PURITY LOST:  
THE PARADOXICAL FACE OF THE NEW  
TRANSNATIONAL LEGAL BODY  

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“Evolution means nothing but growth in the widest sense of that word. Reproduction, of course, is merely one of the incidents of growth. And what is growth? Not mere increase. Spencer says it is the passage from the homogeneous to the heterogeneous—or, if we prefer English to Spencerese—diversification.”

“The fact is that complexity is self-potentiating. Complex systems generally engender further principles of order that produce yet greater complexities. Complex organisms create an impetus towards complex societies, complex machines towards complex industries, complex armaments towards complex armies. And the world’s complexity means there is, now and always, more to reality than our science—or for that matter our speculation and our philosophy—is able to dream of.”

INTRODUCTION

Modern international law seems to be in disarray. The classic doctrines of international law, with their focus on sovereignty, state consent, custom, and treaty, do not provide a satisfactory explanation for many of the practices and institutional structures that fill the global legal universe. The contemporary legal terrain seems to be characterized by overlapping jurisdictions, inconsistent doctrinal interpretations, and competing worldviews. But what are the social implications of the deepening fragmentation and increasing complexity of the global legal system? Some observers argue that these phenomena constitute a new global risk, which requires urgent collective response. Global constitutionalization is put forward in this context as a possible and appropriate reaction.1

** 1 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE §1.174 (Charles Hartshorne & Paul Weiss eds.) (1931).


Using the notions of purity and paradox, this Article develops an analytic framework by which the increasing complexity of the international legal system can be elucidated. Drawing on this framework, the Article considers the consequences of the complexification of the global legal system in terms of its stability and legitimacy. Rather than seeing the messy and complex nature of modern international law as a risk, this Article depicts it as an evolutionary achievement that extends the horizon of possibilities through which the international legal system can react to social pressures. In this light, attempts to purify the international legal system by appealing to grand theories—constitutional, moral, or other—are ill-conceived for two reasons: first, because these grand theories fail to recognize the innate paradoxicality of the law; and second, because such theories constitute a threat to the legitimacy and resilience of the global legal system. This Article explores, in this context, alternative institutional models that draw upon—rather than oppose—the complexity and paradoxicality of modern international law.

This Article opens with Section I, a discussion of the Westphalian scheme of validity (what I will call “the purity thesis”). It then considers, in Section II, the invocation of the Westphalian scheme within new international regimes such as the World Trade Organization and the International Criminal Court and argues that the Westphalian scheme creates irresolvable paradoxes within these regimes. To facilitate this argument, this Article develops a model of paradoxicality in philosophy and law. Section III explores alternative forms of validation that claim to fill the normative void caused by the demise of the Westphalian model. On close inspection, these alternative forms of validation prove equally problematic, lacking both coherence and completeness. Section IV takes a step back by looking into the history of international legal theory for the foundations of the Westphalian scheme of validity. This historical examination demonstrates that international law has never been pure. I show that this impurity closely parallels the problem of grounding in philosophy, especially as reflected in the semantic paradox entitled “the Truth-Teller Paradox.” The last part of this section explores the role of paradoxes in the dynamic of autonomous and self-organizing systems (such as law). Given the impurity of international law historically, what then is unique about the current state of international law? This question is addressed in Section V, which argues that what is unique about the current system of international law is not the impurity of our forms of validation, but the proliferation of multiple, paradoxical validating techniques that are invoked simultaneously at the forefront of the international legal body. The contemporary universe of transnational law is characterized by a shift from (imaginary) purity to multiple paradoxical-
ity—a process of polymorphosis. What are the practical consequences of this process? The remainder of this Article explores the sociological implications of this process, drawing on ideas from systems theory and ecology. It concludes, in Section IV, with a discussion of the false promise of global constitutionalism, setting it against an alternative institutional model: non-hierarchical reflexivity.

I. PURITY: THE WESTPHALIAN NARRATIVE

The pure conception of international law aspired to provide a complete and coherent account of the structure of international law. In particular, it argued that international law regulates—in a complete and coherent fashion—the creation of new (international) norms.2 A succinct description of the Westphalian narrative can be found in an article published by Leo Gross in 1948:

The Peace of Westphalia . . . marks the end of an epoch and the opening of another. It represents the majestic portal which leads from the old into the new world. . . . In the political field it marked man’s abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority. The idea of an authority or organization above the sovereign states is no longer. . . . This new system rests on international law and the balance of power, a law operating between rather than above states and a power operating between rather than above states.3

In the legal domain, the Westphalian narrative was translated into an articulated doctrine of validity and authority. This doctrine—in the form explicated here—constitutes what I call the pure vision of international law.4 One of the most eloquent advocates of the purity thesis was Josef

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4. This vision can be associated, of course, with the positivist school, whose most obvious representative in the early twentieth century was Hans Kelsen. See Martti Koskenniemi, Lauterpacht: The Victorian Tradition in International Law, 8 Eur. J. Int’l L. 215, 216–217 (1997); Jorg Kammerhofer, Uncertainty in the Formal Sources of Inter-
Kunz argued that international law regulates the creation of international norms through two hierarchically ordered procedures: custom and treaty. Both are based on the notion of state consent. Custom, Kunz argued, is the hierarchically higher form of norm creation in international law. “Custom-produced, general international law is the basis; the customary principle of ‘Pacta sunt servanda’ is the reason for the validity of all particular international law created by the treaty procedure.” International law also lays down the conditions under which the procedure of custom creates valid norms of general international law. These two conditions are usage and opinio juris. Jus cogens norms, to the extent that they have not been codified in treaties, constitute another type of customary law. This legal articulation of the Westphalian narrative seeks to provide a complete and coherent account of the way in which international law regulates the creation of new norms. This account, although without explicit hierarchical order, also underlies Article 38 of the Statute of the International Court of Justice, which states that international disputes should be resolved primarily through the application of international conventions and international custom.


7. Kunz, supra note 5, at 665. On the interpretation of these two conditions, see Kammerhofer, supra note 4, at 548.

8. See Madeline Morris, High Crimes and Misconceptions: The ICC and Non-party States, 64 LAW & CONTEMP. PROBS. 13, 57 (2001) (with respect to the prohibitions against genocide, war crimes, and crimes against humanity).

9. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S 993. It is also echoed in Article 53 of the Vienna Convention, which states that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law,” thus reflecting the hierarchical order postulated by Kunz. Vienna Convention, supra note 6, art 53. Kunz, supra note 5, at 665.
II. Paradoxes and Inconsistencies in the Current Invocations of the Westphalian Narrative

In describing the demise of the Westphalian legal order, writers usually refer to processes of norm development in non-state arenas, the increasing importance of non-state actors such as non-Governmental organizations ("NGO") and multinational enterprises ("MNE"), the law-making powers of international tribunals, and the emergence of general principles of global humanitarian law.\(^\text{10}\) However, despite the ongoing talk about the demise of the Westphalian order, its underlying principles of state sovereignty and state consent continue to play an important role in the structure of various international legal regimes. It is interesting, therefore, to consider the way in which the Westphalian scheme of validity (as postulated by Joseph Kunz and Leo Gross) is invoked in contemporary treaty regimes. This Section explores this question in the context of two key treaty regimes: the World Trade Organization ("WTO") and the International Criminal Court ("ICC"). I will argue that the invocation of the Westphalian validity doctrine in these regimes generates deep inconsistencies that undermine its claim to provide coherent and complete foundations for modern international law.

Exposing the paradoxes and inconsistencies associated with the Westphalian doctrinal apparatus requires that I first elucidate the meaning of paradox in both logic and law. This theoretical detour also lays the groundwork for the broader thesis set forth in Sections IV and V of this Article.

A. Detour: Paradoxes and Inconsistencies in the Law

1. Paradoxes: A General Exposition

What do we mean by the concept of "paradox"? The term is sometimes used informally to designate a statement that conflicts with the common view.\(^\text{11}\) Within the realm of law, this understanding can be applied to any legal claim that challenges a received legal opinion. I am interested in other forms of paradoxes—not paradoxes that reflect a transitory inter-
pretative dispute but, rather, those that expose a deeper social and linguistic problematic.

Philosophical literature offers various definitions of this more challenging understanding of the concept of paradox. One view focuses on the deep inconsistency associated with paradoxes. Nicholas Rescher, for example, defines paradox as a “set of propositions that are individually plausible but collectively inconsistent.”12 Another view emphasises the paradox’s problematical conclusion, taking paradox as “an argument that begins with premises that appear to be clearly true, that proceeds according to inference rules that appear to be valid, but that ends in contradiction.”13 Other thinkers, such as W.V. Quine, have highlighted the reasoning pattern that generates the paradox: “[a]n antinomy produces a self-contradiction by accepted ways of reasoning. It establishes that some tacit and trusted pattern of reasoning must be made explicit and henceforward be avoided or revised.”14 In light of these general reflections, it is possible to distinguish between two major types of paradoxes.15 Paradoxes of coherence expose a deep inconsistency in some well-defined set of sentences or propositions,16 while semantical paradoxes involve notions of truth, falsity, and reference, and challenge the way we reason with these notions.17

15. This distinction is not exhaustive. See Rescher, supra note 12, at 72–73.
16. I use the term “deep inconsistency” to distinguish such paradoxes from mere contradictions. The difference between the two terms lies in the way in which paradoxes make the “contradiction appear inescapable.” See Peter Suber, The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change 276 (Peter Lang Publishing) (1990). I will sometimes use the term “logical paradoxes” to refer to this type of paradoxes.
17. Another useful taxonomy is Quine’s distinction between “veridical” and “falsidical” paradoxes. Quine, supra note 14, at 4–5. Veridical paradox is, in effect, a truth-telling argument or proof; it establishes that some proposition is true or false (e.g., the Barber Paradox). Falsidical paradox, by contrast, “is one whose proposition not only seems at first absurd but also is false, there being fallacy in the purported proof.” A typical example is Zeno’s paradox of Achilles and the tortoise. Id. at 5.
To get a better sense of the notion of paradox, let us examine a specific and famous example, the paradox of the liar (“Liar Paradox”). Consider the following sentence:

\[ K_1 \text{ This sentence is false.} \]

We can also present this sentence in the following format: \[ K_1 \text{ is false.} \]

\( K_1 \) produces a paradoxical loop: if it is true, it is false, and if it is false, it is true. Attributing a stable true value to this sentence seems to be impossible. It is possible to structure a similar paradox that is hetero-referential, rather than self-referential. Consider the following set of sentences which, following Roy Sorensen, I will call the “Looped Liar Paradox”:

\[
\begin{align*}
\text{Plato:} & \quad \text{What Socrates says is true.} \\
\text{Socrates:} & \quad \text{What Plato says is false.}
\end{align*}
\]

Like the Liar Paradox, it is impossible to attribute stable and coherent truth values to this pair.

A feature common to both the Liar Paradox and the Loop Liar Paradox is their semantic instability: their perpetual oscillation between truth and falsity. The Liar Paradox and the Loop Liar Paradox seem to suffer from some kind of semantic pathology that is unsettling because of the way in which it challenges our conventional grammatical structures and our usage of basic notions such as truth and reference.

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18. The discussion of semantical paradoxes involves the question of the meaning of truth and falsity. However, because of the deep controversy that exists within philosophy with respect to the meaning of truth, I have decided not to delve into this question. Within philosophy, one can find five major theories of truth: the Correspondence Theory; the Semantic Theory; the Deflationary (or Minimalist) Theory; the Coherence Theory, and the Pragmatic Theory. For a useful introduction to this debate, see Bradley Dowden & Norman Swartz, *Truth*, in THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY, http://www.iep.utm.edu/t/truth.htm (last visited Sept. 12, 2007). Semantical paradoxes create a problem, though, for each of these theories. One initial assumption that I do make is that statements can be either true or false (the law of excluded middle).

19. Roy Sorensen, *A Brief History of the Paradox: Philosophy and the Labyrinths of the Mind* 211 (Oxford University Press 2003). This version of the liar can be traced back to the fourteenth century medieval thinker John Buridan. *Id.* at 201–15.


22. See also Adam Reiger, *The Liar, the Strengthened Liar, and Bivalence*, 54 ERKENNNTIS 195 (2001).
2. Paradoxes in Law: Incoherence and Paralysis

Logical and semantical paradoxes have existed for more than two thousand years. Early versions of the Liar Paradox can be found in Christian scriptures and Greek and medieval writings. These paradoxes have not, however, brought human thought to a standstill. While philosophers have continued to deliberate about the proper solution to the Liar Paradox, people have continued to use the notions of truth and falsity in their everyday reasoning and scientists have continued their search for true descriptions. However, the presence of paradoxes and deep inconsistencies in the law seems more threatening and calls into question the capacity of the law to fulfill its function as a reliable arbiter of social conflicts and as a source of normative expectations. Paradoxes can undermine these legal functions, either by leading to paralysis and deadlocks or by generating chaos and indeterminacy, causing people to replace the law with other forms of governance.

Thus, the puzzle of legal paradoxicality deserves closer scrutiny. The first step toward resolution of this puzzle is to identify the proper referent of legal paradoxes. The most suitable candidate for this role is what I will call a “legal set”: a sequence of sentences that invoke, explicitly or implicitly, the legal code (the distinction between legal and illegal). A legal set may include three major types of normative sentences: norms, norm-propositions (statements about norms), or meta-propositions (statements about the entire legal system). These types of normative sentences may be: prescriptive (ought to), permissive (may) or prohibitive (may not). Law includes additional types of norms, such as norms

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23. Sorensen, supra note 19, at 197. Other paradoxes, such as the paradoxes of motion attributed to Zeno, are also ancient. See id. at 49. Sorensen’s book provides a comprehensive discussion of the history of paradox.

24. See Jose Juan Moreso, Putting Legal Objectivity in its Place, 6 ANALISI E DIRITTO 243, 243 (G. Giappichelli ed., 2004) (“[L]egal knowledge is obtained from statements like ‘Legally, all F have the obligation to pay T’ or ‘Legally, x has the right to recover damages D’. These statements express norm propositions. Norm propositions are the meanings of norm statements. . . . Normative statements have a descriptive nature; they are statements about the existence of norms. . . . Norm propositions about the existence of legal norms can be called ‘legal propositions’.”) (citations omitted).

25. See Sven Ove Hansson, Situationist Deontic Logic, 26 J. PHIL. LOG. 423, 428 (1997). “All Israeli citizens are obligated not to emit sewage into the sea” is an example of a prohibitive norm. “Israeli law prohibits the emission of sewage into the sea” is an example of norm proposition; it is a proposition about the existence of a legal norm. “The Israeli legal system is a combination of the common law and civil law traditions” is a meta-proposition. Two other normative types that are mentioned in the literature are: “it is gratuitous that” and “it is optional that.” Something is gratuitous if and only if it is not obligatory, and it is optional if and only if neither it, nor its negation, is obligatory. See
conferring public or private powers—competence norms (the competence to issue other norms) or determinative norms (norms that define certain concepts). A way in which a legal set may be formed is to extract a segment from a law’s printed history (understood as the entire genealogy of rules and case law pertaining to a particular legal domain). A paradox arises whenever a legal set, or a portion of it, is self-contradictory, and when this self-contradiction is supported by apparently good reasons.

Two primary features of legal paradoxes distinguish them from logical and semantical paradoxes. These differences influence, as I will demonstrate, the practical consequences of paradoxes in law. The first distinctive feature of legal paradoxes concerns the unique composition of the legal set. Because legal sets may include both norms and propositional statements, their contradictory form is not limited to conflicting attributions of truth and falsity. This is because norms are usually thought to lack truth value. The second distinctive feature of legal paradoxes, to which I will return later in Sections IV and V, relates to their dynamic quality. It reflects the fact that law is a social system and not a static register of norms. In other words, legal paradoxes influence the world of action and should be examined with this in mind.

Let me delay, for a moment, the discussion of the systemic impact of legal paradoxes and consider them in light of the peculiarities of a legal


28. A different but related problem is indeterminacy. See infra Section IV.B (discussing the Truth-Teller Paradox).

29. However, norm-propositions—propositions that state that a given action is obligatory (required), permitted (allowed), or forbidden (prohibited) according to a given norm—can have truth value.

30. As Henrik von Wright puts it: “Norms as prescriptions of human conduct . . . may be pronounced (un)reasonable, (un)just, or (in)valid when judged by some standards which are themselves normative—but not true or false.” Georg Henrik von Wright, *Is There a Logic of Norms*, 4 *Ratio Juris* 265, 266 (1991).
set. I do not intend to provide a formal account of the way in which legal-oriented sentences can relate to or contradict each other.\textsuperscript{31} For my purposes, it will suffice to give an intuitive account of what is unique in legal inconsistency and provide a few paradigmatic examples. A legal set may be inconsistent when it can be shown to contain contradictory norms. Norms or rules can be contradictory, for example, when one rule permits what another forbids, or when two rules issue contradictory directives, such that simultaneous compliance with both directives is impossible.\textsuperscript{32} A further form of inconsistency arises when one can find conflicting interpretations of the same legal concept within a legal set. Another form of inconsistency arises when one can show that a legal set contains contradictory assignments of validity. The notion of validity plays, as I will argue later, a unique role in the law—something akin to the notion of truth in logic. It is the validity of the law that makes its normative statements binding.\textsuperscript{33}

Let us consider two examples of legal paradoxes, beginning with a legal version of the Liar Paradox. I follow the conventional Deontic notation with $\text{OB}_p$ denoting “it is obligatory that $p$.”

\begin{itemize}
  \item \textbf{O}_1 \text{ It is obligatory not to follow this rule. This can also be presented as: } O_1 \quad \text{O} \lor \neg O_1$.\textsuperscript{34}

  This statement (interpreted as a norm rather than as a norm-proposition) is self-contradictory—it generates conflicting directives. It is similar to the following prescription:

  \item \textbf{O}_2 \text{ It is obligatory not to smoke in bars and it is obligatory to smoke in bars.}

  The self-contradictory nature of \textbf{O}_1 and \textbf{O}_2 makes it impossible to satisfy them—their satisfaction set is empty. Impossibility is the pathological symptom that accompanies normative contradiction.\textsuperscript{35}
\end{itemize}

\textsuperscript{31} Deontic logic represents an attempt to provide such a formalistic account. However, this formalistic presentation is not really necessary for the arguments presented here. See, e.g., \textit{id}; McNamara, \textit{supra} note 25, § 1.2.

\textsuperscript{32} See von Wright, \textit{supra} note 30, at 270–71. This form of inconsistency could give rise to conflicting normative expectations.

\textsuperscript{33} Note, however, that since legal sets may also include “normal” propositions, and may invoke classical reasoning patterns (even if this is done only implicitly and non-exclusively), they can also be contradictory in the sense that this notion is used in propositional logic (i.e., through inconsistent attributions of truth and falsity). On the role of classical deductive patterns in legal reasoning, see generally Arend Soeteman, \textit{Legal Logic? Or Can We Do Without?}, 11 ARTIF. INTELL. L. 197 (2003).

\textsuperscript{34} McNamara, \textit{supra} note 25, § 1.2.
The paradoxes of law tend, however, to be more subtle than these examples. So let us consider a less blunt example. This example follows the Greek story of Protagoras and Euathlus. I will follow the story as it was told by Aulus Gellius. Protagoras, “the keenest of all Sophists,” taught rhetoric and argumentation. Euathlus, who wished to be instructed in the art of oratory and the pleading of causes (what is called law today), became a pupil of Protagoras. It was agreed between the two that Euathlus would pay Protagoras’s fee after Euathlus won his first case. After having been a pupil and follower of Protagoras for some time, and having made considerable progress in the study of oratory, Euathlus had not undertaken any cases. Protagoras decided to demand his fee according to the contract, and he brought a suit against Euathlus.

Protagoras and Euathlus presented their arguments before the court. Protagoras began as follows:

Let me tell you, most foolish of youths, that in either event you will have to pay what I am demanding, whether judgment be pronounced for or against you. For if the case goes against you, the money will be due me in accordance with the verdict, because I have won; but if the

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35. I follow Vranas here. See Peter B.M. Vranas, New Foundations for Deontic Logic: A Preliminary Sketch 4, available at http://www.public.iastate.edu/~vranas/Homesite/papers/deonticweb.doc (2002). Note, however, that while O₁ and O₂ are self-contradictory, a norm-proposition that describes a norm that is self-contradictory can be true and non-contradictory. See Lennart Aqvist, Interpretations of Deontic Logic, 73 Mind 246, 249 (1964). It is also possible to construct looped contradictory obligations with similar consequences:

O₃ You ought to follow rule O₄.

O₄ You ought not to follow rule O₃.

36. 1. AULUS GELLIUS, THE ATTIC NIGHTS OF AULUS GELLIUS 404–09 (E.H. Warmington ed., John C. Rolfe trans., Harvard University Press rev. ed. 1970) (1927). All of the following quotes are from Gellius, id. This account was written roughly six hundred years after the events took place (if they did indeed occur) since it is assumed that Protagoras lived from 492 to 421 B.C.E. See J.A. Davison, Protagoras, Democritus, and Anaxagoras, 3 CLASSICAL QUART. 33, 38 (1953). This paradox was discussed by other ancient writers. See, e.g., Jordan Howard Sobel, The Law Student and his Teacher, LIII THEORIA 1 (1987).

37. GELLIUS, supra note 36, at 405.

38. Id. Protagoras drafted the Constitution of Thuria and likely taught in the Sicilian School of Rhetoric. Davison, supra note 36, at 33, 37.

39. Gellius writes that Euathlus paid Protagoras half of the fee before beginning his lessons and agreed to pay the remaining half “on the day when he first pleaded before jurors and won his case.” GELLIUS, supra note 36, at 407.

40. Id.

41. Id.
decision be in your favour, the money will be due me according to our contract, since you will have won a case. 42

To this Euathlus replied:

I might have met this sophism of yours, tricky as it is, by not pleading my own cause but employing another as my advocate. But I take greater satisfaction in a victory in which I defeat you, not only in the suit, but also in this argument of yours. So let me tell you in turn, wisest of masters, that in either event I shall not have to pay what you demand, whether judgment be pronounced for or against me. For if the jurors decide in my favour, according to their verdict nothing will be due you, because I have won; but if they give judgment against me, by the terms of our contract I shall owe you nothing, because I have not won a case. 43

Gellius concludes the story by noting that the court was struck by the intricacy of the arguments and refused to give a ruling:

. . . the jurors, thinking that the plea on both sides was uncertain and insoluble, for fear that their decision, for whichever side it was rendered, might annul itself, left the matter undecided and postponed the case to a distant day. Thus a celebrated master of oratory was refuted by his youthful pupil with his own argument, and his cleverly devised sophism failed. 44

The story of Protagoras and Euathlus reveals an internal paradox within the normative structure governing this case, leading—at least according to Gellius—to a decisional paralysis. 45 To make the paradox more precise, let us disentangle the story into a series of norms and norm-propositions.

(1) In deciding a contractual dispute, a court should give effect to and enforce the contractual commitments made by the parties.

(2) According to the contract made between Protagoras and Euathlus, Euathlus will pay the full fee only after he won his first case. Protagoras brought a suit against Euathlus claiming his fee. This was Euathlus’s first case.

(3) Hence, according to (1), Protagoras’s suit should be rejected since, at the time the court was re-

42. Id.
43. Id. at 407–09.
44. GELLIUS, supra note 36, at 409.
45. Id. at 405.
required to give a ruling, the contractual condition had not been fulfilled.

(4) If the court rejects Protagoras’s suit (ruling for Euathlus), it will, by this very act, fulfill the contractual condition, thus completing Protagoras’s cause of action.46

(5) Hence, according to (1), Protagoras’s suit should be accepted.

(6) If the court accepts Protagoras’s suit, Euathlus will in fact lose; by its ruling, the court will cause the contractual condition to not be fulfilled.

(7) Hence, according to (1), Protagoras’s suit should be rejected.

Statements (3), (5), and (7) are contradictory. Attempting to reason about the correct legal answer leads to a seemingly insoluble oscillation, in which a ruling for Euathlus leads to a ruling for Protagoras, which leads to a ruling for Euathlus, ad infinitum.47 The paradox is generated by the fact that—due to the contract’s peculiar structure—the correct legal answer (which should be reflected in the ruling) depends in an unsettling way on the court’s ultimate ruling.48 This pathological oscillation is similar to the semantic instability generated by the Liar Paradox; in the legal context it may lead to judicial paralysis, as was reported by Gellius.49 However, in law, paralysis is not an acceptable option. Legal decisions, unlike decisions in science, math, or philosophy, cannot be deferred to a later date.50 That decisions must be made is, in itself, a basic norm of any legal system.

Indeed, the praxis of law seems to adhere to this basic precept, showing few signs of paradoxical stoppages. This may signal that the role

46. This proposition builds on the fact that the ruling operates as a performative speech-act. Such speech-acts have the capacity to make themselves true or binding by being pronounced in adequate circumstances. See Lennart Aqvist, Some Remarks on Performatives in the Law, 11 ARTIF. INTELL. L. 105, 110 (2003).

47. See Sobel, supra note 36, at 10.

48. See id.

49. GELLUS, supra note 36, at 405.

50. This is not always recognized by philosophers. Thus, Jordan Howard Sobel notes, for example, that “rather than reach a final disposition in the case a court might be moved to suspend the case, to put off or postpone judgment to a later day. This action could recommend itself as a desperate expedient to avoid self-contradiction: deferral could recommend itself to a court that considered, whether correctly or incorrectly, that it had no other way out of a logical trap.” Sobel, supra note 36, at 4.
paradoxes are playing in law is not really pathological. With this in mind, let us return to the story of Protagoras and Euathlus. Despite its seeming insolubility, there are several ways in which this paradox may be resolved (or dissolved). They are based on two primary techniques: introducing a distinction (reinterpretation) or appealing to external principles.51

Consider, first, the option of reinterpretation. The court has several ways to reinterpret the foregoing problematic normative cluster. The first option disentangles the temporal components of the paradox. In determining the status of the parties’ rights and obligations, the court does not need to take a forward-looking approach; that is, it does not have to consider the consequences of its ruling on the parties’ contractual obligations. Rather it needs only to assess their rights as they are at the moment of its decision. According to this interpretation, (3) represents the correct decision, implying that Protagoras’s suit was premature, and (5) and (7) are simply incorrect. This interpretation lays the foundation, though, for a future suit by Protagoras.52

Another approach seeks to resolve the paradox by focusing on its self-referential aspect. Thus, the phrase “first case” may be interpreted as not applicable to a case involving Protagoras and Euathlus as parties, barring the problematic self-reference that is generated by the contract. This requires us to reformulate (2), again resolving the paradox and leading to a ruling against Protagoras.

While the foregoing solutions are not uniquely legal, the appeal to external principles reflects an alogical approach because it does not seek to resolve the paradox through the introduction of further distinctions; rather, it dissolves the paradox through an appeal to hierarchically superior normative principles. Thus, the court may invoke the “good-faith” principle and conclude that Protagoras’s scheme was dishonest. Alternatively, the contract could be revised in equity. Euathlus could be ordered to pay earnest money while making a reasonable effort to take on another case or to pay reasonable sum for the time Protagoras had already devoted to his instruction.53

51. For a broader discussion of the problem of paradox resolution, see RESCHER, supra note 12, at 57–58.
52. This solution was pointed to by Leibniz, who discussed this paradox in one of his papers. See Sobel, supra note 36, at 7–9. See also SUBER, supra note 16, at 242.
B. Paradoxes in the Westphalian Order: The Cases of the WTO and the ICC

This Section explores the deep inconsistency that is associated with the Westphalian scheme of validity as it is invoked in two key treaty-regimes: the WTO and the ICC. This deep inconsistency is generated, as we shall see, by the fact that both regimes cling to the traditional Westphalian scheme, while simultaneously introducing conflicting validation and law-making techniques.

1. The Case of the WTO

“The World Trade Organization (WTO) is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.”54

At first glance, the WTO looks like a classic product of the Westphalian order. The WTO regime is the product of a complex web of treaties that were signed in 1994 after a long negotiation process during the Uruguay Round from 1986 to 1994.55 The constitutional core of this web consists of two agreements: the Agreement Establishing the World Trade Organization (“WTO Agreement”), which is the umbrella instrument, and the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), which establishes the WTO legal system.56

The WTO Agreement includes various provisions that allude to the Westphalian notion of validation, with its emphasis on state consent and the associated ideal of national sovereignty. Thus, for example, Article XIV (which deals with “Acceptance, Entry into Force, and Deposit”) and Article XII (which deals with “Accession”) provide that accepting the authority of the WTO requires a formal act from the joining state.57 The WTO does not claim to have universal jurisdiction. In the same spirit, Article XV (which deals with the issue of “Withdrawal”) states that

“[a]ny Member may withdraw from this Agreement.” Consequently, the DSU includes a provision which seeks to protect the rights of member states and to preclude the possibility that these rights will be altered by the WTO judicial bodies. Article 3.2 of the DSU states that:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.  

The Westphalian vision, reflected in the provision quoted above, postulates the dispute settlement body as a highly controllable entity that is completely dependent on the states that have established it. Article 3.2 of the DSU gives the WTO judicial bodies a very limited role: they are expected merely to preserve the rights and obligations of members under the covered agreements and to clarify their meaning. Article 3.2 thus portrays the WTO as a static normative space, whose contours were totally determined by the member states.

This portrait of the WTO system fails to appreciate, however, the highly autonomous character of the WTO legal system. It disregards the powers of the WTO’s new legal system, which—contrary to the above portrait—has been actively shaping the normative field of the WTO, independently of the wishes and preferences of the member states. This autonomy is formally codified in articles 16.4, 17.14, and 23 of the DSU, which jointly transform the WTO dispute settlement mechanism into an obligatory system, insulated from political intervention. In various rulings since 1995, the WTO judicial bodies have created new rights and obligations that did not exist as such before these decisions.

58. Id. art. XV.
59. DSU, supra note 56, art. 3.2 (emphasis added).
60. Id.
61. This tension is also highlighted by Sol Picciotto: “The WTO’s dispute settlement procedures involved a significant shift toward a more legalistic model of adjudication than in the GATT. . . . Nevertheless, the legitimacy of WTO rules is still defended on the grounds that they have been agreed by governments.” Sol Picciotto, The WTO’s Appellate Body: Legal Formalism as a Legitimation of Global Governance, 18 GOVERNANCE 477, 495 (2005).
63. DSU, supra note 56, arts. 16.4, 17.14, 23.
decisions and depart substantively from the legal tradition of the GATT.\textsuperscript{64}

2. The International Criminal Court

\textit{“The International Criminal Court (ICC) is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes.”}\textsuperscript{65}

A similar tension also exists in the new regime of the International Criminal Court. The ICC was created after long and protracted negotiations that culminated in the adoption of the Rome Statute on 17 July 1998.\textsuperscript{66} The Rome Statute provides that the ICC will have jurisdiction over crimes of genocide, certain crimes against humanity, and certain war crimes.\textsuperscript{67} On first reading, the ICC seems like another prototype of the Westphalian model—a treaty produced through inter-state bargaining. This conclusion is supported by Article 126(1) of the Rome Statute, which stipulates that the Statute shall enter into force after the deposit of the sixtieth instrument of ratification, acceptance, approval, or accession with the Secretary-General of the United Nations.\textsuperscript{68} This provision refers to the principle of \textit{pacta sunt servanda} as the treaty’s source of validity. The Westphalian order also underlies Article 4(2), which deals with the legal status and powers of the ICC. Article 4(2) provides that “[t]he Court may exercise its functions and powers, as provided in this Statute,

\textsuperscript{64} On the norm-making powers of the WTO tribunals, see Guzman, \textit{supra} note 62, at 347; Picciotto, \textit{supra} note 61, at 495; Oren Perez, \textbf{ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENT CONFLICT} 65–80 (Hart Publishing 2004). Two prominent examples of law made by the WTO judicial bodies are the Appellate Body decisions that both it and the panels have wide discretion to accept \textit{amicus curiae} briefs from non-state parties and its novel interpretation of Article XX. For a discussion of these issues see Perez, \textit{supra}, at 65–80, 100–05. See Appellate Body Report, \textit{United States—Import Prohibition of Certain Shrimp and Shrimp Products} ¶¶ 79–91, 99–110 WT/DS58/AB/R (Oct. 12, 1998); Appellate Body Report, \textit{European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos-Containing Products} ¶¶ 50–57, 155–157 WT/DS135/AB/R (Mar. 12, 2001).


\textsuperscript{68} \textit{Id.} art. 126(1).
on the territory of any State Party and, by special agreement, on the territory of any other State.\footnote{69}{Id. art. 4(2) (emphasis added).}

However, upon closer inspection, the Rome Statute seems to include provisions that challenge the Westphalian validity scheme.\footnote{70}{For a more detailed discussion of the tension between the ICC regime and the Westphalian validity scheme, see Jackson N. Maogoto, *The Final Balance Sheet? The International Criminal Court’s Challenges and Concessions to the Westphalian Model* 4, 14 (Berkeley Electronic Press, Working Paper No. 1402, 2006), available at http://law.bpress.com/expresso/eps/1402; Leila Nadya Sadat & Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 385, 390–91 (2000); Morris, supra note 8, at 30–33.} This is reflected in its claim to hold jurisdiction over citizens of non-parties,\footnote{71}{Rome Statute, supra note 67, art. 12.} in the establishment of new universal criminal norms that transcend customary international law as it existed prior to the establishment of the Rome Statute,\footnote{72}{Id. arts. 5–8.} in the formal legal recognition of non-state actors (victims and NGOs),\footnote{73}{Id. art. 15 (providing that the prosecutor may initiate investigations on the basis of information received from non-governmental organizations). See also Maogoto supr

It is worthwhile to explore the nearly universal jurisdiction given to the Court in Article 12, which provides the Court with jurisdiction over persons who are not citizens of one of the signatories to the ICC.\footnote{74}{Rome Statute, supra note 67, art. 19(1) (“The Court shall satisfy itself that it has jurisdiction in any case brought before it.”); id. art. 21 (providing the Court with the power to derive new international legal principles from “national laws of legal systems of the world,”); id. art. 119(1) (endowing the Court with the authority to settle disputes “concerning the judicial functions.”). See also Morris, supra note 8, at 30–33.} According to Article 12, the ICC has jurisdiction to prosecute a national of any state when crimes within the Court’s subject matter jurisdiction are committed on the territory of a state that is a party to the treaty or that consents to ICC jurisdiction for that case.\footnote{75}{Id. art. 12(2)(a). This is in addition to jurisdiction based on Security Council action under Chapter VII of the UN Charter and jurisdiction based on consent by the defendant’s state of nationality.} The Court is thus empowered to exercise jurisdiction even in cases in which the defendant’s state of nationality is not a party to the treaty and does not consent to the exercise of jurisdiction.\footnote{76}{Jordan J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT’L L. 1, 6 (2000); Morris, supra note 8, at 13–14.} The jurisdictional principle underlying Article 12 stands in stark contrast to the constitutional principle of state consent. This de
viation is particularly striking when the Rome Statute is compared to the ICJ Statute and the ICJ jurisdictional jurisprudence. 78

Some proponents of the ICC regime have tried to explain this internal inconsistency by arguing that the ICC’s jurisdiction over the nationals of non-party states is based, in effect, on existing principles of customary international law. According to this view, the ICC jurisdiction is based upon:

. . . the principles of universal jurisdiction pursuant to which the courts of any state may prosecute the nationals of any state for certain serious international crimes. Since any individual state could prosecute perpetrators regardless of their nationality, they reason, a group of states may create an international court empowered to do the same.79

In a recent article, Madeline Morris demonstrated that this thesis has no basis in contemporary customary international law.80 She argues that the delegated universal jurisdiction theory does not account for a number of crimes within the subject matter jurisdiction of the ICC that are not subject to universal jurisdiction.81 Additionally, the intricate institutional structure established by the Rome Statute, with the unique enforcement and interpretative powers it provides to the court and the prosecutor, creates a legal environment that is radically different from the one envisioned by the decentralized model that existed prior to the establishment of the ICC.82 Thus, consent to the exercise of universal jurisdiction by individual states is not equivalent to consent to universal jurisdiction delegated to an international court.83

III. ALTERNATIVE FORMS OF NORMATIVE GROUNDING

The Westphalian doctrine of validity, with its emphasis on consensual norm creation through state negotiation, does not seem to cohere with contemporary legal practices. The normative deficit that was created by the demise of the Westphalian scheme is being populated by alternative forms of validation. Four legal ideas emerge as particularly noteworthy in this respect, and I will discuss each of them briefly: global democracy, deference to non-legal rationalities, direct individual consent, and the new association between law and technology. These alternative schemes

78. See Morris, supra note 8, at 20–21.
79. Id. at 27–28. See also Paust, supra note 77, at 3.
80. Morris, supra note 8, at 13, 56–60.
81. Id. at 28.
82. See id. at 29.
83. Id. Some authors have tried to explain ICC jurisdiction by appealing to universal moral principles. I will return to the issue in Section III.B.
challenge the classic conceptions of international law, generating a new and deeply complex legal universe. However, as we consider each of these alternative schemes more closely, it becomes obvious that the project of providing solid foundations to the international legal system fails not just because of the deep differences between these varied normative schemes, but also because when considered separately, they yield inconsistencies that are as problematic as the ones generated by the conventional Westphalian doctrine. These horizontal and intrinsic paradoxes cast doubt upon the claim that these alternative doctrines provide a new, universal model of validity.

A. Global Democracy?

Global democracy is invoked increasingly—in both theory and practice—as a new form of validation that imagines the democratic principle as a truly global idea, undercutting the role of the state. Unlike the idea of global democracy, the Westphalian doctrine has limited aspirations regarding the regulation of the political process. The consent requirement underlying the Westphalian doctrine was interpreted as a purely formalistic condition of constitutional adequacy that does not set substantive requirements to national political structures. Some authors have argued that the Westphalian principle of consent should be read as a requirement to subject the transnational diplomatic process to substantial


85. The most prominent voice in this school of thought is that of David Held. See, e.g., David Held, Cosmopolitanism: Globalization Tamed?, 29 REV. INT’L STUD. 465, 472 (2003).

86. Thus, in the Vienna Convention the only hint of tension between the formal consent of the state and the will of the people is indirect. Article 46 provides that:

(1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance;

(2) A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Vienna Convention, supra note 6, art. 46 (emphasis added).

87. Id. art. 7.
domestic political scrutiny; this interpretation seeks to portray the act of consent as a product of meaningful political deliberation. However, under the Westphalian scheme, the state retains the authority to structure the domestic political process. Further, the political model that emerges from this interpretation is highly fragmented—unlike the unified vision underlying the model of global democracy.

However, choosing the principle of global democracy as an alternative source of validity raises various difficulties pertaining both to its theoretical underpinnings and to its global applicability. From a theoretical perspective, the vision of global democratization is torn between several potentially conflicting commitments. The proponents of global democratization invoke several core commitments: first, a commitment to inclusiveness and open decision-making structures; second, a commitment to a decision-making process that is based on the possibility of reaching agreement through rational deliberation; third, a commitment to individual freedom and fundamental human rights; fourth, a commitment to the value of cultural pluralism; and finally, a commitment to embed these core commitments in global governance institutions.

These commitments conflict in various ways. First, the establishment of strong global institutions—replacing the fragmented and relatively weak bodies that characterize the contemporary international order—is in tension with the commitment to individual freedom and cultural pluralism. As the distance between the global political center and the citizen body grows, so does the risk that the voice of the citizen and the local community will be ignored. A strong central establishment constitutes, therefore, a risk to individual freedom and cultural pluralism. Second, it is not clear whether the commitment to open deliberation and consensual decision-making can be realized, given the vast cultural and ideological differences that characterize the contemporary global society. It is not clear what kind of criteria could guide this deliberative effort, given that choosing any particular criterion could jeopardize the commitment to pluralism. The political institutions of majority voting and parliamentary representation offer a way to circumvent this normative deficit, but they do not resolve it.

89. Held, supra note 85, at 466.
90. Id.
These dilemmas have been apparent in the few attempts to implement the vision of global democracy. Thus, for example, in 2000, the Internet Corporation for Assigned Names and Numbers (“ICANN”) made an ambitious attempt to develop a governance structure based on an electronically-mediated model of representative democracy. ICANN tried to use the Internet to create legitimacy, first by opening its decision-making process to the public (transparency), and second, by conducting global, Internet-based elections for its central governing body (the At-Large Membership Program). ICANN’s experiment was heavily criticized due to its failure to achieve true global representation and responsiveness to civic concerns, leading the organization to abandon its ambitious democratic aspirations. Other institutions—such as the Global Reporting Initiative (“GRI”)—have established multi-stakeholder consultation processes, reflecting a commitment to consensual decision-making. Despite the relative success of the GRI, the consultation procedures it established do not constitute a formal democratic structure; to some extent, the success of the GRI may be attributed to the limited field—sustainability reporting—in which it operated. The tensions that underlie the theoretical articulations of the idea of global democracy were not resolved by the few practical attempts to design global democratic institutions. The idea of global democratization remains a deeply contested notion, both in theory and in practice.

94. ICANN’s experiment failed in the sense that ICANN has radically changed its governance structure by adopting a much milder concept of democracy. Nonetheless, ICANN’s experiment still constitutes an important milestone in the attempt to transform the abstract idea of global democratization into a practical model. For a detailed discussion and critique of ICANN’s democratic experiment, see Palfrey, supra note 93, at 412.
96. I discuss the institutional structure of the GRI in more detail in the last section of this Article. See infra notes 234–239 and accompanying text.
B. Deference to Non-Legal Rationality

The attempt to look for grounding in external, non-legal rationalities has been most visible in the field of human rights. The appeal to universal moral principles as a ground for new global legal norms is particularly noteworthy in two contexts: the problematic jurisdiction of the ICC and the question of humanitarian intervention. Some authors have tried to justify the novel ICC jurisdiction by what amounts, in effect, to a direct appeal to moral principles.97 The ICC Treaty belongs, it was argued, to a new genre of treaties that are “globally binding because they foster the common interests of humanity.”98 In the context of humanitarian intervention, authors have argued for the emergence of a new grund norm: a principle of civilian inviolability.99

However, the appeal to this new source of validity seems problematic not only because the choice of the pivotal norm seems somewhat arbitrary, but also because the meaning of the proposed norms remains extremely fuzzy. As Madeline Morris argued in a recent article:

A threshold problem with the theory of global treaties is that there will inevitably be disagreement about what in fact will serve the common interests of humanity. An equally formidable problem confronting the theory of global treaties is that, even if that which would serve the common interests of humanity could be dispositively identified, that alone would not bind states who would find unacceptable a particular distribution of the burdens involved in serving those interests.100

98. Id. at 52.
100. Morris, supra note 8, at 52.
The deep vagueness of these new postulated norms calls for further interpretation and sets the ground for interpretative disputes. It is not clear what criteria will govern such disputes or which authority will decide them. The suggested new grund norms do not resolve these questions.

Similar appeals to non-legal rationalities can be found in other domains. In the environmental domain, we can find reference to a new environmental ethics, epitomized in the concept of sustainable development and in the precautionary principle. Environmental ethics provides an additional and independent mode of justification, operating alongside other forms of groundings. Science has also been used increasingly as a mode of grounding, especially in the trade and environment domains. In both of these domains, the problems of choosing between the competing external sources and the indeterminacy of the external principles remain unresolved. We are confronted, again, not


103. On the precautionary principle, see id. at 361–64.

104. Two prominent examples are the WTO Agreement, which includes in its preamble a reference to the principle of sustainable development, and the GRI 2006 sustainability guidelines, which open with a reference to the principle of sustainable development. WTO Agreement, supra note 57, pmbl.; GRI, G3 Guidelines, http://www.globalreporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1-BFF2-5F735235CA44/0/G3_GuidelinesENU.pdf at 2 [hereinafter GRI G3]. The WTO tribunals have relied on the invocation of the principle of sustainability in justifying their new (pro-environment) interpretation of article XX. See Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, supra note 64, at ¶¶ 153, 155. For a discussion of the WTO trade and environment jurisprudence, see PEREZ, supra note 64, at 65–80.


106. See e.g., Oren Perez, The Institutionalization of Inconsistency: From Fluid Concepts to Random Walk, in PARADOXES AND INCONSISTENCIES IN LAW 119, 128–36 (Oren Perez & Gunther Teubner eds., 2006); Oren Perez, Anomalies at the Precautionary Kingdom: Reflections on the GMO Panel’s Decision, 6 WORLD TRADE REV. 265, 265, 267
just by conflicting interpretations of the same extra-legal authority (e.g., environmental ethics), but also by deep uncertainty as to how these divergent authorities relate to each other. There seems to be no agreement with respect to how these competing forms of rationality could be ranked and their domains of applicability defined. Indeed, there is no unified moral theory that could bring these different world views under a single umbrella in a way that would be globally accepted (successfully bridging between the cultural-moral disagreements that characterize the contemporary global society).

C. Individual Consent

The doctrine of individual consent forms a third pattern of validation. The idea of individual consent draws both on universal principles of contract law and on the ethos of liberal individualism, with its strong emphasis on freedom of choice and self-determination. This form of validation claims to free international law from its traditional reliance on the state as a necessary perquisite for the making of global norms. The concept of individual consent plays a particularly central role in two fields of international law: international arbitration and Internet law. Yet, as with the other techniques, this concept yields deep and unresolved puzzles.

Consider first the arbitration field. An increasing number of international disputes are being adjudicated today in global arbitration centers. This trend can be attributed both to the legal regime, which was created by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and to a general expansion in the number of international business transactions. The New York Convention...
tion ensures worldwide exclusive jurisdiction to arbitration proceedings based on valid arbitration agreements, provides procedures for the recognition and enforcement of foreign awards, and limits the grounds on which domestic courts can refuse requests for enforcement to a few basic procedural defects. The New York Convention is not, therefore, just a mechanism of enforcement: through the principle of non-interference, it has facilitated the emergence of a new global law that is insulated from the influence of inter-state politics. The normative space that was created by the New York Convention has been filled by a new a-national system of international commercial law, the new lex mercatoria, and a new institutional apparatus comprised of independent arbitrators and several permanent arbitral centers such as the International Chamber of Commerce International Court of Arbitration (“ICA”), the London Court of International Arbitration (“LCIA”), and the US International Centre for Dispute Resolution. But trying to unfold the normative status of this new nexus of norms and institutions reveals a deep puzzle. How can a system that is based on disaggregated and discontinuous contractual arrangements (arbitration clauses), also claim simultaneously a continuous and permanent legal presence?


114. The reliance on arbitration clauses is reflected both in the language of the New York Convention, which limits its jurisdiction to valid arbitral agreements, see New York Convention, supra note 110, art. II(3), and in the Web sites of the arbitral centers mentioned above, which provide their prospective clients with recommended arbitration clauses, see the Web sites of the ICA and LCIA, supra note 113. A typical arbitration
The ICA constitutes a particularly fascinating example of this existential paradox. The ICA Dispute Resolution Rules\(^\text{115}\) draw their validity from the parties’ consent.\(^\text{116}\) In contrast to conventional arbitration, the ICC Rules provide the ICA with the authority to scrutinize an award.\(^\text{117}\) Under the ICC Rules, the arbitral tribunal is required to submit its award in draft form to the ICA. According to Article 27:

> Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal’s liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.\(^\text{118}\)

Commentators note that in scrutinizing the award, the ICA focuses on issues such as the completeness of the award, its adherence to the ICC Rules and the governing national law, internal consistency, and whether it is sufficiently reasoned before authorizing its issuance to the parties.\(^\text{119}\) Although the Court cannot compel the arbitrators to take account of its comments with respect to substance, arbitrators usually take notice of the Court’s comments, at least to some extent.\(^\text{120}\) The Court does not provide the parties with the reasons for its decision. It seems, then, that by giving their consent to ICC arbitration, parties give their agreement not only to adjudicate before an arbitrator according to the law of their choosing, but


\(^{116}\) Id. art. 6.

\(^{117}\) Id. art. 1, apps I, II. According to Article 1(2), “The Court does not itself settle disputes. It has the function of ensuring the application of these Rules. It draws up its own Internal Rules.” Id. art. 1(2).

\(^{118}\) According to Appendix II, Article 6, “When the Court scrutinizes draft Awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration.” Id. app. II, art. 6.


\(^{120}\) Id.
also to the elusive and autonomous jurisprudence of the ICA. Thus, the ICA’s powers and the normative force of its jurisprudence rest, miraculously, on the disaggregated and prospective contractual arrangements of its current and future “clients.”

Internet law provides another example of the invocation of individual consent as an independent grounding. Two prominent examples are ICANN’s Uniform Domain-Name Dispute Resolution Policy (“UDDRP”) and the World Wide Web Consortium Platform for Privacy Preferences Project (“P3P”). Similar to the world of arbitration, the force of ICANN’s dispute resolution policy and the P3P code stems from the direct consent of the concerned individuals—without the mediation of the state. In the case of ICANN’s dispute settlement policy, consent is given in the contract signed between a domain-name holder and a registrar. In the case of P3P, the platform is incorporated into the architecture of the browsers and the Web sites, and consent is implied from the purchase or usage of the browser. The global code is reinterpreted in these cases as a contract—a true manifestation of the idea of social contract.

121. The London Court of International Arbitration has a somewhat similar dual architecture; the powers of the London Court are, however, more limited. See LCIA Arbitration Rules arts. 3, 29, http://www.lcia.org/ARB_folder/arb_english_main.htm.
122. See ICANN, Uniform Domain-Name Dispute Resolution Policy [UDDRP], http://www.icann.org/udrp/. The policy is applicable across all generic top level domains (.aero, .biz, .cat, .com, .coop, .info, .jobs, .mobi, .museum, .name, .net, .org, .pro, .tel and .travel). The policy provides for obligatory international arbitration for disputes arising from alleged abusive registrations of domain names (for example, cybersquatting). The arbitration proceedings may be initiated by a holder of trademark rights. The UDDRP is a policy between a registrar and its customer and is included in registration agreements for all ICANN-accredited registrars. For a list of approved dispute-resolution service providers, see ICANN, Approved Providers, http://www.icann.org/dndr/udrp/approved-providers.htm (last visited Oct. 6, 2007).
123. Platform for Privacy Preferences [P3P], http://www.w3.org/P3P/. The Platform for Privacy Preferences Project enables Web sites to express their privacy practices in a standard format that can be retrieved automatically and interpreted easily by user agents. P3P user agents allow users to be informed of site practices (in both machine- and human-readable formats) and to automate decision-making based on these practices when appropriate. Thus, users need not read the privacy policies at every site they visit. Id.
125. In some cases, the browser is already installed on the computer when it is purchased; consent is then indicated through the act of purchase.
This new form of validity finds resonance in the ideas of individual integrity and individual empowerment that are central to contemporary Western culture. On close scrutiny, however, postulating individual consent as a validating force seems highly problematic. In the case of arbitration, the gap between the disaggregated and discontinuous contractual consent, the permanent nature of the *lex mercatoria*, and some of the new arbitral centers seems unbridgeable. In the case of the new global Internet codes, the invocation of consent does not seem to cohere with the traditional understanding of consent in contract law: the image of “two autonomous wills coming together to express their autonomy by binding themselves reciprocally to a bargain of exchange.”

Can one seriously speak about consent in the context of ICANN’s policy and the P3P code if the individual in question has not taken part in the negotiation of the code or contract in question, and in effect, has no choice but to accept it if he wants to register a domain name or enjoy some kind of privacy protection as he surfs the Net?

If one rejects individual consent as an acceptable form of validation, perhaps there is no choice but to look for alternative groundings. Thus, in the case of the *lex mercatoria*, can one appeal to universal principles of commercial law—a natural law of contracts? And, in the case of the UDDRP and the P3P standards, where validity may reside, not in the fictitious consent, but in the process through which they were developed—their invocation of notions such as democracy and procedural justice?

The increasingly blurred normative reality that characterizes the contemporary international legal universe provides wide occasion for horizontal conflicts between different forms of validation. The field of investment disputes provides a particularly interesting example of this potential tension. There is a problematic interplay between forum selection clauses that are included in individual investment contracts and arbitration procedures set out in bilateral investment treaties (“BITS”) interpreted in light of the 1965 Convention on the Settlement of Investment Disputes.

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128. Recall that P3P is encoded in the architecture of both Web sites and browsers.
Disputes between States and Nationals of Other States (“ICSID Convention”). The question raised in these conflicts is whether the forum selection clause can be seen as a waiver of BIT jurisdiction. In other words, the question is whether the norm of the contract trumps the norm of the treaty or vice versa. There is a diversity of opinion on this question.

D. The Bundling of Law and Technology

Another highly novel source of global validity is the bundling of law and technology. This new technique emerged as a side effect of the development of digital technology that allows the bundling of software and norms in one digitized product. Such norm-in-the-machine products have been available in various forms for some time. One example is the domain of intellectual property rights (“IPR”). Instead of protecting IPR in a certain product (e.g., software or music) through the use of contractual terms or by relying on state regulation, IPR can be protected from violations with special software offering world-wide protection using various technological means. Such technology is increasingly being used in the fight against online file-sharing software.


131. Machines are understood as devices for accomplishing a task as a collection of functional components. See Margaret Jane Radin, Online Standardization and the Integration of Text and Machine, 70 FORDHAM L. REV. 1125, 1143 (2002).


133. See Brad Stone & Miguel Helft, New Weapon In Web War Over Piracy, N.Y. TIMES, FEB. 19, 2007, at C1. The new technological weapon in this case is based on content-recognition software, which makes it possible to identify copyrighted material and to block it (unless it was licensed for use on the site). One of the key players in this field is
another example. The P3P standard is integrated into software (browser) and into the structure of Web sites (another type of machine).134 Another example is new filtering software that is used to protect minors from exposure to sexually explicit materials on the Web.135 In this case, as in the case of intellectual property rights, the software proclaims to fulfill a task that was previously reserved to state regulation. What is common to all these cases is the invocation of technology as a new type of (global) grund norm.136

In Ashcroft v. ACLU,137 the U.S. Supreme Court reached a similar conclusion when it noted that filtering software might more effectively protect minors from exposure to sexually explicit materials on the Internet than the Child Online Protection Act (“COPA”).138 This led the Court to the conclusion that COPA was unconstitutional (by violating the First Amendment) because of the availability of less restrictive alternatives.139 The importance of the U.S. Supreme Court’s decision in terms of this Article’s thesis regarding the fragmentation of the concept of validity lies

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136. For further discussion of this phenomenon, see Radin, supra note 127; Margaret Jane Radin, Regulation by Contract, Regulation by Machine, 160 J. INST. & THEORETICAL ECON. 1 (2004).


139. Filtering software was seen as less restrictive because filters impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, childless adults may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Further, promoting filter use does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.

Ashcroft, 542 U.S. at 667.
not in the particulars of American free speech doctrine, but in its de facto recognition of technology as a source of private law.\footnote{One can see a similar process taking place in the field of morality. See Bruno Latour & Couze Venn, Morality and Technology: The End of the Means, 19 THEOR. CULT. SOC. 247, 253–54 (2002).}

But the claim that technology acts as a new form of normative grounding seems to confuse the \textit{is} and the \textit{ought}—leaping from efficacy to normativity.\footnote{This leap characterizes the concept of legal validity in general. See Csaba Varga, \textit{Validity}, 41 ACTA JURIDICA HUNGARICA 155 (2000). See also infra Section IV.B.} This problematic has not escaped legal observers of modern technology. Thus, for example, the Electronic Frontier Foundation (“EFF”) brought legal action against Sony BMG based on its distribution of CDs that incorporated an IPR protection software.\footnote{For other cases dealing with this problem, see, e.g., Davidson & Assocs. v. Jung, 422 F.3d 630 (2005); DVD Copy Control Assn., Inc. v. Bunner, 75 P.3d 1 (Cal. 2004).} One of the claims raised by EFF alleged that many consumers were not aware that the CDs they bought included this software and that it was downloaded to their computers without their consent.\footnote{Complaint ¶¶ 96–97, Hull v. Sony BMG Music Entertainment Corp., 2005 WL 3806321 (Nov. 21, 2005) (No. BC 343385). In response to the filing of the suit by the EFF, SunnComm has undertaken a commitment to ensure that future versions of MediaMax will not install when the user declines the end user license agreement (“EULA”) that appears when a CD is first inserted in a computer CD or DVD drive. SunnComm has also agreed to include uninstallers in all versions of MediaMax software, to submit all future versions to an independent security-testing firm for review, and to release to the public the results of the independent security testing. Electronic Frontier Foundation, CD Copy Protection Firm Promises Fix for Software Problems (Feb. 2, 2006), http://www.eff.org/news/archives/2006_02.php#004378. For the full litigation history, see Electronic Frontier Foundation, Sony BMG Litigation Info, http://www.eff.org/IP/DRM/Sony-BMG/#docs (last visited Oct. 18, 2007).} Once again, we see a conflict between two forms of validation: technology and individual consent.\footnote{Radin, \textit{supra} note 127, at 1231.}

IV. TAKING A STEP BACK: HAVE WE EVER BEEN PURE?

\textit{A. Purity Revisited}

The structure of contemporary international law is clearly incompatible with the pure Westphalian conception of international law. Deeper reflection, however, exposes the purity of the Westphalian order as a fictitious construct, whose claim for coherence and completeness does not stand up to scrutiny, even if we limit its domain of applicability to the (distant) past. The impurity of the Westphalian scheme of validity becomes apparent almost immediately when considered from the perspec-
tive of simple logic. State will cannot be considered the ultimate source of international law because it leaves unanswered the question of the normative force of the rule that says that will binds. Thus, the force of the norm *pacta sunt servanda* must be assumed to derive—if we want to avoid circularity—from a source that is independent of the will of states. ¹⁴⁵ This has already been noted by various scholars of international law. For example, Hersch Lauterpacht, in a book published in 1927, notes:

To say that the binding force of treaties is derived from the will of contracting parties who, through an act of self-limitation, give up a part of their sovereignty, is to leave unanswered the query why the treaty continues to be binding after the will of one party has undergone a change. The will of the parties can never be the ultimate source of the binding force of a contract whose continued validity is necessarily grounded in a higher objective rule . . . it is the objective validity, independent of the will of States, of the rule *pacta sunt servanda* which renders legally possible the working of conventional international law. ¹⁴⁶

The attempt to resolve the question of the force of *pacta sunt servanda* through appeal to a higher customary law faces similar difficulties. At the level of customary international law, we have to cope with the parallel question of the source and status of the norms regulating the making of customary international law. If the idea of customary international law regulating itself does not seem satisfactory, we have no choice but to imagine a higher level-law—an imaginary constitutional global law—that will be the source of such norms. ¹⁴⁷

But the impurity of the Westphalian model does not lie just in its lack of grounding. It is also reflected in the way in which the idea of state consent opens up the possibility of a legal universe comprised of parallel, equal-standing, legal regimes that are not subject to any superstructure of higher-level law. ¹⁴⁸ This is not mere theoretical conjecture: presidents of


¹⁴⁸. See Kammerhofer, supra note 4, at 549.
the ICJ have warned on several occasions of the risks posed by fragmentation and over-lapping jurisdictions, and one of them noted that “the proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations.”

