI(5)(b) fn 3.

78. GATS Art. VI(5).

79. The Australian Subsidy on Ammonium Sulfate, April 3, 1950, GATT B.I.S.D. (2d Supp.) at 188, para. 12 (1950). *See* Adrian T.L. Chua, *Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence,* J. WORLD TRADE, April 1998, at 29, 30. *See also* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 374 (1999) (noting that in applying the concept of non-violation nullification or impairment in the recent case of *Japan–Measures Affecting Consumer Photographic Film and Paper,*

is not contained in the text of the GATT or the interpretive notes adopted by the GATT contracting parties, it has been persuasively put forward as arguably an intrinsic part of the GATT, capable of being distilled from the provisions and structure of the GATT.[80] In a detailed analysis examining GATT jurisprudence on non-violation nullification or impairment, Adrian Chua, attempts an isolation of the elements of such a complaint, as they have evolved incrementally through judicial legislation by the panels. Three elements are isolated as being essential for a successful non-violation complaint:[81]

> (a) The existence of benefits accruing under the GATT, which benefits are alleged to have been impaired or nullified;
>
> (b) Nullification or impairment of such benefits through some governmental measure;
>
> (c) Reliance-inducing conduct by the respondent.

Regarding the requirement that benefits accruing under the GATT be impaired or nullified, a substantial preponderance of benefits alleged in the cases to have been so impaired or nullified "have been bound tariff concessions under Article II" of the GATT.[82] In the services context, these concessions correspond roughly to the market access commitments undertaken pursuant to Article XVI of the GATS. While such a tariff concession or market access commitment is not necessarily implicated in non-violation complaints, their preponderance in GATT non-violation jurisprudence and the centrality of market access commitments to the GATS framework, justify an examination of the essential requirements of a possible claim that the U.S. measure prohibiting MDP impairs or nullifies market access benefits accruing under the GATS, given the obligations undertaken by the United States in its schedule of specific commitments. Apart from the existence of a benefit, the second element essential for a successful non-violation complaint is the actual nullification or impairment of benefits by means of a governmental measure. Concerning this, three requirements are delineated: (i) that the measure upset the balance of concessions as between the parties, (ii) that the measure be not reasonably foreseeable by the complainant at the time expectations of better market access

---

WT/DS44/R (98-0886) of March 31, 1998, the WTO Panel followed earlier GATT jurisprudence in applying the concept conservatively seeking "evidence of what one might call in domestic law 'actual reliance' to find legitimate expectations").

80. Chua, *supra* note 79, at 30.

81. Six "elements" (numbered A-F) are actually listed. *See* Chua, *supra* note 79, at 37-48. However, only these three are in the nature of substantive requirements; the rest being either in the nature of procedural characteristics (rather than requirements *per se*) or adjuncts of the substantive three. *Id. See also* Trachtman, *supra* note 79, at 370, 373.

82. *See* Chua, *supra* note 79, at 39-40.

arose, and (iii) that there occur a frustration of the complainant's reasonable expectations of enhanced market access arising out of any of several possible sources of such expectation.[83] The third element essential for a successful non-violation complaint is reliance-inducing behavior by the country against which a complaint is filed. It seems that such behavior, while not necessary for purposes of the broader principle of reasonable expectations –for which purpose other sources of reasonable expectations would suffice– is essential for that principle in the specific context of non-violation nullification or impairment.[84] No doubt, a measure of overlap is involved in these requirements as analyzed. This is not surprising, given that the effort towards isolating and sorting the various elements and related requirements of the non-violation complaints is quite nascent.

The three requirements pertaining to the element of actual nullification or impairment of benefits seem central to a successful non-violation claim and, thus, merit the greatest attention, *a fortiori,* since they subsume the third element of reliance-inducing conduct. Along these lines, can it be said that the MDP measure in question has upset the balance of concessions as between WTO members, that it was not reasonably foreseeable by them at the time GATS negotiations on legal services were conducted, and that it has frustrated their reasonable expectations of enhanced market access arising out of U.S. statements, conduct or agreements with third countries? It is immediately seen that these are questions better answered on a case-by-case basis in the context of specific actual non-violation nullification or impairment complaints or disputes. This notwithstanding, certain well-known facts concerning MDP and the state of competition in the international market for legal services, as well as the U.S. approach to negotiating market access concessions in the legal services sector, indicate that the odds are very much against a finding of non-nullification violation or impairment by the United States vis-à-vis other WTO members who may file such complaints. First is the fact that the international market for legal services is one in which, competitively speaking, U.S. suppliers were dominant in the years leading up to the conclusion of GATS and have remained dominant thereafter.[85] Nothing in the concessions made by the

---

83. The sources of such expectations are open-ended, but the most significant ones are:
   a) Assurances and statements made in the course of trade negotiations;
   b) Established negotiation practice of the parties
   c) Conduct of respondent government's policy
   d) Provisions of GATT negotiated between the respondent and a third party
   e) Pre-existing competitive conditions

See Chua, *supra* note 79, at 32-36. It seems from the cases that only complainant's expectations of improved market access arising out of negotiated agreements or statement or conduct of the respondent are relevant for this requirement. *Id.* at 41.

84. *See* Chua, *supra* note 79, at 47.

85. In 1993, the year immediately before GATS became operative, the United States provided $1.453 billion worth of legal services to other countries, as against $326 million worth of legal services purchased by the United States from other countries. The major importers of U.S. legal services were the European Union ($765 million) and Japan ($335 million). *See* U.S.

United States indicated an intention to disrupt this competitive state substantively. The aim was to provide other countries with an equal opportunity to compete, rather than an assurance of absolute improvements in their legal services export to the United States. Equal opportunity in the context in which the negotiations were carried out in the late 1980s and early 1990s cannot logically be dependent on the availability or acceptance of a specific, hitherto-unrecognized, if not inexistent, vehicle for delivering legal services – the MDP. A claim that there has occurred an upset in the balance of concessions can thus not be readily substantiated, whether such a claim is dependent on the resistance of the U.S. legal services market to exports from abroad by regular law firms and MDPs established in those countries, or is dependent on the denial of opportunity to such foreign entities in the notional sense of disallowing their use of the vehicle best suited to effective competition and optimal performance by them.

It is widely acknowledged that the core of the U.S. approach in negotiating and inscribing its GATS schedule of specific commitments involved offers to bind the professional rules of the various states, especially those states which had made appropriate provisions for foreign access to their legal services market, by way of foreign legal consultancy.[86] This indeed reflected a general approach in the broader GATS negotiation towards preserving, rather than expanding, the levels of liberalization existing in the various countries[87] and granting limited concessions, as implicit in the positive list approach used in scheduling commitments. Even though the United States Trade Representative (USTR), working in conjunction with the ABA, encouraged some states to adopt appropriate legislation permitting foreign legal consultants, there was no impetus for an expansion of the degree of access

---

Department of Commerce, Economics and Statistics Admin., Bureau of Economic Analysis, Survey of Current Business, Vol. 74, no. 9 (September, 1994) 132-133 (cited with some critical but non-fundamental commentary in CONE, *supra* note 19,at 1:19). The trend continues to be the same. The United States Trade Representative (USTR) reports that "[f]or the United States, balance of payments receipts for legal services amount to roughly $3.2 billion annually." Press Release,U.S. Proposals for Liberalizing Trade in Services: Executive Summary (July 1, 2002), *available at* http://www.ustr.gov/assets/Document_Library/Press_Releases/2002/July/asset upload_file224_2009.pdf

86. *See* CHRISTOPER ARUP, THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY 167 (2000). Sydney Cone notes:

> [T]he U.S. Schedule of Specific Commitments on legal services consists of two parts: Part (1) is a two-page summary of state law on admission to the bar; Part (2) is an 18-page summary of legal- consultant rules in 16 U.S. jurisdiction .... Part (2) is thus a commitment that those 16 jurisdictions will respect a 'standstill' as regards legal consultancy....

See CONE, *supra* note 19, at 2:44–2:45.

87. *See* Feketekuty, *supra* note 15, at 87.

granted by each U.S. state beyond an emphasis on the avoidance of reciprocity requirements.[88] In this regard, Cone writes:

> It was thus not a task of awesome proportions for a state to be responsive to USTR policy during this period; as long as a state steered clear of reciprocity, it could respect that policy while indulging in any substantive restriction it found expedient for lulling into tolerable quiescence the local bar examiners and other guardians of the public interest.[89]

Being an established element of the various states' regulation of law practice, the continued existence in the circumstances of the measure prohibiting MDP cannot reasonably be said to frustrate any party's expectations. There were three main parties involved in the negotiations,[90] and every party knew of its existence and could reasonably anticipate that it would not be amenable to repeal.

Concerning possible expectations arising from U.S. statements or conduct in the course of negotiations, it must be acknowledged that there exists a general perception that the U.S. Government was *prepared* to lay down legal services like a sacrificial lamb in the Uruguay Round of trade negotiations.[91] But whatever the concessions that may have been made by the United States in that regard, it did not extend to promises –or conduct indicating a readiness– to de-proscribe MDP. Indeed, indications are that the sacrifices were in the area of foreign legal consultants' practice within the United States, in relation to which the United States bound unconditionally, i.e. without requiring reciprocal treatment, the liberalized provisions of the various states that had already adopted appropriate legislation permitting such practice.[92] U.S. trade negotiators, however high their enthusiasm may have been for facilitating trade in other sectors through offers in the legal services sector, were aware of limitations and difficulties implicit in making promises of liberalization that

---

88. For example, requirements which predicate the availability of the concessions granted by a country on the existence of reciprocal concessions in a country whose service suppliers seek to take advantage of the granted concessions.

89. *See* CONE, *supra* note 19, at 4:29. *See also* CONE *supra* note 19, at 2:7.

90. Japan was represented by Japanese Government officials and the Japanese Bar Federation (known by its Japanese acronym "Nichibenren"), the European Union was represented by the European Commission and CCBE, and the United States was represented by the USTR and ABA.

91. THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986 – 1992), Commentary (Terence P. Steward ed., 1993), *cited in* ARUP, *supra* note 86, at 167. Sydney Cone reports that some sort of side deal may have been made by the U.S. negotiating team, involving a trade-in of U.S. liberalization of legal services with regard to practice by foreign legal consultants, for trade concessions to the United States in areas other than legal services, possibly Japanese Semiconductor markets covered by the TRIPS Agreement. *See* CONE, *supra* note 19, at 2:3, 2:12–2:13.

92. *See id.* at 2:12–2:13, 2:44–2:45, 4:29.

went beyond the status quo in the various states, regulatory authority over professions being primarily within the legislative purview of the various states rather than the Federal Government. They accordingly tailored their offers in tandem with this reality, and the so-called sacrifice of the U.S. legal services sector did not go beyond the fact that trade concessions, which the United States obtained from other countries by binding the existing levels of market access, did not accrue to the U.S. legal profession, but rather to other sectors of the U.S. economy, contrary to the high hopes of ABA representatives working with the USTR.[93] The sacrifice did not extend to removing or promising a removal of the prohibition on MDPs. Indeed, the negotiators took the pains to indicate that related prohibitions concerning unauthorized practice and partnership with non-lawyers were reflected in and protected through appropriate market access limitations for all the states of the Union.[94] Sydney Cone, a close observer of the process leading up to the conclusion of GATS negotiation on legal services, provides a detailed account of the intricacies of the negotiations and the jostling leading up to the U.S. commitments in the legal services sub-sector.[95] There is no indication that the USTR, which had primary responsibility for the negotiations, and the ABA, which was a de facto but active participant, made any broad promises beyond a binding of state positions generally on legal practice as they existed at the time of negotiations, and the encouragement of states to permit the licensing of foreign legal consultants. Significantly, Cone writes that, "[i]n the case of the United States, no formal promises were lodged in the schedule subsumed by the GATS, but... definite expectations were raised that the ABA and the USTR would promote the adoption of the Model Rule [on foreign legal consultants] throughout the United States."[96] Arguments for non-violation nullification or impairment relying on U.S. negotiating conduct or promises in the course of such negotiations are, therefore, unavailing.

An important point in relation to non-violation nullification is whether a measure justified under the Article XIV of the GATS exception would still be amenable to impeachment under the provisions of Article XXIII(3) of the GATS. In other words, what is the hierarchy, if any, between the general exceptions and the non-violation provisions? In the present context, would a finding that the U.S. MDP measure nullifies or impairs expected benefits override a finding under Article XIV(a) of the GATS that the measure is one that is necessary to maintain public order, or would it be the other way around? This is important because Article XIV of the GATS provides what is perhaps the best defense for the MDP measure, while Article XXIII(3) of the GATS

93. *See supra* note 91 and accompanying text. *See also* CONE, *supra* note 19, at 2:42–2:44.

94. *See supra* text accompanying notes 19-20.

95. *See generally* CONE, *supra* note 19, at chapter 2 (especially at 2:2–213, 2:24–2:34), Chapter 4.

96. *Id.* at 2:32–2:33.

likewise qualifies as the ultimate assault weapon for parties intent on impugning the measure. Reconciliation is therefore imperative.

It has been argued, in the context of the related provisions of Article XX of the GATT, that "[i]n principle, there is no objection in allowing a measure justified under an Article XX exception to be challenged under Article XXIII(1)(b)."[97] This argument places reliance on certain averments made in the context of discussions under the emergency exception in Article XXI of the GATT.[98] Clearly, however, this is a question that has not been adjudicated definitively by any panel. More importantly, it is a question regarding which a textual approach to interpretation would yield no dividends. This is because by its very terms, the general exceptions in Article XIV of the GATS (just like Article XX of the GATT exceptions) seek to subsume and override all other provisions of the GATS including those of Article XXIII(3), while Article XXIII(3) GATS (just like the corresponding Article XXIII:(1)(b) of the GATT) seeks likewise to subsume and override other provisions, including the general exceptions. They are mutually eliminating. A teleological approach that takes into consideration the design and purpose of the provisions would be more auspicious. Along these lines, it would seem that the interests sought to be protected by the general exceptions – interests such as health and environment, public order and morality, safety and privacy – transcend those implicated by the non-violation nullification or impairment provisions, not just in terms of being values that attract more attention and concern among civil society currently, but more importantly, in terms of embodying values and concerns in which all peoples and states possess concurrent vested interests. Unlike these generic interests, the interests sought to be protected by the non-violation nullification or impairment provisions are contingent, state-specific interests without abiding implications for most other states and civil society in general. It seems in the context of the interests implicated, that the general exceptions would prevail over the non-violation nullification or impairment provisions, should the question arise whether a measure saved by the former is condemned by the latter.

Non-violation nullification or impairment seems ultimately to be a "discipline" at the cross-roads of law and politics. It simultaneously assumes legality and illegality –legality in the sense that the there has been no violation of substantive provisions, and illegality in the sense that there has effectively occurred an abridgment or loss of expected benefits. Such contradiction is indicative of the weakness of the WTO legal framework; a weakness resulting from the organization's character as a grouping of sovereigns where the dictates of diplomacy, as distinct from legality, remains key, notwithstanding the much-trumpeted dawn of a rule-based dispute settlement system.

---

97. Chua, *supra* note 79, at 46.
98. *Id.*

VI. CONCLUDING COMMENTS

The GATS does not oblige or constrain the regulators of the legal profession to accommodate MDP as a vehicle for the delivery of legal services in the United States, and this is not likely to change in the course of the current rounds of WTO negotiations over services.[99] Significant in this regard is the reality that in the hierarchy of fundamental norms that constrain and shape the trading system itself, the importance of non-trade values such as that of maintaining law and order within a nation, is constantly being reaffirmed and reinforced.[100] This is especially so in relation to considerations of the long-term future of the trading regime, whether in respect of goods or services. This reinforcement further secures the capacity of the United States to maintain, in the long-run, a prohibition on MDP as an element of a regulatory mechanism properly tailored to meet legitimate state interests recognized by the WTO itself through the GATS general exceptions. This is quite separate from the fact that the United States has inserted in its schedule of commitments appropriate market access limitations that constrain the capacity of foreign MDPs to claim access to the U.S. legal services market, especially by way of commercial presence, such commercial presence being the most dominant mode for the transnational supply of legal services –at least where such legal services are supplied by the major institutional providers of legal service.

The ABA went into the negotiations leading to the Uruguay Round agreements armed with little other than sanguine expectations of better access to foreign markets. It sustained heavy losses,[101] and the results have since left it better educated and, thus, better prepared for subsequent rounds. More attuned to the intricacies of trade negotiations, especially in the light of government's possible perception of legal services as a relatively insignificant sector that may be pawned for bigger fish, the ABA should be able to marshal resources necessary to hold its own among other competing interests. Therefore, it is not likely that much impetus towards the de-proscription of MDP would flow from future trade negotiations. Indeed, the primary force behind the inclusion of legal services in the Uruguay round was the U.S. legal profession as represented by the ABA,[102] and it still lies within its reach to influence and shape the obligations assumed by the United States in the current

---

99. The rounds commenced with the Doha Ministerial Declaration (adopted Nov. 14, 2001) and were slated to end no later than January 1, 2005. See paragraph 45 of the Doha Ministerial Declaration, *Doha WTO Ministerial 2001: Ministerial Declaration*, WTO document # WT/MIN(01)/DEC/1 2001. The rounds have been fraught with much difficulty however and the rounds have been extended beyond 2005. The expectation is that the rounds will end by the end of 2006, but this is not certain. *See* WTO, *The Doha Declaration Explained,* available at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#services (last visited Jan 16, 2006).

100. *See* Doha Ministerial Declaration *supra* note 98 at ¶¶ 6, 7.

101. *See* CONE, *supra* note 19, at 2:2–2:14, 2:40–2:45; *see also supra* note 91.

102. CONE, *supra* note 19, at 2:2.

rounds of trade negotiations over services. Nothing in its input to the negotiations, or that of the USTR, so far indicate an interest in propagating MDP in the United States. Their focus is the facilitation of transnational practice involving law firms and practitioners, with basically no attention paid to MDP. Noteworthy in this regard is the February 3, 2002 resolution of the ABA section on international law concerning the negotiating position of the United States with regards to legal services.[103] The resolution basically expresses support for access to foreign markets for U.S. lawyers through permanent establishments consistent with, and as expressed and incorporated in, the ABA's 1993 "Model Rule for the Licensing of Legal Consultants" in the United States. These rules are consistent with permanent establishments as a mode of supply but contain no provisions for MDP. It is also interesting that the recent offer of commitments by the USTR pursuant to the on-going trade negotiations, does not contain any adjustments indicating a move towards the accommodation of MDP.[104] From the foregoing, it is clear that to the extent that the GATS is the source of the obligations claimed to potentially constrain U.S. regulatory authorities in relation to MDP, the opportunity for such regulators to shape the contours of regulation as they deem fit remains ample in the context of the current trade negotiations.

In relation to professional services, of which legal services constitute a prominent aspect, some specific initiatives undertaken within the WTO framework are noteworthy because they shed further light on the current and future contours of obligations under the GATS. The most prominent appear to be the initiatives of the WTO Working Party on Domestic Regulation (formerly known as the Working Party on Professional Services). Established by virtue of the Decision on Professional Services adopted by the WTO Council on Trade in Services on March 1, 1995,[105] its name was changed to Working Party on Domestic Regulation by the Decision on Domestic Regulation adopted by the Council for Trade in Services on April 26, 1999.[106] The March 1995 decision mandated the working party to develop disciplines in the area of professional services, in fulfillment of the broader mandate of the Council for Trade in Services under Article VI(4) of the GATS to ensure that measures relating to technical standards, licensing requirements, qualification requirements, and procedures do not constitute unnecessary barriers to trade in services. Pursuant to this mandate, the Working Party on Professional Services

---

103. Center for Professional Responsibility, ABA, *Materials about the Gats and Other International Agreements* (2005), *at* http://www.abanet.org/cpr/gats/gats_home.html (last visited on October 13, 2005).

104. *See* U.S. initial offers, March 31, 2003, *available at* http://www.ustr.gov/sectors/services/2003-03-31-consolidated_offer.pdf (last visited Nov. 27, 2005). The offer on legal services, in the form of a proposed schedule of specific commitments, as updated by the USTR in May 2005 is available at http://www.abanet.org/cpr/gats/legal_svcs_offer.pdf.

105. Document Symbol: S/L/3.

106. Document Symbol: S/L/70.

produced the "Guidelines for Recognition of Qualifications in the Accountancy Sector," which was adopted by the Council for Trade in Services on May 29, 1997.[107] These non-binding guidelines are meant to assist governments in effecting negotiations in the accounting sector. It provides procedural standards, such as transparency, which should attend the making of agreements to provide recognition between WTO members. More substantive than the Guidelines, are the Disciplines Relating to the Accountancy Sector,[108] adopted by the Council for Trade in Services by means of its Decision on Disciplines Relating to the Accountancy Sector of December 14, 1998.[109] These disciplines are applicable only to those WTO members who have scheduled specific commitments in accountancy under the GATS.[110] Besides, Article I of the Disciplines make it clear that they do not apply to any measures subject to scheduling by virtue of Article XVI and XVII of the GATS, which measures are to be addressed through the negotiation of specific commitments. The Disciplines thus restrict themselves to licensing and qualification requirements under Article VI GATS, and should remain so restricted even if extended to the legal services sector as expected under the current round of trade negotiations.[111] Some may be tempted to argue that the MDP prohibition may qualify in effect as a licensing requirement –an area where the working party probably has some leeway in prescribing standards. This would however amount to stretching the words of

107. Press Release, World Trade Organization, WTO Adopts Guidelines for Recognition of Qualifications in the Accountancy Sector (May 29, 1997), *available at* www.wto.org./english/news_e/pres97_e/pr73_e.htm, for a list of guidelines.

108. Press Release, World Trade Organization, WTO Adopts Discipline On Domestic Regulation for the Accountancy Sector (Dec. 14, 1998), *available at* www.wto.org/english/news_e/pres98_e/pr118_e.htm.

109. Document Symbol: S/L/64 . The text of the Disciplines is usually annexed to the text of the Decision.

110. This follows from the use of the positive list approach in scheduling commitments under the GATS. Under that approach, any member who does not expressly list the accounting or legal sub-sectors in it schedule of specific commitments is deemed not to have made any commitments in those areas.

111. *Id.* Regarding this expectation and its ramifications, see the presentation of the CCBE (Council of the Bars and Law Societies of the European Union) to the WTO, *CCBE Response to The WTO Concerning the Applicability of the Accountancy Disciplines to the Legal Profession May 2003,* available at http://www.ccbe.org/doc/En/ccbe_response_080503_en.pdf. There is the important issue of the definition of necessity for purposes of the injunction in the Discipline that WTO members adopt only measures that are not more trade-restrictive than necessary to achieve certain desired ends. The CCBE has reflected the fears entertained by some lawyers that necessity or 'necessary' could be defined in such a narrow manner as to impede the Bar's need to regulate itself in a manner that secures key interests such as that of independence. (See *id.* page 4.). Were that to happen, it is not inconceivable that such a narrow definition of necessity for purposes of the Discipline (and Article VI(4) of the GATS to which it is appurtenant) would spill over to the construction of the word "necessary" for purposes of the general exception in Article XIV(a) of the GATS, thus constricting the reach of the exception. The odds are however higher that the WTO Appellate Body, whose jurisprudence has shown an enhanced robustness in the protection of non-trade values, would resist such narrowness in the construction of the language of necessity, at least for purposes of the general exceptions.

the statute out of their context, licensing requirements being traditionally distinct from requirements pertaining to practice groupings and vehicles for service delivery, a distinction maintained in the GATS itself.[112]

112. *See* GATS Article VI, dealing with licensing requirements and related issues, especially in paragraphs (4), (5) and (6) thereof, as distinct from GATS Article XVI(2)(e) dealing with vehicles or entities for the delivery of services. For a treatment of these vehicles and structures, see the paragraph of this article immediately following that in which note 25 *supra* occurs.

FROM ARREST TO RELEASE: THE INSIDE STORY OF UGANDA'S PENAL SYSTEM

Brooke J. Oppenheimer*

Prior to becoming an independent state in 1962, Uganda's justice system was a model for its neighbors; at that time, the police force was strong, respected, and appreciated by the public; judicial hearings were fair and well-regarded; and the military did not abuse its power.[1] Unfortunately, after many decades of political upheaval, this same system has become an example of a corrupt and inefficient justice system.[2] Although improvements have been made since President Museveni came into power, unrealistic laws, corruption, and public fear of the justice system have prevented any notable progress. This paper will address the recurring problems in Uganda's criminal justice system and provide recommendations on how to address the barriers encumbering the system.

This paper will start by addressing the concerns with criminal investigations, arrests, and police detentions followed by an analysis of pre and post-trial detentions. It will consider the corruption within the penal stages, the legal ambiguities, and the logistical inefficiencies of the system.

I. ARREST, INVESTIGATION, AND POLICE CUSTODY

A. *The Composition of the Police Force*

Article 211 of the Constitution of Uganda provides for a Ugandan Police Force.[3] When Museveni and his National Resistance Movement (NRM) government took control over the police, the police force consisted of 10,000 officers, but was quickly reduced to 3,000 officers after Museveni removed his opposition.[4] After sifting for "good" officers, the police force was quickly

---

*Ms. Oppenheimer would like to thank Professor Elizabeth Spahn from New England School of law for her continuous support of her research and advocacy for children in Africa. She also notes that this research would not have been possible without the assistance of her research partners, Alice Nassaka and Sophie Kyagulanyi, and the support of Foundation for Human Rights Initiative. Ms. Oppenheimer is presently the Executive Director of Advocates for the African Child, a nonprofit organization which provides legal services to children in conflict with the law. Ms. Oppenheimer also interned for the President of the Defence Counsel for the ICTY while completing her legal studies at the New England School of Law.

1. UGANDA JUDICIAL COMM'N OF INQUIRY, REPORT OF THE JUDICIAL COMMISSION OF INQUIRY INTO CORRUPTION IN THE UGANDA POLICE FORCE: MAIN REPORT, 10 (1999-2000) [hereinafter REPORT OF THE JUDICIAL COMMISSION].

2. *Id.*

3. UGANDA CONST. ch. 12, § 211.

4. REPORT OF THE JUDICIAL COMMISSION, *supra* note 1, at 12.

rebuilt to its original size.[5] The Uganda Police are required "(a) to protect life and property; (b) to preserve law and order; (c) to prevent and detect crime; and (d) to co-operate with the civilian authority and other security organs established under this Constitution and with the population in general."[6] The Constitution also allows for an intelligence agency[7] and a military, which generally share many of the roles of the police.[8] The Constitution, however, does not provide a legal mandate for paramilitary forces, even though at least four paramilitary forces are acting as law enforcers. Please refer to Table 1 for the functions of all security agencies.

Table 1: Uganda law enforcement entities, including their legal mandates and roles in the justice system.

Security Unit	Legal Mandate	Functions and Responsibilities
Uganda Police Force	CONST. ART. 211: Uganda Police Force	◆ (a) to protect life and property; (b) to preserve law and order; (c) to prevent and detect crime; and (d) to co-operate with the civilian authority and other security organs established under this Constitution and with the population general.[9] ◆ Has the power of arrest and detention[10]
Uganda Peoples' Defence Forces (UPDF)	CONST. ART. 208: Uganda Peoples' Defence Forces	◆ (a) to preserve and defend the sovereignty and territorial integrity of Uganda; (b) to co-operate with the civilian authority in emergency situations and in cases of natural disasters; (c) to foster harmony and understanding between the Defence Forces and civilians; and (d) to engage in productive activities for the development of Uganda.[11]

5. *Id.*
6. UGANDA CONST. ch. 12, § 212.
7. *Id.* at ch. 12, § 218.
8. *Id.* at ch. 12, § 208-209.
9. *Id.* at ch. 12, § 212.
10. Jemera Rone and Julianne Kippenberg, *State of Pain: Torture in Uganda*, HUMAN RIGHTS WATCH, Vol. 16, No. 4(a), Mar. 2004, at 19.
11. UGANDA CONST. ch. 12, § 209.
12. Rone & Kippenberg, *supra* note 10, at 19.

		• Has the power of arrest but no legal power of detention except for violations of military code by its personnel. Arrested suspects must be released to the custody of the police.[12]
The Chieftaincy of Military Intelligence (CMI)	CONST. ART. 218: Intelligence Services	• Responsible for investigation of terrorism and political opposition[13] • Common power to arrest; no power of detention[14]
The Internal Security Organization (ISO) / The External Security Organization (ESO)	NO LEGAL MANDATE	• Responsible for security and security abroad[15] Common power of arrest; no power of detention[16]
The Joint Anti -Terrorist Task Force (JATF)	NO LEGAL MANDATE	• Created after the enactment of the Anti-terrorism Act in 2002 to assess terrorist activities in the country[17] • Common power of arrest; no power of detention[18]
The Kalangala Action Plan (KAP)	NO LEGAL MANDATE	• Created as part of Museveni's election strategy to target members of the opposition[19] • Common power of arrest; no power of detention[20]
Operation Wembley (presently Violent Crime Crack Unit (VCCU))	NO LEGAL MANDATE	• Crime fighting entity designed to address the high levels of crime in the urban area[21] • Common power of arrest; no power of detention[22]

The aforementioned paramilitary forces are allowed under the "State of Emergency" power provided for in Article 110 of the Constitution.[23] Here, the

13. Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, UGANDA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2002 (March 31, 2003), *at* http://www.state.gov/g/drl/rls/hrrpt/2002/18232.htm.
14. Rone & Kippenberg, *supra* note 10, at 20.
15. *Id.*
16. *Id.*
17. *Id.*
18. Rone & Kippenberg, *supra* note 10, at 19.
19. *Id.*
20. *Id.*
21. *Id.* at 19, 21.
22. *Id.* at 21.

President has the power to take "measures which are required for securing the public safety, the defense of Uganda and the maintenance of public order and supplies and services essential to the life of the community."[24] Since these paramilitary forces are allegedly necessary to protect the public's safety, they are not illegal. However, Article 110(2) only allows for these forces to be in power for ninety days.[25]

B. Summary of the Laws

The Constitution of Uganda permits any person to arrest an individual who has allegedly committed a crime or is thought to have committed a crime.[26] Once an arrest has been made, the suspect must be turned over to the police because the police are the only entity with the power to detain.[27] Within forty-eight hours of arrest, the suspect must be presented in court or released on bond.[28] The court then has the opportunity to remand the suspect for 120 days or 360 days, depending on the severity of the crime, until the commencement of the trial.[29] At the end of this period, the suspect must be tried by a court of law or released from the charges.[30]

C. Arrest Without Probable Cause

Article 23(4)(b) of the Constitution allows a person to be arrested "upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda."[31] Ultimately, this allows for an arrest prior to the actual execution of the crime. The United Nations defines arrest as the "act of apprehending a person for the alleged commission of an offence or by the action of an authority."[32] Under this definition it is necessary for an alleged offense to have been committed. However, the Uganda Constitution allows for an arrest when a law enforcement agent thinks the individual might partake in a criminal activity, even in the absence of any probable cause.[33] Typically, an arrest is made prior to any substantive investigation. As the Chief Justice observed in *Kalanima v. Uganda*, "the policemen arrest people before they have evidence to support the arrest and

---

23. UGANDA CONST. ch. 7, § 110(1)(c).
24. *Id.*
25. *Id.* at § 110(2).
26. UGANDA CONST. ch. 4, § 23(4)(b).
27. Rone & Kippenberg, *supra* note 10, at 19.
28. UGANDA CONST. ch. 4, § 23(4)(b).
29. *Id.* at ch. 4, § 23(6)(b)–(c).
30. *Id.*
31. *Id.* at ch. 4, § 23(4)(b).
32. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 76th plen. Mtg., at Annex (a), U.N. Doc. A/43/173 (1988).
33. UGANDA CONST. ch. 4, § 23(4)(b).

then, after arresting, they go out and find evidence to justify the arrest."[34] This is what happened to a sixty-year-old man from the village of Bulungu, whom I will refer to as Wilson.[35] Wilson was arrested on charges of defilement, based on an accusation made by a mother who had suspicions that he was intimately involved with his daughter. Without any evidence to substantiate the claim, the police arrested Wilson and then proceeded to investigate the case. The police discovered through medical examination that the girl had not been defiled. The officers clearly lacked enough evidence to substantiate a claim, particularly after the mother conceded that she had made a false allegation. However, Wilson suffered four days in detention despite the lack of any substantiated allegation. Ideally, the investigation, including the medical examination of the child, would have been performed *before* the arrest. Investigation prior to the arrest would have prevented undue cost and prevented Wilson's fundamental rights from being violated.

Under the laws of Uganda everyone has the right to make an arrest, including civilians.[36] This leads to further problems because, in Uganda, arrests lead to detention, and when an arrest is made by an unqualified law enforcer, arbitrary arrests and unreasonable detentions become far too common, and in turn overwhelm the penal institutions. The right to make an arrest also gives paramilitary agencies without any legal mandates the power to act as enforcement agents and make arrests at will.[37] However, only the police force has the right to detain.[38] Others, including civilians, the military, and paramilitary officers must release a suspect to the police immediately upon arrest.[39] Unfortunately, immediate release to police is rarely followed because most suspects arrested by ad hoc security groups are detained in illicit "safe houses" or unauthorized military detention centers for significant periods of time prior to being handed over to the police.[40] As Human Rights Watch observed, "These unacknowledged places of detention are not visited by outsiders nor by government officials charged with inspecting conditions inside detention cells. The government is provided 'denialability' by holding the

34. Benjamin J. Odoki, *Reducing Delay in the Administration of Justice: The Case of Uganda*, 5 CRIM. L. F. 57, 78–79 (1994) (citing *Kulanima v. Uganda*, 1971 High Ct. Bull. 210, 211 (Uganda High Ct.)).

35. Interview with suspect, name changed for security, at Naggalama Police Station, Naggalama, Uganda (June 10, 2004). Interviews throughout this paper were done by the author as a representative for the Foundation Human Rights Initiative (FHRI), in Kampala, Uganda.

36. Rone & Kippenberg, *supra* note 10, at 19.

37. Since paramilitary forces are acting without any legal mandate, they are acting as a unauthorized civilian group, and therefore would have the right to make a civilian arrest. This would not allow them to detain suspects however; it would merely provide them the opportunity to bring the suspect to proper authorities.

38. Rone & Kippenberg, *supra* note 10, at 19.

39. *Id.*

40. In this paper, ad hoc agencies or security groups refer to paramilitary forces, the Ugandan military, and the Chieftaincy of Military Intelligence.

detainees in secret, and this creates a feeling of impunity among security and intelligence officers."[41] Consider the following actual cases that were revealed:

- Man in early thirties arrested for alleged robbery and detained in a "safe house" at Makindye military barracks for thirty-one months prior to being released to police custody.[42]
- Man in mid-thirties arrested for alleged robbery, was detained for two years in a "safe house" at Makindye military barracks and Kireka, the VCCU's headquarters.[43]

This stage of the criminal process is also inhabited by corruption in the police force.[44] Corruption at this stage occurs in many forms: police officers accepting bribes to make arrests, making arrests as favors for friends, reducing charges for a "fee," ignoring crimes for a trivial fee, and making arbitrary arrests for political reasons. [45]

Police officers are paid the pitiful salary of 75,591 shillings (approx. $44.00) a month[46] and, therefore, are vulnerable to accept bribes from third parties to arrest innocent civilians or refrain from making arrests when a crime has clearly been committed. The following examples illustrate the problems related to such low pay:

- Assistant Commissioner of Police-Crime Division accepted ten million shillings from suspect, Mohammed Zakey, for reducing murder charges to manslaughter.[47]
- In exchange for an unknown sum of money from the mother of a sixteen-year-old girl, officers arrested and detained girl for being pregnant, which is not a crime under Uganda's penal system.[48]
- Pakistani charged with being a "whistleblower" was offered the opportunity to escape all charges in return for one million shillings.[49]

---

41. Rone & Kippenberg, *supra* note 10, at 59.

42. Interview with suspect, name withheld for security, at Old Kampala Police Station, in Old Kampala, Uganda (May 26, 2004).

43. Interview with suspect, name withheld for security, at Old Kampala Police Station, in Old Kampala, Uganda (May 26, 2004).

44. *See* REPORT OF THE JUDICIAL COMMISSION, *supra* note 1, at 45-49,261; *See also* Anne Mugisa, *Combating Corruption in the Judiciary: The Role of the Press,* African Judicial Network Conference, Bamako, Mali (Feb 18-20, 2003)., *available at http://ajn.rti.org/index.cfm?fuseaction=countries&countryID=11&l=eng.*

45. *Id.*

46. This is the salary for an officer at the rank of Constable. A constable is a police officer with no command responsibility. Constables perform general police duties including traffic and population control, and other minor duties. REPORT OF THE JUDICIAL COMMISSION, *supra* note 1, at 261.

47. REPORT OF THE JUDICIAL COMMISSION, *supra* note 1, at 22.

48. Interview with suspect, name withheld for security, at Old Kampala Police Station, in Kampala, Uganda (May 26, 2004).

49. Interview with suspect, name withheld for security, at Kampala Central Police Station, in Kampala, Uganda (May 27, 2004).

Political arrests are customary and commonplace especially during times of elections and mayhem. Since its independence, Uganda has had a long history of distrust of opposition groups and arbitrary arrests and detainments of opposition members. This hasn't changed under President Museveni's rule.[50] According to Human Rights Watch (HRW), many of the present- day political arrests concern supporters of the 2001 presidential candidate Kizza Besigye and his People's Redemption Army.[51] Other arrests concern the supporters of the Allied Democratic Forces and the National Democratic Army, which are considered to be rebel groups by the present government.[52] HRW noted that these political arrests are made regardless of whether the person was supporting these opposition forces or only acquainted with opposition members:

> These people have been captured in their homes or fields in rural areas, often their workplaces, quite apart from any hostilities. In many cases, suspects believe they were detained only because they personally knew those alleged to be fomenting rebellion, whether from place of origin, school, living abroad, marriage, or other relationship.[53]

One detainee at Luzira Prison was arrested and detained in relation to his alleged involvement in an armed rebellion merely because he was a classmate of Kizza Besigye's, and coincidentally, his late wife was also a classmate of Besigye's wife.[54] The customary practice of arbitrarily detaining a suspect for his political beliefs is customary and expected by Ugandan leaders. However, arbitrarily detaining a suspect is done in clear violation of Uganda's Constitution; Article 23(4) requires that an individual at least be suspected of a crime, yet these "suspects" are merely suspected of associating with particular political groups and are not suspected of any crime.[55]

Still, financial and political incentives are not the only reasons for the corruption. Many of the arbitrary arrests are made merely for the benefit of a friend or family member. Consider the situation of Sulaiman, a thirty-five-year-old man from Mukono.[56] Sulaiman separated from his wife due to her extra-marital relations, leaving Sulaiman with eight children to mind. After many years, the family even believed the wife to be dead since they did not know her

---

50. *See* Rone & Kippenberg, *supra* note 10. *See also* John D. Rusk, *Uganda: Breaking Out of the Mold?*, Africa Rights Monitor Report, 33 AFRICA TODAY, 91, 100 (2nd, 3rd Quarters, 1986).

51. Rone & Kippenberg, *supra* note 10, at 23-24.

52. *Id.* at 24.

53. *Id.*

54. Rone & Kippenberg, *supra* note 10, at 24 n. 35 (citing, *Human Right Watch Interview*, Luzira Prison, Uganda, June 19, 2003).

55. This is also in violation of the Constitution for discriminatory reasons. *See* UGANDA CONST. ch. 4. § 21(2).

56. Interview with thirty-five-year-old from Mukono, name withheld for security, at Kampala Central Police Station, in Kampala, Uganda (May 27, 2004).

whereabouts. When one of his eight children passed away in medical facilities after having fallen ill with something resembling measles, the wife returned with her boyfriend, who happened to be a VCCU officer. Although it is documented that the child passed away due to a serious illness, the VCCU arrested Sulaiman for murder at the request of the officer's girlfriend.

Other arrests appear to be made solely because the officer has the power to do so. Consider Geoffrey's case:[57] Geoffrey was having lunch at a restaurant when officers came and arrested the stranger sitting across from him. Geoffrey mistakenly asked where the officers were taking the man and the officers became angry and chopped off Geoffrey's pinky finger, arrested him, and detained him absent any charges against him.

The period of arrest is crucial to the effectiveness of the entire justice system. Yet, regularly in Uganda, suspects are arrested arbitrarily or without sufficient evidence. This leads to long stays in police stations prior to being brought to court, long delays on remand, and fundamental human rights being taken away from "innocent" civilians.[58]

D. Forced Confessions and Questionable Investigative Techniques

Investigations in Uganda are performed haphazardly, leading to lengthy detentions, arbitrary arrests, and violations of fundamental human rights. Investigations are impeded by archaic ways of obtaining information, negligence, corruption and logistical barriers. Proper investigations are needed so that reliable evidence is accrued and suspects are provided with a fair and impartial trial.

Ad hoc security agencies use renowned torture chambers, so-called "safe houses," to perform barbaric investigations to obtain confessions or other desired information.[59] Notwithstanding the lack of reliability of evidence retrieved under these nefarious methods, officers of these ad hoc agencies put extreme pressure on suspects to confess or concede through the use of physical and emotional torture.[60] Some of their common torture methods include caning with batons and electric wires,[61] shocking with electrical devices,[62] hanging rocks from the prisoners' testicles or twisting their penises,[63] physical

57. Interview with suspect, name changed for security, at Kampala Central Police Station, in Kampala, Uganda (May 27, 2004).

58. Under the Ugandan Constitution, ch. 4 § 28(3)(a), a suspect is innocent until proven guilty by a court of law.

59. *See* Rone & Kippenberg, *supra* note 10, at 7.

60. Interviews with suspects, names withheld for security purposes, at Old Kampala Police Station , Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 – August 10, 2004).

61. *Id.*

62. *Id.*

63. *Id.*

mutilation,[64] kandoya,[65] "Liverpool" water torture,[66] showing of corpses,[67] exposure to poisonous snakes,[68] injecting hypodermic needles into the prisoners' genitals,[69] strangulation,[70] and kicking the prisoners' abdomens.[71] Aside from the physical torture, suspects undergo strenuous mental abuse as they are typically isolated from other suspects and held underground with no access to sunlight, and repeatedly humiliated and mocked by their commanding officers.[72] In the eyes of the paramilitary, torture is a necessary mechanism to retrieve information from its suspects.[73] This notion was clearly endorsed to the public by Col. Noble Mayombo of the Chieftaincy of Military Intelligence (CMI).[74] The following documented examples demonstrate the use of torture to compel a confession:

- Thirty-five-year-old male was forced to confess by VCCU officers to charges of theft by hanging bricks from his genital area.[75]
- Thirty-year-old male was beaten by VCCU officers with electric wires and batons until he confessed to stealing a parcel.[76]
- Twenty-seven-year-old male was threatened by CMI officers that if he did not confess to stealing a motorcycle they would press his genitals so hard that he would never be capable of having children.[77]

Though torture is a common mechanism to elicit confessions, the laws of Uganda prohibit the use and admissibility of such forced confessions.[78] Section 25 of the Ugandan Evidence Act imparts that:

---

64. *Id.*

65. Kantoya is the process of tying the suspect's hands and feet together behind the suspect's back. Rone & Kippenberg, *supra* note 10, at 4.

66. Liverpool water torture is a method where a suspect is forced to lie face up with his mouth open under a water spigot. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 23.

70. *Id.* at 4.

71. Interviews with suspects, names withheld for security, at Old Kampala Police Station, Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 through August 10, 2004).

72. *Id.*

73. *See* FHRI Talk Show: *Manya Eddembe Lyo* (Central Broadcasting Services radio broadcast May 2004) (Col. Noble Mayombo appearing on talk show).

74. Col. Noble Mayombo appearing on FHRI talk show *"Manya Eddembe Lyo"* on Central Broadcasting Services May 2004. *The Reporter*, FHRI 2004.

75. Interview with suspect, name withheld for security, at Kampala Central Police Station, in Kampala, Uganda (May 27, 2004).

76. Interview with suspect, name withheld for security, at Jinja Road Police Station, in Kampala, Uganda (May 24, 2004).

77. Interview with suspect, name withheld for security, at Kampala Central Police Station, in Kampala, Uganda (May 27, 2004).

78. Daniel D. Ntanda Nsereko, *The Poisoned Tree: Responses to Involuntary Confessions*

> A confession made by an accused person is not admissible in criminal proceedings if the making of the confession appears to the court to have been caused by inducement, threat or promise having reference to the charge against the accused, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil or a temporal nature in reference to the proceeding against him.[79]

Unfortunately, in contrast to forced confessions, admissions are admissible even if made as a result of torture.[80] An admission is an acknowledgment of the existence of facts which are usually favorable to an adversary but that do not amount to a confession.[81] Generally speaking, a confession admits guilt of a particular offense while an admission concedes only to a particular point which may or may not result in a conviction. Since admissions are admissible in court proceedings, torture is an effective way to guarantee a conviction; an officer can torture a suspect until the suspect concedes to certain facts, making the prosecutor's case plausible and compelling.

Upon receiving a suspect's confession, the aforementioned ad hoc security agencies transfer the suspects to police stations.[82] Though it is required that they transfer a suspect immediately upon arrest, it could be several weeks or months until security agencies deliver the suspect to a police station.[83] Kampala Central Police Station (CPS) is a favorite police station of ad hoc security units.[84] Although the security agencies use other urban police stations to house their suspects, the majority of detained suspects are found at CPS. Table 2 lists every documented suspect detained at CPS on May 27, 2004 by ad

---

in Criminal Proceedings in Botswana, Uganda and Zambia, 5 AFR. J. INT'L & COMP. L. 609, 618 (1993) (citing Uganda Evidence Act, §25, Laws of Uganda, cap. 43).

79. *Id.* at 618.

80. *Id.* at 630.

81. *See* BLACKS LAW DICTIONARY 48 (7th ed. 1999); *see also* Nsereko, *supra* note 78, at 630.

82. Interview with the Divisional Police Commander (DPC), Mr. Steven Munchara Kassiima, at Kampala Central Police Station, in Kampala, Uganda (May 27, 2004).

83. Interviews with suspects, names withheld for security purposes, at Old Kampala Police Station , Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 – August 10, 2004).

84. Rural Police Stations conceded that they rarely hold other agencies' suspects. Kampala Central Police Station's Observer/Controller (O/C) conceded that there are at least ten suspects detained at any given time that are not under his control. Jinja Road Police Station, Katwe Police Station, and Old Kampala Police Station reported that they usually have around two suspects not under their control. Interview with Onencan J. Stevens, O/C, at Jinja Road Police Station, in Kampala, Uganda (May 24, 2004); Interview with Officer Ngobi, O/C, at Old Kampala Police Station, in Old Kampala, Uganda (May 26, 2004); Interview with O/C, Officer Doka, at Katwe Police Station, in Katwe, Uganda (June 1, 2004).

hoc security agencies. The table shows the length of time the suspect was detained in the "safe house" and the length of time each suspect spent in the police station as of May 27, 2004. It also includes a summary of the torturous methods used on these suspects in order to obtain a confession.

Table 2: All suspects detained by ad hoc security agencies at Kampala Central Police on May 27, 2004.[85]

	Age (years)	Security Unit	Time in "Safe Houses"	Time in CPS	Torture suspects received at the Safe House
1	~30	JATF	3 weeks	42 days	Head shoved in toilet; boiling water burns; beaten with batons and wires
2	49	Unknown	1 day	2 days	Whipped and scourging resulting in massive scars; struck with unknown wooden objects; hit him with cane; suffers from swollen joints and chunks of skin missing.
3	22	VCCU	1 week	4 months	Finger chopped off; beaten with batons and wires resulting in visible scars
4	40	VCCU	3 weeks	4 months	Beaten with batons, wires, sticks resulting in massive scars on his back and deformed knees with little flexibility
5	20	VCCU	3 weeks	4 months	Paralyzed left side of body from beating with batons and wires; repeatedly kicked in the genital areas
6	35	VCCU	1 week	6 months	Beaten with baton below right knee resulting in fracture to the fibula
7	35	UPDF	41 months	1 ½ weeks	Bricks tied to his genitals; beaten with electric wires and batons; forced to wear only underpants in safe houses
8	47	VCCU	4 months	~ 2 weeks	Hit with baton on kneecaps and other joints; beaten with electric wires
9	34	VCCU	8 months	~2 ½ months	Beaten with electric wires and batons
10	30	UPDF	2 years	1 month	Bullet in the side of his torso; beaten with batons and electric wires.

85. Interviews with suspects, names withheld for security, at Kampala Central Police Station, in Kampala, Uganda (May 27, 2004).

11	37	VCCU	8 days	3 weeks	Beaten with electric wires and batons across knees and hands; hands tied between his legs; legs swollen from beating
12	34	CMI	1 month, 1 week	3 weeks	No torture mentioned
13	27	CMI	20 days	2 days	Beaten with metallic bar across knees; threatened that his genitals would be beaten so he would never have children
14	32	CMI	2 months, 3 weeks	~ 1 month	Beaten with batons on knees, back, and ankles; beaten in genitals so that urine came out in small drops

Investigations are also impeded by corruption, adding to the breakdown of the penal system. Similar to the corruption associated with arrest, investigations are misappropriated for a fee or for the benefit of a friend or relative, and for political incentives to intervene in investigations. Some examples of this include:

- Claver Byamugisha, Observer/Controller (O/C) Serious Crimes Department, received a bribe of one million shillings in order to foil an investigation against Medi Ssebaggala arrested for the possession of counterfeit checks. Byamugisha shelved all evidence of the counterfeit checks and failed to pursue any further investigations.[86]
- Chris John Bakiza, Director/Criminal Investigation Department (CID), received a bribe of 100 million shillings from Karim Hirji to misappropriate its investigations by failing to exhaust any leads implicating Hirji.[87]

Some investigators attempt to obtain information by violating a third party's personal freedoms and liberties. Most investigations have drawbacks, including compromised or missing evidence, dead ends, and false leads.[88] Often, investigators avoid these problems by detaining third parties who "might" have some information.[89] These third parties include friends of suspects, people who were seen in the same area as a suspect prior to the

86. REPORT OF THE JUDICIAL COMMISSION, *supra* note 1, at 45-49.

87. *Id.* at 15-21.

88. Interviews with O/Cs, at Old Kampala Police Station, Jinja Road Police Station, Katwe Police Station, Naggalama Police Station, Lugazi Police Station, and Mukono Police Station, in Uganda (May 24, 2004 – June 10, 2004).

89. Interviews with suspects, names withheld for security, at Old Kampala Police Station, Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 through August 10, 2004).

commencement of the crime, and bystanders who innocently involved themselves in the criminal operation.[90] Investigators will typically charge this third party with the offense of the actual suspect with the hope that the person will break down and disclose evidence about the actual suspect.[91] This leads to further arbitrary arrests when names are haphazardly given as a result of torture. There is usually at least one of these victims being detained at a police station at a given time.[92] For example:

- A Sudanese man in his thirties had been detained for ten days at the time of his interview for knowing the whereabouts of his friend who eloped with an underage girl.[93]
- A fifteen-year-old boy detained for over one week at the time of his interview because he allegedly knew the whereabouts of the boy who murdered a man. Investigators believed he knew this information because he had lent the boy his bicycle prior to the incident.[94]

This is a haphazard method of investigation, which is not only cost ineffective, but a blatant violation of human rights.[95]

E. The Forty-Eight Hour Provision

Article 23(4) of the Ugandan Constitution reads, "A person arrested or detained . . . shall, if not earlier released, be brought to court as soon as possible, but in any case not later than forty-eight hours from the time of his or her arrest."[96] A majority of suspects, even suspects of petty crimes, are detained in the police stations for longer than forty-eight hours as a result of a variety of factors, including (1) lack of control over the suspect, (2) lack of ample transportation, (3) backlog at the Directorate of Public Prosecution's office, and (4) corruption.[97]

---

90. *Id.*

91. *Id.*

92. Observational visits, at Old Kampala Police Station, Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 through August 10, 2004).

93. Interview with suspect, name withheld for security, at Kampala Central Police Station, in Kampala, Uganda (May 27, 2004).

94. Interview with suspect, name withheld for security, at Mukono Police Station, Mukono, in Uganda (June 10, 2004).

95. *Universal Declaration on Human Rights,* G.A. Res. 217A (III), U.N.GAOR, art.9 (1948); *African Charter on Human and Peoples' Rights,* Organization of African Unity, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, art. 6 (1982) [hereinafter *African Charter*].

96. UGANDA CONST. ch. 4, § 23(4)(b).

97. Interviews with O/Cs, at Old Kampala Police Station, Jinja Road Police Station, Katwe Police Station, Naggalama Police Station, Lugazi Police Station, and Mukono Police Station, in Uganda (May 24, 2004 – June 10, 2004).

As previously mentioned, ad hoc security agencies often detain suspects in "safe houses" prior to releasing them to police custody.[98] Testimonials from suspects support the conclusion that suspects spend a minimum of one week at these unofficial detention centers.[99] Most spend months there, and some spend as long as two years.[100] Detaining the suspects in these safe houses for longer than the forty-eight hours is clearly in violation of the Constitution.[101] Not only do these suspects spend considerable time in these illicit locations, they also remain in the police stations far longer than the mandated forty-eight hour maximum.[102] The police have no control over suspects brought into the police stations by the ad hoc security agencies; the station merely becomes a "legal" place for these suspects to reside until their release.[103] As Commander Steven Munchara Kassiima reported, suspects detained in the stations by the paramilitary forces are not under police control.[104] Sometimes, they are even detained apart from the other suspects in the cells, and officers almost never know the charges against the suspects.[105]

Corruption in the police system also leads to the persistent violation of the forty-eight hour provision.[106] At this stage of the judicial process, corruption occurs in abundance.[107] The corruption that impedes proper investigations and causes arbitrary arrests also affects the timely release of suspects.[108] Timely releases can be hampered by police demands for a fee in order to be released on bond. Ideally, bond is supposed to be granted to any suspect charged with a minor offense, such as petty theft or assault, or to any suspect, regardless of the

98. Interviews with suspects, names withheld for security, at Old Kampala Police Station, Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 through August 10, 2004).

99. UGANDA CONST. ch. 4, § 23(4)(b).

100. *Id.*

101. *Id.* at ch. 4, § 23(4). *See also id.* at ch. 4, § 23(2) (prohibiting the use of safe houses).

102. Interviews with suspects, names withheld for security, at Old Kampala Police Station, Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 through August 10, 2004).

103. Interview with Commander Steven Munchara Kassiima, District Police Commander (DPC), at Kampala Central Police Station, Kampala, in Uganda (May 27, 2004).

104. *Id.*

105. *Id.*

106. Interviews with O/Cs at Old Kampala Police Station, Jinja Road Police Station, Katwe Police Station, Naggalama Police Station, Lugazi Police Station, and Mukono Police Station, Uganda (May 24, 2004 – June 10, 2004); Interviews with suspects, names withheld for security, at Old Kampala Police Station, Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 through August 10, 2004).

107. *See* REPORT OF THE JUDICIAL COMMISSION, *supra* note 1, at 45-49,261.