The search for alternative sources of validity is not new. A prominent example is the appeal to morality as an independent source of international law. This modern phenomenon represents, so it seems, a return to the tradition of natural law that dates back to Hugo Grotius (1583–1645). The natural law tradition received renewed attention in the early 20th century, appearing in the academic writings of several legal scholars in a counter-reaction to the rise of legal positivism. Thus, in 1927 Hersch Lauterpacht, in *Private Law Sources and Analogies of International Law: with Special Reference to International Arbitration*, wrote about a renaissance of natural law. He refers to several modern reconstructions of this tradition, invoking concepts such as “the sense of right” and “social solidarity.” Particularly illuminating is a quote from Frederick Pollock: “We must either admit that modern international law is a law founded on cosmopolitan principles of reason, a true living offshoot of the Law of Nature, or ignore our most authoritative expositions of it.”

Lauterpacht further developed this thesis in his article, *The Grotian Tradition in International Law.* For Lauterpacht, the force of the Grotian tradition stemmed from the intrinsic insufficiency of the “conception of international law as derived from state will” and from the “constant need . . . [to] judg[e] its adequacy in the light of ethics and reason.”

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150. LAUGHTERPACHT 1927, supra note 146, at 58.

151. Id. at 58–59, n.7 (quoting Frederick Pollack).


153. Koskenniemi, supra note 2, at 408. Lauterpacht argues that “the acceptance of the law of nature as an independent source of international law” is one of the precepts of modern international law. Lauterpacht, supra note 152, at 51. For further information, see C. Wilfred Jenks, *Hersch Lauterpacht: the Scholar as Prophet*, 36 BRIT. Y.B. INT’L L. 1, 72 (1960); Jeffery, supra note 152, at 237–41.
seems, then, that international law has never been pure. Nor is the search
for alternative groundings a new phenomenon.

B. The Problem of Grounding in Law and the Truth-Teller Paradox

The problem of grounding is a measure of the deep indeterminacy that
is part and parcel of the concept of law in both its municipal and interna-
tional realizations. The question of grounding does not afflict only the
Westphalian scheme of consent—it is common to all the forms of valid-
ity considered above. Whenever a new source of validity is invoked as an
alternative to the Westphalian paradigm, the question of its own justifica-
tion remains in a mist of arbitrary articulations. In considering this prob-
lematic, it is interesting to consider a similar puzzle that arises in the
field of semantics—the Truth-Teller Paradox. Consider the following
sentence:

\[ K_1 \text{ This sentence is true.} \]

We can use the structure of this sentence to produce a truth-telling se-
quence (with each sentence belonging to the domain of its predecessor):

- The next sentence is true.
- The next sentence is true.
- The next sentence is true.

\[ \ldots \text{(ad infinitum).} \]^{154}

Initially, one may take these truth-telling sentences as unproblematic.
Indeed, these sentences do not generate the kind of semantic instability
that characterizes liar-like sentences. However, upon reflection, this con-
clusion seems hasty. In this case (as with the liar-like statements), the
sentences involved can consistently be assigned conflicting true/false
values. This makes them hopelessly undetermined.\(^{155}\) The distinc-
tion between the Liar Paradox and the Truth-Teller Paradox is that in the
former, “the problem is that there is no consistent assignment of truth-
values,” while in the latter, “the problem is that there are too many con-
sistent assignments;” thus, any “assignment must involve an arbitrary
choice as to which truth-value should be assigned.”\(^{156}\)

\(^{154}\) This example is taken from Hans G. Herzberger, Paradoxes of Grounding in Se-

\(^{155}\) Bradley Armour-Garb & James A. Woodbridge, Dialethism, Semantic Pathol-

\(^{156}\) ROY SORENSEN, VAGUENESS AND CONTRADICTION 167 (Oxford University Press
2002). See also Herzberger, supra note 21, at 150.
The notion of validity in law produces something akin to the Truth-Teller Paradox. Validity is the qualifying mark or label of legal norms.\textsuperscript{157} It distinguishes between the law (rules) in force and that which is not law. In other words: “Law which is not valid is not law.”\textsuperscript{158} Thus, determining the validity of norms is of critical importance; it is essential to the formation of normative expectations and is also a critical component of legal decision-making. It is the validity of the law that makes its normative statements binding. While non-legal prescriptive statements also purport to be binding, they invoke other reasons for their bindingness.\textsuperscript{159} But validity is not only a mark unique to law; it can only be endowed and transferred according to law. The concept of validity thus holds an inevitable circularity: validity can only be determined recursively, that is, by reference to valid law.\textsuperscript{160} Because norms cannot be evaluated through the logical prism of truth and falsity, the concept of validity operates as a plausible alternative.\textsuperscript{161} Consider, for example, the following set of rules (“the Paradox of Validity”):

Rule 1.1: This rule, and all the rules enumerated below, are valid.
Rule 2.1: . . .
Rule 2.2: . . .
Rule 2.3: . . .
. . .

\textsuperscript{157} Varga, supra note 141, at 155.
\textsuperscript{158} LuHMANN, supra note 27, at 125.
\textsuperscript{159} See Vranas, supra note 35, § 3 (discussing the notion of bindingness).
\textsuperscript{160} LuHMANN, supra note 27, at 128; Varga, supra note 141, at 155–56.
\textsuperscript{161} Vladimir Svoboda, \textit{Forms of Norms and Validity}, 80 PONZAN STUD. PHIL. SCI. AND HUMAN. 223, 229 (2003). As in classical logic, I assume bivalence, i.e., a binary distinction between valid/not-valid. While validity resembles in some aspects the notion of truth, it does not generate the same kind of paradoxes. Thus, for example, the notion of validity does not yield a paradox parallel to the Liar Paradox. As an example, imagine that you open the Civil Code that is in force in your country. On page 100 of the Code, you find rule number 499, which states:

499. This rule is not valid.

What is the meaning of this sentence? Consider, first, the option that rule 499 is valid—that is, it represents the law in force. If it is valid, then what it says is valid as well, and since it says about itself that it is not valid, this must be valid as well. This is a contradiction. Assume, alternatively, that rule 499 is not valid. Then what it says about itself is indeed the case, and no contradiction arises (strictly speaking, if a rule is not valid, what it says is legally irrelevant). Unlike the Liar Paradox, there is a simple way out: we assume that rule 499 is not valid. This leaves us with the riddle of how and why this sentence was incorporated into the Code in the first place.
Rule 2.\(n\): \(\ldots (ad\ infinitum)\).

This sequence of rules can have two consistent assignments (at least) of validity values. The first, in which both the Rule 1.1 (“meta rule”) and all the other rules (“secondary rules”) are valid, and the second, in which both the meta rule and all the secondary rules are invalid.\(^{162}\) The Truth-Teller Paradox generates a similar problem of multiple (consistent) assignments of truth and falsity.

Note, however, that there are important differences between the Paradox of Validity and the Truth-Teller Paradox. In the latter, it is possible to argue that the sentences included in the Truth-Teller sequence are *vacuous* or *under specified*; this reflects the fact that these sentences do not supply concrete conditions by which their truth or falsity may be determined. They fail to yield a statement.\(^{163}\) The parallel legal sequence is not vacuous. Even if we consider it invalid, its deontic content is not lost. The normative statements simply lose the color of law; they become non-legal norms.

The foregoing paradox reflects one of the deepest dilemmas of modern law: on one hand, we feel uncomfortable with the thought that law validates itself; on the other hand, this is exactly what is expected from the law according to the modern conception of validity—that is, that validity can only be endowed *according* to law. The assumption that the criteria and authority for determining the validity of norms must be instituted through valid law thus generates a *vicious circularity*, which seems to be logically irresolvable.

At this point, it might make sense to turn to philosophy. Perhaps we can gain some inspiration from the various strategies invoked by philosophers to resolve the puzzle of semantical paradoxes. Let me briefly sketch some of the attempts to resolve these paradoxes.\(^{164}\)

Alfred Tarski proposed to resolve the puzzle of the Liar Paradox by replacing our everyday, singular understanding of truth with a multi-level

\(^{162}\) The qualification “at least” is necessary because once we assume that the meta rule is not valid, there can be multiple assignments of validity that attribute different values to the secondary rules.

\(^{163}\) Transforming \(K_1\) into a bi-conditional yields the following vacuous sentence: *\(K_1\) is true if and only if \(K_1\) is true*. In contrast, in proper statements such transformation makes perfect sense. Consider: \(K_2\) *Leaves are green*. The sentence “\(K_2\) is true if and only leaves are green” is fully specified. See Laurence Goldstein, *Fibonacci, Yablo, and the Cassationist Approach to Paradox*, 115 Mind 867, 884–85 (2006).

\(^{164}\) See generally, SAINSBURY, supra note 13; RESCHER, supra note 12. An important solution strategy that I will not discuss is based on rejecting (some) of the assumptions of classical logic (e.g., the law of excluded middle). See, e.g., Graham Priest, *What Is So Bad About Contradictions*, 95 J. Phil. 410 (1998).
linguistic framework. According to this construction, one is able to speak meaningfully about the truth of statements in one language (the object language) only in a language that is located higher on the linguistic hierarchy than the object language and whose expressive capacities are essentially richer (the meta language).

Another approach views the non-hierarchical character of natural language as a given. It proposes to resolve the riddle of the Liar and Truth-Teller Paradoxes by arguing that groundless sentences are intrinsically ill-formed and should be excluded from the realm of statements—statement being understood as a sentence that is “used to say something true or false.” It is argued that groundless sentences, while grammatically correct, fail to make any statement; they are, in other words, truth incompetent. Furthermore, since these sentences are truth incompetent, it makes no sense to ask whether they are true or false.

Laurence Goldstein argues that the reason why liar-like sentences generate such awe and confusion is not because of any deep logical problem, but rather because of certain deep-seated beliefs and preconceptions that characterize human thought. Underlying the semantical paradoxes is our naive intuition that “the paradoxical sentences, because they are not ungrammatical, vague or sortally suspect and encompass no false presuppositions, must yield statements when used.” The analysis of these paradoxes thus seems to belong more to the realm of psychology than to the realm of logic.

In effect, the foregoing approaches introduce, though for different reasons, a general ban on self-reference and other forms of groundlessness. However, this ban may seem too strict for and incongruent with our intuitions regarding the use of language. An alternative approach is offered by the model of naive semantics, articulated by Hans Herzberger. The essence of this approach is the following:

In naive semantics, paradoxes are allowed to arise freely and to work their own way out. No semantic defences are to be set up against them.

. . . No effort will be made to eliminate the paradoxes, to suppress

166. Id. at 349–52.
167. Statement, following Goldstein, is understood as “a truth-bearer, a used sentence—‘used’ not in the sense just of being uttered out loud (a pheme) or written down (a grapheme) but in the sense of being used to say something true or false.” Laurence Goldstein, A Unified Solution to Some Paradoxes, 100 Proc. Aristotelian Soc. 53, 54 (1999) (emphasis in original).
168. Id. at 58.
169. Id. at 69.
them, or in any way to interfere and take deliberate action against them. They are to unfold according to their own inner principles. In its early stages naive semantics may appear somewhat haphazard and even chaotic. Gradually some islands of stability will emerge and grow until eventually everything has resettled into a new but orderly arrangement.170

Instead of trying to break or suppress the semantic instability associated with semantical paradoxes—they oscillation between truth and falsity—naive semantics calls us to embrace it. This can be achieved by exposing the pattern through which paradoxical statements change their values at different stages of evaluation.171 Naive semantics thus rejects any attempt to classify liar-like sentences as neither true nor false or both true and false. Their “fundamental semantic character is neither a truth value nor the absence of a truth value, but a valuational pattern” that has certain regularities.172 By demonstrating that paradoxical sentences follow certain regularities, naive semantics shows “how a language could contain paradoxical statements and nevertheless have a systematic and coherent semantic structure.”173

What are the implications of the philosophical struggle with semantical paradoxes for the study of the paradox of validity? Consider Tarski’s hierarchical conception of truth.174 To apply Tarski’s proposal to law, one would have to assume a hierarchy of laws in which the validity of the lower-level normative layer could only be determined through the prism of a higher law. This hierarchical conceptualization of validity is inconsistent, however, with our practical experience of law as a unitary system. So maybe, following the philosophical strategy of barring

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170. Herzberger, supra note 21, at 482.
171. This valuation technique consists of two phases:

Each statement undergoes two phases of evaluation, either of which can be trivially simple or, within fixed bounds, extremely complicated. Each statement can be assigned two characteristic ordinal numbers: a stabilization point and a fundamental periodicity. The stabilization point for a statement marks the earliest stage at which its valuations become periodic, and its periodicity marks the length of its valuational cycle.

Id. at 492 (emphasis in original). Thus, for example, the Looped Liar discussed above, supra note 19 and accompanying text, is cyclic with periodicity 4. Starting with the assumption that Plato’s statement is true leads to the conclusion that Socrates’ statement is true, so that Plato’s statement is in fact false. Thus, Socrates’ statement is false, coming full circle to the original conclusion that Plato’s statement is true. If we attribute the values (1, 0) to (true, false) we get the following cyclical pattern: 11001100 . . .

172. Id. at 497 (emphasis added).
173. Id.
groundless sentences, we should impose a ban on groundless normative structures? This solution raises many difficulties: first, because the idea that validity should only be endowed according to law has deep roots in the moral and political culture of the Western world, and second, because it is not clear what constitutes a proper grounding for a global norm.

The answer to the question of legal paradoxicality lies elsewhere, and requires, as will be argued below, a conceptual switch. This alternative approach has some resonance with the dynamic vision of naive semantics.

C. The Praxis of Paradox: From Purity to System Dynamics

Exploring the puzzle of legal paradoxes requires a departure from the philosophical and logical approach to the study of paradoxes. The philosophical inquiry has been guided by the idea that paradoxes represent a certain malady of thought that should somehow be eliminated, prevented, or resolved.175 One of the main tasks of logic is to free us from this disease.176

The philosophical approach is not applicable to law because the notion of paradox—in its philosophical and logical connotations—does not apply to law in its social instantiation.177 This has to do with the fact that paradoxes are properties of sentences.178 Because law, as a social system, is not reducible to sentences (e.g., norms), it cannot be, strictly speaking, paradoxical—although it can be depicted as self-referential, self-

175. Thus, Alfred Tarski has noted in one of his papers: “The appearance of an antinomy is for me a symptom of disease.” Alfred Tarski, Truth and Proof, 220 Sci. Am. 63, 66 (1969).

176. Nicholas Rescher observes: “The prime directive of rationality is to restore consistency in such situations.” Rescher, supra note 12, at 9. See also Chihara, supra note 13, at 590–91.

177. The gap between the logical and legal planes has remained unnoticed by some legal scholars. For example George Fletcher, in his article Paradoxes in Legal Thought, notes: “This Article commits itself to logical consistency as the indispensable foundation for effective dialogue and coherent criticism. Only if we accept consistency as an overriding legal value will we be troubled by the paradoxes and antinomies that lie latent in our undeveloped systems of legal thought. Grappling with uncovered paradoxes and antinomies will impel us toward consistent theoretical structures.” George P. Fletcher, Paradoxes in Legal Thought, 85 Colum. L. Rev. 1263, 1264–65 (1985).

178. Goldstein, supra note 167, at 54. I use the term “sentence” to denote a string of words satisfying the grammatical rules of a language. See WordNet 2.0 dictionary, http://wordnet.princeton.edu (follow “search” hyperlink and search for “sentence”). This broad definition includes sentences in the form of both statements and norms. Statements (or claims), unlike norms, are truth-bearers; they can be true or false.
organizing, or self-producing. The paradoxes of law emerge as senten-
tial reflections of its unique systemic structure—of its self-organizing
and self-producing features. A self-organizing system is a system that not
only regulates or adapts its behaviour, but creates its own organization.
Self-production (or autopoiesis) denotes the process by which a system
recursively produces its own network of components (in the case of law,
communication ordered by the distinction legal/illegal), thus continu-
ously regenerating its essential organization in the face of external per-
turbations and internal erosion. Self-organizing and self-producing
systems are intrinsically circular and self-referential.

Recognizing that the paradoxes of law are reflections of its unique sys-
temic structure indicates that the notion of purity does not provide a suit-
able guide for the study of legal paradoxicality. One cannot purify the

179. One of the key lessons of the social analysis of law is the understanding that the
essence of law cannot be captured by simply enumerating its normative content. This
point has been forcefully made by Gunther Teubner and Niklas Luhmann. Describing
the law as a system of rules or a system of symbols, Teubner argues, provides no answer to
the dynamic property of law, to its self-regulatory capacity: “For how are norms to pro-
duce norms or symbols to generate symbols? We can only conceive of the law producing
itself if we understand it no longer as a mere system of rules but as a system of actions.”
GUNThER TeUBNER, LAW AS AN autoPoietIC SYStEm 18 (Zenon Bankowski ed., Anne
Bankowska & Ruther Adler trans., Blackwell Publishers 1993). See also NiKLAS
LUHMANN, LAW AS A SOCIAL SYStEm 98–105, 177 (Fatima Katner et al. eds., Klaus A.
Ziegert trans., Oxford University Press 2004); Neil MacCormick, Norms, Institutions,

Technology, Information, and Systems Management Resources, in THE ENCYCLOPEDIA OF
LIFE SUPPORT SYSTEMS (EOLSS), Developed Under the Auspices of United Nations Educa-
tional, Scientific, and Cultural Organization [UNESCO], EOLSS Publishers, Oxford,
UK, http://www.eolss.net; Francis Heylighen & Cliff Joslyn, Cybernetics and Second
Order Cybernetics, in 4 ENCYCLOPEDIA OF PHYSICAL SCIENCE & TECHNOLOGY 155–
of self-organization, see id. at 160–61.

181. In mathematical terms, these forms of circularity can be modeled by an equation
representing how some phenomenon or variable \( y \) is mapped onto itself by a transforma-
tion or process \( f: y = f(y) \). To make sense of this equation, one needs to explicate what
\( y \) and \( f \) stand for. For a more detailed analysis, see Heylighen & Joslyn, supra note 180, at
160.

182. The notion of purification is invoked, for example, by Nicholas Rescher.
RESCHER, supra note 12, at 31. Rescher himself provides some support for the foregoing
thesis in his distinction between the practical and theoretical contexts. In practical con-
texts, Rescher argues, “there is a possibility of compromise—of affecting a division that
enables us in some way and to some extent ‘to have it both ways,’ say, to proceed A-wise
on even days and B-wise on odd ones. But we cannot rationally do this with beliefs. In
theoretical contexts we must choose—must resolve the issue one way or another.” Id. at
11.
law from its paradoxes because they reflect vital steering and stabilizing mechanisms without which the law would not be able to counteract external pressures. The static perspective, which characterises the study of paradoxes in logic, is not suited for that task because it is not sensitive to the social dynamic underlying the paradoxes of law. The circular quality of the concept of validity is therefore an inevitable feature of legal communication. This circularity does not undermine the normative unity of the legal system because the mark of validity is taken for granted in the recursive operations of the law. Further, in functional terms, this circularity provides the law with far-reaching flexibility by empowering it to create and destruct normative structures in response to conflicting social pressures.

V. THE POLYMORPHOSIS OF INTERNATIONAL LAW AND ITS REPERCUSSIONS

The groundlessness of law is not, then, a new problem. Still, I will argue that the paradoxicality of the contemporary system of international law constitutes a novel phenomenon. What is unique in the structure of the international legal system is not the impurity of our forms of validation, but the emergence of multiple validating techniques, which are invoked simultaneously at the forefront of the international legal body. The global legal system has moved from a state of (imaginary) purity to a state of multiple paradoxicalities—a process of polymorphosis—leading to a much more complex juridical universe. But what are the social implications of this process? In order to answer this question, let me first

183. It is simply wrong, therefore, to view consistency, as Fletcher does, “as an overriding legal value” (although the appearance of consistency—concealing the paradox—could have instrumental value). See Fletcher, supra note 177, at 1265.

184. A notable exception is naive semantics, which, as we saw earlier, emphasizes the dynamic aspect of semantical paradoxes. See generally PATRICK GRIM ET AL., THE PHILOSOPHICAL COMPUTER: EXPLORATORY ESSAYS IN PHILOSOPHICAL COMPUTER MODELING 13–57 (MIT Press 1998). However, these attempts, which are based on the idea of iterated functional sequences, do not capture the innovative feature of the law—its capacity to produce surprises.

185. This is why law cannot include a right to revolution. This idea was nicely captured by an old English verse dealing with the paradox of treason (quoted by Josef Kunz): “Treason cannot prosper, what’s the reason? For if it does, who would dare to call it treason?” Josef L. Kunz, Revolutionary Creation of Norms of International Law, 41 AM. J. INT’L L. 119, 121 n.6 (1947).

outline the key types of deep inconsistencies that afflict the contemporary universe of international law.

1) **Horizontal inconsistent sources of validation.** There is no universally agreed upon concept of validity. Different international regimes use different notions of validity (compare the WTO regime to the ICA). In some cases, this form of inconsistency leads to transregime conflicts (e.g., the clash between treaty and contractual obligations in the investment domain and the clash between consent and technology in Internet law).

2) **Internal inconsistency.** Within the same legal regime, it is possible to find conflicting conceptions of validity pulling in different directions (e.g., the cases of the WTO and the ICC).

3) **The incorporation of vague sources of validity** (from morality to science). Vagueness yields conflicting interpretations both within particular regimes and across regimes (e.g., the new principle of civilian inviolability and the precautionary principle).

Together, these inconsistencies bring forth a legal universe whose complexity is multidimensional. The complexity of modern international law cannot be captured through reference to the heterogeneous, institutional reality of multiple legal tribunals. Its complexity runs deeper, covering many layers of legal praxis and challenging the traditional boundaries and tenets of international law (such as the distinction between public and private international law). But what are the possible repercussions of the polymorphosis process? In the following Sections, I explore this question by considering the influence of the polymorphosis process on the structure and autonomy of the global legal system, on its stability, its relationship with other systems of governance, and on its external legitimacy. Responding to these questions requires us to move from the realm of historic-analytic analysis into the realm of futuristic socio-legal analysis. This move also makes the following discussion much more explorative (even speculative).

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187. Compare supra Section II.B.1, with supra Section III.C.
188. See supra Section III.B.
189. See supra Section II.B.
190. See supra Section III.B.
A. From Colonization to Internal Complexification: The Emergence of Cosmopolitan Law

The polymorphosis process can be postulated to be a consequence of the colonization or instrumentalization of the global legal system by multiform external systems.191 There are certainly voices that argue that this colonization is widespread, with a finger pointed, in particular, to the global economic system or the so-called “Washington Consensus.”192 Economic rationality and economic institutions (in all their different embodiments, public and private), it is argued, are actually calling the shots; the law—from the WTO to the Climate Change Convention—operates as a mere façade for economic calculations and corporate interests.193 While this argument has some merit, I do not find it convincing as an explanation for the diverse processes depicted above.

There are two main reasons for my skepticism. First, the diversity and complexity of the different validation techniques—reflecting both their horizontal incompatibilities and their internal fuzziness—makes this argument unconvincing. The empirical argument that served to reject Kunz’s purity thesis by questioning its coherence likewise serves to reject this totalistic Marxist critique (by similarly questioning its coherence). Second, the search for grounding, which underlies all of the forms of validation discussed in Section III, reflects a common adherence to the

191. On the risk of the colonization of global law by external sources see, for example, Fischer-Lescano, supra note 99.
193. See, e.g., David Held, Globalisation: the Dangers and the Answers, OPEN DEMOCRACY, May 27, 2004, available at http://www.opendemocracy.net/globalization_vision_reflections/article_1918.jsp; Finnegan, supra note 192, at 41; Noam Chomsky, The Passion for Free Markets Exporting American Values Through the New World Trade Organization, Z MAGAZINE, May 1997, available at http://www.zmag.org/zmag/articles/may97chomsky.html. Noam Chomsky provides a prototypical formulation of the colonization argument. Referring to the WTO Agreement on Basic Telecommunications, he argues that “the ‘new tool’ allows the U.S. to intervene profoundly in the internal affairs of others, compelling them to change their laws and practices. Crucially, the WTO will make sure that other countries are ‘following through on their commitments to allow foreigners to invest’ without restriction in central areas of their economy. In the specific case at hand, the likely outcome is clear to all: ‘The obvious corporate beneficiaries of this new era will be U.S. carriers, who are best positioned to dominate a level playing field . . . .’” Id. In a similar fashion, the bundling of law and technology can be viewed as an “automatic” mechanism that is controlled by private firms—and serves their interests. Margaret Radin has recently argued that this new form of machine-implemented self-enforcement reflects the replacement of the law of the legislature by the law of the firm. Radin, supra note 127, at 1233.
concept of normativity. Indeed, the quest for validity can only make sense within the realm of law.\footnote{194}{See Varga, \textit{supra} note 141, at 164.}

The polymorphosis process represents, therefore, something else: an internally generated process of complexification. It is a purely internal phenomenon—an internally driven reconstruction of law’s groundings with the law reacting, but not yielding, to external sources.\footnote{195}{This does not mean that the question of the grounding of law is not discussed in non-legal domains, such as politics or philosophy; however, from an internal perspective, this external deliberation appears as noise.} The appeal to democracy, science, morality, direct consent, and technology does not signal the colonization of law, but rather an \textit{extension of the horizon of possibilities} through which international law, in its various realizations, can react to external pressures. But the polymorphosis process represents a deeper message. It brings forth a new kind of global law—a truly \textit{cosmopolitan phenomenon}. The unity of this new body of global laws does not derive from the ideal of national sovereignty or from some projected global hierarchy;\footnote{196}{Hence, one can no longer argue that “national sovereignty is the condition of global law and global law is the condition of sovereignty being possible.” Fischer-Lescano, \textit{supra} note 99, at 347. Nor can such unity be found in the International Court of Justice as the apex of some postulated hierarchy. See Koskenniemi & Leino, \textit{supra} note 149, at 577.} rather, it is constituted through a common appeal to the concepts of normativity and grounding, which are postulated as universally applicable distinctions.

\section*{B. Paradox, Diversity, and Resilience}

The polymorphosis process does not seem to reflect, then, the subjugation of the law by external forces. However, the impact of this process on the functional operation of the law and on its relationship with other social systems still constitutes an unresolved problematic. This problematic raises two questions: first, could the multiple forms of self-reference and inconsistencies associated with the polymorphosis process lead to irresolvable conflicts within and between regimes, leading ultimately to the total paralysis of the global legal system?\footnote{197}{For this possibility, see Teubner & Fischer-Lescano, \textit{supra} note 186, at 1004; \textsc{Greg C. Shaffer} \textsc{and Mark A. Pollack}, \textit{Regulating Risk in a Global Economy: The United States, Europe, and Agricultural Biotechnology} 1–47 (Oxford University Press forthcoming 2007) (manuscript on file with author).} Second, and in light of this possibility, could the entanglement of the law in its internal paradoxes lead to the expansion of other social systems (economics, politics, morality, and religion), simultaneously causing global law to contract as problems migrate to other systems?
Systems theory recognizes operational paralysis and structural disintegration as a possible trajectory in the life of ecological and social systems. However, this conjecture is not the most plausible account of the future direction of the contemporary global legal system. I argue that the complexity and diversity of the contemporary body of law, with its proliferation of validation techniques, should be seen, at this point, as a source of strength rather than weakness. This complexity contributes to the resilience of the global legal system and enhances its ability to respond to external pressures. The legal anxiety associated with the possibility of regime collisions and normative contradictions confuses the micro level (the ramifications of a local dispute, e.g., between the WTO regime and the Kyoto Protocol) and the macro level—the resilience of the global legal system in its totality.

This argument draws on the study of the relation between system resilience and diversity in ecology. The concept of resilience is used in ecology to denote the width or limit of a stability domain in an ecological system and is defined by the “magnitude of disturbance that a system can absorb before it changes stable states.” Biodiversity is defined as a measure of two features of an ecological system: functional-group diversity and functional-response diversity. Functional-group diversity measures the diversity of the ecosystem in terms of groups of species that fulfill different functions (e.g., species may pollinate, graze, predate, fix nitrogen, etc.). The persistence of functional groups contributes to the performance of ecosystems and the services that they generate, while the loss of a major functional group, such as apex predators, may cause drastic alterations in ecosystem functioning.

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201. Folke et al., *supra* note 198, at 569.

202. *Id.* at 570.

203. *Id.*
is defined in terms of the diversity of responses to environmental change among species that contribute to the same ecosystem function. Variability in response to environmental change within the same functional group is critical to ecosystem resilience.

There is an increasing consensus among ecologists that biodiversity contributes to system resilience by increasing sources of renewal and reorganization, and by providing a rich response horizon. Generally, biodiversity provides cross-scale resilience. Species combine to form an overlapping set of reinforcing influences, spreading risks and benefits widely, and thus retaining overall consistency in performance, independent of wide fluctuations in the individual species.

Using biological concepts in the study of social processes is not a trivial exercise. The following comments constitute a first step in an exploration of the applicability of the idea of ecosystem resilience to the study of social systems. In the context of law, resilience may be understood in terms of the capacity of the legal system to withstand external colonization attempts (reflecting a shift from autonomy to allonomy) or its capacity to maintain a certain level of communicative activity (with different levels representing different states). The diversity of validation techniques constitutes a form of functional-response diversity. It provides the law with multiple avenues to respond to external pressures, maintaining, nonetheless, its normative unity (against competing social orders).

This diversity—which in the legal domain is translated into paradoxical tensions at the meta-normative level—has advantages at both the micro-regime level and the macro-meta-system level. Let me give a few

204. Id.
205. Id.
206. Id. at 572.
207. Gunderson, supra note 200, at 431. The distribution of functional diversity within and across scales allows regeneration and renewal to occur following ecological disruption over a wide range of scales (with scale defined as a range of spatial and temporal frequencies). Garry Peterson, Craig R. Allen & C.S. Holling, Ecological Resilience, Biodiversity, and Scale, 1 Ecosystems 6, 11, 16 (1998).
208. For other attempts to use biological ideas in the study of social systems, see Niklas Luhmann, Social Systems 12–58 (John Bednarz, Jr. & Dirk Baecker trans., Stanford University Press 1995); Heylighen, supra note 180, at 24 (the concept of self-organization).
209. “Allonomy,” literally meaning external law, refers to the situation in which a system is regulated or controlled from the outside. Francisco J. Varela, Principles of Biological Autonomy xi (George Klir ed., Elsevier North Holland, Inc. 1979).
210. Diversity contributes therefore to the continuance of (transnational) legal communication. See Heylighen & Joslyn, supra note 180, at 162–63. To the extent that law is taken as a better way to resolve societal conflicts (e.g., relative to force), this result has important moral value.
concrete examples. In the case of the WTO, the friction between the autonomy of the legal system and its apparent commitment to the Westphalian paradigm allows the law to proceed with its internally driven conceptual innovation while still relying on the legitimacy produced by the ideal of state consent.211 The reference to external validating sources—such as science and environmental ethics—further enriches the response horizon of WTO law. In the case of the lex mercatoria, the tension between disaggregated contractual sources and a permanent institutional and doctrinal apparatus allows the law to develop deep sensitivities to the needs of the global economic system within a stable institutional infrastructure, providing the system with memory and coherence (despite its fragmented foundations). The reliance on (and development of) universal private law doctrines that operate as a common conceptual grid constitutes an additional source of validity and stability. At the metaregime level, the interplay between the different validation sources allows the legal system to respond to multiple social needs despite political and economic constraints. Thus, for example, the GRI, drawing upon an innovative institutional structure based on a tripartite commitment to consensus-building, inclusive decision-making process, and the vision of sustainable development, has successfully initiated a new global scheme dealing with corporate sustainable reporting in a field in which the conventional treaty-making route would have faced formidable obstacles.212

The lesson from the biological discussion of diversity and resilience seems to be clear: there is value in diversity in both its institutional and normative dimensions. In terms of institutional design, this suggests, I will argue, a shift from models of institutional hierarchy and normative unity to reflexive models that maintain this diversity and the paradoxical frictions associated with it.213 I will say more about that in Section VI.

C. The Implications for the Legitimacy of the Global Legal System

Finally, a key question is to what extent the paradoxes of validity influence the (external) legitimacy of international law. This question requires us to distinguish between moral and sociological understandings of legitimacy. Legitimacy, in the moral, normative sense, refers to the right to rule.214 Allen Buchanan and Robert Keohane argue that in the

211. Picciotto, supra note 61, at 496. See also supra Section II.B.1.
212. See GRI G3, supra note 104.
213. For a similar conclusion, see Teubner & Fischer-Lescano, supra note 186, at 1004.
case of global institutions, the right to rule should be understood to mean “both that institutional agents are morally justified in making rules and attempting to secure compliance with them and that people subject to those rules have moral, content-independent reasons to follow them and/or to not interfere with others’ compliance with them.” Legitimacy, in a sociological sense, is a measure of belief. From a sociological perspective, an institution is legitimate when it is widely believed to have the right to rule. Legitimacy is therefore a subjective quality, defined by the perception of the institution in the eyes of the individual.

There is a sharp distinction between sociological and normative perspectives. From a sociological perspective, making a claim about the legitimacy of certain global institutions should not be seen as a “moral claim about the universal legitimacy, or even less the moral worth, of any particular international rule.” This understanding of the sociological aspect of legitimacy provides, however, only part of the picture because it focuses exclusively on the individual perspective. One can also take a systemic-institutional view of legitimacy. This perspective conceptualizes legitimacy as a measure of the capacity of the law to maintain its autonomy and as a measure of the growth or contraction of legal communication.

In exploring the relation between legitimacy and validity, I want to focus on one concrete question: what are the implications of the autological and increasingly heterogeneous character of the concept of validity for the legitimacy of global law? I will start with the moral aspect of legitimacy and will then consider the sociological aspect. Initially, one can take the view that the validity of the law is irrelevant to the question of legitimacy. Legitimacy is a moral measure, which is determined by moral considerations; as such, it should not be influenced by internal legal constructions. However, as Buchanan and Keohane demonstrate, the moral legitimacy of international legal institutions is also a function of the operational dynamic of the legal system. To the extent that the

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216. Id. at 405.
218. Id. at 381.
219. Id.
220. See generally Buchanan & Keohane, supra note 215.
various paradoxes of validity influence this dynamic, they can also influence the legitimacy of the law.

Buchanan and Keohane make a two-fold argument in this context. They argue first that legitimacy is primarily an instrumental measure.

The basic reason for states or other addressees of institutional rules to take them as binding and for individuals generally to support or at least to not interfere with the operation of these institutions is that they provide benefits that cannot otherwise be obtained. If an institution cannot effectively perform the functions invoked to justify its existence, then this insufficiency undermines its claim to the right to rule.221

Second, Buchanan and Keohane suggest that part of the legitimacy of global governance institutions lies in certain epistemic-deliberative qualities. In particular, they argue that to be legitimate, a global governance institution must create the conditions for ongoing critical contestation of its goals and terms of accountability through interaction with agents and organizations outside the institution.222 Achieving such epistemic responsiveness requires that the institution be both transparent and open to dialogue with external epistemic actors.223

The question, then, is in what way does the autological and increasingly heterogeneous quality of the concept of validity influence these two measures of legitimacy? If one adopts the view that the unfolding incoherence of the international legal system could lead to operational paralysis, one could conclude this will ultimately reduce the legitimacy of the international legal system. If, on the other hand, one adopts the view that this heterogeneity contributes to the resilience of the global legal system and to its capacity to cope with the range of problems facing the global society (as I have argued above), then it is reasonable to assume that this heterogeneity should contribute to the legitimacy of the international legal body.

The paradoxes of validity could also enhance the legitimacy of international institutions by contributing to their epistemic responsiveness. The autological character of the transnational legal system turns it into a highly innovative system. It is, in the words of Heinz von Foerster, a non-trivial machine.224 Non-trivial machines—unlike trivial machines such as cars and mobile phones—are highly disobedient and unpredict-

221. Id. at 422.
222. Id. at 405–06, 432.
223. Id. at 432.
In non-trivial machines, “a response once observed for a given stimulus may not be the same for the same stimulus given later.” The autological nature of the law allows it to continuously challenge its traditional doctrines, analogies, and conceptual constructs. The broad ensemble of validating techniques that characterize the global legal system further enrich this self-reflection process. One of the main virtues of this self-referential dynamic is that it provides some guarantee against domination and exclusion. By creating an opening for a change, it provides room and hope for critical voices. In a world that cherishes diversity of life forms, this competency constitutes an important virtue. The deep heterogeneity of the global legal system seems to cohere better with the cultural diversity of global society.

The sociological connection between legitimacy and validity constitutes a difficult question. From a systemic perspective, I have argued that the paradoxes of validity may contribute to the resilience of the law and, in that sense, may also contribute to its legitimacy (understood as a measure of legal autonomy and the intensity of legal communication). Decoding the influence of paradoxes of validity on individual perceptions of legitimacy provides a difficult psychological puzzle. First, because of the low visibility of the paradoxes of validity, it is uncertain to what extent they affect the perception of global law within the wider public. If people are not aware of the incoherence and autological character of the law, this fact will not affect their normative beliefs. Second, these features may influence subjective beliefs in different ways. Incoherence, for example may cause a loss of legitimacy by portraying law as a field in which decisions are made in a chaotic and arbitrary fashion. The self-referential nature of validity may put in doubt the bindingness of law—its capacity to provide content-independent reasons for action. Law has developed, however, doctrinal mechanisms that can cope with these questions (e.g., the use of vague concepts).

The cognitive reaction to legal paradoxes is still an under-explored question. So let me conclude this discussion by looking at the findings of

225. Id.
a recent article, which explored the cognitive repercussions of the similar Truth-Teller Paradox. Shira Elqayam explored the way reasoners evaluate Truth-Teller-type propositions ("I am telling the truth") and Liar-type propositions ("I am lying"). Shira Elqayam explored the way reasoners evaluate Truth-Teller-type propositions ("I am telling the truth") and Liar-type propositions ("I am lying"). She found, through two experiments, the existence of a “collapse illusion” by which reasoners evaluate Truth-Teller-type propositions as if they were simply true, whereas Liar-type propositions tended to be evaluated as neither true nor false. This psychological result is inconsistent with the philosophical view of Truth-Teller-type propositions, which considers them hopelessly indeterminate. Elqayam offers several psychological explanations for this phenomenon, which I cannot consider in detail here. However, it would be interesting to explore whether a similar phenomenon exists also in the case of validity.

VI. FROM GLOBAL CONSTITUTIONALISM TO CONTEXTUAL REFLEXIVITY

Modern international law is impure, messy, and complex. But the attempts to purify it through appeals to grand theories—constitutional, moral, or other—are ill-conceived. First, they fail to recognize the innate paradoxicality of law, and second, they constitute a threat to the legitimacy and resilience of the global legal system. The study of diversity and resilience in the ecological domain demonstrates the systemic value of diversity. In terms of institutional design, it suggests a shift from unifying models based on hierarchical normative and institutional structures to reflexive models that could enhance and support the diversity of the global legal system. Indeed, as the concepts of normativity and rule of law become entrenched in the communicative fabric of global society, there is more room for experimenting with novel and reflexive institutional structures.

I would like to conclude this Article with two examples of highly reflexive legal structures. Underlying both examples is the idea of distributed authority. Such refined authority configurations provide richer opportunities for internal dialogue, self-contestation, and conceptual innovation. The price, though, is some loss of coherence. The two examples demonstrate how the use of a reflexive structure can affect both the mi-
cro-dynamic of a single regime, and the interplay between several regimes. These examples also differ in their model of distributed authority and in the construction of their reflexive dynamic.

My first example focuses on the GRI. The GRI was founded in 1997 by the Coalition for Environmentally Responsible Economies in partnership with the United Nations Environment Programme. The GRI is based on three potentially conflicting pillars: first, a commitment to multi-stakeholder decision making; second, an ideological commitment to the ethos of sustainable development; and third, a formal, hierarchical institutional structure. The commitment to consensual decision-making is reflected, for example, in the text of the G3 Sustainability Guidelines (2006):

Transparency about the sustainability of organizational activities is of interest to a diverse range of stakeholders, including business, labor, non-governmental organizations, investors, accountancy, and others. This is why GRI has relied on the collaboration of a large network of experts from all of these stakeholder groups in consensus-seeking consultations. These consultations, together with practical experience, have continuously improved the Reporting Framework since GRI’s founding in 1997. This multi-stakeholder approach to learning has given the Reporting Framework the widespread credibility it enjoys with a range of stakeholder groups.

The commitment to the value of sustainable development is set out in the G3 Guidelines. The Guidelines open with the famous definition of sustainability provided in the World Commission on Environment and Development report, Our Common Future. In addition to its commitments to multi-stakeholder consultation and sustainable development, the GRI is also based on a carefully designed hierarchical structure. The GRI is run by a Board of Directors and a Secretariat. The Board has “the

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235. Id.

236. It also finds resonance in the description of the GRI on its Web site: “The ‘Global Reporting Initiative’ is a large multi-stakeholder network of thousands of experts, in dozens of countries worldwide, who participate in GRI’s working groups and governance bodies, use the GRI Guidelines to report, access information in GRI-based reports, or contribute to develop the Reporting Framework in other ways—both formally and informally.” Id.

237. The goal of sustainable development is to “meet the needs of the present without compromising the ability of future generations to meet their own needs.” THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43 (Oxford University Press 1987).

238. GRI, supra note 234.
ultimate fiduciary, financial, and legal responsibility for the GRI, including final decision making authority on GRI Guidelines revisions, organizational strategy, and work plans.”239 The Secretariat is responsible for implementing “the technical work plan set by the Board of Directors.”240 While the Stakeholder Council is supposed to provide a kind of parliamentary scrutiny with respect to the Board’s decision-making process, its formal powers are very limited.241 The Board has the formal capacity to adopt policies that are inconsistent with the results of the deliberation process and the ideological commitment to sustainable development.242

The tripartite normative commitment of the GRI could potentially lead to a range of irresolvable conflicts. Despite this potential for internal quarrels, the GRI has functioned in an admirable fashion over the last years. It has produced two Reporting Guidelines over a period of four years.243 These Guidelines have not only reflected a deep commitment to ecological values—setting ambitious reporting standards that depart from the conventional, economic-oriented accounting principles—but have also influenced, in a substantive way, the reporting practices of MNEs.244

239. The GRI formal instruments of incorporation are not published on the Web site; I rely, therefore, on the information that was made public on the GRI Web site. GRI, Board of Directors, http://www.globalreporting.org/AboutGRI/WhoWeAre/Board/ (last visited Oct. 6, 2007).


241. The Stakeholder Council (“SC”) has 60 members. It meets annually and constitutes “the GRI’s formal stakeholder policy forum, similar to a parliament, that debates and deliberates key strategic and policy issues.” However, its only formal powers are to approve nominations for the Board of Directors and to provide it with strategic recommendations. The SC members are chosen by the Organizational Stakeholders. GRI, Stakeholder Council, http://www.globalreporting.org/AboutGRI/WhoWeAre/StakeholderCouncil/ (last visited Oct. 6, 2007); GRI, Organizational Stakeholders, http://www.globalreporting.org/AboutGRI/WhoWeAre/OrganizationalStakeholders/ (last visited Oct. 6, 2007).

242. See GRI, Board of Directors, supra note 239.


244. See KPMG, INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 4, 20 (2005). A survey published in 2005 by KPMG analyzed trends in corporate responsibility among the world’s top 250 companies of the Fortune 500 (“G250”) and the top 100 companies in sixteen countries (“N100”). The report found that sustainability reporting has “now become mainstream among G250 companies (sixty-eight percent) and fast becoming so among N100 companies (forty-eight percent).” Id. at 4. The influence of the GRI Guidelines was reflected in the fact that forty percent of the reporters mentioned that the Guidelines were the tool used by the corporation to decide the content of the sustainability report. Id. at 20.
The GRI reflexive structure seems to have provided the organization with both innovative capacity and the legitimacy to carry out its mission. Further, it succeeded in a domain in which progress through the treaty-making route would have been much more difficult.

My second example is based on the vision of judicial dialogue, drawing on the mechanism of preliminary ruling which was developed in the European Union. This mechanism can be used both in the context of single regimes and in the context of cross-regime relationships. Under Article 234 of the Treaty Establishing the European Community, the European Court of Justice (“ECJ”) “may give preliminary rulings interpreting European law at the request of any national court.” This mechanism was initially intended to address only questions relating to the validity of European law. However, “the ECJ successfully encouraged national courts to use the mechanism to review the compatibility of national law with European law.” As a result of the preliminary reference mechanism, there have been fewer occasions on which the ECJ has exercised its authority to review national judicial decisions. Instead, the ECJ’s interaction with national courts has become something akin to judicial dialogue, with reciprocal learning and exchange of ideas.

The European model can serve as a template for creating more extensive dialogue between international tribunals and national courts and possibly also between different international tribunals. The two regimes that were discussed in Section II—the WTO and the ICC—provide only limited opportunities for such dialogue. In the ICC Treaty, the principle that the Court is to be complementary to national criminal proceedings could be seen as a possible platform for this kind of judicial dialogue. The Rome Statute provides that the ICC will not exercise its jurisdiction if the state is genuinely willing to carry out the investigation or prosecution of crimes. The Statute also outlines processes for judicial review of national court decisions.

247. Id. at 2157.
248. Id.
249. Id. at 2156–57.
250. Rome Statute, supra note 67, art. 17. See also Maogoto, supra note 70, at 19.
251. Maogoto, supra note 70, at 20.
proceedings is likely to prove highly controversial, and we can thus expect the Court to be careful in using this authority.\textsuperscript{252} It seems that incorporating some form of preliminary ruling procedure into the ICC Treaty could provide more room for judicial dialogue, while at the same time defusing some of the political tension associated with the judicial review procedure. Likewise, the WTO does not have procedures to facilitate a constructive dialogue between national courts and the WTO judicial tribunals (although national courts play an important role in enforcing sections of the WTO rule book, especially in the fields of anti-dumping, intellectual property rights, and government procurement).\textsuperscript{253} In both cases, and in particular that of the WTO, designing procedures that facilitate an equal-footed dialogue between national and international courts could contribute to the reflexivity and legitimacy of the legal system as a whole.\textsuperscript{254}

The conceptual shift from purity to reflexivity asks us then to embrace the paradoxicality of law. The \textit{polymorphosis} process seems to mark the end of the dream of grand global constitutionalism.

\textsuperscript{252} Id. at 21.

\textsuperscript{253} In the case of anti-dumping, see, for example, James P. Durling, \textit{Deference, But Only When Due: WTO Review of Anti-Dumping Measures} 6 J. INT’L ECON. L. 125, 125–27 (2003).

\textsuperscript{254} It is beyond the scope of this Article to explore the details of such procedures. It is clear, however, that in order to facilitate dialogue, they should not be designed so as to merely crystallize the supremacy of the international tribunal. In designing such dialogical mechanisms, we should take into account the fact that the WTO rule book, unlike EU law, is not directly applicable within the jurisdictions of most WTO members.
THE SEARCH FOR POST-CONFLICT JUSTICE IN IRAQ: A COMPARATIVE STUDY OF TRANSITIONAL JUSTICE MECHANISMS AND THEIR APPLICABILITY TO POST-SADDAM IRAQ

Dana Michael Hollywood

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Few societies have suffered as has contemporary Iraq. Today, Iraq is a nation under foreign occupation with a horrifying history of savage authoritarian rule. Transitional justice mechanisms that address this legacy are critical to the stability and reconstruction of that troubled state. In particular, mechanisms aimed at national reconciliation could do much to allay sectarian divisions in Iraq, notably those created by the


2. The egregious and systematic human rights violations in Iraq under the Ba’ath regime have been well-documented and are beyond the scope of this paper. Arguably the best source on the monstrous inhumanity of the Ba’ath regime is Kanan Makiya’s masterly study first published in 1989 and later updated in 1998. See KANAN MAKIYA, REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ (updated ed. 1998). See also INT’L CTR. FOR TRANSITIONAL JUSTICE & HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY, IRAQI VOICES: ATTITUDES TOWARD TRANSITIONAL JUSTICE AND SOCIAL RECONSTRUCTION v (2004), available at http://www.hrcberkeley.org/download/Iraqi_voices.pdf [hereinafter IRAQI VOICES] (“Hundreds of thousands killed or missing, hundreds of mass graves, crippled state institutions, and a political culture shaped by three decades of one-party rule and dictatorship are but four contemporary realities.”), Opening Statement by Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, U.S. Department of State: Before the Comm. on Gov’t Affairs, 108th Cong. 1–2 (2003) (statement by Pierre-Richard Prosper, Ambassador-at-Large for War Crimes) (“[T]he Iraqi regime has repeatedly committed atrocities and serious violations of the laws of war over a twenty-year period, including: [t]he gassing and killing of between 50,000 and 100,000 Kurds during the Anfal campaign in 1998; [t]he brutal oppression and torture of Kuwaitis in 1991, displacing 1.5 million people, killing more than 1,000 Kuwaitis and leaving over 600 persons missing; [t]he brutal suppression of Shi’a Muslim insurgencies in southern Iraq in 1991, with indiscriminate attacks that killed between 30,000 to 60,000 persons, the draining of the southern marshes, and the secret execution of thousands; [a]nd a series of violations during Iraq’s war with Iran.”).

Sunni minority’s persecution of the Shi’a majority\(^4\) and the Sunni Ba’ath regime’s genocide of the Kurdish population.\(^5\)

Consequently, while transitional justice is indispensable to Iraq in its transition from authoritarianism to democracy, it also faces unique challenges. The President of the Center for Strategic and International Studies and the President of the Association of the United States Army co-authored a perceptive article in 2002 entitled *Toward Postconflict Reconstruction*.\(^6\) The article delineates four “pillars” that all post-conflict societies must establish in their transition from war to peace or authoritarian rule to democracy: security; justice and reconciliation; social and economic well-being; and governance and participation.\(^7\) While the authors acknowledge that these four pillars are “inter-related,” they also note that security is the “sine qua non of postconflict reconstruction.”\(^8\) Today, the security pillar has yet to be erected in Iraq.\(^9\) Until it has been established,


\(^7\) Id. at 91–92.

\(^8\) Id.

\(^9\) The February 22, 2006 explosion of the Askariya, or Golden, Mosque in Samarra, one of the Shi’ites’ most revered shrines, has so inflamed sectarian tensions that scholars, journalists, and policymakers fear that Iraq is now in the midst of a civil war. For background on the attack on the Askariya Mosque see PETER W. GALBRAITH, THE END OF IRAQ: HOW AMERICAN INCOMPETENCE CREATED A WAR WITHOUT END 1–12 (2006). The argument that Sunni-Shi’a tensions have so deteriorated in Iraq that the country is now in civil war is perhaps most forcefully made by former Ambassador Peter Galbraith. In a devastating critique of American policy, Galbraith comments: “Insurgency, civil war, Iranian strategic triumph, the breakup of Iraq, an independent Kurdistan, military quagmire. These are all consequences of the American invasion of Iraq that the Bush Administration failed to anticipate.” Id. at 7. See also Sean D. Naylor, *Retired Generals Blast Rumsfeld*, ARMY TIMES, Apr. 24, 2006, at 10 (“[M]any observers now debate whether the country is on the brink of civil war.”); Phil Rosenthal, *Journalists War Over “Civil War”*, CHI. TRIB., Apr. 14, 2006, at C1 (“Allawi has called it a civil war . . . and a growing number of Americans have decided that’s exactly what it is. A Los Angeles Times/Bloomberg poll of 1,357 adults nationwide this week found 56 percent of respondents believed Iraq was ‘currently engaged in a civil war’ . . . .”); Civil War (Siv-el Wôr), n. 1 A Violent Conflict Between Organized Groups Within a Country, WASH. POST, Apr.
transitional justice mechanisms will fail to contribute their full potential and must be used sparingly. While acknowledging this reality, this paper looks cheerfully to a hopefully not-too-distant future when transitional justice mechanisms can be implemented to their full potential in a peaceful and stable Iraq.

Part I of this Article provides a conceptual analysis of transitional justice. Throughout this section, various transitional justice mechanisms will be considered as the author believes that a comparative study better assists one in more fairly evaluating a particular approach. Part II considers the 1991 Czech lustration law. Particular emphasis is placed on this law because prima facie, the need for de-Ba’athification may be analogized to the need for de-Communization. In both cases, strong arguments can be made that party leaders responsible for building a repressive totalitarian apparatus and committing systematic human rights violations should not be trusted to carry out democratic reforms and must therefore be estopped from serving in positions of power. Indeed, lustration in the

9, 2006, at B03 (“[T]he war in Iraq has been a civil war not simply since the escalation of internecine killings following the bombing of [the Golden Mosque] in February, but at least since the United States handed over formal control to an interim Iraqi government in June 2004.”); Whether It’s Civil War or Not, Iraq Still Needs Military Help, TAMPA TRIB., Mar. 21, 2006, Nation/World, at 14 (“The Iraqi occupation is entering its fourth year with violence escalating. Some people here and in Iraq are calling the situation civil war . . . .”); Iraq ‘Now in the Grip of Civil War’, THE HERALD (Glasgow), March 20, 2006, at 1 (“We are losing each day as an average 50 to 60 people throughout the country, if not more. If this is not civil war, then God knows what civil war is.”) (quoting former interim Prime Minister Iyad Allawi); Desiree Cooper, Unholy Attacks Call Faithful Into Action, DETROIT FREE PRESS, March 2, 2006, at 1 (“The death count is now in the hundreds as the region hurtles toward civil war.”); Mosque Attack Arrests, DAILY TELEGRAPH (Sydney), March 1, 2006, at 21 (“The attack on Samarra’s Golden Mosque led to widespread retaliatory attacks on the minority Sunni community, sparking fears of civil war.”); Editorial, Nervous Days, THE PRESS (Christchurch, New Zealand), Feb. 27, 2006, at 10 (“There can be no doubt that the attack on the Golden Mosque was designed to create even more intense religious hatred and even spark a religious civil war.”); Richard Sisk, New Wave of Death and Hate: 100 Killed as Sunnis, Shiites Clash; U.S. Troops Don’t Take Sides as the Fear of Civil War Grows, DAILY NEWS (N.Y.), Feb. 24, 2006, at 21 (“This is the first time that I have heard politicians say they are worried about the outbreak of civil war.”) (quoting a Kurdish elder statesman in an interview with the Associated Press); Editorial, Iraq Is on the Brink: Destruction of the Golden Mosque Is a Major Test for Nation Rebuilding, BUFFALO NEWS, Feb. 24, 2006, at A8 (“No moment in the aftermath of the U.S-led invasion has led Iraq closer to civil war than Wednesday’s attack that shattered the iconic golden dome . . . .”); The Golden Mosque, FIN. TIMES (London), Feb. 23, 2006, First Section, at 1 (“Iraqi president Jalal Talabani pleaded with his countrymen to ‘work together’ against the danger of ‘civil war.’”); Louise Roug, Iraqi Shiites Erupt Over Shrine Attack, L.A. TIMES, Feb. 23, 2006, at A1 (“Almost three years after the April 2003 U.S.-led toppling of the Sunni regime of Saddam Hussein, more politicians and ordinary citizens began to utter the words ‘civil war’ openly.”).
form of de-Ba’athification, has had appeal in Iraq. Nevertheless, as Part II details, there are several concerns with lustration as a tool of transitional justice. Part III returns to post-Ba’ath Iraq and considers the transitional justice mechanisms heretofore implemented. The Article concludes with several recommendations to achieve transitional justice in Iraq.

I. TRANSITIONAL JUSTICE

A. Conceptual Overview

Professor Ruti Teitel, one of the preeminent students of transitional justice, has defined the approach as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” Transitional justice, therefore, is concerned with how “a state dedicated to the rule of law come[s] to terms with the lawlessness of a prior government, without in the process infringing on its own commitment to legality and impartiality.” Thus, all models of transitional justice seek to answer how a state reconciles an evil past, or in the words of Václav Havel, a “monstrous heritage.” They are all concerned with what Samuel Huntington has referred to as the “torturer problem.”

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10. See, e.g., Peter Slevin & Rajiv Chandrasekaran, Iraq’s Baath Party is Abolished: Franks Declares End of Hussein’s Apparatus as Some Members Retake Posts, WASH. POST, May 12, 2003, at A10 (“U.S. authorities have made ‘de-Baathification’ a goal of the occupation period.”).


14. SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 211 (1991). Huntington posits that whether a state will pursue transitional justice depends on how the non-democratic leaders exit. Id. at 228. That is, if, like Saddam Hussein, the leader was forced out, there will be a desire for retribution. See id. at 217–19. On the other hand, Huntington argues that if the non-democratic leaders voluntarily stepped down or “negotiated their way out,” often in the face of mass protests, the nation would be more likely to “forgive and forget.” Id. at 225–28. For criticism of Huntington’s hypothesis, see Kieran Williams et al., Explaining Lustration in Eastern Europe: “A Post-Communist Politics Approach” 8 (Sussex Eur. Inst., Working Paper No. 62, 2003), available at http://www.sussex.ac.uk/sei/documents/wp62.pdf.
Transitional justice has two key features. First, it includes restorative concepts of justice, such as the redressing of harms to a community, that extend well beyond prosecutions. Second, it “is transitional, which refers to a major political transformation, such as regime change from authoritarian or repressive rule to democratic or electoral rule or a transition from conflict to peace or stability.” This second feature distinguishes the much broader concept of transitional justice from restorative justice, considered below. Although “[t]he origins of modern transitional justice can be traced to World War I,” the field “gained coherence in the last two-and-a-half decades of the twentieth century, especially beginning with the trials of the former members of the military juntas in Greece (1975) and Argentina (1983) . . . .”

The instruments of transitional justice vary enormously. The International Center for Transitional Justice (“ICTJ”), for example, identifies

15. Restorative justice takes the victim and the community into account with respect to criminal law, in contrast to the perpetrator-centric approach emphasized in a retributive justice system. See Christa Obold-Eshleman, Note, Victims’ Rights and the Danger of Domestication of the Restorative Justice Paradigm, 18 NOTRE DAME J.L. ETHICS & PUB. POL’y 571, 572–73 (2004). See also Susan Opotow, Psychology of Impunity and Injustice: Implications for Social Reconciliation, in POST-CONFLICT JUSTICE 201, 209 (M. Cherif Bassiouni ed., 2002) (“Restorative . . . justice also focuses on redress, but it does so by viewing transgressions primarily as harm inflicted on human relationships and secondarily, as violations of the law.”).


17. 3 ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 1045 (2004).

18. See infra, Part I.B.

19. Teitel, Transitional Justice Genealogy, supra note 11, at 70. Professor Teitel has proposed a “genealogy” of modern transitional justice “divide[d] along three phases.” Id. at 69. She explains:

[T]ransitional justice becomes understood as both extraordinary and international in the postwar period after 1945. The Cold War ends the internationalism of this first, or postwar, phase of transitional justice. The second, or post-Cold War, phase is associated with the wave of democratic transitions and modernization that began in 1989. . . . The third, or steady-state, phase of transitional justice is associated with contemporary conditions of persistent conflict which lay the foundation for a normalized law of violence.

Id. at 70.

20. 3 ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY, supra note 17, at 1046.

five key approaches: “prosecuting perpetrators, documenting and acknowledging violations through nonjudicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.”

These tools are often further categorized in terms of what they hope to accomplish: peace (reconciliation as the primary goal) or justice (retribution and deterrence as the primary goals). A holistic approach to transitional justice seeks to balance these two forces. Indeed, one of the most complicated dilemmas transitioning states face is drawing a line between a search for justice and a crusade for revenge or, as Václav Havel has explained, “manag[ing] to steer between Scylla and Charybdis.”

Because transitional justice has among its many aims the punishment of those who inflicted harms on society and the compensation of those who have suffered, some scholars have come to view it as “backward-


23. Critics of the most visible truth commission, the South African Truth and Reconciliation Commission (“SATRC”), have argued that by granting limited amnesties in exchange for testimony, the SATRC “famously traded justice for truth—an exchange deeply resented by many of those who had been victimized by the state security forces or the families of those victims.” John Torpey, Introduction: Politics and the Past, in POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES 1, 9–10 (John Torpey ed., 2003). While volume one of the SATRC’s report acknowledges the criticism, it grounds the justification for the amnesty process in the desire to compile the most complete history possible:

The amnesty process was also a key to the achievement of another objective, namely eliciting as much truth as possible about past atrocities. The primary sources of information were the perpetrators themselves who, without the option of applying for amnesty, would probably not have told their side of the story.

For many victims, the granting of amnesty was a high price to pay for the public exposure of perpetrators.

Yet, as many commentators noted, trials would probably have contributed far less than did the amnesty process towards revealing the truth about what had happened to many victims and their loved ones.

1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT ch. 5, paras. 64–66 (Susan de Villiers ed., 1998) [hereinafter SATRC Report].

looking. Nevertheless, in a compelling argument, Eric Posner and Adrian Vermeule assert the opposite:

[T]ransitional justice can also be understood in forward-looking terms: providing a method for the public to recapture lost traditions and institutions; depriving former officials of political and economic influence that they could use to frustrate reform; signaling a commitment to property rights, the market, and democratic institutions; and establishing constitutional precedents that may deter future leaders from repeating the abuses of the old regime.26

To these arguments can be added that it is only by completely and openly acknowledging the past that a society can move forward and begin the process of reconciliation required to construct a peaceful and stable post-conflict society.27

Two criticisms are often leveled at a transitional justice approach. First, it is often argued that transitional justice “draw[s] morally arbitrary distinctions in deciding which groups to benefit”28 or “what types of harm to compensate.”29 For example, Posner and Vermeule note that “Germany’s post-Holocaust restitution program . . . included Jews but excluded gypsies and homosexuals.”30 For a more contemporary example, the South African Truth and Reconciliation Commission (“SATRC”) came under a great deal of criticism in its decision to limit “its investigation to gross violations of human rights defined as the ‘killing, abduction, torture or severe ill-treatment,’”31 thereby excluding millions of black Africans who suffered socially and economically under the system of apartheid.32 A second criticism is that transitional justice judgments can

25. The German political scientist Claus Offe, for example, has described transitional justice as comprising “problems of retroactive justice.” CLAUS OFFE, VARIETIES OF TRANSITION: THE EAST EUROPEAN AND EAST GERMAN EUROPEAN EXPERIENCE 82 (1996).
27. See, e.g., SATRC Report, supra note 23, ch. 1, para. 20 (“We could not make the journey from a past marked by conflict, injustice, oppression, and exploitation to a new and democratic dispensation characterised by a culture of respect for human rights without coming face to face with our recent history.”).
28. Posner & Vermeule, supra note 21, at 808.
29. Id. at 809.
30. Id. at 808 (citation omitted).
32. See id. para. 20 (“The Commission’s focus was, therefore, a narrow or restricted one, representing what were perhaps some of the worst acts committed against the people of this country and region in the post-1960 period, but providing a picture that is by no means complete.”). See also Reed Brody, Justice: The First Casualty of Truth? The Global Movement to End Impunity for Human Rights Abuses Faces a Daunting Question, THE NATION, Apr. 30, 2001, at 25 (“The TRC process has been rightly challenged because it focused not on the apartheid system itself, including massive displacements and
not be fairly implemented because the past actions of former officials were often motivated by a plethora of reasons—not least of which is the argument that many collaborators participated in an unsavory regime because they were forced. Despite these criticisms, there is no denying that “[t]he movement from repressive regimes to democratic societies has become a worldwide phenomenon” and transitional justice approaches provide the greatest hope for shepherding broken states toward a stable and just peace.

B. Retributive v. Restorative Justice

Historically, criminal law in the United States has been based upon a retributive justice system. Under such a system, “perpetrators commit crimes against the state, not against other people.” Central to a retributive justice system is the concept of just deserts. That is, the system’s primary focus is to make sure that “offenders get[] what they deserve.” Until fairly recently, a retributive justice system was also the primary paradigm in international criminal law and some scholars believed that such a system served to support the rules of international law. Nevertheless, with the end of the Cold War and an accompanying shift in the characterization of conflicts from inter- to intra-state, two questions emerged regarding the applicability of a retributive international criminal justice system. First, how far removed is retributive justice from venge-

33. Posner & Vermeule, supra note 21, at 811–12.
36. Id.
39. See, e.g., Michelle Maiese, Retributive Justice (May 2004), http://www.beyond intractability.org/essay/retributive_justice (“Retributive justice is a matter of giving those who violate human rights law and commit crimes against humanity their ‘just deserts.’ Punishment is thought to reinforce the rules of international law and to deny those who have violated those rules any unfair advantages.”).
40. See STOCKHOLM INT’L PEACE RESEARCH INST., SIPRI YEARBOOK 2005: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY app. 2A, at 121 (2005) (noting that in 2004 there were nineteen major armed conflicts, and all the conflicts were intra-state (including Iraq), although in three conflicts external states contributed troops).
Second, does a system premised on just deserts serve the interests of an international community in which member states are often attempting to emerge from protracted and savage civil wars?

Mica Estrada-Hollenbeck has argued that a retributive justice system has limited utility in resolving protracted ethnic and sectarian conflicts. She explains that to “resolve [a conflict] is to leave the conflicted parties with institutions and attitudes that favor peaceful interactions. This sort of resolution . . . requires the establishment of working trust.” Such trust, she concludes, is undermined in a retributive system, which “mak[es] [the] conflict resolution processes less stable and reconciliation less likely.” Similarly, as victims’ rights are often subordinated in a retributive justice system, Howard Zehr, the “grandfather of restorative justice,” has identified four victims’ needs that a retributive justice system neglects: information, truth-telling, empowerment, and restitution.

In light of these and other criticisms of a retributive system of international criminal justice, there is an “increasing interest in the concept of restorative justice.” Zehr has defined restorative justice as “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.” Unlike retributive justice, restorative justice views crime not as “a violation of the

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43. Id.
44. Id.
45. Id. at 71.
46. See, e.g., Obold-Eshleman, *supra* note 15, at 572 (“[A retributive] justice system defines crime as breaking the law, thus causing harm to the state as the representative of society in general. Accordingly, rather than the specific victims, the state is the primary party in dealing with the offense . . . .”).
47. Zehr, *supra* note 38, at 76.
48. Id. at 14 (“Victims need answers to questions they have about the offense—why it happened and what has happened since. . . . Securing real information usually requires direct or indirect access to offenders who hold this information.”).
49. Id. at 14–15 (“Often . . . it is important for victims to tell their stories to the ones who caused the harm and to have them understand the impact of their actions.”).
50. Id. at 15 (“Involvement in [victims’] own cases as they go through the justice process can be an important way to return a sense of empowerment to them.”).
51. Id. (“When an offender makes an effort to make right the harm, even if only partially, it is a way of saying ‘I am taking responsibility, and you are not to blame.’”).
53. Zehr, *supra* note 38, at 37.
law and the state” but as “a violation of people and relationships.” 54 Moreover, whereas justice in a retributive system “requires the state to determine blame (guilt) and impose pain (punishment),” restorative justice “involves victims, offenders, and community members in an effort to put things right.” 55 Consequently, under a restorative justice system, the “aim of the judicial system . . . is to reconcile conflicting parties while repairing the injuries from the crimes.” 56 The inquiry does not end, however, with the determination that a transitional or retroactive 57 justice system will best serve the needs of a post-conflict society. Such systems contain a dizzying array of choices, some of which may, at times, seem mutually exclusive of others, as the section below considers.

C. Truth v. Justice

Juan E. Méndez, President of the ICTJ, has argued that post-conflict nations with a heritage of human rights violations owe their victims four distinct duties:

The first of these is an obligation to do justice, that is, to prosecute and punish the perpetrators of abuses when those abuses can be determined to have been criminal in nature. The second obligation is to grant victims the right to know the truth. . . . The third obligation is to grant reparations to victims in a manner that recognizes their worth and their dignity as human beings. . . . Finally, states are obliged to see . . . that those who have committed the crimes while serving in any capacity in the armed or security forces of the state should not be allowed to continue on the rolls of reconstituted, democratic law-enforcement or security-related bodies. 58

Regrettably, these four duties are often viewed as antagonistic rather than complementary and the debate is often framed in terms of “truth versus justice.” 59

54. Id. at 21.
55. Id. See also Estrada-Hollenbeck, supra note 35, at 74 (“Unlike the [retributivist] approach, the restorative justice approach identifies crime primarily as conflict between individuals that results in injuries ‘to victims, communities, and the offenders themselves, and only secondarily as a violation against the state.’”).
56. Id.
57. See supra note 25.
1. Truth: A Right to Disclosure?

Professor Tim Kelsall, among others, has argued that “[d]emands for the truth, and for commissions to investigate it, are becoming the norm in societies emerging from periods of violent conflict or authoritarian rule.”60 For example, in the 1970s and 1980s, six truth commissions were established.61 In the 1990s that number more than doubled to fourteen.62 As Kelsall concludes, “that number looks set to increase again in the current decade.”63 Indeed, in its 2003–2004 annual report, the International Center for Transitional Justice noted that “[i]n recent months, others have decided to launch truth commissions: the Democratic Republic of the Congo, Liberia, Morocco [the first truth commission in the Arab world], [and] Paraguay.”64 Moreover, in 2005, the first truth and reconciliation commission in the United States was convened in Greensboro, North Carolina.65 One of the most thoughtful students of truth commis-


63. Kelsall, supra note 60, at 362.


sions, Priscilla Hayner, notes that they are “fast becoming a staple in the transitional justice menu of options.”

Mary Albon has written that there are three distinct benefits to telling the truth about the past: “1) [T]o seek justice for the victims and help restore their dignity; 2) to facilitate national reconciliation; and 3) to deter further violations and abuses.” Contemporary truth commissions serve all of these functions and more. The most apparent purpose of truth commissions is what Hayner refers to as “sanctioned fact-finding: to establish an accurate record of a country’s past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history.” Some human rights activists argue, however, that truth commissions do not find the truth as much as raise “the veil of denial about widely known but unspoken truths.”

The Swiss Peace Foundation notes that truth commissions are particularly useful in two instances. The first instance occurs in nations where “the systems of abuse . . . [were] designed to hide the facts [and] [t]orture and related abuses were committed largely in secret.” Second, in nations such as Bosnia, where the truth is not hidden, but “multiple ‘truths’” exist, truth commissions allow the real truth to be known and made part of the nation’s history by focusing “on the broad history and patterns of abuses.” As Michael Ignatieff, former director of the Carr Center for Human Rights Policy at Harvard University explains, “[t]he past is an argument and the function of truth commissions, like the function of honest historians, is simply to purify the argument, to narrow the range of permissible lies.”

Community Reconciliation Project is to “heal broken relations within [the] community by . . . distinguishing truth from falsehood and allowing for . . . public mourning and forgiveness.” Darryl Fears, Seeking Closure on “Greensboro Massacre”; Reconciliation Panel Convenes in N.C. to Address ’79 Attack by Nazi Party, Klan, WASH. POST, Mar. 6, 2005, at A3 (omissions in original) (quoting Commissioner Cynthia Brown). Specifically, the project will examine the causes and consequences of the 1979 Greensboro Massacre, in which members of the Ku Klux Klan and Neo-Nazis clashed with the anti-Klan Communist Workers Party (“CWP”), resulting in the death of five CWP members. Id. In criminal trials before all-white juries, no one was convicted. Id.

66. Brody, supra note 32.
68. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 24–25 (2001) [hereinafter HAYNER, CONFRONTING STATE TERROR].
69. Id. at 25.
70. Id.
71. Id.
72. HAYNER, CONFRONTING STATE TERROR, supra note 68, at 25.
Since their inception in the 1970s, the scope of truth commissions has steadily increased so that most present day commissions incorporate a broader focus on reconciliation.73 As Robert Rotberg, President of the World Peace Foundation, has explained, “South Africa’s [TRC] is the prime example of a commission with . . . a comprehensive vision of how such an effort can prevent future conflict and ensure that ‘never again!’ becomes a societal reality.”74 Rotberg concludes, “[t]he [South African] TRC, though flawed in many ways, has set a high standard for future commissions.”75 Indeed, some activists express concern that “because of South Africa, the international community has become blindly besotted with truth commissions, regardless of how they are established.”76

Truth commissions should not be seen as a panacea for every country emerging from protracted violence, and yet, all too often, commissions are established in post-conflict nations that prove to be poor candidates and fail to heed the lessons learned from past commissions.77 Chief

73. See, e.g., Dealing with the Past, supra note 59 at 23 (“Beyond simply an accounting of victims and perpetrators, recent commissions focus more explicitly and expansively on reconciliation.”).


75. Id. at 5.

76. Brody, supra note 32, at 25.

77. An example is the Truth and Reconciliation Commission established by the Sun City Accord for the Democratic Republic of the Congo. By most accounts, the Commission was improperly established and has proven entirely ineffective. The Commission’s mandate is to “consider political, economic, and social crimes committed from 1960 until 2003 in order to establish truth and help bring individuals and communities to reconciliation.” Human Rights Watch, Democratic Republic of the Congo: Confronting Impunity (Jan. 2004) http://hrw.org/english/docs/2004/02/02/congo7230.htm. In a perspicacious paper written for the International Center for Transitional Justice, Federico Borello expresses great concern with both the Commission’s consultative process and its composition. See Federico Borello, Int’l Ctr. for Transitional Justice, A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo 40–42 (2004), available at http://www.ictj.org/images/content/1/1/115.pdf. The paper makes the following conclusion:

It is unlikely that the current commission will be able to function effectively as an investigative body for the following reasons:

Lack of legitimacy because of its composition and insufficient consultation prior to its creation. . . .

Security concerns for staff, victims, and witnesses.

Lack of sufficient time for the commission to complete its investigations and submit a final report before the end of the transition.
among those lessons is the importance of a partnership with a vibrant civil society.\textsuperscript{78} As the Swiss Peace Foundation explains in a government report entitled \textit{Dealing with the Past}:

Without the active participation of civil society and without the resultant sense of public ownership of and investment in the process, a truth commission could produce a technically accurate history of the conflict and abuses, but the report might be relegated to an academic shelf . . . .

. . . As a consequence, a nation in which the institutions and organizations of civil society have been wholly decimated by civil war or by a long period of harsh repression will not, in general, be an appropriate candidate for a truth commission.\textsuperscript{79}

A 2001 article in \textit{The Nation} delineates some of the other lessons learned: “[T]o be as effective as the [South African] TRC, truth commissions must be independent, well resourced and endowed with subpoena power; must hold public hearings when necessary; and must be able to name the accused publicly.”\textsuperscript{80} The article concludes “[F]ew commissions today meet these criteria.”\textsuperscript{81} Moreover, in a world with finite resources in terms of funding and attention, a truth commission may divert such resources from justice efforts.\textsuperscript{82} Reed Brody, advocacy director of Human Rights Watch, relates a telling experience he had in Haiti:

\begin{lrbox}{0.5\textwidth}
\begin{quote}
Apparent lack of sufficient reflection on key provisions of the law, such as amnesty, reparations, and other matters.

Lack of necessary political will to support the commission’s work.
\end{quote}
\end{lrbox}

\textit{Id.} at 46.

\textsuperscript{78} \textit{Dealing with the Past}, supra note 59, at 23 (“In various countries, those sectors of civil society that have contributed to the truth commission process have included religious groups, representatives of the media, human rights and victims’ organizations, the business, medical and legal communities, historians, sociologists, psychologists, and political organizations.”).


\textsuperscript{80} Brody, \textit{supra} note 32.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} See, e.g., Neil J. Kritz, Progress and Humility: The Ongoing Search for Post-Conflict Justice, in POST-CONFLICT JUSTICE, \textit{supra} note 15, at 55, 62 [hereinafter Kritz, \textit{Progress and Humility}] (noting that the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) staff felt that a Bosnian truth and reconciliation commission would “be a source of competition for international resources and local attention”).
In Haiti, where I worked with President Aristide’s minister of justice, we were explicitly told by international donors that they could not fund a special prosecutor’s office—the government’s priority—because they were supporting a truth commission (whose report, published years after its completion, only confirmed what people already knew about coup-era repression).

A terribly controversial element of truth commissions has been the granting of amnesty, tantamount to a prohibition on punishment of those guilty of human rights violations. As Charles O. Lerche III notes, “[o]n balance, it almost seems that some sort of amnesty has been a necessary prerequisite for a commission to contribute to national reconciliation.”

The SATRC, for example, faced some of its most pointed criticism on this subject. The argument in favor of limited amnesties is that they help create the most complete picture as perpetrators would likely not be

83. Brody, supra note 32.

It should be noted, however, that the SATRC did not provide for a blanket amnesty. As Amnesty International and Human Rights Watch explain in a jointly authored report:

The new law did not provide for a general amnesty, but a circumscribed process of individual applications in which those seeking immunity from prosecution (or release from prison) had both to show that their crime was political in motive and to make full disclosure of the acts for which they were seeking amnesty. A successful applicant would be permanently protected from any criminal or civil liability in relation to the offence acknowledged.

Unfinished Business, supra, at 4.

It is important to note as well that “fewer than 10% of the over 7,500 persons who applied [for amnesty] were actually granted amnesty. This is partly attributable to the fact that a high percentage of applications were from common prisoners who tried to use the amnesty process to secure early release.” Paula van Zyl, Unfinished Business: The Truth and Reconciliation Commission’s Contribution to Justice in Post-Apartheid South Africa, in Post-Conflict Justice, supra note 15, at 745, 753 (footnote omitted). See also Jon M. Van Dyke, The Fundamental Human Right to Prosecution and Compensation, 29 Denv. J. Int’l L. & Pol’y 77, 88 (2001) (“As of the end of 1999, 6,037 individuals had applied for political amnesty, with 568 receiving pardons . . . .”).
forthcoming in testifying without some promise of amnesty. The argument against amnesties is that they encourage a culture of impunity. In some instances, the granting of amnesties may also run counter to a state’s obligations to punish human rights violations under international treaties. The Truth and Reconciliation Commission of South Africa Report, however, responds eloquently to these criticisms:

We have been concerned, too, that many consider only one aspect of justice. Certainly, amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature. We believe, however, that there is another kind of justice—a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships—with healing, harmony and reconciliation. Such justice focuses on the experience of victims; hence the importance of reparation.

a. Is Revealing Healing?

While truth commissions vary considerably, they all share the same central tenet that “[s]unlight is said to be the best of disinfectants.” That is, unhealed wounds fester and it is only by bringing them to light that true societal reconciliation can be achieved. Along with goals of

86. See, e.g., SATRC Report, supra note 23, ch. 5, para. 64.
87. See, e.g., UNFINISHED BUSINESS, supra note 85, at 5.
88. See infra Part I.C.2.
89. SATRC Report, supra note 23, ch. 1, para. 36.
92. The analogy of a society’s wounds to a wounded body requiring healing is a powerful metaphor often invoked by proponents of truth commissions. The Chairperson of the SATRC, the Reverend Desmond M. Tutu, explained in the first of the Commission’s six volumes:

The other reason amnesia simply will not do is that the past refuses to lie down quietly. It has an uncanny habit of returning to haunt one. “Those who forget the past are doomed to repeat it” are the words emblazoned at the entrance to the museum in the former concentration camp of Dachau. They are words we would do well to keep ever in mind. However painful the experience, the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future.
broader societal reconciliation, truth commission proponents also point to psychological benefits accruing on a more individualized level.\textsuperscript{93} Indeed, the 1995 Act establishing the SATRC set the restoration of “human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims” as one of the SATRC’s primary goals.\textsuperscript{94}

There are, however, two problems associated with relying on truth commissions to facilitate individualized healing of trauma resulting from state sanctioned violence. First, and quite peculiarly, it is difficult to find the truth in truth commissions.\textsuperscript{95} Oscar Wilde, the great Irish wit, once noted that “[t]he truth is seldom pure and rarely simple.”\textsuperscript{96} Though he


\textsuperscript{95} See, e.g., Kelsall, supra note 60, at 363, 380 (noting that in the proceedings of the Sierra Leone Truth and Reconciliation Commission that the author visited, “in spite of its injunction to victims to express the truth, the whole truth, and nothing but the truth, [the Commission] was rarely able to get beyond detached, factual statements on the part of victims and half-truths, evasions, and outright lies on the part of perpetrators”).

\textsuperscript{96} OSCAR WILDE, THE IMPORTANCE OF BEING EARNEST Act 1 (1895).
penned those words close to a century before the first truth commissions, commissioners would do well to recall the aphorism. In her brilliant book on truth commissions, Priscilla Hayner recounts a conversation she had with S.K. Mbande, a South African minister. Mbande explained that in giving their narrative of events, some people

stand somewhere between truth and dishonesty, because coming up with the whole truth is still not safe. Some give their statements because they’ve been told to do so by the government . . . . But some people are traumatized and fearful, and they feel it’s not safe to talk about it . . . . Some people have forgotten what happened, or due to trauma, they may tell different stories, or keep changing their story, because they can’t remember clearly. 97

A second problem is that while truth commissions may lead to national healing, 98 individual wounds are opened and often left untreated in the process. 99 South African psychologist Dr. Brandon Hamber explains, “Psychological restoration and healing can only occur through providing the space for survivors to feel heard and for every detail of the traumatic event to be re-experienced in a safe environment.” 100 Unlike traditional psychotherapy, truth commissions “do not offer long-term therapy; they offer survivors a one-time opportunity to tell their story.” 101 It is ques-

97. HAYNER, CONFRONTING STATE TERROR, supra note 68, at 137–38. Similarly, in an interview with the editor of the journal African Affairs, Bishop Humper, the chairperson of the Sierra Leone Truth and Reconciliation Commission (SLTRC) explained:

Perpetrators will tell you truth from their own perspective . . . he will say what he saw . . . but he is dissociating himself . . . it may be the truth, but what is truth? What is partial truth? . . . In most of the cases there is some partial truth. The person is saying something that affects another person . . . he reserves within himself some of those elements that he needed to say the whole truth . . . . It’s truth on the surface, it’s not a deep truth.

Kelsall, supra note 60, at 377.

98. Even this is debatable. See Brody, supra note 32 (“A respected poll showed that two-thirds of South Africans believed that the TRC investigations led to a deterioration of race relations.”).

99. Lerche, supra note 84, at 6 (“There is a popular assumption that the TRC provides the space for a cathartic release of emotions that can form the basis for psychological healing—for individual deponents and for society as a whole. But this is questionable.”).

100. Hamber, supra note 93.

101. HAYNER, CONFRONTING STATE TERROR, supra note 68, at 135. Similarly, Dr. Brandon Hamber notes, “the long-term ability of a once-off statement or public testimony to address the full psychological impact of the past is questionable.” Brandon Hamber, Does the Truth Heal?: A Psychological Perspective on the Political Strategies for Dealing with the Legacy of Political Violence, in BURYING THE PAST: MAKING PEACE AND
tionable whether a single retelling in a public setting can truly bring about the psychological restoration sought. Indeed, as Hayner notes, “psychologists question the idea of a one-time catharsis resulting in real psychological healing. . . . In fact, most therapists would avoid pushing someone to address the worst of their pain too quickly, especially if it is rooted in events of extreme trauma.” While truth commissions undeniably give some victims a sense of closure, they serve to severely traumatize others. As the assistant director of the Trauma Center for Victims of Violence and Torture, a non-governmental organization (“NGO”) in Cape Town, South Africa, has explained, the commission “opens the patient up and then walks away. In some ways, they feel they are just being used as a public spectacle.”

The fact that testifying before a truth commission may grant some victims the closure for which they have long been searching, while a similar experience only serves to retraumatize others should come as little surprise, for individuals reconcile pain in profoundly personal ways. Indeed, as volume one of the Truth and Reconciliation Commission of South Africa Report acknowledges, “the reconciliation of victims with their own pain is a deeply personal, complex and unpredictable process. . . . Truth may, in fact, cause further alienation.”

While the fact that not all victims would be served by a truth commission is hardly surprising, what is surprising is that concerns exist that truth commissions (especially those that fail to implement a social ser-


102. See, e.g., HAYNER, CONFRONTING STATE TERROR, supra note 68, at 140 (“Given the great number of victims that come forward and the short period of time that a commission has to complete its work, truth commissions to date have not been able to offer any serious psychological support services, nor generally to respond well to the occasional follow-up phone calls of distress . . . .”).

103. Id. at 139.

104. See, e.g., id. (“Emotionally it helped a great deal. It helped me to come to terms with it. But physically it hasn’t helped. I still have bullets in my chest, I’m still in pain. But emotionally it has helped a great deal.”) (quoting one South African survivor who had been shot during a political march).

105. See, e.g., Suzanne Daley, In Apartheid Inquiry, Agony Is Relived but Not Put to Rest, N.Y. TIMES, July 17, 1997, at A1 (“It was very traumatic to relive it . . . . Now, I can actually see it in my mind. Before the hearing I never cried. But now, I cry all the time” and “It was like—speak to the Truth Commission and you will be reconciled. . . . But it’s not that way. That did not happen. I just cry all the time now. How do you reconcile? How?”) (quoting one victim of the apartheid regime who testified before the SATRC).

106. Id.

vices justice component) may actually do more harm than good. While no comprehensive study on the psychological impact of truth commissions on victims has yet been undertaken, "officials of the Trauma Center for Victims of Violence and Torture . . . say 50 to 60 percent of the dozens of victims they have talked to in the last year have said they suffered difficulties after testifying or expressed regret." As Hayner concludes, “[t]here has been no study to date . . . but the evidence that is available is enough to raise some serious questions.”

2. Justice: A Duty to Prosecute?

In contrast to truth commissions, prosecution through criminal trials holds perpetrators directly accountable for their actions. Criminal trials serve distinct functions relative to non-judicial mechanisms, and many


109. HAYNER, CONFRONTING STATE TERROR, supra note 68, at 135.

110. Daley, supra note 105. See also HAYNER, CONFRONTING STATE TERROR, supra note 68, at 138 (“It’s true that the truth commission is a healing process—if not 100 percent, then 60 percent.”) (quoting Reverend S.K. Mbande). When Hayner asked the Reverend whether the sixty percent referred to the percentage of people who were healed or the percentage to which each person was healed, he replied: “Both. Perhaps 60 percent feel better, but those people are only healed 60 percent.” Id.

111. HAYNER, CONFRONTING STATE TERROR, supra note 68, at 135.

112. The Swiss Peace Foundation explains:

Trials communicate that a culture of impunity which permitted abuses is being replaced by a culture of accountability, giving a sense of security to victims and a warning to those who might contemplate future abuses. They provide some redress for the suffering of victims and help to curtail the inclination towards vigilante justice. . . . [I]n the context of recent intra-societal conflicts, criminal trials make the important statement that specific individuals have committed the crimes in question and are therefore to be held accountable, not entire ethnic or religious groups—thereby repudiating notions of collective blame and guilt that can otherwise be used to foment the next round of violence.

Dealing with the Past, supra note 59, at 18.

The Secretary General’s 2004 report on transitional justice explains:

Criminal trials can play an important role in transitional contexts. They express public denunciation of criminal behaviour. They can provide a direct form of accountability for perpetrators and ensure a measure of justice for victims by giving them a chance to see their former tormentors made to answer for their crimes. Insofar as relevant procedural rules enable them to present their views and concerns at trial, they can also help victims to reclaim their dignity.

Secretary-General’s Report on Transitional Justice, supra note 79, ¶ 39.
scholars believe that they are the best mechanism for developing the rule of law in post-conflict societies.\textsuperscript{113} The view also exists that punishment for gross human rights violations is not only preferable to non-judicial mechanisms but may be mandatory under international treaties to which a state is a signatory.\textsuperscript{114}

\textsuperscript{113} See, e.g., M. Cherif Bassiouni, \textit{Searching for Peace and Achieving Justice: The Need for Accountability}, 59 LAW & CONTEMP. PROBS. 9, 18 (1996) (“The relevance of prosecution and other accountability measures to the pursuit of peace is that through their effective application they serve as deterrence, and thus prevent future victimization.”); Jamal Benomar, \textit{Justice After Transitions}, in \textit{1 Transitional Justice}, \textit{supra} note 16, at 33 (“Punishing perpetrators of past abuses can thus serve not only as a symbolic break with the ugly legacy of authoritarian rule, but also as an affirmation of adherence to new democratic values.”); Richard J. Goldstone, \textit{Ethnic Reconciliation Needs the Help of a Truth Commission}, INT’L HERALD TRIB., Oct. 24, 1998, at 6 (“For without justice and the rule of law, it is far too easy for mankind to fall into a self-destructive Hobbesian state of anarchical survival of the fittest. Through a robust tribunal process, the international community can demonstrate to those who would contemplate committing such horrific crimes—whether in Bosnia or elsewhere—that they will pay a price.”); Samuel P. Huntington, \textit{The Third Wave: Democratization in the Late Twentieth Century}, in \textit{1 Transitional Justice}, \textit{supra} note 16, at 68 (“Prosecution is necessary to assert the supremacy of democratic values and norms and to encourage the public to believe in them.”); MARTHA MINOW, \textit{Between Vengeance and Forgiveness} 25 (1998) (“To respond to mass atrocity with legal prosecutions is to embrace the rule of law.”); Diane F. Orentlicher, \textit{Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime}, 100 YALE L. J. 2537, 2542 (1991) (“Trials may, as well, inspire societies that are reexamining their basic values to affirm the fundamental principles of respect for the rule of law and for the inherent dignity of individuals.”); Mary Margaret Penrose, \textit{Lest We Fail: The Importance of Enforcement in International Criminal Law}, 15 AM. U. INT’L L. REV. 321, 393 (1999) (“Law must come first and enforcement of law is a prerequisite to respect for the law.”)

\textsuperscript{114} This argument is made forcefully by Diane F. Orentlicher, who served as General Counsel to the International League for Human Rights. Orentlicher argues that “explicit obligations to punish human rights crimes . . . are established by the Convention on the Prevention and Punishment of the Crime of Genocide . . . and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment . . . .” Orentlicher, \textit{supra} note 113, at 2562.

For example, the Convention on the Prevention and Punishment of the Crime of Genocide states:

\begin{quote}
Persons charged with genocide or any of the other acts enumerated in article III [(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.
\end{quote}

On the other hand, there are severe limitations with a post-conflict system of justice that only employs prosecutions. First and foremost, systematic human rights violations are never carried out by a single group of individuals. Rather, thousands of individuals were responsible for transforming Iraq into a republic of fear, just as thousands were responsible for committing genocide in Rwanda and thousands were responsible for committing torture.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture") states:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, adopted Dec. 10, 1984, G.A. Res. 39/46, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].


Similarly, Article 8 of the Universal Declaration of Human Rights states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Universal Declaration of Human Rights, G.A. Res. 217A, at 73, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

115. See MAKIYA, supra note 2, at xi ("The Ba’th developed the politics of fear into an art form, one that ultimately served the purpose of legitimizing their rule by making large numbers of people complicit in the violation of the regime.").

116. As Neil Kritz writes:

In Rwanda, after ousting a regime that organized genocidal killings of at least half a million people, if the new government were to undertake prosecution of every person who participated in this heinous butchery, some 30,000–100,000
for carrying out the Holocaust—a fact made clear in Hannah Arendt’s brilliant *Eichmann in Jerusalem: A Report on the Banality of Evil*, covering Nazi Adolph Eichmann’s trial in Jerusalem. As one writer explains:

Arendt concluded that far from exhibiting a malevolent hatred of Jews which could have accounted psychologically for his participation in the Holocaust, Eichmann was an utterly innocuous individual. He operated unthinkingly, following orders, efficiently carrying them out, with no consideration of their effects upon those he targeted. The human dimension of these activities were not entertained, so the extermination of the Jews became indistinguishable from any other bureaucratically assigned and discharged responsibility for Eichmann and his cohorts.

Nonetheless, due to limited resources, prosecutions are “[i]n capable of touching more than the tip of this iceberg; they have the capacity to prosecute only a tiny percentage of potential defendants.” This in turn

Rwandan citizens could be placed in the dock—a situation that would be wholly unmanageable and extremely destabilizing to the transition.


117. See generally HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (rev. & enlarged ed. 1965).


119. *Dealing with the Past*, supra note 59, at 21. Indeed, the Special Court for Sierra Leone (“SCSL”) was expected to prosecute less than twenty individuals over four years. Kritz, *Progress and Humility*, supra note 82, at 68.


While Rwanda should be applauded for taking an important step toward national reconciliation, *gacaca* has come under criticism. Amnesty International has expressed concern about the judges’ competency, claiming “[t]he abbreviated training they have received is grossly inadequate to the task at hand, given the complex nature and context
may foster impunity and serve to undermine reconciliation.\textsuperscript{120} A second concern with prosecutions is that a nation emerging from a protracted conflict is too “fragile . . . to survive the destabilizing effects of politically charged trials.”\textsuperscript{121}

If a nation chooses to prosecute perpetrators, it must take caution not to run counter to principles implicit in a democratic legal order. One such principle is that of \textit{nulla poena sine lege}. This concept is defined as “[n]o punishment without a law authorizing it.”\textsuperscript{122} As Professor Teitel explains, “[t]his principle against retroactivity in the operation of criminal justice requires that as a matter of fairness persons ought not to be held accountable for offenses not known to be unlawful at the time they were comm-

\textsuperscript{120} Contra Borello, supra note 77, at 16 (“International law and international jurisprudence have been evolving toward the principle that ‘those bearing the greatest degree of responsibility’ . . . should be prosecuted.”). The concept of prosecuting those “who bear the greatest responsibility” is also enshrined in Article 1 of the Statute of the Special Court for Sierra Leone. Statute of the Special Court for Sierra Leone art. 1(1) (2000), available at http://www.sc-sl.org/scsl-statute.html.

\textsuperscript{121} Orentlicher, supra note 113, at 2544 (“Many countries emerging from dictatorship are polarized and unstable, and may be further fractured by prosecutions of the prior regime’s depredations.”) (footnote omitted).

mitted. While genocide and torture were clearly unlawful under the Ba’ath regime in Iraq, merely being a member of the Ba’ath party was not. Lustration laws (considered in Part II) that seek to impose legal disabilities on former members generally run counter to this important principle.

D. From Competition to Compatibility: A Holistic Approach to Transitional Justice

During the 1990s, disputes over “truth versus justice” were familiar and arose from the belief that the two mechanisms were in competition for finite resources and incompatible with one another. The contest over the creation of a truth and reconciliation commission in Bosnia is one such example. Although the idea of a Bosnian truth and reconciliation commission enjoyed wide support from local NGOs, senior International Criminal Tribunal for the Former Yugoslavia (“ICTY”) officials disapproved of the enterprise and, in the words of Neil J. Kritz, “aggressively blocked the project, and did so in ways that arguably exceeded the Tribunal’s mandate and displayed a disdain for local players and concerns that international institutions of justice must avoid in the future.”

Notably, the ICTY’s former chief prosecutor Richard Goldstone argued in 1998 that “the two processes serve distinct functions and can be complementary,” but such thoughtful views were few and far between in the 1990s.

123. Schulhofer et al., supra note 12, at 20. See also Kritz, Dilemmas of Transitional Justice, supra note 16, at xii (“[T]he reality is that many of the acts that countries emerging from repressive regimes desire to punish today were not crimes when they were committed under the former regime; they were often laudable and encouraged under the old system.”).

124. Kritz, Progress and Humility, supra note 82, at 62. Kritz notes that ICTY concerns included:

(1) The TRC would get in the way of the work of the ICTY . . . . (2) Multiple statements by the same individual to the two bodies might contain inconsistencies that could be used by a defense attorney to impugn the ICTY testimony of the witness. (3) The TRC could be a source of competition for international resources and local attention. (4) The combination of the ICTY and the TRC would be confusing to those who are obliged to live with the legacy of the past on a day-to-day basis in the region.

Id. See also Dealing with the Past, supra note 59, at 29 (“[T]he idea . . . was initially blocked by senior officials at the International Criminal Tribunal for the former Yugoslavia, who effectively mobilized the international community to stop the domestic effort in its tracks.”).

125. Goldstone, supra note 113.
Quite fortunately, as the Swiss Peace Foundation notes, “attitudes on this issue have evolved”126 and “experience has shown that the question is not which takes priority, but how to combine and sequence a ‘package’ of measures that allow the maximum possible of justice, truth-telling, reparations to victims and structural reforms.”127 Two nations in particular, East Timor and Sierra Leone, have taken holistic approaches to transitional justice by combining “peace” and “justice.”128

In the summer of 2001, the United Nations Transitional Administration in East Timor (“UNTAET”) created the Commission for Reception, Truth, and Reconciliation (“CRTR”).129 The CRTR was designed to complement the larger prosecution plan and has largely succeeded in this regard. As one scholar notes, “the CRTR is part and parcel of a broader justice and reconciliation model working on the basis of interdependent and complementary prosecution.”130 Also in 2001, the war-ravaged nation of Sierra Leone131 became the first country to launch a Truth and

126. Dealing with the Past, supra note 59, at 29 (“[T]he current leadership of the ICTY [has endorsed] the TRC proposal as an important, complementary mechanism to help Bosnia to deal with its recent past in a healthy way.”).
127. Id. at 33.
128. See, e.g., Carsten Stahn, Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission in East Timor, 95 A.J.I.L 952, 954 (2001) (considering the establishment of a truth commission in East Timor and concluding “truth commissions have gradually developed into a justice-supportive machinery, designed to complement rather than replace national or international prosecution”).
130. Stahn, supra note 128, at 953.
131. Contemporary intra-state conflicts are often marked by egregious human rights violations and tend to more deleteriously impact civilians (particularly women and children) than inter-state conflicts. See, e.g., Abiodun Alao, The Role of African Regional and Sub-Regional Organizations in Conflict Prevention and Resolution (Office of the United Nations High Comm’r for Refugees, Working Paper No. 23, 2000), http://www.unhcr.org/research/RESEARCH/3ae6a0c88.pdf. One explanation for this is that many rebel forces, particularly those in African conflicts, are unable to rely upon tactical skills and therefore must rely on terror. See, e.g., Tony Clayton, African Military Capabilities in Insurrection, Intervention and Peace Support Operations, in AFRICAN INTERVENTIONIST STATES 51, 54–55 (Oliver Furley & Roy May eds., 2001). Sierra Leone’s vicious decade-long civil war was a study in terror. During the war, 50,000–200,000 people were killed. War Crimes: Bringing the Wicked to the Dock, supra note 90. Moreover, in a war waged by attacks on the civilian population, one scholar explains, “thousands more were defenseless victims of ‘terror tactics,’ including, abduction, rape, carving of messages into chests and backs of victims, and amputation of hands and feet, leaving victims physically disfigured and psychologically scarred.” Jennifer L. Poole, Post-Conflict Justice in Sierra Leone, in POST-CONFLICT JUSTICE, supra note 15, at 563, 564–65 (footnote omitted).
The war began on March 23, 1991 when a guerrilla organization, the Revolutionary United Front (“RUF”), armed by Liberia’s Charles Taylor, invaded Sierra Leone from Liberia with the goal of overthrowing the government. See, e.g., Human Rights Watch, Getting Away with Murder: Mutilation, Rape, New Testimony from Sierra Leone 8 (Working Paper, Vol. 11, No. 3(A), July 1999). While the RUF initially “set forth a vaguely populist agenda of fighting against government officials and their business associates in Freetown who had plundered the country’s resources,” such revolutionary zeal quickly dissipated and spiraled into a campaign of terror. John L. Hirsch, Sierra Leone: Diamonds and the Struggle for Democracy 31 (2001). Although all sides in the conflict committed egregious human rights violations, the RUF became known for monstrous acts committed against civilians, particularly amputating limbs, the RUF’s signature. As a 1998 Human Rights Watch paper reports, “gross violations of human rights committed by the AFRC/RUF . . . included amputations by machete of one or both hands, arms, feet, legs, ears and buttocks and one or more fingers; lacerations to the head, neck, arms, legs, feet and torso; the gouging out of one or both eyes.” Human Rights Watch, Sowing Terror: Atrocities Against Civilians in Sierra Leone 1 (Working Paper, Vol. 10, No. 3(A), July 1998). Children suffered enormously during the war, perhaps more than in any other contemporary armed conflict. A 2004 child friendly version of the Sierra Leone Truth and Reconciliation Report produced with the support of the United Nations Children’s Fund (“UNICEF”) notes:

Children of this country were forced to fight for a cause we could not understand. We were drugged and made to kill and destroy our brothers and sisters and our mothers and fathers. We were beaten, amputated and used as sex slaves. This was a wretched display of inhuman and immoral actions by those who were supposed to be protecting us. Our hands, which were meant to be used freely for play and schoolwork, were used instead, by force, to burn, kill and destroy.


A military stalemate gave way to the 1996 Abidjan Peace Agreement, but as John L. Hirsch writes in his masterly study of Sierra Leone, “[n]o sooner was the Abidjan Agreement signed than the nascent peace process began to break down.” Hirsch, supra, at 54. The RUF refused to disarm as required by the Agreement and within two years the rebels were on the brink of taking the capital of Freetown. Id. at 71. Ultimately, the Economic Community of West African States Monitoring Group (“ECOMOG”) succeeded in pushing the rebels out of Freetown, thereby paving the way once again for renewed peace talks. Id. at 63. On July 7, 1999, in the city of Lomé, Togo, the Lomé Peace Agreement was signed by the government of Sierra Leone and the RUF. See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999, available at http://www.sierra-leone.org/lomeaccord.html [hereinafter Lomé Agreement]. Despite its intention to observe a “total and permanent cessation of hostilities” by signing the agreement, the RUF refused to abide by the terms and in May 2000, seized some 500 United Nations Mission in Sierra Leone (“UNAMSIL”) peacekeepers, who had replaced the ECOMOG troops. Hirsch, supra, at 87. The British government reacted with an ambitious military offensive that served to strengthen the resolve of the peacekeepers and within a year, the RUF had resumed the disarmament process detailed in the Lomé Agreement. Poole, supra, at 572–73.
The Lomé Agreement contained a detailed plan for disarmament, demobilization, and reintegration (“DDR”), the establishment of a Truth and Reconciliation Commission (“SLTRC”), and a timetable for national elections. See Lomé Agreement, supra, arts. XVI, XXVI(1), XII. The Lomé Agreement was not without controversy, however. Article III of the Agreement allowed the RUF to become an accepted political party. Id. art. III. Article IX traded justice for peace by granting a blanket amnesty for all crimes committed by parties, including the RUF, during the war “[t]o consolidate the peace and promote the cause of national reconciliation.” Id. art. IX(3). Critically, at the last minute, the Secretary-General’s Special Representative to Sierra Leone, Ambassador Francis Okelo, added a disclaimer to the agreement stating that “[t]he United Nations interprets that the amnesty and pardon in article nine of this agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.” Human Rights Watch, The Sierra Leone Amnesty Under International Law (Aug. 3, 1999), http://www.hrw.org/campaigns/sierra/int-law2.htm. Although this disclaimer had the effect of dismantling the legal impact of the amnesty provision, international human rights organizations, who did not have to deal with the consequences of the war, decried the amnesty. Sierra Leoneans, on the other hand, recognized the painful reality that without the amnesty provision the war would continue. As such, they were willing to sacrifice justice for peace. See, e.g., Karen Gallagher, No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone, 23 T. JEFFERSON L. REV. 149, 165 (2000). See also Corinna Schuler, Sierra Leone’s ’See No Evil’ Pact, CHRISTIAN SCIENCE MONITOR, Sept. 15, 1999, at 1 (“Some 200 representatives of civil society—groups of women, church leaders, students—agreed to the amnesty provisions at a national conference.”).

132. Per Article XXVI of the Lomé Agreement, the SLTRC was established with the following mandate:

[T]o create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lome Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.


The SLTRC was composed of seven individuals, four Sierra Leoneans and three non-citizens. Id. at § 3(1). Operationally, the work of the Commission was conducted in three phases: a deployment phase; a hearings phase; and a report-writing phase. Sixth Weekly Briefing of the Truth and Reconciliation Commission (Aug. 28, 2002), http://www.sierra-leone.org/trcbriefing082802.html. The SLTRC “worked tirelessly” for two years, taking the statements of over 7,000 people. Press Release, U.N. Econ. & Soc. Council [ECOSOC], Final Report on Ten-Year Sierra Leone Conflict Published; Seeks to Set Out Historical Record, Offer Guidance for Future, U.N. Doc. ECOSOC/6140 (Oct. 27, 2004) [hereinafter ECOSOC Press Release], available at http://www.un.org/News/Press/docs/2004/ecosoc6140.doc.htm. As children were disproportionately impacted by the conflict, the Commission made particular efforts to include the views of children. See id. The SLTRC was funded primarily by international donors. William A.
Schabas, The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone, 25 Hum. RTS. Q. 1035, 1039 (2003). Although initially budgeted at $10 million, the SLTRC had to make do with less than half that amount. Id.


For criticism of the SLTRC, see Shaw, supra note 92, at 4 (“[T]here was little popular support for bringing the Commission to Sierra Leone, since most people favored instead a ‘forgive and forget’ approach. . . . But there was a very strong vocal minority that thought that people needed to talk about what happened.”).

Unlike the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), created by Security Council Resolution 827 (May 25, 1993), and the International Criminal Tribunal for Rwanda, created by Security Council Resolution 955 (Nov. 8, 1994), the Special Court for Sierra Leone (“SCSL”) is a “treaty-based sui generis court.” See, e.g., Poole, supra note 131, at 583. As a member of the International Criminal Court Preparatory Commission notes, it is “the first ad hoc criminal tribunal based upon an agreement between the United Nations and the government of a member state.” Micaela Frulli, The Special Court for Sierra Leone: Some Preliminary Comments, 11 E.J.I.L. 833, 833 (2000). The SCSL has its antecedent in a letter the President of Sierra Leone sent to the Secretary-General. As Annan notes in his Fifth Report on UNAMSIL, “[i]n a letter addressed to me dated 12 June, President Kabbah requested United Nations assistance to establish a special court to try Foday Sankoh and other senior members of RUF ‘for crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages.’” The Secretary-General, Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone, ¶ 9, delivered to the Security Council, U.N. Doc. S/2000/751 (July 13, 2000). In his letter, President Kabbah indicated that the crimes were so serious as to be “of concern to all persons in the world.” Richard S. Williamson, Transitional Justice: The UN and the Sierra Leone Special Court, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 1, 5 (2003) (quoting President Alhaji Ahmed Tejan Kabbah to Kofi Annan (June 12, 2000)). Two weeks later, the Security Council responded with Resolution 1315, which requested that the Secretary-General “negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with th[e] resolution.” S.C. Res. 1315, ¶ 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000). With regard to the legality of the amnesty granted in Article IX of the Lomé Agreement, the United Nations specifically addressed this matter with the following:

While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.
Three aspects of the SCSL are particularly noteworthy. First, the court is a “hybrid” in that it is composed of both international and domestic judges, prosecutors, and defense counsels, and sits in Sierra Leone. See Statute of the Special Court for Sierra Leone art. 12. The judges are appointed by both the Government of Sierra Leone and by the United Nations. Id. art. 12(1)(a). The prosecutor is appointed for a three-year term by the United Nations while the deputy prosecutor is appointed by the Government of Sierra Leone. Id. art. 15(3). For the benefits that a “hybrid” court may offer international criminal law, see Laura A. Dickinson, Note, The Promise of Hybrid Courts, 97 AM. J. INT’L L. 295, 303 (2003) (“Purely domestic and purely international institutions may also fail to promote local capacity-building, which is often an urgent priority in postconflict situations.”). See also Michael Lieberman, Salvaging the Remains: The Khmer Rouge Tribunal on Trial, 186 MIL. L. R. 164, 165 (2006) (citing possible benefits of hybrid courts, including “combining the expertise and integrity of international personnel” with local ownership, “reduced expenses, easier access to witnesses and evidence, and the potential for local capacity building”). See also Frulli, supra, at 835 (arguing that hybrid courts involve the members state to a greater extent in the “establishment, composition, and functioning” of the court).

Second, the SCSL has jurisdiction over both international and domestic crimes. Articles 2–4 confer jurisdiction to the SCSL over crimes against humanity, violations of Article 3 of the Geneva Conventions, and “[o]ther serious violations of international humanitarian law.” Statute of the Special Court for Sierra Leone arts. 2–4. Article 5 confers jurisdiction to the SCSL over crimes under Sierra Leonean law. Id. art. 5. The SCSL’s jurisdiction extends to noncitizens as well as citizens, and to persons who were fifteen years of age at the time of the crime’s commission. Id. art. 7(1). While extension of the SCSL’s jurisdiction to children of this age initially garnered international opprobrium, the SCSL Statute emphasizes rehabilitation over retribution when dealing with juveniles. For example, Article 7(2) states then when trying a case against a juvenile, any of the following would be a proper disposition: “care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.” Id. at 7(2).

Third, the SCSL placed a great emphasis on local outreach, conducted through town hall meetings, transparent communication with media, and consistent sharing of information with civil society organizations. UNITED STATES INST. OF PEACE, BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE 3 (2004), available at http://www.usip.org/pubs/specialreports/sr122.pdf [hereinafter BUILDING THE IST]. As the United States Institute of Peace (“USIP”) notes, “the strong emphasis on outreach . . . is considered to have contributed significantly to its credibility among the local population” and should be a model for other tribunals. Id.

As of this writing, eleven individuals representing the three warring factions have been indicted by the SCSL. Three trials of nine accused have progressed simultaneously. On February 28, 2004, the trial court ordered the joint trials of three members of the Civil Defense Force (“CDF”). CDF Trial, Special Court for Sierra Leone, http://www.scs-l.org/CDF.html (last visited Sept. 26, 2007). On August 2, 2007, two of the defendants were found guilty on several counts each (the third defendant died during the trial). Id. The joint trial against three former RUF members began on July 5, 2004. RUF Trial,
thus providing, in the words of Professor William Schabas, “the evolving discipline of transitional justice with a laboratory in which to examine how the two bodies . . . relate to each other.”

Despite initial concerns that the existence of the Special Court for Sierra Leone (“SCSL”) would prevent individuals from testifying to the Sierra Leone Truth and Reconciliation Commission for fear that their testimony would be used against them at the SCSL, such fears have generally proved unfounded. Sierra

Special Court for Sierra Leone, http://www.sc-sl.org/RUF.html (last visited Sept. 26, 2007). Indictments against two other RUF members (including the notorious Foday Saybana Sankoh) were withdrawn on December 8, 2003 due to the two individuals’ deaths. Id. The joint trial of three former Armed Forces Revolutionary Council (“AFRC”) members began on Mar. 7, 2005. AFRC Trial, Special Court for Sierra Leone, http://www.sc-sl.org/AFRC.html (last visited Sept. 26, 2007). One other AFRC member, Johnny Paul Koroma, remains at large. See OFFICE OF PRESS AND PUB. AFFAIRS, SPECIAL COURT FOR SIERRA LEONE, PAMPHLET, BASIC FACTS, available at http://www.sc-sl.org/basicfacts pamphlet.pdf. In what was a momentous coup for transitional justice, the infamous former President of Liberia, Charles Taylor, was captured on March 29, 2006 following a request by Liberian President Ellen Johnson-Sirleaf that Nigerian authorities apprehend Taylor. See Craig Timberg, Liberian President Backs Bid To Move Taylor Trial to Hague, WASH. POST, Mar. 31, 2006, at A15. In his first appearance before the SCSL, Taylor defiantly pleaded not guilty. See, e.g., Hans Nichols & Lydia Polgreen, Liberia Ex-Leader Faces War-Crimes Court, N.Y. TIMES, Apr. 4, 2006, at A3 (“I think this is an attempt to divide and rule the people of Liberia and Sierra Leone, and so most definitely I am not guilty.”) (quoting Charles Taylor). Whether Taylor will remain at the SCSL is anyone’s guess. Fearing concerns that a Taylor trial may further destabilize a fragile nation, the SCSL has requested that Taylor be moved to a courtroom in the Hague. Taylor, on the other hand, has vowed to fight any move, claiming that he can only receive a fair hearing in Sierra Leone. Id.

134. For an examination of the collaboration and coordination between the SLTRC and the SCSL, see Abdul Tejan-Cole, The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, 6 YALE HUM. RTS. & DEV. L.J. 139 (2003); Elizabeth M. Evenson, Note, Truth and Justice in Sierra Leone: Coordination Between Commission and Court, 104 COLUM. L. REV. 730 (2004).

135. Schabas, supra note 132, at 1065.

136. Beth K. Dougherty, for example, examined a study undertaken by a Sierra Leonean NGO on ex-combatants’ views toward the SLTRC. Dougherty found:

Concern about the SCSL and fears for their security . . . initially kept ex-combatant participation low. But as the hearings went on, and the SCSL did not pursue those who testified, more and more ex-combatants came forward. Many ex-combatants wanted to return to their communities but were afraid of their reception; participating in the TRC was a means of easing the path of reintegration. In at least four districts, perpetrators (mostly RUF) came forward and publicly asked forgiveness. By the end, an unprecedented 13% of individual statements came from perpetrators, and “approximately a third of those who appeared in hearings admitted to their own wrongs, often in great detail.”
Leone has learned that “mass atrocities . . . generally expose and/or produce complex problems and rifts in society which are resistant to simple, one-step solutions; they typically require sophisticated, multi-faceted and well-integrated responses.”\textsuperscript{137} Hopefully, Sierra Leone is not the last nation to learn this lesson. In the words of a 2006 article in \textit{The Economist}, “the wounded little country’s bold experiment could set a trend.”\textsuperscript{138}

\textbf{E. The Need for Reparations}

An important component of transitional justice is the awarding of reparations to victims of state-sponsored human rights violations.\textsuperscript{139} Generally, reparations “refers to compensation, usually of a material kind and often specifically monetary, for some past wrong.”\textsuperscript{140} Reparations may, however, take several forms,\textsuperscript{141} including non-monetary awards.\textsuperscript{142} Prin-
Principles guiding reparations for breaches of international obligations date back to at least 1928 and today states have an unambiguous duty to grant reparations to victims of gross human rights violations.

Reparations serve two primary functions. First, on the most basic level, victims of human rights violations “often suffer a range of physical and psychological injuries and sometimes live under extreme economic conditions as a result of the loss of the breadwinner in the family, the destruction of property, or their physical inability to work.” Reparations therefore help victims “manage the material aspect of their loss.” Reparations also serve to “deter the state from future abuses.”

Three difficulties can be identified in the administration of reparations. First, few transitioning states have the funds to compensate all the victims deserving of assistance. In South Africa, the President’s Fund for overseas donations was established but was poorly funded. Other

building of monuments and renaming streets and community facilities, to expunging criminal records for acts committed with political motives.”).

143. In the 1928 Chorzów Factory case, involving a claim by Germany against Poland concerning the expropriation of a factory, the Permanent Court of International Justice held:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

The Factory at Chorzów (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).

144. See, e.g., International Covenant on Civil and Political Rights art. 2(3)(a), Mar. 23, 1976, 999 U.N.T.S. 171 (“Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy; notwithstanding that the violation has been committed by persons acting in an official capacity . . . .”).

The Convention Against Torture has a similar provision. Article 14 states:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

Convention Against Torture, supra note 114, art. 14.

145. HAYNER, CONFRONTING STATE TERROR, supra note 68, at 170.


147. Id.

148. See UNFINISHED BUSINESS, supra note 85, at 9; HAYNER, CONFRONTING STATE TERROR, supra note 68, at 178–79.
states have considered a reparations tax, but as Hayner notes, “the vast majority of reparations policies to date . . . have not relied on any special tax to cover the expense.” 149 Second, in the event that the state is capable of paying reparations, they may “unsettle property rights and interfere with economic reform by creating new claims against existing property holders.” 150 Last, identifying those individuals deserving of reparations can pose difficult and complex logistical questions for a poor nation emerging from war. Hayner notes that while truth commissions “produce a list of victims” and are “an obvious source on which to build a reparations program,” they “usually document[] only a small portion of the total number of victims, and rarely ha[ve] the resources to corroborate all of the victim statements that [they] receive[].” 151 Consequently, she concludes that “in most circumstances a truth commission is not in a good position to provide a final list of recommended recipients.” 152

149. H AYNER, CONFRONTING STATE TERROR, supra note 68, at 171.
150. Posner & Vermeule, supra note 21, at 766.
151. H AYNER, CONFRONTING STATE TERROR, supra note 68, at 171.
152. Id. Nevertheless, in determining who should receive reparations, both Chile and Argentina have depended upon information compiled by the nations’ truth commissions. Id. at 172.

Since 1997, close to 5,000 Chileans have received a monthly pension from the government as part of its “‘pension plan’ for family members of those killed or disappeared under the military dictatorship.” Id. Survivors of torture are not included in the program. Id. at 173. The checks vary from approximately $345 to $482, depending on how many survivors there are in a family. Id. at 172–73. Children of those killed or disappeared are entitled to extensive educational benefits and may waive mandatory military service. Id. at 173; Law Creating the National Corporation for Reparation and Reconciliation, Law No. 19, 123, arts. 29–32 (Jan. 31, 1992), reprinted in 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 694 (Neil J. Kritz, ed., 1995).