108. Interviews with suspects, names withheld for security, at Old Kampala Police Station, Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 through August 10, 2004).

crime, who has been detained for forty-eight hours.[109] Regardless of the reason for releasing the suspect on bond, there is no charge associated.[110] A suspect should not have to pay a fee in order to be released on bond.[111] Unfortunately, almost all suspects are asked to pay a fee to be released on bond.[112] Consider the following instances:

- A seventeen year-old boy was detained for charges of defilement and was offered bond in return for a payment of 500,000 shillings.[113]
- An eighteen year-old boy detained for defilement and was offered bond in exchange for three million shillings.[114]

Most suspects are unable to pay these exorbitant fees and, therefore, are forced to remain in the police cells until the officers decide to move the case forward to court.[115] However, suspects typically have some petty cash available that they can bribe officers with to push their cases forward.[116] This, however, is a double-edged sword. Why would an officer want to push a case forward when the suspect is paying him small sums of money each day? Hence, the officer might deceive the suspect so that he believes that the officer is helping to push his case forward.

Some of the reasons for violation of the forty-eight hour provision are not so purposeful. Many of the delays are due to logistical problems, such as lack of transportation, backlog at the Directorate of Public Prosecution's Office, and lengthy investigations. Most of the police stations are supplied with only one vehicle, which is to be used for investigations, to transport suspects and witnesses to court, and for stationing officers.[117] Even though the vehicle is to be used for these purposes, many times a station's vehicles are used for personal errands of high ranking officers.[118] In addition, investigations alone

109. Interview with Commander Steven Munchara Kassiima, District Police Commander (DPC), at Kampala Central Police Station, in Kampala, Uganda (May 27, 2004).

110. *Id.*

111. *Id.*

112. Interviews with suspects, names withheld for security, at Old Kampala Police Station, Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 through August 10, 2004).

113. Interview with suspect, name withheld for security, at Katwe Police Station, Katwe, Uganda (June 1, 2004).

114. Interview with suspect, name withheld for security, at Old Kampala Police Station, Old Kampala, Uganda (May 26, 2004).

115. Interviews with suspects, names withheld for security, at Old Kampala Police Station, Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 through August 10, 2004).

116. *Id.*

117. Interviews with O/Cs, at Old Kampala Police Station, Jinja Road Police Station, Katwe Police Station, Naggalama Police Station, Lugazi Police Station, and Mukono Police Station in Uganda (May 24, 2004 – June 10, 2004).

118. Interviews with O/Cs at Old Kampala Police Station, Jinja Road Police Station, Katwe

take a significant period of time. Since the infrastructure is lacking in Uganda, especially in the rural areas, following a lead can be difficult. In Uganda, it can take hours to perform even a simple task, such as finding a witnesses' home. Although, police budgets often include money for new vehicles, corruption in the Ministries often prevents vehicles from reaching their destinations.[119] The Registrar of the High Court-Kampala, His Worship Lawrence Gidudu, expressed his concern regarding the issue of transportation.[120] He reported that vehicles that have been donated or budgeted to police stations and other detention facilities are often used for other matters, sometimes even for personal reasons, by Ministry officials.[121] Also, money designated to supply fuel for transport is often frivolously spent, further adding to the problems with transporting suspects.[122]

The backlog at the Directorate of Public Prosecution's office (DPP) also leads to a delay in bringing the suspect to court. This delay is likely a result of the large number of cases that the DPP's office handles and the lack of state prosecutors to handle cases.

Yet, even when there are no conditions hindering investigations, it is still unreasonable to expect that the police officers will finish their investigations within forty-eight hours. Since it is customary to make an arrest before any substantive investigations are performed, the police officers would have only forty-eight hours to gather enough evidence to put before a magistrate.[123] This is an unrealistic goal. The laws of Uganda provide a loophole to this problem, however, by allowing a suspect to be remanded while further investigations are being made.[124]

Police Station, Naggalama Police Station, Lugazi Police Station, and Mukono Police Station, Uganda (May 24, 2004 – June 10, 2004).

119. Interview with His Worship Lawrence Gidudu, Registrar of Kampala High Court, in Kampala, Uganda. (June 10, 2004).

120. *Id.*

121. *Id.*

122. *Id.*

123. Interviews with O/Cs, at Old Kampala Police Station, Jinja Road Police Station, Katwe Police Station, Naggalama Police Station, Lugazi Police Station, and Mukono Police Station, in Uganda (May 24, 2004 – June 10, 2004).

124. This fact is also observed in the field. It seems that prosecutors do not have sufficient evidence to secure a conviction, so they send the suspect on remand until they can acquire this evidence. *See* Odoki, *supra* note 34, at 78 (citing *Kulanima v. Uganda*, 1971 High Ct. Bull. 210, 211 (Uganda High Ct.)). *See also* UGANDA CONST. ch. 4, §23(6)(b) (providing for bail if the person has been remanded for 120 days). Observational visits at Kawolo Local Administration Prison in Kawolo-Mukono, Uganda (June 11, 2004) and Mukono-Kauga Local Administration Prison, Kauga, Uganda (June 11, 2004).

F. Condition of Police Cells

Since suspects regularly spend considerable time in police cells before attending court, it would at least be comforting to know that the suspects' accommodations are decent. Unfortunately, accommodations are less than desirable. Cells are overcrowded, facilities unhygienic, and bathing and drinking water inaccessible.[125] Such conditions only make the long length of the stay that much worse.

Overcrowding in the cells has become a problem due to the delay in bringing suspects to court. Ideally, there should be as many suspects leaving the cells as entering on any given day. The detention facilities in most of the cells are small; many of them are merely two ten-foot by ten-foot rooms connected by a hallway with a small bathing facility at the end.[126] Some facilities are fortunate enough to have a third room.[127] The newest facility in Kampala, the Kampala Central Police Station, has addressed the space issue.[128] This facility has an underground cell with at least a dozen rooms, two large foyers, and multiple bathing areas and toilet facilities.[129] Ideally, once at capacity, other police stations would transfer suspects to Kampala Central, which can adequately hold extra suspects. Officer Ngobi, the Officer-in-Charge of Old Kampala Police Station reported that he never allows his cells to become overcrowded, and that when cells reach capacity, he transfers suspects to Kampala Central or Jinja Road Police Stations.[130] While this is admirable, Jinja Road Police Station should not accept transfers, as it averages forty-five suspects per day and its capacity is only thirty![131]

Health and sanitation is also a concern in many of Uganda's police stations. Most police stations in Uganda lack water, soap, and garbage

125. These issues are common at most police stations, though there are some that have dealt with this situation accordingly. Observations from visiting Kampala Central Police Station, Jinja Road Police Station, Naggalama Police Station, Mukono Police Station, Old Kampala Police Station, Lugazi Police Station and Katwe Police Station, in Uganda (May 19, 2004 through August 10, 2004).

126. Observation from visiting Kampala Central Police Station, Jinja Road Police Station, Naggalama Police Station, Mukono Police Station, Old Kampala Police Station, Lugazi Police Station and Katwe Police Station, in Uganda (May 19, 2004 through August 10, 2004).

127. Katwe Police Station is an example of a police station with a third room.

128. Kampala Central Police Station is the only station with a large detention facility. Observation from visiting Kampala Central Police Station, Jinja Road Police Station, Naggalama Police Station, Mukono Police Station, Old Kampala Police Station, Lugazi Police Station and Katwe Police Station, in Uganda (May 19, 2004 through August 10, 2004).

129. Observational visits Kampala Central Police Station, Kampala, Uganda (May 27, 2004 - August 10, 2004).

130. Interview with Officer Ngobi, O/C, at Old Kampala Police Station, in Old Kampala, Uganda (May 26, 2004).

131. Interview with Onencan J. Stevens, O/C, at Jinja Road Police Station, in Kampala, Uganda (May 24, 2004 & June 21, 2004).

depositories, which leads to a filthy and unhygienic facility for suspects.[132] At Jinja Road Police Station, the toilet failed to flush and personal waste was left exposed and not removed for days, while windows were either blocked or lacking.[133] The result was an unventilated and stuffy area where mosquitoes were rampant due to the humid and filthy conditions.[134] Such problems are common in many Ugandan police stations. At Mukono Police Station, suspects were prevented from showering during their entire stay; some had not showered in over ten days, resulting in skin issues for many of the suspects.[135] The condition of detention facilities is an important issue that needs to be addressed so that suspects are not deprived of their fundamental human rights.

II. THE PROCESS OF REMAND

The process of remand is a per se violation of fundamental human rights and contradictory to Article 28(1) of the Ugandan Constitution, which provides for a speedy trial.[136] Article 23(6) of the Ugandan Constitution allows for a suspect to be detained pre-trial for 120 days or 360 days depending on whether the case is tried by a subordinate court or by the High Court.[137] Article 23(6) states:

> (b) in the case of an offence which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offence before trial for one hundred and twenty days;138
>
> (c) in the case of an offence triable only by the High Court the person shall be released on bail on such conditions as the Court considers reasonable, if the person has been remanded

132. Observational visits, at Old Kampala Police Station, Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station, in Uganda (May 19, 2004 through August 10, 2004).

133. Observational visit at Jinja Road Police Station, in Kampala, Uganda (May 24, 2004).

134. *Id.*

135. Observational visit at Mukono Police Station, Mukono, Uganda (June 10, 2004).

136. UGANDA CONST. ch. 4, § 28(1) ("In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.") *See also Universal Declaration of Human Rights, supra* note 95, at art. 10; *International Covenant on Civil and Political Rights, article 9(3); African Charter on Human Rights and People' Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S., art. 9(3), entered into force March 23, 1976.; *African Charter, supra* note 95, at art. 7(1).

137. UGANDA CONST. ch. 4, § 23(6).

138. *Id.* at ch. 4, § 23(6)(b).

> in custody for three hundred and sixty days before the case is committed to the High Court.139

A speedy trial is a fundamental human right that is being impinged upon by Uganda's remand process.[140] Even when the law is followed, a suspect has an extensive wait before being tried by a court of law. After being brought to court within forty-eight hours of arrest (ideally), the court typically remands the suspect for either 120 or 360 days, depending on the severity of the case, prior to trial.[141] Some courts have ruled that there must be probable cause to further detain the suspect.[142] Regardless of whether probable cause is shown, however, the suspect has effectively been denied a speedy trial. And yet, in Uganda, a suspect would be lucky to only be detained for such a length of time prior to trial.

Similar to the situation in the police stations, suspects on remand often are deprived of their rights under the laws of Uganda. Article 28(3)(a) of Uganda's Constitution states, "Every person who is charged with a criminal offence shall-- be presumed to be innocent until proved guilty or until that person has pleaded guilty."[143] Therefore, a suspect being held on remand is innocent until his trial before the court. Ironically, suspects on remand are detained in the same detention centers, and sometimes even the same cells, as convicted offenders.[144] In Kawolo Local Administration Prison there were ninety-nine male detainees at the time of their interview, thirty-one of which were convicts and sixty-eight were suspects on remand.[145] Both the suspects and the prisoners were housed together and forced to work in strenuous conditions to grow their own food and to maintain their own facilities.[146] At Mukono-Kauga Local Administration Prison, where there were eighty-one convicts and 126 remanded suspects, suspects and prisoners alike were required to fetch water three times a day from a well located two miles from the facility.[147]

The requirement that suspects be released from all charges if not brought to court within the specified remand period is often violated. [148] Table 3

---

139. *Id.* at ch. 4, § 23(6)(c).

140. See *Universal Declaration of Human Rights*, *supra* note 95, at art. 10; *African Charter*, *supra* note 95, at art. 7(1).

141. UGANDA CONST. ch. 4, § 23(6).

142. Rone & Kippenberg, *supra* note 10, at 60.

143. UGANDA CONST. ch. 4, § 28(3)(a).

144. Observational visits, at Old Kampala Police Station, Kampala Central Police Station, Jinja Road Police Station, Mukono Police Station, Lugazi Police Station, Katwe Police Station and Naggalama Police Station in Uganda. (May 19, 2004 through August 10, 2004).

145. Observational visit, at Kawolo Local Administration Prison, in Kawolo-Mukono, Uganda (June 11, 2004).

146. *Id.*

147. Observational visit, at Mukono-Kauga Local Administration Prison, Kauga, Uganda (June 11, 2004).

148. UGANDA CONST. ch. 4, § 23(6).

articulates this problem. These statistics only consider suspects remanded for capital offences that are triable by the High Court.

Table 3: High Court cases (capital offenses) that were on remand in January 1990.[149]

	Remand Period	Number of Suspects (Total: 11,525)
	Below 6 months	767
	6 months – 1 year	3,575
Over Maximum Time →	1 year – 480 days	2,782
	480 days – 2 years	2,127
	2 years – 3 years	1,655
	3 years – 4 years	525
	4 years – 5 years	88
	Over 5 years	6

Few suspects, if any, should be detained over the mandatory period. However, Table 3 shows that 62% of all suspects sent on remand are being detained longer than the maximum period.[150] This is an alarming rate that should alert law enforcers and government officials that the present system of remand is flawed.

However, Article 23(6) of Uganda's constitution, which provides for remand of a suspect within 120 or 360 days, depending on the severity of the case, has improved the process of remand. Prior to implementation of the constitutional provision in 1995, the Magistrates' Court (Amendment) Statute § 74, provided that a suspect could remain on remand for 240 days or 480 days depending on the court trying the case.[151] Presently, further plans are in place to improve this system. The government has proposed that Article 23(6) of the Constitution be amended so that suspects tried by the High Court are remanded only for 120 days and suspects tried by subordinate courts are remanded for only sixty days.[152] To date, this proposed amendment is being considered by Parliament.[153] This is definitely an improvement, but there is plenty of room for further development. Even sixty days is a significant period of time to be detained *prior* to being found guilty by a court of law.

149. Odoki, *supra* note 34, at 76.

150. The sixty-two percent figure is derived from the figures presented in Table 3.

151. *See* Odoki, *supra* note 34, at 74 (quoting Magistrates' Court (Amendment) Statute, § 74 (1990)).

152. E-mail from Sheila Muwanga Nabachwa, Access to Justice Coordinator, Foundation for Human Rights Initiative (FHRI) (December 6, 2004) (on file with author).

153. *Id.*

III. THE COURT SYSTEM

The Ugandan court system should be a place where violators of the laws are punished; however, the court system also partakes in its own criminal activities.[154] A corrupt and inefficient judicial system only adds to the deprivation of a suspect's right to a fair and impartial trial.

After disposing of the dual court system that resulted from English colonialism, the Magistrates' Courts Act of 1964 established a unified court system.[155] This contemporary judicial system is composed of the Supreme Court of Uganda, the High Court, the Chief Magistrates' Court, the Magistrates' Courts of grades I through III, and the resistance committee courts.[156] Please refer to Table 4 for the roles and objectives of the different tiers in the unified court system.

Table 4: The different levels of courts in Uganda and their jurisdiction.

Supreme Court of Uganda	Appellate tribunal established in 1987 after the fall of the East African Court of Appeals. It hears first and second appeals from the High Court.[157]
High Court	Established in the Constitution. It has original and appellate jurisdiction. It hears capital cases including those crimes that carry the death penalty. It also has jurisdiction over matrimonial and probate issues, Constitutional questions, admiralty, and election petitions.[158]
Chief Magistrates' Court	This court has jurisdiction over criminal offenses except those that carry the death penalty. It also has appellate jurisdiction over cases heard at the Magistrates' Courts Grade I and II.[159]
Magistrates' Courts Grade I	Like the Chief Magistrates' Court, these courts have jurisdiction over cases not punishable by death. They, however, do not have jurisdiction over cases were the maximum sentence is life imprisonment. The maximum sentence is imprisonment for ten years.[160]
Magistrates' Courts Grade II	These courts have jurisdiction over minor offenses

154. Anne Mugisa, *Combating Corruption in the Judiciary: The Role of the Press*, African Judicial Network Conference, Bamako, Mali (Feb 18-20, 2003), *available at* http://ajn.rti.org/index.cfm?fuseaction=abstractsBamako2003 &paper=Mugisa&l=eng.

155. Odoki, *supra* note 34, at 59.

156. Republic of Uganda, Courts of Judicature, at http://www.judicature.go.ug (last visited December 19, 2005).

157. Odoki, *supra* note 34, at 60-61.

158. *Id.* at 61.

159. *Id.* at 62.

160. *Id.* (citing Magistrates' Courts (Amendment) Statute §158, No. 6/90 (1990) (Uganda)).

	with a maximum sentence of imprisonment for three years.[161]
Magistrates' Courts Grade III	These courts have jurisdiction over minor offenses with a maximum sentence of imprisonment for one year.[162]
Resistance Committee Courts	These Courts are composed of village councils at the local level elected from their community by their peers. They have jurisdiction over minor disputes including debts, contracts, trespass, real estate transactions, and marital statuses.[163]

One would hope that the administrators of justice would not participate in corruptive practices. However, in Uganda, magistrates and their staff actively partake in coercive practices. The Inspector General of Government has suggested that at least half of the defendants are encouraged to pay a bribe.[164] As one woman from the Toro district said, "In courts of law, winning a case depends on whether one has money or not. Right from the messenger, you have to oil the system."[165] Another woman exemplified this statement regarding her experience with the court: "I went to the Magistrates [sic] court, I had a case with someone who had killed my cow. Every time, I was taking money to court. The magistrate used to ask me if I had brought something."[166] If a bribe is made to benefit one party, the vital documents may be plucked out of the file or the file may mysteriously disappear.[167] Other times, the judgment is just never made.[168] In one case, where government officials were indicted for embezzling 14,000,000 shillings (approximately $8,250), the magistrate released the suspect and "forgot" to draft a judgment.[169] Upon inquiry by the inspector of courts, the magistrate claimed that the judgment was being typed and later tried to write a judgment which she back-dated.[170] She was caught when it was discovered that the date of the judgment was a Sunday, which is a day that courts are not in session.[171]

Sometimes the corruption has no effect on the judgment, but exhibit funds or bail money are not accounted for. A few years prior to 2003, the Judicial Commission of Inquiry discovered that 2.5 million shillings

161. *Id.* (citing, Magistrates' Courts (Amendment) Statute §157-158, No. 6/90 (1990) (Uganda)).

162. *Id.* (citing, Magistrates' Courts (Amendment) Statute §157-158, No. 6/90 (1990) (Uganda)).

163. *Id.* at 63-64 (citing Resistance Councils and Committees Statute, No. 9/87 (Uganda 1987)).

164. Anne Mugisa, *Combating Corruption in the Judiciary: The Role of the Press*, African Judicial Network Conference, Bamako, Mali (Feb 18-20, 2003)., *available at* http://ajn.rti.org/index.cfm?fuseaction=abstractsBamako2003 &paper=Mugisa&l=eng.

165. *Id.*

166. *Id.*

167. *See id.*

168. *See id.*

169. *Id.* at 3-4.

170. *Id.* at 4.

171. *Id.*

(approximately $2,500) of exhibit money was not accounted for.[172] Testimony from a court clerk provided that the magistrate and his secretary were holding the money in "safe custody" in the secretary's millet (produce) business.[173] Later the magistrate purchased a car with his share.[174]

Unfortunately, even when these activities are discovered, they are not adequately resolved. One magistrate, found to have stolen bail money, was merely required to pay the money back without ever facing criminal charges;[175] a meek punishment for such an offensive crime. In another case, a court clerk who accepted a bribe to make a file disappear had her salary docked in half for one year, but it was later reinstated prior to the conclusion of the year.[176]

As Anne Mugisa, a journalist in Uganda, noted, "While there is public outcry, there seems to be sworn silence in the corridors of the judiciary or even outright denial that anything is happening."[177] Many of the magistrates deny the existence of corruption in the judiciary, and blame the associated problems on the communication between the DPP and the police.[178] As the corruption in the judicial system continues, the public becomes more wary of the system.[179]

IV. THE UGANDAN PRISON SYSTEM

The Uganda Prison Service is under the control of the Ministry of Internal Affairs.[180] Though the prisons might have improved under Museveni's leadership, prisons in Uganda today still show a cause for concern. In 1999, the Prison Service was responsible for 13,000 inmates.[181] The remainder of the convicts were detained at local administration prisons.[182] However, there has been an indication that the two prison systems will merge together.[183]

Convicts (and suspects on remand) suffer tremendously at many of the prisons throughout Uganda. Regardless of whether torture is being used on the detainees at these centers, the conditions of most Ugandan prisons are appalling. Cells are typically overcrowded, food is inadequate, clothing and bedding is insufficient, and the facilities are unsanitary.[184] Such conditions are blatant violations of international human rights standards.[185]

---

172. *Id.* at 2.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 3.
177. *Id.* at 2.
178. *See id.* at 3.
179. *See id.* at 1.
180. WSJ Coetzee & WJ Clark, *Uganda Prisons Adopt Open Policy and Reform*, CRIME & JUSTICE INT'L, July-Aug. 1999, vol. 15, 15.
181. *Id.* at 16.
182. Interview with O/C, Mary Tamale, at Mukono-Kauga Local Administration Prison in Kauga, Uganda (June 11, 2004).
183. *Id.*
184. Observational Visits, at Mukono-Kauga Local Administration Prison and Kawolo Local Administration Prison, in Uganda (June 11, 2004); *See also*, Coetzee & Clark, *supra* note

Overcrowding tends to be a common problem with all types of detention facilities and prisons in Uganda. In 1986, the Murchison Bay Prison detained approximately 10,000 people when the maximum capacity was 800.[186] In 1990, Masaka Central Prison housed 456 detainees when the capacity was 120.[187] More recent research shows that overcrowding continues to be a problem. In Kawolo Local Administration Prison, each twelve-foot by twelve-foot cell holds approximately thirty people.[188] The overcrowding problem is further elevated by the fact detainees are rarely allowed to leave the cells, since the facility lacks a fence surrounding the property.[189] Still, some detainees are allowed out of their cells to perform hard labor since this prison is responsible for growing its own food.[190] Other detainees are required to fetch water, sometimes from as far as two miles away.[191] Most detainees admit they prefer being held all day in their cells to performing such rigorous labor.[192]

Hard labor has become more of an issue due to inadequate amounts of food and water given to the detainees. Suspects are typically only fed cassava once a day.[193] Detainees in prisons run by the Uganda Prison Service are slightly more fortunate since they are not required to grow their own food; they are served posho[194] and beans one to three times a day.[195]

In addition to the inadequate amounts of food and water, all prisons in Uganda have a shortage of blankets, clothing and mattresses.[196] The Uganda Prison Service has reported that the government can only supply blankets to twenty-five percent of the inmates and clothes to thirty percent of inmates.[197] These percentages do not incorporate the large numbers of detainees without adequate clothes or blankets at the local administration prisons. Some detainees are lucky enough to have papyrus mats to sleep on, but most sleep on bare floors.[198] The only prison known to have mattresses is Luzira Women's

---

142, at 16.

185. *See* Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment G.A. Res. 43/173 (Dec. 9, 1988); *See also*, Article 5, International Covenant on Civil and Political Rights, U.N. Doc A/6316 (1966).

186. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, UGANDA: A COUNTRY STUDY (Rita Byrnes ed., 1992).

187. *Id.*

188. Observational visit, Kawolo Local Administration Prison, Kawolo, Uganda (June 11, 2004).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* Cassava is a shrub with an edible foot that is a staple food in many parts of Africa.

194. Posho is maize that is pounded into corn flower and then cooked. Also known as Ugali, it is a staple food of East Africa. *See* Mukwano Industries online cookbook, found at http://www.mukwano.com/cookbook.asp.

195. Coetzee & Clark, *supra* note 180, at 16.

196. *Id.*

197. *Id.*

198. Observational visit, Kawolo Local Administration Prison, in Kawolo, Uganda (June 11, 2004). *See also* Coetzee & Clark, *supra* note 180, at 16.

Prison.[199] These mattresses were donated by the International Red Cross in 1997.[200]

It has been suggested that 10% of inmates die while detained in Ugandan prisons.[201] It is believed the main reasons for this exorbitant death rate are AIDs and malnutrition.[202] Unfortunately, malnutrition is probably due to the prison lifestyle. In addition, detainees are also often deprived of medical care, so a treatable illness such as malaria can quickly turn into a cause of death.[203] In one case, fifty-two-year-old Steven Egava was serving a sentence for a defilement conviction at Kawolo Local Administration Prison when he suffered a seriously broken arm.[204] Egava was denied any pain medication or treatment for his injury. [205]

V. RECOMMENDATIONS

The entire Ugandan penal system needs to be revamped in order to address the concerns discussed above. Unfortunately, the laws are not the only factor playing into the inefficacy of the justice system. Torture and corruption in the justice system have become so common and expected that few people are willing to address the situation until they too fall victim to its shortcomings. Though the restoration will be a long and difficult process, there are solid steps that can be taken to improve the system and restore suspects and prisoners with their fundamental human rights.

A. Recommendations for the Laws

- Article 23(4)(b) of the Ugandan Constitution needs to be re-written to allow for an arrest only when there is probable cause, and not when it is merely thought that someone has or might commit a crime. This would require that investigations be completed prior to the arrest and detention of the suspect.
- Clarification or revision of the forty-eight hour provision is also necessary. Either more time should be allowed for a suspect to remain in police custody, or it should be specified that "forty-eight hours" means forty-eight business hours, since it is unrealistic to expect that a suspect detained on Friday will be brought to court on a Sunday.

---

199. Coetzee & Clark, *supra* note 180, at 16.

200. *Id.*

201. *Id.*

202. *Id.*

203. *See id.*; Observational Visits, Mukono-Kauga Local Administration Prison and Kawolo Local Administration Prison, in Uganda (June 11, 2004).

204. Interview with convicted defiler, Steven Egava, at Kawolo Local Administration Prison, in Kawolo-Mukono, Uganda (June 11, 2004).

205. *Id.*

- The process of remand, which allows for a suspect to be detained for 120 days or 360 days depending on whether it is triable by the High Court, should be abandoned or, in the alternative, limited. If it is to be limited, only capital cases should be remanded. The present suggestion for remand proceedings before Parliament is better, but even the recommended sixty days (for non-High Court cases) and 120 days (for High Court cases) is too lengthy. Regardless, these processes should be amended through the use of statutes so that they can be amended later to further reduce the remand period. Amending the Ugandan Constitution will make it more difficult to change in a few years.
- A Constitutional provision should be added to restrict the formation of ad hoc security agencies. If the present government feels it needs officers to address a particular issue, such as terrorism, police officers who have earned their positions through training and experience should be appointed to the task. Present ad hoc security agencies should be disbanded, and all suspects should be released to police custody.
- A law should be imposed that a confession or an admission is inadmissible against the defendant in court proceedings.

B. Other Recommendations

- Police stations should be required to set up internal parameters on how to prevent corruption in their stations. The regulations and the results from the internal investigations should be transparent to the public.
- Suspects should be allowed to complete an evaluation of their stay at the end of their time at every detention center. State attorneys should collect these statements when the suspect is brought to court. If the suspect is released, the suspect should have the right to complete an evaluation which should be sent to an outside tribunal such as the Uganda Human Rights Commission (UHRC). Evaluations should also be provided for court proceedings. Evaluations should not be seen by the place evaluated until they have been received and reviewed by an independent body.
- When an investigation reveals corruption, violators should be criminally prosecuted. Violators should not be granted the opportunity to simply replace the money extorted.
- Salaries of police officers need to be raised so that they are not tempted to accept bribes. The government should also make an effort to improve the living conditions for police officers.
- All detention facilities should be open to visits by human rights organizations, including local Non-Government Organizations

(NGOs) registered in Uganda, the UHRC, and international organizations.

- The right to free press should be maintained and its exercise encouraged in order to expose illegal activities and inefficiencies in the justice system.
- Court reporters should be required in court proceedings so that recorded proceedings can later be reviewed to investigate unfair and deceptive activities.

VI. CONCLUSION

Although the Ugandan justice system has come a long way, it is still ineffective and barbaric in nature. Yet, as the existing problems receive greater exposure, more pressure will be applied to make changes in the system. Thus, although the system has been shown to have legal barriers, historical encumbrances, and economic hardships leading to corruption within the system, there is opportunity for change. Ugandan citizens are eager to have a just system, and with time such desire will hopefully lead to the much needed changes.

DIAMONDS ARE A CARTEL'S BEST FRIEND: THE RISE AND FALL OF ANTICOMPETITIVE BUSINESS PRACTICES WITHIN DE BEERS'S INTERNATIONAL DIAMOND CARTEL

Matthew R. Dorsett*

I. INTRODUCTION

Antitrust law exists to protect consumers from unfair business practices,[1] such as price-fixing and the elimination of competition.[2] It exists to preclude businesses from exercising excessive control over the markets in which they operate and traditionally targets such anticompetitive behavior as collusion, excessive market concentration, and predatory pricing.[3] The United States has traditionally maintained exceedingly stringent standards in the area of antitrust activity when compared with those of other nations around the world.[4]

In the 1958 landmark antitrust case *Northern Pacific Railway Company v. United States*, the U.S. Supreme Court found that the objective of antitrust laws "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress. . . ."[5] Antitrust law in the United States exists to provide a healthy balance between the interests of American industry, competing in both domestic and foreign markets, and that of consumers, seeking protection of their economic welfare.[6]

---

* J.D. Candidate 2006, Indiana University School of Law - Indianapolis; B.A. American Studies 2003, Franklin College. The author would like to thank his family and friends for their immeasurable encouragement, support, and patience throughout the writing process and law school in general. He would also like to thank Mr. Kurt Laker, J.D. Indiana University School of Law - Indianapolis 2004, for his guidance toward this topic. As Benjamin Franklin once said, "An investment in knowledge always pays the best interest." It is the author's hope that the following words will provide as much use and enjoyment to another as they did to him.

1. *See* 1-1 Antitrust L. and Trade Reg., 2d ed. § 1.02 (noting that U.S. antitrust law was passed by Congress as a response to the growing power and economic control of corporate giants like the Standard Oil Trust).

2. *See* 1-1 Antitrust L. and Trade Reg., 2d ed. § 1.04 [hereinafter Antitrust L. and Trade Reg. § 1.04] (emphasizing the U.S. Justice Department's continued devotion to criminal prosecution under antitrust policies against price fixing and market allocation).

3. *See* DEBORA L. SPAR, THE OXFORD HANDBOOK OF INTERNATIONAL BUSINESS: ANTITRUST AND COMPETITION POLICY 219 (Alan M. Rugman & Thomas L. Brewer eds., 2001) [hereinafter ANTITRUST AND COMPETITION POLICY].

4. *Id.*

5. Northern Pacific Railway Co. v. U.S., 356 U.S. 1, 4 (1958).

6. John L. Cooper, *Programs from the 1992 Annual Meeting: The Boundaries of Horizontal Restraints: Communication and Cooperation Among Competitors: Balancing Competitor Cooperation and Competition Against Consumer Welfare and Viable International Competition*, 61 ANTITRUST L.J. 621 (1993).

While businesses in the United States are subject to high standards, enforcement of laws restricting unfair business practices against international businesses is an obstacle not yet completely overcome.[7] International cartels, such as the Organization of the Petroleum Exporting Countries ("OPEC"), which have enjoyed decades of control over the worldwide oil market, continue to circumvent U.S. antitrust law.[8] Several factors contribute to this problem, including the inability of the U.S. Department of Justice to exercise personal jurisdiction over, and effect service of process on, international businesses.[9] Few international cartels, however, have managed to maintain the continued success, both within the United States and on the international scene, found in the international diamond cartel.[10] The continued success of the diamond cartel, though, is in jeopardy since its mastermind and longtime puppeteer, De Beers Consolidated Mines ("De Beers"), recently pled guilty to a ten-year-old antitrust indictment in the United States.[11]

---

7. *See* ANTITRUST AND COMPETITION POLICY, *supra* note 3, at 220 (noting that the U.S. Justice Department's failure to prosecute De Beers, the South African company that directs the highly successful international diamond cartel, is a result of the company's continued devotion to educating itself as to U.S. antitrust policies in order to outwit the Justice Department and circumvent U.S. antitrust laws). *See also* Damjan Kukovec, *International Antitrust – What Law in Action?*, IND. INT'L & COMP. L. REV., vol. 15.1 (2004); Symposium, *The Role of Foreign Competition in U.S. Merger Enforcement: Information from Abroad: Who Bears the Burden in an Antitrust Investigation?*, 65 ANTITRUST L.J. 227 (1996) [hereinafter *Role of Foreign Competition*] (noting that international antitrust enforcement and fact gathering poses significant jurisdictional and comity problems, thus restricting access even to information located abroad dealing with primarily domestic issues); 1-1 Antitrust L. and Trade Reg., 2d ed. § 1.03 (noting that there still exists today an uncertainty in antitrust enforcement policy among the courts).

8. *See* Appendix B: Jurisdictional Conflicts Arising from Antitrust Enforcement, *Jurisdictional Conflicts Arising from Extraterritorial Enforcement: Part I: Antitrust and Competition Laws: Jurisdictional Conflicts Arising from Antitrust Enforcement: Panel Discussion*, 54 ANTITRUST L.J. 729 (1985) (noting that the Act of State and sovereign immunity defenses still hinder successful enforcement of antitrust policies against such international cartels as OPEC). *See also* Margaret Levenstein and Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801 n.2 (2004). A "cartel" is generally defined as "[a] combination of producers and sellers that join together to control a product's production or price." BLACK'S LAW DICTIONARY 206 (7th ed. 1999).

9. Assistant U.S Att'y Gen. Joel I. Klein, A Note of Caution with Respect to WTO Agenda on Competition Policy, Address Before The Royal Institute of International Affairs, http://www.usdoj.gov/atr/public/speeches/0998.htm (Nov. 18, 1996).

10. DEBORA L. SPAR, THE COOPERATIVE EDGE: THE INTERNAL POLITICS OF INTERNATIONAL CARTELS 73 (1994) [hereinafter INTERNATIONAL CARTELS]. "[T]he international diamond cartel is a rare, almost unique, phenomenon. It has maintained a level of cooperation that has not even been achieved in most commodity markets, and it has succeeded in keeping the supply of diamonds limited and their price high." *Id.*

11. On July 12, 2004, De Beers pled guilty to a 1994 indictment alleging price-fixing schemes between it and General Electric. Margaret Webb Pressler, *De Beers Pleads to Price-Fixing*, WASH. POST, July 14, 2004, at E1, http://www.washingtonpost.com/wp-dyn/articles/A48041-2004Jul13.html; Arik Johnson, *De Beers Diamond Monopoly Poised to Re-Enter U.S. Market, Faces New Scrutiny in Europe*, COMPETITIVE INTELLIGENCE, *at* http://www.aurorawdc.com/ci/000133.html (Mar. 2, 2004).

De Beers has effectively maintained a stranglehold on the international diamond market since the company's inception well over a century ago.[12] Since that time, De Beers has managed to control the supply of diamonds in the international market and keep diamond prices far above would-be market levels.[13] Unlike other industries, the international diamond cartel has effectively incorporated all major diamond producers into an efficient, cooperative unit, impressing upon producers the necessity of unified actions.[14] "It has enforced a complex system of stockpiles, production quotas, and standards that are designed to keep prices and demand high even while overall diamond supplies are growing."[15]

Headquartered in South Africa since its inception, De Beers has achieved staggering worldwide success in avoiding prosecution under antitrust laws.[16] While prosecution in the United States is not surprising given the stringent U.S. antitrust standards, its home jurisdiction, South Africa, also maintains laws against antitrust activity.[17] Ironically, De Beers has managed to escape prosecution in South Africa due to its strong influence on the South African economy, in particular, its dominant presence in the country's stock market.[18] Given the diverse economic market in the United States, U.S. officials have aggressively pursued prosecution against De Beers and others in the international diamond cartel under federal antitrust laws.[19] However, due to the

---

12. De Beers Mining Company was formed in 1880 in response to the booming diamond mining business in South Africa. INTERNATIONAL CARTELS, *supra* note 10, at 47.

13. *Are Diamonds Really Forever?*, LUDWIG VON MISES INST. 320, *at* http://www.mises.org/econsense/ch91.asp (Sept. 8, 2004) [hereinafter *Are Diamonds Really Forever?*].

14. *See* INTERNATIONAL CARTELS, *supra* note 10, at 41.

15. *Id.*

16. *See id.* at 41-42, 47, 73-74.

17. Center to Bridge the Digital Divide, NetTel@Africa Off-Line Content, *The Basic Principle of Competition Policy*, *at* http://cbdd.wsu.edu/kewlcontent/cdoutput/TR501/page32.htm (n.d.) (last visited Nov. 6, 2005) [hereinafter *The Basic Principle of Competition Policy*].

18. *Id.* at 77.

19. Where De Beers enjoys a dominant presence in the South African economy, the company has had minimal impact on the broadly diverse United States economy. *See* Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 637 (2004) (noting that De Beers constitutes over one-half of the South African stock market); *see also* Alan Cowell, *De Beers, With Net Off 15%, Will Curb Its Diamond Buying*, N.Y. TIMES, August 24, 2001, at W1 (noting that although the United States constitutes one-half of the annual $60 billion diamond gem market, De Beers's annual diamond gem profits in 2001 were only $744 million). As a result, pursuing prosecution of De Beers in the United States would likely not have nearly the detrimental effect on consumers and investors that it would in South Africa, which is likely why the U.S. Justice Department has been so eager to pursue De Beers under the law. *See* Anne K. Bingaman, *Report from Officialdom: 60 Minutes With Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice*, 63 ANTITRUST L.J. 323 (1994) (noting that the U.S. Justice Department considered its 1994 indictment against De Beers for antitrust violations relating to price-fixing its most notable indictment of the current Attorney General's term in office).

inability to reach international businesses and obtain evidence located outside U.S. borders, the government's success to date has been only minimal.[20]

The changing diamond market has brought with it a change in the operating philosophy within the international diamond cartel. Where diamond producers, led by De Beers, have traditionally focused on elimination of competition and setting uniform market standards, the insurgence of antitrust regulation worldwide has brought much scrutiny upon what were once overlooked, or, more commonly, ignored business practices within the diamond industry.[21] Public discovery of the presence of conflict diamonds[22] in the market,[23] coupled with reports of money laundering, damaged the diamond industry's reputation in the late 1990s.[24] The growing number of diamond producers around the world also left De Beers with an increasingly looser grip on the market.[25] The recent development of the synthetic gem diamond,[26] a stone which can be naturally cultured and grown in a laboratory to exactly replicate those traditionally mined by companies like De Beers, further cracked the cartel's foundation, the traditional image of scarcity and distinctiveness, which De Beers's has struggled for so long to maintain.[27]

---

20. Klein, *supra* note 9.

21. *See id. See also Role of Foreign Competition*, *supra* note 7. "[A]ntitrust enforcement cooperation agreements are becoming both more common and more substantively meaningful." *Id.*

22. "Conflict diamonds are diamonds that originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments, and are used to fund military action in opposition to those governments, or in contravention of the decisions of the Security Council." United Nations Department of Public Information, *Conflict Diamonds: Sanctions and War*, *at* http://www.un.org/peace/africa/Diamond.html (last updated Mar. 21, 2001). *See also De Beers reshapes to market*, MINING J., June 2, 2000, at 437 [hereinafter *De Beers reshapes to market*].

23. De Beers's introduction of the "Kimberley Certificate," a document providing consumers with the history of each diamond, has helped to alleviate much consumer distrust. TurkishPress.com, *Diamond Industry Battles to Regain Sparkle*, *at* http://www.turkishpress.com/news.asp?ID=33704 (Nov. 14, 2004) [hereinafter *Diamond Industry Battles*].

24. *Id.*

25. As late as the mid-1950s, De Beers retained a dominant control over the production of diamonds worldwide. However, "[b]y 1960, South African diamonds accounted for only 19 percent of total world gemstone production and by 1990, 9 percent." INTERNATIONAL CARTELS, *supra* note 10, at 52-53.

26. Synthetic industrial diamonds, used mainly for industrial cutting, have been on the market for nearly half a century. American Museum of Natural History, *The Nature of Diamonds: Growing Diamonds*, http://www.amnh.org/exhibitions/diamonds/growing.html (n.d.) (last visited Nov. 6, 2005). De Beers is a major producer of synthetic industrial diamonds. *Id.*

27. Only recently has the technology for growing synthetic gem diamonds, those commonly found in jewelry, been developed. *See Diamond Industry Battles*, *supra* note 23. The synthetic diamond market has taken the international diamond cartel off-guard within the last decade. *Id.* High-ranking officials continue to discuss ways to eradicate the potential harm of synthetic diamonds, which are virtually indistinguishable from mined diamonds. *Id.* Maintaining the image that diamonds are rare and unique is essential to the continued success of

With legitimate concerns looming over De Beers and the international diamond cartel, the future of the diamond industry is uncertain. Restraints on competition in the mining industry and the diamond market, both of which De Beers once enjoyed near-exclusive control over,[28] are generally discouraged and becoming more obsolete in today's world.[29] Further, where De Beers dominated the pre-twentieth century diamond market, producing over ninety percent of the world's diamonds, its power since 1900 has continually diminished due to the increasing number of competitors.[30] The future of a company that has operated essentially free from antitrust restraints for over a century is today facing serious threats from both competitors and governments worldwide.[31] Now resuming a direct presence in the United States after settling a ten-year-old antitrust indictment,[32] De Beers will likely be under close watch for some time as its actions will certainly have direct consequences on both the U.S. diamond market and, more importantly, on U.S. consumers.[33] Similarly, a tightening grip on antitrust activity throughout the world,[34] including South Africa,[35] and a push for increased cooperation between governments in the area of antitrust enforcement against international cartels,[36] will inevitably force De Beers to, at the very least, modify its traditional business practices.[37]

This Note examines the history of De Beers and the international diamond cartel, its unsurpassed success despite legitimate antitrust regulation in both the United States and South Africa, and the potential consequences of a continued diamond cartel, especially in the U.S. market. Part II of this inquiry focuses on the history and tradition of anticompetitive practices within the international diamond cartel. It also looks at the inner workings of De Beers and how its actions and policies have affected the diamond industry. Part III examines the efforts made to combat antitrust activity, focusing on antitrust legislation in both South Africa and the United States, as well as attempts to prosecute De Beers and others. While South Africa has yet to pursue

---

the diamond industry. *Id.* The emergence of synthetic diamond technology threatened to damage the image that De Beers and others have sought to maintain for over a century. *Id.* In an effort to battle the emerging synthetic diamond industry and as part of its Gem Defensive Program, the international diamond cartel, led by De Beers, has recently developed and distributed testing machines to distinguish between natural and synthetic diamonds, as well as implementation of negative propaganda and clever marketing schemes to discount the validity and legitimacy of synthetic diamonds. *See* Joshua Davis, *The New Diamond Age*, WIRED NEWS, *at* http://www.wired.com/wired/archive/11.09/diamond_pr.html (Sept. 2003).

28. *See* INTERNATIONAL CARTELS, *supra* note 10, at 53.

29. *See* Klein, *supra* note 9. *See also Role of Foreign Competition*, *supra* note 7.

30. De Beers: A Diamond is Forever, *De Beers History*, *at* http://www.debeersgroup.com/debeersweb/About+De+Beers/De+Beers+History/ (n.d.) (last visited Nov. 6, 2005) [hereinafter De Beers History].

31. *See* Role *of Foreign Competition*, *supra* note 7. *See generally* Klein, *supra* note 9.

32. *See* Pressler, *supra* note 11, at E1.

33. *See id.*

34. *See Role of Foreign Competition*, *supra* note 7.

35. *The Basic Principle of Competition Policy*, *supra* note 17.

36. Klein, *supra* note 9.

37. *See id.*

prosecution of its largest economic superpower, despite applicable antitrust legislation that would make that possible, the United States has made attempts to curtail De Beers's antitrust activity and has, in fact, recently achieved arguable success.[38] Part IV will examine the efforts toward international cooperation and enforcement in the area of antitrust law, and Part V will conclude by addressing the consequences of recent obstacles for the international diamond cartel and the future of the cartel both in the United States and on the international scene.

II. HISTORY OF DE BEERS AND THE INTERNATIONAL DIAMOND CARTEL

In order to understand how a company like De Beers is able to control an international market, coordinate major players in its industry, and maintain a public illusion that its product is scarce and valuable,[39] it is necessary to examine its history. For De Beers, this includes an examination of how it formed, grew, and rose to control perhaps the most successful cartel in history. From humble beginnings, De Beers has evolved into the largest diamond producer in the world and the largest company in the South African economy.[40] There is little doubt that this growth and power have played a significant role in De Beers's business practices and continuing efforts to maintain its control over the diamond industry.[41]

Cooperation in the diamond industry began when diamonds were discovered in the late 1860s in South Africa.[42] While diggers were limited to holding only single plots of land at one time, they quickly realized the financial benefit of plot conglomeration[43] because they were unable to predict which

---

38. *See infra* Part III(b); Pressler, *supra* note 11, at E1.

39. INTERNATIONAL CARTELS, *supra* note 10, at 43 (footnote omitted).

> To be considered valuable, diamonds must be perceived as rare; and if this scarcity is to be credible, all excess diamonds must be kept off the market. Understandably, then, a common interest in restricting the entry of diamonds onto the market has persistently forced the members of the diamond trade to bind together to prevent diamonds from becoming as common as flint. The advantages of restricting supply, of course, are not unique to diamonds. Where diamonds are concerned, however, they appear to have been particularly irresistible, powerful enough to have compelled a history of cooperative behavior that culminated in the creation of the present-day diamond cartel.

Id.

40. *See id.* at 77. *See also* Leslie, *supra* note 19, at 637.

41. *See* INTERNATIONAL CARTELS, *supra* note 10, at 53. In order to maintain control of the industry as new diamond producers continue to enter the market, De Beers has been forced to incorporate others into the cartel. *Id.* "Most diamond-producing states have signed long-term contracts with De Beers, agreeing to sell a fixed proportion of their rough stones solely to De Beers and its agents." *Id.* As a result, the modern-day diamond cartel is largely a cooperative effort between De Beers and other leading diamond producers worldwide. *Id.* "Together, these ventures form a seamless web of collaboration, each strand linked to De Beers at the center and then turning outward to form the larger network." *Id.*

42. *Id.* at 43.

43. *See generally id.* at 45. Diggers began to combine their ownership in mine plots to

plots would be fruitful.[44] The restrictions on property holdings were quickly abolished and the cooperative efforts between diggers continued to grow, especially as the diamond mines grew in size and greater effort was required to extract the diamonds.[45] After the discovery of diamond mines on their property in 1871, "brothers Johannes Nicholas and Diederick Arnoldus de Beer[46] sold their farm 'Vooruitzigt,' which they had bought in 1860 for £50, to Dunell Ebden & Co for £6,300."[47] This farm would be the eventual site of the extremely prosperous De Beers and Kimberley Mines.[48]

Cecil Rhodes, an entrepreneur, began renting steam-powered pumps to diggers at the Kimberley Mine in 1874 in order to help alleviate the water seepage problems in the mine.[49] Rhodes's business continued to grow with the booming diamond mining industry in the area.[50] As his business grew, he began to amass ownership in plots at the De Beers Mine.[51] He formed the De Beers Mining Company in 1880 to control his stake in the De Beers Mine, and by 1887, Rhodes had purchased all remaining plots in the mine.[52] While Rhodes controlled the diamond mining industry at the De Beers Mine, he set his sights even higher.[53]

Rhodes recognized that the value of diamonds rested in maintaining a perception of their scarcity.[54] In the late 1870s, Rhodes convinced the other South African diamond producers to sell him their mines in exchange for exclusive purchasing rights from him so that they could, in turn, resell the diamonds at set prices and in specific quantities.[55] At this point, the business practices within the South African diamond industry began to resemble those of

---

promote efficiency and productiveness in the mining process. *Id.* By owning smaller shares in several plots rather than a full share in a single plot, diggers increased their chances of having ownership in a diamond-producing plot. *Id.*

44. *Id.*

45. *Id.*

46. Despite the common belief that the De Beers entity is controlled by the "De Beers family," the company, as was the famous De Beers Mine, is actually named after the original owners of the property upon which the De Beers enterprise was founded. De Beers History, *supra* note 30. Had Johannes Nicholas and Diederick Arnoldus de Beer known the financial potential their farm held when they sold it to Dunell Ebden & Co in 1871, the sale likely would not have taken place and, as a result, De Beers as it is known today would not exist. *See generally id.*

47. *Id.*

48. *Id.*

49. INTERNATIONAL CARTELS, *supra* note 10, at 47.

50. *See id.*

51. *Id.*

52. *Id.*

53. *See id.* at 48-49.

54. *Id.* "Gem diamonds, after all, serve no real purpose. . . . Realizing the extent to which prosperity in the diamond market thus rested with the dual ability to manipulate demand and coordinate it with supply, Rhodes was determined to wrest control of both sides of the equation, regulating the entire industry so that the quantity of diamonds sold on the European market followed precisely the number of wedding engagements in any given year." *Id.*

55. *Id.* at 49.

the modern international diamond cartel.[56] By 1880, Rhodes owned all major diamond mines in South Africa and had, thus, successfully consolidated all of the region's diamond industry.[57] Rhodes had given birth to the international diamond cartel, which would continue its reign over the diamond industry into the twenty-first century.[58]

At the turn of the century, after Rhodes's death, De Beers began to change in an effort to preserve the company's control over the industry.[59] Ernest Oppenheimer took control of De Beers as Chairman in 1929.[60] Oppenheimer continued to adhere to the anticompetitive principles upon which Rhodes had built his empire.[61] Because only a small percentage of diamonds are suitable as gems due to their varying quality, Oppenheimer recognized that the remaining diamond supply would have to be capitalized in order to keep the diamond industry afloat.[62] Oppenheimer understood that, in order to maintain a successful cartel, uniform prices must be set industry-wide since the cost of diamond production bears no relationship to the value of the diamond.[63] Thus, maintaining control of the system as a whole, from production to marketing to distribution, was necessary to preserve a perception of the scarcity and value of diamonds.[64]

After Oppenheimer seized the reins of De Beers, the company began to move beyond the borders of South Africa.[65] In building its monopolistic control over the diamond industry, De Beers took advantage of the 1930s depression era in the United States by buying surplus diamonds.[66] The Central Selling Organization (CSO)[67] was formed in 1930 by De Beers in response to the growing number of diamond producers in the industry.[68] De Beers, as the

---

56. *See id.*
57. *Id.*
58. *Id.* at 47, 51-52.
59. *Id.* at 50.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 51-52.
66. *De Beers to Boycott War Zone Diamonds*, UNITED PRESS INT'L, July 12, 2000 [hereinafter *War Zone Diamonds*].
67. Kevin Bonsor, *How Diamonds Work*, *at* http://money.howstuffworks.com/diamond7.htm (n.d.) (last visited Nov. 6, 2005).

> There are fewer than 200 people or companies authorized to buy rough diamonds from De Beers. These people are called sightholders, and they purchase the diamonds through the Central Selling Organization (CSO), a subsidiary of De Beers that markets about 70 percent to 80 percent of the world's diamonds. De Beers sells a parcel of rough diamonds to a sightholder, who in turn sends the diamonds to cutting facilities and then to distributors." *Id.* In short, customers of the CSO are strategically selected and are called "sightholders" because they are expected to buy whatever is offered to them.

Id.

68. De Beers History, *supra* note 30.

world's largest diamond producer, recruited the other major diamond producers in the industry to join the CSO. This provided a central marketplace for their product and an opportunity for De Beers to control prices and competition within the industry.[69] Having the major diamond producers united with the major diamond distributors under one organization, which De Beers itself controlled, proved to be the crowning accomplishment to De Beers's ongoing effort to monopolize and govern the international diamond industry.[70] Formation of the CSO placed De Beers firmly in control of the international diamond cartel, a position that De Beers has yet to fully relinquish.[71]

The CSO, however, lost prominence in the international diamond market in recent years.[72] As the number of international diamond producers increases, the number of companies buying and selling diamonds through the CSO continues to decrease.[73] With more diamond producers available, the need to be part of an exclusive central organization has declined.[74] New diamond producers and purchasers recognize the power of an expanding market over the traditional monopolistic control exercised by De Beers.[75] To combat this decrease in utilization of the CSO, De Beers has continued to reshape its policies regarding how CSO customers qualify as "sightholders," thus allowing more market participants to qualify to buy and sell through the CSO.[76]

Tightening competition requirements by the European Union have further encouraged De Beers's efforts to modify CSO membership standards.[77] In an effort to alleviate negative publicity and a potential stigma associated with the CSO, De Beers recently changed the organization's name to the Diamond Trading Company.[78] Due to longstanding history and tradition in the industry,

---

69. *Are Diamonds Really Forever?*, *supra* note 13, at 320. "It is not simply that De Beers mines much of the world's diamonds; De Beers has persuaded the world's diamond miners to market virtually all their diamonds through [the CSO], which then grades, distributes, and sells all the rough diamonds to cutters and dealers further down the road toward the consumer." *Id.*

70. *Id.*

71. INTERNATIONAL CARTELS, *supra* note 10, at 74. "Because all the other members are linked to the cartel via De Beers, there is little opportunity for them to break with De Beers or to form third-party arrangements. Only De Beers can guarantee the producers' cooperation to the distributors and the distributors' to the producers." *Id.*

72. *See generally De Beers reshapes to market*, *supra* note 22, at 437 (stating that a significant decline in the number of diamond producers participating in the CSO leads to the conclusion that the CSO consequently has suffered a loss of prominence in the industry).

73. *Id.*

74. *See generally id.*

75. *See generally id.*

76. *Id.*

77. *Id.*

78. In 2000, De Beers publicly changed the name of the Central Selling Organization (CSO) to the Diamond Trading Company (DTC). De Beers History, *supra* note 30.

this effort, however, has likely had very little impact on participation or reputation, as the organization is still commonly referred to as the CSO.[79]

Naturally, as De Beers loses prominence in the international diamond market, so does the cartel.[80] "Even an unchallenged cartel, of course, does not totally control its price or its market; even it is at the mercy of consumer demand."[81] The presence of growing competition in the international diamond market has complicated the cartel's efforts to retain control over diamond prices and industry competition.[82] Further, the current world recession has played a major role in the decline of diamond prices.[83] "World demand, and particularly consumer demand in the U.S. for diamonds, has fallen sharply, with consumers buying fewer diamonds and downgrading their purchases to cheaper gems . . . ."[84] De Beers itself has suffered substantial decreases in total profits in recent years.[85]

Today, even though the Oppenheimer family retains control of De Beers, the focus has changed. Where business during Rhodes's and Oppenheimer's reigns primarily focused on monopolistic control of the South African mines, in the 1950s the company was forced to shift its concentration to cooperation with other new diamond producers that had begun to spring up in other parts of the world.[86] In order to maintain control of the industry, De Beers has been forced to incorporate others into the cartel as new diamond producers continue to enter the market.[87] "Most diamond-producing states have signed long-term contracts with De Beers, agreeing to sell a fixed proportion of their rough stones solely to De Beers and its agents."[88] As a result, the modern-day diamond cartel is largely a cooperative effort, more so than in the past, between De Beers and

---

79. While the name on the letterhead may have changed in 2000, those within both the diamond industry and the news media alike continue to refer to the organization as the CSO. *See Are Diamonds Really Forever?*, *supra* note 13.

80. *See generally* INTERNATIONAL CARTELS, *supra* note 10. Given De Beers's dominant position as leader of the international diamond cartel and due to its continued influence on and control over the industry, it follows that a loss in market prominence by De Beers would have a detrimental effect on the cartel itself. *Id.*

81. *Are Diamonds Really Forever?*, *supra* note 13.