In Argentina, where close to 9,000 people disappeared under the military dictatorship, family members of the disappeared “receive[d] a lump sum of $220,000, paid in government bonds.” H AYNER, CONFRONTING STATE TERROR, supra note 68, at 175.
II. THE URGE TO PURGE: LUSTRATION LAW IN THE CZECH REPUBLIC

Several Central European nations have used lustration\(^{153}\) to deal with the legacy of totalitarian Communism.\(^{154}\) The Czech Republic was the


\(^{154}\) In Czechoslovakia, the Communist Party seized power in February 1948. See JOHN F.N. BRADLEY, *POLITICS IN CZECHOSLOVAKIA*, 1945–1990, at 27–28 (1991). Stalinist purges followed, culminating in the notorious Slansky trial, in which major Czech Communist figures were tried on charges of treason. See Heda Margolius Kovaly, *Under a Cruel Star: A Life in Prague, 1948–1968* (Franci Epstein & Helen Epstein trans., 1986) (detailing the show trial and execution of Ms. Kovaly’s husband, who had served as foreign minister). Following Stalin’s death in 1953, token reforms were allowed in Czechoslovakia, culminating with the 1968 Prague Spring, during which democratization flourished. As the State Department has explained, “[a]fter January 1968, the Dubcek leadership took practical steps toward political, social, and economic reforms. In addition, it called for politico-military changes in the Soviet-dominated Warsaw Pact . . . .” U.S. State Dep’t, Bureau of European and Eurasian Affairs, Background Note: Czech Republic (Sept. 2007), http://www.state.gov/r/pa/ei/bgn/3237.htm [hereinafter State Dep’t Note: Czech Rep.]. The Prague Spring came to a violent demise on August 21, 1968. On that day, troops from the Soviet Union, Hungary, Bulgaria, East Germany, and Poland invaded Czechoslovakia. The justification for the invasion appeared in *Pravda* on September 26. ALVIN Z. RUBINSTEIN, *SOVIET FOREIGN POLICY SINCE WORLD WAR II: IMPERIAL AND GLOBAL* 95 (2d ed. 1985). The article, soon dubbed the Brezhnev Doctrine, explained:

> It should be stressed that even if a socialist country seeks to take an ‘extra-bloc’ position, it in fact retains its national independence thanks precisely to the power of the socialist commonwealth—and primarily to the Soviet Union—and the might of its armed forces. The weakening of any link in the world socialist system has a direct effect on all the socialist countries. Thus, the anti-socialist forces in Czechoslovakia were in essence using talk about the right to self-determination to cover up demands for so-called neutrality and [Czechoslovakia’s] withdrawal from the socialist commonwealth.

*Id.* As two scholars have written, “[t]he Soviet invasion . . . ended the optimum chance for a fundamental reform of a socialist regime and started the long process of the decay of communism that was to culminate in the Velvet Revolution just over two decades later.” BERNARD WHEATON & ZDENĚK KAVAN, *THE VELVET REVOLUTION: CZECHOSLOVAKIA, 1988–1991*, at 3 (1992). The Velvet Revolution (referred to as such for its peaceful nature) had its antecedents in police brutality. On November 17, 1989, police violently broke up a peaceful pro-democracy student march. State Dep’t Note: Czech Rep., *supra*. The violence inspired the Czech people and led to the creation of the Civic Forum, an
first Central European nation to pursue such a policy and the Czech lustration law has served as a model throughout the region. This section considers lustration as a tool of transitional justice. It begins with a general overview of lustration law and concludes with an analysis and assessment of the Czech lustration law.

A. Lustration Law in General

Lustration includes “screening, disqualifying, and purging” former officials from elected and appointed state positions. Lustration laws typically draw on secret police files—a fact that critics argue is an inherent

umbrella pro-democracy organization led by the taciturn playwright Václav Havel. See id. By the end of December 1989 the Czech Communist Party had collapsed, leading to the appointment of Havel as President. Id. David Remnick beautifully explains Havel’s quixotic rise to power:

A bourgeois boy becomes a bohemian playwright; he then becomes a dissident, who, for the crime of writing subversive essays and helping to organize a subversive movement called Charter 77, is encouraged by the regime to master the art of welding in a reeking Czech prison; finally, in late November, 1989, everything implodes and he is leading demonstrations in Wenceslas Square, and hundreds of thousands of people are shouting “Havel na hrad!” (“Havel to the Castle!”); within days, he is the head of state, working in the same hilltop redoubt that served as a seat of power for dynasts of the Bohemian kingdom and the Hapsburg monarchy, for the emissaries of Berlin and the satraps of the Kremlin.


156. See, e.g., Boed, supra note 153, at 359.

157. In 1990, Czechoslovakia changed its name to the Czech and Slovak Federal Republic ("CSFR"). On January 1, 1993, the CSFR ceased to exist and divided into the Czech Republic and Slovakia with remarkably little violence. IRRECONCILABLE DIFFERENCES?: EXPLAINING CZECHOSLOVAKIA’S DISSOLUTION (Michael Kraus & Allison Stanger eds. and trans., 2000).

Following the split, the Czech Republic proceeded with lustration. The Slovakian President, Vladimir Mečiar, opposed lustration and beseeched the Constitutional Court to abrogate the law in 1994. Although the Court refused, the law was never invoked and ceased to exist in 1996. See, e.g., Ellis, supra note 153, at 183. For an attempted explanation of the divergent responses to transitional justice in the Czech Republic and Slovakia, see Nadya Nedelsky, Divergent Responses to a Common Past: Transitional Justice in the Czech Republic and Slovakia, 33 THEORY & SOC’Y 65 (2004).


159. Ellis, supra note 153, at 181.
weakness. As Mark Ellis, the former Executive Director of the Central and East European Law Initiative (“CEELI”) explains, this information is then “used to determine whether suspected individuals collaborated with the former state security service.”

Professor Herman Schwartz has explained that lustration law generally falls into one of two camps, “(1) those that ban a relatively large number of former functionaries from a wide range of . . . positions; and (2) those that apply to just a particular activity.” Act No. 451/1991 (the Czech lustration law) is an example of the former. As lustration only seeks to sanction those individuals in positions to undermine the democratic process, lustration as a tool of transitional justice could be thought of as a midpoint in terms of severity between retributive justice and restorative justice. Indeed, Roman David has referred to the Czech lustration law as “semi-retributive” in nature. Similarly, as a working paper for the Sussex European Institute (“SEI”) explains, “[a]s sanctions go, those imposed by lustration are restrained.”

Lustration is often justified on a state security theory. It is argued that lustration can allow a fragile democracy to take root by preventing those who would harm it from serving in positions of power and undermining the process. In addition to this security argument, Professor Maria Łoś argues that lustration also achieves “historical truth” and “minimal

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160. See infra note 180 and accompanying text.
161. Ellis, supra note 153, at 181.
162. Schwartz, supra note 158, at 149.
163. Roman David, Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001), 28 LAW & SOC. INQUIRY 387, 425 (2003) (“The Czech lustration law does not sanction every member of the past repressive apparatus. Instead, it is primarily forward looking since it concerns only access to senior public posts in state institutions. Thus, the law . . . can be called ‘semi-retributive.’”) (citation omitted).
164. Williams et al., supra note 14, at 18 (“Unlike the states of Europe liberated from German occupation in 1944-45, post-Communist democracies did not resort to the mass interment or summary execution of suspected collaborators, suspend their civil and political rights, or seize their property.”).
165. See, e.g., David, supra note 163, at 420 (“In the Czech Republic, the threat to democracy is reduced by removing some members of the totalitarian machinery from leading positions.”). See also Maria Łoś, Lustration and Truth Claims: Unfinished Revolutions in Central Europe, 20 LAW & SOC. INQUIRY 117, 149 (The Vice-Minister of the Interior in the Czech-Slovak cabinet explained: “Is it so difficult to understand that people want to know who the former agents and informers are? This is not an issue of vengeance, nor of passing judgments. This is simply a question of trusting our fellow citizens who write in newspapers, enact laws and govern our country.”).
166. Łoś, supra note 165, at 145 (“[L]ustration brings a clarification of values and a frank evaluation of the past, as well as a clear warning for the future. In its absence, one can expect a continuation of the lie and a dangerous, moral ambivalence.”).
justice." One more affirmative purpose can be added to those proposed by Łoś. The SEI working paper argues that lustration generally serves to prevent blackmail and thus contributes to national reconciliation. Although the example the authors use is from the Czech law, the argument has applicability to lustration law in general. They explain:

Advocates of lustration warned that individuals with past associations with the security services who now held important public offices were open to blackmail. Conceivably, these people could be forced . . . to act against the public interest and subvert democracy; if they did not cooperate, their histories would . . . be divulged . . . and their lives ruined. Lustration was thereby presented as a necessary means to protect public safety and democracy by ensuring that occupants of prominent and sensitive positions were not vulnerable to such duress.

One of the principle criticisms of Act No. 451/1991 is that it assigned collective guilt. It should be noted, however, that lustration laws may avoid such criticism by being narrowly tailored and by making individualized assessments. Nevertheless, the following criticisms can be leveled at lustration regardless of how narrowly drawn the law may be.

The first problem can be described as a personnel dilemma. That is, lustration often “exact[s] a heavy price from the society by denying it scarce human resources.” Countries which purge large segments of managerial and administrative expertise will find political and economic reconstruction extraordinarily arduous, for revolutionaries rarely have the

167. Id. at 146–47 (“Even if the justice discourse does not necessarily call for punishment, and lustration measures are not penal in character, the underlying notion is one of retribution. Evil must be met with (at least some) evil. The wrongdoer must not be allowed to profit from his misdeeds.”).

168. The argument is also made by the Czechoslovak Parliamentary Investigative Commission for the Clarification of the Events of November 17, 1989 (“Parliamentary Investigative Commission”), which was established prior to passage of Act No. 451/1991. The Commission’s spokesman explains, “[t]he only way to prevent blackmail . . . and a series of political scandals that could surface at crucial moments is to clear the government and legislative bodies of these collaborators.” Petr Toman, Spokesman, Parliamentary Investigative Commission, Report on StB Collaborators to the Czechoslovak Federal Assembly (Mar. 22, 1991), reprinted in 3 TRANSITIONAL JUSTICE, supra note 152, at 308 [hereinafter Report on StB Collaborators].

169. Williams et al., supra note 14, at 9.

170. See, e.g., Boed, supra note 153, at 359 (“The foremost legal criticism of the practice has been that lustration risks the miscarriage of justice by assigning collective guilt without a determination of an individual’s responsibility for any harm caused.”).

171. Schwartz, supra note 158, at 146.
skills necessary to run a modern administrative state.\textsuperscript{172} In his brilliant chronicle of the Soviet empire’s demise, David Remnick recounts a remark a Russian official made to a Washington Post reporter. The official explained, “[w]hen we were forming the new structures, we had to hire people from the old structures. Our supporters—the people who came to rallies and street demonstrations—didn’t know anything about how to run a country.”\textsuperscript{173} Within the Russian official’s comments may lie a partial solution—lustration law must take into account the wealth of talent available without members connected to the ancien régime and be willing to compromise if there are too few of those individuals to effectively run the state. As Eric Posner and Adrian Vermeule note, “[w]ell-designed schemes can finesse the dilemma, maintaining a critical mass of useful old-regime personnel while excising the officials who present the greatest threat to the new regime or whose presence would create the greatest public offense.”\textsuperscript{174}

A second problem with lustration is the source of information on which it relies. Secret police files in the Czech Republic and Soviet Union have proven to be both incomplete and inaccurate.\textsuperscript{175} With regard to incompleteness, neither the files of the Czech secret police, the Státní bezpečnost (“StB”), nor the Soviet Komitet Gosudarstvennoy Bezopasnosti (“KGB”) contained the identities of those in the “top echelons of the system,”\textsuperscript{176} a fact that has led to Havel decrying the Czech law as only affecting the “small fry.”\textsuperscript{177} With regard to inaccuracies, both sources of files have proven to be unreliable, with many files being “falsified and deliberately distorted by agents seeking to exaggerate their achievements.”\textsuperscript{178} In one list of “alleged former ‘collaborators,’” President Havel’s name even appeared.\textsuperscript{179} Finally, in the unlikely event that secret police files could be certified as being complete and accurate, it is

\textsuperscript{172} See, e.g., Posner & Vermeule, supra note 21, at 778–79 (“Former resisters or revolutionaries are often the very people who have been denied technical education or political office . . . .”).


\textsuperscript{174} Posner & Vermeule, supra note 21, at 779.

\textsuperscript{175} See, e.g., Schwartz, supra note 158, at 151.

\textsuperscript{176} Cepi, supra note 153, at 25. See also Stephan Engelberg, The Velvet Revolution Gets Rough, N.Y. Times, May 31, 1992, § 6 (Magazine), at 31 (“We know that at least 16,000 top-level agents were not listed in any registers. . . . We are chasing little fish.”) (quoting a Czech parliamentary deputy).


\textsuperscript{178} Schwartz, supra note 158, at 145.

\textsuperscript{179} Id. at 152.
debatable whether a state transitioning from totalitarian rule to democracy would want to use them. As President Havel explained in a 1991 interview, “[i]t is absurd that the absolute and ultimate criterion for a person’s suitability for performing certain functions in a democratic state should come from the internal files of the secret police.”

Finally, because lustration laws may implicate behavior that took place decades earlier, lustration raises the issue of procedural fairness. As time passes, exculpatory evidence may be lost or destroyed, witnesses may die, and memories may fade. Indeed, this is the purpose behind statutes of limitations. As lustration laws are not criminal statutes, the principle of *nulla poena sine lege* does not generally apply. Nevertheless, in an amicus brief on the applicability of international agreements to the Czech law before the Constitutional Court of the Czech & Slovak Federal Republic (“CSFR”), a number of human rights organizations argued that the rationalization for the principle continues to apply. The brief notes, “[i]t is unfair to sanction someone today by today’s standards for what was legitimate and even considered laudatory in the past.”

**B. The CSFR’s Screening (Lustration) Law**

1. Antecedents

The Parliament of the CSFR passed Act No. 451/1991, the Czech Screening (“Lustration”) Law, on October 4, 1991. The act was originally scheduled to expire on December 31, 1996. Since that time, the law has been extended twice by the Czech Republic, first on September 27, 1995 for five additional years, and indefinitely on October 25, 2000. In each case, President Havel unsuccessfully attempted to veto

180. Michnik & Havel, supra note 24, at 538.
181. See, e.g., Schwartz, supra note 158, at 147.
182. See, e.g., Marc A. Massey, Comment, *The Problem of Court Enforced Morality*, 82 DENV. U. L. REV. 461, 469 (2004) (“Statutes of limitations have been upheld on the basis that it is contrary to the notion of justice to fail to put one’s opponent on notice that he will need to defend himself within a reasonable amount of time and that ‘the right to be free from stale claims in time comes to prevail over the right to prosecute them.’”).
185. Id. art. 23, at 321.
186. See, e.g., David, supra note 163, at 409. See also Williams et al., supra note 14, at 12 (“[R]ight-wing defenders of the legislation relocated the perceived threat from ex-Communists in the mainstream leftist party, the Social Democrats, to justify the permanent renewal of the law in 2000.”).
the extension.\textsuperscript{187} As of November 2002, over 400,000 individuals had been lustrated (screened) and approximately 12,000 individuals had tested positive, i.e. found to have collaborated with the StB.\textsuperscript{188}

Screening of individuals began with the run-up to the federal elections held in June 1990.\textsuperscript{189} With the exception of the Communists, all the political parties requested that their candidates be screened for past association with the StB.\textsuperscript{190} A similar request came that fall in the run-up to local elections, although this time it was not the parties that made the request, but the Czech National Council, which sought an order from the Czech Electoral Commission requiring that all parties screen their candidates.\textsuperscript{191} While the Electoral Commission did not mandate screening, it did recommend that parties screen their candidates.\textsuperscript{192} As a result, some parties complied while others did not. This lack of uniformity allowed McCarthyite allegations to be made that collaborators were running the federal government. As a result, in January 1991, parliament passed Resolution 94, tasking the Parliamentary Investigative Commission for the Clarification of the Events of November 17, 1989 (“Parliamentary Investigative Commission”)\textsuperscript{193} with determining whether any members of parliament were registered as StB collaborators.\textsuperscript{194} On May 22, 1991, the Parliamentary Investigative Commission reported to the parliament that “fourteen members of the federal government and sixty other officials were declared to have been collaborators.”\textsuperscript{195}

With the Parliamentary Investigative Commission’s findings, calls for a more thorough lustration law became increasingly assertive. The final gasp of the Communists in the Soviet Union, taking shape in an attempted coup against Gorbachev\textsuperscript{196} less than three months later, intensi-
fied the crusade. The next month, the government presented the parliament with a draft lustration law. Prior to presenting the draft, the government consulted with the International Labour Organization (“ILO”), which recognized the need “to remove from public institutions persons who took part in suppressing human rights.” Nonetheless, this draft version hardly resembled the law that was eventually passed and diverged from what would become Act No. 451/1991 in several important respects. First, the original draft was narrowly tailored in that it sought to identify individuals who had harmed others or committed human rights violations. Act No. 451/1991’s scope is much broader and implicates an individual if he is merely listed in StB files, regardless of the circumstances. The law’s inability to consider a host of mitigating circumstances and thereby allow for an individualized assessment is a troublesome aspect of Act No. 451/1991. Closely related, the draft version operated on individual guilt, whereas Act No. 451/1991 “espouses the principle of collective guilt” as it “bar[s] entire categories of people . . . from holding certain positions.” Finally, the original draft placed the burden of proof on the government to show that the accused had suppressed human rights whereas Act No. 451/1991 placed the burden on the accused to prove that he was not a collaborator.

197. See, e.g., Williams et al., supra note 14, at 11 (“[T]he coup . . . sparked (vague) claims that Communist-era networks had been stirring during the brief time when it looked like Moscow might revert to a hard line.”).


199. See, e.g., Boed, supra note 153, at 369.

200. Id. at 378.

201. One can readily imagine a number of reasons (duress and necessity to name just two) why an individual living in a totalitarian regime would assist the security services. See, e.g., Posner & Vermeule, supra note 21, at 820. See also Weschler, supra note 194, at 81 (“The law makes no provision for any such mitigating circumstances [as joining the dissident movement]. If you ever signed—if you’re listed in the registry . . . that’s it: You’re StB positive, and there’s no appeal. You’re lustrated.”) (quoting Jaroslav Basta, a Czech dissident).


203. Id. (“The chief flaw of the new legislation is that it is partially based on a presumption of guilt rather than of innocence: that is, the burden is on people in certain government positions to prove they did not work for the secret police . . . .”).
To come into law, Act No. 451/1991 had to be signed by the President, the philosopher-king Václav Havel. On the one hand, Havel considered the bill “very harsh and unjust,” yet he also appreciated the need “not [to] try to escape from the past.” In a remarkable interview, he explained:

[A]s President, I must bear in mind that society needs some public action in this regard because otherwise it would feel that the revolution remains unfinished. There are people whose own lives . . . have been destroyed by the regime . . . .

. . . Our society has a great need to face that past, to get rid of the people who had terrorized the nation and conspicuously violated human rights, to remove them from the positions that they are still holding.

As the law could be revised once it had been passed, Havel chose to ratify Act No. 451/1991, but proposed several amendments. Among Havel’s recommendations were that those found to have been collaborators be allowed to appeal the decision in court and that the law make an individualized determination of guilt, which would include consideration of mitigating factors. As he explained:

The amendment that I proposed . . . provides for the right of appeal to an independent court, which would have the right to pronounce people capable of holding certain positions according to the specific circumstances of the individual case. For example, if a person later fought for human rights, the court would have the power to declare that this contribution was greater than the guilt of having belonged to something sometime in the past. This would also cover persons who were forced to cooperate with the regime . . . .

Despite such remonstrations, parliament refused to implement any of the President’s proposals.


The lustration law that passed in 1991 required that individuals serving in delineated positions present their employer with a certificate from the Ministry of Interior that the individual did not fall into one of three positions.

204. For references to Havel as such, see Paul Berman, Havel’s Burden: The Philosopher-King is Mortal, N.Y. TIMES, May 11, 1991, § 6 (Magazine).
205. Michnik & Havel, supra, note 24, at 538.
206. Id. at 537.
207. Id. at 539–40.
208. Id. at 538.
209. The positions are listed in Article 1 of the Lustration law. See Act No. 451/1991 art. 1(1).
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delineated categories\textsuperscript{210} during the period from February 25, 1948 to November 17, 1989.\textsuperscript{211} The duty is on the employee to obtain the certificate.

\begin{itemize}
\item[(a)] a member of the National Security Corps detailed to any State Security section;
\item[(b)] listed on the files of the State Security as a resident, an agent, a holder of a lent-out apartment, a holder of a conspiratorial apartment, an informer or an ideological collaborator of the State Security;
\item[(c)] a conscious collaborator of the State Security;
\end{itemize}

\textit{Id.} art. 2(1).

The law defines a “conscious collaborator” in the following manner:

\begin{quote}
[T]he citizen concerned has been listed on the files of the State Security as a confidant, a candidate of secret collaboration or as a secret collaborator of confidential contacts and knowledge, and he knew he was in contact with a member of the National Security Corps and was giving him information through the form of clandestine contacts, or was implementing tasks set by him.
\end{quote}

\textit{Id.} art. 2(2).

In an action brought by ninety-nine members of the Federal Assembly, the Constitutional Court of the CSFR found the Article 2(c) category unconstitutional. Decision on Act No. 451/1991, Constitutional Court of the Czech and Slovak Federal Republic, Pl. US 1/92 (Nov. 26, 1992), available at http://test.concourt.cz/angl_verze/doc/p-1-92.html. The Court held that having a certificate indicating such collaboration could “merely express[] the intention of the State Security to recruit the recorded persons for conscious collaboration in the future.” \textit{Id.}

In upholding the rest of the law, the Court noted:

\begin{quote}
In a democratic society, it is necessary for employees of state and public bodies . . . to meet certain criteria of a civic nature, which we can characterize as loyalty to the democratic principles upon which the state is built. . . .
\end{quote}

\textit{Id.}

\begin{quote}
Even . . . Act No. 451/1991 was based on [democratic values and criteria]. It cannot be understood as revenge against particular persons or groups of persons, nor as discrimination against persons who . . . alone or in cooperation with or through a repressive body, had violated fundamental human rights and basic freedoms . . . .
\end{quote}

The statute . . . does not even discriminate against such persons (neither in employment nor in their profession), it merely provides . . . certain additional preconditions for those positions designated as crucial by law, or for engaging in a licensed trade . . . .

\textit{Id.}

\begin{itemize}
\item[(211)] Act No. 451/1991 art 2(1).
\end{itemize}
Should he fail to do so, his employment will terminate within fifteen days from the date the organization received notice.212

3. Assessment

The Czech lustration law has been the subject of much criticism, including a 1992 decision by the ILO that Act No. 451/1991 violated Convention No. 111.213 Nevertheless, to adequately assess Act No. 451/1991 one must consider whether the act, and more generally lustration, meet the stated goals of transitional justice. The typology suggested by Professor Łoś, that lustration achieves “historical truth” and “minimal justice,”214 and the additional goal of national reconciliation, offer a useful starting point.

In terms of state security and safeguarding democracy, Act No. 451/1991 clearly achieved this goal. As Timothy Garton Ash, Professor of European Studies at Oxford and a Senior Fellow at the Hoover Institution, notes, “there is no doubt that the [lustration] law did keep a number of highly compromised persons out of public life in Czech lands, while such persons remained to do much damage in Slovakia.”215

With regard to exposing historical truth, the Czech law did not fare as well. Under Act No. 451/1991, a lustrated person could choose not to reveal his status to the public once his status was revealed to his employer. As Roman David explains,

The entire lustration process is kept secret; the lustration certificate is delivered to the person concerned and cannot be published without her consent. Thus, a positively lustrated person has to leave her position without any public knowledge of her collaboration. The dilemma of the truth versus the protection of the personality of former informers has been solved for the benefit of the latter.216

As a result, lustration was unable to serve the very important transitional justice function of reckoning with the past. Nevertheless, this is a specific weakness of Act No. 451/1991 rather than a general weakness of lustration. It would not be burdensome to devise a lustration process in which results of a positive lustration could be made public provided that an appeals process had first been exhausted.

212. Id. art. 14(1).
214. See supra notes 166–167 and accompanying text.
215. Posner & Vermeule, supra note 21, at 807 (alteration in original). See also supra note 165 and accompanying text.
216. David, supra note 163, at 424.
There are clearly more efficacious mechanisms of achieving “justice” than lustration. Lustration is “semi-retributive” and forward-looking in nature, as it does not seek to punish all former members of a repressive regime, but only those who held positions in public life. Nonetheless, as the example of Sierra Leone indicates, nations are free to choose among a variety of transitional justice mechanisms, and no single mechanism itself is sufficient to achieve all the goals of transitional justice. Provided that they do not violate the principle of *nulla poena sine lege*, selective prosecutions should be implemented along with a lustration process, thus achieving justice.

With regard to achieving national reconciliation, there is no doubt that today the Czech Republic is a vibrant democracy and stable economy. Whether these remarkable achievements are the result of lustration is hotly disputed. As noted, the SEI argues that by curtailing the possibility of blackmail, lustration helps achieve national reconciliation to some degree. Roman David also argues that Act No. 451/1991 has “substantially helped reduce political tensions.” On the other hand, Roman Boed has argued that “[l]ustration has had divisive effects on the societies that have experienced it [and] [i]t thus seems that the effect of lustration would be to move society away from national reconciliation rather than towards it.” Neil Kritz has also admonished that “if extended too broadly, purges can have the destabilizing effect of creating a large, ostracized, and unemployed element within society.”

III. THE SEARCH FOR TRANSITIONAL JUSTICE IN IRAQ

One may argue that with the death of Saddam Hussein on December 30, 2006, no further efforts need be made toward national reconciliation. The fact is, however, that while Hussein had a capacity for evil not likely rivaled since Hitler or Stalin, acting alone, he would have been incapable of transforming Iraq into the state of horrors it had become at the time of the American invasion on March 20, 2003. As the International Center for Transitional Justice and the Human Rights Center at Berkeley ex-
plain, “[t]he [Ba’ath] party as a social institution was clearly identified as an instrument of oppression and control that was the means by which Saddam Hussein entrenched his grip over all aspects of Iraqi life.”

Similarly, as an Iraqi scholar posited:

The Ba’ath regime differs from all its predecessors in Iraq not only in the sanctification of violence in its ideology and its idiom but also in having made it into a pivotal tool in running the country. It has built up security services that are among the best endowed and most skillful in the world and that have penetrated every sector of Iraqi society, including economic life. They have turned themselves into a vast apparatus of terror and violence.

For thirty-five years, or “more than a third of modern Iraq’s existence,” thousands of Ba’ath party members inflicted countless acts of unimaginable cruelty and savagery upon the Iraqi people. Indeed, the Sunni-Shi’a sectarian violence that now threatens to destroy Iraq has its roots in the Ba’ath party apparatus that allowed the Sunni minority to systematically persecute the Shi’a majority. Consequently, there is much work to be done from a transitional justice perspective in Iraq, but not until the security pillar has been firmly erected.

This section first presents a brief history of the Arab Socialist Ba’ath Party. It then looks to the dizzying spate of post-Ba’ath developments, beginning with the American invasion in 2003. Next it considers the two transitional justice mechanisms heretofore implemented in post-Saddam Iraq; the Iraqi Special Tribunal and efforts at de-Ba’athification.

A. The Arab Socialist Ba’ath Party

When one considers what was, until 2003, the centrality of the Ba’ath to the ordinary Iraqi’s life, it is quite remarkable that the party was not “homegrown,” but rather had established itself in Syria for a decade before being transported to Baghdad from Damascus. The party initially developed out of what the Ba’ath claim was a “struggle” against French colonial rule and it attracted young urban intelligentsia. Although Saddam Hussein would not join the party until 1959, the party

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223. IRAQI VOICES, supra note 2, at 36.
225. Id. at 33.
226. See, e.g., PHEBE MARR, THE MODERN HISTORY OF IRAQ 310 (2d ed. 2004) (noting that the top eighteen positions in the Ba’ath apparatus in 1998 broke down along the following lines: sixty-one percent to Sunnis, twenty-eight percent to Shi’a, six percent to Kurds, and another six percent to others).
227. See BENGIO, supra note 224, at 33.
228. MAKIYA, supra note 2, at 184–85.
retained this membership profile when he joined—a fact which clearly distinguished the poor and uneducated Saddam from other party members.\(^{229}\)

The Arabic word Ba’ath means “resurrection.”\(^{230}\) Indeed, central to Ba’ath ideology is a longing to return to past greatness—a concept returned to time and again by Ba’ath leadership.\(^{231}\) For example, Saddam Hussein invoked this concept before his disastrous invasion of Kuwait. Hussein explained, “[t]he opportunity we speak of is a [sic] historic opportunity; the Arab nation will either . . . move to regain its . . . universal task, or else it will remain in the state its enemies wish to see it in.”\(^{232}\) Similarly, Kanan Makiya has explained that “[p]arlochialism and mythmaking, the twin pillars of Ba’thist ideology, . . . both emanate from the unifying idea of a permanently hostile outside always directing its attention to Ba’thism.”\(^{233}\)

The party’s motto is “Unity, freedom, socialism.”\(^{234}\) All three terms can be seen as foreign, not only to Iraq, but in a larger sense, to Arab society—\(^{235}\)a fact that makes the ideology’s unparalleled success all the more remarkable. The term “unity,” which refers to Arab unity, does not appear a single time in the Qur’an.\(^{236}\) The term “freedom,” which refers to freedom from foreign control, appears to have been borrowed from the French Revolution’s idea of liberté.\(^{237}\) The term “socialism” refers to Arab socialism.\(^{238}\)

The Ba’ath Party came to power in Syria in March 1963 and has had a monopoly on power there ever since.\(^{239}\) A month before its ascendancy to power in Syria, the Ba’ath Party attempted a coup in Iraq, but it lasted

\(^{229}\) See, e.g., ABURISH, POLITICS OF REVENGE, supra note 4, at 34–35.

\(^{230}\) Edward Wong, The Struggle for Iraq: Expanding Safeguards; In Effort to Secure Borders, Iraqis are Patrolling a River for Smugglers and Pirates, N.Y. TIMES, July 9, 2005, at A5 (“Al Baath [is] the name of Mr. Hussein’s tyrannical party. It means resurrection in Arabic.”).

\(^{231}\) See BENGIO, supra note 224, at 37 (Saddam Hussein claimed that the Ba’ath party was the “renewal of the nation’s mission.”).

\(^{232}\) Id.

\(^{233}\) MAKIYA, supra note 2, at 75.

\(^{234}\) See, e.g., BENGIO, supra note 224, at 37.

\(^{235}\) Id. at 38.

\(^{236}\) Id.

\(^{237}\) See id.

\(^{238}\) Arab socialism distinguished itself from European socialism in discounting the latter’s rejection of nationalism. Id. Indeed, Michel Aflaq, one of the principal founders of Ba’thism, once noted, “Communism is Western, and alien to everything Arab.” MAKIYA, supra note 2, at 226.

\(^{239}\) U.S. State Dep’t, Bureau of Near Eastern Affairs, Background Note: Syria (May 2007), http://www.state.gov/r/pa/ei/bgn/3580.htm.
less than a year.\textsuperscript{240} Splits in the party were primarily to blame for its failure, but, as Phebe Marr notes, it was significant for three lessons, which would be internalized by a young but already influential Saddam Hussein:

The first is that ideological divisions . . . are to be avoided at the top at all costs. Second, that potential military opponents must be moved out of power as soon as possible. Third, it is easier to gain power than to maintain it. In any future government, gaining control over the instruments of state would be paramount. For this purpose, a security apparatus would prove far more effective than a party or the military.\textsuperscript{241}

The Ba’ath would not make the same mistakes again, and five years later the party undertook another, albeit successful, coup, plunging Iraq into a whirlwind of terror that would last thirty-five years. The Arab world’s stunning defeat in the 1967 Six-Day War no doubt played a role in the downfall of the Kassem military regime,\textsuperscript{242} but credit must be given to the Ba’ath. As Marr notes, “the leadership that emerged in 1968 was a more practical and seasoned group than that of 1963; it was also more ruthless, more conspiratorial, and above all, more determined to seize power and this time to hold it.”\textsuperscript{243} Despite Saddam Hussein’s later embellishments that he “learned how to fire the gun of a tank” during the coup, it was a “totally bloodless coup.”\textsuperscript{244}

Ahmad Hassan al-Bakr and Saddam Hussein became, respectively, President and Vice Chairman of the Revolutionary Command Council (“RCC”).\textsuperscript{245} In this capacity, Hussein was in charge of the state intelligence and security apparatuses.\textsuperscript{246} That year, a new constitution was also promulgated.\textsuperscript{247} As the United States Institute of Peace (“USIP”) notes, “the new Baathist constitution marginalized the judiciary by ending the separation of powers, making civilian courts subservient to

\begin{itemize}
\item \textsuperscript{240} Marr, supra note 226, at 116, 119.
\item \textsuperscript{241} Id. at 123.
\item \textsuperscript{242} See Hazem Saghieh, openDemocracy, The Six-Day War, Forty Years On (May 18, 2007), http://www.opendemocracy.net/conflict-middle_east_politics/sixdaywar_4629.jsp (“For the Arabs, their decisive defeat in June 1967 . . . . was laden with significance—political, cultural, economic and of course military.”).
\item \textsuperscript{243} Id. at 136.
\item \textsuperscript{244} Aburish, Politics of Revenge, supra note 4, at 75–76, 80.
\item \textsuperscript{245} Id. at 125.
\end{itemize}
the military court system, and creating special courts outside the regular judicial system." In another development with far-reaching consequences for the courts, James Dobbins explains that the regime made the deliberate decision . . . to encourage a return to tribal justice as part of its policy of retribalizing Iraq to fragment political opposition. This policy has meant that significant portions of the population have effectively been distanced from the state’s criminal justice system, resorting instead to tribal elders and a range of traditional, sometimes summary, forms of justice.

In one indicative example of the ever-widening grip of the various security apparatuses over Iraqi society, in 1969 the Iraqi Penal Code was amended to include an entire chapter on “[o]ffences against the internal security of the State.” Similarly, as USIP notes:

Over time, as Hussein consolidated power, the [Iraqi National Police] became increasing marginalized and their responsibilities for internal security and protecting the regime were taken over by the various security organizations. The police remained responsible for law enforcement, but the pervasiveness of the regime’s security apparatus and its brutal methods meant that crimes were more likely to be committed by regime operatives than criminals.

At first, Saddam Hussein was careful to play mentee to al-Bakr and not to challenge his mentor, but it was undeniable that power was steadily gravitating toward the apprentice. When al-Bakr resigned on July 16, 1979, Hussein was waiting, and he became President, Secretary-General of the Ba‘ath Party Regional Command, RCC Chairman, and Commander-in-Chief of the military.

248. Id.
251. ESTABLISHING THE RULE OF LAW, supra note 247, at 5.
252. MARR, supra note 226, at 145.
253. Although al-Bakr cited personal reasons for his resignation and his health had been deteriorating, at least one of Hussein’s biographers questions the voluntary nature of al-Bakr’s resignation. See Said K. Aburish, How Saddam Hussein Came to Power, in THE SADDAM HUSSEIN READER: SELECTIONS FROM LEADING WRITERS ON IRAQ 41, 50–51 (Turi Munthe ed., 2002) (noting that the author has “interviewed more than a hundred Iraqis, a knowledgeable collection of people who belong to different political groupings with different agendas, and not a single one accepts the Bakr resignation on face value”) [hereinafter Aburish, How Saddam Hussein Came to Power].
254. MARR, supra note 226, at 178.
changing of the guard marked a decisive shift, already under way, from a one-party state to a personal, autocratic regime, dependent for security—and increasingly for decisions—on Saddam Husain and his close family members and cohorts.255 Less than two weeks later, Hussein engaged in a Stalinist-style purge lasting two weeks and resulting in the deaths of twenty-two top Ba’ath leaders and the imprisonment of forty others.256 The show trials were videotaped and “distributed to all security offices, to be shown to the public as a warning to ‘other traitors and conspirators.’”257 Also at this time, a formidable personality cult—which would last for the next twenty-four years—began to develop around Hussein.258

B. Post-Ba’ath Developments

In the past four years, Iraq’s political landscape has seen a dizzying array of changes as the United States and a new generation of Iraqi leaders have attempted to purge Iraq of its Ba’athist past. Iraq was under foreign occupation from April 2003 until June 28, 2004, when sovereignty was transferred (in principle) to the Interim Iraqi Government.259 Following the downfall of the Ba’ath regime in the spring of 2003, the United States created the Coalition Provisional Authority (“CPA”).260 On May 6, 2003, President Bush appointed L. Paul Bremer III, a former diplomat and ambassador to the Netherlands, as his special envoy and head of the CPA.261 In July 2003, the CPA, in agreement with Iraqi political parties and former exiles, appointed the broad-based twenty-five member Iraqi Governing Council (“IGC”).262 Mr. Bremer’s tenure was marked by

255. Id. at 177.
256. Aburish, How Saddam Hussein Came to Power, supra note 253, at 51, 54.
257. Id. at 54.
258. MARR, supra note 226, at 151. See also Aburish, How Saddam Hussein Came to Power, supra note 253, at 58 (“[T]he Iraqi media began calling him ‘knight’, ‘struggler’, ‘leader’, ‘son of the people’ and comparing him to Peter the Great.”).
260. In his outstanding book on the American intervention in Iraq, Thomas Ricks notes that the standard joke among military members interfacing with the CPA was that the acronym stood for “Can’t Produce Anything.” THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 205 (2006).
a rising insurgency, escalating violence, and controversy. Lakhdar Brahimi, the United Nations special envoy, had a strained relationship with Mr. Bremer, claiming at one point that “Mr. Bremer is the dictator of Iraq.”263 Quite inexplicably, Mr. Bremer has argued that his disastrous policy of “deBaathification . . . was his most popular act.”264

On June 28, 2004, the CPA dissolved and sovereignty was transferred to interim President Sheikh Ghazal Mashal Ajil al-Yawer and interim Prime Minister Dr. Iyad Allawi, who would each hold power until elections in January 2005.265 Dr. Allawi is a secular Shi’a, who, according to BBC News, “ha[d] the advantage as prime minister . . . of being equally mistrusted by everyone in Iraq’s multifarious population.”266 On January 30, 2005, amidst rising violence, Iraqis elected the members of a 275-member Transitional National Assembly (“TNA”). It is estimated that fifty-seven percent of eligible voters took part in the election.267 Three months later, the TNA approved the Iraqi Transitional Government (“ITG”), and Jalal Talabani, a Kurdish leader, was named to the largely ceremonial post of President of Iraq, making him the “first Kurd to serve as president of an Arab-dominated country.”268 Ibrahim al-Jaafari, a Shi’ite, was named Prime Minister,269 the most powerful post.

On October 15, 2005, a constitution written largely by Shi’ites and Kurds was submitted to the Iraqi people in a referendum.270 Unlike their boycott of the January elections, Sunni Arabs participated heavily in the and its accompanying cabinet, some 54 percent—a slight majority—were Shi’ah, 22 percent were Kurds, and some 16 percent were Arab Sunnis.”

referendum. While seventy-nine percent of the voters approved the constitution, the vote was largely split along sectarian lines, with the Shi’ites and Kurds favoring the document and the Sunnis largely rejecting it. At the time of the referendum, the results of a secret poll by the United Kingdom’s Ministry of Defense were leaked to the British public. The poll left little doubt that coalition forces had overwhelmingly failed to win the peace in Iraq. Quite astonishingly, the poll indicated that eighty-two percent of Iraqis were “strongly opposed” to coalition troops’ presence; sixty-seven percent of Iraqis felt less secure as a result of the occupation; and alarmingly, forty-five percent of all Iraqis believed that attacks against coalition forces were justified. Similarly, a January 2006 poll conducted by the Program on International Policy Attitudes, the Center for International and Security Studies at the University of Maryland, and the World Public Opinion Web site revealed that a whopping eighty-eight “percent of Sunni Arabs and [forty-one] percent of Shi’ites approved of attacks on US forces.”

On December 15, 2005 elections were again held, this time to elect a permanent Iraqi National Assembly. The elections were generally peaceful, and following the trend they set during the constitutional referendum, the Sunnis participated in large numbers and were rewarded with roughly one-fifth of the seats in the 275-member Assembly. Despite the peaceful nature of the elections, the seeds of sectarianism were evident. One astute observer has noted that “[f]ewer than one in ten Iraqis had voted for parties that crossed ethnic or religious lines.” On May 20, 2006, Nouri Kamel al-Maliki, a Shi’a, was named Prime Minister and Iraq’s first permanent government replaced the ITG. Despite heading a government of “national unity,” Al-Maliki’s Iraq remains a powder keg, with ever-escalating sectarian violence between Shi’a and Sunnis—a fact

272. Id. (“Two Sunni-dominated provinces, Anbar and Salahuddin, overwhelmingly rejected the constitution.”).
274. Charles Levinson, Sunni Tribes Turn Against Jihadis, CHRISTIAN SCIENCE MONITOR, Feb. 6, 2006, at 1.
276. GALBRAITH, supra note 9, at 3.
278. Id.
that underscores the need for transitional justice mechanisms, explored below.

C. Transitional Justice in Post-Ba’ath Iraq

1. The Iraqi Special Tribunal

On December 10, 2003, just three days prior to the arrest of Hussein in a tiny cellar outside of Tikrit,\textsuperscript{279} Iraq’s transitional IGC established the Iraqi Special Tribunal (“IST”) to try Iraqis on international and domestic crimes.\textsuperscript{280} Despite concerns from human rights organizations,\textsuperscript{281} the Bush administration ceded to the IGC’s wish that Iraqis alone try Hussein.\textsuperscript{282} The IST’s jurisdiction covers the crime of genocide,\textsuperscript{283} crimes against humanity,\textsuperscript{284} war crimes,\textsuperscript{285} and specific provisions of Iraqi law.\textsuperscript{286} The IST covers such crimes committed during Ba’ath rule (between July 17, 1968 and May 1, 2003).\textsuperscript{287} In a controversial appointment, the IGC appointed Salem Chalabi, the nephew of the head of the Iraqi National


\textsuperscript{280} See, e.g., Vivienne Walt, Tribunal in Iraq Targets Hussein, BOSTON GLOBE, Dec. 11, 2003, at A34.

\textsuperscript{281} Peter Slevin, Iraqi Governing Council Says It Wants to Try Hussein, WASH. POST, Dec. 15, 2003, at A9 (“[I]t’s . . . important that the trial not be perceived as vengeful justice. For that reason, international jurists must be involved in the process.”) (quoting Ken Roth, Executive Director of Human Rights Watch). See also Walt, supra note 280 (“Lawyers who have researched Hussein’s government for years warned yesterday that Iraq’s judges were unprepared to try war crimes suspects in hearings that might involve hundreds of witnesses and millions of documents.”).

\textsuperscript{282} See Slevin, supra note 281 (“The Bush administration expects to advise Iraqi investigators and judges, but will leave the principal decisions to Iraqis . . . .”). The Statute of the Iraqi Special Tribunal does, however, require “[t]he President of the Tribunal . . . to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber.” Statute of the Iraqi Special Tribunal art. 6(b), available at http://www.cpa-iraq.org/human_rights/Statute.htm (last visited Oct. 23, 2007). It also allows for the “Governing Council or the Successor Government, if it deems necessary, [to] appoint non-Iraqi judges who have experience in the crimes encompassed in th[e] statute.” Id. art. 4(d).

\textsuperscript{283} Statute of the Iraqi Special Tribunal art. 11.

\textsuperscript{284} Id. art. 12.

\textsuperscript{285} Id. art. 13.

\textsuperscript{286} Id. art. 14. Three crimes in particular are delineated: “attempt to manipulate the judiciary or involvement in the functions of the judiciary,” id. art. 14(a); “the wastage of national resources and the squandering of public assets and funds,” id. art. 14(b); and “[t]he abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country,” id. art. 14(c).

\textsuperscript{287} See id. art. 1(b).
Congress ("INC") and neo-conservatives’ favorite Iraqi exile Ahmed Chalabi, to head the IST.\footnote{See, e.g., Iraqis Distrust Saddam Tribunal, THE AUSTRALIAN, Apr. 22, 2004, World, at 7 (noting disfavor among Iraqis of the recently returned Ahmed Chalabi and that "[m]any feel Saddam should be prosecuted by people who lived under his brutal rule"). Five months into his three-year term, the American-educated Salem Chalabi was dismissed by Prime Minister Allawi. John F. Burns & Dexter Filkins, Iraqis Battle Over Control of Panel to Try Hussein, N.Y. TIMES, Sept. 24, 2004, at A13.}


In April 2006, Hussein and six co-defendants were charged with genocide for the savage al-Anfal campaign conducted against the Kurds in the late 1980s.\footnote{100,000 Murders—Saddam on Fresh Charges of Genocide Against Kurds, DAILY TELEGRAPH (Austl.), Apr. 6, 2006, World, at 33. For background on the Anfal campaign, see generally Human Rights Watch, Genocide in Iraq: The Anfal Campaign Against the Kurds (July 1993), http://www.hrw.org/reports/1993/iraqanfal.}

On November 5, 2006, the IST convicted Saddam of crimes against humanity and sentenced him to death by hanging.\footnote{Borzou Daraghi, Hussein May Be Hanged by Spring, Lawyer Says, L.A. TIMES, Nov. 7, 2006, at A9.}

On December 26, 2006, Iraq’s highest court rejected Saddam’s appeal and upheld his death sentence.\footnote{In an interview with Jim Lehrer of PBS, President Bush explained, “It basically says to people, ‘Look, you conducted a trial and gave Saddam justice that he didn’t give to others . . . . But then when it came to execute him, it looked like it was kind of a revenge killing.’” Jim Rutenberg, Bush Widens Iraq Criticism Over Handling of Executions, N.Y. TIMES, Jan. 17, 2007, at A8.}

He was executed on December 30, 2006 in what many observers considered a sectarian lynching that would further destabilize Iraq.\footnote{For criticism of the IST in general, see Human Rights Watch, Judging Dujail: The First Trial Before the Iraqi High Tribunal, VIII. Conclusions (November 2006), http://hrw.org/reports/2006/iraq1106/9.htm#_Toc151270369 ("The court’s conduct . . . reflects a basic lack of understanding of fundamental fair trial principles, and how to uphold them in the conduct of a relatively complex trial. The result is a trial that did not
Iraqi court sentenced Saddam’s infamous cousin, Ali Hassan al-Majid (also known as Chemical Ali), to death for genocide, war crimes, and crimes against humanity committed during the Anfal campaign, which killed 182,000 people. On September 4, 2007, an Iraqi appeals court upheld al-Majid’s death sentence.

Prior to the IST’s establishment, a number of options to prosecute Hussein and his cohorts were considered, ranging from prosecution before an international tribunal established by the United Nations Security Council to prosecution before the recently established International Criminal Court, or a hybrid court that would include both local and international jurists. The decision to try Hussein and other top Ba’athists by an all-Iraqi tribunal has been the subject of heated criticism. First, human rights lawyers questioned whether Iraqi judges with little experience in international criminal law were up to the monumental task of trying Hussein in a case that would likely include “hundreds of witnesses and millions of documents.” Second, some observers have argued that trying Hussein before an all-Iraqi tribunal would not greatly enhance the capacity to meet key fair trial standards.


298. See, e.g., Options for Hussein Trial Run Gamut, DALLAS MORNING NEWS, Mar. 30, 2003, at 19A.

299. See, e.g., Editorial, When Hussein Goes to Trial, MILWAUKEE JOURNAL SENTINEL, Mar. 9, 2004, at 12A.

300. Walt, supra note 280. See also BUILDING the IST, supra note 133, at 8 (noting the “lack of experience with international criminal law among Iraqi judges”); Gersh, supra note 289, at 280 (“[T]he Iraqi judiciary simply does not have the expertise to carry out so complex a trial in a manner that will withstand international scrutiny.”). But see Opening Statement by Pierre-Richard Prosper, supra note 2, at 3 (“I am aware that there are those who say the Iraqis are not up to the challenge. . . . I am convinced that there are qualified Iraqi jurists both within and outside of Iraq who are ready and willing to accept the mandate of justice.”). A related argument is the degree to which the Iraqi judiciary has been infected by corruption. See, e.g., Craig T. Trebilock, Note from the Field: Legal Cultures Clash in Iraq, 2003 ARMY LAW. 48, 48 (2003) (noting the difficulty civil affairs attorneys had working with “a legal system that was broken from years of corruption and political influence”). For an interesting article on the role American military lawyers played in training Iraqi judges for the IST, see Erik Holmes, Tribunal on Trial, ARMY TIMES, Jan. 22, 2007, at 24.
ity of the local judiciary. Third, observers have argued that the IST’s legitimacy has been weakened as a result of its composition, a point that leaves the IST susceptible to the claim that it is nothing more than a tool of the United States “dispensing victors’ justice.”

2. De-Ba’athification

The very first order passed by the American-controlled CPA was the “De-Ba’athification of Iraqi Society.” As of this writing, the policy has resulted in up to eighty-five thousand Ba’athists, most of them Sunni Arabs, losing their jobs. Prima facie, it is remarkable how closely the CPA’s plan for de-Ba’athification resembles Act No. 451/1991, the needlessly harsh lustration law enacted in the Czech Republic. Clearly and quite unfortunately, Mr. Bremer and company never bothered to consider Act No. 451/1991 in formulating their own vetting program embodied in CPA Order Number 1 (“Order No. 1”). Nor did Mr. Bremer consider the views of a joint and interagency workshop convened by Army staff, conducted on December 10–11, 2002. The group categorically advised against the type of top-down de-Ba’athification Order No.

301. See, e.g., Human Rights Watch, Saddam Hussein’s Trial: Bringing Justice for the Human Rights Crimes in Iraq’s Past (December 2003), http://hrw.org/english/docs/2003/12/19/iraq6770_txt.htm (last visited Oct. 22, 2007) (“The capacity of future domestic courts can be strengthened by having national staff working alongside internationals with expertise in prosecuting these types of cases. A mixed domestic-international tribunal in Iraq could leave a truly positive legacy.”). See also Gersh, supra note 289, at 292–93 (“Trying Saddam . . . will do little to improve the capacity of the Iraqi judiciary. Saddam’s trial will revolve around complex allegations of genocide, war crimes, and human rights violations. These are issues that an Iraqi judge is unlikely to ever see again, unless he participates on an international tribunal.”) (footnote omitted).

302. See, e.g., Slevin, supra note 281 (“There is the risk . . . that prosecutions undertaken by Iraqi courts supported only by American forces will be seen as dispensing victors’ justice.”) (quoting law professor Diane F. Orentlicher). See also Edward Alden, Plans for Iraqi-led Courts to Try Saddam’s Regime, FIN. TIMES (London), Apr. 8, 2003, at 6 (citing critics who “say that an international tribunal could be important in helping to heal the divisions caused by the war and in giving legitimacy to the American effort”); Ruti Teitel, The Law and Politics of Contemporary Transitional Justice, 38 CORNELL INT’L L.J. 837, 844 (2005) (“In any event, the selection of judges by what was widely viewed as a wing of the occupation, as well as the role of the United States in the 1980’s, would seem to make the Iraqi case equally vulnerable to the claim to victor’s justice.”).


Rather, the group encouraged a bottom-up approach similar to that employed in the dismantling of the Nazi party in post-war Germany. Nor did Mr. Bremer heed the advice of those on the ground, including General Jay Garner, Bush’s first head of the post-war mission in Iraq, who claimed the policy was “too hard,” or the CIA station chief in Baghdad, who claimed the policy would “undercut the operation” of Iraq.  

Section 1(2) of Order No. 1 reads: “Full members of the Ba’ath Party holding the ranks of . . . Regional Command Member . . . Branch Member . . . Section Member . . . Group Member . . . are hereby removed from their positions and banned from future employment in the public sector.” Like Act No. 451/1991, Order No. 1 mandates vetting for certain classes of people employed in the public sector. Section 1(3) reads: “Individuals holding positions in the top three layers of management in every national government ministry, affiliated corporations and other government institutions (e.g., universities and hospitals) shall be interviewed for possible affiliation with the Ba’ath Party, and subject to investigation for criminal conduct and risk to security.”  

The process of de-Ba’athification is carried out by the Iraqi de-Ba’athification Council, established on May 25, 2003 by CPA Order Number 5. In an act that stunningly demonstrates the CPA’s egregious incompetency and failure to engage the aspirations of ordinary Iraqis, the CPA named Ahmed Chalabi as the head of the Iraqi de-Ba’athification Council. Once the golden boy of the Pentagon, Mr. Chalabi has
since fallen out of favor with some (but unfortunately not all) American policymakers as a result of accusations that he embellished intelligence to the Defense Department prior to the American invasion, and once the invasion had taken place, shared American intelligence with Iran.\textsuperscript{313} Mr. Chalabi once had far greater aspirations than head of the de-Ba’athification Council, but high political office has proven elusive as he has no following in Iraq.\textsuperscript{314} Chalabi’s impact on the de-Ba’athification policy cannot be overemphasized. Marine General Anthony Zinni, who oversaw the 1998 Desert Fox Raids on Iraq, has claimed, “I think the de-Baathification . . . was at Chalabi’s insistence . . . . Iraqis told me this, Iraqis from inside during the war said that Chalabi was pushing Bremer to get rid of all of the Baathists because he wanted to put his people in those position, he could control them.”\textsuperscript{315} Peter Galbraith goes even further in his assessment of Chalabi’s persuasiveness. He writes, “Ahmed Chalabi’s role in the events leading to the American invasion of Iraq cannot, in my view be overstated. If it were not for him, the United States military likely would not be in Iraq today.”\textsuperscript{316} For an unpopular yet ambitious figure to be given an exceedingly important post which can easily be manipulated to harm political rivals or enemies speaks to the CPA’s sheer incompetency.

Concerns with Mr. Chalabi’s performance arose soon after his appointment. Former CIA analyst and Iraqi scholar Kenneth Pollack, for example, testified to the Senate Foreign Relations Committee that he believed Mr. Chalabi was forging documents in his role as head of the Council.\textsuperscript{317}

Like Act No. 451/1991, Order No. 1 has been the subject of much criticism\textsuperscript{318}—and for good reason. Like Act No. 451/1991, it fails to

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\textsuperscript{314} See \textit{Tenet}, supra note 313, at 397, 446 (“In the December 2005 elections, Chalabi’s party garnered about 0.5 percent of the vote and won not a single seat in Parliament.”).

\textsuperscript{315} RICKS, supra note 260, at 163–64.

\textsuperscript{316} GALBRAITH, supra note 9, at 86.

\textsuperscript{317} See, e.g., Eli Lake, \textit{Allawi Runs with Alleged Baathists}, N.Y. SUN, Jan. 28, 2005, at 1.

make individualized assessments and instead espouses the principle of collective guilt—a grossly unfair concept when one considers the pressure to join the Ba’ath Party in Saddam’s Iraq. Also, similar to Act No. 451/1991, Order No. 1 deprived the struggling new Iraqi government of much needed talent, served to create a security vacuum, and helped fuel the insurgency. Finally, Order No. 1 achieved the nearly impossible; it further destabilized an already dangerously unstable country—the exact opposite of what transitional justice mechanisms are supposed to do. It actually made attainment of national reconciliation a more remote, rather than a closer, goal. Fareed Zakaria, the thoughtful editor of Newsweek International, in his review of George Packer’s Iraq war chronicle The Assassins’ Gate, states:

As a balancing act that kept Iraq’s three communities at peace, it [CPA Order No. 1] was a disaster. Bremer’s decisions signaled to Iraq’s Sunnis that they would be stripped of their jobs and status in the new Iraq. Imagine if, after apartheid, South Africa’s blacks had announced that all whites would be purged from the army, civil service, universities and big businesses. In one day, Bremer had upended the social structure of the country. And he did this without having in place a new ruling cadre that could take over from the old Sunni bureaucrats.

These decisions did not cause the insurgency, though it is worth noting that for the first few months of the occupation, Sunni Falluja was much less of a problem for the United States than was Shiite Najaf. But Bremer fueled the dissatisfaction of the Sunnis, who now had no jobs but plenty of guns. And most especially, his decisions added to the chaos and dysfunction that were rapidly rising in Iraq.

Had Bremer and company consulted ordinary Iraqis rather than the self-serving Mr. Chalabi, they would have likely embarked upon a quite

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purges of the military and the police, arguably sacrificed present security to the claims of justice, leaving the country with a real military and security vacuum.

319. See, e.g., id. ("[T]here was a rush to de-Baathification, resulting in the evisceration of existing institutions, such as the Iraqi parliament and army. These purges needlessly sacrificed potential sources of legitimacy concerning, for example, ongoing constitutional reform at the time."). See also BAKER & HAMILTON, supra note 3, at 21 ("Most of Iraq’s technocratic class was pushed out of the government as part of de-Ba’athification."); Susan Sachs, Aftereffects: Sovereignty; Iraqi Political Leaders Warn of Rising Hostility if Allies Don’t Support an Interim Government, N.Y. TIMES, May 18, 2003, § 1, at 22 ("But some professors said the purging process could go too far, replacing corrupt deans with incompetent ones whose only qualification was their lack of Baathist links."). See also TENET, supra note 313, at 427 ("We soon began hearing stories about how Iraqis could not send their kids to school because all the teachers had been dismissed for being members of the Ba’ath Party.").

320. Zakaria, supra note 264.
different process. In the remarkable 2004 study *Iraqi Voices*, the International Center for Transitional Justice and the Human Rights Center at Berkeley explain a comprehensive survey they conducted on Iraqi attitudes toward transitional justice. On the subject of de-Ba’athification, the study’s findings are worth quoting at length:

> It is significant that most respondents differentiated between the Ba’ath party leadership and those who actually ordered or committed human rights violations, and Ba’ath party members in general. With a few exceptions, respondents were reluctant to place the entire Ba’ath party membership on trial, and there was widespread recognition that Ba’ath party membership was a technique for survival under the old regime that did not necessarily mean direct participation in human rights crimes.321

In April 2004, Bremer’s Order No. 1 was significantly relaxed, allowing “the quick return to the government payroll of former Baath Party members ‘who were Baathists in name only.’”322 As part of the rollback, and in an effort clearly designed to fill the security vacuum Order No. 1 helped create, “senior army officers, including generals and full colonels, [were] allowed to return . . . .”323 Moreover, in the new strategy unveiled by President Bush on January 11, 2007 calling for a surge of more than 20,000 soldiers and marines to Iraq, the President also called for easing the disastrous policy.324

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323. Id.