82. The 1990s brought a rush of diamonds into the market as a result of the economic crash in East Asia and the fall of the former Soviet Union. *War Zone Diamonds*, *supra* note 66. This flood seriously damaged De Beers's efforts to control the flow of diamonds within the industry. *Id.* "Some new gem producers refused to join the De Beers cartel." *Id.* Similarly, large diamond deposits continue to be discovered through the world, most recently in Canada. Anthony DePalma, *International Business: Diamonds in the Cold; New Canadian Mine Seeks Its Place in a De Beers World*, N.Y. TIMES, Apr. 13, 1999, at C1.

83. *Are Diamonds Really Forever?*, *supra* note 13.

84. *Id.*

85. *See* De Beers History, *supra* note 30. De Beers's profits dropped forty percent in the late 1990s after the economic crash in East Asia. DePalma, *supra* note 82, at C1. In August 2001, De Beers announced that its profits had fallen fifteen percent since the first of the year. Cowell, *supra* note 19, at W1.

86. INTERNATIONAL CARTELS, *supra* note 10, at 52-53.

87. *Id.* at 53.

88. *Id.*

other leading diamond producers worldwide.[89] "Together, these ventures form a seamless web of collaboration, each strand linked to De Beers at the center and then turning outward to form the larger network."[90]

In the twentieth century, De Beers began amassing legal challenges against its business practices, especially in the United States. Shortly after World War II, the U.S. Department of Justice charged De Beers with alleged price-fixing schemes within the industrial diamond trade.[91] De Beers pulled all operations within the United States, thereafter operating primarily from its headquarters in South Africa.[92] The U.S. Department of Justice continued to pursue De Beers, winning an indictment in 1994.[93] The indictment stood for ten years as De Beers remained outside the jurisdictional reach of U.S. officials.[94] De Beers's legal battles have been highly publicized and have undoubtedly damaged the company's image and reputation in both the diamond industry and with consumers worldwide.[95]

In an effort to curb slumping consumer confidence, De Beers announced its "strategic review" in 1998, under which it vowed to cease anticompetitive practices and devote itself to resolving its legal problems.[96] This review, however, has proven to be nothing more than empty words, contributing to the long history of masquerades by the company.[97]

> The review that was said to herald a true desire to change its image from that of the most successful cartel in history, in fact never did anything to stop the company from working behind a cloak of opaqueness that allowed it to sell more than 60% of the world's rough diamonds to only 120 clients . . . .[98]

The review included a proposed "supplier of choice" program, designed to promote its practice of selling a majority of the diamonds available through its CSO to only a small number of select buyers.[99] The "supplier of choice" program is, in fact, still under review by European Union competition authorities.[100] Despite its continuing anticompetitive practices, De Beers has nevertheless maintained its vow of "total legal compliance around the world"

---

89. *Id.*
90. *Id.*
91. Johnson, *supra* note 11.
92. David Teather, *De Beers Hopes to End its 50-year US Absence*, GUARDIAN, Feb. 25, 2004, at 19.
93. Johnson, *supra* note 11.
94. *See* Pressler, *supra* note 11, at E1.
95. *See* Teather, *supra* note 92, at 19.
96. Emma Muller, *De Beers to Open New York Retail Store*, BUS. DAY, Sept. 27, 2002, at 20.
97. *Id.*
98. *Id.*
99. *Id.*
100. Johnson, *supra* note 11.

and its "drive to create a new, modern De Beers," as a spokeswoman for the company stated after De Beers pled guilty to the antitrust indictment in the United States in July 2004.[101]

While maneuvering room on the legal front appears to be dwindling, De Beers's control within the international diamond cartel remains steadfast. Although De Beers now actually controls only around eight percent of the world's diamond supply, it is able to impose cooperation among the other members of the diamond cartel through its use of coercive tactics.[102] "In the end, all benefit: because the cartel can enforce compliance, it can stem excess supplies and maintain the critical perception of scarcity. And as long as this perception is maintained, diamonds will remain valuable."[103] While the cartel has suffered serious hits in recent years as a result of increasing competition and growing governmental opposition to its anticompetitive practices, especially in the United States, the practices traditionally employed by the international diamond cartel remain an effective means of achieving Rhodes's and Oppenheimer's foremost goal of cooperation, or anticompetitive practices, as it would more properly be termed today, within the industry.[104]

III. COMBATING ANTITRUST ACTIVITY WITHIN THE DIAMOND INDUSTRY

A. *Legislation and the Lack of Prosecution Efforts in South Africa*

National policies against anticompetitive practices in South Africa date back nearly half a century.[105] De Beers's history of antitrust activity in South Africa spans over twice that of South African antitrust laws.[106] Since South Africa passed legislation against anticompetitive business practices, however, De Beers has yet to fall subject to such regulation.[107] In 1955, South Africa passed its first anticompetition regulation, the Monopolistic Conditions Act.[108] After this Act proved inadequate and unenforceable, it was reevaluated in the 1970s, and the Maintenance and Promotion of Competition Act was passed in

101. Pressler, *supra* note 11, at E1.

102. INTERNATIONAL CARTELS, *supra* note 10, at 41.

103. *Id.* at 42.

104. *Id.* at 52. "Today, the cartel is much more than a geographical monopoly. It is an intricate network of production quotas, quality controls, and stockpiles. It is a formidable system of fixed prices and controlled distribution. *Id.* at 51-52. "[The diamond cartel's] tactics are varied and complex. Its strategy, though, is as simple now as it was in Rhodes's time: to restrict the number of diamonds released into the market in any given year and thus to perpetuate the illusion of diamonds as a scarce and valuable commodity." *Id.* at 41.

105. *The Basic Principle of Competition Policy*, *supra* note 17.

106. INTERNATIONAL CARTELS, *supra* note 10, at 48-50.

107. *See id.* at 77.

108. *The Basic Principle of Competition Policy*, *supra* note 17. This Act was superseded in 1979 by the Maintenance and Promotion of Competition Act. *See infra* notes 109-10.

1979.[109] This new Act provided for the formation of a Competition Board, an unprecedented step against antitrust activity in South Africa, to oversee and investigate anticompetitive activity.[110] "The 1979 Act was amended in 1986 to give the Competition Board further powers, including the ability to act not only against new concentrations of economic power but also existing monopolies and oligopolies."[111] Barely more than a decade later, South Africa's efforts to combat antitrust practices culminated with the passage of the new Competition Act in 1998.[112] While this 1998 Act could be seen to represent South Africa's

---

109. *The Basic Principle of Competition Policy, supra* note 17; Maintenance and Promotion of Competition Act, No. 96 (1979) (BSRSA).

110. *Id.*

111. *Id.*

112. *Id.* The 1998 South African Competition Act provides in pertinent part as follows:

> The people of South Africa recognise [sic]: That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans. That the economy must be open to greater ownership by a greater number of South Africans. That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy. That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans . . . .

Preamble of Competition Act, No. 89 (1998) (BSRSA).

> 4. Restrictive horizontal practices prohibited. – (1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if – (a) it has the effect of substantially preventing, or lessening, competition in a market, . . . (b) it involves any of the following restrictive horizontal practices: (i) directly or indirectly fixing a purchase or selling price or any other trading condition; (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or (iii) collusive tendering. . . . 5. Restrictive vertical practices prohibited. – (1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market . . . . 7. Dominant firms. – A firm is dominant in a market if – (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power. . . . 8. Abuse of dominance prohibited. – It is prohibited for a dominant firm to – (a) charge an excessive price to the detriment of consumers; . . . (d) engage in any of the following exclusionary acts . . . (v) buying – up scarce supply of intermediate goods or resources required by a competitor. . . .
>
> Chapter 2, Prohibited Practices, Part A, Restrictive Practices, §§ 4-5, 7-8 of Competition Act, No. 89 (1998) (BSRSA). It is relevant to note that under Section 8(a) of the 1998 Competition Act, charging consumers an excessive price, to their detriment, for a product is prohibited. § 8(a) of Competition Act, No. 89 (1998) (BSRSA). De Beers announced in 2001 its plans to open "upmarket diamond jewellry [sic] outlets in Europe, the US [sic] and Japan . . . ." Paul Armstrong, *Brussels Deals Blow to LVMH and De Beers*, TIMES, Apr. 19, 2001. In an effort to ward off a European Commission investigation concerning the strengthening of De Beers's "already-dominant position in the rough diamond

committed effort to eradicate anticompetitive business practices, it has proven to do very little against the nation's largest economic power, De Beers.[113]

South Africa maintained "flaccid competition legislation" prior to 1998.[114] The continued success of anticompetitive companies like De Beers instilled tolerance, or more appropriately, approval, for such practices in the South African economy.[115] However, the mounting push by reformists for the eradication of antitrust practices in South Africa in the late twentieth century created a stalemate between factions that are content with the business practices of the past and those advocating change.[116] As the largest business entity in the South African stock market, De Beers held a stake in this debate and likely played at least an indirect role in resisting the movement for reform.[117]

The lack of stringent laws against antitrust practices in South Africa prior to 1998 swung the pendulum of success seemingly in favor of De Beers and

---

market," De Beers stated its intention of selling its jewelry "for up to 30 percent more than rival Bond Street outlets." *Id.* As a result, it appears that De Beers has made public statements indicating a blatant violation of the 1998 Competition Act. § 8(a) of Competition Act, No. 89 (1998) (BSRSA). However, in keeping with the long-standing tradition in South Africa, these self-admitted violations have yet to be punished under South African competition law. *Id.* The 1998 Competition Act further states in pertinent part, "9. Price discrimination by dominant firm prohibited. – (1) An action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if – (a) it is likely to have the effect of substantially preventing or lessening competition; . . . ." Chapter 2, Prohibited Practices, Part A, Restrictive Practices, § 9 of Competition Act, No. 89 (1998) (BSRSA). While this statute appears to have been arguably tailored to business practices traditionally relied on by anticompetitive companies, most notably De Beers, it has proven essentially ineffective in the efforts to eradicate such practices as De Beers continues to operate by its traditional internal business standards. *See infra* Part III(b). While De Beers's recent vow to devote itself to more legitimate operations, avoiding anticompetitive practices and resolving ongoing legal battles, *see* Pressler, *supra* note 11, at E1; *see also infra* Part III(b), such as those existing for half a century in the United States, *see* Johnson, *supra* note 11; *see also infra* Part III(b), actual enforcement of the 1998 Competition Act has yet to occur. It seemed that perhaps the mere passage of this Act would possibly spur reform with the company, bringing its conventional anticompetitive practices to a halt. *See id.* De Beers has since indicated that it had no plans to alter its traditional business practices. *See* Pressler, *supra* note 11, at E1.

113. *See* INTERNATIONAL CARTELS, *supra* note 10, at 77 (noting that De Beers, its subsidiaries and sister companies, also owned by the Oppenheimer family, constituted at least one-half of the South African stock market). *See also* Leslie, *supra* note 19, at 637.

114. *See* Mungo Soggot, *Business; Anti-Trust Battle Rages in South Africa*, AFR. NEWS, Aug. 26, 1996.

115. *See generally id.* "South Africa is one of the most concentrated economies in the world – conglomerates control more than 70% of the Johannesburg Stock Exchange." *Id.* With an economy composed almost solely of conglomerates, it would be detrimental to the national economy to enforce antitrust policies against those engaging in anticompetitive practices. *See id.*

116. *Id.*

117. *See* INTERNATIONAL CARTELS, *supra* note 10, at 77. *See also* Leslie, *supra* note 19, at 637.

other companies supporting higher profits and opposing competition.[118] A constant battle between "old-guard" and "new-guard" lawyers raged, the former content with lax competition legislation, and the latter pushing for stringent reform; a battle that prevented any real reform.[119] Stern opposition to new antitrust legislation brought internal conflict within the Department of Trade and Industry[120] in the late 1990s, as more rigid regulation seemed to be on the horizon.[121] The South African Department of Trade and Industry was, in large part, responsible for the development and drafting of the 1998 Competition Act.[122] Despite the inability to produce an acceptable complete draft of legislation, the department sent a discussion document dealing with potential competition reform policies to the National Economic Development and Labour Council (NEDLAC) in September 1996,[123] which would eventually culminate in a new Competition Act in 1998.[124]

The NEDLAC discussion examined and endorsed the U.S. approach to promote competition by legislatively threatening to break up conglomerates.[125] Despite actions within the government toward eradication of anticompetitive practices, forces from pro-anticompetitive factions continued to oppose any reform legislation. The passage of the new Competition Act in 1998, therefore, seemed to be a major victory for those favoring strong competition legislation.[126] However, despite this new legislation, just after the July 2004 antitrust guilty plea in the United States, a spokeswoman for De Beers was quoted as saying that De Beers has "no plans to change the way [it does] business."[127] Further, the South African government has yet to pursue De Beers under the Competition Act for anticompetitive activity.[128]

The 1998 Act, at least in theory, prohibits collective and individual actions by businesses to restrict competition and abuse dominant status in the South African economic market.[129] The Act also specifically provides for a new Competition Commission, a reform of the existing inadequate Competition

118. *See generally* Soggot, *supra* note 114.

119. *Id.*

120. *Id.*

121. *See* INTERNATIONAL CARTELS, *supra* note 10, at 77.

122. *See* Soggot, *supra* note 114.

123. *Id.*

124. *The Basic Principle of Competition Policy*, *supra* note 17; Competition Act, No. 89 (1998) (BSRSA).

125. Soggot, *supra* note 114. Actually breaking up conglomerates, however, has not been necessary as the legislation itself has proven effective in "send[ing] out the right signal." *Id.*

126. The 1998 Act "outlaws restrictive horizontal practices (collusion between competing firms which prevent or lessen competition); restrictive vertical practices (agreements between firms and their suppliers and/or customers which prevent or lessen competition) and abuse of dominant market position." Business Regulation and Commerce: Monopolies, Restraint of Trade and Competition, 2004 S. AFR. L. DIG. [hereinafter Restraint of Trade and Competition].

127. Pressler, *supra* note 11, at E1; *see infra* Part III(b).

128. *See generally* INTERNATIONAL CARTELS, *supra* note 10, at 77.

129. Restraint of Trade and Competition, *supra* note 126.

Board established by the 1979 Maintenance and Promotion of Competition Act,[130] and the formation of a competition-directed tribunal and appellate court to oversee the interpretation and enforcement of the new standards.[131] "Th[e] act specifically provides a legal background for the formation of the South African Competition Commission. A body that is responsible for the investigation, control and evaluation of prohibited practices, exception applications, mergers and acquisitions."[132] At its inception, the 1998 Act, along with its establishment of the new Competition Commission, was believed to signify South Africa's growing intolerance for anticompetitive practices.[133]

With legitimate competition policy in place, the question remains as to why businesses like De Beers are allowed to continue their anticompetitive practices. The answer rests firmly in economics: "South Africa is one of the most concentrated economies in the world. . . ."[134] Conglomerates, including De Beers, constitute over seventy percent of the South African stock market.[135] De Beers itself constitutes one of the most powerful companies in that group given its historical domination of the South African market.[136] Considering how vital De Beers is to the economy and the stock market, "the South African government has rarely found any reason to interfere with the internal workings of the De Beers Corporation, or to impose any constraints on its overseas activities."[137]

Despite its lack of any official affiliation with the South African government, De Beers "operates as an officially sanctioned national monopoly, free from governmental restraints and bureaucratic interference."[138] Given this stranglehold on the South African economy, there is no question as to why the

---

130. *See The Basic Principle of Competition Policy*, *supra* note 17; Maintenance and Promotion of Competition Act, No. 96 (1979) (BSRSA).

131. Restraint of Trade and Competition, *supra* note 126.

132. *The Basic Principle of Competition Policy*, *supra* note 17 (internal citation omitted).

133. *Id.*

134. Soggot, *supra* note 114.

135. *Id.*

136. *See* INTERNATIONAL CARTELS, *supra* note 10, at 77.

> As of 1986, at least half of the South African stock market was composed of the stocks of De Beers, its sister company, Anglo American, or one of the many other firms in the Oppenheimer empire. Moreover, these firms are not just producing ordinary commodities; they control all South Africa's strategic minerals and thus constitute South Africa's economic power base.

Id. *See also* Leslie, *supra* note 19, at 637.

> De Beers operates free from constraints of antitrust within its home country. The South African government had historically played a hands-off role with De Beers given the economic power of the company; in 1986, the stock of De Beers and its sister companies and affiliated firms constituted over half of the value of the South African stock market.

Id.

137. INTERNATIONAL CARTELS, *supra* note 10, at 77.

138. *Id.*

country refuses to act against De Beers.[139] To prosecute De Beers would be detrimental to its own national economy, which would directly contradict the very purpose of the Competition Act, which is to protect the national economy.[140]

B. Legislation and Prosecution Efforts in the United States

While De Beers has enjoyed a vice-like grip on the South African economy since its inception, allowing it to remain free from anticompetitive prosecution in its home country,[141] the company does not have nearly such a dominant position in the United States.[142] The United States constitutes one-half of the world's $60 billion per year diamond gem market.[143] Although De Beers has traditionally been the leader in diamond gem production throughout the world, its share of that market continues to decline.[144] Unlike its control of more than one-half of the South African stock market, thus essentially dominating the South African economy,[145] De Beers has no presence in the U.S. stock market due to a lack of direct business operations and continuing legal problems in the United States.[146] As a result, where South Africa has been extremely hesitant to prosecute,[147] the United States has had very little to lose by pursuing prosecution of De Beers under U.S. antitrust law.[148]

Ironically, however, De Beers had managed to avoid prosecution in the United States until July 2004.[149] Despite the much more stringent antitrust laws in the United States,[150] De Beers enjoyed decades of unrestricted advertising and maintained diamond sales in the United States through the use of intermediaries.[151] The intermediaries purchased diamonds from De Beers and

---

139. *See id.*

140. *See generally id.* The Competition Act was passed as an effort, as is all antitrust legislation, to protect consumers and the economy from anticompetitive practices within a given market. Prosecution of De Beers, given its stranglehold on the South African economy, would consequently bring harm to the national economy itself, which would contradict the intention of the Competition Act. *Id.*

141. *See id.*

142. *See generally* Cowell, *supra* note 19, at W1 (indicating that although the United States constitutes one-half of the annual $60 billion diamond gem market, De Beers's diamond gem profit in the United States for the first half of 2001 was only $744 million).

143. *Id.*

144. *See id.*

145. *See* INTERNATIONAL CARTELS, *supra* note 10, at 77. *See also* Leslie, *supra* note 19, at 637.

146. *See* Johnson, *supra* note 11; *see generally* Pressler, *supra* note 11, at E1.

147. INTERNATIONAL CARTELS, *supra* note 10, at 77.

148. *See generally* Teather, *supra* note 92, at 19; Pressler, *supra* note 11, at E1; Johnson, *supra* note 11 (all noting the United States's continual battle, dating back to World War II, to prosecute De Beers under U.S. antitrust law).

149. *See* Pressler, *supra* note 11, at E1.

150. ANTITRUST AND COMPETITION POLICY, *supra* note 3, at 219.

151. Pressler, *supra* note 11, at E1; Teather, *supra* note 92, at 19.

sold them directly to U.S. consumers, thereby allowing De Beers to operate in the United States without having a direct presence to avoid giving the U.S. Justice Department jurisdiction over the company.[152] In July 2004, however, De Beers pled guilty to a ten-year-old indictment alleging price-fixing schemes with market competitors in violation of U.S. antitrust law.[153] This voluntary plea allowed De Beers to eliminate its use of intermediaries and deal directly with U.S. consumers once again,[154] thus it could be seen as more of a business decision by De Beers than a prosecution by the U.S. Justice Department. The economic motive for the plea is even more evident given the contemporaneous introduction of the competitive synthetic diamond into the U.S. market.[155]

Antitrust legislation has existed in the United States for more than twice as long as it has in South Africa.[156] U.S. antitrust policies date back to the emergence of the corporation and the rise of trusts that accompanied the growth of business and industry following the Civil War.[157] Congress enacted a series of antitrust laws in response to a growing public hostility toward and fear of monopolies and their anticompetitive business practices.[158] Collectively, these federal antitrust statues work to provide U.S. consumers and businesses with a free competitive economy.[159] According to the statutes, the United States may obtain criminal sanctions, damages, and injunctive relief, and it may bring suit

---

152. *See generally* Teather, *supra* note 92, at 19. With an indictment looming, De Beers has effectively used intermediaries to operate in the United States without providing a way for the U.S. Justice Department to establish jurisdiction over the company. *Id.*

153. Pressler, *supra* note 11, at E1.

154. *Id.*

155. *Id.*

156. 1-9 Antitrust L. and Trade Reg., 2d ed. § 9.01.

157. *Id.*

158. *Id.*

> The Sherman Act is the first and undoubtedly the single most important federal statute dealing with restraints of trade and monopolies, which that Act bans in broad and simple terms. The Clayton Act, amended by the Robinson-Patman Act, outlaws specific anticompetitive business dealings and is considered a vital supplement to the Sherman Act. It deals with price discrimination, mergers and acquisitions, exclusive dealing, "tying" arrangements, and corporate interlocks. The Clayton Act also contains the primary remedial provisions of the antitrust laws. The Federal Trade Commission Act established a regulatory commission with the power to define and prohibit "deceptive business practices" and "unfair competition."

Id.

> Enacted in 1894, four years after passage of the Sherman Act, the Wilson Tariff Act was passed because the Democratic administration had pledged to replace trade protectionism with a policy of free trade. As originally introduced, the tariff act that ultimately included the Wilson Tariff Act ("the Act" or "the Wilson law") contained no antitrust provisions; these were added during the Senate floor debate because Congress was convinced trusts could abuse the act's other provisions.

1-5A Antitrust L. and Trade Reg., 2d ed. § 5A.01 [hereinafter Antitrust L. and Trade Reg. § 5A.01].

159. *Id.*

in any federal district that the corporation inhabits, transacts business, or is found.[160]

The Sherman Act, passed on July 2, 1890 after two years of debate, became the first and, to this day, the single-most important piece of antitrust legislation in the United States.[161] It was passed "to prevent practices creating monopolies or restraining trade by restricting competition and obstructing course of trade."[162] The elimination of competition using anticompetitive pricing to manipulate free market forces is a *per se* violation of the Sherman Act.[163] The Act prohibits any agreement by market participants to raise or lower prices or to charge rigid, uniform prices.[164] In other words, the Sherman Act strictly prohibits price-fixing in a given market, including the diamond market.[165]

Enacted four years after the passage of the Sherman Act, the Wilson Tariff Act was passed in an effort to protect free trade by eliminating the trade protectionism philosophy adopted by the Sherman Act.[166] Very similar to the Sherman Act,[167] the Wilson Tariff Act "prohibits [monopolies], conspiracies, trusts, agreements, and contracts intended to operate in restraint of free competition in trade or commerce in imported articles."[168]

The legislature and the judiciary long debated the extent to which these federal antitrust laws should be applied to international businesses and transactions.[169] In 1982, Congress passed the most significant amendment to the Sherman Act,[170] the Foreign Trade Antitrust Improvements Act [FTAIA],[171]

---

160. Business Regulation and Commerce, Monopolies, Restraint of Trade and Competition, U.S. FED. L. DIG. (2004) [hereinafter Business Regulation and Commerce].

161. 1-9 Antitrust L. and Trade Reg., 2d ed. § 9.02 [hereinafter Antitrust L. and Trade Reg. § 9.02]; 15 U.S.C.S. § 1 (2005).

162. Business Regulation and Commerce, *supra* note 160.

163. *Id.*

164. *Id.*

165. *See id.*

166. Antitrust L. and Trade Reg. § 5A.01, *supra* note 158; 15 U.S.C.S. § 1 (2005).

167. *Id.*

168. Business Regulation and Commerce, *supra* note 160; 15 U.S.C.S. §§ 8-11 (2005).

169. 1-6 Antitrust L. and Trade Reg., 2d ed. § 6.03 [hereinafter Antitrust L. and Trade Reg. § 6.03].

170. Antitrust L. and Trade Reg. § 9.02, *supra* note 161.

171. Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified in scattered sections of 12 and 15 U.S.C.). Section 402 of the Act added a new section (§ 6a) to the Sherman Act, which provides as follows:

> This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

in an effort to clarify how U.S. antitrust law should be applied to cases involving international businesses and transactions.[172] The Act provided for a "direct, substantial, and reasonably foreseeable effect" test to be applied in all such cases.[173] As a result, any anticompetitive action taken by an international business or a domestic business in an international transaction that does not have a "direct, substantial, and reasonably foreseeable effect" on U.S. consumers or businesses cannot be prosecuted under federal antitrust laws.[174]

Despite this restriction on international prosecution, the U.S. Justice Department has persistently pursued international businesses, including De Beers and the international diamond cartel, under federal antitrust laws.[175] U.S. antitrust law typically has a greater effect on foreign businesses.[176]

> Arguably, the greatest impact [of U.S. anticompetitive legislation] is felt by foreign firms that move into the US market. Because US antitrust rules are amongst the most stringent in the world and because they are applied with varying levels of intensity by successive administrations, they are a constant source of frustration for foreign firms that operate in the US market.[177]

De Beers, however, has proven to be an exception to the typical international anticompetitive firm, demonstrating its exceptional ability to avoid enforcement of U.S. anticompetitive rules.[178]

Despite decades of efforts to prosecute De Beers,[179] the U.S. Justice Department did not find success against the company under federal antitrust law until 2004.[180]

> International litigation often raises questions of personal jurisdiction and service of process, and normally presents great difficulties in terms of an enforcement agency's ability to

---

(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a (2005).

172. Antitrust L. and Trade Reg. § 6.03, *supra* note 169.

173. 15 U.S.C. § 6a.

174. *See id.*

175. *See generally* Teather, *supra* note 92, at 19; Johnson, *supra* note 11 (both noting the United States's continual battle, dating back to World War II, to prosecute De Beers under U.S. antitrust law).

176. ANTITRUST AND COMPETITION POLICY, *supra* note 3, at 219.

177. *Id.*

178. *Id.* at 220.

179. *Id.*

180. Pressler, *supra* note 11, at E1.

> obtain documentary and testimonial evidence located abroad. Antitrust enforcement is a very fact-intensive exercise that almost invariably places a high evidentiary burden on enforcers. And when competition authorities cannot get access to the evidence needed to prosecute a violation, the world's consumers and businesses ultimately bear the cost.[181]

De Beers has become a master at avoiding antitrust prosecution in the United States.[182] "Well aware of the long arm of US [sic] law, . . . De Beers has become somewhat of an expert on US antitrust policy, and has carefully structured its entire organization to avoid any entanglement with the US rules."[183] This evasive structuring has included strategic advertising and the use of intermediaries to avoid direct sales to U.S. consumers.[184]

The U.S. Justice Department's efforts to prosecute De Beers under federal antitrust laws began in the mid-1940s. A federal suit seeking equitable relief was filed against De Beers in the Southern District of New York under the Sherman Act and the Wilson Tariff Act.[185] The federal government sought to restrain alleged antitrust violations,[186] initially obtaining a preliminary injunction to freeze De Beers's property in order to secure payment of any contempt fines that might flow from a future violation of a final order yet to be issued.[187] On May 21, 1945, however, the U.S. Supreme Court reversed the district court for lack of jurisdiction, thus invalidating the preliminary injunction.[188]

The U.S. Justice Department defended the injunction, arguing that the sequestration of property was "the only means of enforcing [the] Court's orders or decree" against a foreign corporate defendant.[189] While the Court recognized that section four of the Sherman Act gave the district court jurisdiction "to prevent and restrain violations of [the] Act,"[190] it ultimately found that the

---

181. Klein, *supra* note 9. *See also Role of Foreign Competition*, *supra* note 7.

182. ANTITRUST AND COMPETITION POLICY, *supra* note 3, at 220.

183. *Id.*

184. Pressler, *supra* note 11, at E1; Teather, *supra* note 92, at 19.

185. De Beers Consol. Mines, Ltd, et al. v. United States, 325 U.S. 212, 214-15 (1945). The complaint sought equitable relief based upon a charge that the defendants were engaged in a conspiracy to restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds, in violation of §§ 1 and 2 of the Sherman Act and § 73 of the Wilson Tariff Act.

Id. at 215 (internal citation omitted).

186. Specifically, the Justice Department alleged that De Beers had fixed the prices of industrial diamonds. *See* Teather, *supra* note 92, at 19. *But cf. De Beers Consol. Mines*, 325 U.S. at 214-15 (noting that the Justice Department's complaint alleged price fixing on both gem and industrial diamonds).

187. Philip W. Savrin, Survey Article, *Trial Practice and Procedure*, 46 MERCER L. REV. 1497, 1506 (1995).

188. *De Beers Consol. Mines*, 325 U.S. at 223.

189. *Id.* at 215.

190. *Id.* at 218 (quoting Sherman Act, 15 U.S.C. § 4).

injunction issued by the district court in this case was inappropriate under the circumstances.[191] The Court reasoned that the district court had jurisdiction only to "restrain the future continuance of actions or conduct intended to monopolize or restrain commerce."[192] Acknowledging that the arm of a preliminary injunction is limited to the relief that may be granted as a final result of the suit, the Court found that the injunction issued in the case dealt wholly with issues lying outside the suit and thus was inappropriate and void.[193] The Court further recognized that the government's right to De Beers's assets that were frozen under the injunction was not the subject of the suit.[194] As a result, the district court had no jurisdiction over De Beers; the antitrust suit against the company was, therefore, dismissed.[195]

While De Beers managed to escape prosecution in 1945, the consequences of the suit had a lasting impact not only on the company itself, but on the diamond market and the international cartel as well.[196] The suit prompted De Beers to pull all operations out of the United States and retreat back to South Africa in order to avoid the Justice Department establishing jurisdiction over the company in future suits.[197] A second suit against De Beers arose in 1976 based on similar antitrust allegations.[198] This suit, however, merely resulted in a consent decree, under which De Beers simply promised to refrain from fixing the prices on industrial diamonds in the future.[199]

De Beers's legal troubles in the United States continued when Edward Russell, a former employee of General Electric Superabrasives,[200] filed suit against his employer's parent company, General Electric ("GE"), in 1993 alleging wrongful discharge of employment.[201] Russell claimed that his employment was terminated as a result of his knowledge of interactions and agreements between GE and De Beers.[202] During the course of the employment

191. *Id.* at 220.

192. *Id.* at 219-20.

193. *Id.* at 220. "[The injunction in this case] deals with property which in no circumstances can be dealt with in any final injunction that may be entered." *Id.*

194. Savrin, *supra* note 187, at 1506.

195. *De Beers Consol. Mines*, 325 U.S. at 219-23.

196. *See generally* Teather, *supra* note 92, at 19; Pressler, *supra* note 11, at E1; Johnson, *supra* note 11.

197. *See* Teather, *supra* note 92, at 19. "The South African company pulled out of America shortly after the second world war, when the justice department filed a criminal lawsuit against it alleging that it fixed the price of industrial diamonds." *Id.*

198. *De Beers Charged Again in US*, BUS. L. BRIEF, Feb. 1, 1994.

199. *Id.*

200. General Electric Company Superabrasives [GES] is a division of the General Electric Company that is involved in the development and manufacturing of, among other superabrasive products, industrial diamonds. *See* Russell v. Gen Elec. Co., 1994 WL 16006017, 2 (S.D. Ohio 1994).

201. *Id.* at 1.

202. *Id.* at 2-3.

suit, Russell made several allegations against both GE and De Beers involving potential violations of U.S. antitrust law.[203]

> Russell alleges De Beers is a South African diamond cartel that operates a virtual worldwide monopoly of diamond gemstones and is the only significant competitor with [General Electric] in the industrial diamond market. He claims that De Beers and GE control approximately 90% of the worldwide industrial diamond market. He contends that the technology exchange between GE and De Beers was camouflage for potential antitrust violations.[204]

Russell contended during the suit that GE and De Beers had made agreements to simultaneously raise their industrial diamond prices in 1992.[205] The federal district court denied a motion for summary judgment by GE on January 4, 1994.[206] Barely one month after the district court's ruling, Russell withdrew his allegations against GE and the suit was settled outside of court on February 16, 1994.[207]

Ironically, the day after Russell settled his suit, the U.S. Justice Department obtained a grand jury indictment against both GE and De Beers[208] based, in large part, on the allegations concerning antitrust violations by both companies that were made by Russell during litigation.[209] Russell, not surprisingly, was a key witness for the Justice Department in obtaining the indictment against GE and De Beers.[210] "The indictment charges that

---

203. *See id.*

204. *Id.* at 2.

205. *Id.* at 3.

206. *Id.* at 10.

207. *See* U.S. v. Gen. Elec. Co., et al., 869 F. Supp. 1285, 1289 (S.D. Ohio 1994).

208. The indictment was returned on February 17, 1994; suit was filed December 8, 1994. *See id.* at 1288-89.

209. *Id.* at 1288. The district court found, in part, the following facts:

> On February 17, 1994, the grand jury returned an indictment charging defendants General Electric Company ("General Electric"), De Beers Centenary, AG ("De Beers"), Peter Frenz, and Philippe Liotier with one count of conspiracy to raise prices in violation of Section 1 of the Sherman Act. General Electric is a United States corporation. [It] manufactures industrial diamonds. . . . De Beers, through various affiliates, also manufactures industrial diamonds. Thus, De Beers is in direct competition with [General Electric]. General Electric and De Beers dominate the world industrial diamond manufacturing market.

Id. Peter Frenz is a manager for General Electric's industrial diamond division, and Philippe Liotier was a managing director for Diamant Boart, a company that buys industrial diamonds from both GE and De Beers. *Id.* Diamant Boart is owned by Sibeka, a company that is in a 50/50 joint industrial diamond manufacturing venture with De Beers. *Id.*

210. *Id.* at 1289. *But cf. GE Refutes Government Charges*, PR NEWSWIRE, Feb. 17, 1994 [hereinafter *GE Refutes Government Charges*]. The day after Russell settled his employment suit with GE, GE made the following public statement:

defendants conspired to raise the list prices of industrial diamonds in 1991 and early 1992. [GE] and De Beers raised the prices of their industrial diamonds in early 1992. This was the first market-wide increase in the list prices of industrial diamonds in nearly five years."[211] The government claimed that representatives of both companies exchanged advance pricing information as part of an alleged conspiracy[212] to end a 20-year economic decline in the industrial diamond industry.[213]

Despite the victory in obtaining the indictment, the U.S. Justice Department's steepest obstacle still lay ahead.[214] Three of the defendants charged in the indictment, most notably De Beers, were beyond the jurisdictional reach of the court.[215] So long as De Beers remained outside the United States and did not directly transact business with U.S. consumers or distributors, the company would remain out of the Justice Department's reach.[216] Having the distinct advantage of being a foreign corporation with no business interests in the United States, De Beers simply failed to appear in court to answer for the antitrust allegations raised by the indictment, thus avoiding jurisdiction in the suit.[217]

> The government began its investigation two years ago after former GE vice president Ed Russell made sensational allegations of direct price-fixing between GE and De Beers. Yesterday Mr. Russell dismissed his lawsuit against GE and retracted his allegations, stating in a sworn affidavit in Federal Court that "during my entire employment at GE, I never had any personal knowledge of any anti-trust wrongdoing." In his affidavit, Mr. Russell also acknowledged he had been fired for performance reasons, not for whistleblowing.

Id.

211. *Gen. Elec. Co.*, 869 F.Supp. at 1289. "In late 1991 and early 1992, before the price increases were publicly announced or took effect, Liotier provided Frenz advance list pricing information about De Beers' planned price increase. Similarly, Frenz provided Liotier advance list pricing information about [GE's] planned price increase." *Id.*

212. *Id. See also GE Facing Charges of Fixing Price of Industrial Diamonds in Europe*, DEUTSCHE PRESSE-AGENTUR, Oct. 26, 1994 [hereinafter *GE Facing Charges of Fixing Price*]. GE defended the allegation by arguing that Liotier was acting as an employee of Diamant Boart, which is a GE customer, and thus the exchange of information between Frenz and Liotier was lawful. *Gen. Elec. Co.*, 869 F. Supp. at 1289.

213. *GE Facing Charges of Fixing Price*, *supra* note 212.

214. *See Gen. Elec. Co.*, 869 F. Supp. at 1289.

215. *Id.* "Three of the named defendants in this case – De Beers, Peter Frenz, and Philippe Liotier – were, and remain, beyond the territorial jurisdiction of the Court." *Id.*

216. *See* Teather, *supra* note 92, at 19.

217. *See generally id.*; Pressler, *supra* note 11, at E1; Johnson, *supra* note 11.

> [I]t is often difficult to compel foreigners to participate in judicial proceedings in a country where the effects of their actions are being felt. One of the most notorious examples of this has been the persistent failure of the U.S. authorities to prosecute successfully the De Beers group for its alleged restraints on diamond trade.

Symposium, Symposium in Honor of Professor James A. Rahl: An International Antitrust Challenge: International Jurisdiction in National Legal Systems: The Case of Antitrust, 10 NW. J. INT'L L. & BUS. 56, 73 (1989) [hereinafter International Jurisdiction in National Legal Systems].

Left to defend the antitrust suit alone, GE released a public statement discounting the Justice Department's case against it.[218]

> After investing two years and millions of taxpayer dollars in an investigation that did not yield proof of any direct price-fixing and after the person whose allegations prompted the investigation said he knew of no price-fixing the government is now trying to salvage its effort by bringing a wholly circumstantial case of indirect price-fixing that is without merit. . . . Government prosecutors have virtually unlimited power to bring an indictment. But, under our system of justice, they must prove the facts and satisfy the law to win the case in court.[219]

GE claimed that the information its employees received and used to set GE's industrial diamond list prices was received from a legitimate GE customer, not from De Beers.[220] The highly anticipated suit, though De Beers was not involved, was heralded as promising to be "one of the most far-ranging and hard-fought cases in antitrust annals."[221]

The suit against GE, however, turned into another failure for the U.S. Justice Department in the area of antitrust prosecution, once again due to jurisdictional problems.[222] While the allegations Russell made during his earlier employment suit against GE helped the U.S. Department of Justice win an indictment against both GE and De Beers,[223] the evidence needed to prosecute GE under the Sherman Act was unavailable, as much of it was held by GE's co-defendant, De Beers, in South Africa.[224] Prosecutors claimed that the evidence they needed was located overseas[225] and, thus, beyond their jurisdictional reach.[226] The court found that the Justice Department's circumstantial evidence, most notably Russell's allegations against GE and De Beers, was insufficient to allow the case to proceed.[227] GE was acquitted of the charges, and the suit against GE was dismissed.[228]

---

218. *See GE Refutes Government Charges*, *supra* note 210.
219. *Id.*
220. *Id.*
221. *GE Facing Charges of Fixing Price*, *supra* note 212.
222. *See* Johnson, *supra* note 11.
223. *Gen. Elec. Co.*, 869 F.Supp. at 1289.
224. *See* Johnson, *supra* note 11.
225. *Id.*
226. *See id.*
227. *Gen. Elec. Co.*, 869 F. Supp. at 1290-92, 1300. In its motion for acquittal, GE asserted, among other arguments, that there was "insufficient evidence that Philippe Liotier acted on De Beers' behalf and that General Electric knew this," and the court agreed. *Id.* at 1290. In explaining its reasoning for granting GE's motion for acquittal, the court found the following:

While GE's involvement in the suit ended with its acquittal in 1994, De Beers would continue to feel the consequences of the indictment for the next decade.[229] To avoid jurisdiction in the United States, De Beers was forced to remain abroad and avoid any direct contact with the U.S. diamond market.[230] After the 1994 indictment, "[t]he company still advertise[d] heavily in the [United States] to maintain its brand name and [sold] through intermediaries, but it [did] not have its own retail presence and De Beers executives could be detained if they travel[ed] to the [United States]."[231] Despite the fact that the United States accounts for over one-half of retail jewelry diamond sales worldwide and the fact that the diamond market continued to grow after the 1994 indictment, due, in large part, to the emergence of many new sources of diamonds around the world, De Beers was forced to refrain from any direct communication or transactions in the United States due to the still-valid U.S. antitrust indictment.[232]

Following GE's acquittal in 1994, De Beers made efforts to get the indictment against it dropped.[233] However, the Clinton and the Bush

---

> General Electric cannot be held criminally liable for sharing advance pricing information with a customer. Stated otherwise, the government's conspiracy theory falls apart completely if Liotier was not acting on De Beers' behalf. . . . The government does not cogently dispute General Electric's contention that there is no direct evidence to establish that Liotier was acting on De Beers' behalf. The government maintains, however, that a rational trier of fact could infer this fact from circumstantial evidence it presented in its case. . . . The court finds that even if this evidence is viewed in the light most favorable to the government, it is insufficient to support an inference that Liotier acted on De Beers' behalf.

Id. at 1291-92.

> It would have been difficult for the government to prove its case even in the best of circumstances. Here, however, the government's usual burden of investigating and proving its case was made more difficult because three of the four named defendants, and many potential witnesses, are foreign nationals beyond the jurisdiction of this Court.

Id. at 1300.

228. *Id.* at 1301.

229. *See* Teather, *supra* note 92, at 19; Pressler, *supra* note 11, at E1; Johnson, *supra* note 11.

230. *See* Johnson, *supra* note 11.

> That hasn't stopped De Beers from becoming one of the world's best-known brands and one of the biggest advertisers in the U.S., relentlessly linking diamonds to engagements, weddings and anniversaries with its "A Diamond is Forever" campaign. But De Beers hasn't had a retail presence in America and its executives are subject to detention if they enter the country. De Beers only has its own retail stores in London and Tokyo.

Id.

231. Teather, *supra* note 92, at 19. *See also* Johnson, *supra* note 11.

232. Pressler, *supra* note 11, at E1. "[De Beers hasn't] been able to set foot in a market that represents half the world's diamond market . . . . De Beers could not call you in this country, they couldn't send you an e-mail, they couldn't mail you anything." *Id.* (quoting Kenneth M. Gassman, director of research for the Rapaport Diamond Report, an industry trade publication).

233. Johnson, *supra* note 11.

administrations persistently blocked any attempt by the company to rid itself of the charges.[234] U.S. officials did seek De Beers's help "in clamping down on illicit sales of smuggled Central African diamonds, used to finance regional wars – notably, the conflict in the Democratic Republic of the Congo."[235] De Beers offered to help in exchange for quashing the 1994 indictment that restricted its officials from entering or conducting business in the United States.[236] The exchange, however, did not take place, likely due to the Justice Department's unwillingness to allow De Beers back into the U.S. market.[237]

De Beers's legal troubles in the United States did not end with the indictment. Following the indictment, several buyers of industrial diamonds brought a civil antitrust class action suit against GE and De Beers, alleging a price-fixing conspiracy in violation of the Sherman Act and seeking to recover damages against the companies.[238] De Beers failed to either answer or appear for the litigation, and the court entered default judgment against the company.[239] GE, however, subject to the court's jurisdiction, did appear, settling the suit in 1999.[240]

Under the default judgment, De Beers had "no further standing to contest the factual allegations of plaintiff's claim for relief."[241] However, it remained to be determined by the court whether plaintiffs had a cause of action based on the unchallenged facts, as De Beers, while in default, had not admitted any conclusions of law.[242] The default judgment itself did not constitute a

---

234. *Id.*

235. *De Beers Wants Improved US Relations*, UPI, Jan. 31, 2000, LEXIS, Nexis Library, UPI File.

236. *Id.*

237. *See generally* Pressler, *supra* note 11, at E1. The 1994 indictment remained in effect, despite De Beers's offer to help eradicate the diamond smuggling in Central Africa in 2000, until the charges were settled in 2004 as a result of De Beers's unrelated, voluntary plea. *Id.*

238. In re Indus. Diamonds Antitrust Litig., 119 F.Supp.2d 418 (S.D.N.Y. 2000).

239. *Id.* at 419.

240. *Id.*

> Following extensive discovery and negotiation, GE settled all claims asserted against it by the plaintiff class by agreeing to pay plaintiffs' attorneys fees and expenses ($1,850,000 and $500,000 respectively) and to give each class member an in-kind rebate of free diamonds of like grade and quality to their purchases of industrial diamonds from GE during a "claim period" of 20 months after the settlement became final, in an amount equal to 3% of the diamonds purchased by the member from GE during the claim period. If a class member purchased no diamonds from GE during the claim period, it was given the option of either transferring a share of its right to such in-kind rebate to another entity or of receiving from GE a cash payment of $1,000. After notification of the class members and a fairness hearing, the settlement was approved by the Court on July 23, 1999.

Id. After the settlement with GE, the court reviewed the default judgment previously entered against De Beers at an evidentiary hearing on July 26, 2000. *Id.*

241. *Id.* at 420.

242. *Id.*

submission to damages, rather it merely established the facts of the case.[243] Any damages flowing from the suit were required to be determined at a subsequent evidentiary hearing.[244] The court found the evidence at the evidentiary hearing to be insufficient to support any award of damages against De Beers.[245] In its reasoning, the court cited the lack of any direct sales in the United States by De Beers; De Beers instead used independent middlemen to transact business with consumers.[246] As a result, De Beers's shrewd business strategy again proved successful in thwarting an adverse judgment in the United States.[247]

The expanding diamond market and the introduction of the synthetic diamond, however, began to take its toll on De Beers.[248] The 1994 indictment still kept the company from operating, at least directly, in the United States, the largest diamond market in the world.[249] "U.S. officials over the years [were not] eager to help De Beers because of its history of harsh labor conditions and support for South Africa's apartheid regime."[250] Despite its extensive efforts to prosecute De Beers in the United States, the U.S. Justice Department knew that its case against the company stood little chance given the acquittal of GE in

---

243. *Id.*

244. *Id.* at 419.

> The court conducted an inquest to fix damages against the defaulting defendant De Beers on July 26, 2000. The only witness was Dr. Michael C. Keeley, plaintiff's economics expert. De Beers was not represented at the hearing. An attorney for its Irish subsidiary, De Beers Industrial Diamonds (Ireland), attended the hearing, but declined the Court's invitation to cross-examine the witness or otherwise actively participate.

Id. at 419.

245. *Id.* at 424.

246. *Id.* at 421. The court found that plaintiffs' expert, Dr. Keeley, inaccurately computed the damages being sought. *Id.*

> Dr. Keeley based his computation of damages on estimates of total U.S. sales of industrial diamonds by both GE and De Beers. This was a clear error of considerable magnitude. De Beers did not sell directly to any members of the plaintiff class or any other U.S. purchaser similarly situated. De Beers industrial diamonds are marketed in the U.S. by distributors . . . . To award damages against De Beers based on plaintiffs' purchases of industrial diamonds not directly from De Beers but from an independent distributor would violate the rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) that those who purchased the products of a price-fixing defendant indirectly through an independent middleman may not recover damages therefore from that defendant.

Id.

247. *See generally id.* De Beers's strategic use of independent intermediaries, thus avoiding any direct contact with U.S. consumers, avoided a judgment for civil damages. *Id.*

248. *See* Pressler, *supra* note 11, at E1.

249. Johnson, *supra* note 11. "[T]he charges have been hanging over De Beers for years, preventing its executives from traveling to the United States to do business even on precious gems without the risk of being arrested." Pressler, *supra* note 11, at E1.

250. Johnson, *supra* note 11.

1994.[251] If De Beers was willing to plead guilty to the indictment, the Justice Department knew that it was in little position to resist.[252]

A settlement to the decade-old charges would "give De Beers a bigger marketing presence and greater legitimacy with U.S. consumers."[253] A De Beers official was quoted as saying that the company "would really, really like to resolve these issues"[254] and that it was "hopeful of a resolution with the justice department."[255] On July 12, 2004, De Beers voluntarily pled guilty to the 10-year-old charges of price-fixing in the industrial diamond market.[256] The company agreed to pay a $10 million fine to settle the indictment.[257] De Beers released a statement following the guilty plea claiming that although it was now free to resume business relationships and transactions in the United States, it had no intention of altering its traditional business strategies.[258] It is important to note that while De Beers effectively released the restraints on itself in the U.S. market, thereby giving the U.S. Justice Department no ammunition to pursue it, its business practices, specifically its "supplier of choice" sales tactic, is still under investigation by the European Union.[259]

De Beers's motive for the guilty plea after ten years of exile from the United States was likely due to several factors.[260] Its market presence had been in decline since the indictment due to the expanding market, new discoveries of diamonds around the world, and the advancements in synthetic diamond manufacturing.[261] "Industry experts say the company may have settled because

---

251. *Id.* "[U.S.] Justice Department officials apparently have concluded that – having lost their case against De Beers's co-defendant GE in 1994 – they have little leverage to continue to exclude the company from the U.S. if it is willing to plead guilty, unconditionally, to the 10-year-old charge." *Id.*

252. *Id.*

253. Pressler, *supra* note 11, at E1.

254. Johnson, *supra* note 11 (quoting Lynette Hori, a spokeswoman for De Beers).

255. Teather, *supra* note 92, at 19.

256. Pressler, *supra* note 11, at E1.

257. *Id.*

258. *Id.* "Obviously, this means now that [De Beers] can resume normal business relationships.... Our sales directors can meet clients, and marketing teams can meet retailers. But we have no plans to change the way we do business." *Id.* (quoting Lynette Hori, a spokeswoman for De Beers).

259. Johnson, *supra* note 11. De Beers's "supplier of choice" program is aimed at enabling the company to single out only a select few buyers to which it will sell diamonds, creating competition among buyers for such status and maintaining tighter control over the cartel and the market. *Id.*

260. *See* Pressler, *supra* note 11, at E1.

261. *Id.* "[De Beers] dominance in the world's diamond market has been declining in recent years as new mines have opened in Russia, Canada and Australia, and as new varieties of synthetic diamonds – both industrial and gem quality – are being created." *Id. But cf.* DePalma, *supra* note 82, at C1 (explaining that De Beers has recently gained a foothold in the newly-discovered Canadian diamond mine region).

> [T]he Canadians need De Beers.... Without it, they risk disrupting the cartel's tight grip on the market – a grip that keeps gem prices high for all. And [in March 1999], in fact, the mine's owners agreed to sell part of its production to

it was too risky to stay away from the U.S. market when so many new sources of diamonds were emerging."[262] De Beers, however, defended its motive as being linked to its strategy of "total legal compliance around the world" and its "drive to create a new, modern De Beers" rather than to the growing competition from mined and synthetic diamonds.[263] Given its past support for the apartheid regime in South Africa and its involvement in the conflict diamond struggle, De Beers has been working to improve its image around the world.[264] Settling its legal problems in the United States is one large step toward that goal.[265] However, the consequences of such a step have yet to be realized.[266]

IV. INTERNATIONAL ANTITRUST COOPERATION AND ENFORCEMENT

Antitrust cases involving international cartels have increasingly received more attention on the worldwide scene in recent years.[267] The problem with enforcement, however, is that the investigation and prosecution procedures for international cases do not correspond with the jurisdictional authority afforded by international law.[268] The United States has encountered this problem, specifically lacking the necessary jurisdiction and evidence, in trying to prosecute members of the international diamond cartel.[269] Following its unsuccessful attempt to prosecute De Beers and others in 1994, the United States stepped up its efforts in the area of international antitrust enforcement.[270] To enhance the Justice Department's ability to prosecute international antitrust violations, Congress passed the International Antitrust Enforcement Assistance Act [IAEAA][271] in 1994.[272] The IAEAA was the result of the "increasingly

---

> De Beers. But that deal carries its own risks, for antitrust regulators in Washington take a dim view of De Beers, and if the owners get too cozy with the cartel, their American businesses could suffer.

Id. De Beers negotiated a deal to purchase thirty-five percent of the diamonds produced from the Canadian mines over the next three years. *Id.* "De Beers now has a foot in the door of what could in a few years be one of the world's top five diamond-producing regions." *Id.*

262. Pressler, *supra* note 11, at E1.

263. *Id.* (quoting Lynette Hori, a spokeswoman for De Beers).

264. Teather, *supra* note 92, at 19.

265. *Id.*

266. *See generally id.*

267. Klein, *supra* note 9. "[I]nternational cartel cases, where competitors in various countries get together privately to fix prices or allocate territories on a worldwide basis, have assumed increasing prominence." *Id.*

268. *Id.*

269. *Id.* The U.S. Justice Department lacked the necessary jurisdiction to pursue De Beers and the necessary evidence to prosecute GE after the 1994 antitrust indictment. Johnson, *supra* note 11.

270. *See* Antitrust L. and Trade Reg. § 1.04, *supra* note 2.

271. 15 U.S.C.A. § 6201 (2004). The IAEAA provides, in pertinent part, as follows:

> [T]he Attorney General of the United States and the Federal Trade Commission may provide to a foreign antitrust authority with respect to which such agreement is in effect under this chapter, antitrust evidence to assist the foreign antitrust authority –

global focus of antitrust enforcement in the 1990's"; it has enabled the Justice Department and the Federal Trade Commission to conduct international antitrust investigations in cooperation with antitrust enforcement authorities in foreign countries.[273]

After GE's acquittal in 1994 due to the inability to reach needed evidence overseas,[274] Congress realized that "American consumers and businesses were increasingly at risk from foreign cartels and monopolies that only could be prosecuted under U.S. antitrust laws if the enforcement agencies could obtain the evidence required to prove antitrust violations."[275] Congress passed the IAEAA "in order to permit the negotiation of reciprocal arrangements" to overcome the difficulty of obtaining evidence from foreign parties,[276] which was the problem in 1994 when GE was acquitted.[277] The IAEAA, however, has proven somewhat ineffective due to a lack of participation.[278] In fact, by 2001, seven years after the IAEAA was passed, Australia remained the only government to take advantage of the opportunity.[279]

> (1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or
>
> (2) in enforcing any of such foreign antitrust laws.

Id. 15 U.S.C.A. § 6204 (2004) provides limitations, outlining evidence which may not be offered to foreign antitrust authority under the IAEAA. *Id.*

272. 1-9 Antitrust L. and Trade Reg., 2d ed. § 9.07 [hereinafter Antitrust L. and Trade Reg. § 9.07].

> The International Antitrust Enforcement Assistance Act ("the Act"), enacted in 1994, was designed to enhance the ability of the Antitrust Division of the [U.S.] Justice Department and the Federal Trade Commission ("FTC") to participate in international antitrust investigations. The Act authorizes the Attorney General and the FTC to conduct investigations on behalf of, and provide antitrust evidence to, foreign antitrust enforcement agencies. By limiting cooperation to foreign agencies with reciprocal arrangements, the Act also was intended to cause those foreign agencies to provide similar information to the American antitrust agencies. The Act also provides safeguards for sensitive business information.

Id.

273. *Id.*

274. Johnson, *supra* note 11.

275. Antitrust L. and Trade Reg. § 9.07, *supra* note 272.

276. Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 650 (2001). "A principal objective of bilateral agreements, accordingly, has been to promote the discovery and exchange of information between antitrust authorities." *Id.* at 649-50.

277. *See* Johnson, *supra* note 11.

278. Swaine, *supra* note 276, at 650-51.

279. *Id.* at 650. In 1996, the U.S. Assistant Attorney General acknowledged the IAEAA's participation problem and expressed optimism that such cooperation would be given in the future. Klein, *supra* note 9.

> We recognize nevertheless that getting nations to enter into such bilateral agreements will not be easy, and that differences in the substantive and procedural rules in different countries will have to be carefully worked through. Most countries, for example, do not impose criminal penalties for violation of their competition laws. And there are always important cultural and sovereignty issues that must be resolved when such agreements are contemplated. Still, it is

The World Trade Organization [WTO] has also expressed an interest in playing an active role in international antitrust enforcement.[280] However, allowing the WTO to get involved should be approached very cautiously as it could lead to disruption of potentially successful enforcement factors that are already in place.[281] For example, "an increasingly globalized economy, spurred largely by technological advances, has meant that markets throughout the world are economically available even to previously domestic businesses."[282] Similarly, "successive reductions of government-imposed barriers to trade . . . [have] meant that entry into foreign markets is not just economically feasible but practically feasible as well."[283] Encouraging more previously domestic businesses to enter the global economy diminishes the potential for a successful cartel or anticompetitive agreements.[284] Allowing the WTO to get involved in international antitrust enforcement could disrupt the expanding global economy, which would in turn discourage domestic businesses from taking on a global role as legitimate world market participants.[285]

The idea of positive comity is a popular tool in the area of international antitrust enforcement.[286] Positive comity, as it relates to international antitrust enforcement, involves the recognition of and adherence to one nation's antitrust laws by another nation.[287] It recognizes that "anti-competitive activities

---

> my personal belief that such differences ultimately will not stand in the way of cooperation aimed at eliminating cartels.

Id.

280. Klein, *supra* note 9.

281. *Id.*

282. *Id.*

283. *Id.*

284. *See generally id.* As more businesses enter the global economy as legitimate competitors, the power of current cartel members over the markets in which they participate will diminish and it will become harder for companies like De Beers and GE to forge anticompetitive agreements, such as those to fix market prices. *Id.*

285. *See generally id.*

286. *See* Swaine, *supra* note 276; Donald C. Klawiter, *Criminal Antitrust Comes to the Global Market*, 13 ST. JOHN'S J. LEGAL COMMENT. 201 (1998); Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L. L. 563 (2000); Kukovec, *supra* note 7, at 18.

287. *See* BLACK'S LAW DICTIONARY 261-62 (7th ed. 1999).

> A great deal of misconception about the nature of conflict of laws is due to the loose use of the term 'comity.' The laws of another state or nation, it has been sometimes said, can have no operation in another sovereignty except by comity. In the dictionary definition, comity means 'courtesy between equals; friendly civility.' Such a conception of the matter supposes one sovereign, as a matter of courtesy, allowing the law of another to operate within the territory of the first. If this were true, the determination of when, by comity, recognition would be given to foreign law would not be a predictable matter. . . . Courts use it, often loosely, and in cases correctly decided despite looseness of terms. It is clear that reference to foreign law in appropriate cases is dependent not upon a mere courtesy which a court may grant or withhold at will, but upon the need to achieve justice among parties to a controversy having foreign contacts.

Herbert F. Goodrich & Eugene F. Scoles, *Handbook of the Conflict of Laws* § 7, at 7-8 (4th ed. 1964). "The comity principle is most accurately characterized as a golden rule among nations – that each must give the respect to the laws, policies and interests of others that it would have

occurring within the territory of one party to the agreement may adversely affect the interests of the other party."[288]

> Traditional comity contemplates that an antitrust authority consider the other party's interests in deciding whether to initiate an investigation or proceeding, determining its scope, and electing which remedies to pursue. . . . U.S. agreements also contain "positive" comity provisions, whereby one authority may request the other to investigate anticompetitive activities occurring within its territory that affect the requesting authority's important interests.[289]

In the 1990s, the United States began working with the European Commission (EC) to establish such cooperation agreements.[290] In 1991, the "EC/U.S. Antitrust Cooperation Agreement" was formed, which was expanded in 1997 to a positive comity agreement.[291] Similarly, the 1994 IAEAA serves as an important tool for the U.S. Justice Department in forging cooperation agreements outside the comity arena.[292]

The notion of using positive comity agreements in the area of international antitrust enforcement has encouraged antitrust authorities to take the idea further to include "cartel-specific agreements."[293] "[T]he current successes of the Antitrust Division has [sic] resulted from 'cartel-specific agreements' where the United States and other governments have shared information, coordinated enforcement actions, such as execution of searches for documents, assisted in locating and contacting witnesses and similar initiatives."[294] While these agreements do not carry the weight of a treaty or the stature of an official comity agreement, they do give an alternative for international antitrust enforcement, providing much-needed cooperation and discovery of critical evidence.[295]

While antitrust authorities have experienced some success through the use of positive comity and cartel-specific agreements,[296] there remains a

---

others give to its own in the same or similar circumstances." Thomas Buergenthal & Harold G. Maier, *Public International Law in a Nutshell* 178 (2nd ed. 1990).

288. Kukovec, *supra* note 7, at 28.

289. Swaine, *supra* note 276, at 652.

290. *See* Klawiter, *supra* note 286.

291. *Id.* at 213-14.

292. *Id.* at 214. "In addition to positive comity agreements, the U.S. Government is also negotiating agreements with other Governments, pursuant to the 1994 International Antitrust Enforcement Assistance Act, to greatly expand the exchange of information among antitrust enforcement authorities around the world." *Id.* (citation omitted).

293. *See id.*

294. *Id.*

295. *Id.* at 214-15.

296. *Id.* at 216.

> [O]ver thirty grand juries are investigating international cartel matters. Those investigations represent at least 30%, and probably over 50% of all the criminal investigative activities being conducted under the antitrust laws today. This is

problem, as with the IAEAA, in recruiting participation with other governments.[297] Prosecution of some of the U.S. Justice Department's biggest antitrust targets, such as De Beers, has proven extremely difficult without the cooperation of the countries in which those targets operate.[298] South Africa's unwillingness to prosecute De Beers or to forge any comity agreements in the area of antitrust law to allow foreign nations to pursue De Beers, due largely to the company's stranglehold on the nation's economy,[299] has served to place De Beers beyond the reach of prosecution in foreign countries, most notably in the United States.[300]

The idea of comity in the area of antitrust law, while hailed by academics, has traditionally not been favored by legislators, especially in the United States.[301] Further, the use of antitrust-related comity agreements continues to decline as more countries begin to play an active role in enforcement themselves.[302] While comity was a forefront issue for nearly half a century when U.S. antitrust law stood alone on the global scene, today it is an outdated concept because there is an increasing implementation of antitrust law worldwide.[303] As the number of countries that are passing and enforcing

---

> truly monumental considering that there were virtually no such cartel investigations in 1991 or 1992. The trend is likely to continue.

Id. "Early in 2000, the Antitrust Division has over thirty grand juries investigating suspected international cartels, comprising one-third of the Antitrust Division's total criminal investigations." Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 AM. CRIM. L. REV. 241, 276 (2003) (citation omitted).

297. *See* Klawiter, *supra* note 286, at 215.

> Despite the fact that these cooperation agreements are beginning to solve some of the Antitrust Division's evidentiary problems, they are only limited successes to date. In many situations, the Antitrust Division is still thwarted in its attempt to obtain evidence found in other countries and to arrange for witnesses to testify in its proceedings.

Id.

298. *See generally id.*

299. *See generally* INTERNATIONAL CARTELS, *supra* note 10, at 77; Leslie, *supra* note 19, at 637.

300. *See* Teather, *supra* note 92, at 19.

301. Waller, *supra* note 286, at 564.

> The United States Congress has never required the consideration of comity in the exercise of jurisdiction under any aspect of the antitrust laws despite numerous opportunities to do so. Moreover, the Congress has enacted numerous pieces of legislation operating on an extraterritorial basis without any incorporation of comity considerations. The most prominent example in recent years has been the Helms-Burton Act imposing sanctions on firms anywhere in the world which do business in Cuba or traffic in United States assets which were expropriated without compensation by the Castro regime.

Id. at 564 n.3.

302. *Id.* at 565-66.

303. *Id.*

> Comity was the burning issue of the day for nearly fifty years while the United States was the world's antitrust policeman and U.S. national law sought to regulate nearly alone most anticompetitive conduct in foreign and global markets. Now we stand poised on the brink of a new world in which dozens of jurisdictions police their own markets for anticompetitive conduct and abusive

antitrust legislation increases, the need for agreements to enforce U.S. antitrust policies in those countries declines.[304] As an alternative to comity, one suggestion is "to allow the countries that feel the greatest economic effects from the cartel to regulate it, even if the host country has chosen not to do so or has 'regulated' the cartel by giving its approval."[305]

However, the problem remains of countries that pass antitrust laws but refuse to enforce them, such as the South African government's refusal to pursue De Beers for anticompetitive activity in violation of the country's Competition Act.[306] South Africa's refusal to enter into a comity agreement to allow antitrust officials to pursue De Beers under U.S. antitrust law has proven detrimental to other prosecution efforts as well.[307] For this reason, learning from incidents like the acquittal of GE in 1994 due to insufficient evidence, the U.S. Justice Department continues to pursue cooperation agreements with foreign nations, regardless of whether there is a comity agreement or not.[308]

> In recent times, both the Antitrust Division and the FTC have spent far more time negotiating cooperation agreements with foreign enforcement agencies and working with those agencies to discover the necessary evidence to obtain convictions and effective relief and very little time worrying about unilateral assertions of extraterritorial jurisdiction, with or without comity.[309]

While a solution to the U.S. Justice Department's dilemma with companies like De Beers may not be solved without the use of comity or a willingness on the part of the host government, to prosecute the company itself, the growing use of cooperation agreements with foreign nations is an important step toward successful international antitrust enforcement.[310] "Cooperation is of extreme importance for effective prosecution of international cartels, as much of the alleged conduct takes place outside domestic territory and much of the evidence is located beyond the domestic regulator's reach."[311] In most

---

> market structures and the United States debates with its trading partners the creation of truly global rules to police global markets. Traditional comity concerns have little role to play in this debate.

Id.

304. *See id.*

305. *International Jurisdiction in National Legal Systems*, *supra* note 217, at 73.

306. *See generally* INTERNATIONAL CARTELS, *supra* note 10, at 77; Leslie, *supra* note 19, at 637.

307. *See generally* INTERNATIONAL CARTELS, *supra* note 10, at 77; Leslie, *supra* note 19, at 637.

308. Waller, *supra* note 286, at 573.

309. *Id.*

310. *See generally id.*

311. Kukovec, *supra* note 7, at 38.

international cartel cases, cooperation is sought as a precondition for enforcement.[312]

> Another effort in the area of international antitrust enforcement is the International Competition Network [ICN], established in 2001 largely due to the efforts of the U.S. Justice Department's Antitrust Division and the FTC.[313]

> Established largely in response to the new challenges in antitrust enforcement created by increased globalization, the ICN is a global network of competition authorities focused exclusively on competition. The twin goals of the ICN are to provide support for new competition agencies in enforcing their laws and building a strong competition culture in their countries, and to promote greater convergence among these authorities by working together and with interested parties in the private sector to develop guiding principles and best practices to be endorsed and implemented voluntarily.[314]

The ICN consists of several small groups, each focusing on different specific areas of competition law.[315] These groups present their findings to the ICN members, who in turn have the option to implement the group recommendations through their own separate legislation.[316] Currently, the ICN consists of sixty-five member jurisdictions on six continents and represents around seventy percent of the world's Gross Domestic Product.[317] While the ICN does not forge binding cooperation agreements between member nations, it does evidence willingness on the part of the United States and others to work together against international antitrust activity.[318]

V. CONCLUSION

Anticompetitive practices in the diamond industry have existed for well over a century.[319] As leader of the international diamond cartel, De Beers has achieved staggering success in consolidating the diamond industry and

312. *Id.* at 40. "Although disagreements on enforcement can arise in cartel investigations . . . , the drive to cooperate is stronger because often the very precondition for enforcement in international cartel cases is cooperation." *Id.*

313. Krauze, *supra* note 296, at 283.

314. *Id.* (citation omitted).

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 284.

319. INTERNATIONAL CARTELS, *supra* note 10, at 49.

imposing anticompetitive business practices on market participants.[320] However, as the number of diamond producers around the world continues to grow and economies worldwide are suffering from recession, the control that De Beers once enjoyed is slowly diminishing.[321] As the market grows, new producers and participants have been incorporated into the cartel, thus sacrificing some of De Beers's control over the cartel and the market.[322] Similarly, De Beers's continual legal troubles in the United States not only hurt the company's image in recent decades,[323] but undoubtedly weakened its grip on the diamond industry by prohibiting any direct contact or business transaction with U.S. consumers.[324]

While being forced to settle ongoing legal troubles in the United States, De Beers remains free from prosecution in its home country.[325] Despite nearly half a century of legislation restricting anticompetitive business practices,[326] South Africa has yet to pursue De Beers for such activity.[327] Given the company's dominant presence in the South African economy, constituting around one-half of the national stock market, it is no surprise that De Beers escaped decades of anticompetitive behavior without any interference from the South African government.[328] South Africa essentially left prosecution of De Beers's anticompetitive business practices to the rest of the world, most notably to the United States.[329] However, by operating out of South Africa and without any cooperation from the South African government, De Beers essentially has been allowed to operate free from restraint in the area of antitrust law due largely to jurisdictional problems.[330]

While international cooperation in antitrust enforcement gained prominence in recent years,[331] participation in such cooperation schemes has not met expectations.[332] The U.S. Justice Department continues to encounter difficulty in international antitrust prosecution due to jurisdictional problems,[333] and the unwillingness of countries like South Africa to provide needed

320. *Id.* at 41.

321. *See supra* notes 82-85, 142, and accompanying text.

322. *See* INTERNATIONAL CARTELS, *supra* note 10, at 49. As new market participants come onto the scene, the cartel has been forced to incorporate them into its cooperative effort to maintain control of the market. *Id.* However, the more diamond producers and market participants there are in the cartel, the less control major cartel members like De Beers can exercise. *Id.*

323. *See* Teather, *supra* note 92, at 19 (noting that De Beers has been working in recent years to clean up its damaged image in the United States).

324. *See* Pressler, *supra* note 11, at E1; Johnson, *supra* note 11.

325. *See* INTERNATIONAL CARTELS, *supra* note 10, at 77.

326. *The Basic Principle of Competition Policy*, *supra* note 17.

327. INTERNATIONAL CARTELS, *supra* note 10, at 77.

328. *See id.*

329. *Id.*

330. *See supra* notes 269, 297-300 and accompanying text.

331. Klein, *supra* note 9.

332. Swaine, *supra* note 276, at 650.

333. Klein, *supra* note 9.

evidence and cooperation further adds to the frustration.[334] As a result, De Beers remained out of the reach of the U.S. Justice Department due both to its abroad operations and the stranglehold it has over the South African economy.[335] The growing implementation of comity and cooperation agreements between nations, however, is moving antitrust enforcement efforts closer to reaching De Beers.[336] The use of such agreements may prove to be the answer to decades of unsuccessful efforts to prosecute De Beers under U.S. antitrust law.[337]

Given De Beers's 2004 antitrust guilty plea in the United States, the tradition of anticompetitive practices and cartel activity within the diamond industry may be nearing a conclusion. Despite public statements that it has "no plans to change the way [it does] business,"[338] De Beers already has been forced to make public strides toward legitimacy.[339] The company declared its support for the Kimberly Process, which is "an attempt to remove diamonds from the market that are used to fund bloody conflicts in Africa," and is working to clean up its tarnished image with consumers worldwide.[340] Its recent guilty plea in the United States may prove to be its biggest stride yet toward legitimate business operations. However, allowing a corporation with a long history of anticompetitive practices and broken promises to reclaim a direct presence in the U.S. economy carries certain risk. The effects that a fully-functioning De Beers will have on U.S. consumers have yet to be seen. While the company professes to be turning over a new leaf, its efforts may merely be a smoke screen for a continued future of anticompetitive business practices in the diamond industry.

334. *See generally* INTERNATIONAL CARTELS, *supra* note 10, at 77; Leslie, *supra* note 19, at 637.

335. *See supra* notes 306-07.

336. *See supra* notes 308-12.

337. *See* Kukovec, *supra* note 7, at 38.

338. Pressler, *supra* note 11, at E1.

339 *See* Teather, *supra* note 92, at 19.

340. *Id.*

RELIGIOUS ACCOMMODATIONS FOR POLICE OFFICERS: A COMPARATIVE ANALYSIS OF RELIGIOUS ACCOMMODATION LAW IN THE UNITED STATES, CANADA, AND THE UNITED KINGDOM

Lynn A. Grunloh*

I. INTRODUCTION

The tenets of Sikhism require its followers to wear the religious symbols of both a beard and a turban.[1] Officers of the Royal Canadian Mounted Police, however, are subject to a strict grooming policy that requires all officers to wear a traditional uniform.[2]

A devout Baptist police officer in the state of Indiana was forbidden from gambling and aiding others in their gambling efforts.[3] He was assigned by the police force to a full-time position as a Gaming Commission agent at a casino in Indiana.[4]

These stories illustrate the serious problem of a police officer's religious observances. Part II of this Note provides a brief overview of the history of religious accommodations in the United States under Title VII's prohibition of religious discrimination. This section also discusses the problems, both economic and social, associated with religious accommodations directed towards police officers. Finally, this section addresses a new circuit court decision that may create a statutory exemption for police officers and the department's duty, or lack thereof, to accommodate religious beliefs.

Part III of this Note examines Canadian law regarding religious discrimination. This section examines the country's efforts to add religious minorities to its police force and the subsequent problems associated with the policy. Additionally, this section addresses the concerns of Canadian citizens pertaining to the ensuing diversity in the police force.

Part IV of this Note presents the United Kingdom's comprehensive regulations concerning religious discrimination as an example for both the United States and Canada. This section highlights the reluctance of the United Kingdom's employers to implement the new regulations.

Finally, Part V discusses the potential benefits of Canada and the United States using the United Kingdom's recently enacted regulations. This section

---

* J.D. Candidate 2006, Indiana University School of Law-Indianapolis; B.S. Entrepreneurship and Small Business Management 2003, Illinois State University.

1. Grant v. Canada, [1995] F.C. 158, *available at* http://reports.fja.gc.ca/fc/1995/pub/v1/1995fca0229.html (last visited Jan. 7, 2006).

2. *Id.*

3. Endres v. Indiana State Police, 349 F.3d 922, 923 (7th Cir. 2003).

4. *Id.* at 924.

focuses on the history of both the United States and Canada with regard to police officers and religious accommodation. It concludes that a comprehensive scheme may serve to resolve ambiguities.

II. UNITED STATES: ARE POLICE OFFICERS STATUTORILY EXEMPTED FROM RELIGIOUS ACCOMMODATIONS?

A. *Overview*

1. Title VII and the Prohibition of Religious Discrimination

In the United States, Title VII of the Civil Rights Act of 1964 provides for equal employment opportunity by prohibiting discrimination on the basis of race, color, religion, sex, or national origin.[5] Title VII was implemented as a result of the Civil Rights movement toward racial equality in America.[6] The statute was Congress's response to this movement and an attempt to address racism in American labor markets.[7] The statute sought to economically integrate African Americans into the mainstream of society in order to address the "de jure system of segregation and discrimination" in public, as well as private, employment.[8] Although race was the primary motivator behind adoption of the statute, it also addressed religious discrimination.

Under Title VII, an "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . but such term does not include, (1) the United States . . . or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation . . . ."[9] The term "person" includes "governments" and "governmental agencies."[10] Furthermore, the Supreme Court has held that employers are covered under Title VII without regard to whether they receive federal funding.[11] The Court reasoned that Title VII was broadly aimed at eradicating discrimination throughout the economy.[12] Therefore, police departments are covered under the language of Title VII.

An "employee" is defined as "an individual employed by an employer . . . ."[13] Exemptions to this definition do not include "employees subject to the

---

5. 42 U.S.C. § 2000e-2(a)(1) (2004).

6. SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 45 (2d ed. 2000).

7. *Id.*

8. *Id.* at 55.

9. § 2000e(b).

10. § 2000e(a).

11. Gebser v. Lago Vista Sch. Dist., 524 U.S. 274, 286-87 (1998).

12. *Id.* at 286.

13. § 2000e(f).

civil service laws of a State government, governmental agency or political subdivision."[14] Therefore, police officers are unquestionably covered by Title VII's definition of employee.

"Religion" is defined as "all aspects of religious observance and practice, as well as belief . . . ."[15] Usually whether an employee's action constitutes a religious practice is not an issue.[16] In cases when it presented an issue, an expansive approach was used.[17] In *United States v. Seeger*[18] and *Welsh v. United States,*[19] the Supreme Court developed a standard that defined religious practices to include moral or ethical beliefs as to what is right and wrong, noting that these beliefs are held with the sincere strength of traditional religious views.[20] Even if a religious group espouses no such belief or rejects a certain belief, the employee's belief will still qualify as a religion.[21] Therefore, Title VII can be said to encompass a very broad definition of religion.

Based on the definition of "employer," "person," "employee," and "religion," it appears that a police officer would receive extensive protection from religious discrimination while on duty. However, Title VII provides for an exemption that limits the breadth of such protection.[22]

2. *Title VII and the Duty to Accommodate Religious Observance or Practice*

Religious discrimination is prohibited "unless an employer demonstrates that he is unable to reasonably accommodate an employee's, or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business."[23] Therefore, under Title VII, employers are required to reasonably accommodate an employee's or an applicant's religious practice or observance.[24] An accommodation of a religious observance or practice is not required if doing so would impose an undue hardship on the employer.[25] Therefore, religious discrimination is not entirely prohibited under Title VII.

---

14. *Id.*
15. § 2000e(j).
16. 29 C.F.R. § 1605.1 (2005).
17. *Id.*
18. United States v. Seeger, 380 U.S. 163 (1965).
19. Welsh v. United States, 398 U.S. 333 (1970).
20. § 1605.1.
21. *Id.*
22. § 2000e(j).
23. *Id.*
24. ESTREICHER & HARPER, *supra* note 6, at 607.
25. *Id.* at 612.

According to the Equal Employment Opportunity Commission (EEOC),[26] once an employee or prospective employee notifies the employer of a need for religious accommodation, the employer has the statutory obligation to reasonably accommodate this request.[27] The employer may refuse to accommodate the employee when the employer demonstrates that an undue hardship would "in fact result from each available alternative method of accommodation."[28] The mere assumption that other employees might also need an accommodation is not an undue hardship.[29] If multiple alternatives exist, the EEOC will determine reasonableness by looking at the alternatives contemplated by the employer, the alternatives actually offered to the employee, and alternatives it finds for accommodating religious practices.[30] Thus, from the EEOC's application of Title VII, it appears that the requirement of reasonable accommodation is a fairly stringent standard for the employer to defeat.

The EEOC also stated that the employer must offer the alternative that least disadvantages the employee's employment opportunities.[31] The EEOC has suggested some alternatives that employees should consider.[32] For example, one reasonable accommodation recognized by the EEOC is a voluntary substitute or swap with another employee with substantially similar qualifications.[33] Another reasonable accommodation recognized by the EEOC is flexible scheduling, which includes "arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices."[34] Finally, when an employee cannot be accommodated as to the entire job or an assignment within that job, the employer should change the job assignment or offer the employee a lateral transfer.[35] Based on this guidance, the employer has quite an extensive duty to accommodate an employee's religion.

---

26. Title VII created an Equal Employment Opportunity Commission (EEOC). *Id.* at 56. Claimants must first file charges with the EEOC in order to take advantage of the agency's ability to investigate and the opportunity to reach an informal conciliation. *Id.* at 1071. Also, the EEOC can file suit on behalf of claimants. *Id.* The EEOC does not have the power to issue substantive regulations under Title VII, but it does provide interpretative guidance. *Id.* at 56. Furthermore, the Supreme Court has announced a strong rule of deference to an agency's interpretation of its governing statute. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

27. § 1605.2(c)(1.).

28. *Id.*

29. *Id.*

30. § 1605.2(c)(2).

31. § 1605.2(c)(2)(ii).

32. § 1605.2(d)(1).

33. § 1605.2(d)(3)(i).

34. § 1605.2(d)(3)(ii).

35. § 1605.2(d)(3)(iii).

Although the plain language of Title VII does not provide any guidance as to the degree of accommodation required, the Supreme Court has held that a reasonable accommodation does not require more than a *de minimis* cost to the employer.[36] In *Trans World Airlines v. Hardison*, the Court held that allowing an employee to only work four days a week, in order for the employee to observe his religious practices, was an undue hardship on the employer.[37] The Court reasoned that the employee's job was essential and he was the only available person to perform this job on the weekends.[38] Furthermore, leaving the job empty would have impaired Trans World Airlines's operations, or would have forced them to pay premium wages to someone that was not regularly scheduled to work Saturdays.[39] The Court pointed out that requiring Trans World Airlines to bear additional costs just to give this particular employee weekends off would involve unequal treatment of employees on the basis of religion.[40] Therefore, by requiring the employer only bear a *de minimis* cost, the Supreme Court has apparently articulated a more lenient standard for employers as compared to the EEOC's guidelines.

Trans World Airlines was a private employer, so the Supreme Court did not directly address the uniqueness of government employers. However, the government as an employer creates complicated issues due to the First Amendment.[41] The Supreme Court has said " 'the government may (and sometimes must) accommodate religious practices . . . without violating the Establishment Clause.' "[42] Furthermore, principles have been established for

---

36. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

37. *Id.*

38. *Id.* at 69.

39. *Id.*

40. *Id.* at 84.

41. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. However, the Supreme Court recently stated that "[a] government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment." City of San Diego v. Roe, 125 S.Ct. 521, 523 (2004). The court in *City of San Diego v. Roe* held that an officer that was discharged for offering sexually explicit videos for sale online was not protected under the First Amendment because his actions had injurious effect on the mission of the police department. *Id.* at 526.

42. Mark Tushnet, *The Emerging Principle of Accommodation of Religion*, 76 GEO. L.J. 1691, 1691 (1988) (quoting Hobbie v. Unemployment Appeals Comm'n, 48 U.S. 136, 144 (1987)). *See also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1414 (4th ed. 2001) ("[T]he Establishment clause forbids not only government preferences for some religious sects over others, but also government preferences for religion over irreligion") (quoting Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 854 (1995)). Reasonable accommodations reflect a qualified claim to special treatment on the basis of religion. ESTREICHER & HARPER, *supra* note 6, at 607. The proposition that the establishment clause is not violated in this instance is based on the idea that there are permissible cases of government action towards religion, which facilitate religious liberty. Tushnet, *supra* at 1691. These facilitations refer to both the establishment and free exercise clauses and suggest that accommodations are guided by the interpretation of both religion clauses. *Id. But see* Thornton v. Caldor, 472 U.S. 703, 709-10 (1985) (explaining that a state statute, which provided Sabbath

reasonable accommodation when the government is acting as an employer. A reasonable accommodation that protects a religious practice may impose costs on the government's efficiency.[43] However, the issue of cost is usually decided against the employee and for the government; therefore, the courts have required only a minimal level of accommodation of religious employees.[44] Arguably then, accommodations for government employees, like those required by the Court in *Trans World Airlines,* may not entail more than a *de minimis* cost to the employer.

Furthermore, the courts usually impose on the employee a duty to cooperate with the employer to find an acceptable accommodation.[45] The courts disagree over how broad the employee's duty to cooperate is and whether it requires the employee to compromise his or her religious beliefs.[46] Most courts, however, do not require the employee to compromise religious beliefs because bilateral cooperation is appropriate in balancing the employer's needs.[47] Therefore, employees should be cooperative and willing to compromise in an effort to reach an accommodation that is acceptable to both parties.

It appears that the EEOC's guidance regarding Title VII has not been strictly followed in the courts. For example, the EEOC first articulated that the employer must accommodate the employee unless an undue hardship would "in fact" result from each alternative method of accommodation.[48] This standard seems more stringent than the *de minimis* cost standard established in *Trans World Airlines.*[49] Black's Law Dictionary defines *de minimis* as "1. Trifling; minimal. 2. . . . so insignificant that a court may overlook it in deciding an issue or case."[50] The EEOC did not interpret undue hardship as requiring a "minimal" accommodation because it required the employer to give the employee the alternative that least disadvantages the employee's employment opportunities.[51] Furthermore, the EEOC contemplated the employer offering a different job assignment if flexible arrival/departure times or floating/optional holidays did not rid the workplace of religious conflict.[52] The Supreme Court implicitly rejected the idea of job reassignment with its "minimal" standard of accommodation.[53] Consequently, the Supreme Court's interpretation of

---

observers with an absolute right not to work on their Sabbath, violated the Establishment Clause because the statue did not have a clear secular purpose and advanced religion).

43. *See* Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment,* 21 BERKELEY J. EMP. & LAB. L. 575, 615 (2000).

44. *Id.* at 609.

45. *Id.* at 597.

46. *Id.* at 599.

47. *Id.* at 600.

48. 29 C.F.R. § 1605.2(c)(1) (2005).

49. *Trans World Airlines,* 432 U.S. at 84.

50. BLACK'S LAW DICTIONARY 352 (7th ed. 2000).

51. § 1605.2(c)(2)(ii).

52. § 1605.2(d)(3)(iii).

53. *See Trans World Airlines,* 432 U.S. at 84.

reasonable accommodation for a private employer seems to contradict the EEOC's general interpretation of Title VII.

In addition, the applicability of offering reasonable accommodation to government employees has conflicted with the EEOC's guidance. The EEOC did not contemplate resolving the issue of cost against the employee[54] as the Supreme Court has so held.[55] Furthermore, courts have imposed a duty to cooperate on the employee that includes compromising religious beliefs.[56] However, the EEOC considered having the employer offer alternative accommodations and allow the one that is least disadvantageous to the employee.[57] The courts's interpretations of Title VII have generally favored the employer, both governmental and private, while the Commission has favored the employee. This tension is especially prevalent in the area of religious accommodations of police officers.

B. The Applicability of Religious Accommodations to Police Officers under Title VII

Title VII did not establish a specific provision regarding police officers, but the uniqueness of their position in society deserves special attention. The Los Angeles Police Department (LAPD) states its mission as follows:

> [T]o safeguard the lives and property of the people we serve, to reduce the incidence and fear of crime, and to enhance public safety while working with the diverse communities to improve their quality of life. Our mandate is to do so with honor and integrity, while at all times conducting ourselves with the highest ethical standards to maintain public confidence.[58]

Police officers exist to prevent crime and disorder and are accordingly dependent on the public's approval of their existence and its respect for their ability to maintain peace.[59] Police officer managers and supervisors exist to "define problems, to establish objectives, and to assist line police officers in the accomplishment of the police mission."[60] A manager is evaluated based on the

---

54. *See generally* § 1605.2.

55. ESTREICHER & HARPER, *supra* note 6, at 612 (discussing *Trans World Airlines*).

56. Kaminer, *supra* note 43, at 599.

57. § 1605.2(c)(2)(ii).

58. LAPD Online, *To Protect and to Serve: Mission Statement*, *at* http://www.lapdonline.org/general_information/dept_mission_statement/mission_stmnt.htm (last visited Nov. 12, 2005).

59. LAPD Online, *To Protect and to Serve: Management Principles*, *at* http://www.lapdonline.org/general_information/dept_mission_statement/mgmnt_principles.htm (last visited Nov. 12, 2005).

60. *Id.*

excellence of his subordinates in achieving the department's goals.[61] "The life's blood of good management is a thoroughly systematic, two-way circulation of information, feelings, and perceptions throughout the organization."[62]

In order to protect the public, managers rely heavily on subordination and public respect.[63] The dangerous nature of their jobs and their importance in our society necessarily require subordination.[64] However, the need for subordination and the importance of protecting the public can lead to conflicts with Title VII, and the courts have struggled in dealing with these tensions.

The courts have unanimously decided that employers are not required to accommodate religious employees in a way that results in health or safety hazards to the public.[65] The issue of health and safety is a factor for police departments because they are responsible for public safety.[66] The safety of the public is a significant societal goal, and an accommodation, even a "reasonable" one that threatens or harms this goal is usually held to be more than a *de minimis* cost.[67] Police departments, however, are still required to eliminate a conflict between employment requirements and religious practices as long as they will not suffer an undue hardship.[68] These conflicting interests are considered for each reasonable accommodation request within a police department.

In order for a police officer to claim a denial of religious accommodation, which requires a showing of religious discrimination, the officer must plead that "(1) he had a bona fide belief that compliance with an employment requirement is contrary to his religious faith, (2) he informed his employer about his views, and (3) his refusal to comply with the employment requirement caused his injury."[69] In evaluating these elements, the courts weigh the competing interests of eliminating conflict in the police force with the public's safety.

Three areas of a police officer's religious practice have been addressed under Title VII's religious accommodations. First, a police officer's appearance and its religious aspects raised safety concerns and subordination problems, as well as Title VII issues. Second, the request of paid holidays, vacation time, and overtime for religious practices raised issues within the

---

61. *Id.*
62. *Id.*
63. *See generally id.*
64. *See id.*
65. Kaminer, *supra* note 43, at 616.
66. *Id.*
67. *Id.*
68. Rodriguez v. City of Chicago, 156 F.3d 771, 775 (7th Cir. 1998). However, reasonable accommodations do not require "satisfaction of an employee's every desire." *Id.* at 777 (quoting Wright v. Runyon, 2 F.3d 214, 217 (7th Cir. 1993)).
69. Gold v. City of Chicago, No. 85-C4885, 1985 U.S. Dist. LEXIS 14709, at *4 (N.D. Ill. Oct. 21, 1985).

officer's ranks and under Title VII. Finally, an officer's request for a job reassignment raised Title VII issues.

1. Police Officer's Religious Appearance

Police officers are under strict requirements regarding their appearance while on duty. For example, the LAPD requires an officer to be "neat and clean at all times while on-duty . . . ."[70] Specifically, male employees are under several requirements:

> [Male officers] shall keep their hair properly trimmed. The hair shall be at least moderately tapered, shall not extend below the top of the shirt collar nor cover any portion of the ear, and shall not interfere with the proper wearing of the uniform hat. . . . Sideburns shall not extend beyond a point even with the bottom of the ear lobe and shall extend in a cleanshaven, horizontal line. . . . A short and neatly trimmed mustache of natural color may be worn. . . . A growth of whiskers shall be permitted only for medical reasons or when required by the nature of the assignment. An employee with a medical condition which precludes his shaving shall be assigned duties requiring the least possible public exposure.[71]

Clearly there is not much room for deviation from acceptable appearance standards for police officers.

Religious observances or practices affect an officer's appearance. For example, Sikh Muslims are required to wear beards as a part of their daily religious practice.[72] Police departments often implement grooming policies that do not permit officers to wear beards for the purpose of creating a uniform look within the police force.[73] Courts generally hold that a failure to accommodate this particular religious practice is unlawful discrimination.[74] Policies such as these are revised in order to reasonably accommodate good faith religious observances, such as wearing a beard.[75]

In addition, Sikh Muslims are required to wear turbans as a central element of their daily religious observances.[76] In a dispute in New York, the

---

70. LAPD Online, *The Department Manual: Volume 3 Management Rules and Procedures*, at 157, *at* http://www.lapdonline.org/pdf_files/manual/volume3.pdf (last visited Nov. 12, 2005) [hereinafter LAPD Department Manual on Management].

71. *Id.* at 157-58.

72. United States v. City of Wilmington, No. 96-447-MMS (D. Del. 1997), *at* http://www.usdoj.gov/crt/emp/documents/wilmingtoncd.htm (last visited Nov. 12, 2005).

73. *Id.*

74. *Id.*

75. *Id.*

76. James Barron, *Two Sikhs Win Back Jobs Lost by Wearing Turbans*, N.Y. TIMES, Jul. 29, 2004, at B3.

police department attempted to justify a denial of a turban accommodation because it created "safety issues."[77] An accommodation allowing for the police officers to wear turbans was deemed reasonable despite the safety issues presented by the department because the hardship was not more than a *de minimis* cost.[78] In both of these situations, therefore, the interest of eliminating the conflict between the job requirements and the employee's religion outweighed the health or safety issues implicated.

Rastafarians wear dreadlocks as a spiritual declaration that symbolizes their African ancestors.[79] Long twists or braids in the hair violate police department's grooming policies that prohibit "ragged, unkempt or extreme appearances."[80] An example of a permissible hairstyle in a police department is the "Box Fade" hairstyle, which is presumably not a ragged, unkempt or extreme appearance.[81] Courts usually require an accommodation for this hairstyle for the same reasons Sikh Muslims are allowed to wear beards.[82] Again, eliminating the conflict between the job and the employee's religion superseded the costs imposed by the accommodation.

The police department can generally accommodate an officer's appearance for a religious purpose because of the minimal costs imposed on the department's efficiency.[83] However, the level of cost imposed on the department becomes a more overriding issue with regard to an officer's work schedule.

2. *Paid Holidays, Vacation Time, Overtime: Reasonable Accommodations?*

Religious observances often require an officer to miss work. Police departments, however, have strict policies regarding an officer's schedule. The LAPD stipulates the following:

---

77. *Id.*

78. *Id.*

79. David France, *Law: The Dreadlock Deadlock*, NEWSWEEK, Sept. 10, 2001, at 54.

80. *Id.*

81. *Id.*

82. *Id.* Followers of Sikhism adhere to the 5K's – Kanga, Kachha, Kara, Kirpan, Kesh. Sikh Net, *5K – Panj Kakar*, *at* http://www.sikh.net/SIKHISM/W/5kakar.htm (last visited Nov. 12, 2005). The Kesh refers to a Skih's hair, which they are forbidden to cut, and also applies to a beard. *Id.* The belief is founded on the understanding that man was created in the true image of the Lord WaheGuru and that the Lord wanted hair to grow. *Id.* Therefore, it is an act against the Lord's will for a Sikh to trim his hair. *Id.* Sikhs also wear turbans following the 10th Guru, Guru Gobind Singh, who initiated the Khalsa brotherhood. Belief Net, *Sikhism* (2005), *at* http://www.beliefnet.com/index/index_10036.html (last visited Nov. 12, 2005).

83. CNN, *Trooper's Work, Religion Clash Over Riverboat Casino Duty* (Aug. 24, 2000), *at* http://archives.cnn.com/2000/US/08/24/trooper.dilemma.ap. "'The one area that people have been winning in religion is in hairstyle . . . . It's very simple to accommodate the individual by having the individual put their long hair up in a hat.'" *Id.*

> [Officers] shall be in actual attendance on-duty for a minimum of eight hours on each day that he/she is assigned to work. . . . All officers shall work 261 days in each calendar year. Each officer shall normally be entitled to eight regular days off during each 28-day deployment period. Additionally, each officer shall receive thirteen days off in lieu of a holiday . . . . An employee may be allowed time off to observe a religious holiday when such allowance will not interfere with the proper performance of Department operations. Time off shall be deducted from the employee[']s accrued overtime, compensatory equivalent time off, or accrued vacation time.[84]

Tension obviously arises between allowing an officer to practice religious observances and disrupting the department's operations.[85]

The leading Supreme Court case in the area of paid holidays, vacation time, and overtime is *Trans World Airlines, Inc. v. Hardison*.[86] The Supreme Court's rationale in denying the claim of religious discrimination was that accommodating a leave request by a particular employee necessarily discriminated against other employees on the basis of their religious beliefs.[87] *Trans World Airlines* refused to allow an employee to take off work on Saturdays for religious purposes because his job was essential and he was the only one who performed that particular task on Saturday.[88] In other words, to accommodate this particular request, the employer would bear more than a *de minimis* cost due to the effect on the other employees.[89]

Based on this holding, a case in Illinois allowed a suit challenging the police department's practice of granting additional paid holidays to "minority" religions.[90] In *Ka Nam Kuan v. City of Chicago*, the Northern District of Illinois stipulated the factors to be considered in determining whether a burden imposes more than a *de minimis* cost: "the number of employees accommodated, the magnitude of the overtime the city must pay, or the extent of the impact of the policy on the city's budget, and the work schedules of the police officers who are not accommodated."[91] A court must also determine if

---

84. LAPD Department Manual on Management, *supra* note 70, at 170-71.

85. *See* CNN, *supra* note 83 (explaining that Orthodox Jews or Seventh-day Adventists are required to observe the Sabbath and officers are required to work around the clock, which leads to problems with religious accommodations). *See also* RIVERSIDE WEBSTER'S II DICTIONARY 598 (rev. ed. 1996) (defining "Sabbath" as "Saturday, the 7th day of the week, set apart as a day of worship by Jews and some Christians[,]" or "Sunday, the 1st day of the week, set apart as a day of worship by most Christians.").

86. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

87. *Id.* at 85.

88. *Id.* at 68.

89. *Id.* at 84.

90. Ka Nam Kuan v. City of Chicago, 563 F. Supp. 255, 257 (N.D. Ill. 1983).

91. *Id.* at 259.

the city must pay overtime wages to substitute employees on a regular basis.[92] Courts are sometimes willing to require an employer to discriminate against some employees in order to allow others to observe their Sabbath.[93]

In addition, another case in Illinois allowed an Orthodox Jew to bring a claim asserting the police department's failure to reasonably accommodate her requests.[94] The Northern District of Illinois allowed a Chicago police officer to bring a religious discrimination claim based on the fact that she repeatedly requested her work schedule be altered to allow her to observe the Sabbath and other religious holidays.[95] The officer argued that these denials forced her to use vacation, unpaid leave, and sick days in order to practice her faith.[96]

Some courts find that requiring an employee to use unpaid leave is a reasonable accommodation.[97] Most courts further require an employee to use some vacation days to observe religious holidays.[98] Nevertheless, a few courts follow the proposition that if the employee stands to lose a benefit, such as vacation time, which is enjoyed by other employees, he or she is discriminated against on the basis of religion.[99]

As evidenced by the LAPD Department Manual, religious observances can often be accommodated, but only with a cost to the employee.[100] An officer may be forced to use unpaid leave, vacation time or some other job related benefit.[101] However, the EEOC recommends flexible scheduling, permitting an employee to make up lost time, and utilizing the accommodation with the least disadvantage to the employee.[102] Once again, the courts have adopted a more stringent standard against the employee than what the EEOC recommended.

3. Job Assignments: Religious Accommodations or Required Aspect of the Job?

The nature of the police department demands compliance with manager orders.

> The Department is an organization with a clearly defined authority. This is necessary because unquestioned obedience of a superior's lawful command is essential for the safe and prompt performance of law enforcement operations. The most

92. *Id.*
93. *Id.* at 258.
94. Gold v. City of Chicago, No. 85-C4885, 1985 U.S. Dist. LEXIS 14709, at 1 (N.D. Ill. Oct. 21, 1985).
95. *Id.*
96. *Id.*
97. Kaminer, *supra* note 43, at 607.
98. *Id.* at 608.
99. *Id.*
100. LAPD Department Manual on Management, *supra* note 70, at 171.
101. Kaminer, *supra* note 43, at 607.
102. §§ 1605.2(c)(2)(ii), (d)(3)(i).

> desirable means of obtaining compliance are recognition and reward of proper performance and the positive encouragement of a willingness to serve. However, negative discipline may be necessary where there is a willful disregard of lawful orders, commands, or directives.[103]

However, unquestioned obedience to a superior's command may lead to a conflict with an officer's religious beliefs. Exceptions to orders may lead to chaos in the department with all officers choosing which assignments to cover.[104] Therefore, the courts are required to strike a balance between the religious officer's request and the cost to the department.

It is difficult for police officers to accommodate religious employees that are "choosy" about assignments based on religious observances or beliefs.[105] In *Ryan v. United States Department of Justice*, the Seventh Circuit addressed the difficult issue of Federal Bureau of Investigation (FBI) agents swapping assignments based on religious practices.[106] Ryan's Roman Catholic religion prevented him from investigating groups that destroyed government property in opposition to violence.[107] Ryan was discharged because he "repeatedly refused to carry out a lawful order to investigate an unsolved federal offense; he declined to swap assignments; he would not promise to carry out similar orders in the future and implied he would refuse to participate in related matters . . . ."[108] The denial of Ryan's religious discrimination suit was based on his unwillingness to cooperate with the police department's offers of accommodation.[109]

---

103. LAPD Online, *The Department Manual: Volume 1 Policy*, at 8-9, *at* http://www.lapdonline.org/pdf_files/manual/volume1.pdf (last visited Oct. 21, 2005) [hereinafter LAPD Department Manual on Policy].

104. CNN, *supra* note 83.

105. Ryan v. United States Dep't of Justice, 950 F.2d 458, 462 (7th Cir. 1991). However, for private employers, "[t]ransferring a religious employee to another position – even if the position is less desirable – has been deemed a reasonable accommodation so long as the employee's employment status is reasonably preserved." Kaminer, *supra* note 43, at 608. "Religiously motivated selectivity in the work one is willing to perform is an 'aspect of religious observance and practice' that the employer must disregard unless it demonstrates that it is 'unable to reasonably accommodate . . . without undue hardship.'" *Ryan*, 950 F.2d at 461 (quoting Baz v. Walters, 782 F.2d 701, 706 (7th Cir. 1986)).

106. *Ryan*, 950 F.2d at 459. Law enforcement agencies, like the FBI and police departments, are entitled to insist that their agents or officers follow orders. *Id.* at 461. Obedience is vital in an organization responsible for public safety. *Id.*

107. *Id.* at 460. Ryan's religious belief was described in the U.S. Bishop's Pastoral Letter on War and Peace, which said that Roman Catholics were called to be "peacemakers." *Id.* At no point was the seriousness of Ryan's sincerity questioned. *Id.*

108. *Id.* at 460-61. The court noted that reallocating work between agents is the most obvious accommodation. *Id.* at 461. However, the court refused to decide whether several swaps would create an undue hardship because the demand for such accommodation may overwhelm the agency. *Id.* at 461-62.

109. *Id.*

The Seventh Circuit revisited reasonable accommodations for police officers in *Rodriguez v. City of Chicago*.[110] Rodriguez, a Catholic, refused to stand guard outside an abortion clinic because of his religious beliefs.[111] The court found that the police department reasonably accommodated Rodriguez's beliefs by providing the opportunity for him to transfer to a district that did not have abortion clinics.[112] A transfer would eliminate the conflict between Rodriguez's job and his religious beliefs without a reduction in salary or a risk to the public safety.[113] Again, this case of religious discrimination failed because of Rodriguez's unwillingness to cooperate with the department's offers of reasonable accommodations.

Based on the decisions in *Ryan* and *Rodriguez*, it appears courts are willing to allow an officer an opportunity to alter his job assignment in order to protect his religious beliefs. The officer must cooperate with the department and accept the alternative offered. However, the Seventh Circuit recently altered this standard in favor of the department.

C. *A New Approach to Religious Accommodations in the Seventh Circuit*

A recent Seventh Circuit decision deviated from its past application of the law pertaining to reasonable accommodations of religion and possibly created a statutory exemption for law enforcement employers.[114] Ben Endres was hired as a certified Indiana State Trooper in 1991, and in March 2000 he was assigned as a Gaming Commission Agent to the Blue Chip Casino in Michigan City, Indiana.[115] Riverboats in Indiana cannot leave the dock without a

---

110. *Rodriguez*, 156 F.3d 771. *See generally Uphold Law, Judge Tells Officer*, WASH. POST, Jun. 26, 1991, at D5. A police sergeant refused to arrest abortion protestors because it violated his religion. *Id.* The sergeant previously asked for a different assignment to avoid abortion clinics, but the department refused. *Id.* The court found that the police department did not have to accommodate this religious belief because "police must uphold the law, whether they personally agree with a specific law." *Id.*

111. *Rodriguez*, 156 F.3d at 772. Following a mass demonstration outside abortion clinics throughout the city of Chicago, the police department assigned officers "clinic duty" on Saturday mornings. *Id.* at 773. Clinic duty requires the officer to establish a police presence near the clinic. *Id.* Rodriquez, a Roman Catholic, believes "an elective abortion is the wrongful taking of human life and that individuals have a general moral obligation to avoid participation in, or facilitating, an elective abortion." *Id.* However, Rodriguez had no problem going to the abortion clinic in the case of an emergency. *Id.*

112. *Id.* at 775. The court referred to this transfer as a "paradigm of 'reasonable accommodation.' " *Id.* (quoting *Wright*, 2 F.3d at 217).

113. *Id.* at 776.

114. Adina Matusow, *Baptist Cop's Fight Tests Civil Rights Act*, LEGAL TIMES, Apr. 12, 2004, at 8. For a discussion of religious objections in the medical field, see Marilyn Gardner, *Pharmacists' Moral Beliefs vs. Women's Legal Rights*, CHRISTIAN SCI. MONITOR, Apr. 26, 2004, at 11 (discussing pharmacists who refuse to fill prescriptions because of religious objections).

115. Brief of Intervener United States of America, Endres v. Indiana State Police (No. 3:01-CV-0518) (Nov. 12, 2001), *available at* http://www.usdoj.gov/crt/emp/documents/endresbrief.htm (last visited Oct. 2, 2005).

"gaming officer" on board.[116] The assignment consisted of monitoring blackjack tables, slot machines,[117] certifying gambling revenue, investigating complaints from the public about the gaming system, and conducting licensing investigations.[118] Endres, however, was a member of the Community Baptist Church, which "holds as a tenant of its faith the position that gambling is a vice which is contrary to the principles of the Bible and that its members should not, in any way, participate in and/or facilitate gambling."[119] A conflict arose between Endres's religious beliefs and his assigned duty as an officer.

Endres informed the department of the conflict and that he would not be able to accept the assignment.[120] He requested an alternative assignment, but this request was denied.[121] Endres did not report for duty and, as a result, was charged with "a refusal to comply with a written order and insubordination"; Endres was subsequently terminated.[122] Endres argued to the Indiana State Police Board that he was hired to defend safety and not to regulate gambling.[123] He further argued that he was willing to investigate a crime in a casino, which is part of enforcing the law and not becoming part of an immoral activity.[124] After his termination was upheld, Endres filed a complaint based on the department's failure to attempt to make a reasonable accommodation of his religious belief in violation of Title VII.[125]

The District Court refused to dismiss Endres's Title VII claim based on sovereign immunity.[126] The police department took an interlocutory appeal from this denial to the Seventh Circuit.[127] The court chose not to decide the constitutional issue of whether Title VII is an appropriate exercise of Section Five of the Fourteenth Amendment deciding instead to focus on whether Title VII obliges the department to grant Endres's requested accommodation.[128] The court held that a "task specific request for religious accommodation by an employee of a law enforcement agency or other 'paramilitary' employer is *per se* unreasonable."[129] The court pondered, "[m]ust prostitutes be left exposed to

116. CNN, *supra* note 83.

117. *Id.*

118. Brief for Petitioner at 3, Endres v. Indiana State Police (No. 03-1183) (Feb. 17, 2004), *available at* http://www.jenner.com/files/tbl_s18News/RelatedDocuments147/971/endres_cert2.pdf (last visited Nov. 12, 2005).

119. Brief of Intervener United States of America, *supra* note 115.

120. *Id.*

121. *Id.*

122. *Id.*

123. CNN, *supra* note 83.

124. *Id.*

125. Brief for Petitioner, *supra* note 118, at 4.

126. *Id. See also* Brief for Intervener United States of America, *supra* note 115 ("Congress has the power to abrogate States' Eleventh Amendment immunity to private suits under federal statutes enacted pursuant to Section 5 of the Fourteenth Amendment.").

127. Brief for Petitioner, *supra* note 118, at 5.

128. Endres v. Indiana State Police, 334 F.3d 618, 623 (7th Cir. 2003).

129. Brief for Petitioner, *supra* note 118, at 6.

slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith?"[130] The court stated that "nothing in the text . . . of Title VII [supports] its conclusion that 'paramilitary' organizations were not required, like all other employers, to reasonably accommodate an employee's religion."[131]

The Seventh Circuit issued a new opinion in *Endres* following a motion for rehearing.[132] Again the court did not require the police department to accommodate Endres's request because "[j]uggling assignments to make each compatible with the varying religious beliefs of a heterogeneous police force would be daunting to managers and difficult for other officers who would be called on to fill in for the objectors."[133] The court did not interpret either *Ryan*[134] or *Rodriguez*[135] to require the police department to offer an alternative assignment to Endres.[136] This opinion, however, did contain a dissent that questioned the majority's decision to strike out the "reasonable accommodation requirement from the statute as it applies to police and fire personnel."[137] Consequently, Endres's case of religious discrimination was unsuccessful despite the department's failure to attempt to accommodate his religious belief.

1. Future Implications of the Endres Decision

The *Endres* decision may raise questions in the minds of public safety and emergency personnel as to their right to receive religious accommodations.[138] The plain language of Title VII does not suggest "that law enforcement agencies, fire departments, or any other 'paramilitary' employers are exempt from the reasonable accommodation provisions."[139] However, "police officers and firefighters have no right under Title VII . . . to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons."[140] The *Endres* decision comes at a time

130. *Endres*, 334 F.3d at 623.

131. Brief for Petitioner, *supra* note 118, at 7-8.

132. *Id.* at 8.

133. *Endres*, 349 F.3d. at 925. The court noted that the Gaming Commission was an unpopular assignment and the police department had to draft volunteers. *Id.*

134. *Ryan*, 950 F.2d at 458.

135. *Rodriguez*, 156 F.3d at 771.

136. *Endres*, 349 F.3d at 926. In fact, the court said "agencies such as police and fire departments designed to protect the public from danger may insist that *all* of their personnel protect *all* members of the public – that they leave their religious (and other) views behind so that they may serve all without favor on religious grounds." *Id.*

137. Brief for Petitioner, *supra* note 118, at 8.

138. *Endres*, 349 F.3d at 930 (Ripple, J., dissenting). "Congress apparently saw no reason to exempt categorically such organizations from the plain mandate of the statute and preferred that the boundaries of the reasonable accommodation requirement be established in case-by-case adjudication." *Id.* at 930. Many will be puzzled by this "blanket exemption." *Id.*

139. *Id.* at 929.

140. *Rodriguez*, 156 F.3d at 779. Police officers are not entitled to demand their duties to conform to their religious views. *See id.* (Posner, R., concurring).

where there is a new assertiveness and an increasing number of people that demand public space in the name of religion.[141] When the employer is not a regular employer, like a paramilitary organization, it may not be reasonable to accommodate specific conscientious objections due to the demands of professional discipline.[142] The *Endres* decision, therefore, suggests a fear that reasonable accommodations within the police force may lead to officers refusing to perform their public safety duties in emergency situations.

2. *Societal Concerns Regarding Police Officers' "Choosing" of Assignments*

Reasonable accommodations reflect the societal commitment to religious pluralism.[143] Religious choices are so central to human dignity that they require special protections through reasonable accommodations.[144] If religious minorities were left without the protection of Title VII in the police force, they might face pressure to assimilate to the majority position or move to isolated communities where they can live together as "coreligionists."[145] Either of these choices could "impoverish the larger society."[146] Furthermore, there is a need for professions to develop more tolerance, understanding, and openness to religious beliefs of the professions' members.[147] Religious accommodations recognize the importance of individual self-realization through religion, which is fundamental to a free society.[148]

Religious accommodations in the police force raise a conflicting social issue. A police force that regularly provides religious accommodations for specific conscientious objections may diminish public confidence in the

---

141. Barry Sullivan, *Naked Fitzies and Iron Cages: Individual Values, Professional Virtues, and the Struggle for Public Space*, 78 TUL. L. REV. 1687, 1707 (2004).

142. *Id.* at 1709.

> [T]hirty or forty years ago, most policemen assigned to protect a casino or a barroom would have accepted that as part of their jobs; they would have done it, regardless of their personal, religious views . . . [because] they did not think it was the state's job to design their public responsibilities in a way that accommodated or complemented their personal religious views.

Id. at 1710. *But see, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a religious employee is entitled to unemployment compensation for a refusal to work on Saturday for religious reasons).