This appears to be the sole recommendation from the largely ignored Iraq Study Group that President Bush chose to implement in his new Iraqi strategy. In Recommendation 27, the Iraq Study Group explains: “Political reconciliation requires the reintegration of Baathists and Arab nationalists into national life, with the leading figures of Saddam Hussein’s regime excluded. The United States should encourage the return of qualified Iraqi professionals . . . into the government.” BAKER & HAMILTON, supra note 3, at 65.

Despite the prominence President Bush has placed on reversing de-Ba’athification, Prime Minister al-Maliki has been slow to act. In September 2007, he promised that lawmakers would further revise the policy, but the issue is consistently preempted by debate on more pressing affairs, such as the latest bombing to occur. See, e.g., Cave, supra note 296.
CONCLUSIONS AND RECOMMENDATIONS

Post-conflict nations are best served when a holistic approach to transitional justice is taken and efforts at achieving both peace and justice are balanced. The typology proposed by Juan E. Méndez, the President of the ICTJ, that post-conflict nations owe four duties to victims—justice, truth, reparations, and lustration,325 provides a useful model for considering transitional justice approaches in post-Ba’ath Iraq.

A. Prosecution and Justice

Méndez first calls for “an obligation to do justice, . . . to prosecute . . . the perpetrators of abuses when those abuses can be determined to have been criminal in nature.”326 The Iraqi Voices study of Iraqi social attitudes toward transitional justice found “considerable support for holding perpetrators accountable through legal trials.”327 This is understandable, not only from the purely emotional perspective of a people who have suffered greatly, but particularly so when one considers the primacy of justice in Muslim culture. One Islamic scholar has referred to justice as “the defining theme of Islamic ethics,”328 noting that “[t]he major characteristics of the society envisioned by the Qur’an are compassion, or kindness, honestly, and justice.”329 The same author argues that the “Qur’an says that . . . God has called for justice.”330 Indeed, the Qur’an gives the following incantation: “Say: ‘My Lord hath commanded justice; and that ye set your whole selves (to Him) at every time and place of prayer, and call upon Him, making your devotion sincere as in His sight: such as He created you in the beginning, so shall ye return.’”331

With the establishment of the IST, the question becomes who that Tribunal will try. While the Ba’ath party delineated several layers of leadership,332 for the purposes of transitional justice, three layers of culpability can be identified: Saddam and his inner circle; mid-ranking members—the cogs in the Ba’ath machine (one eminent Iraqi journalist estimates
this would encompass 3,000 members);\textsuperscript{333} and the general Ba’ath party membership (estimated to be more than one million).\textsuperscript{334} Only the first layer—Saddam and his inner circle—should be tried by the IST. Those individuals who committed human rights abuses but were not members of the inner circle should be prosecuted in ordinary Iraqi criminal courts.\textsuperscript{335}

For purposes of competency, capacity building, and legitimacy, it is certainly unfortunate that the Bush administration chose to demonstrate its hostility toward international justice and cave in to Iraqi demands that the tribunal be composed solely of Iraqi judges and prosecutors. Nonetheless, as Hussein’s cohorts are tried, the international community may still, and must, press for a greater background role, thereby enhancing the IST’s competency, capacity building, and legitimacy. Such a role is expressly authorized by article 6(b) of the IST’s statute:

\begin{quote}
The President of the Tribunal shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber. The role of the non-Iraqi nationals shall be to provide assistance to the judges with respect to international law and the experience of similar tribunals (whether international or otherwise), and to monitor the protection by the Tribunal of general due process of law standards.\textsuperscript{336}
\end{quote}

\textbf{B. Truth and Reconciliation}

Méndez next calls for an “obligation . . . to grant victims the right to know the truth.”\textsuperscript{337} As some form of amnesty is often “a necessary prerequisite for a [truth] commission,”\textsuperscript{338} all truth commissions allow for forgiveness. Forgiveness is an Islamic virtue. As one Islamic scholar notes, “[v]ariations on the term ‘be compassionate’ or ‘show mercy’ . . . occur hundreds of times in the Quran.”\textsuperscript{339} While the Qur’an affirms the Biblical injunction “an eye for an eye,” it also declares that eschewing retaliation and embracing forgiveness is an act of atonement:

\begin{quote}
And We ordained for them: ‘Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.’ But if anyone remits the retaliation by way of charity, it is an act of atonement for him-
\end{quote}

\begin{itemize}
\item[334.] \textit{Id.}
\item[335.] \textit{Id.}
\item[336.] Statute of the Iraqi Special Tribunal art. 6(b).
\item[337.] \textit{Supra} note 58 and accompanying text.
\item[338.] \textit{See supra} notes 84–85 and accompanying text.
\item[339.] SONN, \textit{supra} note 328, at 8.
\end{itemize}
self. And if any fail to judge by (the light of) what God hath revealed, they are (no better than) wrong-doers.\footnote{The Holy Quran, supra note 331, Surah 5:45.}

A truth commission would likely be seen in this light, and therefore supported by ordinary Iraqis. There are two reasons, however, to counsel against the establishment of such a commission at this time. First, it is questionable whether there is a truth to reveal in Iraq. As noted above, the Swiss Peace Foundation’s study on truth commissions concludes that they are particularly useful in two scenarios: where “the systems of abuse . . . [were] designed to hide the facts [and] [t]orture and related abuses were committed largely in secret” or where the truth is not hidden, but “multiple ‘truths’” exist,\footnote{See supra notes 70–71 and accompanying text.} neither of which applies to post-Ba’ath Iraq. As \textit{Iraqi Voices} notes, some of the participants in the study were skeptical as to the value of a truth commission. The horrors which beset Iraq were no secret; Iraqis knew that the Ba’athist regime was a barbaric reign of terror that had no appreciation for human life or dignity.\footnote{IRAQI VOICES, supra note 2, at 39.} Whether there is truth to reveal is therefore questionable.

A second concern is that Iraq lacks the requisite civil society to undertake the challenges inherent in a truth commission.\footnote{See supra notes 78–79 and accompanying text.} For example, Kanan Makiya, in his introduction to the 1998 edition of \textit{Republic of Fear}, excerpts a document signed by hundreds of exiled Iraqis:

\begin{quote}
Civil society in Iraq has been continuously violated by the state in the name of ideology. As a consequence the networks through which civility is normally produced and reproduced have been destroyed. A collapse of values in Iraq has therefore coincided with the destruction of the public realm for uncoerced human association.\footnote{MAKIYA, supra note 2, at xxx.}
\end{quote}

Ultimately, the decision as to whether and when to establish a truth commission is one that the Iraqi people alone should make.

\subsection*{C. Reparations}

A third obligation owed to victims, argues Méndez, is the “grant[ing] [of] reparations to victims in a manner that recognizes their worth and their dignity as human beings.”\footnote{See Méndez, supra note 58 and accompanying text.} While the prosecution of Hussein and his henchmen is a clear form of retributive justice, reparations can be seen as a direct form of restorative justice, as they demonstrate efforts to assuage the horrors Iraqis suffered under the Ba’ath regime. A compre-
hensive reparations system should be undertaken immediately through
the establishment of a commission to investigate and determine dis-
bursements to victims. Reparations should take the form of both material
and symbolic support; the former focusing on rebuilding lives, the latter
on restoring dignity.346

D. De-Ba’athification

Finally, Méndez suggests that “states are obliged to see . . . that those
who have committed the crimes while serving in any capacity in the
armed or security forces of the state should not be allowed to continue on
the rolls of reconstituted, democratic law-enforcement or security-
related bodies.”347 As argued above, the overzealous and partisan de-
Ba’athification process in Iraq sacrificed scarce Iraqi talent and further
exacerbated sectarian divisions by assigning collective guilt rather
than making individualized assessments. Since its implementation, de-
Ba’athification in Iraq has been significantly moderated, and under pres-
sure from the Bush administration, Prime Minister al-Maliki has vowed
to go further.348 This is certainly a welcome development. The remaining
question, which can only be answered in time by the Iraqi people, is
whether this and other efforts made toward transitional justice thus far
are too little, too late.

346. IRAQI VOICES, supra note 2, at iii.
347. Méndez, supra note 58 and accompanying text.
348. See supra note 324.
THE EVOLVING LAW OF DOCUMENT PRODUCTION IN JAPANESE CIVIL PROCEDURE: CONTEXT, CULTURE, AND COMMUNITY

Carl F. Goodman*

INTRODUCTION

In 1996, Japan enacted a new Civil Procedure Code as part of its judicial reform effort (the “1996 Code”).¹ It was, to a great extent, a rewrite of the old Japanese Civil Procedure Code (the “Old Code”)² in the modern Japanese used by the general public.³ The 1996 Code did, however, make several substantial changes. The most significant addressed procedures dealing with the production of evidence, particularly those dealing with document production.⁴ One new provision expanded the scope of documents available for production, but also restricted expansion so that a document prepared solely for the use of the party in possession of the document (a “self-use document”) was excluded from production.⁵ This change represented a compromise between those who argued for open production of relevant documents and those who argued for retention of the old rule wherein only documents that met three specific statutory criteria were available for production. It was anticipated

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³ See Shozo Ota, Reform of Civil Procedure in Japan, 49 AM. J. COMP. L. 561, 563 (2001) (“The old Code of Civil procedure of 1926 . . . was basically a streamlined version of the Code of 1890, which was in turn basically a translation of the German Code of Civil Procedure of 1877.”).
⁴ Some of the specific changes included the creation of a new preparation for oral argument procedure that permitted parties to engage in private discussions with the court before entering the public oral argument phase of the case, MINSOH Ō, arts. 168–74, a new inquiry procedure loosely modeled after American interrogatories but without any sanction or compulsion requiring answers to inquiries, MINSOH Ō, art. 163, and a loosening of the procedural requirements that needed to be met as part of a motion to require that a party or third person produce documents to be used in litigation. MINSOH Ō, art. 222.
⁵ MINSOH Ō, art. 220, para. 4.
that the judicial system would articulate the parameters of this compromise in actual litigations.

In 1999, the Supreme Court of Japan decided Fuji Bank v. Maeda, a case that broadly interpreted the self-use document exception and severely restricted the right to obtain documents from a recalcitrant party. Both lawyers (bengoshi as well as foreign lawyers) and judges read Fuji Bank as a broad application of the self-use document exception excluding from production corporate documents prepared by employees for in-house use and restricted from distribution outside the corporation. Nonetheless, Japanese bengoshi continued to press lower courts to order the production of in-house corporate documents. Over time, these cases reached the Supreme Court, which, through a series of decisions interpreting the self-use exception, has moderated the reach of Fuji Bank. Consequently, although greater production of documents is now possible than was originally thought permissible under Fuji Bank, the recent series of cases has introduced added complexity as to how broadly or narrowly the Court will interpret the self-use document exception to production.

It is the purpose of this Article to update a 2003 study of the 1996 Code, with special focus on the document production article of the 1996 Code and the Supreme Court of Japan’s evolving self-use document ju-

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7. A bengoshi, the rough equivalent of the American lawyer, is licensed to represent parties in litigation before all courts in Japan. Bengoshi must belong to a bar association and are subject to a special law known as the bengoshi-ho.


The new Code of Civil Procedure . . . is perhaps better described as a revision rather than a reform. The new code was designed as a linguistic up-dating of the code to make it more accessible to contemporary readers. The new version made hardly any substantive changes. Among the few was to be a broadening of discovery. However, whatever the intended changes may have been, in light of the Supreme Court’s decision in K.K. Fuji Bank v. Maeda . . . denying discovery of a bank memo evaluating a loan application as an “internal” memo under [MINSOH] article 220(4)(c), the most significant preexisting limits on discovery appear to remain.

Id.
risprudence in the ten years since the 1996 Code was adopted. Although proceeding cautiously, the Court appears to be relaxing the rules governing document production to allow parties greater access to documents where production will not have a seriously detrimental effect on the operations of the producing entity—while simultaneously creating a doctrine that supports Japanese customs and community values.

This Article contains three parts. Part I provides a background of the Japanese civil litigation system so that the cases that address document production issues may be placed in a litigation perspective. Part II discusses the Supreme Court decisions dealing with document production under the 1996 Code. Finally, Part III discusses the contextual, cultural, and community rationale that underlays and supports the decisions.

I. BACKGROUND

A. A Civil and Common Law Hybrid

The modern Japanese legal system’s structure resembles that of civil law systems. Like other civil law systems, its fundamental laws are contained in codes. The centerpiece of the Japanese system is the Civil Code. The basic law of civil procedure is the Civil Procedure Code, which was re-written in 1996. But Japan’s version of the civil law system has always been somewhat different from the classical civil law systems represented by the Napoleonic Code, where, consistent with the equality notion of the Revolution, the law was to be easily understood by
all people, and the German Civil Code, where the law was considered a science. Nonetheless, Japan’s civil law system retains the fundamental elements of a civil law system (as distinguished from a common law system):

(i) Codes are the law, whereas judicial decisions, while useful in teaching how judges have interpreted the Codes in the past, are not law.

(ii) Judges are part of a civil service government bureaucracy and their duty is to apply the law as found in the Codes, rather than using their authority to make their own law.

(iii) Procedure follows the inquest model rather than the adversary model of the common law system. As a consequence, the judge is in charge of fact-finding and is the central figure in all courtroom dramas, while the role of the attorney is marginalized. In Japan, the classical inquest, wherein the judge may take evidence ex officio, has been modified to require that the parties suggest witnesses to be called.

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13. Von Mehren & Gordley, supra note 10, at 48–53 (“On July 5, 1790, the Constituent Assembly voted ‘that the civil laws would be reviewed and reformed by the legislators and that there would be made a general code of laws simple, clear and appropriate to the constitution.’”)

14. See generally Carl Steenstrup, German Reception of Roman Law and Japanese Reception of German Law, 1 INT’L J. INTERCULTURAL COMM. STUD. 273, (1991). See also Von Mehren & Gordley, supra note 10, at 59–68. As a consequence of American influence after World War II, the current legal system has many common law aspects, rendering it in some respects a hybrid system with a decided emphasis on the Civil Law. See infra notes 43–44.

15. See Kaoru Yunoki, Hanrei Kenkyū No Mokuteki To Hōhō [Objectives and Methods of Studies of Precedents], 16 Hō-shakaigaku Kenkyū 1, 3–5 (1964), translated in The Japanese Legal System 150–51 (Hideo Tanaka ed., Univ. of Tokyo Press 1976) (“A judgment is after all a solution of a dispute between individuals, which is particularistic in nature, and does not establish a general rule which is applicable to all persons. This applies also to a judgment of the Supreme Court, even one entered by its grand bench.”); Joseph Dainow, The Civil Law and the Common Law: Some Points of Comparison, 15 AM. J. COMP. L. 419, 424, 426 (1967).

16. See Geoffrey C. Hazard, Jr., Discovery and the Role of the Judge in Civil Law Jurisdictions, 73 NOTRE DAME L. REV. 1017, 1021 (1998) (“The central task in a civil law adjudication is for the judge to identify the legal and factual issues involved and to decide them correctly.”).
leaving the decision whether to call such witnesses to the judge. Moreover, the function of the judge encompasses the duty of the State to assure that the party in the “right” prevails in litigation.17

(iv) Preclusion rules are an autonomous regime, separate from the doctrine of stare decisis. Thus, a higher court’s ruling is binding on the lower court only in the case in which it is rendered, and is not binding on lower courts in other cases.18

(v) Trials are not seen as the end product of a long road involving a separate pre-trial discovery procedure. Rather, trials are seen as a seamless sequence of meetings, evidence gathering, witness testimony taking, etc., constituting one “plenary proceeding,” at the conclusion of which the judge, having “clarified” the facts and issues, gives her decision.19

(vi) The first-level appeal is seen as a continuation of the trial. New evidence and arguments may be presented if doing so will lead to a correct decision,20 unlike the appellate review of the trial court record in the common law system. Second-level appeal is

17. Id. (“Under the civil law procedural systems, the judge is responsible for deciding a case according to the truth of the matter . . . [and] eliciting relevant evidence.”).
18. See MINSOHŌ, arts. 114, 115. Indeed, in cases where the judgment awarded damages to be paid over time, where there are significantly changed circumstances, it is possible to initiate a new suit to lower or increase the amount awarded to take account of the changed circumstances. See MINSOHŌ, art. 117.
19. The Japanese trial or “plenary hearing” is broken into parts—a preliminary oral argument stage, which is like a traditional trial, and a second stage, where witness testimony and documents are presented. See MINSOHŌ, arts. 148, 164–67. Both the preliminary oral argument and the oral argument stages are part of the continuous, plenary hearing. The 1996 Code introduced another procedure, the preparation for oral argument, which is less formal and is also less open to public view. This stage is designed to move cases more quickly and to encourage early settlements. See Ota, supra note 3, at 568–70. For a general discussion of Japanese procedure, see Carl F. Goodman, Justice and Civil Procedure in Japan (2004) [hereinafter Goodman, Justice].
20. See Akira Mikazuki, Satibansho Seido [Judicial System], 5 NHONOKU KEMPŌ TAIKEI 73 (J. Tanaka ed., 1962), translated in THE JAPANESE LEGAL SYSTEM, supra note 15, at 444, 465–68. For a chart showing the percentage of cases where the first level appeal court received new evidence in the form of witness testimony on appeal, see Goodman, Justice, supra note 19, at 436.
seen as a review of the case to correct errors made by the lower court, unlike the role of American highest courts, which resolve splits among courts within their jurisdiction to ensure uniformity.21

Nonetheless, the Japanese system has retained elements that in one way or another mirror notions of common law or customary law systems.22 For example, while the Commercial Code trumps the Civil Code when it comes to commercial matters, issues not resolved by the Commercial Code are determined by commercial custom.23 Only in the absence of such custom does the Civil Code come into play.24 Thus, the provisions of the Civil Code that determine whether a written document is required for a contract (generally it is not, as there is no general statute against frauds in the civil law system) are not applied when the commercial custom in the industry favors written contracts.25 In addition, mediation, conciliation, and negotiation are the preferred means of dispute resolution, rather than the invocation of the state’s coercive power through the organized judiciary.26 The assistance of the judiciary may,


22. See THE JAPANESE LEGAL SYSTEM, supra note 15, at 59 (“Custom is to regulate a transaction if it is found that the parties either explicitly or impliedly acted upon it, so long as such custom is not repugnant to public policy. . . . If the custom in question is so well established that the people concerned regard it as ipso facto binding upon them, it is called customary law (kanshū hō) and is applied without the necessity of an allegation by either party.”).


24. See id.


Thus, while in the case of a soy-bean contract a writing may not be required because the custom in the industry is to do things orally, a contract will be required in certain real estate transactions, not because the Code says a contract is required but because it is the customary thing to do.

Id.

however, be invoked to facilitate the process of conciliation and settlement.\textsuperscript{27} And, finally, consistent with Emperor Meiji’s Charter Oath,\textsuperscript{28} which called for a break with the evils of the past and for determinations based on the just laws of nature, Japanese judges are not immune from the temptation to create legal rules based on reason rather than the letter of the law.\textsuperscript{29}

B. History

The Japanese version of the civil law system was adopted in the late nineteenth century as a step towards modernization of the legal system. Although the ruling class did not believe that the codes borrowed from France and Germany represented either pre-existing Japanese customary rules or legal ideals, they recognized that they must convince the Western imperialist powers that Japan’s legal system was civilized.\textsuperscript{30}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{27} See MINJI CHÔTEIHÔ [Law for Conciliation of Civil Affairs], Law No. 222 of 1950, translated in 2 EHS LAW BULL. SER. no. 2360 (1999). See also Kota Fukui, Justice System Reform in Japan: The Connection Between Conflict Management and Realization of General Rules of Law, 51 OSAKA U. L. REV. 55, 55 n.3, 66–67, 74 (2004); GOODMAN, JUSTICE, supra note 19, at 398–406; Shunko Muto, Concerning Trial Leadership in Litigation: Focusing on the Judge’s Inquiry and Compromise, 12 LAW IN JAPAN 23 (1979); Tetsuya Obuchi, The Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects, With Special Emphasis on In-Court Compromise, 20 LAW IN JAPAN 74, 75 (1987); Chin Kim & Craig M. Lawson, The Law of the Subtle Mind: The Traditional Japanese Conception of Law, 28 INT’L & COMP. L. QUARTERLY 491, 507–08 (1979) (“Conciliation procedures, however, are not exclusively extra-judicial, but are now also an important part of the enacted procedural law.”).
\item \textsuperscript{28} For a translation of the Charter Oath of Five Articles (1868), see W.W. McLAREN, JAPANESE GOVERNMENT DOCUMENTS VOL. 1 8 n.1 (Univ. Publications of America, reprint ed., 1979).
\item \textsuperscript{30} The adoption of the Civil Law system was a part of Japan’s modernization during the Meiji era and was an essential step in the renegotiation of the unequal treaties under which Japan had lost a great deal of her sovereignty to the Western powers. See Harald Hohmann, Modern Japanese Law: Legal History and the Concept of Law: Public Law
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The first step to modernization was quite natural—a look to the Chinese legal system that had been the font of Japanese law beginning in the seventh century. However, it was quickly realized that borrowing Chinese legal rules would not achieve the objective sought by the ruling class: to regain Japanese sovereignty that had been wrested away by the imperialist Western powers through treaties that stripped Japan of various sovereign powers. The Westerners, who applied extraterritoriality and Consular Courts to China, would not undo these institutions in Japan if Chinese law was adopted as Japanese law. Thus, the natural second step was to find and adopt a Western legal system that would convince the Western imperialist powers that Japan had a modern, civilized legal system.

As an initial matter, Japan’s leaders were split between the civil law system of France and the common law system of England. French law was being taught at the law school created at the Ministry of Justice, giving members of the French School a decided advantage in its influence on Japanese legal thinking. Common law, on the other hand, resembled Tokugawa principles in some respects, as the Tokugawa Magistrates had, at least in the later days of the Shogunate, been attempting to create some

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32. For example, such treaties had the effect of nullifying Japanese ability to raise the unreasonably low tariffs on imported products that had destroyed the Japanese monetary system. They also placed Westerners in charge of legal matters involving their own citizens through extraterritoriality provisions and the creation of “Consular Courts.” See Hohmann, supra note 30, at 155.

33. See Daniel V. Botsman, Punishment and Power in the Making of Modern Japan 144–45 (Princeton Univ. Press 2005) (“The new Chinese-style penal code certainly did nothing to help the Japanese leader’s cause. . . . [I]t was precisely in order to protect British subjects from Chinese laws that the institution of extraterritoriality had been introduced to East Asia in the first place.”).

systematic rules based on the decisions reached by the Magistrates. A vibrant English School objected to the French-inspired Civil Code, and was supported by nationalists who, for entirely different reasons, opposed the new Civil Code. A Francophile Civil Code was written (with the assistance of French legal scholars) but the English School was successful in postponing its final adoption.

With the adoption of a Germanized Constitution and the ascendance of German legal thinking in Japan, the Civil Code was rewritten to adopt the German style, while retaining some French elements. The family law and inheritance provisions, which applied to all Japanese society, were written to embody the family law system of the Samurai class (the ‘ie’). While the Criminal Procedure Code retained a French orientation, the Code of Civil Procedure was based on the German Civil Procedure Code.

Yet before the adoption of Western codes, an indigenous judicial system was required to deal with cases that were not within the jurisdiction of the Consular Courts. Judges needed guidance as to how to approach cases until written laws governing the entire array of anticipated problems could be adopted. The ruling oligarchs found the answer to this dilemma in the use of custom and reason as a foundational principle for
judicial decisions. Naturally, reason required the judge to find what was considered a fair, reasonable, and appropriate determination—much as the Tokugawa Magistrate had done. When the Western codes were adopted as Japanese law, pre-war judges continued to utilize custom and reason in their decision-making.

The defeat of Japan and the subsequent Occupation, headed by Americans with a decided preference for the common law, as well as the adoption of a constitution infused with common law thinking, brought about corresponding changes in the Civil Procedure Code and the judicial system. Echoing the U.S. Constitution, Japan established a single

41. See Wilhelm Röhl, Law of Civil Procedure, in History of Law in Japan Since 1868 665 (Wilhelm Röhl ed., 2005) (According to general principles of adjudication, as set forth by decree of the dajōkan in 1875, “[j]udgment of civil cases shall be rendered according to custom in the absence of law; and in the absence of custom they shall be decided according to reason.”).

42. The Western Codes were adopted over a period of years after the Meiji Restoration. The process was complete before World War I and the judges before, and even after, World War II continued to use custom and reason in their decisions. See Noda, supra note 29, at 223–24. Tom Ginsberg comments:

Particularly whenever a clear answer was not to be found, the judges would utilize the (pre-Meiji) notion of ‘judicial reason’ to find that particular Western norms ought to be adopted as logical rules. This adaptation played an important role in transforming the normative basis of Japanese law.

Tom Ginsberg, Japanese Legal Reform in Historical Perspective 23 (October 8, 2002) (unpublished article), www.law.uiuc.edu/academics/asiangr/pdfs/JapaneseLegalReforminHistoricalPerspective-revised.pdf. In a similar vein, Seigo Hirowatari observes:

By this I mean a phenomenon wherein social relations are not established in terms of rights and duties, but by traditional, social norms: norms dictated by moral and social obligation (giri) and personal emotion (ninjo), which are indefinite and based primarily upon the customary practices of communities. The result is that social conflicts are mostly solved without resort to the courts. This phenomenon was explicitly identified as a ‘problem to be overcome’ in the immediate aftermath of World War II . . .


43. Following the atomic bombing of Hiroshima and Nagasaki, Japan accepted the Potsdam Declaration and unconditionally surrendered to the Allies. American military forces under General MacArthur occupied the main islands of Japan. Although nominally an “Allied Occupation,” the reality was that the American forces were in control of the Occupation, while Japan retained a form of government with a Cabinet and a Diet that could pass laws. Legislation was subject to Occupation approval and the government adopted many laws in compliance with Occupation goals. Included among the laws proposed by the American Occupation was the current Japanese Constitution. See Goodman, Justice, supra note 19, at 75–160.
judicial system headed by a Supreme Court with authority to handle all cases of both public and private law. Although the constitution prohibits the creation of specialized public law courts, such as an administrative court or a constitutional court that are a mainstay of most civil law systems, the Japanese judicial system created panels at the trial court level (district courts) to ensure that specialist judges with knowledge of the administrative climate and administrative law hear administrative law cases.

C. The Function of Japanese Judges and Attorneys

The quintessential American common law idea of judicial review enshrined in Marshall’s decision in Marbury v. Madison is granted to the Japanese court system by the Japanese Constitution. But in a system rooted in a narrow doctrine of preclusion that forswears stare decisis, the question of what exactly a finding of unconstitutionality in one case means for future cases is unclear. Moreover, a court system that lacks the power of contempt or any substitute to enforce its orders without assistance from the public prosecutor is unlikely to aggressively pursue its judicial review power—as is the case with the Japanese Supreme Court. In over fifty years, it has held laws unconstitutional in only seven cases.

44. See KENPÔ, art. 76, para. 2.
45. KENPÔ, art. 81 (“The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”).
During the Occupation, the Old Code was amended to provide a greater role for attorneys. The Occupation objected to the dominant paternalistic Japanese judge; thus, the role of the judge was subordinated to attorneys’ examination and cross-examination.\textsuperscript{48} Although the Old Code was amended during the American Occupation to include cross-examination provisions and appeared to place lawyers at the front of the litigation process,\textsuperscript{49} the reality was that post-war Japanese lawyers were untrained in adversary trial methods, which conflicted with the norms of harmony and avoidance of conflict in Japanese society. Moreover, Japanese judges did not change their ways simply because the Code placed

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\textsuperscript{48} See ALFRED C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN 131–32 (1976). Writing about the Japanese criminal law system, Professor Daniel Foote notes:

[Under the influence of the Occupation following World War II, Japan adopted an adversary system that, in structure, is very similar to that of the United States. In practice, however, the adversary system operates in a much less adversarial fashion in Japan than in the United States.


\textsuperscript{49} See MINSHŌ, art. 202, para. 1 (providing that the party offering the witness directly examines the witnesses first, followed by examination by the opposition party, and finally examination by the court); MINJI SOSH-O KISOHU, art. 114 (using the phrase “cross-examination” and limiting cross-examination to credibility and matters brought out in direct examination). \textit{But see} MINSHŌ, art. 205 (expressing a preference and accepting written witness statements in lieu of oral testimony); MINSHŌ, art. 202, para. 2 (permitting the judge to modify the order of examination so that the court may question the witness first). These provisions diminish the role of cross-examination. Indeed, there are few, if any, oral witnesses in the typical Japanese civil case. In 2001, 85.5% of cases had no witnesses testify, and in 2002, that percentage increased to 86.4%. \textit{See} GOODMAN, JUSTICE, \textit{supra} note 19, at 354.
them in a different light. In addition, unlike in the United States where it is common for lawyers to represent parties, parties in Japan at the first-level trial frequently appear pro se, inspiring judges to rise to their defense when the occasion demanded. As a consequence, the trial process atrophied into a procedure that minimized lawyer participation and maximized the role of the judge. Judges with a paternalistic attitude towards the parties and attorneys before them once again predominated despite the Occupation era reform of the Old Code.

The Occupation’s view of judicial reform resulted in the abolishment of Japan’s Administrative Court in favor of a single judiciary without special courts, the adoption of judicial review, and the grant of independence from the Ministry of Justice to the judiciary. As a consequence, the immediate post-war judicial system was composed mostly of judges who had served pre-war. As the system was bureaucratic in nature (the Occupation had taken the judicial bureaucracy out of the hands of the Ministry of Justice and placed it in the hands of the Supreme Court), the more senior judges in the system were those who had served the longest pre-war and the judges appointed post-war tended to be junior to those who had served in the pre-war period. On bench, these judges quite naturally applied the legal thinking that had guided them through the Hogakubu law faculties they had attended and the reasoning they applied to cases before the war. That thinking was strongly influenced by custom, reason, and the notion of Japanese norms of behavior. Pre-war judges tended to decide cases according to what was viewed as right or

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51. See Goodman, *Japan*, supra note 9, at 567.

52. This is especially true in a system like Japan’s, where the judge is not an impartial referee, but rather is a representative of the state charged with ensuring that the correct party wins. See Tanabe, supra note 50, at 87; Makoto Itoh, *The Reception in Japan of the American Law and its Transformation in the Fifty Years since the End of World War II: Civil Procedure Law*, 26 *Law in Japan* 66, 68–69 (2000).

53. Before World War II, Japan’s Administrative Court operated as a tribunal independent from the primary judiciary, as is common in civil law systems. However, changes to the Japanese Constitution in 1946 provided that “no extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.” *KENPO*, art. 76, para. 2.


appropriate in the circumstances, rather than based on the science of the Code or other statutory principle. 56

The ability of Japanese judges to create a body of judge-made law, much as American judges can, is highlighted by lines of decisions like those that establish the legal foundation for the lifetime employment system, 57 the rights of tenants to remain in possession of leased property even though the term of the lease has expired, 58 and the rights of distributors not to be terminated unless procedures deemed fair under the circumstances are followed. 59 And, like common law courts, Japanese

56. See Takayanagi, supra note 34, at 25–27. See also Haley, Spirit, supra note 55, at 205 (“In case after case throughout the century, Japanese judges have denied ‘rights’ in order to ameliorate what they have perceived to be the injustice of property and contract enabling those with greater economic or social leverage to enlist the aid of the state against those with whom they dealt.”). Prewar judges also applied the Japanese concept of jori (also written as dori). This application was based, at least in part, on Decree No. 103 of 1875, which provided that when no written law or custom applied to a case, the judge should apply reason. See Takayanagi, supra note 34, at 25–26.

57. See Daniel Foote, Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability?, 43 UCLA L. REV. 635 (1996); Curtis J. Milhaupt, A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law, 37 HARV. INT’L L. J. 3, 44 (1996) (“Judge-made law supports the lifetime employment system by supplying bargaining endowments to both employers and employees, enabling malleable, long-term employment patterns.”). For a critique of Foote’s explanation that the rule arose as a consequence of the judiciary’s action to protect a weaker party (the employees) from the unilateral action of a stronger party (the employer) while maintaining stability, see David Kettler & Charles T. Tackney, Light from a Dead Sun: The Japanese Lifetime Employment System and Weimar Labor Law, 19 COMP. LAB. L. & POL’Y J. 1 (1997). Kettler and Tackney, while agreeing with Foote’s basic theory that lifetime employment is a product of judge-made law, believe that “[n]ot judicial traditionalism but a novel combination of labor activism and imported legal approaches led Japanese courts to assimilate the employment relationship Foote emphasizes.” Id. at 4.


59. See Willem M. Visser T’Hooft, JAPANESE CONTRACT AND ANTI-TRUST LAW: A SOCIOLOGICAL AND COMPARATIVE STUDY 46–47 (2002) (“Since no specific legal rules govern the termination disputes between manufacturers and distributors, court decisions have constituted the main source of law . . . . [I]n cases of termination, Japanese Courts do sometimes not distinguish the differences between distribution agreements and other continuing commercial contracts . . . .”). For a discussion of judicial law-making in the area of landlord-tenant relations, see Haley, Spirit, supra note 55, at 140–47. For a discussion of judicial law-making in the areas of labor and employment law, see Takashi Araki, LABOR AND EMPLOYMENT LAW IN JAPAN 23 (Japan Institute of Labor 2002) (“The most important characteristic of legal protection for employment security, restraint on dismissals, is not imposed by legislation (statutes) but by case law or judicial precedent
judges may modify court-established rules to meet new circumstances. In applying both the good faith and morals as well as the abuse of rights provisions of the Civil Code, Japanese judges are not averse to the application of Japanese norms, even when a statute or the constitution itself may point in a different direction. This kind of common law approach is not a reflection of the influence of American legal thinking, but rather reflects indigenous Japanese thinking on the proper role of the judiciary in society. It reflects a subtle blend of civil law, common law, and customary law.

The function of the judge in rendering a “right” decision, meaning a decision in which the party who should win does win, is based on German legal thinking. Although modern cases eschew such a hard and fast rule, the reality is that the Japanese judge sees it as her function to make the correct decision. What is correct depends very much on the circumstances at the time of decision as well as at the time of the act, social norms, and the facts of the case.

D. Post-War Movement to Broader Production Practice

The post-war circumstance of Japan was dire indeed. The war left a ravaged country with little or no economic structure. To most, the first order of the day was to rebuild the economy and, as a consequence, many other values took second place to the creation of the economic miracle. Courts were not immune to this need. It was not until the Mi...
namata disease and other major pollution cases, which marked a change in Japan’s attitude toward environmental matters, that values other than purely economic values were embraced. As a consequence, the power of major corporations to affect the Civil Procedure Code and civil procedure in general diminished, enabling others to press for changes that might help plaintiffs in litigation against corporations. Moreover, many bengoshi, freed from the supervision of the Ministry of Justice, saw it as their role to strenuously represent the interests of their clients and to perform a societal service by representing the weak against the strong. Many of these lawyers looked to the United States where the discovery rules were perceived to favor individual plaintiffs in disputes with corporations by placing corporate documents and other information in the hands of plaintiffs’ lawyers. Many Japanese judges also desired access to some internal corporate documents so that a correct decision could be rendered in the case.

While the civil law system generally does not have a vibrant discovery process, the system in Japan does recognize a need for parties to produce evidence relevant to a case. As the judge (as inquisitor) is the player who elicits the facts, the classic civil law system sees it as an abuse of the system for parties or their representatives to discuss the case with poten-

64. For a discussion of the Big Four pollution cases, see Frank K. Upham, Law and Social Policy in Post War Japan (Harvard Univ. Press 1987); Frank K. Upham, Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits, 10 Law & Soc’y Rev. 579 (1976).


66. In Japan, the judge determines what evidence is relevant and probative, while also serving as the decision maker. The judge’s function is to see that the party who should win does in fact win. See supra note 62 and citations therein. Prior to the enactment of the New Code, many Japanese judges loosely interpreted the Old Code’s document production article to permit greater production so that parties could properly form either their claim or defense. See Mochizuki, supra note 12, at 290.

tial witnesses. Witnesses are to be examined by the judge without advance preparation by the lawyer or party. The pre-war Japanese system (and this remains true in the post-war period as well) allowed lawyers to send questions to prospective witnesses through the lawyer’s Bar Association, thus avoiding the charge that the lawyer was influencing the testimony. But there was, and still is, no mechanism requiring the Bar Association to forward the questions or compelling the witness to answer them. The Americanization of Japan’s civil procedure system, which elevated the questioning of witnesses by the lawyers to a central feature, anticipated that, as in America, the lawyer in a case would interview witnesses before their testimony was given. Nonetheless, the Code of Civil Procedure retains the pre-war procedure and many Japanese lawyers still utilize the old system of forwarding questions through the Bar Associations rather than risk the appearance of influencing the witnesses’ responses. This approach, in turn, leads to ineffective direct examination and leaves lawyers to rely on the court’s questioning of witnesses, even if the Code places that responsibility on counsel.

The civil law system in Japan has produced long, drawn-out, and contested cases, some of which last for many years before a judge is pre-

68. For the lawyer to interview a witness before the judge has examined the witness would be considered an ethics breach, as the lawyer does not play a role in gathering evidence in the civil law system—this is a judicial function. See Tanabe, supra note 50, at 75. The gathering of evidence is a “sovereign” function performed by the state’s representative, the judge. See Hazard, supra note 16, at 1019–20.

69. See Tanabe, supra note 50, at 96 (“Under the prewar Japanese system . . . pretrial interview of witnesses was forbidden . . . .”).

70. See Bengoshi hō [Lawyers Law of Japan], Law No. 205 of 1949, art. 23, para. 3, translated in EHS LAW BULL. SER. no. 2040 (2001). Questions sent through the Bar Association may be sent prior to the filing of the Complaint. There is no requirement to reply to questions sent through the Bar Association.

71. See Tanabe, supra note 50, at 81–83.


73. See Itoh, supra note 52, at 68. See generally Tanabe, supra note 50.

74. See Minsohō, art. 202; MINJI SOSO-O KISOHU [Japanese Rules of Civil Procedure], art. 113, para. 1–2, art. 114, translated in TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN (Taniguchi-Reich-Miyake ed., Juris Publishing 2007) [hereinafter MINJI SOSO-O KISOHU]. Some critique the American approach of placing responsibility for questioning in the hands of the lawyers, and argue that the process was bound to fail because of the lack of discovery in Japan. See, e.g., Kojima, supra note 12, at 706–07 (“Witnesses are to be examined reciprocally, that is by both parties. . . . Partly because there was no discovery, reciprocal examination did not work effectively.”).
pared to render a decision. Of course, such long procedures make litigation an ineffective method of resolving disputes, yielding the varied conciliation and mediation methods of dispute resolution that are ubiquitous in Japan. But a technologically industrialized Japan is bound to have some litigation, and political pressures to conclude cases more quickly have emerged. Responding to that pressure, the 1996 Code provided a statutory base for a new “Preparation for Oral Argument” phase of a case, wherein the formalities of a public trial could be avoided, enabling a relatively quick settlement.

The 1996 Code also looked to the American discovery model for tools to accelerate the plenary proceeding phase of a litigated case. The American interrogatory was seen as a vehicle to accomplish this goal while also aiding both the court and the parties. As a consequence, a pre-filing inquiry was adopted, under which a potential plaintiff could send questions to his target defendant in an effort to cabin the issues for the potential litigation. Once litigation was initiated, the same process could be used post-filing to gather evidence. However, unlike American interrogatories, there is no compulsion on the part of the receiving party to respond to inquiries, whether pre- or post-filing. Because the process can be elected post-filing, most Japanese parties find it more convenient and consistent with past practices to utilize the inquiry process, if at all, after the case has been filed. Then, if a party refuses to respond, the judge, who has power to compel a party to be forthcoming, may be prevailed upon to request the same information. The result has been that pre-filing inquiry is of virtually no use and post-filing inquiry...
has not advanced the process much beyond the pre-1996 Code situation.82

E. Production of Documents—Changes with the New Code

Civil law judges have the ability to require a party to produce documents and other evidence that is essential to reach a fair decision.83 The Old Code gave this authority to Japanese judges—but limited its use in several important respects. It is in this area that the 1996 Code made several changes. This section reviews the limitations on this authority in the Old Code and as a counterpoint, discusses the changes wrought in the 1996 Code.

First, the procedure contemplated in the Old Code was not (and still is not) discovery. Unlike the American system where parties ask questions of each other in order to discover the existence of relevant documents or demand documents to ascertain relevance, the Old Code required that a party know of the existence of a document before asking a judge to have a party produce it.84 Thus, a party requesting a document through a judge had to provide specific information concerning the document, including a justification for production that meant, or at least implied, that the requesting party must know what the document said before asking for it.85 These procedural requirements of the Old Code inhibited production.

The 1996 Code retained the specificity requirements for document requests,86 but added provisions making it easier for a requesting party to

82 Bengoshi also use the Japanese procedure for preservation of evidence in their attempt to discover documents. See MINSÓHÔ, art. 234–42. If a court is convinced that evidence must be preserved, it may order the evidence produced for preservation purposes. The preservation motion can be made before a suit is filed, so the mechanism may operate like discovery. However, it is not designed for discovery purposes and the requesting party must make a compelling case for preservation—something that can be achieved if a witness is likely to die soon or leave the country, or evidence is likely to be destroyed in the immediate future unless preserved. In these cases, preservation has been used (although rarely) to actually discover what a witness has to say or to otherwise disclose facts. Nonetheless, the process is discretionary with the court and the burden on the party seeking preservation is high, even in the few situations where preservation may be required. It has limited value as a discovery device. See GOODMAN, JUSTICE, supra note 19, at 258–61 (discussing preservation of evidence under the 1996 Code).

83 See MINSÓHÔ, art. 219–23. See also Hazard, supra note 16, at 1028 (“The letter of procedural law in the civil law regimes is that the judiciary is responsible for obtaining evidence, a responsibility that could not be delegated. It is a responsibility that certainly could not be delegated to partisan advocates for litigation parties.”).

84 See KYÔ-MINSÓHÔ, art. 313.

85 See id. art. 313, paras. 1–5.

86 See MINSÓHÔ, art. 221; MINJI SÔSH-O KİSHÔ, art. 140 (regarding motions for production orders).
identify the desired documents when specifying the content of the document was not possible. As the theoretical basis for the requirement was to make it possible for the producing party to know what document was being sought, the 1996 Code merely required that the requestor furnish sufficient information to allow the holder to identify the desired document.87 Then, the holder of the document would provide the necessary specification.88

Second, under the Old Code, the obligation to produce a document was coextensive with a witness’s requirement to testify; consequently, if a document was privileged, it was not subject to production.89 The 1996 Code modified this requirement by allowing the judge to review privileged documents in camera and to order production of the requested materials in redacted form.90

Third, production was limited to narrow circumstances in the Old Code. Thus, the Old Code allowed a judge to order production in only three situations:

(i) where the party possessing the document was relying on the document in the case, but had not yet produced the document;91

(ii) where the requesting party had a right to the document under some substantive law;92 or

(iii) where the document had been created as a consequence of a relationship between the parties (a “relationship document”) or was created for the benefit of the requesting party (a “benefit document”).93

Some Japanese judges, urged on by plaintiffs’ lawyers, broadly interpreted the third requirement to avoid the restricted nature of these categories. Thus, what was considered a relationship document or a benefit

87. See MINSOHÔ, art. 222, para. 1.
88. See id. art. 222, para. 2.
89. See Kyû-MINSOHÔ, arts. 280–81; Mochizuki, supra note 12, at 294 (explaining coextensive witness testimony and document production obligations under the Old Code).
90. See MINSOHÔ, art. 223, para. 1, 223, para. 3; MINJI SOSH-O KISOHU, art. 141. Where the holder of the document is a non-party, the court may question the holder before ordering production and/or redaction. See MINSOHÔ, art. 223, para. 2.
91. See Kyû-MINSOHÔ, art. 312, para. 1.
92. See id. art. 312, para. 2.
93. See id. art. 312, para. 3.
document was given a broad interpretation by some lower court judges. Other judges saw this expansive reading of the Old Code as inconsistent with the real meaning of the limitations. To cabin the expansive reading of the Old Code, these judges adopted a rule under which a document prepared solely for the use of the possessor of the document (i.e., a self-use document) could not also be considered a relationship document or a benefit document.94

Fourth, there was no provision in the Old Code allowing the judge to order the government to produce documents. Thus, documents in the possession of a government agency were unavailable in private litigation. Reformers of the Old Code could not avoid dealing with these four limitations. On one hand, plaintiffs’ lawyers wanted a major rewriting of the production rules to allow for production beyond that allowed by the Old Code.95 On the other hand, lawyers who represented corporate interests (typical defendants) were quite happy with the status quo.96 The government, for its part, was hesitant about having to produce documents, especially when it thought the national interest (or at least the government’s interest) could be harmed by production. The 1996 Code sought a compromise. This compromise took final form in article 220.97

The 1996 amendments resolved the government’s complaint by postponing to a later date the terms under which the government could be ordered to produce documents. To satisfy those demanding a provision requiring that the government could be compelled to produce, the 1996 Code made clear that an amendment to that end would be forthcoming (a two-year period was provided).98 In due course, an amendment was en-

94. For a discussion of lower courts’ efforts to expand production and the corresponding effort of other courts to limit it through the judicial creation of the self-use exception, see Mochizuki, supra note 12, at 290–93; Taniguchi, supra note 12, at 776–78; Harada, supra note 67, at 43–48; Kojima, supra note 12, at 702–03. See also Kuo-Chang Huang, Introducing Discovery into Civil Law 176–89 (2003).

95. See Mochizuki, supra note 12, at 296 (explaining that the Old Code’s document production provisions gave insufficient access to individual plaintiffs bringing suits against corporations and the government).

96. See id. at 299 (explaining that corporations favored a plan narrower than the New Code); Taniguchi, supra note 12, at 776–78.

97. See Minsōhō, art. 220.

98. As adopted, the 1996 Code provided that an investigation would be undertaken and an amendment to deal with the issue of documents in the government’s possession would be submitted within approximately two years of June 26, 1996, the date on which the 1996 Code was promulgated.

[A] compromise was worked out between the Government and the Diet, in which the bill was amended as follows: (4)(b) was dropped (Art.220(4)) and a provision was added to the chapter of transitory provisions to the effect that the
acted that authorized a court to direct the government to produce documents, except where it would hinder performance of the public duty, harm the public interest, or disclose a government secret.99 In addition, production should be denied if it would be likely to harm national security, damage the relationship between Japan and a foreign country or international organization, or prejudice the government in negotiations with a foreign power or international organization.100 Once a party makes a motion to have the government produce a document, the court, unless it finds the reasons for production given by the requestor clearly unreasonable, must confer with the appropriate government official concerning the request.101 The government is then given an opportunity to present its opinions as to why production is exempted under the law.102

Article 220 took account of the arguments made by defendants’ lawyers by retaining the three limited categories pursuant to which documents could be produced.103 In this sense, it left the Old Code unchanged. But to account for the desires of plaintiffs’ lawyers, the 1996 Code contained a catch-all provision allowing production of virtually any document.104 To contain this open-ended production category, the 1996 Code limited the production of any other document by providing that certain categories of such documents not be produced.105 Among these categories was the self-use document106 (i.e., a document prepared solely for the use of the party in possession of the document), thereby meeting Government must further consider the matter to come up with an appropriate conclusion within two years in keeping consistency with the system of the public access to the government documents currently in deliberation.

Taniguchi, supra note 12, at 777.
99. See Minsonō, art. 220, para. 4(b).
100. See id. art. 223, para. 4(1).
101. See id. art. 223.
102. See id. art. 220, para. 4(b), art. 223.
103. See Minsonō, art. 220, paras. 1–3.
104. See id. art. 220, para. 4.
105. See id. art. 220, paras. 4(a)–4(c). Professor Mochizuki describes the compromise as follows:

Article 220[] begins with a restatement into modern written Japanese of the three clauses of Article 312 of the Old Code. Clause 4, however, states that people must also produce documents that are not covered by the first three clauses, so long as one of four exceptions does not apply.

See Mochizuki, supra note 12, at 299.
106. See Minsonō, art. 220, para. 4(c).
the desire of defendants’ counsel that the self-use exception be made a part of the 1996 Code.\textsuperscript{107}

Scholarly opinion as to the effect of these code changes varied, although there was general consensus that the changes would lead to a shift in judicial approach as to the presumption of production, and consequently, a narrowing of the scope of the judicially created self-use doctrine. Nonetheless, the Justice Ministry handbook on the 1996 amendments took a position that is similar to the test for self-use documents under the Old Code:

\begin{quote}[W]hether a document is a Clause 4 self-use document will turn on whether it “was created solely for internal use and is not expected to be shown to unrelated outsiders, considering the totality of circumstances such as the content of the document, and the process by and reason for which the document was created and is now possessed by its current possessor.”\textsuperscript{108}
\end{quote}

An intriguing question was the effect the structure of the 1996 Code production provision would have on the meaning of a benefit document or a relationship document. From a purely grammatical point of view, the categories that had given rise to the self-use exception were not included in the language limiting production on the basis of self-use status. Yet it could be argued that the language of the 1996 Code was meant to place relationship and benefit documents back into the narrow category they had occupied before some courts broadly interpreted them as producible.\textsuperscript{109} Such broad—some would say strained—interpretation was no longer necessary, as any document could be ordered for production.\textsuperscript{110}

\begin{footnotes}
\item[107] See Mochizuki, supra note 12, at 302 (“[O]pponents of generalizing the duty to produce wanted documents covered by the old self-use exception to be similarly protected under the new law . . . .”).
\item[109] See supra note 105 and accompanying text.
\item[110] See Mochizuki, supra note 12, at 299–301 (“Uncertainty about the breadth of the self use exceptions raises questions about the New Code’s commitment to greater access to information.”). In addition to the exceptions to production mentioned above, the Code also applies the various privileges that apply to oral testimony to documents. See MINSOH, art. 220, para. 4(b). Privileges in Japan are somewhat broader than the privileges in the United States, and include privileges for pharmacists, midwives, and foreign lawyers licensed to give foreign legal advice in Japan, as well as a privilege for trade and professional secrets. See MINSOH, art. 197. In addition, although not designated a “privilege,” a witness may not be asked questions that embarrass the witness. MINJI SOSHO-KISOHU, art. 115. How broadly a judge will interpret embarrassment remains to be seen.
\end{footnotes}
In sum, by attempting to meet the objections and requirements of all parties, the language of article 220 of the 1996 Code set the stage for judicial interpretation of the meaning of the document production requirement, especially the statutory self-use exception.

II. THE EVOLUTION OF THE JAPANESE SUPREME COURT’S JURISPRUDENCE ON THE PRODUCTION OF DOCUMENTS

A. The First Judicial Interpretation of Self-Use: Fuji Bank v. Maeda

Litigation concerning the meaning of the document production provisions followed on the heels of the 1996 Code, which took effect in 1998. The Supreme Court rendered its first decision dealing with the meaning of the 1996 Code’s document production provisions in November 1999 with Fuji Bank.111 The plaintiff was the family of a debtor who had killed himself when he was unable to repay loans he spent speculating in the stock market.112 The defendant was the banking institution that had lent him the money.113 The document sought was an internal bank document prepared because the loan amount exceeded the branch bank’s lending authority.114

The debtor’s family argued that the lending bank owed a duty to the borrower when the bank was aware or should have been aware that the borrower had no assets to repay the loan and thus, the bank should have refused to extend the loan.115 The family sought damages for breach of this duty, arguing that it was the proximate cause of the suicide.116 To establish its case, the family asked the court to order the bank to produce the internal bank documents used to determine whether a loan should be granted.117 Such internal documents were required by the bank’s home office because the size of the loan exceeded the local branch manager’s lending authority.118 The plaintiff argued that the documents would dis-
close that bank officials were aware of the decedent’s precarious financial position and that some of them had urged that they reject the application because the decedent would be unable to repay, which would establish that the bank was aware of the risks to the decedent and accordingly owed a duty to the decedent not to extend credit.

The document was the bank’s internal document containing the advice and opinions of bank executives that was relevant to the case. The issue before the court was whether the document was a self-use document exempt from production under the 1996 Code. The Tokyo High Court held that the document was not a self-use document and ordered its production. On interlocutory appeal, the Supreme Court reversed and held that the document was exempt from production.

The Supreme Court reasoned that: (i) the document was prepared for the internal use; (ii) the bank did not intend to allow others outside the company to ever view the document; and (iii) the bank would suffer harm if the document was produced because in future situations persons within the company would be afraid to present their views in an open and forthright matter out of concern that their opinions would later be subjected to public scrutiny. What appears to have been of greatest concern to the Court was that production might inhibit the free flow of information and views within the company, causing damage to the decision-making process. Accordingly, the Court held that the document was a self-use document, and in the absence of some special circumstance, was not subject to production. Since no special circumstance was shown, the High Court’s production order was reversed.

Several things about the decision are of importance. First, although there are some differences regarding the proper translation of the self-use exception in the 1996 Code, the translations make it clear that to be a self-use document, the document must have been intended only for the
use of the holder of the document (and it seems reasonably clear that such a holder would have been the preparer of the document—thus it was prepared solely for the use of the preparer-holder). The statutory language contains no other requirements for a document to be an excluded self-use document. Yet the Supreme Court in *Fuji Bank* makes it clear that a self-use document is not shielded from production merely because it was prepared for the exclusive use of the preparer-holder of the document. In addition to meeting the statutory definition of a self-use document, the document will only be exempted from disclosure if disclosure “is likely to cause disadvantage” to the preparer-holder.

Second, the Supreme Court’s opinion takes the position that even if a document is a self-use document whose production will cause disadvantage to the holder, the Court may nonetheless order its production if there are “special circumstances.” The 1996 Code does not reference or define “special circumstances,” and the Court in *Fuji Bank* likewise failed to define “special circumstances,” even when it introduced the concept.

Having decided that the document fell within the self-use exception, the Supreme Court also noted that it was clear that the document was not producible under the provision of the 1996 Code governing relationship documents, article 220, paragraph 3. The Court did not explain why a self-use document could not also be a relationship document, although the opinion implied that a self-use document, by definition, could not be

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128. See MINSOH, art. 220, para. 4.


130. *Id.*

131. *Id.*

132. However, on the facts in *Fuji Bank*, the Court found that special circumstances did not exist and thus refused to order production. *Id.*

133. *Id.*
a relationship document. As the grammatical structure of article 220 appears to limit the self-use exception to the catch-all category of documents, this implication may be important. It would appear that the self-use exception would, in fact, also apply to relationship documents through an indirect mechanism; that is, by limiting the definition of relationship documents so that a document must fail the self-use exception as a necessary condition for relationship status.

B. The Aftermath of Fuji Bank

Four months after the *Fuji Bank* decision was issued, the Court had another opportunity to discuss document production. The plaintiff in this case was a purchaser of telephone communications equipment who sought damages after the equipment failed to operate properly, making communication through use of the equipment impossible. To establish its case that the equipment was defective, the plaintiff sought production of schematic drawings of the equipment, relying on the catch-all provision of article 220. The defendant objected to production on two grounds. First, article 220, paragraph 4(b), by incorporating the testimonial privilege applicable to trade and professional secrets, exempts from the catch-all category documents that record professional or technical secrets. Second, the defendant claimed that the schematic was created solely for the internal use of the company, i.e., it was a self-use document. The Osaka High Court refused to order production.

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134. *Id.*
135. *See Minshū,* art. 220, para. 4.
136. *See Case No. 20 of 1999, 54 Minshū 1073 (Sup. Ct., Mar. 10, 2000), translation available at [http://www.courts.go.jp/english/judgments/text/2000.3.10-1999.-Kyo-.No. 20.html](http://www.courts.go.jp/english/judgments/text/2000.3.10-1999.-Kyo-.No. 20.html). Japanese cases are not cited by the names of the parties, but are referred to by case number and date. This practice preserves the privacy of the litigants. However, it is possible to determine the names of parties in some cases, and for convenience these cases (e.g., *Fuji Bank*) may be referred to as such. Additionally, since Japanese High Court cases are not binding, the court’s opinions may not be published and are not cited by the Supreme Court. The Supreme Court fully explains the High Court holding and reasoning in many cases, so citations in this Article to the High Court reasoning refer to the Supreme Court opinion.
137. *Id.*
138. *Id.*
140. *Id.*
141. *Id.*
premum Court reversed and remanded for further proceedings to determine whether the documents were exempt from production. 142

As an initial matter, the Court found that merely because the document related to a product that defendant manufactured and contained information concerning the product, it was not ipso facto a trade secret document. 143 To make a document a trade or professional secret document, the possessor needs to establish that production of the document would disadvantage her in some fashion. 144 The risk that competitors might see the document does not itself amount to disadvantage. 145 In short, to be a professional or trade secret document, disclosure must somehow disadvantage the profession or otherwise adversely affect the party trying to keep the document secret. 146 The matter was remanded for the High Court to consider whether the document in fact contained secrets within the Fuji Bank definition. 147

In dealing with the defendant’s second claim, the Court reaffirmed its statement in Fuji Bank that to be a self-use document, the possessor must show that: (i) the document had been prepared solely for the use of the possessor; (ii) the document was never intended for disclosure to others; and (iii) production would cause disadvantage to the possessor. 148 In Fuji Bank, the defendant bank was able to show that it would be injured by production. 149 However, in the instant case, no such showing had been made. 150 The High Court was satisfied that it was a self-use document.

142. Id.
143. Id.
145. Id.
146. Id.
147. Id. The Supreme Court observed that:

[A]lthough the Documents may contain technical information which the manufacturer of the equipment has, the opposite party has not presented the nature of the information or the specific content of the disadvantage which may result from the disclosure, and the decision of the original instance court has not specified this.

Id. 148. Id. (citing and using the same language that it had used in Fuji Bank).
simply because the document was made for the sole use of the company. The High Court failed to consider whether any disadvantage would result to the holder of the document if the document was produced. Without a finding of such injury, the document could not automatically be considered outside the catch-all category on the ground that it was a self-use document. The matter was remanded for further proceedings.

In December 2000, the Court had another chance to refine its Fuji Bank holding. In this case, the Supreme Court reversed a ruling by the High Court of Tokyo that ordered a defendant credit union to produce a document regarding a loan in a stockholder’s derivative suit. The stockholder argued that the directors had made certain loans with inadequate security, and hence, had breached their duty to the corporation. The stockholder requested internal documents of the credit union relating to the making of the loans, claiming that the documents would disclose the alleged breach of fiduciary duty. The credit union opposed production, arguing that the documents had been prepared solely for the use of the credit union, and thus were self-use documents not subject to production.