143. ESTREICHER & HARPER, *supra* note 6, at 607.

144. *Id.*

145. *Id.*

146. *Id.*

147. Sullivan, *supra* note 141, at 1687.

148. *Id.* at 1688. "It is an important project in any society, but particularly so in one such as ours, which [is] . . . 'rich in everything except the warmth of human connection.'" Id. (quoting Gary Krist, If It's Not One Thing, It's Another, N.Y. Times, Aug. 24, 2003, at 7).

neutrality of its protectors.[149] Courts' denial of religious accommodations in this context is not always based on the inconvenience of the police department, rather it is based on the "loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect."[150] It is an undue hardship to the police department when the public confidence erodes through "recognition of a right of recusal by public-safety officers . . . ."[151] For example, an individual might think police will "first start asking questions about my life to determine whether I am a sinner who should be allowed to be a victim."[152] Police officers are required to protect individuals engaged in illegal activities, not the actual activity itself; therefore, perhaps they should be denied religious accommodations in order to bolster public confidence.[153]

However, there is a conflicting school of thought suggesting the possibility that allowing a police officer a religious accommodation from an "immoral" duty might lead the officer to "zealously" do the job that accommodates his religious beliefs.[154] A risk of "half-hearted" enforcement by the police officer may arise if the officer's religious beliefs are not accommodated.[155] Both of these issues are at the forefront of the religious accommodations in the police force debate.

---

149. Eugene Volokh, *Intermediate Questions of Religious Exemptions: A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, *available at* http://www1.law.ucla.edu/~volokh/intermed.htm (last visited Nov. 12, 2005).

150. *Rodrigiuez*, 156 F.3d at 779.

> The public knows that its protectors have a private agenda . . . [b]ut it would like to think that they leave that agenda at home when they are on duty – that Jewish policemen protect neo-Nazi demonstrators, that Roman Catholic policeman protect abortion clinics, that Black Muslim policemen protect Christians and Jews, that fundamentalist Christian policeman protect noisy atheists and white-hating Rastafarians, that Mormon policemen protect Scientologists, and that Greek-Orthodox policemen of Serbian ethnicity protect Roman Catholic Croats. We judges . . . want to think that U.S. Marshals protect us . . . whether . . . we vote for or against the pro-life position in abortion cases.

Id.

151. *Id.* at 779-80.

152. Agnosticism/Atheism Blog, *Supreme Court Rejects Case of Religious Police Officer*, Apr. 20, 2004, *at* http://atheism.about.com/b/a/080227.htm (last visited Nov. 12, 2005).

153. *Id. See also* Agnosticism/Atheism Blog, *Police Assignments vs. Religious Beliefs*, Dec. 2, 2003, *at* http://atheism.about.com/b/a/047154.htm (last visited Nov. 12, 2005) (explaining that the *Endres* case raises other concerns; perhaps Catholic hospitals may choose not to provide contraception services and although it is a private institution it provides a vital public service akin to that of the police).

154. Volokh, *supra* note 149. Citizens may remain skeptical if "there's an emergency at an abortion clinic . . . and the police officer [that is exempted from protecting abortion clinics] is summoned to attend to it, will he do his best?" *Id.*

155. *Id.*

D. Summary of the United States: Religious Accommodation Law in the Seventh Circuit. A Trend?

Title VII's definition of religion includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[156] Title VII's definition of religion does not explicitly exempt law enforcement agencies, fire departments, or other paramilitary employers.[157] However, the Seventh Circuit's decision in *Endres* can be read to create such an exemption from Title VII,[158] which deviates from every other circuit in the United States.[159] The United States Supreme Court denied certiorari in *Endres*.[160] Therefore, the statutory ambiguity remains unanswered by the highest court and is left open to interpretation by the lower courts. An international perspective may provide some guidance to the questions left after *Endres*.

III. CANADA RELIGIOUS ACCOMMODATIONS FOR THE ROYAL CANADIAN MOUNTED POLICE

A. Overview

In Canada, religion is a prohibited form of discrimination in employment.[161] An employer may discriminate on the basis of religion only if it has a "*bona fide* justification."[162] A bona fide justification is established when the "accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost."[163] The

---

156. 42 U.S.C. § 2000e(j) (2004).

157. *Endres*, 349 F.3d at 929.

158. Matusow, *supra* note 114.

159. *Endres*, 349 F.3d at 927.

160. Endres v. Indiana State Police, 541 U.S. 989 (2004), *cert. denied.*

161. Canadian Human Rights Act, R.S.C., ch. H-6, §§ 2, 7 (1977) (Can.). This provision is based on the principle that "all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated . . . ." *Id.* at § 2.

162. *Id.* at § 15(2).

163. *Id. See also* INNIS CHRISTIE, GEOFFREY ENGLAND & W. BRENT COTTER, EMPLOYMENT LAW IN CANADA 91 (2d ed. 1993). "The essence of the duty of 'reasonable accommodation' and the reason why its role in human rights statutes is crucially important is that it takes account of the unique characteristics and circumstances of the *individual* employee and requires the employer to make reasonable efforts to accommodate those circumstances." *Id.* An example of a reasonable accommodation is exempting a Sikh Muslim who is a maintenance electrician from a hard hat requirement on the job site. *Id.* at 89. This is not to be confused with a bona fide occupational qualification (BFOQ):

various provinces in Canada have exempted some industries and occupations from reasonable accommodations.[164] Thus, both Canada and the United States have an undue hardship standard for reasonable accommodations.

The Canadian courts have stipulated guidelines for an employee requesting an accommodation. First, the employee must take initiative by requesting the specific accommodation and explaining why it is needed.[165] Employees need to be flexible, realistic, and deal with the employer in good faith.[166] In turn, the employer should respect the dignity of the employee asking for accommodation and assess his or her need based on the needs of the religious group.[167] The employer may need to consider alternatives to the requested accommodation and, if accommodation is not possible due to undue hardship, be fully prepared to demonstrate the hardship.[168] The courts approach the issue of undue hardship on a case-by-case basis.[169]

Factors the courts consider in determining whether undue hardship exists include "the cost of accommodation (both present and reasonably foreseeable costs), and health and safety risks to the person requesting accommodation, to other employees and to the public."[170] Some level of expense inflicted on the

---

> [A] limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives . . . In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

Id. at 87-88 (quoting Ont. Human Rights Commn v. Etobicoke (Borough), [1982] 1 S.C.R. 202, 208). An example of a BFOQ is a rule banning non-Catholics from teaching at Catholic schools. *Id.* at 90.

164. *Id.* at 101. Four provinces exempt domestic workers engaged in the employer's private residence; one province exempts farm workers living in the employer's private residence; one province exempts religion instructors in religious schools; one province exempts persons who are employed to look after medical needs of their employers, sick children, or a relative who is ill. *Id.*

165. P.A. Neena Gupta, *The Employers Duty to Provide Religious Accommodation* (June 2004), *at* http://www.hrinfodesk.com/preview.asp?article=13142 (last visited Nov. 12, 2005).

166. *Id.*

167. *Id.* For an example of a religious accommodation policy, see Yosie Saint-Cyr, *Sample Religious Accommodation Policy* (July 2004), *at* http://www.hrinfodesk.com/articles/samplereligousaccommodationpolicy.htm (last visited Jan. 16. 2006).

168. Gupta, *supra* note 165.

169. *Id.*

170. *Id.* In no circumstances will the court look at the discriminatory preferences of co-workers or customers. *Id.* Other factors the court considers include the impact on the morale of other employees and the interchangeability of the workforce and other facilities. Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] S.C.R. 489, 502 (holding that the employee did not have to work on days prohibited by his religion because the employer failed to show undue hardship and therefore had a duty to accommodate).

employer is acceptable, but an undue interference with the operation of the business or undue expense to the employer is not required.[171]

Reasonable accommodation law in Canada is very similar to that in the United States because both consider health and safety of the public, alternative accommodations, and cooperation on both sides. Canada, however, took affirmative, self-imposed steps to accommodate police officer's religion.

B. Religious Accommodation for the Royal Canadian Mounted Police: More Tolerant than the United States?

Canada has taken a more tolerant approach to diversity within the police workforce than the United States.

> The Government of Canada recognizes cultural diversity as a fundamental characteristic of Canadian society and . . . the Royal Canadian Mounted Police (RCMP) is committed to providing effective police services that are appropriate, sensitive and equally responsive to all segments of Canada's diverse society. The RCMP is committed to . . . all laws prohibiting discrimination on any ground, regardless of . . . religion . . . .[172]

In fact, Canada actively recruits Sikh Muslims who are required to wear a beard and turban as part of their religious practice, without restrictions.[173] These affirmative, self-imposed steps towards religious diversity contrast with the court-imposed steps in the United States.

1. Appearance of the Royal Canadian Mounted Police

In mid-1987, the Royal Canadian mounted Police (RCMP) implemented affirmative action policies within the force for the sole purpose of recruiting visible minorities.[174] The RCMP wanted to "remove a barrier to the

---

171. *Id.*

172. R.C.M.P. Career Opportunities, *The RMCP's Commitment to Cultural Diversity*, *at* http://www.keremeos.com/rcmp/careers.html (last visited Nov. 12, 2005). In fact, the RCMP Cadet Training Program provides a chapel in which trainees can practice their faith. *Id.*

173. Ahluwalia, P., *I was Made for a Purpose*, SIKH SPECTRUM (Apr. 11, 2001), *at* http://www.sikhspectrum.com/042003/purpose.htm (last visited Nov. 12, 2005).

174. Grant v. Canada, [1995] F.C. 158, *available at* http://reports.fja.gc.ca/fc/src/shtml/1995/pub/v1/1995fca0229.shtml (last visited Nov. 12, 2005). The force noted that preventing visible minorities from joining would be "fruitless" because the Canadian Armed Forces, Canadian National Railway, and Minister of Correctional Services all accommodated religious minorities. *Id.* Furthermore, the Metro Toronto Police allowed turbans, but the individuals were not permitted to go on industrial sites that required hard hats, to do traffic duties where hard hats were required, or to perform duties that required a gas mask. *Id.*

employment of . . . Sikhs."[175] At this time, RCMP recruiting teams told Sikh Muslims they could wear beards and turbans instead of the traditional felt hat required of RCMP officers.[176] However, in situations where the officer is performing duties that require special headdress or safety equipment, the officer must remove the turban.[177] By imposing accommodations on themselves, religious minorities are likely to feel welcome within the RCMP.

In fact, the Canadian courts have gone as far as requiring a beard exemption policy to extend equally to religious and non-religious employees. The Waterloo Regional Police Services (WRPS) implemented a policy allowing officers to only wear beards for religious, medical, or investigative purposes.[178] Once the beard policy was challenged, the court found it to be an irrational rule because WRPS lacked a legitimate reason for such a broad prohibition.[179] The court found that a beard policy taking into account health and safety or a policy merely regulating appearance and maintenance of a beard would be legitimate.[180] Therefore, the accommodation of appearances cannot unduly affect other police officers in the force.

Canada's approach reflects more acceptance and tolerance of deviations of a police officer's appearance. Likewise, the United States allows similar religious accommodations of appearance, but often only after resistance.

2. *Paid Holidays, Vacation Time, Overtime, and Job Assignments: No More Religious Accommodations?*

In the midst of actively recruiting religious minorities, the RCMP addressed other accommodation issues. Specifically, the Deputy Director of Personnel Planning noted two other concerns that the RCMP would not accommodate.[181] Attempts of religious accommodations regarding certain activities, such as using or carrying a firearm, often failed.[182] Furthermore, religious claims failed when employees could not work on specific holidays,

175. *Id.*

176. *Id.* The RCMP's "ceremonial uniform" consists of a "felt hat, scarlet tunic, blue breeches with a yellow cavalry stripe, brown Strathcona boots and jack spurs and such other items as the Minister might approve." *Id.* Before any change in this traditional uniform is made the RCMP looks to the following factors: "tradition; uniformity of dress; ease of public identification of uniformed officers; safety considerations." *Id.*

177. *Id.* The RCMP's policy also required that officers receiving religious accommodations based on appearance perform all duties assigned to them. *Id.*

178. Regional Municipality of Waterloo Police Services Board v. Waterloo Regional Police Ass'n, 1999 C.L.A.S.J. LEXIS 7640, at 6 (2000).

179. *Id.* at 48-49.

180. *Id.* at 48.

181. *Grant v. Canada*, [1995] F.C. 158.

182. *Id.*

such as the Sabbath.[183] However, in other employment contexts the employer has a duty to consider and grant requests for religious leave.[184]

The RCMP created an application for Sikhs that were exempted from the traditional uniform policy.[185] It required them to agree to the following language: "Notwithstanding that I may be granted the exemption requested . . . I hereby undertake to perform all duties assigned to me by the RCMP and to wear any special headdress or safety equipment that is necessary for bona fide operational reasons or is required by law."[186] Therefore, although religious employees are allowed exemptions for appearance when appearance is not a bona fide occupational qualification, they appear to be mostly excluded from accommodations regarding work schedules and job reassignment by signing the application form.[187]

Religious employees of the RCMP are excluded from various areas based on a balancing of factors. The factors include:

> [T]he economic consequences for the employer; the size of the employer's organization; the magnitude of any safety risks and who would bear the costs of injury that might arise; the degree of interference with the operation of the employer's business including problems of morale that might result from a prospective accommodation measure and the interchangeability of work force and facilities available to an employer.[188]

Based on these factors, the Commission of the RCMP concluded that only allowing accommodations in appearance survived the balancing of factors.[189]

3. *Societal Concerns: Religious or Traditional Appearance?*

The RCMP's acceptance of religious minorities was met with much societal resistance.[190] In *Grant v. Canada*, concerned members of society brought suit against the RCMP challenging the recently enacted policy of

---

183. *Id.*

184. Gupta, *supra* note 165. In addition to the equal number of paid religious holidays that all employees receive, the employee may still request accommodation for additional paid leave days, such as floating days, compassionate leave days, or unpaid leave. *Id.*

185. *Grant v. Canada*, [1995] F.C. 158.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* The court, however, noted that "every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. . . . It was a wise man who said there is no greater inequality than the equal treatment of unequals." *Id.*

190. *Id.*

allowing turbans and beards.[191] The plaintiffs had great pride and attachment to the traditional appearance of the RCMP.[192] They further asserted that they had a real interest in retaining the religious neutrality of the uniform based on this pride.[193] The court held that there was no evidence that officers wearing turbans deprived any person of liberty or security.[194] Furthermore, the plaintiff's assertion that a "visible manifestation of a Sikh officer's religious faith, as part of his uniform, will create a reasonable apprehension of bias was not based upon any concrete evidence."[195]

Grant evidences Canadian society's unwillingness to allow religious accommodations for police officers.[196] This unwillingness is likely based on the notion that police are supposed to protect everyone and not just those who follow an officer's particular religious beliefs. This is similar to the fear generated in the United States and its citizens' unwillingness to allow officers religious exceptions.

As a result, Canada actually accommodates fewer religious practices in the RCMP than the United States. This is in spite of the RCMP's efforts to encourage diversity, namely religious diversity, within its workforce.

IV. UNITED KINGDOM: SETTING THE STANDARD FOR RELIGIOUS ACCOMMODATIONS

A. *Overview and History*

The European community has recognized crucial human rights issues related to religion.[197] In *Prais v. Council of the European Communities*, the plaintiff wanted to compete for a position available on the Council of the European Communities.[198] To qualify for the position, all candidates were required to take a test; however, the date of the test conflicted with the plaintiff's religious obligations.[199] The Council refused to administer the test at a later date, so the plaintiff filed a claim based on Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides:

---

191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. Case 130/75, Prais v. Council of the European Communities, 1976 E.C.R. 1589.
198. *Id.*
199. *Id.* Vivian Prais was Jewish and Friday, May 16, 1975, the date for the written test in the competition, was the first day of the Jewish feast of Shavuot, during which it is not permitted to travel or to write. *Id.*

> [F]reedom to manifest one's religions or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[200]

The Council argued that the European convention did not grant the plaintiff the rights she claimed.[201] The Council reasoned that accommodating religion would require it to "set up an elaborate administrative machinery"[202] for the following reasons:

> [I]t would be necessary to ascertain the details of all religions practised in any Member State in order to avoid fixing for a test a date or a time which might offend against the tenets of any such religion and make it impossible for a candidate of that religious persuasion to take part in the test.[203]

The Court agreed with the Council and ruled that the test had to be administered on the same date for everyone, oddly enough, due to the principle of "equality."[204] Therefore, the plaintiff's right to freedom of religion was suppressed by a need for a uniform test date for all candidates in order to ensure "equality."

As evidenced in *Prais*,[205] the United Kingdom commonly did not prohibit discrimination in employment on the basis of religion until the passage of new regulations.[206] Ironically, the United Kingdom did prevent discrimination on

---

200. *Id. See also* Hellenic Resources Net, *The European Convention on Human Rights*, Nov. 4, 1950, *available at* http://www.hri.org/docs/ECHR50.html#Convention (last visited Nov. 12, 2005).

201. *Prais*, 130/75 1976 E.C.R. 1589.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Northern Ireland, however, prohibits discrimination on the basis of religion or belief. Gay Moon & Robin Allen, Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and their Implications, 580 EUR. HUM. RTS. L. REV. 602, 585 (2000). The protection of religious beliefs stems from the country's historical religious conflicts. Id. For an explanation of the history of the conflict in Northern Ireland, see Wikipedia, History of Northern Ireland, at http://en.wikipedia.org/wiki/History_of_Northern_Ireland (n.d.) (last visited Nov. 12, 2005). In fact, Northern Ireland went as far as allowing a policy of 50-50 religious recruitment policy into the Police Service. Police Recruitment Policy Upheld, BBC NEWS, July 23, 2002, available at http://news.bbc.co.uk/1/hi/northern_ireland/2144722.stm (last visited Nov. 12, 2005). The policy required that 50% of new recruits be Catholic. *Id.* This policy was upheld against a challenge by a Protestant claiming discrimination because recruitment was not merit based. *Id.* The court reasoned that the need to correct religious imbalance was necessary because a police force should be representative of the community it serves. *Id.*

the basis of various other categories, such as persons undergoing gender reassignment surgery and marital status.[207] Those who faced religious discrimination at work were without a legal remedy.[208] In order to circumvent this problem, religious discrimination cases were presented as race discrimination cases, which led to interesting results.[209] For example, Sikhs were classified as a racial group,[210] Rastafarians as a religious group,[211] Jews as a religious group,[212] gypsies as a racial group,[213] and Muslims as not being a racial group.[214] The lack of an obvious bright line between race and religion, along with the lack of protection of religious beliefs, led to frustration among religious groups.[215]

To add to the frustration, a statutory provision allowed workers to opt out of work on Sunday.[216] The Sunday Trading Act of 1994 and the Shops Act of 1950 were based on the Christian religion and its observation of the Sabbath on Sunday.[217] Therefore, many Muslim workers were not able to visit the mosque on Fridays, and many Jews were not able to observe the Sabbath on Saturdays.[218] One concession was made to Sikhs by exempting them from wearing safety helmets on construction sites.[219] Needless to say, non-Christian religious groups were frustrated at the arbitrariness of the protection of religious practices.[220]

Based on these examples, it is obvious that there were major issues regarding equality in religious rights in the United Kingdom. However, a large part of the United Kingdom, absent Northern Ireland, did not view religion as an issue of equal treatment.[221] Rather, religious rights were addressed only as those rights to hold and practice religious beliefs.[222] Therefore, equal treatment on the basis of religion was not afforded in the workplace or even generally in society.[223]

---

207. Helen Pritchard, *Discrimination in Employment, in* THE HANDBOOK OF EMPLOYMENT RELATIONS, LAW & PRACTICE 150 (Brian Towers ed., 2003).

208. *Id.*

209. Moon & Allen, *supra* note 206, at 584.

210. Mandella v. Dowell Lee [1983] 2 A.C. 548.

211. Dawkins v. Dep't of Env't [1993] I.R.L.R. 284.

212. Seide v. Gillette Industr. [1980] I.R.L.R. 427.

213. Comm'n for Racial Equal. v. Dutton [1989] 1 All E.R. 306.

214. Tariq v. Young C.O.I.T. 24773/88.

215. Moon & Allen, *supra* note 206, at 584-85.

216. *Id.* at 586.

217. *Id.* at 585-86.

218. *Id.*

219. *Id.* at 586.

220. For a discussion of the special status of the Church of England with the Crown and the State, *see id.* at 587 (explaining the rights of certain Church of England bishops to participate in the House of Lords and the freedom it enjoys from planning laws).

221. *Id.*

222. *Id.*

223. *See generally* TROWERS & HAMLINS EMPLOYMENT DEPARTMENT, EMPLOYMENT LAW FOR CHARITIES 48-69 (Emma Burrows ed., 2003).

The tide began to turn in the late 1990s.[224] The recognition of limitations on the protections offered to some religious beliefs by current law led to profound changes in the United Kingdom.[225] The Amsterdam amendment to the E.C. Treaty introduced a new Article 13 E.C., which provides:

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[226]

Based on this amendment, the Council agreed to two new Directives.[227] The first Directive, proposed in December of 1998, outlawed discrimination on the grounds of race, which covered housing and education.[228] The second Framework Directive, proposed in November of 2000, required member states to implement legislation outlawing discrimination in the workplace on the grounds of religion and sexual orientation.[229]

The second Framework Directive required the new legislation on religion to be implemented by December 2, 2003.[230] As a result, the United Kingdom approved the Employment Equality (Religion or Belief) Regulations in 2003.[231] Employers in the United Kingdom are now required to treat all religions equally in the workplace.

---

224. *See generally* Chartered Institute of Personnel and Development (2003), RELIGIOUS DISCRIMINATION: AN INTRODUCTION TO THE LAW, *available at* http://www.cipd.co.uk/changeagendas.com (n.d.) (last visited Oct. 8, 2004) (on file with author) [hereinafter CIPD].

225. Moon & Allen, *supra* note 206, at 580.

226. *Id.* at 583.

227. *Id.*

228. *Id.*

229. CIPD, *supra* note 224, at 1. *See* Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment and Occupation, 2000 O.J. (L 303) 16 [hereinafter Council Directive]. The decision to outlaw discrimination on the basis of religion in the workplace was based on the idea that "[e]mployment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realizing their potential." *Id.* Furthermore, religious discrimination "may undermine . . . the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons." *Id.* at 16-17. Apparently religious equality in housing and education does not contribute to these goals. *See* Moon & Allen, *supra* note 206, at 583 (noting only the race directive applies to housing and education).

230. CIPD, *supra* note 224, at 1.

231. *Id.*

B. *Comprehensive Statutory Scheme*

1. General Overview

The Regulations prohibit direct and indirect discrimination, harassment and victimization that is based on an individual's religion or belief.[232] The Regulations define the scope of "religion" simply as "any religion, religious belief or similar philosophical belief."[233] The explanatory notes to the Regulations suggest a number of factors when deciding what constitutes religion: whether there is collective worship, a clear belief system, or a profound belief affecting a way of life or view of the world.[234] These notes do not have legal effect, so it will largely be up to employers, employment tribunals, and courts to resolve this ambiguity.[235] It is interesting that the notes do not require a belief in a supreme being, which has been a requirement to qualify as a religion in United Kingdom courts outside of discrimination law.[236] Ultimately, it is unclear as to how religion will be interpreted under the new regulations.

Direct discrimination occurs when an employee is treated less favorably on the grounds of religion than other employees are treated.[237] Indirect discrimination occurs where:

> [A] provision, criterion or practice is applied equally to persons not of the same religion or belief, and persons of a particular religion or belief are put at a disadvantage when compared to other persons, and the provision, criterion or practice cannot be shown to be a proportionate means of achieving a legitimate aim.[238]

"Victimization" occurs when an employee is treated differently because he or she has engaged in one of the following:

> [B]rought proceedings against the alleged discriminator or any other person under the Regulations given evidence or information in connection with proceedings brought by any person against the alleged discriminator or any other person under the Regulations otherwise done anything under or by

---

232. *Id.*
233. *Id.* at 5.
234. *Id.* at 6.
235. *Id.* (noting that Rastafarians, Humanists, Satanists, Pagans, cults and animal rights activists will likely qualify for protection under the Regulations).
236. *Id.*
237. *Id.* at 1.
238. *Id.* at 2-3.

> reference to the Regulations in relation to the alleged discriminator or any other person, or alleged that the alleged discriminator or any other person has committed an act which would amount to a contravention of the Regulations.[239]

Finally, harassment is "unwanted conduct that violates the dignity of a person or creates an intimidating, hostile, degrading, humiliating or offensive environment."[240] The Regulations extensively protect religion in the workplace.

The Regulations, however, do provide for certain exceptions to the general prohibition on religious discrimination.[241] Where the nature of the job, or the context in which it is being carried out, create a genuine occupational requirement, discrimination is allowed as long as there is a legitimate objective and the requirement is proportionate.[242] An organization with a particular religious ethos is also exempted from the general prohibition.[243] However, these exceptions only apply to recruitment, promotion, transfer, training, benefits, and dismissal.[244] The exceptions do not apply to the terms of employment or to any other detriment to the employee, such as demotion.[245]

Finally, in an effort to avoid ambiguities in application, the Regulations specify provisions for certain employers.[246] Provisions extend religious protection to public office-holders, barristers, partnerships, trade organizations, employment agencies, government training to assist people in obtaining employment, and the police.[247] Therefore, the Regulations unambiguously state that the police are subject to its prohibition of religious discrimination.

2. *The Regulations Applicability to Police Officers*

The Regulations pointedly state that "all police constables enjoy the same protection from discrimination and harassment as employees."[248] The office of

---

239. *Id.* at 3.
240. *Id.* at 3.
241. *Id.* at 4.
242. Moon & Allen, *supra* note 206, at 594.
243. *Id.*
244. CIPD, *supra* note 224, at 4.
245. *Id.*
246. *Id.*
247. *Id.*
248. The Department of Trade and Industry, *Explanatory Notes for the* Employment Equality (Sexual Orientation) Regulations 2003 *and* Employment Equality (Religion or Belief) Regulations 2003, at 33, *at* http:/www.dti.gov.uk/er/equality/so_rb_longexplain.pdf (last visited Jan. 22, 2005) (on file with author) [hereinafter Notes]. The Regulations state, " 'employment' means employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions shall be construed accordingly." The Employment Equality (Religion or Belief) Regulations, (2003) SI 2003/1660, *available at* http://www.legislation.hmso.gov.uk/si/si2003/20031660.htm (last visited Nov. 12, 2005) [hereinafter Employment Regulations].

police constable is treated as "employment" for the purposes of the Regulation.[249] The constables' employer is the chief officer of the force to which they belong or the police authority when the discriminatory acts are done by that authority.[250] The police officers covered are the National Criminal Intelligence Service and National Crime Squad; officers in forces such as the British Transport Police; Ministry of Defence Police, Royal Parks Police; and police cadets.[251] Therefore, the Regulations undoubtedly cover police officers' practice of religion.

However, the Framework Directive cautioned against strict applicability towards the police.[252] The Directive does not require employers to hire or keep employees that are incompetent and unavailable to perform essential functions of the job or its relevant training.[253] Furthermore, it provides:

> [T]he armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.[254]

The Directive goes on to provide that the Armed Forces may choose not to apply provisions regarding disability or age due to its need to safeguard combat effectiveness.[255] However, nowhere in the Directive does it state that the police force may choose not to apply the provisions on religious discrimination.[256] Therefore, it may be presumed that, absent an officer's inability to do the job, religious discrimination is categorically prohibited.

C. *Anticipated Impact in the Workplace and in Society*

Due to the recent enactment of the Regulations, their interpretation is the subject of much speculation throughout the United Kingdom. There has never been specific legislation in the area of religious discrimination in the workplace. This void may lead to fundamental changes in workplace culture.[257] In fact, society does not view religious discrimination as a problem.[258] Only two percent of the public believes employers discriminate against employees on the

---

249. Notes, *supra* note 248.
250. *Id.*
251. *Id.*
252. Council Directive, *supra* note 229, at 17.
253. *Id.*
254. *Id.*
255. *Id.*
256. *See generally id.*
257. *New Laws Could Revolutionize Office Culture*, BBC NEWS, July 23 2002, *available at* http://news.bbc.co.uk/1/hi/business/2357279.stm (last visited Nov. 12, 2005).
258. *Id.*

basis of religion.[259] There is also a concern that legislation may not lead to a more tolerant society and instead may breed resentment among some workers.[260] This is especially relevant in light of the societal view that religious discrimination is not a problem in the workplace.

In addition to creating valuable rights for employees, the Regulations pose difficult challenges to employers.[261] First, employers face the difficulty caused by the low level of understanding of many religions and the manifestations of their subsequent beliefs.[262] Due to the Regulations' expansive definition of religion, employers should be cautious in assuming that less conventional beliefs fall outside the scope of the Regulations.[263] Furthermore, it is not enough that employers simply avoid direct religious discrimination. They must also avoid implementing a policy that puts a religious employee at a "particular disadvantage" unless the policy is a "proportionate means to achieve a legitimate end."[264] At first glance, it may seem the employer's hands are tied because, along with the Religious and Belief Regulations, the employer is also now subject to Sexual Orientation Regulations.[265] It is likely that religious employees will object, based on genuinely held religious grounds, to working with homosexual employees.[266] The only guidance given to employers in this situation is to use proportionate means and strike a balance between the conflicting sides.[267]

Another problem stemming from the implementation of the Regulations is tolerating the expression of religious beliefs.[268] It will be difficult for employers when this expression of religious belief proves offensive toward others and leads to discrimination.[269] For example, some religions have beliefs regarding the role of women in society or sexual orientation.[270] Attempts to suppress this expression may lead to a claim of discrimination under the new Regulations; however, allowing the employee to freely express these views may lead to tension within the workplace.[271] Furthermore, the employer could be liable for claims of harassment when the comments amount to harassment of

---

259. *Id.*

260. *Id.*

261. Stephen Levinson, *Religious Discrimination*, EMPLOYMENT LAW BULLETIN, Oct. 2003, at 4.

262. *Id.*

263. *Id.* at 5 (noting that non-believers are likely covered under the Regulations).

264. *Id.*

265. *Id.*

266. *Id.* at 5-6 (explaining other "hot spots" including dietary requirements, prayer facilities, dress codes, holidays, and restrictions on hours of work).

267. *Id.*

268. Richard Nicolle, *Employment – A Little Respect*, LAWYER, Jun. 23, 2003, *at* 2003 WL 61848628, at 2.

269. *Id.*

270. *Id.*

271. *Id.*

other employees.[272] The exercise of all rights, however, must be proportionate and balanced against the competing rights of other parties.[273] One way to strike a balance is to implement a policy of cultural sensitivity providing training and a mutual understanding and respect for others.[274]

Despite intense speculation as to how employers and employees will receive the new Regulations, it appears little progress has been made.[275] As of November 2003, only thirty-three percent of employers updated policies for religious beliefs within the workplace, although employees were going to be able to bring claims as of December.[276] This presents a problem because the new Regulations did not place a cap on the level of awards for successful claimants.[277] Of those who did update their policies, the driving factor for a large majority was the company's reputation.[278] Only half of the employers wanted to develop diversity within the workforce.[279] Perhaps the employers are approaching the implementation of the new Regulations from the wrong perspective.

There is little evidence that the police force is taking implementation of the new Regulations seriously. The Metropolitan Police Authority cites the new Regulations as a consideration for an important policy to prioritize.[280] However, it may be too soon to judge the Regulations' effectiveness in police departments in the United Kingdom.

V. CONCLUSION: UNITED KINGDOM AS AN EXAMPLE FOR THE UNITED STATES AND CANADA?

The United Kingdom's Regulations promise religious tolerance in the workplace. However, the reluctance of employees to implement them, and society's perception that there is no discrimination in the workplace may diminish its effectiveness. In addition, it is too soon after adoption of the Regulations to see the effect they will have in the police force.

---

272. *Id.*

273. *Id.* at 3.

274. *Id.*

275. *Employment – Discrimination Polices Get Short Shrift From Employers*, LAWYER, 2003 WL 61849637, at 1 (Nov. 3, 2003). This lack of progress may be attributable to employer confusion. *Anti-Discrimination Agencies: New Beginning or Bitter End?*, LAWYER, 2002 WL 24528190, at 1 (Sept. 16, 2002). "Having six different laws – on race gender, disability, age, religion and sexual orientation – will be as confusing for employers as for the public." *Id.* at 2. Therefore, a movement towards a uniform commission and a uniform law is emerging in the UK. *Id.* A call for an overarching equality commission is necessary because presently there are six commissions dealing with the six separate strands of discrimination. *Id.* A single human rights commission, as well as a single unified law may solve the confusion. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 2.

279. *Id.*

280. Metropolitan Police Authority, *Summary of the Policing and Performance Plan 2004/05*, at 4, *available at* http://www.mpa.gov.uk (last visited Jan. 16, 2006).

However, the Regulations serve as an example that should be considered by the United States and Canada. Given both countries' history of problems with religious accommodations in the police force, a comprehensive statutory scheme may better serve the interests of the public, government, and police officers. Additionally, such a statutory scheme will definitively establish the law regarding police officer's religious accommodation; thus, the courts will be able to uniformly address the issue. As Aristotle once said, "[l]aws should be constructed so as to leave as little as possible to the decision of those who judge."[281]

281. Fort Liberty, *Quotes About Law*, *at* http:/www.fortliberty.org/quotes/quotes-law.shtml (last visited Nov. 12, 2005).

BLUE RUSH: IS AN INTERNATIONAL PRIVATIZATION AGREEMENT A VIABLE SOLUTION FOR DEVELOPING COUNTRIES IN THE FACE OF AN IMPENDING WORLD WATER CRISIS?

Amy K. Miller*

Water is "[o]ne of the world's great business opportunities. . . . [It] promises to be to the 21st century what oil was to the 20th century: the precious commodity that determines the wealth of nations."[1]

I. INTRODUCTION

Water is essential for all facets of human life.[2] While humans can survive without food for weeks, if deprived of water they will die within a few days.[3] Alarmingly, scholars and researchers predict that by 2015 blue water[4] flows will be unable to meet domestic, industrial, and agricultural needs because pollution, unsustainable use, and exponential increases in the global population have already greatly strained water resources beyond their capacity to recharge.[5] In the face of such a severe water crisis, the international community is searching for a new approach to water resource management.[6] Accordingly, the United Nations General Assembly adopted a draft resolution that proclaims

---

* J.D. Candidate, Indiana University School of Law- Indianapolis; expected graduation date, May 2006. The author wishes to thank her family and friends for continued patience, support, and understanding throughout the writing process. The author also thanks Professor Robin K. Craig for her guidance during the writing of this Note.

1. Shawn Tully, *Water, Water Everywhere*, FORTUNE MAG., May 15, 2000, http://www.mindfully.org/w ater/water-everywhere15may02.htm.

2. DANTE A. CAPONERA, PRINCIPLES OF WATER LAW AND ADMINISTRATION: NATIONAL AND INTERNATIONAL 1 (1992). *See infra* notes 29-37 and accompanying text.

3. JEFFREY ROTHFEDER, EVERY DROP FOR SALE 14 (2001).

4. RETHINKING WATER MANAGEMENT INNOVATIVE APPROACHES TO CONTEMPORARY ISSUES 65 (Caroline M. Figueres et al. eds., 2003) [hereinafter INNOVATIVE APPROACHES]. Blue water is the main source for human use and, thus, the focus of water resource management. *Id.* It is comprised of renewable runoff from streams, lakes, and groundwater recharge. *Id.*

5. *See* NAT'L INTELLIGENCE COUNCIL, GLOBAL TRENDS 2015: A DIALOGUE ABOUT THE FUTURE WITH NONGOVERNMENT EXPERTS 9 (NIC 2000-02, Dec. 2000), http://www.cia.gov/cia/reports/globaltrends2015/gl obaltrends2015.pdf [hereinafter GLOBAL TRENDS 2015]; WORLD WATER ASSESSMENT PROGRAMME, United Nations Educ., Scientific & Cultural Org., WATER FOR PEOPLE WATER FOR LIFE THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 251, U.N. Sales No. 92-3-103881-8 (2003) [hereinafter WATER FOR PEOPLE].

6. TERENCE RICHARD LEE, WATER MANAGEMENT IN THE 21ST CENTURY 1 (1999). *See also* Rona Nardone, Note, *Like Oil and Water: The WTO and the World's Water Resources*, 19 CONN. J. INT'L L. 183, 183 (2003). "[T]he international community will have to work together to overcome the substantial cultural, financial, regulatory and operational challenges of the world water crisis". *Id.*

2005 to 2015 as the "International Decade for Action – Water for Life."[7] "The Decade will focus on water-related issues, at all levels and on the implementation of programmes and projects, and the furtherance of cooperation at all levels, in order to help to achieve the internationally agreed water-related goals."[8]

In 1992, delegates at the International Conference on Water and Environment officially encouraged States to treat water as an economic good,[9] giving rise to numerous economic approaches to water management.[10] Since then, uncertain supply and increasing water demands have produced new markets for the international commodification[11] of water.[12] Nevertheless, treating water as an economic good remains a controversial idea.[13] For example, one of the most intensely debated economic approaches to water management is the privatization of water systems.[14] Under this approach, governments, including municipalities, solicit private companies "to take over the management, operation, and sometimes even the ownership of the public water sector."[15]

---

7. *International Decade for Action, "Water for Life," 2005-2015*, G.A. Res. 58/217, U.N. GAOR, 58th Sess., Agenda Item 95, at 1, U.N. Doc. A/RES/58/217 (2005), http://www.unesco.org/water/water_ celebrations/decades/water_for_life.pdf [hereinafter U.N. Doc. A/RES/58/217].

8. *UN Declares International Water Decade "Water for Life," at* http://www.gdrc.org/uem/water/decade _05-15/ (n.d.) (last visited Nov. 13, 2005) [hereinafter *Water for Life*].

9. Christopher Gordon, Symposium, *Freshwater Ecosystems in West Africa: Problems and Overlooked Potentials*, (Feb. 1998), http://www.aaas.org/international/africa/ewmi/gordon.htm.

10. *See generally* JAMES WINPENNY, MANAGING WATER AS AN ECONOMIC RESOURCE (1994); JOHN C. BERGSTROM ET AL., THE ECONOMIC VALUE OF WATER QUALITY (2001).

11. PETER H. GLEICK ET AL., PAC. INST. FOR STUDIES IN DEV., ENV'T & SECURITY, THE NEW ECONOMY OF WATER THE RISKS AND BENEFITS OF GLOBALIZATION AND PRIVATIZATION OF FRESH WATER 3 (Feb. 2002), http://www.pacinst.org/reports/new_economy_of_water/new_economy_of_water.pdf [hereinafter New Economy]. "'Commodification' is the process of converting a good or service formerly subject to many non-market social rules into one that is primarily subject to market rules." *Id.*

12. Nardone, *supra* note 6, at 183. For example, there is already an established and rapidly expanding market for bottled water. NEW ECONOMY, *supra* note 11, at 11-12. During the 1990s, bottled water sales alone exceeded 50 billion liters. *Id.* In addition to existing markets, several countries are currently considering proposals for bulk water–trading, including the United States, Canada, Iceland, Malaysia, and Turkey. Nardone, *supra* note 6, at 184.

13. INNOVATIVE APPROACHES, *supra* note 4, at 41-65; THE POLITICAL ECONOMY OF WATER PRICING REFORMS (Ariel Dinar ed., 2000) [hereinafter WATER PRICING]; Maude Barlow, *Water as Commodity –The Wrong Prescription*, 7 BACKGROUNDER 3 (2001) (published by FOOD FIRST: INST. FOR FOOD AND DEV. POL'Y), http://www.foodfirst.org/pubs/backgrdrs/2001/s01v7n3.html. *But see* Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir. 2000) (noting that in the United States, commerce clause jurisprudence already recognizes the economic value of water).

14. NEW ECONOMY, *supra* note 11, at 21.

15. *Id.* at i.

Privatization is not a novel idea. In fact, private entrepreneurs have provided water to Latin American cities since colonial times.[16] What is causing all the controversy? Because public water sectors have been unable to satisfy water needs for all people, there has been a substantial increase in the extent of privatization efforts.[17] For instance, international aid agencies and water organizations, such as the World Bank and the World Water Council, strongly encourage developing countries to privatize water and sanitation service provision.[18] Consequently, multinational corporations have aggressively pursued responsibility for a larger portion of the water service market.[19] Economists and scholars further encourage privatization because they believe that allowing developing countries to use their abundant water resources will result in sizeable economic improvements.[20]

At the same time, there is a growing public awareness and attention to problems associated with privatization efforts.[21] Opponents of privatization fear that water privatization will infringe upon the human right to water because profit-driven companies will be reluctant to serve the poor.[22] To add to the opponents' concerns, numerous water privatization projects have recently failed or have caused substantial controversy.[23] For example, in 2002, experts

---

16. TOVA MARIA SOLO, THE WORLD BANK, INDEPENDENT WATER ENTREPRENEURS IN LATIN AMERICA THE OTHER PRIVATE WATER SECTOR IN WATER SERVICES 8 (May 2003), *available at* http://www.wsp.org/publications/SSIP.pdf.

17. NEW ECONOMY, *supra* note 11, at 21. *See also* INNOVATIVE APPROACHES, *supra* note 4, at 51. "Between 1984 and 1990, only eight new private water and sewage contracts were signed in developing countries, compared with 97 between 1990 and 1997." *Id.* (citation omitted).

18. NEW ECONOMY, *supra* note 11, at 21. In 2000, the World Water Forum in the Hague called for greater involvement from the private sector to attain funding for solving water problems. *Id.* The "Framework in Action," distributed at the meeting, called for ninety-five percent of new water investments to come from the private sector. *Id.*

19. *Id.*

20. *See* Shashank Upadhye, *The International Watercourse: An Exploitable Resource for the Developing Nation Under International Law?*, 8 CARDOZO J. INT'L & COMP. L. 61, 61-62 (2000).

21. *See, e.g.*, World Bank Group, *Multilateral Initiative To Manage South America's Largest Groundwater Reservoir Launched, at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,content MDK:20113114~menuPK:34466~pagePK:64003015~piPK:64003012~theSitePK:4607,00.html (May 23, 2003); ELISABETH TUERK ET AL., CTR. FOR INT'L ENVTL. L., GATS AND WATER: RETAINING POLICY SPACE TO SERVE THE POOR (Aug. 2003), http://www.ciel.org/Publications/GATS_5Sep03.pdf [hereinafter RETAINING POLICY]; Global Exchange, *Top Ten Reasons to Oppose the Free Trade Area of the Americas, at* http://www.globalexchange.org/campaigns/ftaa/topten.html (last modified Sept. 13, 2005).

22. RETAINING POLICY, *supra* note 21, at 2.

23. *See, e.g.*, NEW ECONOMY, *supra* note 11, at 21; CRITICAL MASS ENERGY AND ENV'T PROGRAM, PUB. CITIZEN, WATER PRIVATIZATION CASE STUDY: COCHABAMABA, BOLIVIA, http://www.citizen.org/documents/Bolivia_(PDF).PDF (n.d.) (last visited Oct. 2, 2005) [hereinafter COCHABAMABA]; Dustin Van Overbeke, Project, *Water Privatization Conflicts, Water is Life, at* http://www.uwec.edu/grossmzc/VAN OVEDR/ (Spring 2004); PUB. CITIZEN, WATER PRIVATIZATION FIASCOS: BROKEN PROMISES AND SOCIAL TURMOIL (Mar. 2003), http://www.citizen.org/documents/privatizationfiascos.pdf [hereinafter PRIVATIZATION FIASCOS].

declared one of the world's largest privatization efforts, located in Manila, Philippines, a failure because of several factors, including enormous increases in water rates, an increase in water losses due to leaks or unauthorized connections, inability to attain provision of service goals, and a lack of private funding to continue programs for the urban poor.[24] There is also a cloud of controversy surrounding water privatization schemes in Jakarta, Indonesia.[25] Originally, the World Bank endorsed contracts awarded to companies controlled by the family of the Surharto dictatorship, despite the institution's advocacy of open bidding and transparency in privatization efforts.[26] Although national law and local regulations prohibited foreign investment in drinking water, the government later awarded the privatization contracts to two foreign entities.[27]

With these considerations in mind, this Note explores the potential contribution of an international water privatization agreement to optimize the use of international water resources, focusing on water resources planning for the Guarani Aquifer in Brazil, Argentina, Uruguay, and Paraguay (the Guarani States). Part II discusses the importance of water as a commodity and, specifically, the importance of groundwater resources. Part III examines privatization, concluding that, with proper risk management, it is a viable solution to the world water crisis. However, because the Guarani Aquifer is a transboundary water supply, it is subject to international law.[28] Therefore, the Guarani countries have an obligation to reconcile domestic privatization efforts with international water law principles. Part IV discusses applicable international water law. Part V proposes an international plan for privatization that complies with international water law principles and rules. Such a plan would be among the first to coordinate privatization of a transboundary aquifer at an international level.

---

24. Mae Buenaventura et al., *Debt, Trade and the Privatization of Water Services*, *at* http://www.jubileesouth.org/news/EpZyVykZkysCPeKses.shtml (Dec. 12, 2003).

25. PRIVATIZATION FIASCOS, *supra* note 23, at 6.

26. *Id.*

27. *Id.*

28. See Amy Hardberger, Comment, *What Lies Beneath: Determining the Necessity of International Groundwater Policy Along the United States – Mexico Boarder and a Roadmap to an Agreement*, 35 TEX. TECH L. REV. 1211, 1212 (2004) (suggesting that international law applies to bodies of water accessible to more than one country).

II. WHY IS WATER SUCH A VALUABLE COMMODITY?

Since water fulfills vital social and cultural roles,[29] control over water supplies and flow presents a tremendous business opportunity for countries and multinational corporations.[30] Access to a sustainable supply of water is an important building block of social stability and the economic development of any civilization.[31] Such access can alleviate poverty and heath problems,[32] reduce gender inequalities,[33] and foster adequate food supplies.[34] Culturally, water is a symbolic component in ceremonies of most of the world's major religions[35] and in the national identities of many native peoples.[36] In short, the availability of fresh water and how countries choose to use it affects how people live.[37]

---

29. NEW ECONOMY, *supra* note 11, at i. *See also* Agenda 21, U.N. Doc. A/CONF.151/4 (1992), ch. 18 ¶ 68(a), ("Water should be regarded as a finite resource having . . . significant social and economic implications reflecting the importance of meeting basic needs"); *Ministerial Declaration of The Hague on Water Security in the 21st Century*, *at* http://www.thewaterpage.com/hague_declaration.htm (Mar. 22, 2000):

> To manage water in a way that reflects its economic, social, environmental and cultural values for all its uses, and to move towards pricing water services to reflect the cost of their provision. This approach should take account of the need for equity and the basic needs of the poor and the vulnerable.

Id.

30. Int'l. Forum on Globalization, *Free Trade of the Americas and the Threat to Water*, *at* http://www.if g.org/programs/ftaawater.htm (n.d.) (last visited Oct. 3, 2005). Globally, water privatization is already a $400 billion per year industry. *Id.* Overall, the privatization of water industry is one-third larger than the global pharmaceuticals industry. *Id. See also* INNOVATIVE APPROACHES, *supra* note 4, at 51 (noting that the U.S. private water sector generates more than $80 billion per year, which is four times the sales of Microsoft Corporation).

31. CAPONERA, *supra* note 2, at 11. "The history of human civilization is intertwined with the history of the ways humans have learned to manipulate and use water resources." PETER GLEICK ET AL., THE WORLD'S WATER THE BIENNIAL REPORT ON FRESHWATER RESOURCES 2002-2003 2 (2002) [hereinafter BIENNIAL REPORT].

32. *See infra* notes 183-188 and accompanying text.

33. *See* WATER FOR PEOPLE, *supra* note 5, at 251 (noting that the lack of water creates particular hardships for women).

34. *See generally id.* at 203-10 (exploring the use of water in agriculture).

35. World Water Assessment Programme, United Nations Educ., Scientific & Cultural Org., *Valuing Water*, *at* http://www.unesco.org/water/wwap/facts_figures/valuing_water.shtml (n.d.) (last visited Oct. 19, 2005) [hereinafter *Valuing Water*].

> Water is used in Buddhist funerals, poured till overflowing into a bowl placed in front of the monks and the dead body. In Christianity, water is used in several rites, including baptism and washing. In this religion, water symbolizes purification and cleansing. To Hindus, all water is sacred, especially rivers. It is thought to have cleansing properties, and is used to attain both physical and spiritual purity. It is an essential element in nearly all rites and ceremonies. In Islam, water is used for ablutions: worshippers must be pure for prayers. Small pools of water are found within or just outside all mosques for this purpose.

Id. (emphasis omitted)

36. NEW ECONOMY, *supra* note 11, at 9.

37. CAPONERA, *supra* note 2, at 7.

Today, States no longer consider water an unlimited resource.[38] In fact, 1.4 billion people, almost twenty percent of the world's population, do not have access to an adequate supply of potable water.[39] Furthermore, 2.4 billion are without sanitation services, and over 450 million people throughout twenty-nine countries suffer from water shortages.[40] The steady increase in the world's population greatly burdens the water resources.[41] "It took [nearly] all of history up to 1830 to put a billion people on the planet but only one hundred years to add the second billion. The third arrived in just forty-four years and the most recent billion came in a scant twelve years."[42] Every year, the world population increases by ninety million people.[43] As a result of the rising population, water use has tripled since the middle of the last century.[44] The increasing population is the most significant factor affecting water supply and water quality,[45] but it is not the only one.

In addition to a substantial increase in water use, pollution greatly strains the remaining freshwater supplies.[46] Natural pollution can occur in urban and irrigation areas when over-pumping of aquifers allows minerals and saltwater to transfer into the groundwater.[47] However, it is industrial and human waste disposal practices that pose the greatest threat to water quality and human health.[48] This threat is not surprising, given that individuals can produce as much as twenty-nine metric tons of waste per year.[49]

---

38. U.N. Doc. A/RES/58/217, *supra* note 7.

39. DIANE RAINES WARD, WATER WARS DROUGHT, FLOOD, FOLLY, AND THE POLITICS OF THIRST 2 (2002). *See also* ROTHFEDER, *supra* note 3, at 4. To meet the minimum quality of life, each individual needs fifty liters of water per day (lpd). *Id.* This equation allows five lpd for drinking, ten lpd for cooking, fifteen lpd for bathing and twenty lpd for sanitation. *Id.* Put into context, in the United States, this would not be enough water to flush an average toilet twice. *Id.* Yet in countries such as Haiti and Gambia, people are only able to attain a meager three lpd, or the equivalent of less than two large bottles of Evian a day. *Id.*

40. Nardone, *supra* note 6, at 183. Accordingly, ten million people die every year from water-related diseases, such as cholera and dysentery. ROTHFEDER, *supra* note 3, at 4.

41. WARD, *supra* note 39, at 3.

42. *Id.* at 2-3.

43. *Id.* at 3.

44. *Id.*

45. LUDWIK A. TECLAFF & ALBERT E. UTTON, INTERNATIONAL GROUNDWATER LAW 1 (1981).

46. CONFLICT MANAGEMENT OF WATER RESOURCES 226 (Manas Chatterji et al. eds., 2002). In developing countries, the three main sources of groundwater pollution are untreated waste, industrial waste, and agricultural activity. *Id.*

47. HENRY C. KENSKI, SAVING THE HIDDEN TREASURE THE EVOLUTION OF GROUND WATER POLICY 22 (1990); INNOVATIVE APPROACHES, *supra* note 4, at 123.

48. KENSKI, *supra* note 47, at 23. For example, businesses without access to sewer systems dispose of wastes in shallow underground cesspools/dry holes or septic tanks. Lenntech, *Sources of Groundwater Pollution*, *at* http://www.lenntech.com/groundwater/pollution-sources.htm (n.d) (last visited Dec. 22, 2005). Dry holes and cesspools introduce wastes directly into the ground, often resulting in groundwater contamination. *Id.* On the other hand, septic tanks cannot treat industrial wastes. *Id.*

49. KENSKI, *supra* note 47, at 23.

Another significant source of pollution is agricultural activities.[50] Large-scale farms release an enormous amount of animal waste and nitrogen into the water and soil systems, with lasting damaging effects.[51] Pollution is especially devastating to groundwater resources because cleanup is extremely expensive and restoration is nearly impossible.[52] Remediation of aquifers requires complex technologies to seal off contaminated areas, alter the groundwater flow, neutralize contaminants, and treat the water of the polluted reservoirs.[53]

Other human activities, such as deforestation and urban development, can contribute to the overall depletion of groundwater resources.[54] These activities diminish soil deposits and can reduce the recharge, availability, and renewability of groundwater resources.[55] For example, in forested areas, the rainwater seeps slowly into underground reservoirs, where it is stored for future use.[56] However, where commercial and urban development destroyed the forests, a lack of soil causes the rainwater to run directly into rivers and streams instead of replenishing the groundwater resources.[57]

A. Finite Supply

The total volume of water in nature, 1.4 billion cubic kilometers, is fixed and invariable.[58] If all of the water on Earth was in a solidified cube, each side would measure about 1,120 kilometers, or about twice the length of Lake Superior.[59] Of this water, about ninety-seven percent is salt water and less than three percent is fresh water.[60] The largest amount of fresh water (about seventy-seven percent) is in a solid state in the polar caps and glaciers.[61]

---

50. MAUDE BARLOW & TONY CLARKE, BLUE GOLD THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER 34 (2002) [hereinafter CORPORATE THEFT].

51. *Id.* at 33. A 100,000-gallon spill of animal waste, laced with antibiotics, killed over 700,000 fish in Minnesota. *Id.* at 33-34. More horrifically, fertilizers used throughout the Midwest have leached into the Mississippi River. *Id.* The nitrogen runoff empties into the Gulf of Mexico where it has created an area of 6,900 square miles (about the size of New Jersey) where nothing can survive. *Id.*

52. INNOVATIVE APPROACHES, *supra* note 4, at 122.

53. KENSKI, *supra* note 47, at 26-27; *see* Karin E. Kemper et al., *Management of the Guarani Aquifer System Moving Towards the Future*, 28 WATER INT'L 185, 189 (June 2003) (noting that portions of the Guarani Aquifer are already substantially polluted).

54. ROTHFEDER, *supra* note 3, at 8-9.

55. NEW ECONOMY, *supra* note 11, at 5.

56. Chris Sudzina, Project, *Final: Methods and Effects of Topical Rainforest Deforestation*, *at* http://jrscience.wcp.muohio.edu/FieldCourses00/PapersCostaRicaArticles/Final.MethodsandEffectsof.html (last modified Nov. 27, 2002).

57. *Id.*

58. Julio Barberis, *The Development of International Law of Transboundary Groundwater*, 31 NAT. RESOURCES J. 167, 167 (1991).

59. CORPORATE THEFT, *supra* note 50, at 5.

60. Barberis, *supra* note 58, at 167.

61. *Id.*

Unfortunately, much of this water is inaccessible.[62] Most of the accessible fresh water, about twenty-two percent, is groundwater.[63] Surface water, found in rivers and lakes, constitutes a meager 0.36 percent of all fresh water.[64] Rainfall is the only phenomenon that can renew these accessible resources.[65]

B. Understanding Groundwater Resources

Groundwater is in various types of aquifers.[66] By definition, an aquifer is a geologic formation with sufficient water storage and transmitting capacity to provide enough water for a useful water supply.[67] In short, aquifers act as natural water reservoirs,[68] providing strategic and cost-effective reserves for water supply.[69] Because aquifers are a natural distribution system,[70] access to groundwater can be cheaper than acquiring surface water in many areas around the world.[71] In addition, groundwater generally does not need to be treated for consumption because the natural filtering process of the subsoil produces water above the quality obtained by normal methods of water treatment.[72] Consequently, over half of the world's population is dependent on groundwater.[73]

Because the purpose of water law is to regulate the use of water, it is essential to understand the natural context of water.[74] Lawyers drafting water policies and treaty agreements must understand hydrogeology,[75] considering

---

62. CORPORATE THEFT, *supra* note 50, at 5.

63. Barberis, *supra* note 58, at 167.

64. *Id.*

65. *See infra* notes 81-82 and accompanying text.

66. Gabriel Eckstein & Yoram Eckstein, *A Hydrogeological Approach to Transboundary Ground Water Resources and International Law*, 19 AM. U. INT'L L. REV. 201, 210 (2003) [hereinafter *Hydrogeological Approach*].

67. U.S. Geological Surv., *Water Science for Schools*, *at* http://ga.water.usgs.gov/edu/dictionary.html#A (last modified Sept. 1, 2005).

68. *Hydrogeological Approach*, *supra* note 66, at 210.

69. THE WORLD BANK GROUP, GLOBAL ENVIRONMENT FACILITY PROPOSAL FOR PROJECT DEVELOPMENT FUNDS (PDF) BLOCK B GRANT 2, *at* http://wbln0018.worldbank.org/LAC/Guarani/AR/Doclib.nsf/e6cfa f4d4f3083ad 85256896006bfaea/ccad0ecf0e3a3bef852568f2005c9036/$FILE/Guarani%20pdf-final.doc (n.d.) (last visited Dec. 22, 2005) [hereinafter WORLD BANK GROUP].

70. MIMI JENKINS, CONJUNCTIVE USE WITHOUT MANAGEMENT: YOLO COUNTY, CALIFORNIA'S WATER SUPPLY SYSTEM CONJUNCTIVE USE WITHOUT MANAGEMENT ch. 4 A.2 (Sept. 1992), *at* http://www. dcn.davis.ca.us/dcn/projects/conjunctiveuse/chapt4.html. Water can be accessed without building above-ground distribution systems, whereas distribution systems must be constructed to transport surface water from withdrawal points to areas where it is needed. *Id.*

71. Lisa Gaines et al., Guest Editorial, *Transboundary Aquifers*, 28 WATER INT'L 143, 143 (June 2003).

72. WORLD BANK GROUP, *supra* note 69, at 2.

73. *Hydrogeological Approach*, *supra* note 66, at 201-02.

74. CAPONERA, *supra* note 2, at 5.

75. Robert D. Hayton, *The Law of International Aquifers*, 22 NAT. RESOURCES J. 71, 72 (1982).

that hydrological research has greatly affected the rules applying to ground water.[76] The hydrological cycle is the movement of water from the sea to the atmosphere, from the atmosphere to the earth, and from the earth back to the sea.[77] Generally, experts accept that both surface and groundwater are a part of this cycle.[78] Most aquifers flow to a natural discharge site, such as a spring, river, lake, or the sea.[79] Groundwater flow is a function of gravity, soil porosity and permeability, slope of the groundwater table, ambient air pressure, and temperature.[80] Thus, the flow of groundwater is similar to that of water soaking into a sponge.[81] Aquifers can recharge naturally from rainfall, snow, hail, surface water,[82] or from other aquifers.[83] In addition, activities such as irrigation, dike and canal building, and damming projects can recharge aquifers.[84] Exchanges between surface and groundwater are significant because the conditions affecting the quality and quantity of the water on one side can have consequences for interconnected water resources.[85] For example, surface

---

76. Barberis, *supra* note 58, at 168; *Convention on the Law of Non-navigational Uses of International Watercourses*, G.A. Res. 51/229, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/229 (1998), reprinted in 36 I.L.M. 700 (1997) [hereinafter *Non-Navigational Convention*]:

> (a) "Watercourse" means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;
> (b) "International watercourse" means a watercourse, parts of which are situated in different States.

Id. These definitions reflect a hydrogeological approach to water law by recognizing the interrelationship between surface and ground water. *Hydrogeological Approach*, *supra* note 66, at 229.

77. *Hydrogeological Approach*, *supra* note 66, at 207-08.

> The hydrologic cycle . . . is the system in which water - solid, liquid, gas, or vapor - travels from the atmosphere to the Earth and back again in a constant cycle of renewal. Generally, water falls from the atmosphere in the form of precipitation, such as rain, snow, and sleet. Water that falls on land either runs over the land into streams, rivers and lakes, or it percolates into the earth. Throughout its surface travels and especially when it reaches large bodies of water, it evaporates through the effects of solar energy and returns to the atmosphere where it continues in the cycle. Plants consume or absorb some water, which they then transpire through their leaves back into the atmosphere.

Id. (citations omitted).

78. Barberis, *supra* note 58, at 169. *See also* Hardberger, *supra* note 28, at 1217 (noting that even aquifers restrained between two impermeable geologic layers can have interaction with surface waters).

79. *Hydrogeological Approach*, *supra* note 66, at 217.

80. *Id.* at 218.

81. *Id.* at 217.

82. CAPONERA, *supra* note 2, at 247.

83. *Hydrogeological Approach*, *supra* note 66, at 220.

84. *Id.*

85. *Id.* at 221.

> [I]t is very common to have mutual relationships between surface and underground water resources that vary in time and space. A river, for example, may discharge water into a related aquifer at one point of its course, and receive

waters polluted by various human activities are a source of groundwater pollution.[86] Pollutants, such as urban sewage, pesticides, and oils, seep untreated into rivers and, thus, into aquifers fed by the rivers.[87]

C. *Application of International Law to Aquifers*

There is little water law precedent concerning aquifers.[88] Countries generally use surface water resources first and do not turn to groundwater resources until the surface supplies become insufficient.[89] Historically, groundwater law derived from ancient customs that recognized groundwater resources as incidental to land ownership.[90] However, because ancient customs did not appreciate the mobility of groundwater, many laws did not address actions, such as over-pumping, that affected the quality of neighboring wells and other groundwater resources.[91] Spanish law, a foundation for water law in Latin America, "traditionally held that groundwaters belonged to the owner of the overlying land."[92] Consequently, Brazil,[93] Argentina, Paraguay, and Uruguay recognize private ownership of water resources "in association with land ownership, up to the point where it flows out of the property concerned."[94]

Clearly, the mobility of water prevents one from viewing it solely in a national context.[95] However, because aquifers lie out of sight beneath the surface of the land, this concept can be harder to grasp.[96] As a result, traditional international agreements omitted provisions pertaining to

---

> water from ground water at another; or a given stretch of a river may discharge into an aquifer during the autumn season and receive water in the spring.

Id. (citation omitted).

86. Barberis, *supra* note 58, at 172.

87. *Id.*

88. TECLAFF & UTTON, *supra* note 45, at 4.

89. *See id.* at 5-6.

> [B]ecause law, and governments, respond (with few exceptions) only to felt needs of a society it comes as no surprise that traditionally there has been a failure to focus on the regulation and management of groundwater use in most legal systems. Demand for regulatory action simply has not been insistent.

Id. at 6 (quoting Robert D. Hayton, *The Ground Water Legal Regime as Instrument of Policy Objectives and Management Requirements*, 2 ANNALES JURIS AQUARIUM 272, 275 (proceedings of the Second International Conference on Water Law and Administration, Caracas, Venezuela, Feb. 8-14, 1976)).

90. *Id.* at 6.

91. *Id.* at 6-7.

92. *Id.* at 7.

93. CAPONERA, *supra* note 2, at 111. The Brazilian Mining Code handles groundwater as a mineral. *Id.*

94. *Id.* at 110-11.

95. Hardberger, *supra* note 28, at 1212.

96. Tracy Stitt, Note, *Evaluating the Preliminary Draft Articles on Transboundary Groundwaters Presented by Special Rapporteur Chusei Yamada at the 56th Session of the International Law Commission in Geneva*, May 2004, 17 GEO. INT'L ENVTL. L. REV. 333, 333 (2005) (noting that aquifers are generally "out of sight and out of mind").

groundwater and instead focused solely on transboundary surface waters.[97] Presently, a close analysis of an aquifer's hydrologic system determines if the aquifer is, in fact, a transboundary resource subject to international law.[98] Aquifers are part of an international hydrologic system in four main scenarios.[99] In each case, the implications of water use vary for each country, as illustrated below.[100]

The simplest form of a transboundary aquifer is a confined aquifer[101] divided by an international boundary.[102] By definition, a confined aquifer is an underwater resource that is not linked hydrologically with other ground or surface water resources.[103] This situation is similar to that of a mineral or oil deposit that underlies two or more countries. Any use of this resource may negatively affect other states because overall quantity diminishes.[104] Examples of this model include the Nubian Sandstone aquifer underneath Chad, Egypt, Libya, and Sudan and the Qa-Disi Aquifer underlying southern Jordan and northern Saudi Arabia.[105]

Another type of shared aquifer is an aquifer located entirely within the territory of one state and hydrologically linked with an international river.[106] Implications of water use by one country vary with the direction of surface water flow.[107] For example, if the aquifer recharges the river, changes in use of the aquifer may have an impact on that river,[108] and excessive exploitation of the aquifer could decrease the river's volume.[109] On the other hand, if the river recharges the aquifer, use of the water in the river may alter the hydrological regime of the aquifer.[110] Examples of this model include the Red Light Draw, Hueco Bolson, and Rio Grande aquifers that underlie the United States and Mexico.[111]

An aquifer located entirely within the territory of a single state and hydrologically linked with another aquifer in a neighboring state is a more complex type of shared groundwater.[112] So long as there is a difference in the hydraulic levels between the aquifers, groundwater will percolate from one

97. TECLAFF & UTTON, *supra* note 45, at 9.
98. *See, e.g.*, *Hydrogeological Approach*, *supra* note 66, at 221-49.
99. Barberis, *supra* note 58, at 168.
100. Kemper et al., *supra* note 53, at 193-94.
101. *Hydrogeological Approach*, *supra* note 66, at 212. A confined aquifer is an aquifer located between impermeable layers of the earth's subsurface. *Id.*
102. Barberis, *supra* note 58, at 168.
103. *Id.*
104. Kemper et al., *supra* note 53, at 194.
105. *Hydrogeological Approach*, *supra* note 66, at 248.
106. Barberis, *supra* note 58, at 168.
107. *Id.*
108. Kemper et al., *supra* note 53, at 194.
109. Barberis, *supra* note 58, at 168.
110. Kemper et al., *supra* note 53, at 194.
111. *Hydrogeological Approach*, *supra* note 66, at 238.
112. Barberis, *supra* note 58, at 168.

aquifer to the other.[113] Substantial "withdrawals from one aquifer may decrease the water in both aquifers or can even reverse the direction of flow from one aquifer to the other."[114]

Another type of aquifer subject to international law is an aquifer situated entirely within the territory of one state that has its recharge zone in another state.[115] Modifications in the recharge area, such as damming, may affect water availability and quality in the aquifer.[116] An example of this model is the Guarani Aquifer.[117]

III. PRIVATIZATION

Globally, there are enough freshwater sources to meet the current and future needs of the world's population; a simple solution is redistribution of the resources under a new water management scheme.[118] Scholars and economists promote privatization as a solution that allows countries to tailor water management schemes to meet unmet citizen needs and simultaneously generate revenue.[119]

A. *What is privatization?*

The word "privatization" may suggest water supplies free of government oversight or participation, but in fact, this rarely happens.[120] Instead, privatization refers to a variety of partnerships between governments and private companies with varying degrees of governmental control and oversight of water resources and infrastructure.[121] In fact, very few governments allow

---

113. *Id.*

114. Kemper et al., *supra* note 53, at 194.

115. Barberis, *supra* note 58, at 168.

116. *Id.*

117. *Hydrogeological Approach*, *supra* note 66, at 246.

118. Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384, 384 (1996). "[T]he management of freshwater is largely a question of redistribution of a natural resource, given certain physical, economic, environmental and social constraints." *Id. See also* FED. MINISTRY FOR THE ENV'T, NATURE CONSERVATION & NUCLEAR SAFETY & FED. MINISTRY FOR ECON. COOPERATION & DEV., WATER – A KEY TO SUSTAINABLE DEVELOPMENT, INT'L CONFERENCE ON FRESHWATER 8 (Dec. 3-7, 2001), "), http://www.water-2001.de/outcome/reports/Brief_report_en.pdf. "There is enough water in the world for everyone in the world, but only if we change the way we manage it. The responsibility to act is ours – for the benefit of the present and future generations." *Id.*

119. *See* Innovative Approaches, *supra* note 4, at 46-47.

120. NEW ECONOMY, *supra* note 11, at 26.

121. Nardone, *supra* note 6, at 190. Some of the functions that can be privatized include: capital improvement planning and budgeting; finance, design, and construction of capital improvements; operation and maintenance of facilities; pricing decisions; billing and collection management; payroll of employees or contractors; risk management, and oversight of water quality and service standards. NEW ECONOMY, *supra* note 11, at 26. *See also* Jamie Knotts,

the water itself to come into private ownership or permit a laissez-faire (unregulated) engagement of the private sector.[122] Privatization provides incentives for countries and their private partners to redistribute and conserve water resources and promotes efficiency in water and sanitation services.[123] Furthermore, privatization provides a solution for the common problems of developing countries, such as inadequate financing in the provision of public services[124] and political manipulation[125] of state-owned enterprises.[126]

B. Forms of Privatization

1. Joint Arrangements / Mixed Management

The simplest form of privatization is joint arrangements or mixed management.[127] Under this approach, governments outsource specific tasks, such as operation and maintenance contracts, to private firms.[128] The government retains all ownership of physical assets,[129] but its level of oversight will vary according to the specific arrangement.[130] The private firms are often able to provide both managerial and operational expertise to greatly improve efficiency.[131] In addition, these arrangements offer much-needed flexibility for the government, because they can vary in duration and scope and often include performance-based incentives and penalties[132] that are not available in the public sector.[133] Easy modifications of such agreements enable the government

---

Privatization When Public Goes Private, ON TAP MAG. (2003), *at* http://www.nesc.wvu.edu/ndwc/ articles/OT/SP03/Privatization.html.

122. Nancy Alexander, Globalization Challenge Initiative, *Service Apartheid: The World Bank's Private Sector Development Strategy and the PRSP*, (noting "[p]rivatization in an unregulated environment is a recipe for disaster"), *at* http://www.africaaction.org/docs01/priv0110.htm (n.d.) (last visited Dec. 21, 2005).

123. INNOVATIVE APPROACHES, *supra* note 4, at 47. Private companies prioritize maintenance and repairs because lost water means lower profits. *See id.*

124. LEE, *supra* note 6, at 103.

125. Helena Kerr do Amaral, Project, *Brazilian Water Resource Policy in the Nineties* (Dec. 1996) (noting that extensive water sector reforms were needed to improve public services that were rapidly deteriorating due to years of political wrangling over public utilities), *at* http://www.gwu.edu/~ibi/minerva/Fall1996/ Helena.Kerr.Amaral.html.

126. NEW ECONOMY, *supra* note 11, at 26. In a fully public water system the water supply and infrastructure are completely controlled, owned, and operated by a governmental agency. *Id.* In addition, public funds are used to finance the water system operation, including maintenance and construction costs. *Id.*

127. LEE, *supra* note 6, at 99; *New Economy*, *supra* note 11, at 27.

128. INNOVATIVE APPROACHES, *supra* note 4, at 47.

129. Nardone, *supra* note 6, at 190.

130. Robert Vitale, *Privatizing Water Systems: A Primer*, 24 FORDHAM INT'L L.J. 1382, 1386 (2001).

131. Knotts, *supra* note 121. *See also* NEW ECONOMY, *supra* note 11, at 27.

132. Knotts, *supra* note 121. "[A]rrangements sometimes allow the private company to share in the revenue increases gained from better management and bill collection." *Id.*

133. LEE, *supra* note 6, at 103.

to explore many different alternatives in order to achieve maximum benefits.[134] A majority of agencies believe that these arrangements have improved competency, independence, and trust with stakeholders.[135] Areas where this approach has proven successful include: the maintenance and repair of equipment, water, and sewage networks and pumping stations; meter installation and maintenance; payment collections, and data processing.[136] In addition, such contracts are common in areas such as Africa, where the institutional capacity of local regulators is weak.[137]

2. *Concession*

Concessions are the most common form of privatization in the water supply and sewage sector.[138] Full concession arrangements transfer full operational and management responsibility of the entire water supply system, including financial and commercial risk, to a private contractor for a fixed term.[139] Partial concession options, defined by the duties transferred to the private entity, also exist.[140] Throughout the arrangement, the government maintains control over the service provision through monitoring and regulations.[141] At the conclusion of the term, the contractor must return the assets to the government in good condition.[142] Concessions reduce the need for more intrusive forms of regulation and ensure that prices do not reach outrageous levels.[143] As an additional advantage, the responsibility for operations, maintenance, and investments lies in a single contractor.[144] More appropriate investment decisions result because the contractor is in the best position to forecast demand and respond to maintenance/repair needs.[145] However, success can be difficult to achieve because both full and partial concessions require clearly defined responsibilities and risks[146] and a comprehensive regulatory scheme.[147]

---

134. Vitale, *supra* note 130, at 1387.

135. SOPHIE TREMOLET ET AL., EVT'L. RESOURCES MGMT.,THE WORLD BANK GROUP, CONTRACTING OUT UTILITY REGULATORY FUNCTIONS 31 (Jan. 2004), http://rru.worldbank.org/Documents/PapersLinks/ 2550.pdf.

136. NEW ECONOMY, *supra* note 11, at 27.

137. LEE, *supra* note 6, at 113; TREMOLET ET AL., *supra* note 135, at 28.

138. LEE, *supra* note 6, at 105.

139. INNOVATIVE APPROACHES, *supra* note 4, at 47.

140. Nardone, *supra* note 6, at 191.

141. LEE, *supra* note 6, at 118.

142. *Id.*

143. *Id.* at 105-6.

144. *Id.* at 118.

145. *Id.*

146. NEW ECONOMY, *supra* note 11, at 28.

147. LEE, *supra* note 6, at 108.

One variation on the concession approach is a "build, operate, and transfer contract" (BOT).[148] Under BOTs, the private firm, usually a major construction or engineering company, must finance, build, and operate the system.[149] At the end of the contract, the firm must return all assets to the government.[150] Because the private investor controls every aspect of these long-term projects, from the early design stages to operation and maintenance, BOTs provide significant cost efficiencies.[151]

3. Split Ownership

Under this model, private and public shareholders split ownership of water systems in a corporate utility.[152] Such organizations generally have a corporate infrastructure managed by a board of directors.[153] Usually the public sector retains the majority of ownership because of legal restrictions on private ownership.[154] Generally, governments do not transfer ownership rights because water is essential to public service.[155] Regulation of essential services prevents abuse and provides economic stability.[156] This model of privatization is beneficial because it reconciles two potentially conflicting goals of water supply.[157] The public's concerns of affordability, water quality, equity of access, and expansion of service offset the private owners' objectives to maximize profits and recuperate costs.[158] Presently, split ownership corporations exist in the Netherlands, Poland, Chile, and the Philippines.[159]

4. Divestitures

Divestitures are the most extreme form of privatization.[160] Under this approach, a government sells ownership and operations of the water system to a private company.[161] Common forms of divestiture include selling shares, selling physical assets, opening a government-owned company to private investment, and offering management or employee buy-outs.[162] Divestitures

148. *Id.* at 122.
149. *Id.*
150. INNOVATIVE APPROACHES, *supra* note 4, at 47.
151. LEE, *supra* note 6, at 122.
152. NEW ECONOMY, *supra* note 11, at 27.
153. *Id.*
154. *Id.*
155. Timothy P. Duane, Regulation's Rationale: Learning From the California Energy Crisis, 19 YALE J. ON REG. 471, 477 (2002).
156. *Id.* at 477-78.
157. NEW ECONOMY, *supra* note 11, at 27.
158. *Id.*
159. *Id.*
160. INNOVATIVE APPROACHES, *supra* note 4, at 47.
161. Edwin S. Rubenstein, *The Untapped Potential of Water Privatization* (Oct. 2000), *at* http://www.es rresearch.com/Theprivatewaterindustry.htm.
162. LEE, *supra* note 6, at 100.

can generate substantial improvements in productive efficiency and increase national income.[163] However, regulation of water quality and other public protections may not be available under this model,[164] leaving its use appropriate only in markets with significant unmet demands.[165] The British government applied this approach to ten regional water sectors during the 1980s.[166] This divestiture was largely unsuccessful because there was little incentive for the water companies to make capital investments for rehabilitation and improvement of the water and sewage infrastructures.[167] For example, one water company submitted plans for water treatment plants that it never built.[168] Another company successfully petitioned the government to re-define "waters," allowing the company to dump raw sewage into coastal waters rather than expanding treatment facilities.[169] Use of the divestiture model is rare today.[170]

C. *Drivers of Water Privatization*

1. *Privatization Can Help Satisfy Basic Unmet Human Needs*

As previously noted, approximately twenty percent of the world's population does not have access to a potable supply of water.[171] Water scarcity problems occur most often in developing nations.[172] Governments cannot provide adequate water services to these individuals without major reforms or enormous increases in investment.[173] For example, during the late 1980s, a rapidly deteriorating infrastructure greatly strained the financial resources of the Argentine government.[174] At that time, almost eighty percent of the pipe network was in need of replacement.[175] The government entered into a

163. *Id.* at 101.
164. Nardone, *supra* note 6, at 192.
165. LEE, *supra* note 6, at 129.
166. PRIVATIZATION FIASCOS, *supra* note 23, at 8.
167. *Id.* at 9.
168. *Id.*
169. *Id.*
170. INNOVATIVE APPROACHES, *supra* note 4, at 47.
171. WARD, *supra* note 39, at 2.
172. WATER FOR PEOPLE, *supra* note 33, at 6. "People privileged enough to live in more prosperous parts of the world . . . rarely have to confront the consequences of water scarcity." *Id.*
173. NEW ECONOMY, *supra* note 11, at 21. *See* GEORGE R.G. CLARKE ET AL., WORLD BANK, HAS PRIVATE PARTICIPATION IN WATER AND SEWERAGE IMPROVED COVERAGE? EMPIRICAL EVIDENCE FROM LATIN AMERICA (World Bank Pol'y Research, Working Paper No. 3445, Jan. 2004) (stating that resolving water and sanitation problems will require 600-800 billion dollars), http://wdsbeta.worldbank.org/external/default/WDSContentServer/IW3P/IB/2004/12/08/000012009_20041208141341/Rendered/PDF/WPS3445.pdf.
174. LEE, *supra* note 6, at 119.
175. *Id.*

privatization agreement to obtain the funding for repairs and replacement of the pipe network.[176]

Realistically, government officials are subject to the political process and cannot easily raise water prices without jeopardizing their own positions.[177] Privatization allows officials to avoid this problem and enables them to use public funding to meet other social needs.[178] In addition, the private sector can obtain capital more easily than the public sector, which allows the expansion of service to proceed more quickly.[179] Rapid access to capital is especially relevant in developing countries that face crushing demands to expand coverage in growing urban areas while maintaining current infrastructures and water treatment standards.[180] For example, Kenya would need to invest 4 billion dollars, nearly the equivalent of the country's total annual national budget, to provide all Kenyans with access to clean and safe water.[181] Engagement of the private sector presents a viable solution to these funding needs.[182]

In addition to expansion of service, privatization can also provide higher-quality water.[183] Private companies that own resources within the water sector have a strong motivation to keep the water clean.[184] Improvements in water quality and service lead to improvement in overall public health and welfare.[185] For example, empirical evidence shows that in Latin America water and sanitation services have improved under private-sector engagement.[186] Although few case studies focus on privatization effects on water quality, those that do show an improvement.[187] For instance, case studies in Salta, Argentina, and Conakry, Guinea, show that privatization improved the physical, chemical, and bacterial quality of water resources.[188]

176. *Id.*

177. NEW ECONOMY, *supra* note 11, at 23.

178. *Id.*

179. *Id.*

180. INNOVATIVE APPROACHES, *supra* note 4, at 53. In the Ivory Coast, access to a safe supply of water increased dramatically because a private company was allowed to increase water rates to cover the long-term marginal costs. *Id.*

181. WAMBUA SAMMY, WATER PRIVATIZATION IN KENYA 4 (Global Issue Papers, No. 8, 2004), http://www. boell.de/downloads/global/Water%20Privatisation%20in%20Kenya.pdf.

182. *Id.* at 5.

183. CLARKE ET AL., *supra* note 173, at 3.

184. *See* Roy Whitehead, Jr. et al., *The Value of Private Water Rights: From a Legal and Econ. Perspective*, 9 ALB. L. ENVTL. OUTLOOK 313, 335 (2004).

185. WATER FOR PEOPLE, *supra* note 5, at 122-23.

186. CLARKE ET AL., *supra* note 173, at 7.

187. *Id.* at 11.

188. *Id.*

2. *Need for Efficiency*

Competent and efficient water service provision requires private sector participation.[189] The very nature of the public sector inhibits efficiency in industry because governments use public utilities to pursue goals that are unrelated to their entrepreneurial role.[190] Water resources serve "as vehicles for political patronage, corruption, nepotism, misappropriation of public funds, and . . . as an instrument for furthering the political and material interests of the politicians in office."[191] For instance, an audit of irrigation projects in Orissa, India revealed "serious failures of expenditure control, and widespread mismanagement of funds involving significant excess/undue payments to contractors, as well as extra, unauthorized and wasteful expenditure. . . . [A]s high as 32% of the overall expenditure flowed down the drain of corruption and undue favours to contractors."[192]

A more common form of political misapplication of water resources is the use of water subsidies that promote waste and overuse of water.[193] For example, despite severe water shortages in Jordan, government subsidies encourage "overuse of irrigation water."[194] In addition, users who are already connected to the public water system benefit from water subsidies, rather than the neediest citizens who do not have access to a safe supply of water.[195]

Because private ownership increases the transaction costs of government interference in entrepreneurial decision-making, industries can be protected from undue political influence.[196] Institutional frameworks designed to attract private investments protect private property and limit government intervention.[197] This separation between government regulators and private firms makes intervention relatively more expensive.[198] Unlike public employees, who do not see any of the residual profits from their efforts, private sector managers have a direct personal stake in the profitability of their

189. *See* Alexander Orwin, Env't Probe, *The Privatization of Water and Wastewater Utilities: An International Survey*, *at* http://www.environmentprobe.org/enviroprobe/pubs/ev542.html (Aug. 1999).

190. LEE, *supra* note 6, at 96. *See also* CLARKE ET AL., *supra* note 173, at 3 (stating that governments have a strong incentive to set water rates to cover operating costs but not to provide resources for expansion and maintenance).

191. *Id.*

192. Himanshu Upadhyaya, *India Together: Accelerated Corruption, a Trickle of Irrigation*, *at* http://www .indiatogether.org/2005/jan/gov-aibpcorr.htm (Jan. 29, 2005).

193. LEE, *supra* note 6, at 96.

194. James David, *Water: The More Than 'Silent' Emergency*, 9 INTEGRAL LIBERATION 87, 89 (June 2005), http://www.holycrossjustice.org/pdf/Integral%20Liberation/June%202005/Water%20%20The%20More%20than%20Silent%20Emergency%20%20James%20David.pdf.

195. MARK W. ROSEGRANT ET AL., INT'L FOOD POL'Y RESEARCH INST., WORLD WATER AND FOOD TO 2025: DEALING WITH SCARCITY 10 (2002), http://www.ifpri.org/2020/briefs/number21.htm.

196. LEE, *supra* note 6, at 96.

197. *Id.*

198. *Id.*

enterprises.[199] This interest provides an incentive for private managers to remain innovative and efficient.[200] One example of improved efficiency by engagement of the private sector is the reduction of unaccounted-for water (UfW).[201] By definition, UfW "is the difference between the quantity of water supplied to a [water sector] network and the metered quantity of water used by the customers."[202] Lost water equals lost profits for private companies, thus private managers have a greater incentive to reduce leaks and theft.[203]

While market forces alone cannot protect the vital social and cultural roles of water,[204] there is a necessary cost for the provision of water.[205] Gratuitous price increases are of great concern to opponents of water privatization.[206] However, water pricing schemes can be disproportionate even without private sector involvement, thus high water prices are not a direct consequence of privatization.[207] For example, in fully public water systems, the unserved poor pay up to twenty times the price that served non-poor pay per unit of water,[208] but because of the lack of financing, the government is unable to expand its infrastructure and customer base to provide service to these people and subsidize their water costs.[209]

C. *Risk Management*

Because major international efforts to privatize water systems and markets are a relatively new endeavor, there are many concerns about their ability to adequately protect social objectives.[210] Furthermore, while countries with the weakest public sectors have the greatest need for water services, privatizations have the least chance of success under weak regulatory schemes.[211] However, as demonstrated below, the risks of privatization are

---

199. *Id.* at 97.

200. *Id.* at 98.

201. CLARISSA BROCKLEHURST & JAN G. JANSSENS, THE WORLD BANK GROUP, INNOVATIVE CONTRACTS, SOUND RELATIONSHIPS: URBAN WATER SECTOR REFORM IN SENEGAL 5, n.14 (Water Supply & Sanitation Board, Discussion Paper Series No. 1, Jan. 2004), http://iris37.worldbank.org/domdoc/PRD/Other/PRDDContainer.nsf/All+Documents/85256D2400766CC78525700600667888/$File/WSS_Senegal.pdf. UfW can be physical losses from leaking pipes, administrative losses from illegal connections, or both. *Id.*

202. *Id.*

203. *Id.* at 5.

204. BIENNIAL REPORT, *supra* note 31, at 34.

205. NEW ECONOMY, *supra* note 11, at 40.

206. *Id.* at 30.

207. INNOVATIVE APPROACHES, *supra* note 4, at 49.

208. *Id.*

209. NEW ECONOMY, *supra* note 11, at 23.

210. *Id.* at 29.

211. TREMOLET ET AL., *supra* note 135, at 43.

> Paradoxically, those regulators who would most benefit from contracting out are the ones that have the most difficulties in entering into such agreements to bring about a satisfactory outcome, either for lack of financial capacity or capacity to

manageable so long as privatization agreements adhere to three basic principles: 1) manage water in a manner that reflects its social value; 2) use sound economics, and 3) maintain strong governmental regulation.[212]

1. Reflect Social Value in Water Management

In order to reflect the social value in water management, privatization agreements must meet basic human needs for water.[213] Human needs take priority over all other needs. Accordingly, privatization contracts must include a provision requiring fulfillment of unmet human needs to be the first priority of the solicited private entrepreneur.[214] In addition, privatization agreements should include a guaranteed minimum quantity of water for residents within the service area.[215] Although private companies may be reluctant to invest heavily in impoverished communities, governments can use many tools to entice private entrepreneurs to enter into expansion agreements, such as expansion mandates, "quantitative performance indicators, and economic incentives."[216] For example, in Senegal, the government remunerates private companies for water sold, which creates an incentive for the companies to provide water service to the poor.[217] These tools provide incentives for companies to develop low-cost operations and innovative solutions for residents.[218]

The La Paz-El Alto concession in Bolivia provides an excellent illustration of an agreement with explicit expansion requirements.[219] The "expansion mandates" obligated the private company to meet certain levels of service provision and water quality.[220] The contract required the company to install new connections, expand coverage, and extend new services to areas with a specific population density within a specified timeframe.[221]

While these provisions provide a significant level of protection, they are not always enough. In some instances, meeting basic needs for water will require subsidies for impoverished citizens who cannot afford even the most minimal costs.[222] For example, current South African water laws guarantee each citizen twenty-five liters of water per capita per day at no cost.[223]

> monitor performance, or insufficient access to external contractors' supplier market . . . . This institutional approach faces significant challenges in countries with limited technical and financial capacity and fledgling institutions.

Id.

212. NEW ECONOMY, *supra* note 11, at 40-41.
213. *Id.* at 40.
214. *Id.*
215. *Id.*
216. *Id.* at 29-30.
217. BROCKLEHURST & JANSSENS, *supra* note 201, at 16.
218. *Id.*
219. NEW ECONOMY, *supra* note 11, at 29.
220. *Id.*
221. *Id.*
222. INNOVATIVE APPROACHES, *supra* note 4, at 49.
223. *Id.*

Reflecting the social value of water in management will alleviate opponents' fears that profit incentives limit access to a sustainable supply of water. Incorporating the social value of water into management policies balances the two extreme viewpoints: 1) water is a fundamental human right[224] that should be provided free of charge,[225] and 2) the free trade of water alone will solve the shortage problems of the world.[226]

2. *Use of Sound Economics*

When governments seek out private firms to invest in an infrastructure and provide water service, activists point to subsequent price increases as evidence of corporate greed.[227] While it is true that prices generally rise after private sector engagement, the increases are often unrelated to direct corporate involvement.[228] Regardless of ownership, if the prices are less than the cost of provision, then prices must increase until there are enough funds to pay for capital infrastructure, water treatment, sewage treatment, and service to the poor.[229] In some cases, water tariffs must increase two to three hundred percent.[230] These increases may seem outrageous but for consideration of consumers' willingness to pay.[231] For example, in developing countries, where urban water rates are usually less than one-sixth of the full cost of provision, the unserved poor are willing to pay up to four dollars per cubic meter (four times the average cost of water provision),[232] while the served non-poor may pay prices as low as twenty cents per cubic meter.[233] Prices for the unserved poor are high because unregulated vendors control access to water.[234] Government-regulated privatization allows the unserved poor to obtain water services for only one dollar per cubic meter, a fourth of the amount they are willing to pay.[235]

Individuals with low incomes are willing to pay for water and sanitation, so long as the service is reliable and the cost of delivery is available.[236]

---

224. World Health Org., *Water for Health Enshrined as a Human Right, at* http://www.who.int/mediacent re/news/releases/pr91/en/ (Nov. 27, 2002). "Water is fundamental for life and health. The human right to water is indispensable for leading a healthy life in human dignity. It is a pre-requisite to the realization of all other human rights." *Id.* (quoting The United Nations Comm. on Econ., Cultural and Soc. Rights).

225. INNOVATIVE APPROACHES, *supra* note 4, at 47.

226. *Id.* at 42.

227. *See* COCHABAMABA, *supra* note 23, at 3.

228. INNOVATIVE APPROACHES, *supra* note 4, at 48.

229. *Id.*

230. COCHABAMABA, *supra* note 23, at 3.

231. INNOVATIVE APPROACHES, *supra* note 4, at 49.

232. *Id.* The average cost of water provision is one dollar per cubic meter. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. NEW ECONOMY, *supra* note 11, at 30.

Furthermore, if a company is able to provide new or improved desirable services, then customers are generally willing to pay more.[237] The more information that is provided to the public concerning the improvement in services and capital investments needed to provide them, the more accepting the public will be to price increases.[238] Large price increases generate strong, at times even violent, opposition if the public is ill-informed.[239] However, linking price increases to improvements in service builds public trust and creates performance incentives for private entrepreneurs.[240] For example, when the government of Conakry, Guinea was no longer able to provide adequate water services to its citizens, it leased water sector assets to a private company.[241] The private operation recuperated a fee that reflected the full operating costs, but it initially charged customers only one-fourth of the full cost.[242] Subsequent increases in rates were contingent upon improvements in service.[243] Within the first five years of the contract, coverage increased by three hundred percent.[244] Overall, experts tout the project as a success.[245]

Furthermore, use of subsidies protects those who cannot afford price increases.[246] To be effective, subsidies must be both economically and socially sound.[247] For instance, if they reduce the price of water too much, subsidies promote inefficient use.[248] Additionally, subsidies are also not effective if used for political wrangling, such as policy favors or social gifts.[249] Subsidies should be subject to regular review to ensure discontinuance of those that are no longer socially beneficial.[250] Nevertheless, a lack of necessary subsidies can be devastating. In South Africa, millions of people went without water because of

---

237. *Id.*

238. *Id.*

239. COCHABAMABA, *supra* note 23, at 3-4. In 1999, the Bolivian government granted a forty-year contract to a private company to run a municipal water system. *Id.* at 3. Without explanation, water tariffs increased as much as 200% only a few weeks after the company took over. *Id.* The citizens were unable to survive under this burden and riots broke out, effectively shutting down the city for four days. *Id.* Protests went on for months before the government finally terminated the contract, but in the end, six people died because of the violence. *Id.* at 3-4.

240. NEW ECONOMY, *supra* note 11, at 40-41.

241. INNOVATIVE APPROACHES, *supra* note 4, at 53.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 49.

247. NEW ECONOMY, *supra* note 11, at 41.

248. ANDREAS KRAEMER & MATTHIAS BUCK, GROUP ON ECON. AND ENV'T POLICY INTEGRATION, ORG. FOR ECON. CO-OPERATION & DEV., WATER SUBSIDIES & THE ENVIRONMENT 37 (ORG. FOR ECON. CO-OPERATION & DEV., PAPER NO. OCDE/GD(97)220, Jan. 15, 1998), http://www.olis.oecd.org/olis/1997doc.nsf/43bb6130e5e86e5fc12569fa005d004c/5bb1a3702e23600cc12565690055d4ba/$FILE/12E77396.DOC.

249. NEW ECONOMY, *supra* note 11, at 31.

250. *Id.* at 41.

substantial increases in water prices without the provision of subsidies.[251] One citizen reflected, "[i]t's actually worse than under apartheid . . . . They're charging people for water in neighborhoods where there is 70 percent unemployment and people don't even operate on a cash economy."[252] Such high prices effectively forced people to drink from polluted streams, resulting in a three-year cholera epidemic.[253] To prevent such incidents, governments must maintain strong regulation over the water sector.

3. *Maintain Strong Government Regulation*

If the government does not retain some control or ownership of water resources, then the social values of water lack adequate protection.[254] Public ownership ensures that citizens have the representation and necessary remedies to correct an imbalance in social and economic concerns.[255] Because privatization does not absolve governments of their duties to protect the environment or public health and safety,[256] the government must carefully draft provisions[257] and regulations to protect social values of water resources.[258] Governments can achieve the goal of protecting the social value of water by monitoring water quality.[259] Improvements in water quality benefit everyone by reducing public health problems.[260] In order to maximize effectiveness, regulatory schemes should be "transparent, accessible, and accountable to the public."[261]

---

251. Kari Lydersen & Cleo Woelfle-Erskine, *Drying Up: The Global Water Privatization Pandemic,* LIP MAG., Summer 2004, *at* http://www.lipmagazine.org/articles/featlydersen_water.shtml.

252. *Id.*

253. *Id. See also Privatization in South Africa: Starting Over*, THE DOMINION, Feb. 25, 2004 (stating that the outbreak was "one of the largest outbreaks of cholera in the nation's history"), http://dominionpaper.ca/a ccounts/2004/02/25/privatizat.html [hereinafter DOMINION].

254. INNOVATIVE APPROACHES, *supra* note 4, at 53.

255. NEW ECONOMY, *supra* note 11, at 41.

256. *Id.* at 26. *See also* Paulette L. Stenzel, *Why and How the World Trade Organization Must Promote Environmental Protection*, 13 DUKE ENVTL. L. & POL'Y F. 1, 27 (2002) (noting that corporations now have social responsibilities).

257. BROCKLEHURST & JANSSENS, *supra* note 201, at 7. Affermage contracts are another option for States that do not have a sophisticated regulatory framework because regulatory provisions are built into the contract itself. *Id.* Under this type of contract, the private company is paid a fee to cover the cost of running the system and producing water. *Id.* The private operator collects the consumer payments, retains the previously agreed upon fee, and remits the difference to the government. *Id.* Affermage contracts are advantageous when national law does not provide a foundation for utility regulation or the overall regulatory capacity is inadequate. *Id.*

258. *See* TREMOLET ET AL., *supra* note 135, at 1.

259. NEW ECONOMY, *supra* note 11, at 41.

260. WATER FOR PEOPLE, *supra* note 5, at 123.

261. NEW ECONOMY, *supra* note 11, at 41.

The key to drafting contracts that protect the public interest lies in skillful governmental negotiations with the private entity.[262] Privatization agreements must clearly define the responsibilities of each party, including specific performance criteria and standards and regulatory schemes, to ensure provision of quality services.[263] Dispute resolution procedures are also an essential part of the negotiation process.[264] Contracts with clearly developed and explicit dispute resolution procedures are the most effective.[265] Most importantly, negotiations should be transparent and include affected stakeholders.[266] If citizens believe that an agreement is corrupt or counter to the best interests of the public, then problems will likely arise. Stakeholder participation facilitates discussion of a wide range of viewpoints before acceptance of an agreement and provides the public with a sense of ownership in the final result.[267]

D. Case Studies

1. Argentina

One of the largest privatizations took place in Buenos Aires, Argentina.[268] At the time of the concession, the city maintained an insufficient water supply and poor sewage treatment services.[269] Almost half of the city's population did not have access to potable water, and over sixty percent were without sewage services.[270] In areas where sewage services were available, almost all of the sewage was discharged untreated because of obsolete treatment technology.[271] To further exacerbate matters, almost eighty percent of the pipe network needed to be replaced.[272] A lack of funds hindered maintenance and upgrading, thereby making expansion of service impossible.[273]

To remedy the problem, the Argentine government arranged a thirty-year concession for drinking water supply and sewage services with Aguas Argentina, a consortium led by the French company Lyonnaise des Eaux

---

262. *See, e.g.*, BROCKLEHURST & JANSSENS, *supra* note 201, at 43-46 (analyzing a successful privatization agreement).

263. NEW ECONOMY, *supra* note 11, at 41.

264. *Id. See also* BROCKLEHURST & JANSSENS, *supra* note 201, at vii (noting that an effective dispute resolution process prevented a serious clash when the government failed to meet investment requirements).

265. *See* NEW ECONOMY, *supra* note 11, at 41.

266. TREMOLET ET AL., *supra* note 135, at 15, 37.

267. NEW ECONOMY, *supra* note 11, at 42.

268. LEE, *supra* note 6, at 119.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

Dumez.[274] The government transferred full responsibility for the entire drinking water supply and sewage system to the private company.[275] The government established a regulatory body to ensure enforcement of the contract.[276] In addition, the regulatory framework outlined water quality standards and water tariff rate-making provisions.[277] These efforts prompted rapid improvements in water availability.[278] The percentage of the population served increased by fifteen percent,[279] while the water tariffs decreased by twenty-seven percent.[280] In addition, non-payment of water bills decreased from twenty percent to two percent.[281]

Nevertheless, continued success requires regulatory reforms.[282] Politicization and corruption plague the existing regulatory mechanisms.[283] Weak regulatory mechanisms allowed contract modifications and non-compliance with performance objectives.[284] "For example, Aguas Argentinas reneged on a contractual obligation to build a new sewage treatment plant."[285] Consequently, over ninety-five percent of the sewage from Buenos Aires dumps into the Rio del Plata River.[286] Public confidence has begun to deteriorate due to lack of transparency and arbitrary decision-making.[287]

2. *Senegal*

In the mid 1990s, Senegal commenced a major reform of its urban water supply sector in response to a national financial crisis.[288] During this time, only fifty-four percent of the urban population had access to safe water due to saline contamination of the groundwater.[289] The government realized that private funding was essential in order to complete the necessary improvements and expansions.[290] In addition, the government needed greater managerial autonomy to ensure increased productivity and operational efficiency.[291] Senegal officials created a steering committee comprised of representatives

274. *Id.* at 120-21.
275. *Id.* at 121.
276. *Id.*
277. *Id.*
278. NEW ECONOMY, *supra* note 11, at 23.
279. *Id.*
280. LEE, *supra* note 6, at 121.
281. NEW ECONOMY, *supra* note 11, at 23.
282. INNOVATIVE APPROACHES, *supra* note 4, at 54.
283. *Id.*
284. PRIVATIZATION FIASCOS, *supra* note 23, at 2.
285. *Id.*
286. *Id.*
287. *See id.*
288. BROCKLEHURST & JANSSENS, *supra* note 201, at vii.
289. *Id.* at 3.
290. *Id.* at 5.
291. *Id.*

from each government agency concerned with water supply and sanitation.[292] The government dismantled the bankrupt public utility and created a new state asset-holding company to manage the sector.[293] Senegalize officials solicited private companies to manage the water services and to produce and distribute the water.[294] The agreement structured tariffs to recover costs and thereby secure financial sustainability.[295] The contract also addressed social concerns, such as retention of public staff.[296] Moreover, the contract clearly defined the duties, responsibilities, and assets of both the State and private companies.[297] The entire agreement centered on transparency, accountability, autonomy, and incentives to create a balance between the private operators and the State Asset Holding Company.[298] Overall, the agreement has been a success. Large expansions of the water services network resulted in yearly increases in water volume for use in the urban water sector.[299]

In sum, privatization offers developing countries a viable solution to meeting unmet water needs for their citizens and providing efficient water services. Various models allow countries to tailor a privatization agreement to achieve maximum benefits. While there are risks involved, they are manageable through maintenance of social programs, use of sound economics, and retention of public ownership. However, when agreements affect a transboundary resource, increases in privatization could develop into a collective-action problem.[300] Therefore, when privatization agreements have the potential to affect transboundary water resources, they must comply with international water law principles.

IV. INTERNATIONAL WATER LAW

Although international water law alone cannot solve the problems of the present and predicted stresses on water resources, it is an essential element in constructing a solution.[301] Nations involved in cooperative water management schemes need recourse under the law and legal institutions to resolve disagreements.[302]

---

292. *Id.* at 6.
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.* at 8.
298. *Id.*
299. *Id.* at 43.
300. Benvenisti, *supra* note 118, at 384. Each State has a competing interest in the aquifer. *Id.*
301. Joseph W. Dellapenna, *Recent Books on International Law*, 97 AM. J. INT'L L. 233, 234 (2003) (reviewing STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIOANAL USES (2001)) [hereinafter *Recent Books*].
302. *Id.*

Historically, international water law did not address groundwater resources.[303] Water management discussion often excluded groundwater resources because of uncertain distribution, geophysical characteristics, and the difficulties in determining rights.[304] Consequently, treaties and transboundary dispute resolutions did not begin to address groundwater resources until the beginning of the twentieth century.[305] Even then, rising awareness of the importance of groundwater resources existed, but agreements addressed them as secondary issues.[306] However, after governments and policy makers gained a better understanding of the science of water, international agreements directly addressed the interrelationship between surface and ground waters.[307] Nevertheless, international law concerning aquifers remains relatively undeveloped compared to other areas of water law.[308]

Although international aquifer law is in its infancy,[309] there is enough of a foundation to facilitate cooperation and negotiation among States.[310] With regard to international law, there are four main sources of rules applicable to transboundary aquifers: 1) international customs, 2) international conventions, 3) regional treaties and agreements, and 4) publications of highly qualified experts.[311]

A. *Customary Law*

Customary law is the most basic form of international water law. There are two criteria for creating customary international law: (1) a widespread, consistent, and general practice of States, and (2) acceptance from a sense of legal obligation.[312] To put it another way, customary law is State practice undertaken out of a sense of legal obligation by a large number of States.[313] This type of law develops through a process of claims and counterclaims

303. *Hydrogeological Approach*, *supra* note 66, at 222.
304. Gaines, *supra* note 71, at 143.
305. *Hydrogeological Approach*, *supra* note 66, at 224-25.
306. *Id.*
307. *Id.* at 225.
308. *Id.* at 222.
309. Veronica Brieno Rankin, Project, International Law and Transboundary Groundwater: An Evaluation of the Legal Strategies Promoting Sustainability in a Changing Climate 10 (2004) (unpublished manuscript, on file with author).
310. KERSTIN MECHLEM, FOOD & AGRIC. ORG. DEV. L. SERVICE, WATER AS A VEHICLE FOR INTER-STATE COOPERATION: A LEGAL PERSPECTIVE 3 (Food & Agric. Org. of the United Nations, Legal Papers Online No. 32, Aug. 2003), *at* http://www.fao.org/Legal/prs-ol/lpo32.pdf.
311. Kemper et al., *supra* note 53, at 195.
312. Upadhye, *supra* note 20, at 68.
313. *Id.*

between States.[314] Customary law can include multilateral decisions, decisions by international courts or arbitrators, or unilateral actions of States.[315]

Notably, there is no designated enforcement mechanism for customary law, and as such, customary law alone cannot solve transboundary water disputes.[316] Even today, there is still not a distinct and generally accepted plan of conflict resolution and cooperation over water resources.[317] This lack of consistency results from conflicting interpretations of the general principles of customary law.[318] Despite these inconsistencies, customary law provides needed guidelines for treaties, agreements, and conventions.[319]

There are three overriding principles of customary international water law: (1) the principle of equitable utilization, (2) the obligation not to cause significant harm, and (3) the duty to cooperate.[320] Because of these principles, collaboration and cooperation are the norm in interstate water relations despite States' competing interests in the management of shared water resources.[321] Accordingly, these core principles often serve as the foundation for most contemporary agreements drafted to develop, utilize, protect, and manage transboundary water resources.[322]

1. Equitable Utilization

Equitable utilization is the "heart" of international water law.[323] Under this principle, the sovereign equality of the States tends to limit the use of shared water resources.[324] One State cannot use the water in a manner that is likely to have a negative effect on the legitimate entitlements of other States.[325] Therefore, maximum use and optimal use do not equate.[326] This principle seeks to allow each State to attain the maximum possible benefits while minimizing

314. Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 26 CASE W. RES. J. INT'L L. 27, 34 (1994) [hereinafter Treaties at Instruments].

315. *Id.*

316. *Id.* at 34-35.

317. Shlomi Dinar & Ariel Dinar, *Recent Developments in the Literature on Conflict Negotiation and Cooperation over Shared Int'l Fresh Waters*, 43 NAT. RESOURCES J. 1217, 1223 (2003).

318. *See* MECHLEM, *supra* note 310, at 4.

319. Kemper et al., *supra* note 53, at 196.

320. MECHLEM, *supra* note 310, at 3.

321. *Id.*

322. MECHLEM, *supra* note 310, at 3.

323. *Id.* at 9.

324. *Id.*

325. CAPONERA, *supra* note 2, at 191. Entitlements are based on rights rather than shares of water resources. MECHLEM, *supra* note 310, at 9.

326. MECHLEM, *supra* note 310, at 9.

the detrimental effects to itself and other States.[327] The principle of sustainable use incorporates the equitable use principle because countries cannot benefit from a depleted water source.[328]

There are numerous factors used to determine whether an actual or potential use is equitable, including social and economic needs, the population depending on the watercourse, the effects of the use, existing and potential uses, conservation and protection needs, and the availability of alternatives to an existing or potential use.[329] These factors reflect the complexity of the equitable use principle and the need for flexibility.[330] Because of changing circumstances and uses, maintaining quality among the users requires ongoing adaptations.[331]

Delegates first adopted equitable use under The Helsinki Rules on the Uses of the Waters of International Rivers ("Helsinki Rules").[332] As adopted under the Helsinki Rules, equitable utilization provides incentives for a State to initially develop an untapped water resource because "[a]n existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use."[333] Although the Helsinki Rules marked significant evolution in international water policy, they are not binding.[334] To ensure that countries abide by these rules, they are often expressly included in treaties.[335] For example, the Ganges Treaty of 1996 allocates water use on the basis of historical water flows, while provisions to alter the flow of water during dry periods are based on fairness and reduction of harmful effects.[336]

On the other hand, adherence to the principle of equitable utilization is subjective.[337] An upstream State can exercise full dominion over a

---

327. *Id.* at 9-10. There are two viewpoints of the principle of equitable use that apply to international aquifers: (1) use of the aquifer, and (2) apportionment of benefits. Barberis, *supra* note 58, at 176. Both must be reasonable and equitable to satisfy equitable use. *Id.*

328. Dr. Patricia Wouters et al., The Legal Response to the World's Water Crisis: What Legacy fro, The Hague? What Future in Kyoto?, 4 U. DENV. WATER L. REV. 418, 423 (2001) [hereinafter Legal Response].

329. MECHLEM, *supra* note 310, at 10.

330. *Id.*

331. *Id.*

332. *Helsinki Rules on the Uses of the Waters of International Rivers* (1967), http://www.internationalwater law.org/IntlDocs/Helsinki_Rules.htm [hereinafter *Helsinki Rules*]. "Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin." *Id.* at art. IV.

333. *Helsinki Rules*, *supra* note 332, at art. VIII.

334. Upadhye, *supra* note 20, at 73.

335. MECHLEM, *supra* note 310, at 10-11.

336. A. NISHAT AND M. F. K. PASHA, A REVIEW OF THE GANGES TREATY OF 1996, (AWRA/IWLRI-UNIV. OF DUNDEE INT'L SPECIALTY CONFERENCE), Aug. 6-8, 2001, http://www.awra.org/proceedings/dundee01/ Documents/Pashafinal.pdf.

337. Upadhye, *supra* note 20, at 72-3. "[W]hat is perfectly reasonable to one [State] may be wholly unreasonable to another." *Id.*

transboundary water resource and consider such actions equitable and reasonable; the affected downstream State, however, could find them wholly unjustifiable.[338] For example, tensions ran high between Slovakia and Hungary when Slovakia unilaterally diverted the Danube River.[339] The States' conception of the application of equitable utilization differed greatly.[340] While the Slovaks valued expert opinions and development, the Hungarians viewed the project from an environmental perspective.[341] The parties could not reach an agreement on their own and, consequently, submitted the dispute to the International Court of Justice (ICJ) for resolution.[342]

2. *Obligation Not to Cause Significant Harm*[343]

The obligation not to cause significant harm overlaps with the principle of equitable utilization.[344] This obligation is subject to a balancing test under the equitable use principle because any use of a shared water resource could be potentially detrimental to another State.[345] Article Seven of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses ("Non-Navigation Uses Convention") states that if significant harm does occur, the offending State must "take all appropriate measures . . . to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation."[346] Under this principle, a State cannot act in any way that will cause harm to the quantity, quality, or geological structure of an aquifer.[347] However, the same problem of subjectivity still arises in that "it is left 'up to the state planning a measure to determine whether another watercourse state will experience significant harm.'"[348]

Even still, several treaties and agreements expressly state the obligation not to cause significant harm.[349] For example, during the 1970s, extensive

---

338. *Id.* at 73.

339. Bukhosi Fuyane & Ferenc Madai, The Centre for Energy, Petroleum and Mineral L. & Pol'y, *The Hungary-Slovakia Danube River Dispute: Implications for Sustainable Development and Equitable Utilization of Natural Resources in International Law*, 1 INT'L J. GLOBAL ENVTL. ISSUES 329, 332 (2001), http://www.internationalwaterlaw.org/Bibliography/IJGEI/06ijgenvl2001v1n34fuyane.pdf.

340. *Id.* at 333.

341. *Id.*

342. *Id.* at 332.

343. "[S]*ic utero tuo ut alienum non laedas* – so use your own as not to harm that of another" MECHLEM, *supra* note 310, at 12.

344. *Id.*

345. *Id.* at 13.

346. *Non-Navigational Convention*, *supra* note 76, at Art. 7.

347. Barberis, *supra* note 58, at 169.

348. Jordan C. Kahn, Water: II. 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, 1997 COLO. J. INT'L ENVTL. L. Y.B. 178, 181 (1997) (quoting Ann Milne Roberts, Water Wars or Water Law, FIN. TIMES BUS. REP., Aug. 28, 1997).