The Tokyo High Court reasoned that although the documents may not have been created with an intent to distribute them outside the credit union, since the documents contained information concerning loans and the actions of the directors thereto, the company should have known that, in the event of a derivative lawsuit, the document could be produced as evidence. The High Court seemed particularly concerned with the availability of company documents to shareholders in a derivative suit—after all, the shareholders own the company and a derivative action is brought

151. Id.
152. Id.
153. Id.
154. Id.
156. Id.
157. Id.
158. Id.
159. Id.
against directors for the benefit of the corporation, which is the holder of the document.\textsuperscript{161}

Upon review of the Tokyo High Court’s ruling, the Supreme Court majority held that “special circumstances” justifying production were not met merely because the documents were sought in a derivative suit.\textsuperscript{162} To qualify as a “special circumstance” within the meaning of Fuji Bank, the requestor of the credit union documents would have to show that it was “in a position identifiable with that of a credit association or the holder of the document.”\textsuperscript{163} Although stockholders may have a right to inspect certain documents pursuant to substantive law that gives them access to such documents (e.g., articles of incorporation, minutes of directors’ meetings, certain financial statements, etc.), the substantive law also limits the documents a stockholder is entitled to obtain.\textsuperscript{164} In addition, while stockholders bringing a derivative suit may be in a position identifiable with that of the credit union by virtue of the fact that any recovery flows to the credit union, because the statutes limit the documents available to stockholders (and there is no statutory exception for stockholder-plaintiffs in a derivative case), stockholders are not in a position identifiable with that of the credit union itself.\textsuperscript{165} Hence, no “special circumstance” existed.\textsuperscript{166} A stockholder who brings a derivative suit is no more entitled to internal decision-making documents (that are not made available by substantive law) than is any other litigant.\textsuperscript{167} While the action was instituted on behalf of the corporation, a derivative plaintiff is not

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\textsuperscript{163} Id.


\textsuperscript{166} Id.

\textsuperscript{167} Id.
the corporation and is not entitled to documents created solely for the

benefit of the corporation. As an aside, the Court again noted that the
self-use document cannot be considered a relationship document.

Justice Machida Akira (who became Chief Justice in 2002) dis-
sented. In his view, while the documents sought were self-use docu-
ments, the fact that they were sought in a derivative suit and contained
relevant information regarding whether there had been a breach of trust,
created the special circumstances required to override the self-use excep-
tion. The documents' role in assuring consensus decision-making
within the company gave them a fundamental role in assuring that the
decision-making process complied with the duty of trust the directors
owed to the corporation. Accordingly, he believed the documents
should be produced in a derivative suit.

In another derivative suit decided on the same day, the Court based its
decision on a matter of standing, not on the merits of the case. The
Court upheld a decision of the Tokyo High Court, which had ordered a
credit union to produce documents in a derivative suit against direc-
tors. The directors appealed the production order, but the credit union
did not. The Supreme Court held that only the possessor of docu-

168. Id.

169. The decision may reflect a judicial bias against derivative lawsuits. Such suits
were generally disfavored, and until recently, few derivative suits were brought because
the plaintiff received little, if any, financial gain, so that the filing fee alone made the
lawsuit cost prohibitive. Lower court decisions and pressure from the United States
caused the cost to be decreased to 8,200 yen, lowering the bar to derivative suits. See
Mark D. West, The Pricing of Shareholder Derivative Actions in Japan and the United
States, 88 NW. U. L. REV. 1436, 1463–65 (1994). The lower filing fee opened the door to
more derivative litigation but also raised concerns that such suits would be utilized by
Sokaiya Racketeers to extort money from corporations. See Mark D. West, Why Share-
holders Sue: The Evidence From Japan, 30 J. LEGAL STUD. 351, 374–75 (2001).

170. See Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000) (Akira, J.,


172. Id.

173. Id.


175. Id.

176. Id. The corporation on whose behalf a derivative suit is brought may intervene to
support its directors. See Case No. 17 of 2000, 55 MINSHŪ 30 (Sup. Ct., Jan. 30, 2001)
translation available at http://www.courts.go.jp/english/judgments/text/2001.01.30-
ments—here, the credit union—had standing to appeal an order requiring production, and only a party seeking production could appeal an order refusing production. As the directors did not fit either category, they lacked standing to appeal the order to produce.

A year later, in December 2001, the Supreme Court again contemplated whether a credit union’s internal document was subject to production. In this litigation, the debtor-plaintiff claimed that the credit union was at fault in its dealings with him, and as a consequence, there should be no liability under the debt. What distinguishes this decision from the previous cases was that the original creator of the document was neither possessor of the document nor a party in the case. Rather, the credit union had failed and all of its assets had been sold to a company that had the job of liquidating assets of failed credit unions for the benefit of the Japanese Government’s equivalent of the United States Federal Deposit Insurance Corporation.

This successor corporation filed suit to recover on the debt, and the debtors set up a defense of unlawful conduct by the original lender. To prove their contention, the debtors asked for documents that they claimed would show improper conduct in connection with the loan by the original lender. The successor corporation, which was in possession of the documents, argued that the documents were similar to the documents in the Fuji Bank case because they contained the opinions of firm employees and had been prepared solely for use inside the firm. Thus, they

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2000.-Kyo.-No.17.html. Why the credit union did not object and file an appeal is not stated in the Supreme Court opinion.


178. See 54 MINSHÛ 2743 (Sup. Ct., Dec. 14, 2000) (“[B]ecause the kokoku appellant is not the holder ordered to produce the document but merely a party concerned in a case as to the merits, not having the standing to lodge complaint against the original decision, this kokoku appeal should inevitably be dismissed as unlawful.”).


180. Id.

181. Id.

182. Id.

183. Id.

were self-use documents not subject to production. The Osaka High Court, however, ordered the defendant to produce the documents.

The Supreme Court upheld the High Court’s production order and dismissed the appeal. The Court reasoned that the original lender, which had created the documents sought in the action, was no longer in the lending business and was in the process of liquidation. Accordingly, it was no longer going to make any loans. Further, the possessor of the documents, the successor company, might make loans in the future, but its opinions and the opinions of its employees would not be adversely affected by the production of documents created by the original lender. Unlike Fuji Bank, production would not inhibit communication and decision making inside the possessor company. Accordingly, the Court found that special circumstances existed that warranted the production of these documents. The Court made no reference to the question of employee privacy.

In a similar case, when an insurance company failed and the responsible government authority directed the administrators to appoint a special independent committee to report on the role of former directors in the company’s failure, the resulting report was not considered a self-use document. In the main suit, which was between insurance companies, the defendant, a failed company, was charged with obtaining funds from the plaintiff based on fraudulent financial statements. To establish its case, the plaintiff sought production of a copy of the investigative committee’s report. The report concluded that there was reason to believe that there had been wrongdoing on the part of past management and recommended suit against former directors. The company administrator possessing the report objected to production, claiming that the report was

185. Id.
186. Id.
187. Id.
188. Id.
190. Id.
191. Id.
192. Id. See infra Part III for a discussion of the privacy issue.
194. Id.
195. Id.
196. Id.
a self-use document.197 The company administrator also argued that because opinions of lawyers on the committee were set out in the report, it was exempt from production because of attorney-client privilege.198 Both the Tokyo High Court and the Supreme Court rejected these arguments and ordered production.199

It was the view of the Court that the report, prepared for the failed company’s administrators at the demand of the government agency supervising insurance companies, was not in the nature of a company-prepared document.200 Moreover, the administrators had been appointed by the same governmental body in order to protect policy holders.201 The report was prepared for the same public interest purpose, and thus was not prepared solely for the benefit of the failed company or its administrators.202 The Court also concluded that although lawyers were members of the committee, they had not been engaged to provide legal advice or services, so no attorney-client privilege was involved.203

Up through 2004, although the Supreme Court did not define “special and unusual circumstances,” it found them to exist where there was a lack of standing to complain about production, where the creator of the document was no longer in business, and where the document was created for a public interest purpose. Still, the thrust of the Fuji Bank case, as reaffirmed by the Court’s refusal to order production in a derivative suit, led the Japanese bar and lower court judges to conclude that little had changed as a consequence of the 1996 amendment.204

C. Movement Away from the Strict Application of the Fuji Bank Holding

The prospect of change emerged in 2005. In a series of cases, the Supreme Court has clarified the requirements of the self-use exception to production and has more clearly defined when special circumstances exist that require document production. Although the most recent cases have relaxed the production rules, the basic reasoning of Fuji Bank ap-

197. Id.
199. Id.
200. Id.
201. Id.
202. Id.
204. See Goodman, Japan, supra note 9, at 581, 584 n.282; Haley, Heisei Renewal, supra note 8, at 7.
pears to remain intact: documents of an ongoing business entity will be considered self-use documents exempt from production if the documents are prepared for decision-making purposes solely for examination within the entity, and production might interfere with the free flow of information. That said, while the party seeking the exception bears the burden of showing that production will cause injury, the party requesting production still faces a difficult task when seeking what American lawyers would call a smoking-gun document—a document disclosing wrongdoing on the part of the possessor entity.

In July 2005, the Supreme Court upheld a debtor’s claim for money damages based on an emotional injury suffered when a lender refused to make available financial records concerning the loans between them. The debtor needed the records to work out an arrangement with his creditors. In this case, the possessor of the document was a lender licensed to do business under the Money Lending Business Law (“MLBL”). The borrower had engaged in a series of transactions with the lender over a period of time and had made numerous payments in connection with the loans. Under the substantive law, the maximum rate of interest payable on the loans was fixed. The debtor was unable to continue payments on the loans and engaged counsel to consolidate and make an arrangement for the payment of his debts. Counsel, in turn, asked the lender to produce the records of the various loans and payments made in connection therewith, in an attempt to show that the rate of interest charged to the debtor exceeded the maximum rate allowed by the law. The lender, while willing to discuss an arrangement for future repayment, was unwilling to produce the books. The debtor’s representatives were unwilling to discuss an arrangement until the records of prior transactions had been produced. The debtor filed suit alleging that the

206. Id.
207. Id.
208. See id.
209. Id. See also Risoku seigen hô [Interest Rate Restriction Law], Law No.100 of 1954, art. 1, translated in EHS LAW BULL. SER. no. 2121 (1999) (providing for maximum interest rates).
211. Id.
212. Id.
213. Id.
interest rate charged exceeded the rate permitted by law, and that the lender’s refusal to produce the records prior to the suit had caused the debtor injury by impeding him from arranging for the payment of his debts.\textsuperscript{214} Damages were sought for the emotional harm this allegedly caused the debtor. In the litigation, the lender produced the records.\textsuperscript{215}

With respect to the plaintiff’s first claim, the High Court found that there had been overpayments and ordered the lender to make restitution for overpayment of interest.\textsuperscript{216} With respect to plaintiff’s second claim, alleging emotional injury, the High Court found that such relief was only available if it could be said that there had been a breach of good faith by the lender that had caused the non-pecuniary injury to the debtor.\textsuperscript{217} The High Court found that there was no obligation for the lender to produce the records.\textsuperscript{218} As the debtor and his representatives had not disclosed that failure to make production was delaying the arrangement for payment of creditors and was having an adverse emotional effect, there was no basis for the debtor’s claim that the lender’s conduct was such a gross violation of the duty of good faith.\textsuperscript{219} Critical to the High Court’s reasoning was that there was no statutory duty on the part of the lender to produce the record of prior transactions.\textsuperscript{220}

The plaintiff appealed this finding as to the second claim, and the Supreme Court rejected the lower court’s reasoning.\textsuperscript{221} The Supreme Court found that, under the MLBL, the lender was required to keep records of loans, repayments, and interest paid, and to provide copies to the debtor when payments were made.\textsuperscript{222} The Court found that it was unreasonable to believe that even sophisticated debtors would not at some point lose or otherwise not have copies of some of these records.\textsuperscript{223} The Court also concluded that the purpose of requiring the lender to keep records was, at least in part, to have records available to resolve disputes that might arise

\textsuperscript{214} Id.  
\textsuperscript{216} Id.  
\textsuperscript{217} Id.  
\textsuperscript{218} Id.  
\textsuperscript{219} Id.  
\textsuperscript{221} Id.  
\textsuperscript{222} Id.  
\textsuperscript{223} Id.
between the lender and debtor. The Court noted that this conclusion was supported by the Financial Services Agency guidelines, which require lenders make details of debt available to debtors.

Thus, the Court concluded that the lender was required to produce records requested by a debtor attempting to work out an arrangement with creditors. Moreover, the Court reasoned that no great burden would be placed on the lender if it were required to produce the records from its books, whereas great disadvantage would result to the borrower if denied access to such records. The Court viewed this obligation as part of the lender’s duty of good faith under the loan agreement, and unless there was an abuse of right by the debtor, production was required. Since the lender had unlawfully refused the debtor’s request over a period of six months, the debtor had a right to recover non-pecuniary relief. The case was remanded to the Osaka High Court for a determination of the damages to be awarded.

Although the above case did not directly involve an issue under article 220 of the 1996 Code, its holding is nonetheless relevant. The 1996 Code requires, as did its predecessor, that a party to litigation produce any document to which the requesting party has a right under substantive law. In determining that a debtor could base a claim for non-pecuniary relief on the failure of a lender doing business under the MLBL to make available copies of records to a debtor, the Court also established a debtor’s right in similar litigation to request production of the records under the 1996 Code. As the MLBL did not specifically state that such records were to be made available to debtors—the Court reached this conclusion based on agency guidelines, the purpose of the law, and the relative harms caused by production and non-production—this case may be viewed as broadening the scope of production under the 1996 Code.

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224. Id.
226. Id.
227. Id.
228. Id.
229. Id.
231. See MINSHŌ, art. 220, para. 2.
232. It may be that this case is limited to its facts. Many lenders’ practices are under scrutiny in Japan, and the Court may have been reacting to a general feeling that there is something very wrong in some segments of the lending community. Guidance by a gov-
Three days after the Third Petty Bench of the Supreme Court decided the above case and held that borrowers were entitled to production of the records of their loan from a licensed lender, the Second Petty Bench decided a case which dealt with documents from a police investigation. Here, the Tokyo High Court held that the documents that formed the basis for a search warrant constituted documents regarding the legal relationship between the subject of the warrant and the police, and hence were documents that could be ordered produced by the police under the document production section of the 1996 Code, absent other legal provisions limiting production. Although the Supreme Court found that provisions of the Code of Criminal Procedure inhibited production, and thus refused to order production of most of the materials sought, in an expansive reading of the 1996 Code, the Court reasoned that the underlying documents upon which the search was authorized were relationship documents.

The production issue in this case arose in a lawsuit brought by the subjects of a series of searches made in connection with an arson attack on the home of a Prefectural Assembly Member. The plaintiffs sought production of the warrant allowing the search, as well as numerous underlying documents. The subjects of the search were not arrested for the crime—indeed, no arrests had been made—and argued that the government was responsible for damages in connection with the search and seizure.


234. Id.

235. The warrants for conducting the search were subject to production, but under article 110 of the Code of Criminal Procedure these documents must be shown to the subject of the search and contained none of the information that was critical to plaintiff’s case against the police. See KEISOH [Code of Criminal Procedure], Law No. 131 of 1948, art.110, translated in EHS LAW BULL. SER. no. 2600 (2005).


237. Id.
zsure under the provisions of Japan’s Constitution that render the state responsible for unlawful acts of its agents.\textsuperscript{238}

The criminal investigation into the arson was ongoing at the time of the Supreme Court’s decision. The Tokyo High Court ordered all of the requested documents be produced. Although the Supreme Court concurred that the materials involved were relationship documents, it refused to order production of most materials because of the ongoing investigation.\textsuperscript{239}

The Supreme Court found that the search and seizure constituted a legal relationship between the police and the subject of the search.\textsuperscript{240} This followed from the constitutional provisions requiring a warrant for a search and making citizens and their effects secure in their homes.\textsuperscript{241} This constitutionally protected security could only be breached pursuant to a warrant.\textsuperscript{242} Thus, the warrant and its execution created a legal relationship between the police and the subject of the search.\textsuperscript{243} The papers allowing this legal relationship to be created, i.e., the warrant and the underlying documents on which the issuance of the warrant were based, were documents concerning the legal relations between the holder of the document (the police or prosecutor) and the requesting party (the subject of the search).\textsuperscript{244}

\begin{footnotesize}
\begin{enumerate}
\item See KENPÔ, art. 17 (“Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official.”). The Law Concerning State Liability for Compensation carries out this constitutional provision and provides a cause of action to those injured by illegal acts of the government or its agents. Kokka baishô hō [Law Concerning State Liability for Compensation], Law No. 125 of 1947, art. 1, \textit{translated in EHS LAW BULL. SER. no. 1015} (1993).
\item See Case No. 4 (Kyo) of 2005, 59 MINSHû No. 6 (Sup. Ct., July 22, 2005), \textit{translation available at} \url{http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Kyo-.No..4.html}.
\item See KENPÔ, art. 35 (“The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause. . . .”).
\item See Case No. 4 (Kyo) of 2005, 59 MINSHû No. 6 (Sup. Ct., July 22, 2005), \textit{translation available at} \url{http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Kyo-.No..4.html}.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
Since the documents in their entirety were subject to production under the 1996 Code, the Court next examined whether there were any other legal provisions that exempted the materials from production.\footnote{Id.} As to the warrants, it found none.\footnote{Id.} As a matter of law, the warrants must be shown to the subject of the search at the time of the search, and therefore it was an abuse of discretion for the police and prosecutor to claim that the material contained in the warrant was confidential.\footnote{Id.} A further ground for rejecting the State’s argument was that the warrant contained information already known to the subject of the search, i.e., the name of the search subject and the address of the residence.\footnote{Id.} As to the documents underlying the warrants, the Court found that the provisions of the Criminal Procedure Code that protected information concerning an ongoing investigation from disclosure formed a basis for refusing production.\footnote{Id.} It was not outside the realm of police discretion to claim that confidentiality was required, so the materials were exempted from production.\footnote{Id.}

This case makes clear that a relationship document need not be a document prepared between the parties, such as a contract.\footnote{See id.} The documents underlying the search warrant were prepared solely by the police authorities for the purpose of presentation to a court, and surely were not designed to create a legal relationship, as traditionally understood, between the police who prepared them and the search suspect.\footnote{See id.} Surely the police did not intend to find themselves engaged in a legal relationship with suspects to a crime any more than a prosecutor considers himself as having a legal relationship with an accused. In this sense, the willingness of the Court to broadly interpret what is a legal relationship document may have significance. On the other hand, it may be that the case is limited to documents underlying arrest and search—matters specifically covered by the Constitution and where the criminal law likely prohibits any meaningful production in any event.

On the same day as the decision in the search and seizure case, the Second Petty Bench of the Supreme Court delivered an opinion regard-
ing the scope of production permitted against the government when the documents sought might affect the foreign relations of Japan.\textsuperscript{253} As previously noted, the original rewrite of the document production provisions of the 1996 Code failed to resolve the issue of how documents possessed by the government are treated.\textsuperscript{254} In a subsequent amendment, government documents were made subject to production, but were limited in certain respects. Documents exempt from production include those that could harm the foreign relations of Japan, harm national security, or adversely affect negotiations between Japan and a foreign country or international organization.\textsuperscript{255}

In addition, a procedural safeguard was established to give the government a means of objecting to production of documents, although it was subject to judicial review. A court considering a production request for potentially prohibited materials must give the government authority an opportunity to express a reasoned view as to whether production should be prohibited.\textsuperscript{256} The court must review the rationale to determine its validity. If it finds the government’s reasons inadequate, the court may order production.\textsuperscript{257}

The boundaries of production of government documents were explored in a case where a citizen of Pakistan sought political asylum in Japan.\textsuperscript{258} The foreign citizen claimed he was the subject of political retribution and that there was a warrant for his arrest in Pakistan.\textsuperscript{259} To support his

\begin{quote}

254. See supra notes 98–102 and accompanying text.

255. See MINSHÔ, art. 223. Under article 223, the competent government authority in possession of documents sought to be produced must be advised of the request. If the authority objects to production, it must present an opinion explaining that the documents fall within the official secrets exemption of article 220. See id. art. 223, para. 3.

256. The opinion must disclose the grounds for the opinion and the court may order production if “the opinion is not sufficient to be considered to have reasonable ground.” Id. art. 223, para. 4.

257. Article 223 lists the following concerns as grounds for refusing to make production: that national security will be impaired, that the trust between Japan and other countries or international organizations will be damaged, that negotiations between Japan and other countries or international organizations may be compromised, that prevention or investigation of crimes will be inconvenienced, or that public safety will be compromised. See id. art. 223, paras. 4(1)–4(2). The government may also have grounds for refusing to produce government documents that contain private-party secrets.


259. Id.
\end{quote}
claim, the foreign citizen presented papers to the Minister of Justice, including a copy of the arrest warrant from his home country. The Minister of Justice wrote to the Minister of Foreign Affairs and requested that contact be made with the Pakistani government to determine the validity of the documents. The Pakistani government responded to the inquiry by stating that the arrest and other documents were forgeries. The Minister of Foreign Affairs then notified the Justice Ministry and refugee status was denied.

To challenge this outcome, the foreign citizen sought production of: (i) a copy of the initial request from the Minister of Justice to the Minister of Foreign Affairs (which was in the possession of the Ministry of Justice); and (ii) copies of the correspondence between the Ministry of Foreign Affairs and the foreign government (which were in the possession of the Ministry of Foreign Affairs). Both Ministers objected to production on the grounds that production would harm relations between Japan and a foreign power. Further, the Ministry of Foreign Affairs opined that the documents exchanged between the governments were generally considered confidential in customary diplomatic relations, and thus should not be produced. Both Ministers also claimed that the documents were exempt from production because they contained state secrets; production would harm the public interest and interfere with the performance of public duties. The Tokyo High Court, without conducting an in camera review, ordered the documents produced. The Supreme Court reversed and remanded for an examination into the validity of the claims made by the Ministers.

The Supreme Court noted that the question of production involved not simply whether the ultimate fact disclosed by the correspondence was secret (i.e., that the foreign government said that the documents provided to the Japanese government by the alleged refugee were forgeries), but whether production of the material as a whole would harm diplomatic

260. Id.
261. Id.
262. Id.
264. Id.
265. Id.
266. Id.
267. Id.
relations and disclose state secrets. In this regard, the Supreme Court noted that the Ministers claimed that production of the documents would disclose internal investigative techniques, background information not provided to the foreign government, and comments about internal political matters in the foreign country, all of which would damage the public interest if disclosed. Because the High Court had neither examined the documents in camera nor adequately reviewed the Ministry’s rationale, the matter was remanded for a more thorough examination.

Although concurring to the remand, Justices Takii and Imai seemed to sympathize with the Tokyo High Court. In their view, the Ministry may not simply rely on generalities or speculative injury to the public interest to support a denial of production. Rather, the objection to production must provide concrete reasons why production would cause the public interest to suffer.

Justice Fukuda also wrote separately. His view was that the correspondence between governments constituted a note verbale, and under customary international law, such correspondence may not be disclosed absent the consent of the other country. Justice Fukuda seems to suggest that if upon examination the government’s objection is unjustified, the court should then consider whether the foreign state would object to production. The clear import of his logic is that if the foreign state objects, production should not be ordered.

It is not certain whether there is a majority that would support Justice Takii’s rationale. Only two Justices have signed on to the Court’s opinion and Justice Fukuda’s view was not discussed in the other opinions. Nor does Justice Fukuda address whether he approves or disapproves of the approach taken by Justices Takaii and Imai. What does seem clear is that, while the Court had some question about the presentations by the Ministries, it was unwilling to allow production simply because the Ministries had not supported their opinions with concrete reasons—and the Court was not prepared to allow the High Court to determine the matter

269. Id.
270. Id.
271. Id. (Takii, J. and Imai, J., concurring).
272. Id.
274. Id. (Fukuda, J., concurring).
275. Id.
without a searching investigation into the Ministries’ rationale, including an in camera review of the documents. Moreover, at least two Justices sitting in the Second Petty Bench were prepared to place a substantial burden on the government when it objects to production of documents that may be relevant in a civil litigation involving the government. However, the case did not examine whether a more stringent standard would apply when government documents are sought for use in a private lawsuit in which the government is not a party.

In October 2005, the Third Petty Bench of the Supreme Court had an opportunity to discuss this issue in a case dealing with an industrial accident in which a child worker was injured. The Labor Ministry conducted an investigation of the accident pursuant to its statutory authority. The Ministry prepared an investigative report that contained government investigators’ opinions on the future steps required to prevent such accidents, and a factual statement of the investigators’ analysis as to what had occurred. This analysis was based, in large part, on interviews with management and other company personnel. In a suit by the injured child’s family against the company, the family sought disclosure of the report. The Labor Office objected to production, claiming that the report contained official secrets and that disclosure would discourage cooperation in future investigations, damaging the government’s ability to serve the public interest. The report disclosed the names of persons contacted by the office and summarized interviews, but it did not quote individual statements. The various workers contacted during the investigation also objected to production of the report. The High Court in Nagoya refused to order production. The Supreme Court reversed in part and affirmed in part.

The Supreme Court noted that the report contained two types of information. First, there was information that disclosed opinions of gov-

277. Id.
278. Id.
279. Id.
280. Id.
282. Id.
283. Id.
284. Id.
285. Id.
Government workers as to what future action should be taken. 286 This information disclosed the government’s investigative techniques, which the Court concluded were state secrets and the disclosure of which was unwarranted (“Category I materials”). 287 The other type of information contained in the report was material based on interviews, reports, and measurements, which the Court concluded, as an initial matter, were the secrets of the employer, not the government. 288 The employer’s secret material wound up in the government’s hands as a consequence of the investigation, was of a factual nature, and was not linked to any specific interviewee. 289 The Court ordered production of this material (“Category II materials”). 290

The interaction between the Court’s holdings regarding the two categories of material is instructive. As an initial matter, the Court concluded that all of the material being sought constituted government secrets. 291 Private secret information retains its secret character and becomes a government secret when it comes into the government’s hands as a consequence of the government’s investigation and could damage the government’s ability to perform its public interest functions if disclosed. 292 Thus, both categories of information may be denied production if there is likelihood that production will damage the ability of the government to carry out its functions in the public interest. 293 The Court then turned to the government’s reasons for objecting to production. It first established

287. Id. As noted in its discussion of the case, the Court was concerned about two types of information in the report. One type was “private” (i.e., company) secrets. Under article 223 of the 1996 Code, when the government possesses documents that disclose a private party’s technical or business secrets, the government must allow the private party to object to production and must give the private party an opportunity to present its position as to why the document should not be produced. See MINSHU, art. 223, para. 5. The Court notes that the employees of the corporation objected to production. It is likely that in addition to giving the company an opportunity to object, the government possessor of the documents also gave the employees an opportunity to object.
289. Id.
290. Id.
291. Id.
292. Id.
the appropriate standard for evaluating the government’s reasons for nondisclosure. Here, the Court adopted the same approach as Justices Takaii and Imai (although it did not cite them or otherwise refer to the July decision), holding that there must be a specific or concrete showing that there exists a likelihood that the public interest will be damaged by production.\textsuperscript{294} An abstract possibility that production could hurt the public interest is not sufficient to deny production.\textsuperscript{295} Second, the Court determined that the likelihood of damage to the public interest must be based on the content of the documents sought.

As the documents sought in the instant case contained two different categories of information, the Court dealt with each in turn. As to the Category I materials, the Court found that production should not be made.\textsuperscript{296} This determination seems to mirror the determination in the Fuji Bank line of cases. In both the public and private sector, the Court is concerned about keeping decision-making lines of communication open and allowing the unedited and unfettered statements of employees. Accordingly, the Category II material need not be produced.\textsuperscript{297} As to Category I material, the Court recognized the arguments based on privacy concerns of workers at the company and the potential inability of the government to properly carry out future investigations.\textsuperscript{298} The Court rejected both arguments.\textsuperscript{299}

The employee privacy argument was rejected as a factual matter since the report itself failed to disclose who said what.\textsuperscript{300} Moreover, the report mixed interview materials with other materials and opinions of the investigators to such an extent that the statements of individual employees or directors could not be discerned.\textsuperscript{301} As a consequence, the Court found there was no real loss of privacy at stake.\textsuperscript{302} Further, production would not hinder the ability of the government to perform future investigations since the statutory law required employer-employee cooperation with

\textsuperscript{295} Id.
\textsuperscript{296} Id.
\textsuperscript{297} Id.
\textsuperscript{298} Id.
\textsuperscript{299} Id.
\textsuperscript{300} Id.
\textsuperscript{301} Id.
\textsuperscript{302} Id.
government investigators.\textsuperscript{303} As the two types of information in the report could be readily segregated, there was no reason not to order production of the Category I materials, and the Court did so.\textsuperscript{304}

In a case involving the Sendai City Assembly,\textsuperscript{305} it was alleged that funds disbursed to various political factions to use in research under the Local Autonomy Law\textsuperscript{306} were improperly allocated.\textsuperscript{307} As a consequence, the plaintiff sought repayment of such sums to the municipal government.\textsuperscript{308} In the course of the litigation, and to prove the validity of the claim, the plaintiff sought an order that would require production of the

\begin{itemize}
  \item\textsuperscript{305} Japan is divided into numerous prefectures and municipal governments that serve local governmental functions. The Sendai City Assembly is a municipal government that is part of the Miyagi Prefecture. The Japanese Constitution provides that prefectoral governors and councils are to be elected, rather than appointed by the central government. \textit{See Kenpō, art. 93, para. 2}. Japanese prefectures perform many agency functions for the central government. Japanese prefectoral governors can be ordered to perform functions on behalf of the national government by the Minister, provided the Minister’s order is within the scope of his authority. \textit{See}, e.g., Okinawa Mandamus Case, Case No. 90 (Gyo-Tsu) of 1996, (Sup. Ct., Sept. 28, 1996) \textit{translation available at} http://www.courts.go.jp/english/judgments/text/1996.08.28-1996-Gyo-Tsu-No.90.html.
  \item\textsuperscript{306} \textit{See} Chihō jichi hō [Local Autonomy Law], Law No. 67 of 1947, \textit{available at} http://nippon.zaidan.info/seikabutsu/1999/00168/mokuji.htm. The Local Autonomy Law permitted the prefectoral governments to provide funding for the various political factions in the prefectural assemblies for the purpose of conducting research. \textit{See id.}, art. 100.
  \item\textsuperscript{307} \textit{See} Case No. 2 of 2005, 59 \textsc{minshū} No. 9 (Sup. Ct., Nov. 10, 2005), \textit{translation available at} http://www.courts.go.jp/english/judgments/text/2005.11.10-2005.-Gyo-Fu-No..2.html. A prefecture enacted a local ordinance in conformity with the Local Autonomy Law that required the factions to provide certain information concerning studies done with allocated funds. But, the factions were not required to provide the study results to the public or the prefecture government. The results of the study were, of course, made available to the members of the faction performing the study. \textit{Id.}
  \item\textsuperscript{308} \textit{Id.} While plaintiffs in such a taxpayer suit would likely lack standing in the United States, the Administrative Case Litigation Law permits such suits in Japan. \textit{See Gyōsei jiken soshōhō [Administrative Case Litigation Law], Law No. 139 of 1962, art. 5, \textit{translated in} EHS LAW BULL. SER. no. 2391 (1999) \textit{See also} Chihō jichi hō [Local Autonomy Law], Law No. 67 of 1947, \textit{available at} http://nippon.zaidan.info/seikabutsu/1999/00168/mokuji.htm.\end{itemize}
studies. The issue before the Court was whether the reports were self-use documents and thus exempt from production.

The Court began its analysis by stating the basic principles for the self-use exception: (i) a document must be prepared solely for the use of the holder or those within its organization and was not intended for disclosure; (ii) disclosure is likely to violate privacy or prevent or inhibit employees from making unfettered opinions and decisions; (iii) a significant or at least not insignificant injury to the holder of the document in the event of disclosure; and (iv) no special circumstances exist that would warrant production, even if all of the above considerations were met.

In applying these principles, the Court recognized the necessity for transparency since public monies were being expended, but noted that the local ordinance provided that information concerning the studies be filed with the prefecture, although not the final report or its substance. The Court then noted the highly political nature of such reports and the obvious reasons for not providing copies to either opposition factions in the Assembly or to the executive branch of the prefectural government. Both privacy concerns of persons who may have assisted in the compilation of the report and the risk that those opinions may not be objectively voiced if the report’s contents were published counseled in favor of holding them self-use documents. In addition, it could be expected that production of the report would cause significant problems for the faction preparing it, both with the executive branch and competing factions. As a result, the Court deemed such reports self-use documents and exempt from production.

Justice Yokoo dissented. In his view, research reports are subject to review by an outside person who is not a member of the faction undertaking the study. This conclusion follows from an analysis of the legal basis for spending public monies for the report and the need to ensure

310. Id.
311. Id.
312. Id.
313. Id.
315. Id.
316. Id.
317. Id.
318. Id.
that public funds are properly spent. Justice Yokoo reasoned that since the study report may be reviewed by an outside person, it fails to meet an essential element of a self-use document; namely, that there is no expectation that the document will be disclosed to other than the holder of the document or those within its organization. The dissent disagreed with the majority on this essential issue: whether the laws governing the reports contemplated disclosure to persons other than faction members. However, the dissent did not disagree as to the proper test to determine whether a document is a self-use document. Thus, the dissent and the majority were of the view that if the report met the basic requirements listed above, it would be a self-use document. The disagreement was over whether the preparer of the report contemplated that the report would be disclosed to persons other than the preparing faction and its members.

In the most recent self-use document case to be decided by the Supreme Court—yet another dispute between a bank and a customer—the Court appears to have further relaxed the restraints on production of an ongoing bank’s records. A bank claimed that it had lent money to a

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320. Id.
321. Id.
322. Id.
323. Id.
324. Case No. 39 of 2005, 60 Minski, No. 2 (Sup. Ct., Feb. 17, 2006), translation available at http://www.courts.go.jp/english/judgments/text/2006.02.17-2005-Kyo-.No..39.html. This decision is consistent with the views of Professor Tanaguchi:

Under the New Code which has made the production duty a “general duty,” the same reasoning should not apply. If the court nevertheless uses the previous definition of “internal document” for defining a (4)(d) document, the exception will be too broad. For example, a so called ringisho (circular letter within a corporation for a major decision making) or a fax correspondence between a branch office and the corporate headquarters has been considered as “internal” and not subject to a production order. Under the New Code, only a limited category of personal documents protected by the rule of privacy should be privileged.

Taniguchi, supra note 12, at 778. However, Professor Taniguchi’s suggestion that a circular letter for major decision-making should not be considered an exempt document was rejected in both the Fuji Bank case and in Case No. 35 of 1999, 54 Minski 2709 (Sup. Ct., Dec. 14, 2000). See supra note 155 and accompanying text.
customer.325 The customer stated that he thought he was buying insurance, not taking a loan, and the mistake voided the deal.326 In an effort to prove the mistake, the customer sought production of internal documents of the bank.327 The documents were communications from the bank’s head office to its branches detailing the bank’s policy of selling variable insurance together with loans.328

The bank argued that the documents were prepared solely for the use of the holder (i.e., the bank) and hence fell within the self-use exception to production.329 The Court acknowledged that the documents had been prepared solely for the internal use of the bank and its employees.330 But, because the documents were informational and not prepared in the course of decision making, the Court concluded that production would not adversely affect the bank’s ability to make decisions in the future.331 In other words, unlike Fuji Bank, where the Court found the documents were part of the decision-making process and production would hamper future decision-making by impairing the free flow of information and opinions, these documents merely reported bank policy.332 Consequently, the Court found that a key element in the self-use document analysis was missing—namely, that production would impose any disadvantage to the future operations of the bank.333 The documents were ordered produced.334

III. CONTEXT, CUSTOM AND COMMUNITY—SUPPORT FOR AND SUPPORTED BY THE DECISIONS

A. Introduction

The Fuji Bank decision placed a severe limitation on the production of documents in a holder’s possession by broadly interpreting the new statutory self-use exception. Yet the decision did not completely exempt self-
use documents from production under the 1996 Code. Rather, the Court focused on two characteristics in order to assess whether a self-use document could be considered exempt from production: (i) the document’s production would work some significant hardship to the possessor of the document, or (ii) there were special circumstances warranting production notwithstanding its status as a self-use document. Fuji Bank was viewed by both bengoshi and lower court judges as a severe restriction on document production.335 However, subsequent decisions have significantly modified Fuji Bank, allowing parties greater access to documents while simultaneously developing a doctrine that supports Japanese customs and community values.

Japan is a collective, or group, society, whereas the United States is an individualist society.336 American society places a high value on individual rights, and it is believed that society in general—as an aggregation of individuals—will ultimately benefit from the protection of individual rights. Still, the concept of rights in the United States is an individual one. In contrast, in Japan the group or collective is significantly more important than the individual.

Collective societies tend to be “high context” societies, which means that interactions may only be understood by taking into account the entire context of the communication, including the parties to the communication, body language, and the customs that are prevalent in the society.337 In collective societies, “group goals have precedence over indi-

335. See Goodman, Japan, supra note 9, at 582–85. See also Haley, Heisei Renewal, supra note 8, at 6 n.6.

Haim Weinberg summarizes the views of Hofsted and Kotani, both of which are relevant in this regard:

Hofstede (1991) describes Japanese society as one “in which people from birth onwards, are integrated into strong, cohesive subgroups, which, throughout people’s lifetimes continue to protect them in exchange for unquestioned loyalty.” This is why Kotani (1999) hypothesizes that when Japanese people are in a group, the intense cohesiveness is experienced as if there were a common self.

337. See Richard L. Wiseman et al., A Cross-Cultural Analysis of Compliance Gaining: China, Japan, and the United States, INTERCULTURAL COMM. STUD. 1, 4 (1995) (“The dimensions of individualism/collectivism and context are related. That is, the predominant mode of communication in collective cultures is high context while the primary
individuals’ goals” and “the group is the center of decision-making.” Not only is Japan a group society, but is also a society in which hierarchy and status matter significantly.

The concepts of hierarchy and status were first solidified and stratified in the late fifteenth century by the unifier and civil ruler of Japan, Hideo-shi, and then hermetically sealed in the sixteenth and later centuries by the Tokugawa Shoguns. “[S]tatus and group lines created the vertical means of communication in individualistic cultures is low context.”). See also infra notes 379–82 and accompanying text.

339. Id. at 6. This characteristic of high context societies has implications for the Supreme Court’s emphasis on the need to keep the decision-making process open and to protect the free flow of information and opinions through restricting the production of documents reflecting opinions and information outside the group.

and horizontal boundaries which defined and confined the individual within his society.” Further, status was the defining characteristic of law during the feudal period. During Japan’s feudal period most of the population lived in villages that were semiautonomous and where the self-policing, five-household group organization created joint responsibility. But hierarchy and status were a critical element of life, whether one was in the elite samurai (warrior) class or the peasant farming class. Belonging to your appropriate group in society was an essential element of life.

Chief among the status-binding institutions was the family system (the ie). The ie was a household system wherein authority over the family resided in the head of the house, who controlled the property of the house and had significant decision-making authority over house members. Members of society belonged first to their house; second to their community (such as their village, their block in town, or their military organization, etc.); and third, to neighborhood groups within their commu-

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343. Yoshirō Hiramatsu, Tokugawa Law, 14 LAW IN JAPAN 1, 40–41 (Dan F. Henderson trans.). Yoshirō Hiramatsu explains:

> In Tokugawa times, status discipline and legal discipline had inseparable structures. . . . Status discipline regulated the people . . . . It showed the superior-inferior relationships within the groups. . . . Ethics and humanity were usually advocated for each social status based on superior-inferior relations transcending all . . . . In daily life, status norms were regarded as the primary obligation, and the penal law protected them.

Id.
344. See Macfarlane, supra note 19, at 369; Hamilton & Sanders, supra note 39, at 32.
345. Herman Ooms, Tokugawa Village Practice: Class, Status, Power, Law 338 (1996) (“Hierarchy seems to be present in all societies at all levels as the result of an informing ideological principle . . . .”); id. at 168 (“Hierarchical lineage structure seems to have determined all important relationships within the village.”).
nity (such as the five-household groups). In this setting, collective decision-making and codependence became ingrained in society and a culture based on “mutual, interdependent relations and reliance” developed. Given this culture and its emphasis on hierarchy and status, it is but a short step to realize that “legal relations” flowed from group and status structure.

The efforts of the judicial branch to create a legal doctrine favoring the lower-status class in its conflict with the upper classes evidence the persistence of hierarchical and status elements that characterized Tokugawa Japan in modern Japanese society. Thus, tenants are favored over landlords, employees over employers, franchisees over franchisors and distributors over manufacturers, leveling the status divide between them. Modern legislation integrates this theme by providing consumers with protections against business.

Notwithstanding the post-war Americanized constitution that emphasizes individual rights, Japan remains a communal society that recognizes hierarchy and class status. Judges, as part of the community, apply the common sense of the community in rendering judicial decisions that uphold community values. A compelling example of the judiciary’s need to apply community values and the common sense of the society is

347. See Ooms, supra note 345, at 80 (“The five-household groups were adopted nationwide in the mid 1630s in order to establish multipurpose subvillage administrative units . . . .”)


349. In Tokugawa Japan, households, rather than individuals, were the subject of regulations and parties to disputes. Ooms, supra note 345, at 5. See also Richard B. Parker, Law, Language and the Individual in Japan and the United States, 7 Wis. Int’l L.J. 179, 200 (1988) (“If it is true that Japan is a society of ‘contextuals’ rather than ‘individuals’ and that the use of language in Japan is highly contextual, then we should expect that law in Japan to also be ‘contextual.’ It is.”).

350. See supra note 39 and accompanying text.


found in the Gokoku Enshrinement case. In this case, the Christian wife of a deceased Self-Defense Force member contested the enshrinement of her husband at a Shinto Shrine dedicated to members of the military establishment. The plaintiff based her claim on the Japanese Constitution’s protection of the freedom of religion—in this case her religion was Christianity, while the religious affiliation of the Shrine was Shinto. Her husband apparently had no religious affiliation. The Court concluded that the enshrinement was a “private law matter” between the wife and the Shrine. As such, it did not implicate government action. Thus, the constitution was not directly applicable to the Shrine’s actions.

The Court then turned to the issue of whether, as a private law matter, the enshrinement was a violation of article 90 of the Civil Code that voids juridical acts that are contrary to good faith. The Court found that the enshrinement did not violate any of the wife’s legal rights, so there was no violation of the Civil Code. The concurring opinion of Justice Nagashima is instructional. Justice Nagashima pointed out that although the wife was Christian, the other surviving relatives of the deceased were Buddhist or Shinto. In his view, there was no reason to prioritize the wife’s religious beliefs over the beliefs of the other family members. Similarly, Justice Sakaue was concerned about the effect of

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354. Id.
355. Id.
356. Id.
357. Id.
359. Id. The government, in the form of the Self-Defense Force, did play a role in the enshrinement when it provided data and administrative assistance to the shrine. The government also supported the enshrinement by having an officer attend meetings concerning enshrinement and by cooperating with the Veterans Association, which was instrumental in securing enshrinement at this particular site. Id.
360. Id.
361. Id.
363. Id. (Nagashima, J., concurring). Justice Nagashima remarked:

There is no legal grounds for giving priority to a surviving spouse over surviving parents or children with regard to mourning and honoring the memory of the deceased, and it is obvious that things would be out of control if relatives who believe in different religions may seek legal remedies against each other
the wife’s actions on the other family members. He would have gone further than the Court or Justice Nagashima, and would have recognized the need for the individual to subordinate her personal “right” to the “rights” of others in the community. 364 Professor Haley, in reference to this case, has said:

The Yamaguchi Shrine case, along with the landmark 1977, 1983, and 1997 Supreme Court decisions, together reflect judicial deference to community values. . . . Stripped of legal garb . . . the case involves a challenge to community practice and an established pattern of life. The plaintiff petitioned for the state to intervene to protect her individual interest and beliefs against the actions taken by and on behalf of the community of which she was a part. The judicial response was refusal. Acting through the courts, the state denied her the protection she sought. This I submit, is the crux of the case and much of Japanese law.365

More recently, the Supreme Court used community values to inform legal relations between parties. 366 This decision recognized a common

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because of the discomfort for the other relative’s religious action of mourning and honoring the memory of the deceased. Thus religious tolerance is necessary even with relatives among each other.

*Id.*

364. *Id.* (Sakaue, J., concurring). As Justice Sakaue explained:

It would considerably contradict our common sense or socially accepted idea if anyone is free to worship or to pray for the deceased with a religious ceremony which is against the will of his or her surviving relatives such as his spouse, descendant or parents and if those relatives are not allowed to oppose and has to tolerate such activity of others as long as it is related to religion no matter how their mental peace are disturbed. . . . This is the very case where conflict of personal rights of surviving relatives occurred, in which case the tolerance that the majority opinion mentioned is required. Therefore, even if the religious ceremony of praying or mourning by other close relatives or those conducted according to their will is against one’s will, he or she should be tolerant of it and, unless there is such special circumstances as to give priority to his or her mental peace, the infringement of his or her personal rights should not be considered unlawful since it is within the limitation to be endured.

*Id.*

365. HALEY, SPIRIT, supra note 55, at 196. However, the constitution did attempt to make that transition. *Id.* at 199. For example, the constitution provides that “[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.” KENPO, art. 14, para. 1.

law spouse’s rights against the national pension system upon the death of her husband, even though the spouses were related (uncle and niece) and thus could not enter into a lawful marriage under Japan’s Civil Code.\textsuperscript{367} The Supreme Court recognized that there were strong social policy reasons for prohibiting the marriage of such close relatives and further recognized that such marriages were, as a general rule “significantly unethical or prejudicial to the public interest.”\textsuperscript{368} Nonetheless the Court noted that:

\begin{quote}
[A]ccording to the facts mentioned above, in the appellant’s community, due to such regional characteristic, marriage between relatives took place somewhat frequently . . . . [I]t was acknowledged without resistance among their relatives and also publicly accepted in their community . . . . \textsuperscript{369}
\end{quote}

Although the American Occupation did not replace the traditional Japanese cultural values of community with American values of individualism,\textsuperscript{370} it did have a significant effect on Japanese life, including the replacement of the traditional \textit{ie} with a more nuclear family.\textsuperscript{371} The

\begin{quote}
American postwar occupation, with its imposition of liberal democratic institutions, mitigated many aspects of the starkly differentiating hierarchical practices of the prewar period. . . . Yet some aspects of social practice routinely deviate sharply from these formal standards. . . . [T]he thoroughly hierarchical labor market is riddled with preferences based on family background and age. As a result, formally equal Japanese citizens . . . routinely relate to one another, not as relative equals, but as social superiors and subordinates.
\end{quote}

\textit{Id.}

\begin{quote}
Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. . . . With regard to choice of spouse, property rights, inheri-
\end{quote}

\textit{Id.}
growth of the economy after the war also had the effect of loosening group ties that centered on the “home village.”

B. Principles Governing Document Production by Corporations and the Government

The Supreme Court’s evolving jurisprudence concerning production of documents can only be fully understood by taking into account Japan’s group orientation, its hierarchy and the importance of status, its high-context communication style, and the significant role of the employing corporation in modern Japanese society. Understanding the function of document production as merely a means to present evidence in a civil litigation is insufficient to appreciate the Supreme Court’s language and the thrust of its decisions. Social and cultural factors influence several aspects of the Court’s decisions, including: (i) the limitation of the self-use exception to documents whose production will work a disadvantage to the holder of the document; (ii) the emphasis on privacy; and (iii) the significance of the decision-making document in the group-oriented culture of the Japanese corporation. For example, the Supreme Court’s creation of the significant disadvantage requirement as a necessary condition for application of the self-use doctrine in the *Fuji Bank* case echoes the Court’s acceptance of interference with privacy as a significant hardship that may be sufficient to avoid production. Neither disadvantage nor privacy is found in the statute, and privacy is nowhere explained in the *Fuji Bank* decision.372

While the concept of disadvantage is not found in the language of article 220 of the 1996 Code, the statute does exempt from production documents that contain information that is covered by a privilege set out in article 197, paragraph 1.373 Under this privilege, technical or profession

tance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.


372. The concept of disadvantage is also not included in the Ministry of Justice’s manual explaining the application of the self-use doctrine. *See Mochizuki, supra* note 12, at 302. The Justice Department Manual is quoted to the effect that the old rule of self-use documents is incorporated into the statutory language. Under the old rule, there was no need for, and no judicial opinions dealing with, an exception based on disadvantage.

373. Under the 1996 Code, the provisions dealing with witness testimony precede those dealing with documents. Article 197, which is contained in the witness portion of the Code, deals with witness privileges. Pursuant to article 197, paragraph 1, government officials may refuse to testify about official secrets unless the supervising government has
sional secrets contained in documents need not be disclosed. As noted in one of the cases discussed above, the holder argued that the electronic schematic of its telephone equipment was a technical or professional secret that should not be subject to production. The Supreme Court remanded the case to the High Court to determine whether the schematic qualified as a technical secret, stating:

The term “technical or professional secret” as provided by Art. 197, para. 1, subpara. 3 of the Code of Civil Procedure should be understood as matters, which, if made public, their social value of which would decline and the activities using these will be difficult, or will seriously affect the profession and make it difficult to continue the profession.

Thus, under one subpart of article 220 of the Code, there is explicit reference (by way of incorporation) to the concept of disadvantage as it relates to the issue of document production. It is possible that the Court, reading the self-use document provision in the context of article 220, was persuaded that the concept of disadvantage also permeated the self-use exception.

Among the various forms of significant disadvantage that could meet the self-use exception, the Court specifically mentions both privacy and limits on the decision-making process of individuals and organizations. These are not the only possible categories of disadvantage; they are merely illustrations of disadvantage to the holder of a document that granted permission for such testimony. See MINSHÔ, art. 197, para. 1 (referencing article 191, which governs examination of a government official regarding official secrets). Article 197, paragraph 2 incorporates the more familiar evidentiary privileges such as attorney-client and physician-patient. See id. art. 197, para. 2. Article 197, paragraph 3 permits a witness to refuse to testify if the testimony would disclose technical or professional secrets. See id. art. 197, para. 3.

374. See supra notes 136–54 and accompanying text.
376. At first glance, traditional privileges do not appear to involve a determination of disadvantage. After all, a patient need not make a showing of disadvantage to prevent testimony concerning his medical records. However, the traditional privileges are all founded on disadvantage or privacy concerns. For instance, the doctor-patient privilege deals with personal private materials, while the attorney-client privilege implicates both private matters and disadvantage. Just as the Supreme Court has bundled the concept of privacy into disadvantage, it has bundled article 197, paragraph 2 into the disadvantage definition.
377. Although the Court has grounded its determination that there was a significant disadvantage solely on the latter. See Case No. 20 of 1999, 54 MINSHÔ 1073 (Sup. Ct., Mar. 10, 2000), translation available at http://www.courts.go.jp/english/judgments/text/2000.3.10-1999.-Kyo-.No.20.html.
call for denial of production. Precisely whose privacy the Court appears prepared to protect is not stated. There are several possibilities—the privacy of the corporate entity, the privacy of the author(s) of the document, or the privacy of corporate employees who provided information incorporated in the document.

The fact that the Court did not specifically define whose privacy was involved may trouble an American observer, but this is merely a reflection of the difference in cultural communication between the United States and Japan. What Americans may view as a failure to expressly state something in a conversation or court decision may simply be a reflection of cultural differences. Japan is a high context society wherein contextual factors affect the meaning of words, rules, actions, etc., whereas the United States is a low context society. In a low context society, it is expected that communications will be more precise and specific than would be expected in a high context society. In contrast, vagueness in communication is a key characteristic of a high context society. Indeed, vagueness may be a means of permitting later reconsideration.

378. See generally Edward T. Hall, Beyond Culture (1976); Edward T. Hall & Mildred Reed Hall, Hidden Differences: Doing Business With the Japanese (1987); Takie Sugiyama Lebra, Japanese Patterns of Behavior 46–48 (Univ. Press Hawaii 1977). See also Martin Rösch & Kay G. Segler, Communication with Japanese, 27 MGMT. INT’L REV. 56, 60 (1987) (“In countries such as Japan with a highly contexted mode of communication a message will generally carry a smaller part of explicitly stated information; i.e., the context carries more information than it would in countries with a low level of context information . . . .”); Kristiina Jokinen & Graham Wilcock, Contextual Inferences in Intercultural Communication, 19 SKY J. LINGUISTICS 291, 291–92 (2006) (“In the low context culture, everything is fully spelled out . . . . In a high context culture . . . . communicators assume a lot of shared knowledge, experience, and worldview . . . less is made explicit and much more is implicit . . . .”).

379. See Judy Minot, On Common Sense, www.kokikai.org/. Judy Minot elaborates on this distinction as follows:

In high context cultures a lot of communication takes place through “things not said.” In low context cultures people mean what they say (or at least they think they do) in any case people place highest value on explicit communication through words. If someone doesn’t understand something in a low context, they ask questions. In a high context culture they would find out the answer by looking around them, seeing how people interact, understanding from the context.

Id.


High context is the situation in which human interaction can be exercised exchanging less information such as knowledge, concept and experience between individuals. . . . This implies that more and accurate information is required
eration of the question as a consensus begins to form on a meaning.\textsuperscript{381} Thus, to understand what the Court meant by its reference to privacy as a significant hardship factor, one must look to its context.

Just as the initial draftsman of Japan’s civil law system had to invent Japanese words in an attempt to capture concepts of Western law that did not exist and could not be written or said in Japanese, so too do modern Japanese freely borrow words from another language.\textsuperscript{382} But the concept behind the word may be quite different in Japanese.\textsuperscript{383} Indeed, “the assumption that the same words [in the different languages of English and Japanese] have the same meaning may well be misleading.”\textsuperscript{384}

It seems obvious that disclosure documents prepared for a decision-making process containing views of the bank employees would implicate their individual privacy concerns. How, then, can it be explained that the Supreme Court allowed the views of the employees to be disclosed through production of the bank’s records once the bank no longer issued loans?\textsuperscript{385} While the Court was concerned with the privacy rights of employees of the ongoing Fuji Bank, it was apparently unconcerned about the privacy rights of the employees of the bank that had failed and was in

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with precise words/phrases/topic selection in undeviating speech pattern in order to minimize the communication failure. . . . In the consideration of the interacting procedure created by most Japanese people, they are categorized as the high context personalities.
\end{flushright}

\textit{Id.}

381. See Joan C. Howden, \textit{Competitive and Collaborative Style: American Men and Women, American Men and Japanese Men, IV:1 INTERCULTURAL COMM. STUD.} 49, 54 (1994) (“Deliberate vagueness is employed in Japanese language not to show weakness and subordination, but to leave room for arrangements and planning to be conducted or negotiated among many members of a collectivist group, or a network of those concerned.”).


383. For example, a Japanese “mansion” is generally a small apartment in a concrete building with a door person, not a “mansion” as visualized in the United States. A Japanese “mansion” is an apartment that is distinguished from a Japanese “apartment” by the nature of the building in which it is located.

384. Rösch & Segler, \textit{supra} note 378, at 62. In Japanese, a word may even have different meanings based on its context. “Even in the Japanese language, context to a large extent determines the significance of a word. Japanese allows a fairly substantial range of interpretations; the actually intended meaning of a word will only be clear when all its circumstances are taken into account.” \textit{Id.} at 61.

liquidation. To American eyes, the employees’ privacy interests would appear to be the same in both instances, rendering the decisions inconsistent. The answer may reside in the different meaning given to the concept of privacy rights in Japan. Privacy, when used in the context of a corporate employee’s relationship with her employer, may not carry the individual or personal connotation that it has in American law. In the analysis of the Supreme Court of Japan, privacy is seen in a group context rather than in a personal context.

The interpretation of employee privacy in the context of the document production decisions may have additional roots in the varying nature of the concept of rights as understood in Japan. Rights may be individual in some contexts (such as when a female employee sues because she has been sexually harassed by her employer), but group-oriented in others (such as when the government passes special laws to better the economic conditions of the so-called Burakumin, but fails to pass laws that prohibit discrimination against them—even though they are Japanese citizens386—or fails to pass laws that protect the indigenous people of Japan, who are also Japanese citizens). In addition, rights may also be understood as relating to the contextual relationship in which the right is in-


Through sustained political activism, the burakumin have caused legislation to be passed since the war that has dramatically bettered conditions for themselves. These improvements have come primarily in such issues as better housing and education. . . . [T]he burakumin . . . continue to suffer from, in comparison to the majority Japanese, higher illness rates, higher unemployment, lower wages for the same jobs, illegal lists that corporations buy and use to avoid hiring buraku people, discrimination in marriage, and myriad abusive and discriminatory attacks on their person and position.

Id. Frank Upham criticizes the current Burakumin policy as follows:

If . . . the goal of dowa policy is the full acceptance of Burakumin by the majority, the present mode of affirmative action seems, at least in the short run, anomalous if not deliberately destructive of the goal. It stresses precisely the programs which will intensify Buraku isolation and ignores those that would bring them into the mainstream. It is as if the present intent was to improve their lot as a group in a narrow economic sense while ignoring the facilitation of individual entry into majority life.

voked. In the case of corporate documents, the right may be one that exists in relation to the employees’ relationship with their employer.

Because individual identity in Japan is grounded on group membership, where “the primary principle is to safeguard the harmony of the group, and the main challenge for the individual is to find their place within a wider fellowship,” it is easy to comprehend a system where the privacy interest is understood in group terms, i.e., what is at stake is not the right of individual employees to privacy, but the right to privacy of the company collectively.

An individual’s identity in Japan is grounded on the individual’s group identity:

The strong sense of belongingness as a stake for self-identity, reinforced by collectivism and conformism, calls for the individual’s total commitment and loyalty to his group. . . . These mutual obligations of loyalty and total protection are an established practice in the Japanese employment system, particularly in large corporations. . . . In such a system, the employee not only is obligated to stay on in the same company. . . but he cannot afford to move. Chances are that he will not be offered a job from the outside. . . All this reflects the tendency of the Japanese employee to find his identity in belongingness rather than in the cultivation and exhibition of professional expertise. . . Employment seems to mean, above all, the teaching and learning of the employee’s role in relation to the employer and other senior employees, with emphasis upon loyalty and group identification.

This is particularly so when hierarchy and status within the group are as significant as they are in Japanese culture.

Similar themes emerge in Japanese human rights theory. Professor Ishida, who has traced its development, noted that after the restoration, but prior to the promulgation of the Constitution of the Empire of Japan (Meiji Constitution), a “collectivity-realism” theory of law developed to deal with questions of human rights: “The collective realism theory neglected the idea that a group is organized of individuals and, moreover,


389. Lebra, supra note 378, at 31–32.
advocated the idea that the group existed as a natural organic body which transcends individuals.  