349. MECHLEM, *supra* note 310, at 13.

irrigation in the United States caused deterioration in the water quality of the Colorado River.[350] To remedy the problem, the United States and Mexico negotiated an agreement, Minute 242, which placed a cap on the level of salinity in order to ensure Mexico a potable water supply.[351] Further, some agreements create special inter-state commissions to fulfill their obligation not to cause significant harm.[352] For instance, the Franco-Swiss agreement regarding the Genevese Aquifer created a joint commission to ensure the protection of the aquifer.[353]

3. *Duty of Cooperation*

The final principle obligates States with shared water resources to cooperate in order to attain optimal utilization and adequate protection of such resources.[354] Article 8 of the Non-Navigational Convention states, for example, that "[w]atercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith . . . ."[355] This duty encompasses the obligations to provide prior notice, to negotiate,[356] and to exchange data.[357] Before a State can engage in a water project, such as groundwater withdrawals, it must notify affected States.[358] Prior notification allows affected States to assess their likely harm from the project.[359] Such notification procedures facilitate the negotiation process.[360] If a dispute arises after the affected State is notified of the intended project, each State has a duty to negotiate in good faith to resolve the dispute.[361] To facilitate cooperation, States are obligated to regularly exchange data on the condition of the shared resource.[362] This exchange of information is generally the foundation of many international water resource treaties.[363]

---

350. *Id.* at 14.
351. *Id.*
352. *Id.*
353. Rankin, *supra* note 309, at 21.
354. Barberis, *supra* note 58, at 180.
355. *Non-Navigational Convention*, *supra* note 76, at Art. 8. The Non-Navigational Convention encourages the use of joint commissions to facilitate cooperation. *Id.*
356. Barberis, *supra* note 58, at 178-79.
357. MECHLEM, *supra* note 310, at 15.
358. *Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment, Report of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev. 1 (1972), *reprinted in* 11 I.L.M. 1416 [hereinafter Stockholm Declaration]. "[W]hen major water resource activities are contemplated that may have a significant environmental effect on another country, the other country should be notified well in advance of the activity envisaged." *Id.*
359. Barberis, *supra* note 58, at 180.
360. *Id.*
361. *Id.* at 181.
362. MECHLEM, *supra* note 310, at 15-16.
363. *Id.* at 16.

B. Conventions

States can also adopt conventions to create rules of conduct and binding obligations for shared water resources.[364] Although no convention focuses directly on groundwater resources, those conventions that deal with water resources in a comprehensive manner provide a foundation for the law governing transboundary aquifers.[365]

The 1996 United Nations Convention on the Protection and Use of Transboundary Watercourses and International Lakes ("Convention on Protection and Use") marked a significant step forward in the pursuit to preserve international groundwater resources. [366] Under the Convention on Protection and Use, countries have the duty "to prevent, control and reduce any transboundary impact."[367] This convention requires countries to enter into "bilateral or multilateral agreements . . . to define their mutual relations and conduct regarding the prevention, control and reduction of transboundary impact."[368]

Following the Convention on Protection and Use, the 1997 U.N. General Assembly adopted the Non-Navigational Convention, marking the "[m]ost notable . . . development of international law applicable to groundwater"[369] because it is the first international convention to include certain groundwater resources within its scope.[370] The Non-Navigational Convention defined a "watercourse" as "a system of surface waters and *groundwaters* constituting by virtue of their physical relationship a unitary whole and normally flowing into a

---

364. Kemper et al., *supra* note 53, at 196.

365. *Id.* at 195.

366. *Id.* at 196. The Convention on Protection and Use is especially relevant to the Guarani Aquifer because there is already substantial pollution of shallow groundwater resources in Argentina and Brazil. *Id.* at 189.

367. United Nations, *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 31 I.L.M. 1312 (1992) [hereinafter *Convention on Protection and Use*].

> The Parties shall, in particular, take all appropriate measures:
> (a) To prevent, control and reduce pollution of waters causing or likely to cause transboundary impact;
> (b) To ensure that transboundary waters are used with the aim of ecologically sound and rational water management, conservation of water resources and environmental protection;
> (c) To ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character, in the case of activities which cause or are likely to cause transboundary impact;
> (d) To ensure conservation and, where necessary, restoration of ecosystems.

Id. at art. 2 ¶ 2.

368. *Id.*

369. Yoram Eckstein, Groundwater Resources and Int'l. Law in the Middle East Peace Process, 22 WATER INT'L. 154, 158 (June 2003) [hereinafter Middle East].

370. *Id.* at 159. Due to the explicit definition of a watercourse, confined aquifers are not regulated by the Non-Navigational Convention. Rankin, *supra* note 309, at 17.

common terminus."[371] The Non-Navigational Convention provided measures for the "protection, preservation, and management" of such water courses.[372] It did not apply retroactively to the rights or obligations of previous agreements, rather it simply laid out the requirements for future watercourse agreements.[373] These requirements included the core principles of international water law: an obligation to negotiate in good faith, a responsibility not to cause significant harm to other States' interests, and a duty to "cooperate on the basis of sovereign equality, territorial integrity, mutual benefit, and good faith."[374] However, the Non-Navigational Convention is only binding on the countries that have ratified it.[375] Since Argentina and Paraguay abstained, their future agreements do not have to comply with the Non-Navigational Convention.[376]

---

371. *Non-Navigational Convention, supra* note 76, at Art. 2 (emphasis added).

372. *Id.* at Art. 1.

373. *Id.* at Art. 3.

> 1. In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention.
> 2. Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention.
> 3. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.
> 4. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or any part thereof or a particular project, programme or use except insofar as the agreement adversely affects, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse, without their express consent.
> 5. Where a watercourse State considers that adjustment and application of the provisions of the present Convention is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.
> 6. Where some but not all watercourse States to a particular international watercourse are parties to an agreement, nothing in such agreement shall affect the rights or obligations under the present Convention of watercourse States that are not parties to such an agreement.

Id.

374. *Non-Navigational Convention, supra* note 76, at Art. 8.

375. Aaron Schwabach, *The United Nations Convention on the Law of Non-navigational Uses of Int'l. Watercourses, Customary Int'l. L. and the Interests of Developing Upper Riparians*, 33 TEX. INT'L. L.J. 257, 278-79 (1998).

376. *See generally* Dr. Patricia Wouters, *The Legal Response to International Water Scarcity and Water Conflicts: The UN Watercourses Convention and Beyond*, at http://www.thewaterpage.com/pat_wouters 1.htm (2000) [hereinafter *Legal Response*].

C. *Regional Treaties/Agreements*

Only one-fourth of existing treaties related to transboundary freshwater mention groundwater.[377] This section briefly addresses two of them: the Franco-Swiss Genevese Aquifer management agreement, and the Israel-Palestinian Coastal and Mountain Aquifer Systems. These agreements illustrate how political factors can affect treaties.[378]

The Franco-Swiss agreement, based on the principle of cooperation, formed a joint commission to manage the Genevese Aquifer, which underlies France and Switzerland.[379] A twenty-year span of over-appropriation substantially depleted the Genevese Aquifer.[380] Overall, excessive use reduced the aquifer's size by a third.[381] Clearly, the Genevese Aquifer needed a new water management plan. After extensive negotiations, the countries passed the "Arrangement on the Protection, Utilization, and Recharge of the Franco-Swiss Genevese Aquifer"[382] ("Franco-Swiss Agreement"). The agreement formed a commission of French and Swiss authorities to manage the annual extraction rates and recharge sources of the aquifer.[383]

In contrast, ongoing conflicts between Israel and Palestine overshadow the Israeli-Palestinian agreements concerning shared aquifer systems.[384] Because water scarcity is one of the most serious problems in the region, it is not surprising that two countries with a history of violent disputes are struggling to reach a final arrangement for the Coastal Aquifer and Mountain Aquifer Systems.[385] Both sides support their claims to the aquifers on the basis of "historical use, territorial possession, and basic human needs."[386] To further complicate matters, these aquifers are outside the scope of the Non-Navigational Convention because their hydrogeological cycles do not meet the definition of a "watercourse" under the Convention.[387] To facilitate cooperation, the existing interim agreements provide for both an Israeli-Palestinian Economic Cooperation Committee and a joint water council to promote "equitable utilization of joint water resources" and establish water resource management.[388] Although negotiations have temporarily ceased, in 2001 both sides released official statements pledging their commitment to cooperation.[389]

---

377. Rankin, *supra* note 309, at 19.
378. *Id.*
379. *Id.*
380. *Id.* at 19-20.
381. *Id.*
382. *Id.* at 21.
383. *Id.*
384. *Id.* at 23.
385. *Middle East*, *supra* note 369, at 154.
386. *Id.* at 157.
387. Rankin, *supra* note 309, at 28.
388. *Id.* at 26.
389. *Id.*

In spite of the conflicts, water resource development is progressing because of third-party involvement.[390] The U.S. Agency for International Development has developed initiatives that resulted in research and expansion of water networks and wastewater treatment.[391] The tempestuous relationship between the two States necessitates tribunal or third-party review for specific disputes concerning international water law principles.[392]

D. Experts

Highly respected professional organizations are a growing source of international water law despite the fact that their findings and recommendations are not binding.[393] For example, the International Law Association (ILA) is a private non-governmental organization that has developed many of the international water law norms.[394] Several ILA documents, including the Helsinki Rules of 1966 and the Seoul Rules of 1986, have marked significant advancements in international water law.[395] The Helsinki Rules were the first attempt to codify international water law norms.[396] In addition, the Helsinki Rules were among the first documents to address the relationship between groundwater and surface water.[397] The Seoul Rules went a step further and actually defined an "international aquifer" as "waters of an aquifer that is intersected by the boundary between two or more States . . . if such an aquifer with its waters forms an international basin or part thereof."[398] Notably, the Seoul Rules were the first regulatory document to address confined aquifers under the principle of equitable utilization.[399]

A division of the United Nations, the International Law Commission (ILC), is another influential organization that shapes international water law.[400] The ILC issued the Resolution on Confined Transboundary Groundwater (RCTG) to supplement the Non-Navigational Convention, which applied only to aquifers hydrologically connected to surface water.[401] The RCTG simply

390. *Id.* at 29.
391. *Id.*
392. *See Middle East*, *supra* note 369, at 160.
393. Kemper et al., *supra* note 53, at 195.
394. *Id.* at 197.
395. Rankin, *supra* note 309, at 11-12
396. *Id.* at 12.
397. *Id.*
398. *The Seoul Rules on International Groundwaters* (1986) (describing when international standards consider an aquifer international ground water), http://www.internationalwaterlaw.org/IntlDocs/Seoul _Rules.htm.
399. Rankin, *supra* note 309, at 15.
400. Kemper et al., *supra* note 53, at 197.
401. Int'l L. Comm, *Resolution on Confined Transboundary Groundwater*, 2 Y.B. Int'l L. Comm'n 135 (1994).

recommends that States also apply the principles of the Non-Navigational Convention to confined aquifers.[402]

In addition to the ILA and ILC, other organizations have drafted model documents that have had a substantial impact on international water law. For instance, the Bellagio Draft Treaty ("Bellagio Treaty") originated from the Ixtapa Draft Agreement ("Ixtapa Draft"), an aquifer management protocol for the United States and Mexico.[403] A multidisciplinary group of specialists transformed the Ixtapa Draft into a model groundwater management program.[404] The specialists drafted the Bellagio Treaty to fill gaps in international water law concerning aquifers and to provide a model treaty that countries could use to draft bilateral or multilateral agreements.[405] The Treaty's goal "is to achieve joint, optimum utilization of the available waters, facilitated by the procedures for avoidance or resolution of differences over shared groundwaters in the face of ever increasing pressures on this priceless resource."[406]

The Bellagio Treaty centers around three concepts of deference to the sovereignty of States: (1) the focus of administration on critical zones of withdrawal and contamination rather than a comprehensive administration; (2) the actual enforcement left to internal administrative agencies of each country, but subject them to the oversight of an international agency, and (3) a joint agency, of limited discretion, to instruct the commission on initiatives for problem-solving.[407] In addition, the Bellagio Treaty suggests mechanisms for sustained use and preservation and dispute resolution.[408]

Overall, international law provides numerous safeguards for shared water resources.[409] Although it may appear at first glance that privatization and international law are incompatible, this is not the case. In fact, the principles and rules set forth by customary international law reflect the social value of water and protect it for future use.[410] In addition, because customary international water law requires close cooperation, it is less likely that States will use resources in ways that harm other States.[411]

---

402. *Id.*

403. Rankin, *supra* note 309, at 15.

404. Kemper et al., *supra* note 53, at 197.

405. *Id.*

406. Robert Hayton & Albert E. Utton, *Transboundary Groundwaters: The Bellagio Draft Treaty*, 29 NAT. RES. J. 663, 665 (1989), *available at* http://uttoncenter.unm.edu/pdfs/Bellagio_Draft_Treaty_E.pdf.

407. *Id.* at 664-65.

408. *Id.* at 665.

409. *See supra* notes 320-411 and accompanying text.

410. *See supra* notes 323-353 and accompanying text.

411. *See supra* notes 354-363 and accompanying text.

V. SPECULATIVE CASE STUDY OF THE GUARANI AQUIFER

The Guarani Aquifer, located beneath Brazil, Argentina, Uruguay, and Paraguay, is "one of the most important underground fresh water reservoirs in the world."[412] Until about twenty years ago, the Guarani States treated parts of the aquifer as their national entities rather than a shared water source.[413] Once the scientists and researchers discovered the interrelationships between the aquifers, it took several more years for the public and decision makers to appreciate this complex interrelationship of the aquifer.[414] In an effort to show unity, the countries renamed the hydrogeological system the Guarani Aquifer "in homage to the Guarani indigenous people who used to – and still do – live in the area."[415] Although public awareness of the Aquifer is moderate at best,[416] management of its resources is essential to minimize conflicts between the States because the Guarani aquifer is a strategic water supply for the four countries.[417]

The total surface area of the aquifer is approximately 1.2 million square kilometers,[418] equivalent to the size of England, France, and Spain combined.[419] The aquifer has a freshwater reserve volume of about 40,000 km^3, which is large enough to supply the entire population of Brazil for 3,500 years.[420] In fact, the aquifer could supply water for 360 million people at a rate of 300 liters per day[421] for each person for a hundred years and deplete a mere ten percent of the reserves.[422] In addition to these large reserves, the aquifer has an average annual recharge of 160 km^3.[423] The aquifer also has geothermal[424] potential.[425] Water naturally emerges at temperatures that are ideal for water supply, tourism, and development of alternative energy sources.[426] This

412. MARINA RUBIO, INT'L HYDROLOGICAL PROGRAMME, INTERNATIONALLY SHARED (TRANSBOUNDARY) AQUIFER RESOURCES MANAGEMENT: THEIR SIGNIFICANCE AND SUSTAINABLE MANAGEMENT 45 (Nov. 2001), http://unesdoc.unesco.org/images/0012/001243/124386e.pdf.

413. Kemper et al., *supra* note 53, at 185.

414. *Id.*

415. *Id.* at 185, 188-89.

416. *Id.* at 187.

417. *See id.* at 188.

418. WORLD BANK GROUP, *supra* note 69, at 2 (noting that the surface area in each country is 839,800 km^2 in Brazil, 225,500 km^2 in Argentina, 71,700 km^2 in Paraguay, and 45,000 km^2 in Uruguay).

419. *Id.*

420. WORLD BANK GROUP, *supra* note 69, at 2.

421. This is six times the amount each individual needs to meet the minimum quality of life. *See supra* note 39.

422. Kemper et al., *supra* note 53, at 185.

423. *Id.*

424. Geothermal Resources Council, *What is Geothermal*, *at* http://www.geothermal.org/what.html (2003). Geothermal energy is the thermal energy contained in the rock and fluid in the earth's crust. *Id.* Geothermal energy can be used to generate electric power and provide heating. *Id.*

425. Kemper et al., *supra* note 53, at 185.

426. *Id.*

aquifer presents incredible business opportunities for Brazil, Argentina, Paraguay, and Uruguay,[427] as developing water resources can be a catalyst for social progression.[428]

A. *Need for Privatization Agreement*

In the face of an impending global water crisis, cooperation among states with shared resources will become increasingly important.[429] Several characteristics of aquifers heighten the need for cooperation, including susceptibly to pollution, danger of salinization if over-exploited, uncertainty of structure, lack of understanding of the relationship to surface water, and the potential to serve as long-term storage within comprehensive management schemes.[430] In short, a State cannot manage its share of an aquifer in a sustainable manner without cooperation from other parties.[431] Fortunately, the Guarani States have recognized the need for "a coordinated shared groundwater management framework" and are developing an "integrated management framework for the Guarani Aquifer System."[432] However, in order to maximize the potential of the Guarani Aquifer, the countries should also address the economic value of the aquifer in an international privatization agreement. Such an agreement would easily fit into the currently proposed management framework.

Developing an international privatization agreement is of particular importance in the Guarani context because each of the States suffers from unmet needs and inefficiencies in existing infrastructures.[433] In Argentina, despite the success of privatization efforts, such as the concession of Buenos Aires,[434] only sixty-nine percent of the urban population have connections to a

---

427. DAVID HALL ET AL., PUBLIC SERVICES INT'L. RESEARCH UNIT, MAKING WATER PRIVATISATION [SIC] ILLEGAL: NEW LAWS IN NETHERLANDS AND URUGUAY 2 (Nov. 31, 2004), http://www.psiru.org/reports/ 2004-11-W-crim.doc. In October of 2004, over sixty percent of Uruguayan voters passed a constitutional referendum to ensure that social considerations would take priority over economic considerations in water policies. *Id.* The amendment states that access to piped water and sanitation are fundamental human rights. *Id.* Water and sewage services must be exclusively provided by the government, making privatization illegal. *Id.*

428. Upadhye, *supra* note 20, at 61.

429. ERAN FEITELSON & MARWAN HADDAD, IDENTIFICATION OF JOINT MANAGEMENT STRUCTURE FOR SHARED AQUIFERS: A COOPERATIVE PALESTINIAN-ISRAELI EFFORT 1 (World Bank, Technical Paper No. 415, 1998) (on file with author). "The discrepancy between water sources, water uses, spheres of control (either at the national or sub-national level) and ownership patterns, and the extensive externalities involved can all be a basis for conflicts. . . . [O]vercoming the scarcity and temporal variance of water availability in semi arid regions, or the excess of water in temperate regions, often requires cooperation." *Id.*

430. *Id.*

431. *Id.*

432. Kemper et al., *supra* note 53, at 189.

433. Orwin, *supra* note 189.

434. *See supra* text accompanying notes 268-281.

municipal water supply.[435] Further, only seventeen percent of the rural population has any form of sewage treatment.[436] Most of the sewage that enters the system remains untreated.[437] In Brazil, while the water supply system serves over seventy percent of the population, only thirty-five percent are connected to public sewers.[438] Almost half of the population has rudimentary cesspools or no means of disposal.[439] In Paraguay, a government-owned corporation is the sole provider of water and sewage services for all urban areas with populations of over 4,000 or more.[440] Unfortunately, less than half of these people have access to water systems, and a mere thirty-five percent are connected to sewers.[441] Only seventeen percent of the rural population has access to a potable water supply.[442] In Uruguay, almost ninety percent of people have access to a safe water supply.[443] Even still, only forty-eight percent are connected to sewers, and on-site sanitation is considered inadequate.[444]

B. International Solution

Economic structures, such as international privatization agreements, are essential for the sustainable development and maximum utilization of the Guarani Aquifer. Such agreements ensure cost effective management of the aquifer, provide another source of sustainable funding,[445] promote efficiency, and allow governments flexibility to expand service. Market mechanisms are the common denominator of two economic structures: water trade and utilities.[446] The ability to trade water allocations is important because it provides States with the flexibility to accommodate changes in circumstances and cope with rapid shifts in demand without requiring a readjustment in water rights or basic allocations.[447] In addition, water markets have the capacity to reduce imbalances in supply and demand.[448] On the other hand, utilities allow for private sector involvement in the management of the aquifer and in funding programs, such as water supply and protection.[449]

---

435. Orwin, *supra* note 189.
436. *Id.*
437. *Id.*
438. *Id.*
439. *Id.*
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.*
445. FEITELSON & HADDAD, *supra* note 429, at 16.
446. *Id.* at 16-17.
447. *Id.* at 16.
448. WATER PRICING, *supra* note 13, at 49-50.
449. FEITELSON & HADDAD, *supra* note 429, at 17.

1. *Step One: Data Collection and Exchange*

The first step toward creating an international privatization agreement is data collection and exchange amongst the parties.[450] "[A]ll economic structures require that water be priced, or bought and sold, and unless consumption is monitored no market transaction is possible."[451] The establishment of joint monitoring structures and databases is also a confidence-building measure.[452] The exchange of information facilitates communication and fosters relationships among the States, thereby reducing the probability of a need for a third-party to resolve disputes.

The Guarani States began exchanging information in 1990s.[453] Scientists and government officials from each State and international agencies compiled and shared data concerning water use, consumers, and physical problems, such as overexploitation and pollution.[454] Representatives from each country later formed the Project Preparation Superior Council (PPSC) to assess the data in order to develop project goals and an operative plan.[455]

Although it is tempting to gloss over the first phase of development, the States' willingness to share information can determine the success of the project. For example, an Israeli-Palestinian team worked diligently for two years to identify joint management structures for the aquifers shared by the countries.[456] However, lack of information sharing coupled with the continued precarious water supply led to a loss of confidence in the project.[457] As a result, it will be much more difficult to persuade Israel and Palestine to pursue another joint management project.[458]

2. *Step Two: Definition of Water Rights and Determination of Water Allocations*

When water managers treat water as the economic good that it is, then it is possible to allow the market to govern allocations of water.[459] However, prior to the introduction of a water market, the regulatory body must determine the total number of water rights needed for allocation to existing water users.[460] Groundwater use rights are ambiguous and challenging to define because it is often difficult to determine the magnitude and availability of aquifers.[461]

---

450. *Id.*
451. *Id.*
452. *Id.* at 20.
453. Kemper et al., *supra* note 53, at 190.
454. *Id.*
455. *Id.* at 191.
456. FEITELSON & HADDAD, *supra* note 429, at 20.
457. *Id.*
458. *Id.*
459. LEE, *supra* note 6, at 55.
460. *Id.*
461. INNOVATIVE APPROACHES, *supra* note 4, at 135.

Nevertheless, once established, a well-defined usage right entitles users to an extraction allocation at a specified time.[462] So long as the regulatory body clearly defines both users and their respective entitlements, water rights promote efficient use of water.[463] Clearly defined usage rights also promote trade that can enhance efficiency and provide the rights to a holder with a long-term perspective.[464] Such a rights-holder will not only consider his individual benefits from the water, but also the opportunity costs.[465]

The Guarani States face many challenges in the establishment of a water market. To begin, scientists lack baseline knowledge on characteristics and behavior of the aquifer.[466] Users must have assurance that the aquifer will be able to replenish itself and provide water for future uses, otherwise there is no incentive to use the water efficiently.[467] Also, additional data is needed concerning water uses and water users to determine supply and demand.[468] To complicate matters, there is an inadequate legal framework for groundwater management and diverging positions from national standpoints as to the core of water authority and the required levels of involvement and responsibility.[469] The Guarani States recognize these challenges and developed a plan to expand and consolidate the scientific and technological knowledge base and develop a framework for the coordinated management of the aquifer.[470]

3. *Step Three: Pricing, Enforcement, and Dispute Resolution*

The next step towards private sector engagement is the establishment of pricing and/or trading mechanisms.[471] To obtain full benefits of the international agreement, the Guarani States should agree to a single pricing scheme for the entire aquifer. Water pricing mechanisms must promote system sustainability and the efficient use and allocation of water resources.[472] When water is free, individuals use more than they would otherwise.[473] Overuse of water resources reduces the availability of water, and in turn, increases competition for water.[474]

There are two basic types of water charges: water tariffs and water fees. Water tariffs are charges that directly correlate to the use of the infrastructure.[475]

---

462. *Id.*
463. *Id.*
464. *Id.*
465. *Id.* at 135-36.
466. Kemper et al., *supra* note 53, at 191.
467. INNOVATIVE APPROACHES, *supra* note 4, at 135.
468. Kemper et al., *supra* note 53, at 191.
469. *Id.*
470. *Id.* at 192.
471. FEITELSON & HADDAD, *supra* note 429, at 17.
472. WATER PRICING, *supra* note 13, at 336.
473. INNOVATIVE APPROACHES, *supra* note 4, at 137.
474. *Id.*
475. WATER PRICING, *supra* note 13, at 351.

Ideally, tariffs would cover the costs of operation, maintenance, and replacement, thereby ensuring the sustainability of the system.[476] "Water fees are government charges for the use of the nation's water resources."[477] The fees should cover the costs of water resources management, such as resource monitoring, assessments of water quantity and quality, administration of water rights, and environmental costs.[478] Water markets can establish the value of water, but this is a challenge.[479] The water markets must have a strong institutional foundation.[480] They also need to correlate to secure water rights allocation, reliable water availability, use monitoring, and low-transaction cost exchange mechanisms.[481]

Pricing mechanisms are useless without proper enforcement mechanisms and dispute resolution procedures.[482] Therefore, enforcement measures and dispute resolution procedures need to be developed simultaneously with pricing mechanisms. It is very costly for regulatory bodies to monitor the many different users involved in abstracting groundwater.[483] Incentives to comply with regulatory provisions are generally low because users know that governments do not monitor their individual behaviors.[484] Providing users with information concerning the condition of their resource is essential to enticing them to preserve the resource.[485] Information becomes increasingly more valuable with a well-defined basis of water rights and responsibilities.[486] By providing users with information, the regulatory body gives users the ability to self-regulate.

In addition, the regulatory body can initiate other enforcement mechanisms to respond to changes in circumstances. For example, the Guarani States might consider price-cap regulation immediately following privatization. Price-cap regulation encourages productivity gains, which are the largest immediately following privatization.[487] Price-cap regulation is also attractive in areas where technological changes increase competition.[488]

On the other hand, the Guarani States might consider rate-of-return regulation.[489] This can provide investors with a guaranteed fair rate-of-return.[490] Rate-of-return is especially relevant for investments with a high sunk-

476. *Id.*
477. *Id.*
478. *Id.*
479. *See id.* at 352.
480. *Id.*
481. *Id.* at 352-53.
482. FEITELSON & HADDAD, *supra* note 429, at 17.
483. INNOVATIVE APPROACHES, *supra* note 4, at 139.
484. *Id.*
485. *Id.*
486. *Id.*
487. LEE, *supra* note 6, at 188.
488. *Id.*
489. *Id.*
490. *Id.*

cost component, such as drinking water supply and sewerage.[491] Although the incentives for cost reduction are weak, this type of regulation works well in countries with general macroeconomic instability and histories of high inflation.[492]

The Guarani States have an advantage in developing dispute resolution procedures because they are already united under the Mercosur[493] trade agreement,[494] which is "an intergovernmental organization without supranational powers."[495] The organizational structure of Mercosur provides means for dispute settlement among State Parties and between private parties affected by different aspects of the process of integration.[496] The organizational framework and dispute resolution procedures of the Mercosur agreement provide an excellent framework for the creation of a multilateral privatization agreement.

4. Step Four: Constraints on Privatization and Trade Agreements

Finally, the Guarani States must establish constraints for privatization and trade agreements to prevent damage to the aquifer.[497] The PPSC, [498] or a similarly organized body, would set up trading rules and govern the structure of the privatization agreement. In other words, the PPSC would act as the single negotiating body for purchases of water from the aquifer.[499] For example, the PPSC could outlaw divesture privatization agreements to promote State ownership and regulation. The PPSC would also set the terms of privatization

---

491. *Id.*

492. *Id.*

493. "Mercosur" stands for Mercado Común del Cono Sur. *Legal Response*, *supra* note 376.

494. The Mercosur trade agreement established a Common Market to further economic integration among the countries. Evelina Teubal Alhadeff, *Mercosur (Argentina, Brazil, Paraguay, and Uruguay): Protocol of Brazilia for the Settlement of Disputes*, 36 I.L.M. 691, 691 (1997) [hereinafter *Protocol of Brazilia*]; Evelina Teubal Alhadeff, *Argentina-Brasil* [sic]-*Paraguay-Uruguay: Additional Protocol to the Treaty of Asuncion on the Institutional Structure of Mercosur ("Protocol of Ouro Preto")*, 34 I.L.M. 1244, 1244 (1995) [hereinafter *Additional Protocol*].

495. *Additional Protocol*, *supra* note 494. The Institutional Organization established by the Mercosur agreement consists of "a Common Market Council, a Common Market Group and a Mercosur Trade Commission, which have powers of decision; and a Joint Parliamentary Commission, an Economic and Social Consultative Forum and the Mercosur Administrative Secretariat." *Id.*

496. Evelina T. Alhadeff, *Mercosur (Argentina-Brazil-Paraguay-Uruguay): Protocol of Buenos Aires on International Jurisdiction in Disputes Relating to Contracts*, 36 I.L.M. 1263, 1263 (1997) [hereinafter *Protocol on Buenos Aires*].

497. *See supra* notes 254-267 and accompanying text.

498. Kemper et al., *supra* note 53, at 191. The PPSC is an ideal regulatory body because it is composed of top officials from all four counties representing water, environment, and foreign affairs. *Id.*

499. *See id. See also* FEITELSON & HADDAD, *supra* note 429, at 17 (noting that "trading rules across priorities [should] be set and enforced").

agreements.[500] For instance, the PPSC might consider requiring a provision that requires the private corporation to guarantee a certain quantity of water to each customer or to make meeting unmet needs its first priority.[501] Such provisions would reflect the social value of the water.[502] In addition, it would be wise to include language that binds private operators to the international water law principles of equitable utilization, the obligation not to cause substantial harm, and the duty to cooperate.[503] Lastly, the PPSC might issue drilling and pumpage licenses to reduce the possibility of over-exploitation.[504] The desired level of cooperation between the States would determine the complexity of the privatization limitations.[505]

VI. CONCLUSION

By recognizing the economic value of water, the Guarani States allow themselves the flexibility to trade water resources and entice private sector engagement.[506] Privatization enables the States to obtain much needed funding and flexibility to meet unmet needs and promote efficiency in water use and infrastructure.[507] An international agreement is ideal because it forces the States to allocate water rights. Clearly defined usage rights lessen the subjectivity associated with the principles of international water law and promote efficiency in the water sector. Therefore, the Guarani States would greatly benefit from an international privatization agreement by increasing water availability, heightening water quality, and lowering costs associated with water management and consumption. In turn, the Guarani States' international privatization agreement would serve as a model for other developing countries.

In the face of an impending water crisis, States must develop a new approach to water resource management. International privatization agreements allow States with shared resources to tailor water management schemes to meet unmet citizen needs, generate revenue, and maximize efficiencies, while ensuring compliance with international water law principles. Privatization is an especially attractive solution for developing countries that face growing demands to expand coverage while maintaining existing infrastructures and water treatment standards.

---

500. *See supra* notes 254-67 and accompanying text.

501. FEITELSON & HADDAD, *supra* note 429, at 17 (stating that in order to address the variance in water availability, a joint management commission must establish "a priority system of water allocations").

502. *See supra* notes 256-258 and accompanying text.

503. *See, e.g.*, *Helsinki Rules*, *supra* note 332 (a formal adoption of the principle of equitable use); *Non-Navigational Convention*, *supra* note 76 (convention requiring States to mitigate harm and cooperate).

504. FEITELSON & HADDAD, *supra* note 429, at 17.

505. *Id.* at 18.

506. *See supra* notes 445-449 and accompanying text.

507. *See supra* notes 123-124 and accompanying text.

OLD KNOWLEDGE INTO NEW PATENT LAW: THE IMPACT OF UNITED STATES PATENT LAW ON LESS-DEVELOPED COUNTRIES

Insoon Song*

I. INTRODUCTION

In today's highly technological world, biotechnology is one of the most innovative and intensive industries.[1] Biotechnology is defined as techniques[2] that use living organisms or parts of organisms to make or modify products, to improve plants or animals, or to develop microorganisms for specific uses.[3] Biotechnology may also be defined as "the engineering and biology of the interaction between man and machines."[4] The biotechnology industry has used the genetically-based characteristics in microorganisms, plants, and animals to create drugs and to develop drug therapies.[5] These drugs or drug therapies may prevent, cure, or alleviate diseases and their symptoms.[6] Also, biotechnology has been used to develop agricultural products or environmental solutions for environmental disasters.[7] Genetically engineered crops or fruits are products of biotechnology.[8] Biotechnology has increased production or quality of livestock

---

* J.D. Candidate, 2006, Indiana University School of Law – Indianapolis (*expected*); Master of Science, Molecular Biology, Department of Life Science and Biotechnology, Korea University, Seoul, Korea, 1998; Bachelor of Science, Genetic Engineering, Korea University, Seoul, Korea, 1996. The author would like to thank her parents, husband and other family members for their support and understanding throughout law school.

1. Akim F. Czmus, M.D., Comment, *Biotechnology Protection in Japan, the European Community, and the United States*, 8 TEMP. INT'L & COMP. L.J. 435, 435 (1994).

2. The techniques include "selecting natural strains of organisms that carry desirable traits; making hybrids by fusing cells from different parental sources; using chemicals and radiation to create mutant strains; or genetically engineering plants, animals, and micro-organisms to produce specific phenotypic characteristics." JONATHAN CURCI STAFFLER, GRADUATE INSTITUTE OF INTERNATIONAL STUDIES (IUHEI), GENEVA, TOWARDS A RECONCILIATION BETWEEN THE CONVENTION ON BIOLOGICAL DIVERSITY AND TRIPS AGREEMENT 5, http://www.botanischergarten.ch/Patents/Staffler-CBD-TRIPS.doc (n.d.) (last visited Oct. 28, 2005).

3. GRAHAM DUTFIELD, INTELLECTUAL PROPERTY RIGHTS AND THE LIFE SCIENCE INDUSTRIES: A TWENTIETH CENTURY HISTORY 135 (2003).

4. Czmus, *supra* note 1, at 435.

5. *Id.* at 435-36.

6. *Id.* at 436.

7. *Id.*

8. *See id.* Genetic engineering is defined as "[s]cientific alteration of the structure of genetic material in a living organism. It involves the production and use of recombinant DNA and has been employed to create bacteria that synthesize insulin and other human proteins." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004), *available at* http://www.answers.com/genetically+engineered&r=67 (n.d.) (last visited Oct. 28, 2005).

and a variety of crops.[9] Genetically altered microorganisms that decompose oil spills and prevent further damage to the environment have also been developed.[10] Generally, biotechnology aims to utilize scientific research and technology to create a better future for humankind.[11]

As the biotechnology industry grows, patent law has been expanded to protect patent rights to life forms and their structural and functional components.[12] The patent serves as a device for society to measure the value of an invention.[13] It allows patentees to stipulate competitive prices for discoveries, and the products that later embody them.[14] The importance of patent protection has been emphasized because biotechnology is a high-risk, extremely research-intensive activity and has always been crucial to enable biotechnology companies to secure large amounts of investment capital to stay in business.[15] Patent portfolios are the main magnet for the investors of biotechnology companies.[16] The larger the patent portfolio is, the greater the interest from investors.[17] As a result, biotechnology patenting has experienced a tremendous increase in the last two decades.[18]

In this current situation, the United States is naturally very concerned about both the commercialization of biotechnology applications and products, as well as the development of patent law.[19] This biotechnology boom in the United States has vastly increased corporate demand for unconventional forms of natural resources — that is, living materials found primarily in less-developed countries.[20] In particular, there is a "gene rush" as governments and companies aggressively scout less-developed countries in search of genetic material.[21] As a result of this development, we have seen debates concerning whether this "gene rush" from the United States is bio-prospecting or bio-piracy.[22]

This Note will explore the impact of the U.S. patent system on less-developed countries. Part II of this Note will look at the U.S. patenting system.

---

9. Australian Government, Department of Foreign Affairs and Trade, *Intellectual Property & Biotechnology, at* http://www.dfat.gov.au/publications/biotech/overview.html (last modified Jan. 20, 2004)[hereinafter *Intellectual Property & Biotechnology*].

10. Czmus, *supra* note 1, at 436.

11. *Id. See also Intellectual Property & Biotechnology, supra* note 9.

12. DUTFIELD, *supra* note 3, at 152.

13. NUNI PIRES DE CARVALHO, THE TRIPS REGIME OF PATENT RIGHT 1 (2002).

14. *Id.*

15. DUTFIELD, *supra* note 3, at 153.

16. *Id.*

17. *Id.*

18. *Id.*

19. *See id.* at 154.

20. *See* Andrew Kimbrell, *Replace Bio-piracy with Biodemocracy,* (July 23, 1996), *at* http://www.ratical.org/ co-globalize/ReplaceBPwBD.html (last visited Oct. 28, 2005).

21. *Id.*

22. *See* Sudhir D. Ghatnekar & Mandar S. Ghatnekar, *Bio-prospecting or Bio-piracy?* INDIAN EXPRESS NEWSPAPERS, Feb. 8, 1999, http://www.expressindia.com/fe/daily/19990208/fec0801.html .

Specifically, Part II will first examine the history of patent law in the United States, looking at U.S. Constitutional provisions for the establishment of patent law. Part II will also explore patentability in the United States, focusing on two landmark U.S. patent cases: *Diamond v. Chakrabarty*[23] and *J. E. M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*[24] The third part of this section will focus on the topic of biotechnology patenting in the United States.

Part III of this Note will examine the impact of United States patents on less-developed countries. The first portion of Part III will discuss whether inventions patented by the United States using genetic resources or indigenous knowledge of less-developed countries represent bio-prospecting or bio-piracy. Four cases will be studied as examples on point. The second portion of Part III will illustrate the neem tree case from India and the rosy periwinkle case from Madagascar. This section will then illustrate the basmati rice case from India and Pakistan and the jasmine rice case from Thailand.

Part IV of this Note will discuss the effort to resolve disputes among developed countries, including the United States and less-developed countries, under Trade Related Intellectual Property Rights (TRIPS) obligations. Specifically, Part IV will first present the general features of TRIPS. This section will also look at the Convention on Biological Diversity (CBD) and TRIPS, Article 27.3(b). Also, it will discuss the relationship between the CBD and TRIPS, Article 27.3(b) for patents of the traditional or indigenous knowledge and plants, animals, and biological process. Finally, Part IV will present proposals from several countries to settle disputes between developed countries and less-developed countries under the TRIPS Agreement.

In conclusion, Part V of this Note proposes a means to settle patent disputes generated by this fast-developing area of science involving the United States and less-developed countries. Proposals from several countries to resolve disputes under TRIPS will be considered as background to this Note's suggested solution for patent disputes regarding indigenous knowledge and natural resources between the United States and the less-developed countries with case studies in Part III, specifically India, Pakistan, and Thailand.

II. PATENTING SYSTEM IN THE UNITED STATES

A. *History of Patent Law in the United States*

The term "patent" is derived from the original "Letters Patent,"[25] granted after the fourteenth century in England.[26] The purpose of the patent was to

23. 447 U.S. 303 (1980).

24. 534 U.S. 124 (2001).

25. DANIEL GERVAIS, THE TRIPS AGREEMENT, DRAFTING HISTORY AND ANALYSIS 117 (2003). "Letter Patent" means literally "open letters." *Id.*

grant the inventor or importer of a new technology the sole right to use his invention for a sufficient period to establish his business.[27] While the inventor or importer benefited from his patent right, the State gained technological progress.[28] From the beginning, in order to obtain patent rights, the invention was required to be new in the Kingdom, and it was supposed to benefit the State.[29]

In 1787, at the Constitutional Convention, a measure was proposed to incorporate as one of the new federal powers the ability to secure the establishment of intellectual property law.[30] That document states: "Congress shall have the Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right in their respective Writings and Discoveries."[31] Based on this provision, the first patent act was passed in 1790.[32] The first patent act rejected the English practice of awarding patents to local importers of foreign inventions, instead it protected the "first and true inventor."[33] The second patent act was enacted in 1793. It denied foreigners the right to apply for patents and codified the first inventorship test – the novelty and nonobviousness test.[34] The third patent law, the 1836 Patent Act, was enacted as the first modern patent law.[35]

Initially, Thomas Jefferson, the patent administrator and then-Secretary of State, personally examined the patent applications.[36] When he became too busy to examine the applications, patents began to be granted simply upon registration.[37] However, because of growing litigation between individuals with contesting claims and discontent with the patent administration, the process was reformed in 1836 Patent Act.[38] Through this reformation, a formalized

---

26. *Id.* The development of American patent law can be traced back to ancient Greece. ARTHUR R. MILLER & MICHAEL H. DAVIS, INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL 4 (2000). However, the acceptable starting point is the Statute of Monopolies, adopted in England in 1623. *Id.* This act addressed many basic patent issues that remain relevant today. *Id.*

27. GERVAIS, *supra* note 25, at 117. The early patent was emerged from monopolies, or so-called "guilds." MILLER & DAVIS, *supra* note 26, at 4. They were groups of artisans, and they controlled various sectors of markets. *Id.* at 4-5. These early patent monopolies were concerned with commerce, rather than with invention. *Id.* at 5. Foreigners who brought new technical skills into the jurisdiction were granted the privilege to practice a particular art or manufacturing process. *Id.*

28. GERVAIS, *supra* note 25, at 117.

29. *Id.*

30. Czmus, *supra* note 1, at 436.

31. *Id.* (*quoting* U.S. CONST. art. 1, § 8, cl. 8).

32. Czmus, *supra* note 1, at 436.

33. DUTFIELD, *supra* note 3, at 3.

34. *Id.*

35. *Id.*

36. MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY, GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 32 (1998).

37. *Id.*

38. *Id.* Until 1836, there was no general administrative body to examine the validity of patents. MILLER & DAVIS, *supra* note 26, at 5. From 1836, the Patent Office has been vested with the authority to examine patent and determine requirements for patent applications. *Id.*

examination system was established, and technical experts were recruited to restore the patent policy.[39] This 1836 law lasted without amendment until the 1952 Patent Act, which demands that the inventor distinctly specify the claims for his invention.[40] The patent specifications were required to particularly point out and distinctly claim the subject matter which the applicant regarded as his invention.[41]

Since the first patent act was enacted, the purpose of patent law has been to grant the owner of a patent the absolute and exclusive right to determine who will be able to use, make, or sell the patented item through a priority-granting system.[42] This system grants the person who first develops a new product or process the patent rights to the invention, so long as the patent application is filed with reasonable diligence.[43] Giving preference to the first and true inventor of a product or process is consistent with the rewards system of patent law and creates the incentive to invent.[44]

B. Patentability in the United States

Inventions' patentability within the United States is set forth in 35 U.S.C. § 101.[45] According to this provision, "whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title."[46]

Three further requirements for patentability are specified in 35 U.S.C. §§ 101, 102,[47] and 103:[48] (1) novelty; (2) non-obviousness; and (3) utility.[49] The novelty requirement precludes patents for inventions that are already known

---

39. RYAN, *supra* note 36, at 32.

40. *Id.* at 32-35. The 1952 Patent Act is completely codified in Title 35 of the United States Code. MILLER & DAVIS, *supra* note 26, at 9.

41. RYAN, *supra* note 36, at 35.

42. Amy E. Carroll, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Comment: Not Always the Best Medicine: Biotechnology and the Global Impact of U.S. Patent Law*, 44 AM. U. L. REV. 2433, 2446-47 (1995).

43. *Id.* at 2447.

44. *Id.*

45. *Id.* at 2449.

46. *Id.*

47. *Id.* 35 U.S.C. § 102 (1988) states that "[a] person shall be entitled to a patent unless . . . the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent."

48. *Id.* 35 U.S.C. § 103 (1988) states:

> [A] patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

49. *Id.*

and being used, or that have already been patented.[50] Its purpose is to determine whether the invention is timely and original.[51] The utility requirement demands that an invention be usable and serve an intended purpose that has at least a minimal social benefit.[52] The test for non-obviousness turns on a determination of "prior art," or whether the subject matter of the patent deviates from common practices so as not to be self-evident.[53] Generally, it involves the hypothetical judgment of a person with ordinary skill in the particular technological field.[54] However, according to 35 U.S.C. § 102, technologies and methods currently in use in other countries are not recognized as prior art.[55] If knowledge is new for the United States, it is considered novel for the purpose of patentability.[56] In addition, a written description of the method to enable the skilled person to create and use the invention is required.[57] In the requirement to obtain a patent, subject matter is defined as "any new useful process, machine, manufacturer or composition of matter in any new or useful improvement thereof."[58] This provision illustrates the intent of Congress not to place restrictions on subject matter for which a patent may be sought.[59]

C. *Biotechnology Patenting in the United States*

Since the first patent act was enacted in 1790, only seventy of the four million U.S. patents had been issued for living organisms when Chakrabarty, a microbiologist for General Electric Co., filed for such a patent in 1972.[60] Prior to the 1980s, the natural doctrine that organisms or substances as they occur in nature cannot be considered inventions, and are therefore not patentable, prevailed.[61] This natural doctrine entirely precluded the patenting of life forms and their structural and functional components.[62] Consequently, the patents for biotechnological processes and products were highly uncertain.[63]

This situation started to change in 1980, with the U.S. Supreme Court's decision in *Diamond v. Chakrabarty*.[64] In *Chakrabarty*, the Court held

---

50. *Id. See also* 35 U.S.C. § 102.
51. STAFFLER, *supra* note 2, at 14.
52. Carroll, *supra* note 42, at 2449.
53. *Id.*
54. STAFFLER, *supra* note 2, at 14.
55. Vandana Shiva, *The US Patent System Legalizes Theft and Bio-piracy* (July 28, 1999), *at* http://www.organicconsumers.org/Patent/uspatsys.cfm (on file with author) [hereinafter *Theft and Bio-piracy*].
56. *Id.*
57. STAFFLER, *supra* note 2, at 14.
58. *Id.*
59. *Id.*
60. DUTFIELD, *supra* note 3, at 154.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id. See also* Czmus, *supra* note 1, at 437.

that man-made microorganisms were patentable.[65] In this case, Chakrabarty invented human-made, genetically-engineered bacteria capable of breaking down multiple components of crude oil. He filed a patent application for these bacteria.[66] The capacity to break down crude oil was not possessed by any naturally occurring bacteria.[67] In the patent application, Charkrabarty asserted claims to the method of producing the bacteria, the new bacteria and the bacteria themselves.[68] The Court reasoned that such bacteria were patentable due to their man-made characteristics.[69] The Court stated that the bacteria invented by Chakrabarty constituted a "manufacture" or "composition of matter" within the meaning of 35 U.S.C. § 101.[70] With this case, the Court broadened the range of patentable human-created biological products by permitting the patenting of "anything under the sun that is made by man."[71]

Five years after *Chakrabarty*, the Patent and Trademark Office (PTO) Board of Patent Appeals and Interferences held in *Ex parte Hibberd*, 277 U.S.P.Q. (BNA) 443 (1985), that plants also fell within the meaning of "manufacture" or "composition of matter" by confirming the holding of *Chakrabarty*.[72] This case concerned maize plant technologies, including the development of seeds, plants, and tissue cultures that have increased free tryptophan levels, or which are capable of producing plants or seeds having increased tryptophan content.[73] Such maize plants are considered to have a greater nutritional value than ordinary corns.[74] The maize plants claimed in *Ex parte Hibberd* were produced through conventional cross-breeding, but they also relied on new techniques such as cell culture and genetic analysis.[75] This case opened the way for the patenting of plants by holding that plants, plant seeds, and plant tissue cultures constituted patentable subject matter.[76]

In 1987, the PTO Board of Patent Appeals and Interferences produced another groundbreaking ruling in *Ex parte Allen*, 2 U.S.P.Q.2d (BNA) 1425 (1987), concerning multi-cellular animals.[77] In this case, the inventors developed a method for producing polyploidy Pacific oysters.[78] While such

---

65. *Id. See also Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

66. *Chakrabarty*, 447 U.S. at 303. *See also* Czmus, *supra* note 1, at 437.

67. *Chakrabarty*, 447 U.S. at 303.

68. *Id.* at 305.

69. Czmus, *supra* note 1, at 437.

70. *Chakrabarty*, 447 U.S. at 307-08.

71. Czmus, *supra* note 1, at 439. *See also Michael North, The U.S. Expansion of Patentable Subject Matter: Creating a Competitive Advantage for Foreign Multinational Companies?*, 18 B.U. INT'L L.J. 111, 123 (2000).

72. DUTFIELD, *supra* note 3, at 156. *See also Ex Parte Hibberd*, 227 U.S.P.Q. (BNA) 443 (1985).

73. *Ex Parte Hibberd*, 227 U.S.P.Q. at 443.

74. DONALD S. CHISUM, CHISUM ON PATENT 19 (2004).

75. DUTFIELD, *supra* note 3, at 156.

76. *Id. See also* CHISUM, *supra* note 74, at 19.

77. DUTFIELD, *supra* note 3, at 156-57. *See also* CHISUM, *supra* note 74, at 21.

78. *Id.*

sterile oysters remain edible year round because they do not devote significant portions of their body weight to reproduction, natural oysters are considered inedible during the summer breeding season.[79] Although the patent was rejected, relying on the language of the decisions in *Charkrabarty* and *Hibberd*,[80] the ruling established that multi-cellular organisms were patentable.[81]

Soon after, in *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920 (Fed. Cir. 1991), the PTO announced that it would examine claims directed to multi-cellular organisms, including animals.[82] In this case, animal rights advocate organizations, farmers, and animal husbandry organizations challenged a rule promulgated by the PTO, stating that non-naturally occurring, man-made living microorganisms, including animals, are patentable subject matter.[83] The court held that the plaintiffs lacked standing to seek judicial action of the PTO, and that non-naturally, non-human, multi-cellular organisms are patentable.[84]

In 2001, the Supreme Court finally confirmed the legality of patents on plants in *J.E.M. Ag Supply Inc. v. Pioneer Hi-Bred Int'l, Inc.*[85] In this case, the patent holder, Pioneer Hi-Bred, sued J.E.M. Ag Supply for patent infringement.[86] Pioneer Hi-Bred's patents covered the manufacture, use, sale, and offer for sale of its inbred and hybrid corn seed products.[87] The reseller, J.E.M. Ag Supply, purchased the patented hybrid seeds from Pioneer Hi-Bred and resold the seeds.[88] In the patent infringement suit, J.E.M. Ag Supply argued that Pioneer Hi-Bred's corn plant patent was invalid because it was outside of the scope of 35 U.S.C. § 101.[89] J.E.M. argued that sexually reproducing plants were not patentable subject matter.[90] The Court upheld

---

79. *Id.*

80. *Id.* The court of *Allen* stated:

> The issue . . . in determining whether the claimed subject matter is patentable under Section 101 is simply whether that subject matter is made by man. If the claimed subject matter occurs naturally, it is not patentable subject matter under Section 101. The fact, as urged by the examiner, that the oysters produced by the claimed method are controlled by the laws of nature does not address the issue of whether the subject matter is a non-naturally occurring manufacture or composition of matter. The examiner has presented no evidence that the claimed polyploidy oysters occur naturally without the intervention of man, nor has the examiner urged that polyploidy oysters occur naturally.

Id. at 22.

81. DUTFIELD, *supra* note 3, at 157.

82. CHISUM, *supra* note 74, at 22.

83. *Id. See also Animal Legal Defense Fund*, 932 F.2d at 920.

84. CHISUM, *supra* note 74, at 22.

85. DUTFIELD, *supra* note 3, at 157. *See also J.E.M. Ag Supply Inc.*, 534 U.S. at 127.

86. DUTFIELD, *supra* note 3, at 157.

87. *J.E.M. Ag Supply Inc.*, 534 U.S. at 127.

88. *Id.* at 128.

89. *Id.* at 129.

90. *Id.*

Pioneer Hi-Bred's patent, reasoning that this method of creating new lines of plants through sexual reproduction was protectable under 35 U.S.C. § 101.[91] Conclusively, the Court in this case followed the same broad construction of 35 U.S.C. § 101 as it had done in *Chakrabarty*.[92]

III. IMPACT OF UNITED STATES PATENTS ON LESS-DEVELOPED COUNTRIES

A. *Bio-Prospecting or Bio-Piracy?*[93]

Over the past two and one-half decades, there has been much debate over the issues surrounding the relationship between intellectual property rights, the appropriation of genetic resources, and the traditional or indigenous knowledge of indigenous people by developed countries.[94] In general, indigenous people are defined as the descendants of pre-conquest, traditional people of a certain geographic area.[95] They hold a common history, culture, language, and customary law.[96] Traditional knowledge encompasses information about the agronomic or culinary characteristics of crops or the medicinal qualities of native species.[97] Normally, traditional knowledge comprises insights and understandings developed through generations.[98] As a result, it forms an essential aspect of an indigenous group's cultural survival.[99]

From the debate concerning appropriation of genetic resources and traditional or indigenous knowledge, two pivotal questions have arisen.[100] First, can life be "owned"?[101] Second, if it can, do corporations from developed countries have the right to own components of traditional or indigenous

91. Michael Woods, *Food for Thought: The Bio-piracy of Jasmine and Basmati Rice*, 13 ALB. L.J. SCI. & TECH. 123, 129 (2002).

92. *See J.E.M. Ag Supply Inc.*, 534 U.S. at 129-30.

93. Ghatnekar & Ghatnekar, *supra* note 22.

94. Case Western Reserve University, *Introduction: Bio-prospecting/Bio-piracy, at* http://home.cwru.edu/~ijd3/authorship/bioprospecting.html (n.d.) (last visited Oct. 28, 2005) [hereinafter *Bio-prospecting/Bio-piracy*].

95. Paul Gepts, *Who owns Biodiversity, and How Should the Owners Be Compensated?*, 134 PLANT PHYSIOLOGY 1295, 1303 (2004).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Bio-prospecting/Bio-piracy*, *supra* note 94.

101. *Id. See also* VANDANA SHIVA, BIO-PIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE 19-24 (1997).

knowledge systems of people in less-developed countries?[102] Some call this phenomenon bio-prospecting, while others refer to it as bio-piracy.[103]

Bio-prospecting is defined as the "exploration of wild plants and animals for commercially valuable genetic and biochemical resources."[104] Bio-prospecting is a fair enterprise based on certain legal conditions and benefit sharing.[105] Bio-prospecting can help medical and other scientific research by collecting biological samples.[106]

Bio-piracy,[107] on the other hand, occurs when corporations use the folk wisdom of indigenous people to locate and understand the use of medicinal plants and then exploit this knowledge commercially.[108] Bio-piracy refers to the appropriation and monopolization of a traditional population's knowledge and biological resources, including the smuggling of diverse forms of plants and animals.[109] Bio-piracy results in traditional populations losing control over their resources.[110] While the corporations of developed countries allege that their exploitation is bio-prospecting, the less-developed countries assert that it is bio-piracy by developed countries and is an endemic and an epidemic in their lands.[111]

Four case studies clearly illustrate the dispute concerning bio-prospecting or bio-piracy between developed countries and less-developed countries. These cases concern the neem tree,[112] rosy periwinkle,[113] basmati rice,[114] and jasmine rice.[115] These cases illustrate instances of the appropriation of genetic resources and traditional or indigenous knowledge of less-developed countries for

---

102. *Bio-prospecting/Bio-piracy*, *supra* note 94.

103. *Id.* Bio-prospecting is the collection of biological materials/resources for use in scientific research, while bio-piracy refers to the unlawful use of such resources. *Id. See also* Kimbrell, *supra* note 20.

104. Ghatnekar & Ghatnekar, *supra* note 22.

105. *Bio-prospecting/Bio-piracy*, *supra* note 94. *But see* SHIVA, *supra* note 101, at 72-79.

106. Michael A. Gollin, *Bio-piracy: The Legal Perspective*, *at* http://www.actionbioscience.org/biodiversity/gollin.html (Feb. 2001).

107. Bio-piracy is defined as:

> 1. unauthorized use of biological resources, such as plants, animals, organs, microorganisms or genes; 2. unauthorized use of traditional communities' knowledge on biological resources; 3. unequal share of benefits between a patent holder and the indigenous community whose resource and/or knowledge has been used; or 4. patenting of biological resources with no respect to patentable criteria (novelty, non-obviousness and usefulness).

Wikipedia, *Bio-piracy*, *at* http://en.wikipedia.org/wiki/Bio-piracy (last modified Sept. 4, 2005).

108. Kimbrell, *supra* note 20.

109. Ethical Boundaries, *Bio-piracy in the Amazon – Introduction*, *at* http://www.amazonlink.org/biopiracy/ (n.d.) (last visited Oct. 28, 2005).

110. *Id.*

111. *See Theft and Bio-piracy*, *supra* note 55.

112. *See infra* Part III.B.

113. *Id.*

114. *See infra* Part III.C.

115. *Id.*

commercial purposes.[116] These disputes have arisen mainly between the United States and less-developed countries — India, Madagascar, Pakistan and Thailand.

B. Illustration 1 – Neem Tree (India) and Rosy Periwinkle (Madagascar)

A classic example of a dispute concerning bio-piracy by corporations based in the United States is that of the *Azadirachta indica*, commonly known as the neem tree, in India.[117] In India, there are approximately 14 million neem trees.[118] Since time immemorial, the medical properties and effects of neem have been known among Indians.[119] Indians have used the neem's fruits, seeds, oil, leaves, roots, and bark for medicinal purposes.[120] The neem has been known to be effective for constipation, diarrhea, indigestion, nausea, malaria, fever, hemorrhoids, headaches, ear, eye and heart problems, lice, external cleansing of the body after birth, leprosy, respiratory disorders in children, rheumatism, chronic syphilitic sores, ringworm, scabies, and epistaxis.[121] The neem leaves have also been used by holy men to avert bad luck and disease in India.[122]

When the *Vedas*[123] were composed, the neem was called *Sarva Roga Nivarini,* which means "one that could cure all aliments and ills."[124] Neem also has many other uses, including timber, toiletries, contraception, fuel, and

---

116. *See* Gepts, *supra* note 95, at 1303-04.

117. Vandana Shiva, *The Neem Tree – A Case History of Bio-piracy, at* http://www.twnside.org.sg/title/pir-ch.htm (n.d.) (last visited Oct. 28, 2005) [hereinafter *The Neem Tree*].

118. Sara Hasan, *The Neem Tree, Environment, Culture and Intellectual Property, at* http://www.american.edu/TED/neemtree.htm (Apr. 2002).

119. Neem Foundation, *Therapeutic uses of Neem, at* http://www.neemfoundation.org/thera.htm (n.d.) (on file with author) [hereinafter *Therapeutic uses of Neem*].

120. *Id.*

121. Thimmakka's, *Biotechnology vs. Indigenous Knowledge: The Case of the Neem*, at http://www.thimmakka.org/Newsletters/neemi.html (Jan. 1999)[hereinafter *Biotechnology vs. Indigenous Knowledge*].

122. *Therapeutic uses of Neem, supra* note 119.

123. The meaning of *Vedas* is defined as follows:

> [O]ldest scriptures of Hinduism and the most ancient religious texts in an Indo-European language. The authority of the Veda as stating the essential truths of Hinduism is still accepted to some extent by all Hindus. The Veda is the literature of the Aryans who invaded NW India c.1500 B.C. and pertains to the fire sacrifice that constituted their religion. The Vedic hymns were probably first compiled after a period of about 500 years during which the invaders assimilated various native religious ideas. The end of the Vedic period is about 500 B.C. Tradition ascribes the authorship of the hymns to inspired seer-poets (*rishis*).

The COLUMBIA ENCYCLOPEDIA, (6th ed. 2001), *available at* http://www.bartleby.com/65/ve/Veda.html (2005).

124. *Therapeutic uses of Neem, supra* note 119.

agriculture.[125] Among its many uses, its power as a potent pesticide is the most important and controversial.[126] Azadirachtin,[127] one of the active ingredients in Neem, is highly effective against 200 species of insects, including mites, nematodes, fungi, bacteria, and viruses.[128] Also, it is benign to most species, excluding insects.[129]

Native Indians have been making pesticide emulsions for 2000 years by using their own processes.[130] However, they could not patent the neem for two reasons.[131] First, although an invention or process should be novel to be granted a patent, information on the neem is ubiquitous in India.[132] Second, the neem is classified as a pharmaceutical because pesticides are part of agricultural processes and contribute to the health and well-being of people.[133] In India, pharmaceuticals are exempt from patentability under the Indian Patent Act (IPA) of 1970.[134]

However, a timber company in the United States that figured out the neem tree's usefulness in acting as a pesticide patented its process to stabilize emulsions and sold the patent to the U.S.-based company, W.R. Grace, in 1971.[135] W.R. Grace secured its rights to the formula of a pesticide by using the emulsion from the neem tree's seeds, and began suing Indian companies for making the emulsion.[136] Among the patents on neem, the patents granted to W.R. Grace for extraction and storage processes are the most controversial.[137]

---

125. Hasan, *supra* note 118.

126. *Id.*

127. Azadirachtin is a naturally occurring substance that belongs to an organic molecule class called tetraortritenoids. Pioneer Enterprise, *Azadirachtin, at* http://www.pioneerherbs.com/azadirachtin.htm (2000). Azadirachtin is structurally similar to ecysones that control the process of metamorphosis of insects. *Id.* It occurs in all parts of the neem tree but the majority of it is concentrated in the neem kernel. *Id.* As a chemical compound belonging to limonoids, it is known to affect over 200 species of insect by acting as an antifeedant and growth disruptor. Wikipedia, *Azadirachtin, at* http://en.wikipedia.org/wiki/Azadirachtin (last modified July 31, 2005).

128. *Biotechnology vs. Indigenous Knowledge*, *supra* note 121.

129. *Id.*

130. Hasan, *supra* note 118.

131. *Biotechnology vs. Indigenous Knowledge*, *supra* note 121.

132. *Id.*

133. *Id.*

134. *Id.* Since 1970, India had a patent law that was regarded as a model by many other less-developed countries. Amit Sen Gupta, *Indian Patent Act—Jeopardising the Lives Millions, at* http://phm-india.org/issues/patents/indianpatent.html (n.d.) (on file with author). The Indian patent law stressed on the obligations of the patent holder by providing strong provisions that prevented the patent holder's monopoly rights. *Id.* Particularly, Indian patent law did not provide for monopoly rights for drugs and agro-chemicals. *Id.* As a result, the Indian drug industry became the strongest and the most self-reliant industry in less-developed countries. *Id.*

135. Hasan, *supra* note 118.

136. *Id.*

137. *Id.*

First, U.S. Patent No. 4,946,681[138] was granted in 1990 for improving the storage stability of neem seed extracts containing azadirachtin.[139] Second, U.S. Patent No. 5,124,349[140] was granted in 1994 for storage of stable insecticidal composition comprising neem seed extract.[141] This patent mainly contributed to increase "the shelf-life stability of azadirachtin solution."[142]

W.R. Grace alleged that azadirachtin was being destroyed during traditional processing, thus its method for making stable emulsion was novel.[143] However, the Indians asserted that W.R. Grace's allegation was inaccurate[144] and argued that the extracts were subject to degradation, but this was not a problem since Indian farmers usually put such extracts to use as they need them.[145] According to them, the method of stabilization patented by W.R. Grace was needed only in order for the product to be packaged and shipped for an extended period of time in the commercial market.[146] Indians argued that this stabilization and other advanced methods to make stable emulsion had already been developed by Indian scientists in the 1960s and 1970s.[147]

Also, they argued the patent claims to neem were illegitimate, basing their argument on two grounds.[148] First, Indians claimed nature's creativity and the creativity of other cultures as its own.[149] Second, it led to the false claim that the pesticide property of neem was created by the patentee, although this

---

138. *Id.*

> A process for the production of stable azadirachtin solutions comprising extracting ground neem seeds with a solvent having azadirachtin solubility to produce an aqueous-containing azadirachtin extract solution and then adding an effective amount of 3-4 Angstrom molecular sieves to selectively remove water from the extract to yield a storage-stable azadirachtin solution having less than 5% water by volume.

U.S. Patent No. 4,946,681 (issued Aug. 7, 1990).

139. Hasan, *supra* note 118. The inventor is named as James F. Walter of Ashton, Maryland. *Id.*

140. *Id.*

> Storage stable pesticide compositions comprising neem seed extracts which contain azadirachtin as the active pesticidal ingredient wherein the compositions are characterized by their non-degrading solvent systems. In a first embodiment, the pesticide compositions contain solvent systems characterized as having greater than 50% by volume aprotic solvents and less than 15% by volume water. In a second embodiment, the pesticide compositions contain solvent systems characterized as having greater than 50% by volume alcohol and less than 5% by volume water. The pesticide compositions contain surfactant concentrations of at least about 1.0%, up to 10%.

U.S. Patent No. 5,124,349 (issued Jun. 23, 1992).

141. Hasan, *supra* note 118.

142. *Id.*

143. *The Neem Tree*, *supra* note 117.

144. *Id. See also* Hasan, *supra* note 118.

145. *The Neem Tree*, *supra* note 117.

146. *Id.*

147. *Id.*

148. SHIVA, *supra* note 101, at 71.

149. *Id.*

patent was based on traditional knowledge of Indians.[150] Indians claimed W.R. Grace's patent claim treated petty tinkering as a source of creation, rather than acknowledging that specific species were sources of creation and communities were sources of knowledge.[151]

W.R. Grace claimed that their neem patents and project benefited the Indian economy by providing employment opportunities and high remuneration to the farmers because the price of neem seeds had increased.[152] Over the last twenty years, the per ton price of neem seed increased more than ten times.[153] However, contrary to W.R. Grace's claim, this increase in the price of neem seeds turned a free resource into an exorbitantly expensive one, producing a negative result.[154] The local Indian farmers are now competing with an industry supplying consumers in developed countries.[155] Since the Indian farmers cannot afford the price that the industry can, the industry will ultimately have exclusive access to neem trees as a raw material and to all production processes.[156]

Another instance of a dispute concerning bio-piracy by corporations is the rosy periwinkle case.[157] In 1954, following clues from indigenous medicine men in Madagascar, researchers at Eli Lilly pharmaceuticals extracted two powerful cancer-fighting alkaloids from the rosy periwinkle: vinblastine and vincristine.[158] These anticancer compounds are especially effective against leukemia and Hodgkin's disease.[159] Eli Lilly first became aware of the effect of the rosy periwinkle because of its traditional use as an anti-diabetic.[160] Eli Lilly made hundreds of millions of dollars from drugs derived from the rosy periwinkle alkaloid.[161] However, the people of Madagascar who provided the indigenous knowledge about the rosy periwinkle never received any compensation from Eli Lilly.[162]

---

150. *Id.*

151. *Id.*

152. *The Neem Tree*, *supra* note 117.

153. *Id.* W.R. Grace said that the price of neem seed has gone up from Rs 300 a ton to current levels of Rs 3000-4000 a ton over the last twelve years. *Id.* In fact, however, the price has risen more than this. *Id.* The price has been risen to over Rs 8000 (approximately $300) per ton. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *See* Case Western Reserve University, *Case Study: Rosy Periwinkle (Madagascar)*, *at* http://home.cwru.edu/~ijd3/authorship/rosy.html (2003) [hereinafter *Rosy Periwinkle*].

158. *Id. See also* Elizabeth John & K.T. Chelvi, *Bio-piracy and the Law of the Jungle*, NEW STRAIT TIMES PRESS, June 27, 2004, *available at* http://www.williams.edu/go/native/malaysia.htm (last visited Oct. 28, 2005).

159. Kate Wong, *Mother Nature's Medicine Cabinet* (Apr. 9, 2001), *at* http://vienna-doctor.com/ENG/Article_ENG/natures-medicine-cabinet.html (on file with author).

160. *Rosy Periwinkle*, *supra* note 157.

161. John & Chelvi, *supra* note 158. *See also Rosy Periwinkle*, *supra* note 157.

162. John & Chelvi, *supra* note 158.

C. *Illustration 2 – Basmati Rice (India and Pakistan) and Jasmine Rice (Thailand)*

The above cases regarding patents using traditional knowledge of indigenous people in less-developed countries are not unique.[163] There is another issue between developed countries and less-developed countries regarding rice, with the exploited countries being mostly in Asia.[164] Rice is the basic food in all meals in Asia; it constitutes nearly eighty percent of people's daily caloric intake.[165] Rice accounts for up to half of Asian farms' incomes.[166] Over thousands of years in Asia's agricultural history, farmers developed and conserved an enormous amount of genetic diversity in rice.[167] However, these countries — mostly less-developed countries — did not provide patent protection for their varieties of rice.[168]

Seeing the international market potential of this local genetic diversity of rice, agricultural biotechnology companies in developed countries acquired samples of rice, then genetically engineered a close substitute for the natural variety maintaining its desirable consumer characteristics.[169] The modified varieties can be patented, and their names copyrighted under TRIPS.[170] It means that the biotechnology companies can license the production of rice in specified countries, export the product in competition with the natural varieties from those countries, and further prevent the natural varieties from being sold in importer's markets using its traditional names.[171] Examples of products that have been involved in this scenario are basmati rice from India and jasmine rice from Thailand.[172]

In 1997, a Texas-based company, RiceTec Inc., won a controversial U.S. patent[173] on basmati rice.[174] RiceTec got a patent for three things — growing

---

163. *See supra* Part III.B.

164. *See* Matthew Clement, *Rice Imperialism: The Agribusiness Threat to Third World Rice Production*, MONTHLY REVIEW, (Feb. 2004), *available at* http://www.monthlyreview.org/0204clement.htm (last visited Oct. 28, 2005). *See also* GRAIN, *Bio-piracy, TRIPS and the Patenting of Asia's Rice Bowl: A Collective NGO Situationer on IPRs on Rice*, (May 1998), *at* http://www.grain.org/briefings/?id=29 (last visited Oct. 28, 2005) [hereinafter *Patenting of Asia's Rice Bowl*].

165. *Patenting of Asia's Rice Bowl*, *supra* note 164.

166. *Id.*

167. *Id.*

168. William A. Kerr, Jill E. Hobbs & Revadee Yampoin, *Intellectual Property Protection, Biotechnology, and Developing Countries: Will the TRIPs be Effective?* AgBioForum, 2(384), 203-211 (1991), *at* http://www.agbioforum.org/v2n34/v2n34a09-kerr.htm (1999).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. RAFI, *Basmati Rice Update*, (Jan. 4, 2000), http://www.biotech-info.net/basmati_rice.html (last visited Oct. 28, 2005) [hereinafter *Basmati Rice Update*].

The invention relates to novel rice lines and to plants and grains of these lines

rice plants with certain characteristics identical to basmati; the grain produced by such plants, and the method of selecting the rice plant based on a starch index (SI) test devised by RiceTec.[175]

Basmati rice means "queen of fragrance" or "the perfumed one."[176] Basmati rice has been grown for centuries in India and Pakistan, and basmati rice varieties are recognized worldwide for their fragrant aroma, long and slender grain, and distinctive taste.[177] For this reason, basmati rice has been known as the "crown jewel" of South Asian rice[178] and has been favored by emperors and praised by poets for hundreds of years.[179] For a long time, basmati export markets have been important for India and Pakistan.[180] In 1998 and 1999, basmati exports were valued at approximately $425 million in India.[181] RiceTec had been trying to enter the international rice market with brand names such as Kasmati and Texmati to describe basmati-type rice, but it did not succeed.[182] However, after RiceTec was granted a patent in 1997, it was able to call its aromatic, various forms of basmati rice "Basmati" within the United States.[183] In addition, RiceTec labeled its rice "Basmati" when exporting it.[184] The patent of RiceTec applies to breeding crosses involving twenty-two farmer-bred basmati varieties from Pakistan and India.[185] Although this patent is valid only in the United States, it affects extensively varieties

---

> and to a method for breeding these lines. The invention also relates to a novel means for determining the cooking and starch properties of rice grains and its use in identifying desirable rice lines. Specifically, one aspect of the invention relates to novel rice lines whose plants are semi-dwarf in stature, substantially photoperiod insensitive and high yielding, and produce rice grains having characteristics similar or superior to those of good quality basmati rice. Another aspect of the invention relates to novel rice grains produced from novel rice lines. The invention provides a method for breeding these novel lines. A third aspect of the invention relates to the finding that the "starch index" (SI) of a rice grain can predict the grain's cooking and starch properties, to a method based thereon for identifying grains that can be cooked to the firmness of traditional basmati rice preparations, and to the use of this method in selecting desirable segregants in rice breeding programs.

U.S. Patent No. 5,663,484 (issued Sept. 2, 1997).

174. *Basmati Rice Update*, *supra* note 173. *See also* Anthony Browne, *India Fights U.S. Basmati Rice Patent, at* http://www.biotech-info.net/basmati_patent.html (Jun. 25, 2000).

175. *TED Case Studies – Basmati, available at* http://www.american.edu/projects/mandala/TED/basmati.htm (n.d.) (last visited Oct. 28, 2005). [hereinafter *TED Case Studies – Basmati*].

176. *Id.*

177. *Id.*

178. *Basmati Rice Update*, *supra* note 174.

179. *TED Case Studies – Basmati*, *supra* note 175.

180. *See* Etc group, *Update on Basmati Rice Patent, at* http://www.etcgroup.org/article.asp?newsid=34 (Jan. 4, 2000)[hereinafter *Update on Basmati Rice Patent*].

181. *Id.*

182. *TED Case Studies – Basmati*, *supra* note 175.

183. *Id.*

184. *Id.*

185. *Update on Basmati Rice Patent*, *supra* note 180.

grown anywhere in the Western Hemisphere.[186] Also, this has repercussions for India and Pakistan, not only because India and Pakistan will lose the 45,000 ton U.S. import market, but also because its position will be threatened in crucial markets like the European Union, the United Kingdom, the Middle East, and West Asia.[187]

The U.S. import market forms ten percent of the total basmati export of India and Pakistan.[188] From 1996 to 1997, India exported approximately 523,000 tons of Basmati to the European Union.[189] If RiceTec's patent is not revoked, and RiceTec can sell its rice under the brand name "Basmati," it will definitely cut into India and Pakistan's global market share.[190] According to Vandana Shiva, director of a Delhi-based research foundation monitoring issues of patents and bio-piracy, RiceTec's patent on basmati rice constituted theft in three ways:

> a theft of collective intellectual and biodiversity heritage of Indian farmers, a theft from Indian traders and exporters whose markets are being stolen by RiceTec Inc, and finally a deception of consumers since RiceTec is using a stolen name Basmati for rice which are derived from Indian rice but not grown in India and, hence are not the same quality.[191]

The same situation occurred with Thai jasmine rice.[192] A University of Florida researcher, Chris Deren, developed a new strain of jasmine rice.[193] Thai jasmine rice is indigenous to Thailand, but it is not well-suited to the United States because of the day length.[194] To get the rice to grow in the United States, Deren used gamma rays to genetically alter the plants so they would be non-responsive to day length.[195] Also, he manipulated the rice to grow shorter than traditional Thai jasmine plants to make them suitable for machine harvest.[196]

Although Thailand is the world's largest exporter of rice, the prospect of a U.S. patent on jasmine rice produced widespread alarm in the Thai rice

---

186. *Id.*
187. *TED Case Studies – Basmati*, *supra* note 175.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *See* Danielle Knight, *Groups Take Legal Action to End U.S. 'Bio-piracy': Legal Action on Basmati & Jasmine Rice*, (Apr. 27, 2000), *at* http://www.grain.org/bio-ipr/?id=166 (last visited Oct. 28, 2005).
193. *See* Paul Kimpel, *Gourmet-Style Thai Jasmine Rice May Be Future U.S. Crop* (Sept. 11, 2001), *at* http://news.ufl.edu/2001/09/11/jasmine (last visited Oct. 28, 2005). *See also* Noel Rajesh, *And now, Thai Jasmine Rice*, *at* http://www.indiatogether.org/agriculture/articles/noel_jasmine.htm (Aug. 2002).
194. Kimpel, *supra* note 193.
195. *Id.*
196. *Id.*

industry.[197] In 2000, Thailand exported 243,000 tons of rice to the United States, its biggest buyer, and jasmine rice amounted to 200,000 tons.[198] If the small-scale farmers in Thailand lose the jasmine rice markets, in particular, to their main buyer, the United States, the basis of their livelihood will undoubtedly be threatened.[199] An American strain of jasmine rice under the control of large companies would certainly seriously undercut Thailand's rice market.[200]

According to the general manager of Semi-Chi Rice Produces, an American company in Florida, a jasmine rice variety that is comparable to jasmine rice imported from Thailand can bring in a sizeable profit.[201] Currently, regular varieties of American rice sell at $340 per ton, while jasmine rice from Thailand sells at $520 per ton.[202] In 2001, Thai jasmine rice sales in the United States amounted to about $120 million dollars.[203] If this $120 million dollar market is reduced, it would have a drastic effect on the Thai rice export, and it would certainly hit Thai farmers the hardest.[204] As a result of this controversy over jasmine rice, Thai farmers and citizens carry negative feelings toward the United States.[205]

IV. SETTLEMENT OF THE DISPUTE UNDER TRIPS

The conflict between developed and less-developed countries over the enforcement of intellectual property rights was an increasingly divisive legal issue through the later twentieth century.[206] In the case of basmati rice, Indians argued the U.S. government's decision to grant a patent for the basmati rice violated TRIPS.[207] They said the basmati rice is traditionally grown in India and Pakistan, and granting a patent over it violated the geographical indications act under TRIPS.[208] Geographical indication is the identification of "a good originating in the territory of a member, or a region or locality in that territory,

---

197. BizAsia, *Thai-U.S. Conflict over Jasmine Rice* (Oct. 26, 2001), *at* http://bizasia.com/agricultrue_/epz2q/thai_us-conflict-jasmine.htm (on file with author).

198. Chris Westcott, *Thai Jasmine Rice and the Threat of the US Biotech Industry* (Dec. 18, 2001), http://www.mofga.org/news20020119.html (last visited Oct. 28, 2005) [hereinafter *Thai Jasmine Rice*].

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* Thailand, it is now a common sight to see farmers wearing Bin Laden t-shirts during their protests. *Id.* The protests are increasingly becoming aggressively anti-American. *Id.* Most farmers do not support the violent acts of September 11th, but many of them sympathize with Bin Laden's anti-American sentiments. *Id.*

206. Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C.J. INT'L L. & COM. REG. 229, 235 (1998).

207. *TED Case Studies – Basmati*, *supra* note 175.

208. *Id.*

where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin."[209] "Scotch whiskey" and "French champagne" are well-known examples.[210] Indians argue that the United States cannot label their rice "Basmati," just as their wine cannot be labeled "champagne."[211]

Although over 111 countries agreed on TRIPS, disputes regarding global bio-piracy and the efforts to settle those disputes have continued.[212] Each country has its own position; the developed countries and the less-developed countries disagree over whether a strict patent system on less-developed countries should be imposed.[213] The United States supports an international agreement which imposes a strict patent system on less-developed countries,[214] while less-developed countries protest it.[215]

This section will present potential solutions to settle the dispute concerning bio-piracy issues between developed countries, specifically the United States and less-developed countries.

A. *TRIPS*

In 1883, the first global agreement on patent laws was signed in the Paris Convention.[216] This convention had two fundamental provisions for current international intellectual property agreements.[217] The first provision is the principle of national treatment that demands the member countries not discriminate against foreign property owners.[218] The second provision is the right of priority that permits a party filing a patent in a member country to receive that same filing date in subsequent application in other member states.[219] The Paris Convention initially attempted to establish a global framework for patent law.[220] However, this attempt failed because for over eighty years after the Convention, there was no international body to oversee the enforcement of its provisions.[221]

However, from 1967, World Intellectual Property Organization (WIPO), a special agency of the United Nations, began to administer several

209. *Id.*
210. *Update on Basmati Rice Patent*, *supra* note 180.
211. *Id.* at 210.
212. Long, *supra* note 206, at 236.
213. *See* Leanne M. Fecteau, Note, *The Ayahuasca Patent Revocation: Raising Questions About Current U.S. Patent Policy*, 21 B.C. THIRD WORLD L.J. 69, 77 (2001).
214. *Id.*
215. *See id.*
216. Carroll, *supra* note 42, at 2456.
217. *Id.*
218. RYAN, *supra* note 36, at 94. *See also* Carroll, *supra* note 42, at 2456.
219. *Id.*
220. *Id.* at 2457.
221. *Id.*

international intellectual property agreements[222] including the Paris Convention.[223] WIPO receives applications once a national patent is filed, publishes reports about national patents, and initiates patent registration procedures in other countries.[224] Also, one of the main functions of WIPO is to resolve procedural discrepancies among the domestic patent systems of member countries.[225] Such procedural discrepancies became apparent when comparing the United States patent filing system with the filing systems in other countries.[226] While the United States grants priority filing status to proven inventors of patentable items, almost every other country bases its patent priority on the filing date of the patent application.[227] Since in many of the latter, first-to-file jurisdictions, publication of an inventor's discovery precludes the inventor from obtaining a patent on his or her invention, problems arise in trying to harmonize these two systems.[228]

Although WIPO's efforts to resolve procedural discrepancies between member countries seemed to succeed, questions have since been raised as to its effectiveness.[229] While WIPO held the position to oversee international intellectual property systems, it had no enforcement mechanism to assure that a member's laws complied with the minimum requirements.[230] While less-developed countries regarded WIPO as a hospitable forum for their concerns, developed countries considered it to be indifferent to their needs.[231] Developed countries, including the United States, claimed that WIPO did not promote more stringent intellectual property systems among its member countries.[232] They asserted that the standards of the Paris Convention adopted by WIPO were too weak to provide adequate international patent protection.[233] They pointed out the situation where the less-developed countries had become important sources of the production of intellectual property products, and much of production was pirated.[234] Under the standards of the Paris Convention, even in member countries that belonged to the patent treaty, local laws offered

222. *Id.* The lists of international agreements on intellectual property rights administered by WIPO are: Berne Convention, dealing with copyrights; Madrid and Lisbon Agreements, dealing with repression of false or deceptive indications of source on goods, and protection and registration of appellations of origin, and the Rome Convention, dealing with performers, producers of phonograms, and broadcasting organizations. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. DORIS ESTELLE LONG & ANTHONY D'AMATO, A COURSEBOOK IN INTERNATIONAL INTELLECTUAL PROPERTY 135 (2000).

231. *Id.*

232. Carroll, *supra* note 42, at 2458.

233. RYAN, *supra* note 36, at 104.

234. *Id.*

little chance of remedy for infringement.[235] Developed countries realized that they could not prevent their developed intellectual property products from being pirated under WIPO.[236]

Since many developed countries questioned the effectiveness of WIPO, a new alternative proposal was needed.[237] The alternative is the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).[238] To reform the international intellectual property institutions, the United States established the Advisory Committee on Trade Policy and Negotiation (ACTPN),[239] led by the CEOs of Pfizer and IBM.[240] The ACTPN persuaded the United States Trade Representative (USTR) that multilateral trade negotiations should be used to adapt the institution to a world economy in which less-developed countries were major producers of intellectual property goods and developed countries owned the intellectual property rights of goods produced by less-developed countries.[241] The ACTPN contended patent protection regulations should be harmonized at a high standard to protect the intellectual property rights of developed countries and prevent patent infringement by less-developed countries.[242] Consequently, persuaded by U.S. business interests, the USTR constructed a GATT strategy.[243] Before 1986, a Ministerial Declaration was issued in Geneva, and the new GATT round, the Uruguay Round, began.[244] As a result of this Declaration, TRIPS was included in the GATT.[245]

---

235. *Id.*

236. *See id.*

237. *See* Carroll, *supra* note 42, at 2459.

238. *Id.*

239. RYAN, *supra* note 36, at 105. The ACTPN was established by the 1979 Trade Act to institutionalize business advice to the president. *Id.*

240. *Id.*

241. *See id.*

242. *Id. See also infra* note 245.

243. RYAN, *supra* note 36, at 105. The main concern of the GATT rounds of negotiations in the 1950s was tariff reduction. *Id.* An "offer-concession" negotiation scheme was developed. *Id.* Under this scheme, the major trading states bargained in an essentially bilateral fashion, requesting and offering concessions, trading off agreements in one product area for those in another. *Id.* In the Kennedy Round of tariff negotiations in the 1960s, a "linear-cut" negotiation scheme whereby an across-the-board cut was the starting point for exceptions-oriented bargaining. *Id.* In the Tokyo Round from 1973 to 1979, a multilateral trade negotiations forum proved capable of winning international agreements to reduce nontariff trade barriers. *Id.* Nontariff barriers were unreasonable customs procedures, import-licensing schemes, and export subsidies that posed special challenges to trade negotiations because they were difficult to quantify and, thus, tricky to value and weigh when offers and concessions were being made. *Id.*

244. Carroll, *supra* note 42, at 2459. The Ministerial Declaration, written by the Swiss and Colombian ambassadors, gave the following mandate to the negotiators:

> In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate, as appropriate, new rules and disciplines.

TRIPS is the most recent, and most comprehensive, multinational treaty dealing with the protection of traditional intellectual property.[246] The purpose of TRIPS is "to reduce distortions and impediments to international trade [by] taking into account the need to promote effective and adequate protection of intellectual property rights and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. . . ."[247] In other words, TRIPS sets out the minimum standards of protection to be provided by each member country.[248] TRIPS adopts the long-established, minimum substantive norms established in the Berne Convention for the Protection of Literary and Artistic Work, [249] governing copyrights, and the Paris Convention for the Protection of Industrial Property,[250] governing patents, and trademark.[251] TRIPS includes provisions

---

> Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT. These negotiations shall be without prejudice to other complementary initiatives that may be taken in the WIPO and elsewhere to deal with these matters.

GERVAIS, *supra* note 25, at 11.

245. Carroll, *supra* note 42, at 2459. The TRIPS agreement was signed into United States law by President Clinton in December 1994 as part of the Uruguay Round. *Id.* at 2460.

246. Long, *supra* note 206, at 249-50.

247. Fecteau, *supra* note 213, at 77.

248. *Id.* at 78. *See also* World Trade Organization, *TRIPS: A More Detailed Overview of the TRIPS Agreement*, *at* http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (n.d.) (last visited Oct. 28, 2005).

249. Long, *supra* note 206, at 250. Berne Convention for the Protection of Literary and Artistic Works was signed in 1886. RYAN, *supra* note 36, at 100. Since being signed, it has been amended many times. *Id.* WIPO's International Bureau that receives financial assessments from member countries and charges fees for the services, administers the Berne Convention. *Id.* The Berne Convention required members to grant the identical level of protection to domestic and foreign intellectual property owners, like many other multinational and bilateral treaties. Long, *supra* note 206, at 250. However, the Berne Convention did not merely require establishing minimum substantive standards of protection that members were required to meet in their domestic laws. *Id.* at 252. The Convention currently requires copyright protection for literary and artistic works including every production in the literary, scientific and artistic domain whatever may be the mode or form of its protection. *Id.* It requires that authors be granted a term of protection of no less than the life of the author, plus fifty years, for their copyrighted works. *Id.* Also, the authors should be given the right to control the reproduction of their works, their translation and their public distribution, performance and display under the Convention. *Id.* The United States acceded to the Convention in 1989. *Id.*

250. Long, *supra* note 206, at 250. The Paris Convention for the protection of industrial property was signed in 1883 and periodically amended in the twentieth century. RYAN, *supra* note 36, at 94. Instead of obligating minimum standards of patent protection among its members, each Paris Union member freely offers any standard of patent protection it wishes. *Id.* However, the Convention requires national treatment that demands members not discriminate against foreign property owners. *Id.* The Paris Convention requires members to provide patent owners a right of priority one year from the date of national filing in which to file patent applications in members; independence of existence so that forfeiture of a patent in one country does not result in world-wide forfeiture, and the right of the inventor as such in the patent. Long, *supra* note 206, at 254.

251. Long, *supra* note 206, at 250.

protecting a broad range of intellectual property rights, including patents, copyrights, trademarks, geographical indications, and industrial designs.[252] TRIPS patent provisions allow a twenty-year term of protection from the time of filing and define patentable subject matter as any new development that involves an inventive step and an industrial application.[253] In addition, TRIPS strengthens international patent protections by prohibiting discrimination against foreign patents.[254] While guaranteeing strengthened patent protections to all member countries, TRIPS includes provisions that exclude certain subject matter from patentability for a limited time, such as products that protect human, plant, or animal life and health, or products that are harmful to the environment.[255]

The provisions of TRIPS mirror the U.S. patent requirements of novelty, non-obviousness, and utility.[256] Also, the TRIPS Agreement stated that the World Trade Organization (WTO) Council for TRIPS would monitor compliance with TRIPS provisions and oversee disputes between member countries.[257] The WTO Council has resolved patent enforcement problems that existed before trade sanctions were imposed.[258] However, it tends to pass resolutions in favor of developed countries.[259]

For instance, India and Pakistan failed to comply with the requirement of enacting an intellectual property law system.[260] TRIPS required these countries to pass new patent legislation that conformed to TRIPS requirements and to set up mailbox systems for holding applications.[261] The applications in the mailbox would receive priority dates as of the dates they were originally submitted if these countries enacted a patent system complying with TRIPS.[262] When India and Pakistan failed to comply with the mailbox requirement under TRIPS, the United States filed dispute resolution proceedings through the WTO Council against each country.[263] When Pakistan complied with this requirement, the United States dropped its complaint.[264] Also, the WTO Appellate Body upheld a panel ruling in favor of the United States against India, thereby making India follow mailbox rule obligations, despite significant domestic opposition.[265]

---

252. Carroll, *supra* note 42, at 2460.
253. *Id.*
254. *Id.*
255. *Id.*
256. Fecteau, *supra* note 213, at 78.
257. *Id.*
258. *Id.*
259. *See id.*
260. *Id.*
261. *Id.* at 79.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*

In creating a system granting patents on agricultural and pharmaceutical products, India complied with TRIPS Article 27.[266] However, this requirement does not take into account the differing cultural perspectives of indigenous groups in member countries regarding the modification of biological resources, particularly, discovering and nurturing the medicinal and agricultural uses of plants over the centuries.[267] Nevertheless, less-developed countries were economically pressured by developed countries to sign TRIPS, preventing them from passing protectionist laws.[268] Consequently, TRIPS Article 27 directly opposes CBD's goals of protecting the genetic resources of less-developed countries.[269]

B. Convention on Biological Diversity

The CBD was first presented at the United Nations Conference on Environment and Development (UNCED),[270] which took place in Rio de Janeiro in June 1992.[271] It came into force in 1993 and has 182 contracting parties.[272] According to international environmental concerns at UNCED, the CBD specifically focused on conversations about the Earth's biological diversity and its sustainability through national strategies, plans, and programs.[273] In the CBD, intellectual property rights were addressed in three

---

266. *Id.* at 80. TRIPS Article 27 states that member countries must protect property rights in genetic plant resources "either by patents or by an effective sui generis system or by any combination thereof." *Id.*

267. *Id.* at 81.

268. *Id.*

269. *Id.*

270. Carroll, *supra* note 42, at 2461. This conference is commonly referred to as the "Earth Summit" or the "Rio Summit." *Id.* UNCED was unprecedented for a UN conference, both in terms of its size and the scope of its concern. United Nations, *UN Conference on Environment and Development (1992), at* http://www.un.org/geninfo/bp/enviro.html (May 23, 1997) Twenty years after the first global environment conference, the UN sought to help countries reconsider economic development and halt the destruction of natural resources and pollution of the earth. *Id.* The main messages of this conference were as followings:

> 1. Patterns of production—particularly the production of toxic components, such as lead in gasoline, or poisonous waste—are being scrutinized in a systematic manner by the UN and governments alike;
> 2. Alternative sources of energy are being sought to replace the use of fossil fuels which are linked to global climate change;
> 3. New reliance on public transportation systems is being emphasized in order to reduce vehicle emissions, congestion in cities and the health problems caused by polluted air and smog;
> 4. There is much greater awareness of and concern over the growing scarcity of water.

Id.

271. Carroll, *supra* note 42, at 2461-62.

272. DUTFIELD, *supra* note 3, at 212.

273. Carroll, *supra* note 42, at 2462.

> CBD's overall objectives are: the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the

separate articles relating to indigenous peoples.[274] The first article sets forth "the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources."[275] The second article concerns "access to and transfer of technology which makes use of those resources, on mutually agreed upon terms, including technology protected by patents and other intellectual property rights" to less-developed countries.[276] The third article stated that developed countries must "take all practicable measures to promote and advance priority access on a fair and equitable basis . . . to the results and benefits arising from biotechnologies" when based upon genetic resources provided by less-developed countries.[277] Since many indigenous communities are dependent on biological resources, less-developed countries support the CBD.[278]

C. *TRIPS, Article 27.3(b); Traditional Knowledge and Biodiversity*

Among Articles in the TRIPS agreement, Article 27 defines which inventions governments should make eligible for patenting and what they can exclude from patenting.[279] Specifically, Article 27.3(b)[280] focuses on biotechnological inventions.[281] It is under review in WTO Council, as required

---

> benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies.

STAFFLER, *supra* note 2, at 28.

274. Carroll, *supra* note 42, at 2462.

275. *Id.*

276. *Id.*

277. *Id.* U.S. President George [Insoon, please insert the appropriate middle initial to make clear which President George Bush.] Bush refused to sign the Convention on Biological Diversity, reasoning that if the United States biotech industry was forced to disclose secrets or give away products, its incentive to invent would be lost. *Id.* at 2963. Many biotech-related firms and groups in the United States praised President Bush's refusal to sign. *Id.* However, due to the pressures from international environmental groups, Madeleine Albright, U.S. Representative to the UN, signed the Convention. *Id.*

278. *See* Agenda for Change, *Convention on Biological Diversity, at* http://www.iisd.org/rio+5/agenda/biodiversity.htm (n.d.) (last visited Oct. 28, 2005).

279. World Trade Organization, *TRIPS: Reviews, Article 27.3(B) and Related Issues, Background and The Current Situation, at* http://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm (last modified Jun. 24, 2004)[hereinafter *TRIPS: Reviews, Article 27.3(B)*].

280. *Id.* Article 27.3(b) states:

> Members may exclude from patentability (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generic system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

GERVAIS, *supra* note 25, at 217-18.

281. GERVAIS, *supra* note 25, at 217-18.

by the TRIPS Agreement since December 1998.[282] Among the most controversial issues for the TRIPS Council were the discussions about the review of Article 27.3(b).[283] The Doha Ministerial Declaration[284] addressed the review of Article 27.3(b) by broadening the discussion.[285] The issues raised in the discussions included how to apply the existing TRIPS provisions on patenting biotechnological inventions, how to define the meaning of effective "sui generis"[286] protection for new plant varieties, how to deal with the traditional knowledge, folklore and genetic material, the rights of the communities where these originate, and how to implement the TRIPS Agreement and the CBD together.[287]

Addressing these issues, many arguments were raised.[288] First, arguments concerning protection for plant varieties and animal inventions were raised.[289] Proponents for protection by patents argued that adequate protection at an international level was necessary to promote investment and facilitate transfer of technology.[290] However, counter-arguments urged that the broad patent protection would facilitate bio-piracy.[291] Second, different views about the scope of the exceptions to patentability were raised:[292] whether a part of the

---

282. *See id.* at 227.

283. *Id.* at 227.

284. *Id.*

> Four issues on the agenda of the Doha Ministerial Conference were the negotiations on geographical indications (both the negotiations for a multilateral system for notifying and registering geographical indications and the issues of expansion of the scope of additional protection); a separate declaration on TRIPS and health; work on clarifying the relationship between the TRIPS Agreement and CBD; and a number of implementation issues, including non violation complaints and the obligations in respect of technology transfer.

Id. at 43.

285. *TRIPS: Reviews, Article 27.3(B), supra* note 279. In Doha Ministerial Declaration, Article 71.1 was also addressed with Article 27.3(b). GERVAIS, *supra* note 25, at 217. Article 71.1 concerns review and amendment of the TRIPS Agreement by WTO Council. *Id.* at 368. Article 71.1 states that the WTO Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. *Id.* at 368-69. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. *Id.* at 369. The Council may also undertake reviews in light of any relevant new developments which might warrant modification or amendment of this Agreement. *Id.*

286. *TRIPS: Review, Article 27.3(B), supra* note 279. The sui generis system of rights is an alternative, unique form of intellectual property protection, designed to fit a particular context and needs. Geoff Tansey, Trade, *Intellectual Property, Food and Biodiversity; Key issues and options for the 1999 review of Article 27.3(b) of the TRIPS Agreement, available at* http://quno.org/geneva/pdf/economic/Discussion/Trade-IP-Food-Biodiversity-English.pdf (last modifed May 24, 2005)

287. *TRIPS: Reviews*, Article 27.3(B), *supra* note 279.

288. *See* GERVAIS, *supra* note 25, at 228-30.

289. *Id.* at 228.

290. *Id.*

291. *Id.*

292. *Id.*

plant or animals is patentable; whether microorganism should be excluded from patentability, and whether classification in Article 27.3(b) should correspond to classification in the CBD.[293] Third, arguments about sui generis protection of the plant varieties and elements of effective sui generis protection were addressed.[294] While proponents of sui generis protection argued that protection of plant varieties is beneficial for agricultural development, others believed that such protection is disadvantageous for agriculture or traditional communities and knowledge of less-developed countries.[295] Also, the issue of elements of effective sui generis protection, such as subject-matter of a sui generis right, duration of the right, or procedural requirements was addressed.[296] Fourth, arguments concerning traditional knowledge were raised.[297] Less-developed countries alleged that the protection of plant varieties, especially plants with medicinal characteristics, has an effect on the protection of traditional knowledge.[298] These countries believed that the current Article 27.3(b) is flexible enough to protect the traditional knowledge and indigenous communities. However, developed countries expressed the view that the sui generis system in TRIPS primarily targeted the protection of the commercial varieties of plants, and TRIPS did not prevent members from protecting farmers' rights within their national sui generis system of protection.[299]

D. Relationship between CBD and TRIPS

The discussions raised under the TRIPS Council have dealt with the relationship with the CBD, as well as the review of Article 27.3(b).[300] However, depending on the countries, the positions on these issues differ.[301] Some countries argue that there is inherent conflict between TRIPS and the CBD and, therefore, TRIPS should be amended to remove such conflict.[302] Many less-developed countries have held this position.[303] Proponents of this view argue that patentability of genetic material under TRIPS leads to appropriation of the natural sources and materials by private parties and that it is inconsistent with the sovereign rights of countries supported by the CBD.[304]

---

293. *Id.*
294. *Id.* at 229.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.* In addition to these four issues, the issues such as ethical exceptions to patentability, relation to Union for Protection of New Varieties of Plants (UPOV), and transfer of technology were raised. *Id.* at 228-30.
300. *Id.*
301. *See* STAFFLER, *supra* note 2, at 23.
302. GERVAIS, *supra* note 25, at 230-31.
303. *See* STAFFLER, *supra* note 2, at 23.
304. GERVAIS, *supra* note 25, at 231. The main obligations of CBD are: 1) recognition of the sovereign rights of States over their biological resources; 2) access to biological resources

They also argue that TRIPS does not require prior informed consent and benefit-sharing, as provided for in CBD.[305] Proponents of this view suggest amendments to exclude patentability of life forms or inventions based on traditional or indigenous knowledge from TRIPS.[306]

On the contrary, the other countries argue that TRIPS does not conflict with the CBD.[307] In general, developed countries, including the United States, follow this view.[308] Proponents of this view argue that the objectives and purposes of TRIPS and the CBD are different, and granting patent rights over genetic material does not conflict with provisions of the CBD regarding the sovereign rights of countries over their genetic material.[309]

Nonetheless, less-developed countries argue that they feel consistently exploited because of structural imbalance between countries rich in biological diversity and those strong in technological and legal instruments.[310] They contend the CBD is intended to conserve and use biological diversity of less-developed countries on a long-term basis, while TRIPS is intended to provide private property rights over products and processes.[311] According to the less-developed countries' standpoint, the TRIPS Agreement influences the provisions of the pre-existing CBD in the access to genetic resources, the fair and equitable sharing of benefits from the utilization of genetic resources, and the respect for traditional knowledge held by the indigenous communities.[312]

First, less-developed countries argue that CBD Article 15.1 recognizes the sovereign rights of States over their national resources and that national governments might determine access to genetic resources.[313] Also, under CBD Articles 14.4 and 14.5, the CBD simply submits access to genetic resources to the "prior informed consent" of the party on mutually agreed terms aimed at sharing the benefits arising from the utilization of such resources.[314] However, on the contrary, it is said that biological resources should be subject to private intellectual property rights under TRIPS Articles 21 and 27.[315] Thus, less-developed countries assert that the conflict arises, while national sovereignty in the CBD implies that countries have the right to prohibit patents on life forms, and TRIPS requires provisions of intellectual property rights on life forms.[316]

---

can only occur with the prior and informed consent of States, and 3) protection and promotion by the signatories of the rights of communities, farmers, and indigenous peoples vis-à-vis their biological resources and traditional knowledge systems. STAFFLER, *supra* note 2, at 28-29.

305. GERVAIS, *supra* note 25, at 231.
306. *Id.*
307. *Id.*
308. *See* STAFFLER, *supra* note 2, at 23.
309. GERVAIS, *supra* note 25, at 231.
310. STAFFLER, *supra* note 2, at 29.
311. *Id.*
312. *See id.*
313. *Id.* at 30.
314. *Id.*
315. *Id.*
316. *Id.* at 29.

Second, according to CBD Articles 15.7 and 19.2, the use or exploitation of biological resources must give rise to equitably shared benefits.[317] However, under TRIPS Article 27.1, patents must be provided for all fields of technology, and intellectual property rights must protect the use or exploitation of biological resources.[318] There is no mechanism for sharing benefits between a patent holder in one country and the donor of material in another country from which the invention is derived.[319] Thus, less-developed countries argue for this issue because while CBD gives developing countries a legal basis to demand a share of benefits, TRIPS does not mention that legal authority for benefit-sharing.[320]

Third, CBD Articles 18.4 and 8(j) state that the use or exploitation of traditional knowledge, innovations, and practices relevant to the use of biodiversity must give rise to equitably shared benefits.[321] However, as with the use or exploitation of biological resources, there is no mechanism to share benefits with the less-developed country from whose traditional knowledge the invention is derived in TRIPS.[322] For this issue, less-developed countries also argue that TRIPS does not have any legal system to guarantee benefit-sharing for their traditional knowledge or their natural resources.[323]

E. Proposals to Settle the Dispute

As previously stated, the main concerns in the relationship between TRIPS and CBD are patenting the genetic material and protection of the traditional knowledge.[324] As presented in illustrations in Part III, there have been disputes about patenting the genetic material as well as patents using traditional knowledge between developed countries and less-developed countries.[325] After the issues were raised, the discussion in the TRIPS Council went into considerable detail with a number of proposals offered to settle the disputes between developed countries and less-developed countries.[326] Several countries including the United States, India, and Thailand submitted the proposals.[327]

The European Union proposed to examine "a requirement that patent applicants disclose the origin of genetic material as a subject in itself, with legal consequences outside the scope of patent law."[328] Switzerland proposed to

317. *Id.*
318. *Id.* at 24.
319. *Id.* at 29.
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. GERVAIS, *supra* note 25, at 231-32.
325. *See supra* Part III.B, Part III.C.
326. *TRIPS: Reviews, Article 27.3(B), supra* note 279.
327. *Id.*
328. *Id.*

amend WIPO's Patent Cooperation Treaty (PCT)[329] so that domestic laws may ask inventors to disclose the origins of genetic resources and traditional knowledge for patent application.[330] The African Group wants TRIPS to prohibit patenting of all life forms, including plants, animals, and micro-organisms.[331] This Group also wants sui generis protection for plant varieties to preserve farmers' rights to use and share harvested seeds.[332]

The other group of less-developed countries,[333] including India and Thailand, submitted a proposal to amend TRIPS so that patent applicants are required to disclose the origins of the biological resources and traditional knowledge used in the inventions, evidence that they received prior informed consent, and evidence of fair and equitable benefit sharing.[334] The proposal of this group reflects the provisions of CBD.[335] In contrast, the United States argued that CBD's objectives on access to resources and traditional knowledge and on benefit sharing could be achieved through national legislation and contractual arrangements based on the legislation that included commitments on disclosure.[336]

V. CONCLUSION

Today, as biotechnology develops, patent law to protect patent rights of life forms also has been expanded.[337] Since biotechnology is a high-risk and research-intensive activity requiring large amounts of investment, the importance of patent rights is emphasized.[338]

Currently, the United States, one of the most technologically developed countries in the world, has been particularly concerned both with biotechnology applications and products and with patent law.[339] Having jumped on the biotechnology boom, the United States turned its attention to an unconventional form of resources: living materials or traditional knowledge found in less-

329. *Id.* International Patent Cooperation Union established PCT. *Id.* PCT, signed in 1970 and later amended, makes it possible to seek patent protection simultaneously in each of a large number of countries by filing an international patent application. RYAN, *supra* note 36, at 96. The international patent application through PCT contains the name of the application, the title of the invention, a description including an abstract, the claims for patent, and the member states or region in which a patent is sought. *Id.* The application through PCT is the same as if the application had been independently filed in the state's patent office. *Id.*

330. *TRIPS: Reviews, Article 27.3(B), supra* note 279.

331. *Id.*

332. *Id.*

333. *Id.* The other countries in this group were Bolivia, Brazil, Cuba, Ecuador, Peru, and Venezuela. *Id.*

334. *Id.*

335. *See id.*

336. *Id.*

337. *See supra* Part I.

338. *See* DUTFILED, *supra* note 3, at 152-53.

339. *See supra* Part I.

developed countries.[340] However, since the United States started to develop the natural resources of less-developed countries, there have been debates about whether this activity by the United States is bio-prospecting or bio-piracy.[341]

The United States has broadened the range of patentability of life forms since the decision in *Diamond v. Chakrabarty*.[342] In *Chakrabarty*, the Court held that the micro-organism can be patented by permitting the patenting of "anything under the sun that is made by man."[343] After this decision was made, the subsequent decisions for life forms confirmed the holding of *Charkrabarty*.[344]

Disputes arose between the United States and less-developed countries since the United States developed the natural resources of less-developed countries and patented the products by its broad range of patentability.[345] As presented in the case studies of the neem tree and rosy periwinkle, the United States invented or produced biotechnological products or medicine using the natural resources and traditional knowledge of less-developed countries.[346]

Although the indigenous people of less-developed countries possessed their resources and the traditional knowledge to use those resources for over a thousand years, they were deprived of their rights over those materials and that knowledge because of a lack of a well-organized legal system.[347] After the United States developed the resources from less-developed countries, the indigenous people could not access their own natural resources because of the high costs created by the U.S. company.[348] In another case, the indigenous people did not receive any compensation from the U.S. company, even though their traditional knowledge provided the main clues for the invention patented by the company.[349]

In the case of genetically developed crops, usually rice of less-developed countries, the situation is worse.[350] As shown in the case studies of basmati rice and jasmine rice, rice is the nutritional mainstay in less-developed countries and the main source of their incomes.[351] Although these countries developed and conserved many varieties of rice, they did not have patent rights in those varieties due to their weak patent law systems.[352] After the companies of the United States acquired samples of rice and genetically engineered those samples to make close substitutes, the rice export markets of less-developed

340. *Id.*
341. *See supra* Part II.A.
342. *See supra* Part II.C.
343. *Chakrabarty*, 447 U.S. at 307.
344. *See supra* Part III.C.
345. *See supra* Part III.B-C.
346. *See supra* Part III.B.
347. *Biotechnology vs. Indigenous knowledge, supra* note 121.
348. *The Neem tree, supra* note 117.
349. *Rosy Periwinkle, supra* note 157.
350. *See supra* Part III.C.
351. *Patenting of Asia's Rice Bowl, supra* note 164.
352. *See* Kerr, Hobbs & Yampoin, *supra* note 168.

countries were threatened.[353] A U.S. company even trademarked the traditional name of rice, "Basmati," and sold its rice under this name.[354] Consequently, less-developed countries lost not only their rights over their rice and know-how, but also their reputation for rice.[355] Often, this controversy over rice creates negative feelings among farmers and citizens of less-developed countries toward the United States.[356]

Then, is the development activity of the United States in less-developed countries bio-prospecting or bio-piracy? If developed countries and less-developed countries have different positions for the development of natural resources, what would be the best solution to this dispute? After the conflict between developed and less-developed countries over patents regarding traditional knowledge and natural resources was raised, efforts to resolve the conflict under an international treaty, such as TRIPS, have been on-going.[357]

TRIPS is known as the most comprehensive, multinational treaty dealing with the protection of intellectual property rights.[358] However, although TRIPS sets out standards of intellectual property protection for signatory nations to follow, issues such as the relationship between TRIPS and the CBD and the clarification of TRIPS Article 27.3 are still under review.[359] The parties are trying to find mutual agreements between developed countries and less-developed countries through this review process.[360] Although several countries have submitted proposals to resolve the disputes, the parties have not found a compromise.[361] Each country still holds to its own position.[362] A number of less-developed countries, including an African group, India, and Pakistan, proposed that TRIPS Article 27.3 be revised to exclude life forms from patenting or that countries should have full discretion to exclude any life form from patenting.[363] Offering an opposing view, the European Union and the United States seek to preserve the status quo of the existing TRIPS text.[364] They propose to preserve the present textual ambiguities of TRIPS that may be exploited in the implementation process, and they want to work through bilateral treaties on stronger intellectual property standards than TRIPS.[365]

Therefore, to resolve the disputes between the developed countries and less-developed countries, each side should step back. The United States, the most powerful country in the world, has a social responsibility to protect the

353. *See supra* Part III.C.
354. *Basmati Rice Update*, *supra* note 174.
355. *See supra* Part III.C.
356. *See supra* note 205 and accompanying text.
357. *See supra* Part IV.A.
358. Long, *supra* note 206, at 249-50.
359. *See supra* Part IV.B-C.
360. *See supra* Part IV.
361. *Id.*
362. *Id.*
363. *See supra* Part IV.E.
364. *Id.*
365. *Id.*

interests of countries unable to protect themselves. It should not deliberately interpret the TRIPS Agreement in a manner restrictive to less-developed countries. If it insists on its position without compromising with other countries, its development activities may be regarded as bio-piracy rather than bio-prospecting, and such activities may generate strong negative feelings from less-developed countries. On the other hand, less-developed countries should attempt to accelerate domestic industrialization and implement well-organized patent laws instead of resisting the agreements under the international treaty; only a well-organized national patent law system will protect them from this fast developing world.