Professor Ishida further elaborated: “The group has an existence apart from its members. This has similarity with the concept of ‘realism’ in the philosophical sense, which is the doctrine that universals have real objective existence; therefore collectivity realism theory is the translation used.” Ishida also observed a tendency to overemphasize the collectivity realism theory in the post-war era. In his discussion of the theoretical work of Yozo Watanabe, he commented:

[T]he important thing, from the viewpoint of fundamental human rights, is the group’s decision-making process. Watanabe assumed the group decision as though it had an organic nature. . . .

The rights and liberty of the group are at the foundation of the rights and liberties of the individual. The destruction of the freedom of the group is no more than destruction of the freedom of the individual. We must, therefore, place a guaranty of freedom of group activity at the core of the problem of spiritual freedom in present days.

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391. *Id.* at 52 n.38.
392. *Id.* at 63.
393. *Id.* at 65 (citing Y. WATANABE, KEMPÔ TO GENDAI HÔGAKU 79 (1963)). Parker explains:

In other words, for the Japanese, one is one’s share in social relationships, not metaphorically, but literally. . . . Understanding the Japanese conception of the self as contextual helps us to understand . . . the beginning of a general explanation of the nature of the “mutual trust,” “personal interdependency,” and “group harmony” which the Japanese value so much. In a society made up of “contextuals” rather than “individuals,” terms such as “trust” and “interdependence” and “harmony” do not describe moral goals to be achieved by individuals; they are rather part of the definition of what it means to be human and Japanese.

Parker, supra note 349, at 189. The question of the relationship of the individual to the group is discussed at length in Hamaguchi Esyun, *A Contextual Model of the Japanese: Toward a Methodological Innovation in Japan Studies*, 11 J. JAPAN. STUD. 289 (Kumon Shumpei & Mildred R. Creighton trans., 1985). Hamaguchi notes:

It has also been argued that, in contrast to individual actors, the Japanese are contextual actors participating in *aidagara* relationships. It has further been argued that this type of actorship is consistent with the Japanese social system, a system of holonic decentralized control where spontaneous cooperation is essential. Such an evaluation is only a first step. If we can proceed to develop a new general systems theory that lays a foundation for methodological contextualism, new horizons for Japan studies will be opened.
Thus, it is possible to interpret the privacy interest mentioned by the Court as an interest that the employer-employee corporate group has in protecting the views and opinions of the employees from public disclosure. The right is a communal right of protection that belongs to the employer-employee group, not to the individual employees. Once the bond of the group is broken (such as by the dissolution of the employer), the group right is also broken. Hence, it is consistent to say that a right to privacy might be implicated in the continuing business context of the Fuji Bank, where the bond of the employer-employee corporate group remains intact, but is not implicated in the case of the financial institution that was dissolved. 394

Moreover, it has been suggested that in post-modern industrial Japan, the corporation has replaced the family and home village as the central community for Japanese workers. 395 More recently it has been postulated that the corporate community is an aspect of Japan’s post-war modernization, which flows from the unique relationship of the Japanese company to both its shareholders and employees. 396 As a consequence: “Em-

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Id. at 321. Takie Sugiyama Lebra describes the nature of collectivism:

The Japanese concern for belonging relates to the tendency towards collectivism, which is expressed by an individual’s identification with the collective goal of the group to which he belongs. Collectivism thus involves cooperation and solidarity . . . . What would be strictly a private matter in an individualistic society tends to be a group enterprise in Japan.

LEBRA, supra note 378, at 25.


395. See HAMILTON & SANDERS, supra note 39, at 29. Hamilton and Sanders describe this transformation:

The parallel between firm and family must be understood in light of the fact that even the traditional family ie was as much a corporate group, an economic unit, as it was a bloodline. Membership in an ie was to some extent determined by who contributed to the economic welfare of the group. . . . Thus the Japanese household is both a descent group and a corporate group.

Id.


Japanese employment policies reflect the relatively contextual nature of social relationships. Lifetime employment for permanent employees in larger firms ties workers to employers more closely than in the United States. Practices such as tsukiai, the after-hours socializing among white-collar workers, and work-
ployees of a firm identify themselves so strongly with the corporate community that they lose their sense of being members of civil society and become completely absorbed in their roles as members of the corporate community.497 Japanese corporations engage in a structured orientation of new employees that aims to socialize the new employee to the corporate community. Thereafter, the lifetime employment system, the seniority-based pay system, and the after-work socializing hours among employees operate to cement the community.498

It has been suggested that Japanese corporate governance is based on the concept of the corporate community:

The Company Community consists of management, board members, and core employees, who share an identity as “company men.” In Japan, when people say “company,” it means the Company Community. The Company Community provides a *raison de être* to its members and plays a role as a competing unit in the product market. Members of the Company Community owe, in their psychological level, the duty of loyalty to the Community itself and their fellow members.499

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397. Hirowatari, *supra* note 42, at 163. The strength of the concept of corporate community is reflected in questions and comments posed to Professor Millhaupt after his talk on Choice as Regulatory Reform:

Q: . . . The concept of a company community is very strong and so far shareholders have never intervened. . . .

. . .

Q: Parent-subsidiary relationships are not the same as in the U.S. In Japan, even 100% subsidiaries organize their own communities. For the company community members of the subsidiary, the parent company is an outsider for them. . . .

. . .


399. Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of the Corporate Law and Their Solutions* 16 (Berkeley Program in Law & Economics, Work-
It may be that privacy as used in corporate document production cases is not the personal privacy that is common to American lawyers. Rather, privacy may be viewed in the context of the corporation-employee group relationship. In such a case, it is not a personal privacy interest of the employee that is at stake, but rather a privacy interest of the employee as it relates to her relationship with the corporation. In essence, 

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400. See Hamilton & Sanders, supra note 39, at 55. Hamilton and Sanders explain the importance of context as follows:

Japanese talk—and apparently think—about themselves as individuals in context. Thus it is hardly surprising that the philosopher Hajime Nakamura (1968) boldly concludes that “Japanese in general did not develop a clear-cut concept of the human individual qua individual as an objective unit like an inanimate thing, but the individual is always found existing in a network of human relationships.”

Id.

401. See Burke, supra note 346, at 104–05. This notion of privacy is an aspect of what Burke describes as “reciprocal duties and obligations”:

There is no disputing the fact of the existence of this family-centered group society. It is characterized by a “web” of reciprocal duties and obligations that permeates all levels of society. In this web society, the individual has no real existence outside his group. He lives only as a member of his family or community . . . .

Id. (citations omitted). See also Fukui, supra note 27, at 69 (“At least in Japanese society . . . . the binding of community is considerably solid compared with other modern societies.”).

402. Recent changes in Japan’s labor market may have the effect of eroding to some degree the strong corporate community ties that have characterized Japan’s corporate world. For example, Kazuo Sugeno explains:

Such supply-side changes of the labor market are influenced by the changing values of workers. In contrast to workers during the growth periods of Japanese economy, one finds workers in the recent low-growth years increasingly identifying themselves with their employer and increasingly desire respect for privacy and family life. This is particularly the case with younger workers. These employees also criticize the egalitarian approach in the traditional seniority-based wage and promotion systems as unfair and inefficient. They thus support differentiation of treatment in accordance with the differences in performance and contribution. They request to have choices in jobs and career paths. Harmonization of working life with workers’ private life is another frequent request. These phenomena have made the once-solid corporate community increasingly fragmented in its social control.
employee-company privacy gives rise to a right on the part of the corporation (as the representative of the corporate community) not to produce the document, but does not give rise to a corresponding right on the part of the employee to prevent production of the document. Accordingly, the corporate possessor of the document may waive the right and produce. This principle would help to explain why only the corporate possessor of the document and not the employee has standing to contest a production order.403

And, as Professor Ishida noted, “the important thing, from the viewpoint of fundamental human rights, is the group’s decision-making process.”404 Similarly, Hall notes the “essential” nature of an open decision-making process to Japanese business and to the welfare of employees.405 Accordingly, to protect that decision-making process, it makes sense to exempt from discovery documents that explore the process and disclose the thoughts of the members of the corporate group participating in the decision-making process.

Related to the need to protect the decision-making process is the need to achieve consensus, i.e., harmony within the decision-making group, in


403. If the modern corporation-employee relationship is seen as a surrogate for the feudal relationship, the employee’s privacy interest in matters relating to the corporation is more easily understood as creating a right in the corporation that the employing corporation may rely on or waive, and not as an interest that can exist outside the corporation-employee relationship. For a discussion of the corporate community and the company-centered society, see Hirowatari, supra note 42, at 162–64.

404. Ishida, supra note 390, at 65.

405. Hall & Hall, supra note 378, at 82–83. Hall and Hall describe the collective decision-making process in the corporate context as follows:

This process of collective decision-making allows everyone involved a chance to review, evaluate, discuss, and approve or disapprove the proposal. This process is absolutely essential. . . . Final decisions entail many, many meetings, where all points of view are presented and discussed until consensus is achieved. At every stage differences are reconciled. . . . It’s also important to remember that in a system of lifetime employment in one of the major firms, decisions that affect the future of the company have great personal impact on each employee; he knows he will have to live with the results of these decisions.

*Id.* Hall and Hall also compare the closed-door, separate office of an American executive with the bull-pen style offices of Japanese companies where the senior executives are immediately available to others in the organization. *Id.* at 10 (“[N]ot only are other people constantly coming and going, both seeking and giving information, but the entire form and function of the organization is centered on gathering, processing, and disseminating information.”).
Japan. Achieving harmony may require that individuals compromise their personal views to maintain a harmonious relationship with other group members. Production of decision-making documents can adversely affect the consensus-forming process, and has the added disadvantage of disclosing that harmony might not in fact exist.

Once the corporation is in the process of liquidation, the decision-making process of that corporate group is no longer sacrosanct—the group bond has been broken. Accordingly, that group’s decision-making document may be subject to discovery. Likewise, as protection of the group process is the object of the exercise, once a decision has been reached, the decision itself is not protected from disclosure. Hence, the Supreme Court may allow production of the corporate document sent to branch offices that recites the policy and determination of the firm, but also protect the decision-making documents that led to that policy. It is not the opinion of the individual employee that the employer seeks to keep private. Rather, it is the opinion rendered to the ongoing entity or group that must be protected. Once the group is disbanded, the employee has no legitimate reason to have his opinions remain private.

It is relevant to note that in the 2005 decision ordering production of the factual material in a government labor investigation case, the employees of the company who had been interviewed by the investigators

406. See KONO & CLEGG, supra note 399, at 3 (“Within Japanese organizations it is the extent and the substance of shared values that determine the members’ decision-making patterns. . . . It is these patterns that we argue are at the core of corporate culture.”). Kono and Clegg also emphasize the importance of shared information to the Japanese decision-making process and the importance of consensus and group decision-making. Id. at 374–75, 380–81. See also ROBERT C. CHRISTOPHER, THE JAPANESE MIND 53 (1988) (“Probably the single most important thing to know about Japanese is that they instinctively operate on the principle of group consensus.”); HALL & HALL, supra note 378, at 81–82 (“Harmony and consensus are keystones of Japanese society.”); HAMILTON & SANDERS, supra note 39, at 69 (“Authorities’ decision-making is also considerably more consensual in Japanese firms than in their American counterparts.”); Dag Leonardsen, Crime in Japan: Paradise Lost?, 7 J. SCANDINAVIAN STUD. CRIMINOLOGY CRIME PREVENTION 185, 206 (2006) (“Japan is a society based on consensus . . . .”).


409. Id.
had a shared interest with their company in objecting to the disclosure of the report prepared by the government investigators. Unlike Fuji Bank, in this case the information in the report was not internal to the group or company. Rather, the information was disclosed because of a positive obligation to disclose information to the higher group, namely the society at large in the form of the government. No group privacy interest was implicated because disclosures were not made in a group context. Likewise, no personal privacy interest was implicated as there was no way to link the various opinions or factual statements to any specific employee. Hence, no group decision-making interest was implicated. However, the portion of the investigative report that disclosed the internal decision-making process of the Labor Department was deemed exempt from production. Indeed, Japan’s Freedom of Information Act (“FOIA”) specifically exempts from disclosure government documents containing “internal deliberations that would harm the free and frank exchange of opinions or hinder internal decision-making.”

Viewed in this light, the Supreme Court of Japan may be supporting the communal value and group norm of Japanese society when it implies that a privacy interest exists when an ongoing firm (or government agency) is asked to produce decision-making documents, but does not

411. Id. The Court explained:

The part of the Document relating to Information II contains information on the decision-making process within the administrative authorities, and it is obvious in light of its contents that there is a specific likelihood that this part might prevent the administrative authorities from making decisions without restrictions and significantly hinder the performance of public duties when it is submitted to the main case.

Id.

413. The Japanese bureaucracy also operates on a lifetime employment system. Thus, there exists a government equivalent of the corporate community that is present in the private sector. See John O. Haley, Professor of Law, Washington University in St. Louis, Address at Cornell University School of Law: Why Study Japanese Law? (Feb. 27, 2007) (on file with author). Professor Haley describes this analogue:

A newly hired twenty-two year old assistant judge, newly recruited Ministry of Finance official, Mitsubishi bank employee or Fuji Motors manager knew then that thirty-five years hence at age 57 his (women were not included) and his family’s welfare depended fundamentally on the political presence or prosperity of the organization they had joined. Lacking the possibility of exit, individ-
protect a privacy interest once the community has been broken by the
dissolution (or pending dissolution) of the firm. Similarly, the communal
value may be protected when internal communications made in the deci-
sion-making process are protected. Group values are not adversely af-
feCted by the disclosure of communications containing policy determina-
tions as to how the group should deal with the public from higher rank-
ing members of the group to other group members. By leaving the par-
ameters of the privacy interest vague, the Supreme Court allows itself
the opportunity to better define the scope of privacy at a future date when
a clearer consensus regarding privacy emerges in Japanese society.

It seems that both ongoing private employers and government agencies
may comfortably rely on the self-use exception when the decision-
making advice from its employees is the subject of a document produc-
tion motion. The Court seems clear in holding that private and public
employers must be allowed to receive the uncensored opinions of staff
and must be assured that employees can freely engage in the decision-
making process without the concern that those opinions or ideas will be
used to the company’s disadvantage in litigation.

Id. See also John O. Haley, Whence, What and Whither Japan, 19 COMPLAB. L. &
ECONOMIC CHANGE IN JAPAN (Robert M. Uru ed., 1996) and JAPANESE LABOUR AND
MANAGEMENT IN TRANSITION: DIVERSITY, FLEXIBILITY AND PARTICIPATION (Mari Sako &
Hiroki Sato eds., 1997)); TAKIE SUGIYAMA LEIBRA, supra note 378, at 31–32.

To some degree, the ties within a government community may be even stronger
than those in the purely private sector, as mandatory retirement from government may
come at an earlier age than in the private sector, necessitating post-government employ-
ment through agency assistance. See BRIAN WOODALL, JAPAN UNDER CONSTRUCTION:
CORRUPTION, POLITICS, AND PUBLIC WORKS 140 (1996) (“The lifetime employment and
amakudari systems also offer fierce disincentives for would-be whistle-blowers. Since
the post retirement prospects of government officials relate directly to the level and pres-
tige of their final posting in the bureaucracy, officials do whatever it takes to secure pro-
motion.”). Kono and Clegg describe the role of lifetime employment policies in Japan as
follows:

In Japan, male organization members are expected to devote themselves to the
organization, sacrificing their leisure and home life for the obligations that the
company assumes, . . . The obligation that respect for people must be behind
the policies that the organization assumes supports organization members in
their devotion to the organization. Lifetime employment is one of these poli-
cies.

KONO & CLEGG, supra note 399, at 371.
The cases do not address the potential interaction between the in-camera and redaction rights of the Court and a plaintiff’s need for production of facts as distinguished from opinions or advice. In other words, would the free flow of in-house ideas and communications be subverted if factual material was produced, even if the opinions of staff were redacted? In at least one case the Court has made such a distinction—when it exempted opinions and techniques of government investigators in its order requiring production of material obtained by the government investigators from interviews with employees of the company. The factual material encompassed by the order did not meet the self-use exception because it did not constitute a government secret and was not directly connected to a specific employee. Thus, no personal privacy interest was at stake.

It may be that a similar rule will arise in the private company production arena; however, the employer-employee group relationship may be so inviolable that even a redacted version of internal communications would be deemed unpalatable. While the scope of the group privacy right is untested, the Supreme Court’s emphasis on the free flow of information within an ongoing business entity may mean that all decision-making documents prepared solely for use within the company are immune from production, even if the material is simply factual in nature or merely records policies or decisions.

Among the types of disadvantage that might be utilized to support the self-use exception are the common privileges, such as the trade secret or attorney-client privileges. Still, the cases to date suggest that more is required than simply the possessor’s statement that a privilege or secret is involved. The Court has required a searching inquiry into whether the material involved is truly secret or privileged. For example, the manufacturer who argued that its schematic was a secret could nonetheless be ordered to produce the schematic unless it could show that it would suffer some disadvantage as a consequence of production, thus demonstrating it was indeed a trade secret. Similarly, the insurance administrator


415. See Case No. 20 of 1999, 54 MINSHŌ 1073 (Sup. Ct., Mar. 10, 2000), translation available at http://www.courts.go.jp/english/judgments/text/2000.3.10-1999.-Kyō.-No.-20.html and supra notes 136–54 and accompanying text. Under Japanese law, a news reporter may refuse to identify sources under the professional secrets privilege of article 197 of the 1996 Code. See MINSHŌ, art. 197, para. 2. However, this privilege is not absolute and in determining whether the reporter may refuse to testify, the court must balance factors such as the significance of the news report, the manner in which the reporter gathered the information, and the effect that disclosure would have on future re-
could not invoke attorney-client privilege to avoid production when the attorney was merely an investigation commission member, not a lawyer for the insurance company.\textsuperscript{416} This principle is consistent with the Court’s treatment of official or state secrets in documents held by the government. In this context, the court must make a searching examination into the validity of the government’s rationale for refusing production. A court is unlikely to substitute its judgment for that of government, but it will require a reasoned explanation that is within the realm of discretion afforded the official refusing production.

C. Cultural Values Affecting Unresolved Issues—Third Party Document Creators

In article 220, the Code refers to the exclusive use of the document by the \textit{possessor} of the document but does not specify whether the possessor must also be \textit{creator} of the document.\textsuperscript{417} If the creator of the document is not also the corporation-possessor, does the self-use exception apply? In \textit{Fuji Bank}, the Court discussed preparation only in terms of its ultimate use, i.e., whether the document was intended for internal use only. \textit{Fuji Bank} did not consider the questions raised by third party document creators, as the documents in that case were internally created. The issue will

\begin{footnotesize}
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  \item \textsuperscript{417} See \textit{Minsu}, art. 220, para. 4(d).
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inevitably arise, and the principles reviewed thus far do, nonetheless, provide some guidance as to how a court would approach the issue.

Japanese companies make extensive use of business consultants. Production of a consultant’s reports could be at least as damaging to the free flow of decision-making materials as the disclosure of documents in *Fuji Bank* would have been. While outside consultants do not participate in the employer-employee corporate community, they do share some commonality with the community. At least for the duration of the project for which they have been engaged, the outside consultant may reasonably be considered as a part of the “corporate team.” In this sense, a document created by a third party could be viewed as user-created. Moreover, a strict interpretation of the self-use exception, which requires commonality between the creator and possessor, might chill the use of independent examination at the very time when statutory auditors (who, in Japan, audit all activities of the company, not simply its accounting or financial functions) are being phased out in favor of independent directors. 418 In this context, cooperation with independent investigators is not subject to fine or potential criminal penalty, as is the case in a government investigation. Thus, independent investigators truly rely on the cooperation of company employees and interviewees to perform their investigative function. Such cooperation could well be compromised if the report were subject to production in litigation.

Similarly, to require production of advice documents from independent consultants would force companies to perform such functions in-house. When those functions are better performed by outside consultants, it could have a detrimental effect on the entire corporate community. In cases where an independent investigation or consultant’s report has been prepared for use exclusively by the company commissioning the project,

418. Prior to 2006, Japanese corporations were required to appoint statutory auditors. *See Shōhō [Commercial Code],* Law No. 48 of 1899, arts. 273–280, *translated in* EHS LAW BULL. SER. no. 2200 (2001). In response to the economic downturn of the 1990s, the Commercial Code was amended to permit a more Americanized board of directors structure under which outside directors (i.e., directors who are not employees of the corporation) would serve on boards of large corporations. *See* Ronald J. Gilson & Curtis Milhaupt, *Choice as Regulatory Reform: The Case of Japanese Corporate Governance,* 53 AM. J. COMP. L. 343, 344 (2005). The board would monitor the affairs of the company and the operations would be carried out by corporate executives. *Id.* at 353. Corporations utilizing the outside director system could also adopt a committee system, provided the committees’ composition consisted of a majority of outside directors. *Id.* at 352–53. Companies adopting the outside director system could do away with the statutory auditor positions. *Id.*
it is likely that a court would treat such a report as it would treat an internally-created document.\textsuperscript{419}

An even more likely scenario is where the party for whose exclusive use the document was prepared distributes the document externally to obtain advice from a consultant. In such a case, can the possessor successfully invoke the self-use exception? In \textit{Fuji Bank}, the Court did discuss the fact that, when the document was prepared, the possessor did not anticipate that it would ultimately be disclosed to outsiders.\textsuperscript{420} But the Court in \textit{Fuji Bank} did not contemplate a scenario in which a document might be sent to a consultant as part of a decision-making process. In such a case, this out-of-house consultant should be deemed in-house for purposes of the self-use exception because she performs the same function as an in-house employee.

Since Japanese companies have different stakeholders and stakeholder relationships than do American firms, it is possible to imagine a variety of scenarios not addressed by \textit{Fuji Bank}.\textsuperscript{421} What if the out-of-house possessor is a related company—perhaps the lead bank for the preparer of the document? What if the lead bank prepared the report for the use of the possessor? Are members of a corporate group like members of a political faction who receive research reports prepared by the faction?\textsuperscript{422} In the case discussed above, the faction members that received the report were not the preparers, nor was the faction an incorporated group. Nevertheless, the faction members arguably represented a group that, like the

\textsuperscript{419} Of course, the court has the authority to order third persons, i.e. not parties to litigation, to produce documents. See \textit{Minsōhō}, art. 223, paras. 1–2.


\textsuperscript{421} Milhaupt, \textit{supra} note 57, at 19–22. Milhaupt explains this difference:

[\textit{L}arge independent shareholders and groups of interconnected institutions, not dispersed individuals, have characterized Japanese shareholding patterns . . . . \textit{C}apital investment seldom represents the totality of the relationship between shareholders and the managers who concededly control the corporation even in Japan. . . . \textit{S}hareholder-oriented corporate organs and mechanisms have traditionally played little role in the life of the Japanese firm. . . . As career-long employees themselves, Japanese managers pursue employee welfare at least as vigorously as shareholder interests. . . . Strong institutions characterized by highly relational interaction form the key constraints: main banks, \textit{keiretsu} corporate groups, enduring firm-specific employment patterns.

\textit{Id.}

corporate community, was entitled to the free-flow of information so that
faction decisions could be made with all information available to all
members. This principle, to the extent it applied to members of a political
faction, should apply to consultants and other important players in the
Japanese corporate context.

Another possible factual scenario within this third-party issue is how a
holding company will be treated by a court. Now that holding companies
are once again permissible in Japan, is a court to consider all members of
the holding company structure as a single possessor? Is there a differ-
ence between the parent of a wholly-owned subsidiary and a parent of a
partially-owned subsidiary? Should the Japanese legal system adopt an
analysis similar to that found in the American Copperweld case and its
progeny? The Court is unlikely to enter this arena. Instead, the Court
will likely adopt a general rule that treats all members of the holding
compny as one for purposes of possessor analysis. The determining fac-
tors will likely be whether the possessor for whose benefit the document
was made will be significantly injured, and whether the entity to whom
the document was sent and who is in possession would, as a matter of
Japanese norm, be considered an appropriate entity to receive the docu-
ment. It is unlikely that technical questions of the juridical relationship of
preparer and possessor will be considered.

It seems clear that only the possessor ordered to produce or the re-
questor denied production have standing to appeal a production order.
Thus, if the document is in the hands of a third person who is not a party
to the litigation, the party whose cause might be hurt by production lacks
standing to appeal the production order. But does such party have stand-


424. In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 742, 767 (1984), the Supreme Court held that there was an economic unity between a parent corporation and a wholly owned subsidiary because there was only one economic actor and only one economic mind. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 742, 767–77 (1984). Thus, the parent and subsidiary could not conspire to violate the antitrust laws. Id. at 777. See also Texaco Inc. v. Dagher, 547 U.S. 1 (2006); Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d. 1027 (9th Cir. 2005) (economic unity test applied in a Sherman Act Section 1 case where separate entities had common objective and were not competitors).

ing to object to the request for production in the first instance? Does the lack of standing to appeal mean that the party has no standing to raise the self-use exception when a motion to order production has been made? After all, the party is not the possessor, and if the possessor of the document has no objection to production, why should the party have any right to object? The answer may lie in the nature of “voluntary” production by a third person.

If a third person possesses a document, he may volunteer that document to a party to use in litigation, assuming no other legal bar exists, such as a confidentiality agreement. On the other hand, a third person in possession of a document may be unwilling to produce without a court order, even when they have no objection to production. The order, issued by government authority, may provide the needed societal lubricant for the possessor, who would otherwise be seen as volunteering to produce. Since Japanese courts lack general injunctive powers, a determination by the court not to enter an order requiring production does not obligate the third person possessor to refuse to voluntarily produce. Nonetheless, if the requestor resorted to the court, it is likely that a court’s refusal to enter such an order (or to suggest that production be made) would have a chilling effect on attempts by the requestor to obtain voluntary production. In such a situation, it makes sense for the objecting party to present its objections to the court. Limiting the right to make such arguments to the first-level trial court is consistent with the Supreme Court’s determination that only the possessor ordered to produce or the requestor denied production may appeal to the High Court.426

D. Reconciling the Freedom of Information Act and the 1996 Code

The Supreme Court has interpreted the 1996 Code to be less lenient on the government and has required production even when state secrets are involved. These cases may be instructive when the Japanese Freedom of Information Act is tested in the Supreme Court.427 Under the FOIA:

426. See Case No. 35 of 1999, 54 MINSHÔ 2709 (Sup. Ct., Dec. 14, 2000), translation available at http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..35.html. Allowing the party adversely affected to present its position to the District Court is also consistent with article 223 of the 1996 Code, which allows an entity whose private secret is in government possession an opportunity to object when the secret would be revealed if the document request were granted. See MINSHÔ, art. 223.

There are six broad categories of exemptions. Documents can be withheld if they contain information about a specific individual unless the information is made public by law or custom, is necessary to protect a life, or relates to a public official in his public duties; corporate information that risks harming its interests and was given voluntarily in confidence; information that puts national security or international relations or negotiations at risk; information that would hinder law enforcement; internal deliberations that would harm the free and frank exchange of opinions or hinder internal decision-making; business of a public organ relating to inspection and supervision, contracts, research, personnel management, or business enterprise. Exempted information can be disclosed by the head of the agency “when it is deemed that there is a particular public-interest need.” The head of the agency can also refuse to admit the existence of the information if answering the request will reveal the information.\textsuperscript{428}

Article 220 of the Code also specifically exempts government documents from production, providing that it is: “a document containing official secrets held by public officials, which is likely to harm the public interest or significantly hinder the performance of public duties when it is produced.”\textsuperscript{429} Yet to be worked out by the Supreme Court is the relationship between the FOIA and the requirements for production of government-held documents.\textsuperscript{430}

The Supreme Court has held that company secrets disclosed to the labor investigators in the course of an investigation became government secrets once integrated into the investigator’s report.\textsuperscript{431} The secrets in-

\textsuperscript{428} See Banisar, supra note 412. Of particular relevance here is article 5(5), which exempts from disclosure “information concerning deliberations, examinations, or consultations internal to or between either organs of the State . . . [or] local public entities . . . that, if made public, would risk unjustly harming the frank exchange of opinions or the neutrality of decision making . . . .” Minsohō, art. 5, para. 5.


\textsuperscript{430} For a discussion of the needs for greater disclosure in Japan, see C. Raj Kumar, Corruption in Japan—Institutionalizing the Right to Information, Transparency and the Right to Corruption-Free Governance, 10 New Eng. J. Int’l & Comp. L. 1 (2004).


“Official secrets held by public officials” thus construed should be deemed to include not only secrets relating to affairs under the control of public officials
volved in that case did not implicate the FOIA because they were not
given to the investigators voluntarily (the Labor Law compelled disclo-
sure), nor were they given in confidence.432 But it is easy to contemplate
a situation where private information is given voluntarily yet is also con-
fidential. While exempt from general public disclosure under the FOIA,
would this kind of private secret be converted into a public secret exempt
from production? It is likely that a court’s analysis would turn on
whether disclosure by the government would adversely affect the gov-
ernment’s ability to carry out its public interest functions.

While the Court has concluded that an employer could not refuse to
cooperate with the government when the law requires disclosure,433 the
analysis could change where the information is given voluntarily. The
principle expounded by the High Court—namely that disclosure would
restrict the government’s access to information, injuring its ability to per-
form its functions—would apply, rendering disclosure in this context
inappropriate.434

but also secrets of private persons that public officials came to know in the per-
formance of their duties, which are likely to damage the relationships between
the public officials and the private persons and hinder fair and smooth opera-
tion of public duties when they are disclosed.

Article 223 of the 1996 Code recognizes a right for the government to refuse to
produce private secrets contained in government documents and also gives the
private party whose technical or business secrets might be disclosed an oppor-
tunity to present its reasons for non-disclosure.

Id. (citing MINSOH Ō, art. 223).  
432. See Gyōsei kikan no hōyūsuru jōhō no kōkai ni kansuru hōritsu [Law Concerning
Access to Information Held by Administrative Organs], Law No. 42 of 1999, art. 5, para.
433. See Case No. 11 of 2005, 59 MINSHŪ No. 8 (Sup. Ct., Oct. 14, 2005), translation
11.html.
434. Id. The Court reasoned:

[I]t cannot be denied that if, when workers and subcontractors have provided
information on industrial accidents, the fact that they provide information or the
contents of the information were easily made public, some of such persons
concerned would provide the investigators in charge with only insufficient in-
formation, for fear of reprisals of the employer disadvantaged by the provision
of information. . . . Therefore, the disclosure of the Document would damage
the relationships of trust between the workers and the Investigators in Charge,
which seems likely to hinder the investigators from hearing statements of the
persons concerned, an extremely important duty for identifying the safety con-
control system at workplaces and the cause of accident in similar types of accident
investigation.
Article 220 of the 1996 Code defines the categories of documents that are subject to court-ordered production, illustrating that document production is neither automatic nor, like the United States system, under the parties’ control. Article 223 of the 1996 Code, which deals with court orders, specifically requires that the government be given notice and the opportunity to object when a party seeks production of government documents. The government is then given an opportunity to object to the production. Article 223 also contains special exemption provisions for government documents, one of which tracks one of the six FOIA exemptions: “[t]he document is likely to impair national security, harm the relationships of trust with foreign countries or international organizations, or put Japan at a disadvantage in negotiation with foreign countries or international organizations.”

While the FOIA does not contain a provision allowing a court on an appeal of an FOIA determination to conduct an in camera review of the materials requested, the 1996 Code does. Under article 223, the court has authority to examine reasons given by the government supporting its objection to production and should deny production if there is good reason for the official’s position. In making this determination, the 1996 Code directs the court to conduct an in camera examination of the document at issue so that it can evaluate the reason given against the information contained in the document. Although the Supreme Court has yet to apply article 223 to order production, it has indicated that the government must have sufficient and good reasons to refuse document production. It appears that while production of government documents is not to be rejected lightly, good reasons must be submitted to the court to sustain such a finding. It is likely that the government has received this message and it will be easier for future litigants to obtain government documents when there is no state secret involved. Or, at least it will be more diffi-

Id. The High Court noted that the employee’s concern was not with personal privacy, but with reprisal against their employer. Id. This reflects the need to protect the corporate community.

435. Although the Code calls for court orders to produce documents, it is more likely that the court will request that the documents be produced, using its authority to compel only if necessary. See MINSOHō, art. 223.

436. See id. art. 223.

437. Id.

438. See MINSOHō, art. 223, paras. 3–5.

439. This being said, it does not mean that the government will not try to devise new means for avoiding production of documents it wishes to keep confidential. With the passage of a privacy law designed to protect certain personal privacy interests of individuals from disclosure by private corporations, it is likely that the government will make
cult for the government to withhold documents on the basis of government secrets than has been the case in the past.

CONCLUSION

_Fuji Bank_ appeared to be a major setback to those who sought a more relaxed standard for production, but the decision aligns with Japanese norms of community and harmonious decision making. _Fuji Bank_ changed the pre-1996 Code judicial interpretation of what constituted a self-use document and implicitly rejected the views of Professors Tani-guchi and Mochizuki that the 1996 Code changed the presumption that a document should be produced. Since _Fuji Bank_, the Court’s decisions appear to both protect the decision-making functions of the corporate community while also furthering and strengthening the norms of harmony and community within the corporation. The Supreme Court’s focus on and protection of the sanctity of decision-making documents is consistent with the historic and cultural values of the Tokugawa village and feudal family structure and reinforces their analogies in their modern surrogate, the corporate employer in a lifetime employment system.

Clearly, distribution of internal memos is an important part of the free flow of information within an organization that is important to the proper functioning of the entity. The free flow of information can positively affect morale, sales, manufacturing, and much more. All of these positive effects may flow even when the information sent does not implicate privacy concerns or disclose trade secrets. Yet, the Court, in its decision allowing production of a bank’s internal correspondence setting out bank policy, does not explore whether the production of the documents might adversely effect the free flow of information from management to employees or from the home office to branches. If production adversely affects the free flow of information within the organization, it might very well cause the company to restrict the type and volume of information the company shared between head offices, branches, management, and employees. The Court seems focused solely on the free flow of information for decision-making purposes, the fact pattern found in _Fuji Bank_.


This focus exposes some internal administrative documents to production orders—but it also protects the Japanese norms of community and harmony in decision-making.

Similarly, the Court allowed production of factual information in investigative reports that have the public interest as their ultimate goal—in a decision about a government labor investigation, and in another decision dealing with an investigative report prepared for the administrator of a failed insurance company. In both cases, although the subject of the investigation did not instigate the investigation, the public interest served by the investigation was a major factor in the Court’s decisions. Where a company commissions an external independent investigation to serve both a company goal (e.g., restoring public confidence in the company) and a public goal (e.g., protecting the public from a potentially unsafe product), the preparer and possessor will be different juridical entities. Recognizing the legal difference between the preparer and possessor of the document, as well as the public interest in the investigation report, would allow courts to order production of at least some information in independent investigative reports.

On the other hand, ordering production of investigative reports, as a general matter, could spell the end of outside independent investigations and could inhibit the free flow of material that company executives need to make decisions. How the Court will expand or restrict these outside investigative reports in the private sector remains to be seen. Perhaps the Court will develop an ad hoc rule based on the undefined special circumstances exception in Fuji Bank, enabling it to protect the free flow of decision-making information to management while recognizing the public’s need for factual information in some circumstances.

Additionally, the Court appears to have relaxed the definition of a relationship document to include documents that are not mutually executed by the parties and to include some of the documents underlying the creation of the relationship. The provision of article 220 of the 1996 Code that allows a party access to documents where that right is secured in substantive law, has also been relaxed. Thus, although there may not be a specific statutory provision that grants a party a right to have a document produced, it may be sufficient that one party has a legal duty to keep records, and refusing access to those records would be a breach of good faith or an abuse of rights—especially if there is administrative guidance to permit access.

It must be remembered that what is at stake in these cases is not discovery in the American legal sense, but production of documents. A party seeking production still has a high hurdle when making a case for production of documents. Most smoking gun documents are likely to be related to decision making, and thus fall within the self-use exception. Still, the recent cases are a departure from the more restricted rule of Fuji Bank, a literal reading of the 1996 Code, and diverge from the Old Code’s judicial doctrine of self-use. The Supreme Court’s emerging doctrine, while somewhat opening production to administrative corporate documents, keeps the door closed to the production of decision-making documents, both of which further the cultural value of community in the corporate setting.

It remains to be seen how far the Supreme Court will go in liberalizing the document production rules. It is likely that additional cases dealing with the interpretation of the 1996 Code will be forthcoming. Meanwhile, lower courts, especially those that have previously shown themselves to be more accommodating to document production than the Supreme Court, may well read these recent cases as allowing them greater discretion in ordering parties to produce documents. As the Japanese courts cautiously proceed to define the boundaries of document production under the 1996 Code, it is likely that the notions of context, custom, and community will continue to guide the doctrine.
EXTRADITION AS A TOOL FOR UNITED STATES ANTITRUST ENFORCEMENT: IMPLICATIONS OF THE U.K. DECISION

NORRIS v. SECRETARY OF STATE FOR THE HOME DEPARTMENT

INTRODUCTION

Foreign executives who violate U.S. business laws can no longer seek refuge behind their own borders to avoid the U.S. criminal justice system. In 2005, for the first time, the United States convinced a foreign court to order the extradition of a foreign national indicted on a U.S. antitrust charge. Although extradition treaties are typically negotiated to aid law enforcement in prosecution of transnational crimes like terrorism and drug trafficking, extradition is increasingly being used to pursue white-collar criminals between the United States and the United Kingdom. The availability of extradition for a price fixing offense has the potential to expand the extraterritorial reach of U.S. antitrust laws and policies, and may have significant implications for international antitrust enforcement.

In Norris v. Secretary of State for the Home Department, the Queen’s Bench Administrative Court of England (the “Court”) upheld an order


2. See Hammond Speech, supra note 1, at 2.

3. See Joanne O’Connor, Retired City Exec Fights Extradition to US as Lopsided Treaty Comes Into Play, THE LAWYER, May 9, 2005 (“Since the Extradition Act’s inception, the US has filed 43 applications for extradition. And more than half of these—22—are for white-collar offences.”).


5. The Queen’s Bench Administrative Court is the High Court of the United Kingdom that hears appeals from extradition decisions of the Magistrates’ Court. See Extradition Act, 2003, c. 41, §§ 103, 108 (U.K.). Further appeals are made to the House of Lords, the highest court of the United Kingdom, upon certification by the High Court. See Extradition Act, 2003, c. 41, § 114; see also House of Lords Briefing,
made under the Extradition Act 2003 to extradite Ian P. Norris to the United States to face price fixing and obstruction of justice charges. As a result, Norris, the former CEO of the British corporation Morgan Crucible Company ("Morgan"), was confronted with extradition to the United States to face a 2003 indictment from the Eastern District of Pennsylvania for charges related to his involvement in an international cartel in the carbon products market. This ruling is a significant development in international antitrust enforcement, particularly because the U.S. Department of Justice has placed high priority on the aggressive pursuit of international cartels.

http://www.parliament.uk/documents/upload/HofLBpJudicial.pdf (last visited Nov. 9, 2007) (providing an overview of the House of Lords' judicial functions). The Bow Street Magistrates' Court presided over Norris's extradition hearing, and held that price fixing and obstruction of justice charges were extraditable offenses under the Extradition Act 2003.


The term cartel is increasingly used in countries with competition laws throughout the world to refer to a pattern of collusive behavior by competing firms that typically involves the following: participating in meetings and conversations to discuss prices and volumes; agreeing to fix, increase, and maintain prices at certain levels; agreeing to allocate among the corporate conspirators the approximate volume to be sold by them; exchanging sales and customer information for the purpose of monitoring and enforcing adherence to the above-described agreements; issuing price announcements and price quotations in accordance with the above-described agreements; and/or selling at the agreed-upon sales volume allocations.

Id. A hard core cartel is a clear agreement among competitors to control the market, most commonly in the form of price fixing. Contrast a hard core cartel with a cartel characterized by ambiguous conduct that could potentially serve the market. See ELEANOR M. FOX, ET AL., U.S. ANTITRUST IN A GLOBAL CONTEXT 78 (2d ed. 2004).

12. Recently, the United States Department of Justice Antitrust Division has focused on bringing criminal enforcement proceedings against international cartels that affect U.S. commerce. See MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER, A GUIDE TO THE OPERATION OF UNITED STATES, EUROPEAN UNION AND OTHER KEY COMPETITION LAWS IN THE GLOBAL ECONOMY 131 (2006); Hammond Speech, supra note 1, at 1–2. Current Department of Justice efforts emphasize individual accountability and "vigorous
This development concerns the U.K. business community. It also concerns Parliament that the United Kingdom’s current extradition legislation gives the United States great freedom to extradite U.K. citizens, but no reciprocal arrangement exists to protect U.K. interests or to grant such latitude to the United Kingdom when seeking extradition from the United States. If the House of Lords, which has granted Norris leave to appeal, upholds the ruling that Norris should be extradited to the United States to face criminal antitrust charges, the United States will undoubtedly continue to pursue extradition to enforce its antitrust laws in the United Kingdom. This will certainly alter the landscape of international antitrust enforcement. If other countries follow the United Kingdom’s lead, the United States will have the opportunity to impose American antitrust ideals across the globe. This Note argues that the High Court should have reversed the lower court’s ruling in Norris because the statutory requirement of dual criminality was not satisfied. It will also consider the impact on global antitrust enforcement if the Norris decision is ultimately upheld by the House of Lords, and propose that the United States should not use extradition to broaden the reach of its antitrust law and policy.

Part I of this Note outlines the framework of U.S.-U.K. extradition law between the United States and the United Kingdom. Part II discusses the developments that gave rise to the Norris case, including the U.S. indictment and the U.K. extradition decision. Part III discusses the significance of international antitrust enforcement, compares cartel and extraterritorial jurisdiction policy in the United States and the United Kingdom, and considers arguments for and against extraditing antitrust violators. In conclusion, this Note explains why the Norris case was decided
incorrectly and argues that the United States should limit its pursuit of extradition of foreign antitrust offenders as a matter of policy.

I. EXTRADITION BETWEEN THE UNITED STATES AND UNITED KINGDOM

The United States and the United Kingdom have a long history of extradition relations that dates back to 1794. Until recently, extradition procedure between the two countries was governed by the 1989 Extradition Act ("1989 Act") in conjunction with the U.K.-U.S. Treaty of 1972 and a 1985 supplemental treaty (collectively, the "1972 Treaty"). In 2003, the United States and the United Kingdom signed a new Treaty on Extradition ("2003 Treaty") to simplify the existing regime and accelerate extradition between the two countries. After more than two years, the 2003 Treaty was ratified by the United States Senate on September 29, 2006. Still, an imbalance exists because the evidentiary requirements for each country are not parallel.

Before the United States ratified the 2003 Treaty, the United Kingdom passed the Extradition Act 2003 ("2003 Act"), which repealed the 1989 Act. The 2003 Act essentially implemented the terms of the 2003 Treaty by including the United States as one of the countries to which it will extradite. The 1972 Treaty was still in force even after the 2003 Act took effect, which complicated the extradition landscape between the United States and the United Kingdom. The evidentiary requirements


of the 1972 Treaty were greater than those of the 2003 Act.\(^23\) However, U.S. ratification of the 2003 Treaty has brought the bilateral agreement into conformity with the U.K legislation.\(^24\)

The 2003 Act created new extradition procedures for all of the United Kingdom’s extradition partners, including the United States.\(^25\) Like the 2003 Treaty, the 2003 Act created a more flexible regime for extradition in response to the September 11, 2001 terror attacks in the United States.\(^26\) A significant, and controversial, element of the 2003 Act is Order 2003 (S.I. 2003/3334).\(^27\) The Order specially designates the United States as a territory for purposes of certain sections of the 2003 Act,\(^28\) which effectively exempts the United States from the Act’s requirement to provide prima facie evidence in support of an extradition request.\(^29\) As a result of this special designation, the United States is merely required

\(^{23}\) Article IX of the 1972 Treaty provides that “[e]xtradition shall be granted only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party.” Treaty on Extradition between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., Oct. 21, 1976, 28 U.S.T. 227, available at 2003 WL 23527406. This issue is central to Norris’s argument in Norris. See infra Part III.C.1.

\(^{24}\) See Norris, [2006] EWHC 280, para. 35 (“If the 2003 Treaty is ratified by the United States, the inconsistency between the designation and the express terms of the extant Treaty would disappear and citizens of the United Kingdom would cease to have any enforceable right based on it.”).

\(^{25}\) The Extradition Act 2003 is organized into two parts, Part 1 applying to Category 1 territories, and Part 2 applying to Category 2 territories. See Julian B. Knowles, Blackstone’s Guide to the Extradition Act 2003 4 (2004). Category 1 territories are Belgium, Denmark, Finland, Ireland, Portugal, Spain, and Sweden. See Extradition, 2003, S.I. 2003/3333, art. 2, para. 2. Part 1 introduces new extradition procedures, including a statutory appeal process and reduced involvement of the Secretary of State. Id. A country may not be a Category 1 territory if it has the death penalty for criminal offenses. See Extradition Act, 2003, c. 41, § 1(3). Additionally, Part 1 of the 2003 Act implements the European Arrest Warrant. See Knowles at 6. The United States is one of over 100 Category 2 territories. See SI 2003/3334, art. 2.

\(^{26}\) See Joshua, supra note 11, at 12; Harris, supra note 13. In addition, the United Kingdom was motivated to revise its extradition legislation after Spain’s attempt in 1998–2000 to extradite General Augusto Pinochet from the United Kingdom for crimes against humanity. See Knowles, supra note 25, at 3–4.


\(^{28}\) Statutory Instrument 2003/3334 paragraph 3 designates Category 2 territories for purposes of section 71(4), 73(5), 84(7), and 86(7) of the Act. Id.

\(^{29}\) Id. at Explanatory Note.
to provide “information,”30 a low standard that facilitates a relatively simple and speedy United States extradition request from the United Kingdom.31 However, even with ratification of the 2003 Treaty, the United Kingdom is not afforded the same luxury when requesting extradition from the United States.32

A critical reform of the 2003 Treaty was adoption of a dual criminality requirement, where an offense is extraditable only if the conduct is criminalized in both systems.33 The reform replaced the “list” system, in which extraditable offenses were enumerated.34 The 2003 Act also adopted a dual criminality requirement, requiring that the conduct for which extradition is requested is punishable with imprisonment for one year or greater in both the United Kingdom and the Category 2 territory.35 Modern extradition treaties often adopt a dual criminality requirement to determine whether an act is an extraditable offense,36 so this reform is not extraordinary in comparison to other extradition treaties. However, the broader definition of what constitutes an “extraditable offense” under the new regime complicated the Norris extradition.

A. Defining “Extradition Offense” Under the 2003 Act

The 2003 Act defines “extradition offense” differently for two contexts, one for persons not sentenced for the offense, and the other for persons so sentenced.37 The defendant’s “conduct” is the essential concept

31. See Extradition Act, 2003, c. 41, § 84(7) (permitting the Secretary of State to exempt a territory from the need for prima facie evidence requirement of section 84(1)).
32. The United Kingdom must show “probable cause” in U.S. extradition requests. See Extradition Treaty, S.TREATY DOC. NO. 108-23, art. 8. In Norris, a central argument is that the evidentiary terms of the 1972 Treaty directly conflict with the evidentiary terms of the 2003 Act. See Norris, [2006] EWHC 280, para. 34. The Court rejected this argument. See infra p. 15.
33. See Joshua, supra note 11, at 12.
34. Id.
35. See supra note 25 for Category 2 territory definition; Extradition Act, 2003, c. 41, §§ 137–138; KNOWLES, supra note 25, at 12, 22.
37. See Extradition Act, 2003, c. 41, §§ 137–138; KNOWLES, supra note 25, at 18. Norris was not sentenced, thus the applicable definition of “extradition offense” can be found in section 137. See Norris, [2006] EWHC 280, para. 2. This Note will address extradition between the United States, a Category 2 territory, and the United Kingdom under the 2003 Act. The definition of “extradition offense” for Category 1 territories may be found in part 1, sections 64–65 of the 2003 Act.
in section 137 of the 2003 Act. Section 137 provides that conduct must meet a dual criminality requirement. Different subsections of section 137 apply depending on where the conduct occurred in relation to the United Kingdom and the Category 2 territory.

1. Section 137(2)(a)—Where Did the Conduct Occur?

Section 137(2)(a) requires the conduct to have occurred in the Category 2 territory in order to constitute an extradition offense. The High Court of Justice Queen’s Bench Division (“Queen’s Bench”), in Birmingham & Others v. The Director of the Serious Fraud Office, interpreted section 137(2)(a). The central issue in Birmingham was whether section 137(2)(a) is only met if the defendant’s conduct targeted the Category 2 territory, yet did not exclusively occur there. The defendants in Birmingham urged the Queen’s Bench to find that 137(2)(a) was not met because their conduct caused no harm in the United States, only in the United Kingdom, and their conduct did not target the United States. The Queen’s Bench rejected this argument, and held that when the defendants’ conduct took place outside the Category 2 territory and when the harmful effects were felt there, it qualifies as conduct that occurred in the Category 2 territory and therefore meets the requirements of

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38. See The Queen on the Application of Birmingham & Others v. The Director of the Serious Fraud Office [2006] EWHC 200, para. 81 (“The critical concept in s.137 is the defendant’s ‘conduct.’ ”).
40. See id.; KNOWLES, supra note 25, at 18. Section 137(2) applies when the conduct occurs in the Category 2 territory. Section 137(3) applies when the conduct occurs outside the Category 2 territory. Section 137(4) applies when the conduct occurs outside the Category 2 territory and no part of it occurs in the United Kingdom. This section will discuss section 137(2) because that is the relevant subsection for the Norris case.
41. See Extradition Act, 2003, c. 41, § 137(2)(a) (“The conduct constitutes an extradition offense in relation to the category 2 territory if these conditions are satisfied—(a) the conduct occurs in the category 2 territory . . . ”).
42. In Birmingham, the United States sought extradition of three British executives for fraud related to the affairs of Enron Corporation. See Birmingham, [2006] EWHC 200, para. 20. The executives were employed in London by the bank Greenwich NatWest, and they are each citizens and residents of the United Kingdom. Id. The executives challenged the extradition order from Bow Street, arguing that if they were to be tried at all it should be in England. Id. para. 57. The executives reasoned that the conduct that gave rise to the charge in the United States prosecutors’ case occurred in the United Kingdom, and the victim of the alleged fraud was a U.K. institution, thus the requirements of section 137(2) were not met. Id. para. 83.
43. Id. para. 84.
44. Id. para. 83.
45. Id.
section 137(2)(a). Thus, the Queen’s Bench held that 137(2)(a) was satisfied because the defendants’ “alleged conduct substantially took place . . . in the United States, as well as in the United Kingdom.”

2. Section 137(2)(b)—Is Dual Criminality Met?

Section 137(2)(b) introduces the dual criminality requirement of an extradition offense. Dual criminality is an essential principle, one that the House of Lords has said “lies at the heart of [the United Kingdom’s] law of extradition.” Dual criminality may be satisfied even when the conduct complained of in the requesting territory does not have a “precise equivalent” offense in the United Kingdom. The judge at the extradition hearing is not required to find a matching offense, but is required to consider the conduct that instigated the foreign charge and determine whether that conduct would constitute an offense in the United Kingdom, had it occurred there.

B. The U.S.-U.K. Extradition Regime—Political Reaction and Legislative Response

The U.S. delay in ratification of the 2003 Treaty became a significant political issue in the United Kingdom. The primary objection to the

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46. See Bermingham, [2006] EWHC 200, para. 84.
47. Id. para. 86.
48. See Extradition Act, 2003, c. 41, § 137(2)(b) (“The conduct constitutes an extradition offense in relation to the category 2 territory if these conditions are satisfied...(b) the conduct would constitute an offense under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom.”). The “relevant part of the United Kingdom” is defined in section 137(8)(a) as “the part of the United Kingdom in which the extradition hearing took place, if the question of whether conduct constitutes an extradition offense is to be decided by the Secretary of State.” See Extradition Act, 2003, c. 41, § 137(8).
49. In Re Al-Fawwaz, [2001] UKHL 69, para. 94.
50. See Howard Welsh, Lee Hope Thrasher v. Sec’y of State for the Home Dep’t, [2006] EWHC 156 (Admin.), para. 24 (finding that dual criminality was satisfied when “the conduct which constitutes the US offense of mail fraud in relation to forged instruments would constitute the offense of forgery in England”).
51. Unpublished decision by District Judge Nicholas Evans, Gov’t of the United States of America v. Ian P. Norris, June 1, 2005 [hereinafter Magistrates’ Court Decision] (on file with author).
2003 Treaty was the lack of reciprocity, that is, that the evidentiary standards were unbalanced. A particular area of concern was that the U.K. government essentially waived its citizens’ rights with the 2003 Act and potentially subjected them to “oppressive legal action” from foreign powers. One commentator even urged that the United Kingdom “should tear up [its] signature” before the “one-sided treaty” was ratified by the United States. Additionally, U.K. citizens were skeptical of the 2003 Treaty because it was negotiated and signed in secret, so there was no opportunity for parliamentary scrutiny. Many voiced concerns that U.S. officials are unpredictable and, absent a requirement to provide evidence, will embark on “fishing expeditions.”

Soon after the 2003 Act took effect, its critics urged Parliament to terminate the 2003 Treaty, requested a new Order revoking the United States’ special designation, and proposed amendment of Part 2 of the 2003 Act to permit refusal of extradition where the alleged offense was committed wholly or mainly in the United Kingdom. Most recently, the House of Commons included 2003 Act amendments in proposed legislation. As the bill progressed through Parliament, the House of Lords

TIMES UK, Oct. 18, 2006; Michael Binyon, One-Sided Treaty Was Meant to Handle Terrorist Suspects, LONDON TIMES, June 28, 2006.

53. See 673 PARL. DEB. H.L. (5th ser.) (2006) 404 (Lord Goodhart of the House of Lords stated that “[t]he 2003 treaty is unfair because it is not reciprocal”); Smith, supra note 18; Eoin O’Shea, U.K. Businesses Need to Beware the Long Arm of U.S. Law, THE LAWYER, August 14, 2006 (“[T]he effect in law is that Britons are uniquely vulnerable to extradition to the U.S., where they are likely to face lengthy delays before trial, high and irrecoverable costs, much higher sentences and an unfamiliar legal playing field.”). In addition to the lack of reciprocity, Lord Goodhart set forth four reasons why the United Kingdom should not agree to extradition to the United States without evidence: (i) the variable standard of justice in the United States, i.e. fifty-one different jurisdictions with standards ranging from “good” to “very bad;” (ii) lack of adequate legal aid in the United States for those who can not afford a lawyer; (iii) excessive plea bargaining in the United States; and (iv) increasing use of extraterritorial criminal legislation by the United States, especially in fraud cases. See 667 PARL. DEB. H.L. (5th ser.) (2004) 713.


55. Smith, supra note 18.


57. Smith, supra note 18.

58. Either state may terminate the treaty at any time pursuant to Article 24 of the 2003 Treaty, and termination becomes effective six months after receipt of notice. See Extradition Treaty, S.TREATY DOC. NO. 108-23, art. 24.


60. The House of Commons introduced the Police and Justice Bill on January 25, 2006. The bill primarily contains police reform measures, and also includes miscellaneous items such as amendments to the Extradition Act 2003. See Police and Justice Bill,

The House of Commons disagreed with the Lords’ proposed amendment,\footnote{See Commons Amendments to Lords Amendments, H.C. Bill [230] (Oct. 25, 2006).} and the resulting legislation did not include such a provision.\footnote{See Police and Justice Act, 2006, c. 48, sched. 13.}

The political melee in the United Kingdom surrounding the 2003 Treaty and the 2003 Act applied pressure on the United States to ratify the treaty.\footnote{See Hearing on the U.S.-U.K. Extradition Treaty Before the Senate Foreign Relations Committee, 109th Cong. (2006) [hereinafter Committee Hearing] (statement of Samuel L. Witten) (“[O]ur delay in ratification has become a major political issue in the United Kingdom. The issue is being seen by the British media and public as a question of good faith on the part of the United States. Inaction on our part . . . is undermining British public opinion that we are a reliable ally.”); Tim Reid, Senate is Warned of Discontent Here, TIMES UK, July 22, 2006.} The U.S. Senate Foreign Relations Committee (“Committee”), the group charged with reviewing treaties negotiated by the executive branch, met in July 2006 to hear testimony on the 2003 Treaty.\footnote{See Committee Hearing, supra note 64 (statement of Sen. Richard Lugar).} At that hearing, Paul J. McNulty, Deputy Attorney General, urged the Committee to approve the 2003 Treaty because of its law enforcement benefits.\footnote{Id. (statement of Paul J. McNulty).} He highlighted the advantage of exemption from showing prima facie evidence in extradition requests.\footnote{Id.} Additionally, McNulty cautioned the Committee that failure to approve the Treaty would have
serious negative consequences, emphasizing the United States’ relationship with the United Kingdom and pressure there on Parliament to correct the imbalanced extradition relationship. Following this Committee hearing in July 2006, the Senate ratified the treaty on September 29, 2006.

II. THE NORRIS EXTRADITION

The Norris decision was one of the catalysts that brought discussion of the unbalanced evidentiary standards of the 2003 Act to the forefront of discussion in the United Kingdom, both in the legal community and among the citizenry. This case lies at the intersection of extradition and antitrust law, and marks a significant step towards expanding the reach of United States antitrust enforcement globally. The recent change in the perception of price fixing in the United Kingdom, where it is now regarded as unequivocally criminal, has made extradition available, an avenue of cooperation only available in the realm of criminal law.

A. Norris’s U.S. Indictment

In 1999, a federal grand jury in the Eastern District of Pennsylvania initiated an investigation into U.S. federal antitrust offenses involving carbon products manufactured and sold by Morgan. Morgan was involved in an industry wide price fixing conspiracy to coordinate prices for carbon products sold in the United States. Norris, a Morgan employee and company officer, allegedly conspired in organizing and operating the cartel. Additionally, Norris allegedly interfered with the United States’ investigation by organizing co-conspirators to provide false information, preparing a script for cartel participants to follow if...
questioned by the Antitrust Division of the Department of Justice or the federal grand jury, and destroying business files containing evidence of the anticompetitive agreement.75

Morgan is headquartered in Windsor, England76 and has two United States subsidiaries.77 Norris was Chairman of the Carbon Division of Morgan from 1986 through 1998.78 Subsequently, Norris was Morgan’s CEO from 1998 through 2002.79 While Norris was a Morgan employee, the company was a major global manufacturer of carbon and maintained a dominant market share in the United States.80

Norris was indicted in the Eastern District of Pennsylvania in September 2003 for obstruction of justice and conspiracy charges.81 A superseding indictment was filed in October 2003, which added price fixing conspiracy charges.82 In September 2004, a second superseding indictment was filed which made reference to sentencing guidelines.83

B. Norris’s U.K. Extradition

English authorities issued an arrest warrant for Norris at the request of the U.S. Department of Justice on December 31, 2004, and Norris was arrested on January 13, 2005.84 The Bow Street Magistrates’ Court held the extradition hearing on May 10–12, 2005,85 at which the District

75. Norris Indictment, supra note 72, at 3.
76. Id. at 1.
77. Morganite, Inc. is a subsidiary located in North Carolina, and Morgan Advanced Materials and Technology, Inc. is located in St. Mary’s, Pennsylvania. See Norris, [2006] EWHC 280, para. 5.
78. See Norris Indictment, supra note 72, at 1.
79. Id.
81. See Norris Indictment, supra note 72. The specific charges include: (i) violation of 18 U.S.C. § 37, conspiracy to commit offense or to defraud United States, (ii) violation of 18 U.S.C. § 1512(b)(1), knowingly . . . corruptly persuades another person . . . with intent to influence, delay, or prevent the testimony of any person in an official proceeding, and (iii) violation of 18 U.S.C. § 1512(b)(2)(B), to cause or induce any person to alter, destroy, mutilate, or conceal and object with intent to impair the object’s integrity or availability for use in an official proceeding.
82. See United States of America v. Ian P. Norris, Criminal No. 03-632, Superseding Indictment (E.D. Pa. Oct. 15, 2003). The additional charge was violation of the Sherman Act, 15 U.S.C. § 1 (“every contract . . . in restraint of trade or commerce . . . with foreign nations, is declared to be illegal.”).
83. See Norris Second Superseding Indictment, supra note 73.
84. See Norris, [2006] EWHC 280, para. 16.
85. See Extradition Act, 2003, c. 41, § 139(1)(a) (“The appropriate judge is, in England and Wales, a District Judge (Magistrates’ Court) designated for the purposes of this Part by the Lord Chancellor . . . .”).
Judge concluded that no factors existed to properly bar Norris’s extradition to the United States. The case was sent to the Secretary of State of the Home Department (“Secretary of State”) for a final extradition decision, and on September 29, 2005, he ordered Norris’s extradition. Norris appealed the decisions of the District Judge and Secretary of State, but failed to persuade the Queen’s Bench Administrative Court to overturn the order for his extradition. In January 2007, the High Court of the Queen’s Bench Division rejected Norris’s appeal. The House of Lords, the highest court in the United Kingdom, has granted Norris leave to appeal.

C. The Appeal—Norris v. Secretary of State for the Home Department

Norris appealed the Secretary of State’s extradition order under section 108 of the 2003 Act. The appeal encompassed two parts: (i) application for judicial review of the Secretary of State’s decision to refuse Norris’s request for removal of the United States as a designated territory and

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86. See Norris, [2006] EWHC 280, para. 16.
87. See Extradition Act, 2003, c. 41, § 70(1) (“The Secretary of State must issue a certificate under this section if he receives a valid request for the extradition to a category 2 territory of a person who is in the United Kingdom.”).
88. See Norris, [2006] EWHC 280, para. 17. The Secretary of State makes the extradition decision based on the judge’s decision from the extradition hearing. See Extradition Act, 2003, c. 41, §§ 70(1), 87(3), 93(4).
89. The Administrative Court is a division of the High Court Queen’s Bench that exercises supervisory jurisdiction over inferior courts and tribunals. See Her Majesty’s Court Service, http://www.hmcourts-service.gov.uk/cms/admin.htm (last visited Nov. 2, 2006).
90. See Norris, [2006] EWHC 280, para. 52.
91. Norris v. United States of America, [2007] EWHC 71 (Admin); see also Nikki Tait, High Court Upholds Norris Extradition, FIN. TIMES UK, Jan. 25, 2007 (“Two High Court judges dismissed arguments that the price-fixing charges of which Mr. Norris is accused were not a criminal offence in the UK at the time and could not be an ‘extradition offence’.”).
93. Section 108 provides: “If the Secretary of State orders a person’s extradition under this Part, the person may appeal to the High Court against the order.” Extradition Act, 2003, c. 41, § 108(1). The Extradition Act 2003 created a statutory right to appeal to the High Court and provides for a right of appeal to the House of Lords. The Act creates separate rights of appeal against decisions of the judge and against an extradition order made by the Secretary of State. See Bermingham, [2006] EWHC 200, para. 11. This process replaced the traditional process where an extradition defendant appealed by way of an application for a writ of habeas corpus as subjicientum. See KNOWLES, supra note 25, at 121–22.
(ii) statutory appeals regarding whether the offenses specified in the extradition request were “extradition offenses” under section 137 of the 2003 Act and whether any bars to extradition under the 2003 Act existed. The Court issued an opinion on the judicial review issue, and postponed consideration of the statutory appeals as the issue was pending in the Bermingham case.

1. Should the United States Remain a Designated Category 2 Territory?

Norris argued that the United States should be removed from the list of countries designated under the Part 2 Order of the 2003 Act. Norris’s position was that this designation, which exempts the United States from providing a prima facie case to extradite a U.K. citizen, was illegal and irrational because the designation under the 2003 Act contradicts the express terms of the 1972 Treaty. Additionally, Norris argued that the Secretary of State’s refusal to remove the United States from this list of designated territories was also illegal. The underlying substance of Norris’s argument was that the 1972 Treaty provided U.K. citizens with enforceable rights and protections, and that the Secretary of State’s designation of the United States as a Category 2 territory subject to a lower evidentiary standard violated those rights.

Additionally, Norris criticized the 2003 Act because the United Kingdom included the United States as a Category 2 territory based on the expectation that the 2003 Treaty would soon be ratified. Norris argued that the United Kingdom was misled and the Secretary of State’s Order was based on a misunderstanding. Interestingly, Norris’s argument echoes the political debate about the 2003 Act, and even implicates the criticism that there is a lack of reciprocity between the United States and the United Kingdom in extradition procedure.
The Court rejected Norris’s arguments, noting that the judiciary is not entitled to oversee the legislative process which led to the Order. The Court focused on the legality of the Secretary of State’s decision to refuse Norris’s request for removal of the United States as a designated territory, and held that it was a legally sound decision. Specifically, the Court stated that the 2003 Act grants the Secretary of State the power to make orders, which permitted the United Kingdom to grant other states greater assistance in the extradition process, and the 2003 Act does not restrict exercise of that power based on reciprocity. The Court noted that nothing in the 2003 Act suggests that designation is dependent on a bilateral treaty between the United Kingdom and the requesting country. In sum, the Court declined to compel the Secretary of State to remove the Order’s designation to incent the United States to ratify the 2003 Treaty, and refused to impair the Secretary’s powers under the 2003 Act by forcing him to remove the United States. Moreover, part of Norris’s argument is moot now that the 2003 Treaty has been ratified in the United States.

2. Is the Specified Offense an “Extradition Offense” Under Section 137?

The Court in Norris did not address whether or not the specified offense for which the United States was seeking Norris’s extradition was an “extradition offense” under section 137 because the Queen’s Bench was addressing its interpretation in Bermingham. At Norris’s extradition hearing, the Bow Street Magistrates’ Court found that the offenses specified in the United States’ extradition request did in fact meet the requirements, and thus were “extradition offenses” as defined in section 137. Norris challenged this finding in his appeal. In Bermingham, the Queen’s Bench discussed section 137 and its interpretation did not favor Norris. The Queen’s Bench holding in Bermingham precludes Norris’s argument that he should be tried in the United Kingdom for conduct that occurred there. Thus, Norris must rely on the argument that price...
fixing was not a crime in the United Kingdom when he allegedly participated in the carbon-products cartel, and the dual criminality requirement of section 137(2)(b) is not satisfied.\textsuperscript{113}

Cartel participation was not a crime in the United Kingdom until enactment of the Enterprise Act 2002.\textsuperscript{114} The United States charged that Norris engaged in price fixing from 1986 until 2000.\textsuperscript{115} During this period, the Competition Act 1998 ("1998 Act") took effect.\textsuperscript{116} The 1998 Act prohibited price fixing and market sharing agreements\textsuperscript{117} and imposed fines for violations,\textsuperscript{118} but did not impose a criminal penalty. Today, the Enterprise Act 2002 imposes criminal sanctions of up to five years imprisonment for individual cartel participation.\textsuperscript{119}

The lack of a criminal cartel offense during the time of Norris’s alleged violations did not impede the U.S. Department of Justice from arguing in Norris’s extradition request that the dual criminality requirement was met.\textsuperscript{120} Before the Enterprise Act 2002, the U.K. common law crime of conspiracy to defraud served to punish cartel participants where the agreement involved “dishonestly doing something prejudicial to an-

\begin{itemize}
  \item \textsuperscript{113} See Harris, supra note 13.
  \item \textsuperscript{115} See Norris Second Superseding Indictment, supra note 73, at 2.
  \item \textsuperscript{116} Competition Act, 1998, c. 41. The Competition Act 1998 was created to harmonize U.K. competition law with EU competition law. See Joelson, supra note 12, at 490. Prior to the 1998 Act, U.K. competition law was predominantly administrative, and "was perceived by many, although not all, to be toothless and ineffective." Mark Furse & Susan Nash, The Cartel Offence 3 (2004).
  \item \textsuperscript{117} See Competition Act, 1998, c. 41, § 2(2); James Flynn & Jemima Stratford, Competition, Understanding the 1998 Act 42 (1999).
  \item \textsuperscript{118} See Competition Act, 1998, c. 3, § 36; Flynn & Stratford, supra note 117, at 142.
  \item \textsuperscript{119} See Enterprise Act, 2002, c. 40, § 190 ("(1) A person guilty of an offense under section 188 is liable- (a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both . . . ."). Additionally, the Enterprise Act specifies that the cartel offense is an extraditable offense. Enterprise Act, 2002, c. 40, § 191.
  \item \textsuperscript{120} See Magistrates’ Court Decision, para. 5. See also, Joshua, supra note 11, at 12-13 ("[T]he Crown Prosecution Service, representing the U.S. government, seized on the closing of this loophole to argue that the underlying hardcore cartel conduct alleged was punishable in England—not as price fixing, but as common law conspiracy to defraud.").
\end{itemize}
other.” 121 The 2003 Act applies to offenses that were committed both before and after it came into force. 122 Thus, because the Magistrates’ Court found that conspiracy to defraud and the American price fixing charge met the dual criminality requirement, it deemed section 137(2)(b) satisfied and considered Norris’s conduct an extradition offense. 123

III. DISCUSSION

A. International Antitrust Enforcement

Antitrust enforcement was traditionally considered a domestic issue. 124 Today, the global economy demands that antitrust law and policy adopt an increasingly international perspective. 125 As globalization of markets and competition intensifies, anticompetitive practices by firms become international in scope, as do their negative economic effects. 126 However, there is no international law of antitrust 127 and several attempts at creating an international antitrust regime have failed. 128 Furthermore, despite

121. See Jeremy Lever & John Pike, Cartel Agreements, Criminal Conspiracy and the Statutory “Cartel Offense” (pt. 1), 26(2) EUR. COMPETITION L. REV. 90, 90.
122. See KNOWLES, supra note 25, at 21.
123. See Magistrates’ Court Decision, para. 8.
124. Lucio Lanucara, The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses, 9 IND. J. GLOBAL LEGAL STUD. 433, 435 (2001–02) (“Until the 1980s, antitrust enforcement was perceived as an almost exclusively domestic issue.”).
126. DABBAH, supra note 125, at 14; Fox, Global Markets, supra note 125, at 383 (“[M]arket problems that were once national are now of international dimension.”); Organisation for Economic Co-operation and Development, Hard Core Cartels, Recent Progress and Challenges Ahead, 30 (2003), available with a subscription at http://www1.oecd.org/publications/e-book/2403011E.PDF [hereinafter OECD Hard Core Cartels] (“Globalisation and the internationalisation of markets have had a profound effect on competition law enforcement.”).
128. See Edward T. Swaine, The Local Law of Global Antitrust, 43 WM. & MARY L. REV. 627, 632 (2001); Waller, supra note 127, 349 (“There have been five great attempts to achieve a true international . . . competition law in the twentieth century. None has been successful.”); see generally William Sugden, Global Antitrust and the Evolution of an International Standard, 35 VAND. J. TRANSNAT’L L. 989 (2002) (“Efforts to globalize
the proliferation of competition law globally, legislation varies significantly by nation, and no single model applies across borders. Yet, international enforcement of antitrust remains at the forefront of discussion in the antitrust legal community.

There is generally global consensus on prohibiting hard core cartels and agreement on the economic harm they cause. Nonetheless, criminal legislation against price fixing cartels is scarce across the world. Criminalization of cartel behavior is critical to effective international antitrust enforcement. Moreover, as the number of cartels that operate internationally increases, a global perspective is essential to successful enforcement.

Increased cooperation among worldwide antitrust authorities has led to recent success in international antitrust enforcement for national authorities. Bilateral agreements are the most common form of antitrust cooperation. Additionally, the United States has successfully convinced antitrust have a long history. Unfortunately, that history is marked more by failure than success.


130. JOELSON, supra note 12, at 6.

131. Scholars disagree about “the desirability and the feasibility of an international competition law system.” See Waller, supra note 127, at 345. On one hand, skeptics doubt the viability of an international antitrust code or even extensive harmonization of international laws. See, e.g., Wood, supra note 129, at 405. On the other hand, others advocate for an international antitrust regime and favor harmonization of competition law. See, e.g., Eleanor M. Fox, International Coordination of Competition Policy: Does Global Antitrust Law Have a Future, 43 VA. J. INT’L L. 911 (2003).

132. See Wood, supra note 129, at 395; Waller, supra note 127, at 404; OECD Hard Core Cartels, supra note 126, at 8–9 (“[T]he total harm from cartels is significant indeed, surely amounting to many billions of dollars [of affected commerce] each year.”).

133. Joshua, Tangled Web, supra note 114, at 2 n.1. (“To date, besides the US and Canada—and now the U.K.—France, Greece, Ireland, Israel, Japan, Slovak Republic, Norway, and South Korea have some type of criminal law enforcement [for hard core cartels]. . . . Only a limited number of countries provide for sanctions of imprisonment . . . .”); OECD Hard Core Cartels, supra note 126, at 29.

134. See Joshua, supra note 11, at 13.


137. Waller, supra note 127, at 362.
several governments to adopt enforcement policies similar to its own.\footnote{138}{Canada, the United Kingdom, Germany, France, and the European Union have adopted programs similar to the United States programs that encourage pleas and provide leniency for cooperating corporations.} International organizations like the International Competition Network and the Organization for Economic Cooperation and Development (“OECD”) also assist coordination of global efforts and the sharing of best practices between participating nations.\footnote{139}{Id. at 95–96. The International Competition Network is an international body that “by enhancing convergence and cooperation, . . . promotes more efficient, effective antitrust enforcement worldwide.” International Competition Network, http://www.internationalcompetitionnetwork.org (last visited Oct. 27, 2007).} Nonetheless, the recent trend towards cooperation has been embraced by some countries more enthusiastically than others.\footnote{140}{For example, the developing world supports primary commodity cartels and opposes any foreign efforts to extraterritorially apply antitrust laws to limit such cartels. See Spencer Weber Waller, Antitrust and American Business Abroad, § 4:2 (2006) [hereinafter Waller, Antitrust Abroad]. But see Calvani, supra note 136, at 1130.}

\textbf{B. U.S. Cartel Policy and Extraterritorial Jurisdiction}

The United States has aggressively enforced antitrust law for over a hundred years.\footnote{141}{The Sherman Act was adopted in 1890. As amended, the Sherman Act is set forth in 15 U.S.C. §§ 1–7 (2004).} In the United States, collusion among competitors is viewed as the “supreme evil of antitrust.”\footnote{142}{Verizon Communications, Inc v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004). See also Antitrust Division Update, supra note 8 (discussing the Trinko decision and noting that cartel enforcement is a high priority of the Antitrust Division).} Prosecuting cartels is a high priority for the United States, particularly international price fixing cartels.\footnote{143}{Sheryl A. Brown, Antitrust Violations, 43 AM. CRIM. L. REV. 217, 251 (Spring 2006) (“In 1994, the Clinton Administration simplified cooperation in antitrust enforcement between the United States and foreign nations by signing the International Antitrust Enforcement Act. Consequently, aggressive international enforcement of criminal antitrust laws and the prosecution of international price-fixing cartels have become top priorities for the Antitrust Division.”).} In 2006, the Antitrust Division of the Department of Justice obtained fines of $473 million and brought criminal cases against sixty-nine firms.\footnote{144}{Thomas O. Barnett, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Speech at the Fordham Competition Law Institute’s Annual Conference of International Antitrust Law and Policy: Criminal Enforcement of Antitrust Laws: The U.S. Model, 1 (September 14, 2006).} In fact, the United States has created a specialized criminal enforcement team that focuses on hard core collusive activity.\footnote{145}{Id. at 2.}

A Sherman Act section 1 violation is a felony punishable by fines up to...
$100 million for corporations, and $1 million or up to ten years of imprisonment for individuals. 146

The United States applied the Sherman Act extraterritorially as early as 1945. In United States v. Aluminum Company of America (Alcoa), 147 the Second Circuit, sitting for the Supreme Court, 148 held a Canadian corporation liable for Sherman Act violations for conduct that occurred in Canada but had consequences within the United States. 149 The court acknowledged that imposition of liability upon non-citizens for conduct that occurs abroad but violates local law was “settled law.” 150 The Alcoa effects doctrine, as it came to be known, dominated transnational antitrust jurisprudence for many years. 151

Over time, the extraterritorial reach of U.S. antitrust law flourished. 152 The ability of domestic plaintiffs to bring American antitrust claims against foreign defendants, 153 and foreign plaintiffs to bring American

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146. See 15 U.S.C. § 1 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”). These penalties were increased by a 2004 Amendment to the Sherman Act.
148. See 322 U.S. 716 (1944) (transferring the case to the Second Circuit Court of Appeals for want of a quorum of qualified justices on the Supreme Court of the United States).
149. See Alcoa, 148 F.2d at 443–44. Aluminum Limited was a Canadian corporation that managed the Aluminum Company of America’s properties which were outside of the United States. Id. at 439. The court found that Aluminum Limited’s cartel agreements that fixed production quotas and later substituted the quota system for a system of royalties were violative of the Sherman Act. Id. at 442–43. See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986) (refusing recovery under the Sherman Act for an alleged cartel in the Japanese market, because “American antitrust laws do not regulate the competitive conditions of other nations’ economies”).
150. See Alcoa, 148 F.2d at 443 (stating that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize”). This approach is known as “objective territoriality,” a subset of territorial jurisdiction, one of the five generally accepted bases of international jurisdiction. The other four bases of international jurisdiction are nationality, passive personality, protective principle, and universality. See Ellen S. Podgor, “Defensive Territoriality: A New Paradigm for the Prosecution of Extraterritorial Business Crimes,” 31 GA. J. INT’L & COMP. L. 1, 9–10 (2002).
151. See JOELSON, supra note 12, at 49.
153. In Hartford Fire Insurance Company v. California, the Supreme Court held that application of the Sherman Act against a London reinsurance broker that engaged in con-
antitrust claims against domestic defendants, was only limited by the principle of international comity and the Foreign Trade Antitrust Improvement Act. When presented the opportunity to extend U.S. jurisdiction even further and allow foreign plaintiffs to litigate in the United States against foreign defendants for an injury suffered abroad, the Supreme Court, in *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, declined to do so.

Still, the Antitrust Division of the U.S. Department of Justice exercises jurisdiction to the extent the law will allow. Moreover, a United States decision to prosecute an antitrust action reflects an Executive Branch determination that the “importance of antitrust enforcement outweighs any relevant policy concerns.” As such, the Department of Justice states, courts should not engage in a comity analysis as to “second-guess the executive branch’s judgment.”

When determining whether to assert jurisdiction in an antitrust action, the Antitrust Division accounts for international comity. In its analysis, the Antitrust Division will consider factors such as the “relative significance of the alleged violation within the United States as compared to conduct abroad,” “the nationality of the persons involved,” “the degree of conflict with foreign law or . . . economic policies,” and the “effect-
tiveness of foreign enforcement as compared to U.S. action.\textsuperscript{162} The decision about whether to pursue a case is nonetheless highly discretionary, and ultimately if a foreign country’s antitrust regime does not align with U.S. policies, the factors outlined for consideration by the Antitrust Division weigh in favor of exercising jurisdiction.\textsuperscript{163}

\textbf{C. U.K. Cartel Policy and Extraterritorial Jurisdiction}

U.K. competition law aims to correct distortions to the competitive process within the United Kingdom.\textsuperscript{164} In contrast with the United States, where private enforcement of antitrust laws is common, the United Kingdom only recently recognized a private right of action for violations of U.K. competition law.\textsuperscript{165} Another significant difference between U.K. and U.S. cartel law is liability of corporations.\textsuperscript{166} The U.K. Enterprise Act cartel offense does not provide for corporate criminal liability, whereas in the United States corporations may be held liable for any antitrust violation.\textsuperscript{167} In addition, as a member of the European Community (“EC”), the United Kingdom must enforce its competition policy within that of the EC, which itself has an active competition regime.\textsuperscript{168}

The United Kingdom also views cartels as criminal, but not until relatively recently with the enactment of the Enterprise Act 2002 (“2002 Act”). Deterrence was the main objective of introducing a criminal offense for cartel participation with the 2002 Act.\textsuperscript{169} Creation of the crimi-

\begin{enumerate}
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id.
\item \textsuperscript{164} See Enterprise Bill, Bill [115], Research Paper 02/21, Apr. 4, 2002, 16.
\item \textsuperscript{166} Compare Enterprise Act, 2002, c. 40, § 188 (“An individual is guilty of an offence if he dishonestly agrees . . .”) and Joshua, \textit{Tangled Web}, supra note 114, 623 (stating that “[t]he offence can be committed only by an individual, not a company”), with Sherman Act, 15 U.S.C. § 7 (“The word ‘person’ or ‘persons,’ wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.”).
\item \textsuperscript{168} See FURSE & NASH, supra note 116, at 6.
\item \textsuperscript{169} See MacCulloch, \textit{supra} note 114, at 616. Deterrence is a common aim of including criminal sanctions in cartel legislation, and one that is recommended by the OECD. See OECD \textit{Hard Core Cartels}, supra note 126, at 27, 30; Patricia Hanh Rosochowicz, \textit{The Appropriateness of Criminal Sanctions in Enforcement of Competition Law}, 25(12) EUR. COMPETITION L. REV. 752, 753 (2004).
\end{enumerate}
nal cartel offense was a controversial element of the 2002 Act.\textsuperscript{170} Some regard it as “one of the most significant developments in U.K. criminal justice policy in the last decade.”\textsuperscript{171} Indeed, it may demonstrate that the United Kingdom’s perspective on competition is converging with that of the United States, which is perhaps why the British government is willing to proceed with Norris’s extradition today.\textsuperscript{172}

Although the United Kingdom has taken steps towards aligning its competition policy with that of the United States, there are differences which may prove significant.\textsuperscript{173} Specifically, the U.K. cartel offense incorporates a “dishonesty” requirement.\textsuperscript{174} The drafters of the 2002 Act argue that the dishonesty requirement communicates the seriousness of the offense, but some critics maintain that because the term “dishonesty” is undefined,\textsuperscript{175} it will lead to great difficulty in successfully convicting offenders.\textsuperscript{176} This element of the cartel offense contrasts greatly with the U.S. Sherman Act, which is based on conspiracy, and likely will lead to greatly varied enforcement.\textsuperscript{177}

Historically, the United Kingdom was hostile to extraterritorial enforcement of American antitrust law.\textsuperscript{178} In the 1960s and 1970s, the United Kingdom enacted retaliatory legislation known as “blocking statutes” in an effort to curb extraterritorial enforcement of U.S. antitrust law by American courts.\textsuperscript{179} When the United States exercised jurisdiction

\begin{footnotesize}
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  \item \textsuperscript{171} Joshua, Tangled Web, supra note 114, at 620; see MacCulloch, supra note 114, at 616.
  \item \textsuperscript{172} See Joshua, supra note 11, at 13 (“Ironically, it was not the U.K.’s criminalization of cartels as such but rather the change in official perceptions that led the US to request Mr. Norris’s extradition.”); MacCulloch, supra note 114, at 616 (“The Cartel Offence reflects a move within the U.K. regime towards a dual alignment adapting . . . elements from the US antitrust regime . . . .”).
  \item \textsuperscript{173} See Joshua, Tangled Web, supra note 114, at 625.
  \item \textsuperscript{174} Id. at 624–25. See also Enterprise Act, 2002, c. 40. § 188 (“An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B.”)).
  \item \textsuperscript{175} “The definition of ‘dishonesty’ under English law largely stems from cases under the Theft Act 1968. Dishonesty is a matter of fact, not law, for the jury to decide in light of the particular circumstances of the case.” MacCulloch, supra note 114, at 621.
  \item \textsuperscript{176} See Joshua, Tangled Web, supra note 114, at 626.
  \item \textsuperscript{177} Id. at 625.
  \item \textsuperscript{178} See MacCulloch, supra note 114, at 623.
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over British citizens whose anticompetitive acts took place in the United Kingdom, the United Kingdom objected and refused to compel its citizens to cooperate with American pre-trial discovery. Conflict ensued for many years because competition policy was considered an American ideal.

The United Kingdom’s approach to extraterritorial jurisdiction in the context of antitrust, particularly the effects doctrine, is markedly different from that of the United States. The United Kingdom has generally opposed the effects doctrine. The United Kingdom expressed the view that jurisdiction may only be exercised in antitrust matters over foreign corporations on the basis of either the territorial principle or the nationality principle, and even then it should be narrowly applied. Specifically, with regard to the territorial principle, the United Kingdom stated that extraterritorial jurisdiction was justified only if conduct of the foreign national or foreign corporation took place within the state claiming jurisdiction.

D. Extradition for Antitrust Offenders

According to U.S. law, the United States may unquestionably exercise jurisdiction over Norris for his participation in a cartel that impacted American commerce. But, is it prudent for the United States to inter-
vene in the conduct of insulated foreign parties? 188 Domestic regulators and prosecutors have the discretion to exercise such jurisdiction, 189 which undoubtedly implicates foreign policy and may have economic ramifications. Moreover, using extradition to prosecute foreign nationals for U.S. antitrust violations may result in improper application of the law by courts eager to further their national competition policy. As seen in Norris, this may result in an unjust retroactive application of recently implemented competition policy.

The argument in favor of enforcing U.S. antitrust laws on foreign parties is based on the assumption that all parties that participate in U.S. markets, both domestic and foreign, benefit from the transparency of the U.S. market and openness of market information. 190 Furthermore, the United States has an interest in preserving market order. 191 By enforcing its antitrust laws against hard core international cartels, the United States is arguably addressing a problem that concerns the international community as a whole. 192 Still, there exists a tension between the benefits to be gained by global enforcement and jurisdictional norms within the international community. 193

One approach to extraterritorial jurisdiction over business crimes, including antitrust violations, is “defensive territoriality.” 194 The theory of defensive territoriality argues that the United States should exercise jurisdiction over business crimes on a limited basis, and should take a defensive approach. By this theory, the United States should only prosecute when it is necessary for protection, when a U.S. administrative agency controls the business entity, or when the business entity acted outside the United States to intentionally evade U.S. jurisdiction. 195 The rationale behind this principle is that prosecution of certain crimes is subject to the “whims of prosecutors” and political agendas, and extraterritorial prosecution is potentially limitless in the era of globalization. 196 Additionally,
defensive territoriality argues that the uniqueness of business crimes, as distinct from other transnational crimes like terrorism, calls for limited application of U.S. law extraterritorially. That is, because business crimes can be related to a legitimate entity, globalization has impacted business, and business crimes have both a criminal and civil dimension, the United States should limit extraterritorial prosecution of them.

On the other hand, one may argue that it is efficient for the United States, with a developed body of antitrust law and powerful remedies, to reach as far as the law may allow in order to stop anticompetitive practices that harm the global economy. This argument may be persuasive in the context of cartels, where the general consensus is that cartels should be eliminated. However, this position fails for several reasons. First, although many nations have competition laws, their attitude and policies about the aims of such legislation differ. Even when a foreign jurisdiction has a viable antitrust regime, enforcement techniques may differ substantially. Second, many countries resent imposition of American economic policies and laws, and oppose aggressive enforcement against their citizens or businesses. And finally, there may be economic implications such as hostility towards American business, This rationale for limited exercise of U.S. antitrust jurisdiction, despite potential efficiency, weighs in favor of limited pursuit of extradition for antitrust violations.

CONCLUSION

In Norris, the Court properly held it was not a matter for the judiciary to determine whether the United States should be removed as a designated territory under the Extradition 2003. However, the Court should have decided that the dual criminality requirement was not met without awaiting determination of the Bermingham decision. When Norris allegedly engaged in the price fixing agreements, cartel participation was not a crime in the United Kingdom. The Court erred by allowing common law conspiracy to defraud to serve as the comparable U.K. offense. Moreover, the common law conspiracy to defraud has never been suc-

197. Id. at 15–16.
198. Id. at 16–18.
199. WALLER, ANTITRUST ABROAD, supra note 140, § 4:1.
200. Id.
201. Id.
202. Id.; see also O’Shea, supra note 53 (“[A]ttempting to manage a company in accordance with a less predictable legal environment will be costly for business in the short term and is likely to lead to increasing risk-aversion. It would be bizarre if a side-effect of internationalized law enforcement was a more defensive approach to overseas investment and a retreat from wider markets by U.K. businesses.”).
cessfully prosecuted in the United Kingdom where the underlying conduct was cartel participation.\footnote{See Osgood, supra note 16, at 38; Husnara Begum, \textit{BA Cartel Probe sees OFT Test Its Criminal Powers Post-Enterprise Act}, \textit{The Lawyer}, November 6, 2006.}

Although the U.S. Department of Justice may be enthusiastic about the potential to use extradition to reach antitrust violators,\footnote{See Hammond Speech, supra note 1, at 10.} the United States should pursue extradition of foreign antitrust offenders only on a limited basis. The \textit{Norris} case illustrates the potential consequences of the United States flexing its antitrust muscle in the United Kingdom. In light of the negative public reaction in the United Kingdom to the Norris extradition, there is a risk of history repeating itself with blocking legislation or other protective measures. Those consequences may amplify if the same efforts are directed towards a less friendly nation.

Extradition of antitrust offenders allows the United States to expand the global reach of its antitrust policy. It implicates significant foreign policy considerations and may also frustrate effective global antitrust enforcement.\footnote{See \textit{Waller, Antitrust Abroad}, supra note 140, § 4:1. For example, countries that resent American involvement in their nation’s business affairs may refuse to extradite and may not cooperate with American discovery requests. \textit{Id.}} Further, there may be economic ramifications if foreign enterprises view the United States as a risky place to transact their business because of increased exposure to criminal antitrust prosecution. In sum, the United States should approach use of extradition to prosecute antitrust violations with caution and exercise limited discretion in determining when to pursue extradition as an avenue for enforcement.

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THE LIFE-SAVING MEDICINES EXPORT ACT: WHY THE PROPOSED U.S. COMPULSORY LICENSING SCHEME WILL FAIL TO EXPORT ANY MEDICINES OR SAVE ANY LIVES

INTRODUCTION

In the twenty-six years that have passed since doctors observed the first cases of AIDS, no region of the world has escaped the wrath of the AIDS pandemic. Fortunately, the HIV incidence rate reached its highest levels in the late 1990s, and has since stabilized. Nevertheless, an estimated 38.6 million people around the world were afflicted with HIV in 2005, including approximately 4.1 million new HIV infections and 2.8 million AIDS deaths. Although there is no cure for HIV/AIDS, antiretroviral drug treatment slows the progression of the virus. As a result, antiretroviral drug treatment has decreased the number of HIV/AIDS-related illnesses and deaths globally. However, access to

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2. The “HIV incidence rate” is the number of people newly infected with HIV in a given year compared to the number of previously uninfected people. See UNAIDS, 2006 Report on the Global AIDS Epidemic, supra note 1, at 8.

3. See id.

4. See id.

5. See id. at 150. At the International AIDS Conference XI in 1996, studies were presented to show that antiretroviral treatment was effective in preventing AIDS-related illness and death. In the years following the conference, the number of AIDS-related deaths dropped significantly in high-income developed countries, while the number of deaths in low- and middle-income countries continued to skyrocket. See id.
antiretroviral drugs is limited in sub-Saharan Africa, where HIV/AIDS plagues citizens more than in any other area of the world. In recent years, there has been international activism demanding a universal human right to access life-saving treatment. As a result, access to antiretroviral drugs has increased in sub-Saharan Africa. In 2005, more than five times as many people used antiretroviral drugs in low- and middle-income countries compared to those who used the drugs in 2001. Nevertheless, in sub-Saharan Africa, still only about one in six (seventeen percent) of the 4.7 million people needing antiretroviral drug treatment now receive it.

There is no panacea that will resolve the problem of access to essential medicines in impoverished countries. These countries often lack adequate health care systems and sufficient numbers of doctors or other health care workers to prescribe and distribute the drugs. In addition, government regulations often hinder access to essential medicines, through taxes on essential medicines or regulatory red tape. Notwithstanding these infrastructure problems, poverty—and the resulting inability to afford essential medicines—is arguably the most significant barrier to access.

6. See id. at 15. In 2005, almost sixty-four percent of all people suffering from HIV (24.5 million people), and almost nine out of ten children under the age of fifteen suffering from HIV (2.0 million children) live in sub-Saharan Africa. In the same region, there were approximately 2.7 million new HIV infections, and approximately 2.0 million AIDS deaths. See id. For country-specific HIV/AIDS data in sub-Saharan Africa, see id. at 15–23.

7. See id. at 150.


9. See id. at 151. Antiretroviral drug use increased from approximately two hundred and forty thousand people in 2001 to approximately 1.3 million people in 2005. See id.

10. See id. at 15. Furthermore, progress throughout sub-Saharan Africa has not been uniform. While at least fifty percent of those needing antiretroviral treatment in Botswana and Namibia in 2005 received it, access in many other countries is as low as ten percent. See id. at 152. One-quarter of antiretroviral drug use in sub-Saharan Africa can be found in South Africa. See id. at 15.


12. See id.

13. See id.

14. See id.
obstacles even in the absence of pharmaceutical patents, patents affect prices, and remain a significant hurdle to access to medicines. Protection of intellectual property rights ("IPR") permits a patent holder to charge high prices for patented brand-name medicines and grants a monopoly on the protected drug during the life of the patent.

In April 2006, the World Health Organization ("WHO") Commission on Intellectual Property Rights, Innovation and Public Health ("CIPIH") published its report to illustrate how an emphasis on protecting IPR may affect issues of public health. The Commission concluded that “innovation [is] pointless in the absence of favourable conditions for poor people in developing countries to access existing, as well as new products. . . . Intellectual property rights are important, but as a means not an end.” On one side of the debate, high prices of patented drugs are justified because they are necessary to fund a pharmaceutical company’s research

15. See generally DONALD G. RICHARDS, INTELLECTUAL PROPERTY RIGHTS AND GLOBAL CAPITALISM: THE POLITICAL ECONOMY OF THE TRIPS AGREEMENT 53 (2004) ("IPRs are exclusive rights granted to the creators of knowledge-based commodities to market their creations. This grant is deemed necessary in order for the creators to engage in creative activity and production.").

16. See David B. Resnik & Kenneth A. De Ville, Bioterrorism and Patent Rights: “Compulsory Licensure” and the Case of Cipro, 2 AM. J. BIOETHICS 29, 34 (2002). IPR advocates argue that a right to one’s ideas can be based on traditional property laws. Because knowledge and innovation are forms of “property,” there are libertarian justifications for patent law, which argue that a person should have a right to both the tangible and intangible products of one’s labor. See id.

Philosopher John Locke argues that, based on natural law principles, non-human resources are gifts from God, to which all of humankind enjoys a common property right. See RICHARDS, supra note 15, at 27–31. According to Locke, a person creates a private property right to these resources by using labor to increase the value of the property, as long as the person leaves enough of the resource for others. See id. (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Cambridge Univ. Press 1963) (1698)); 77 GEO. L.J. 287, 315 (1988). Instead, because ideas are inexhaustible, and one person’s use of an idea does not deplete the common property, people are free to take and protect their ideas as private property under Locke’s labor theory of property. See id.

17. See WHO CIPIH, Public Health: Innovation and Intellectual Property Rights (Apr. 2006), available at http://www.who.int/intellectualproperty/report/en/. In May, the World Health Assembly and World Trade Organization ("WTO") member states agreed to set up CIPIH to assess the relationship between the fields of intellectual property rights, innovation, and public health. The Commission was given the task of collecting data from different sources and recommending appropriate funding and incentives for the creation of new pharmaceutical products to fight diseases affecting developing countries. See id.

18. Id. at ix–x.
and development ("R&D"). Each successful medical innovation that results in millions of dollars in profits must pay for the millions of dollars lost during the countless failed R&D efforts. Nevertheless, these patents, and the high costs of the patented drugs they protect, are not justified to the extent that they deprive those who cannot afford life-saving medication. 

This Note does not attempt to resolve all of the barriers preventing access to essential medicines. Instead, this Note focuses solely on the responsibility of the United States, as a developed country with immense 

19. See PhRMA, Key Industry Facts/About PhRMA, http://www.phrma.org/key_industry_facts_about_phrma/ (last visited Oct. 9, 2007). Pharmaceutical Research and Manufacturers of America ("PhRMA"), discussing the findings of the Tufts Center for the Study of Drug Development, reports that development of a new drug is estimated to cost a pharmaceutical company $802 million, and takes an average of ten to fifteen years to get the drug from the laboratory to the pharmacy shelf. A pharmaceutical company recovers its R&D costs mainly from commercially successful products. PhRMA reports that out of 5,000 to 10,000 screened compounds, only 250 compounds succeed to reach preclinical testing, five pass preclinical testing to reach human clinical trials, and only one compound is eventually approved by the Food and Drug Administration. See id.

Consequently, proponents of pharmaceutical patents argue that the patents are necessary to allow temporary market exclusivity. Market exclusivity would permit these pharmaceutical companies to recoup their economic costs, profit from their inventions, and would incentivize future innovations.

20. Among these reasons are those founded in international law and principles of moral obligation. First, the right to health is emphasized in customary international law. See Alicia Ely Yamin, Not Just a Tragedy: Access to Medications as a Right Under International Law, 21 B.U. INT’L L.J. 325, 336 (2003) (citing International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3). Article 12 of the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") acknowledges "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Id. In addition, the Economic, Social, and Cultural Rights Committee recognized that a state’s minimum obligation pursuant to the ICESCR is to provide access to essential medicines. See id. at 337. Moreover, the right to enjoy the scientific progress in medicine derives from Article 15 of the ICESCR, which "recognize[s] the right of everyone . . . [t]o enjoy the benefits of scientific progress and its applications" applies to medications. Id. at 344.

Second, the obligation to developing countries is also supported by moral obligation. Under the theory of utilitarianism, there is a fundamental moral obligation to act when others are in need. Moreover, the greater the benefit to the person in need and the less hardship it causes for the actor, the more important is the obligation to act. See Michael A. Santoro, Human Rights and Human Needs: Diverse Moral Principles Justifying Third World Access to Affordable HIV/AIDS Drugs, 31 N.C. J. INT’L L. & COM. REG. 923, 936–37 (2006).

21. Moreover, this Note does not argue that patents should not be granted for essential medicines, and recognizes that patent protection may be necessary to promote innovation and technological advances.
resources in the pharmaceutical sector,\(^{22}\) to help impoverished countries that do not have the manufacturing resources to supply their citizens with essential life-saving medicines.\(^{23}\) In light of this duty, the Life-Saving Medicines Export Act\(^{24}\) was introduced in 2006 to establish a compulsory licensing system that permits U.S. pharmaceutical companies to manufacture generic equivalents of patented medicines for export to developing countries.\(^{25}\) This Note focuses primarily on whether the Life-Saving Medicines Export Act establishes an optimal compulsory licensing system by providing the most effective incentives to generic drug companies to manufacture life-saving medicines for export to developing countries.

First, Part I discusses the development of IPR at the international level and its impact on pharmaceutical policies in the United States. Next, Part II investigates the key provisions of the Life-Saving Medicines Export Act. Then, Part III identifies the key provisions of the Pledge to Africa Act, which established a Canadian compulsory licensing system. Part IV addresses the flaws with the Pledge to Africa Act, and analyzes the improvements that the Life-Saving Medicines Export Act has made over its Canadian counterpart. Furthermore, it examines whether the improvements made in the Life-Saving Medicines Export Act are sufficient to incentivize generic companies to participate in the compulsory licensing system, thereby insuring that the legislation will succeed in increasing access to essential medicines for those who need them the most. This Note argues that while the Life-Saving Medicines Export Act eases procedural barriers and increases economic incentives for generic pharmaceutical companies, these changes alone are not enough. No matter how altruistic a generic company may be, or how severe a pandemic—like AIDS—may become, failure to incorporate greater financial incentives will render the Life-Saving Medicines Export Act useless in the fight to improve the life or death problem of access to essential medicines.

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23. In addition to altruistic reasons for assisting poorer countries, the United States should be motivated by its own self-interests. For example, such legislation would help improve U.S. relations in the international community. In addition, by addressing public health crises in other countries, the United States also decreases the chances of those health crises spreading to the United States. Furthermore, the United States ensures that these developing countries will be able to sustain their roles within the global economy. See 152 CONG. REC. S233-01, S5245 (daily ed. May 25, 2006) (statement of Sen. Leahy).

24. See infra Part II.

I. HISTORICAL BACKGROUND ON THE PATENT SYSTEM IN THE UNITED STATES AND AT THE INTERNATIONAL LEVEL

When the World Trade Organization (“WTO”) was created in 1995 as the successor to the General Agreement on Tariffs and Trade (“GATT”), ideas and knowledge were becoming more significant in international trade. At the same time, varying levels of protection and enforcement of intellectual property rights were causing greater strain in international economic relations. As a result, the WTO member states agreed upon and codified minimum standards that each state government had to meet in order to protect domestic IPR, as well as the IPR of other WTO member states. With respect to patents, WTO member states agreed that patents must be available to inventors, and patent holders should enjoy a minimum set of exclusive rights to the invention for an initial period of time. However, concern later arose over ensuring that the WTO standards did not prevent WTO member states from addressing issues of public health. As a result, the WTO adopted a new approach to assisting people in developing countries who suffer from life-threatening diseases. The WTO now permits countries such as the United States, who possess robust pharmaceutical sectors, to produce and sell generic drugs to nations in need of the life-saving medication.


Most of the value of new medicines and other high technology products lies in the amount of invention, innovation, research, design and testing involved. Films, music recordings, books, computer software and on-line services are bought and sold because of the information and creativity they contain, not usually because of the plastic, metal or paper used to make them.

Id.
28. See id.
29. See infra Part I.A.
30. See id.
31. See infra Part I.B.
32. See infra Part I.C.
33. See id.
A. The Agreement on Trade-Related Aspects of Intellectual Property Rights

On January 1, 1995, the WTO implemented the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"). The objective of the TRIPS Agreement is to protect and enforce intellectual property rights in order to reward and promote technological inventions. At the same time, the TRIPS Agreement recognizes the need to transfer and disseminate this new knowledge to benefit social and economic welfare. The provisions of the TRIPS Agreement that concern patents require that WTO member states provide a patent for any technological invention that is new, non-obvious, and useful. In exchange for these rights, a patent applicant must disclose information about the invention that would allow a "person skilled in the art" to create the product. If the application is granted, the patent holder has the ability to prevent others from "making, using, offering for sale, selling, or importing" the invention. These exclusive rights are protected for twenty years from the date that the applicant files the patent application.

However, there are some exceptions to the exclusive rights that have been granted to the patent holder. Specifically, Article 31 of the TRIPS Agreement permits WTO member states to use the invention without the patent holder’s authorization. Included in such allowed use is government use and government-authorized third-party use pursuant to a "compulsory license." Before the government authorizes use of the inven-


35. TRIPS Agreement, supra note 34, art. 7.

36. See id.

37. See id. art. 27(1). Extending far beyond pharmaceuticals, patents are available for “products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.” Id.

38. Id. art. 29(1).

39. Id. art. 28(1).

40. See id. art. 33.

41. See TRIPS Agreement, supra note 34, art. 31.

42. See id. The TRIPS Agreement does not use the term “compulsory licensing.” Instead, Article 31 discusses “Other Use Without Authorization of the Right Holder.” Compulsory licensing is only one example of such “other use.” See WTO, Obligations
tion, it must ensure that the patent holder’s rights are respected. First, the compulsory license applicant must first make “efforts to obtain authorization from the right holder on reasonable commercial terms and conditions” and have been unsuccessful “within a reasonable period of time” prior to filing the compulsory license application. Nevertheless, the government may waive this required effort in cases of “national emergency or other circumstances of extreme urgency,” or for “public non-commercial use.” Article 31 requires that “adequate remuneration” be paid to the patent holder for use of the invention. Article 31(h) explains that the payment will take into account “the circumstances of each case” and “the economic value of the authorization.”

Article 31 also allows only limited use of the invention by the compulsory license applicant. Because the patent holder is still entitled to use of the invention, the compulsory licensee’s rights are non-exclusive. In addition, the compulsory license applicant may not use the invention beyond the scope for which the compulsory license was granted. Furthermore, Article 31 limits the government’s authority to grant compulsory licenses to inventions used predominantly in the domestic market.

B. The Doha Declaration on TRIPS and Public Health

The TRIPS Agreement raised concerns that poor countries may face greater difficulties in obtaining drugs because of the TRIPS Agreement’s safeguards on intellectual property. In response, WTO member states adopted the Declaration on the TRIPS Agreement and Public Health (“Doha Declaration”) on November 14, 2001 at the WTO’s Fourth Ministerial Conference in Doha, Qatar. First, the Doha Declaration “recognized[d] the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.” Second, al-

43. TRIPS Agreement, supra note 34, art. 31(b).
44. Id.
45. Id. art. 31(h).
46. Id.
47. See id. art. 31(d).
48. See id. art. 31(c).
49. See TRIPS Agreement, supra note 34, art. 31(f).
52. Id.
though the Doha Declaration acknowledged that the protection of IPR promotes the development of new medicines, it also recognized that the patent system causes increased drug prices.\textsuperscript{53} Third, the Doha Declaration affirmed that the TRIPS Agreement “should not prevent Members from taking measures to protect public health . . . and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.”\textsuperscript{54}

The Doha Declaration therefore provides flexibility to the TRIPS Agreement to ensure that intellectual property protection does not create obstacles to the management of public health problems.\textsuperscript{55} For example, the Doha Declaration recognizes the right of WTO member states to grant compulsory licenses to generic drug companies to permit manufacturing of patented brand name drugs.\textsuperscript{56} In addition, the Doha Declaration allows each WTO member state to determine the grounds for granting compulsory licenses.\textsuperscript{57} WTO member states also have the right to define “national emergency or other circumstances of extreme urgency,”\textsuperscript{58} under which the TRIPS Agreement permits a WTO member state to waive the requirement that the generic drug manufacturer must have unsuccessfully attempted to negotiate with the patented drug manufacturer before the proposed user may obtain a compulsory license. Specifically, the Doha Declaration explains that “public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.”\textsuperscript{59} The Doha Declaration, however, leaves unresolved the problem of WTO member states that lack manufacturing capabilities in the pharmaceutical sector to effectively use compulsory licensing, in what is referred to as “Paragraph 6.”\textsuperscript{60} The Declaration recognizes the problem, and instructs the TRIPS Council to report back to the General Council with a solution to the problem by the end of 2002.\textsuperscript{61} In the interim, be-

\textsuperscript{53} See Doha Declaration, supra note 51, para. 3.
\textsuperscript{54} Id. para. 4.
\textsuperscript{55} See id. para. 5.
\textsuperscript{56} See id. para. 5(b).
\textsuperscript{57} See id.
\textsuperscript{58} Id. para. 5(c).
\textsuperscript{59} Doha Declaration, supra note 51, para. 5(c).
\textsuperscript{60} See id. para. 6.
\textsuperscript{61} See id. para. 6 (“We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.”).
cause Article 31(f) of the TRIPS Agreement limits products made under compulsory licenses to domestic use, the Doha Declaration left countries without the resources to produce pharmaceuticals without access to lifesaving medications.62

C. The Decision of the General Council of 30 August 2003

On August 30, 2003, the General Council approved a draft decision (“2003 Decision”) which amended the TRIPS Agreement by implementing Paragraph 6 of the Doha Declaration.63 The 2003 Decision makes it easier for poor countries, unable to manufacture medicines themselves, to import generic drugs made in other countries under compulsory license.64 The 2003 Decision lifted the ban on exporting generic drugs made under compulsory licensing by permitting export of such generic drugs to “eligible importing Members.”65 An eligible importing country is one which is a “least-developed country” (“LDC”),66 or a WTO mem-

64. See 2003 Decision, supra note 63, at 509 (“[n]oting . . . the instruction . . . in paragraph 6 of the [Doha Declaration] to find an expeditious solution to the problem of the difficulties that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing under the TRIPS Agreement”).
65. 2003 Decision, supra note 63, at 510.
66. The UN Committee for Development Policy reviews the list of least-developed countries every three years. In the 2003 Report of the UN Committee for Development Policy, qualification for the category of “least-developed country” (“LDC”) is based on three criteria:

(1) low-income, measured by the country’s average of the gross national income (GNI) per capita;

(2) human resource weakness, measured by the country’s human assets index, which factors in the country’s nutrition, health, education, and adult literacy; and

(3) economic vulnerability, measured by the country’s economic vulnerability index, which factors in the country’s structural vulnerability rather than vulnerability resulting from government policy.

To be added to the list, a country must meet all three criteria. To become eligible to graduate from the list, a country must meet minimum threshold levels for two of the three criteria. To qualify for graduation, a country must meet two of the three criteria for two consecutive reviews. See UN Office of the High Representative for the Least Developed
ber state that has notified the TRIPS Council that it is importing “in the case of a national emergency or other circumstances of extreme urgency or public non-commercial use.”67 A WTO member state seeking to import generic drugs manufactured under compulsory license must notify the TRIPS Council of the specific names and quantities of requested medicines.68 In addition, the eligible importing country must confirm that it is a “least-developed country” or has “insufficient or no manufacturing capacities in the pharmaceutical sector” for the requested medicines.69

The 2003 Decision also includes provisions that ensure that the medicines are used to protect public health, and not for industrial or commercial policy objectives.70 For instance, compulsory licenses must limit the medicine production to only the amount necessary to meet the needs of the importing country.71 In addition, the generic drugs produced under compulsory license must be physically differentiated from their patented equivalents, using means such as special packaging or special colors or shapes of the drugs.72 The 2003 Decision also charges the importing country with taking “reasonable measures within their means, proportionate to their administrative capacities and to the risk of trade diversion to prevent re-exportation of the products.”73 Furthermore, all countries are required to have legal safeguards to prevent importation of these drugs in violation of this compulsory system.74

On December 6, 2005, WTO member states approved the 2003 Decision’s changes to permanently amend the TRIPS Agreement.75 Although the amendment will not take effect until two-thirds of WTO member states have ratified the changes by the December 1, 2007 deadline, these changes remain in effect until then.76


67. See 2003 Decision, supra note 63, at 510.
68. See id.
69. See id.
70. See WTO, Decision Removes Final Patent Obstacle to Cheap Drug Imports, supra note 62.
71. See 2003 Decision, supra note 63, at 510.
72. See id.
73. Id. at 511.
74. See id.
76. See id.

The United States arguably has the strictest patent system of WTO member states. This adherence to intellectual property protection is reflected in the U.S. response to South Africa’s Medicines and Related Substances Control Amendment Act, which was introduced in 1997. The Act took several steps to promote access to cheaper drugs in order to combat the AIDS epidemic in South Africa. The Act was enacted in an attempt to reduce drug prices by: (1) prohibiting price markups, (2) encouraging generic drugs, and (3) allowing South Africa’s health minister to ignore its patent laws when a health crisis exists. In response, thirty-nine pharmaceutical companies, with the support of the U.S. government, sued the South African government for enacting legislation that violated the TRIPS Agreement. Moreover, the U.S. government threatened trade sanctions against South Africa if it implemented the Act. However, the dispute ended when the pharmaceutical companies dropped their lawsuit because of the public protest over the lawsuit.

In 2001, this strict U.S. policy on patent protection reached a turning point. Just as the nation changed dramatically in the aftermath of the September 11th attacks, so too did the U.S. government’s views on patent protection. In October 2001, there were numerous cases of deaths resulting from anthrax exposure, which created fear of a bioterrorism attack. Despite a shortage of Cipro—the only anthrax antibiotic the

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78. See Donald G. McNeil Jr., Medicine Merchants: Patent and Patients; As Devastating Epidemics Increase, Nations Take On Drug Companies, N.Y. TIMES, July 9, 2000, § 1, at 18.
80. See id.; McNeil, supra note 78.
81. See Swarns, supra note 79.
82. See McNeil, supra note 78. The U.S. Department of Commerce placed South Africa on a watch list, which is the first step leading to trade sanctions. In addition, Congress passed a bill that required South Africa to drop the Act in order to receive any U.S. aid. Moreover, President Clinton also voiced his disagreement to President Nelson Mandela. See id.
83. See Swarns, supra note 79.
84. See generally Mullenbach, supra note 77, at 239.
U.S. Food and Drug Administration ("FDA") had approved—pharmaceutical company Bayer A.G. refused to permit other companies to manufacture Cipro. The U.S. government wanted to purchase a stockpile of Cipro to treat Americans in the event of a widespread attack, but was unable to convince Bayer to significantly lower their prices. In response, the U.S. government threatened to bypass the Cipro patent and follow Canada’s lead in resorting to generic alternatives to combat the anthrax attacks. However, the United States did not need to override the Cipro patent; Bayer agreed to further reduce the price of Cipro, and a deal between Bayer and the U.S. government was reached. The U.S. response to the anthrax scare, in light of its reaction to South Africa’s Medicines and Related Substances Control Amendment Act, was strongly criticized as “blatant hypocrisy.” The United States was viewed as having a double standard—one standard “regarding the accessibility of patent relaxation in the context of health emergencies which confront ‘us,’” and a different standard “in the context of health emergencies which constantly confront ‘them’ in the developing world.” Although five people died as a result of the anthrax attacks in 2001, the severity of the national emergency was far from comparable to the HIV/AIDS crisis in countries such as South Africa. Therefore, in light of this evident double standard that Western countries may hold, WTO member states—both developed and developing countries—easily agreed that the TRIPS Agreement should be interpreted to improve public health.

The U.S. Trade Representative welcomed the 2003 Decision, which “allow[s] countries to override patent rights when necessary to export life-saving drugs to developing countries that face public health crises

86. See id.
87. See Keith Bradsher, A Nation Challenged: The Antibiotic; Bayer Insists Cipro Supply is Sufficient; Fights Generic, N.Y. TIMES, Oct. 21, 2001, at B7. Bayer’s Cipro patent was not scheduled to expire in the United States until 2003. See id.
89. See id. The Canadian Health Ministry overrode Bayer’s Cipro patent and ordered a Canadian pharmaceutical company to produce a generic equivalent to Cipro. See id.
90. See id.
92. See id.
93. See id. at 447 n.110.
94. See id. at 447.
95. See id.
but cannot produce drugs for themselves." Moreover, international organizations such as the WHO CIPIH urge: “Countries should provide in their legislation powers to use compulsory licensing, in accordance with the TRIPS agreement, where this power might be useful as one of the means available to promote, inter alia, research that is directly relevant to the specific health problems of developing countries.” To that same end, the Life-Savings Medicines Act of 2006 was introduced as “the catalyst for saving the lives or improving the health of millions of families in impoverished nations.”

II. LIFE-SAVING MEDICINES EXPORT ACT OF 2006

Senator Patrick Leahy introduced the Life-Saving Medicines Export Act to Congress on May 25, 2006. The purpose of the Life-Saving Medicines Act is to promote public health by establishing the infrastructure to permit U.S. generic drug companies to manufacture life-saving medicines in the United States under compulsory license, and then export these medicines to developing countries with insufficient or no manufacturing capability in the pharmaceutical sector to produce the life-saving medicines themselves.

The Life-Saving Medicines Export Act seeks to amend Title 35 of the United States Code, which governs patents. Specifically, it establishes procedures for granting authority to the Under Secretary for Commerce for Intellectual Property and Director of the Patent and Trademark Office to issue compulsory licenses. Moreover, the Life-Saving Medicines Export Act also establishes an office within the Patent and Trademark Office (“PTO”) to assist countries seeking medicines to identify pharmaceutical companies that may manufacture such medicines under compulsory license. The Act also explicitly states that the generic company’s action under the compulsory licensing system is not an infringement of the patent.

99. See id.
100. See generally S. 3175 § 2.
101. See id.
102. See id.
103. See id. § 3(a).
104. See id. § 4.
The pharmaceutical company seeking to produce the essential medicine (“generic company”) must submit an application to the PTO, identifying the eligible importing country in need of the medicine (“importing country”).\(^{105}\) An importing country must be: an LDC,\(^{106}\) a WTO member state that has certified to the WTO General Council of its intent to participate in the compulsory licensing system, or a non-WTO member state that lacks the manufacturing capacity to produce the drug itself.\(^{107}\) Moreover, the generic company may apply for a multi-country license for the production of medicine that will be exported to multiple countries.\(^{108}\) Although only eligible countries may import medicines through the proposed compulsory licensing system, the application may also include the names of any nongovernmental organization (“NGO”) that will assist the importing country with the medicines.\(^{109}\)

The generic company may apply for a license for any pharmaceutical product,\(^{110}\) but must specify the scope of the drug production. The generic company must first specify the name of the drug it seeks to produce and export, as well as the patented equivalent,\(^{111}\) where the patented drug has received either WHO or U.S. FDA approval.\(^{112}\) In addition, the generic company must estimate the quantity of medicines to be produced and exported.\(^{113}\) Before an application is approved by the PTO, the generic company must show that it made efforts to negotiate directly with the patent holder.\(^{114}\) Specifically, the generic company’s application must include a copy of a written request to the patent holder asking for a voluntary license to produce the drug, as well as a description of any subsequent negotiations.\(^{115}\) The generic company is also required to wait at least sixty days after sending the request before submitting an application to the PTO for a compulsory license.\(^{116}\)

\(^{105}\) See S. 3175 § 3(a).
\(^{106}\) See supra note 66 and accompanying text (defining least-developed country).
\(^{107}\) See S. 3175 § 3(a).
\(^{108}\) See id.
\(^{109}\) See id.
\(^{110}\) See id. The Life-Saving Medicines Export Act defines a “pharmaceutical product” eligible for generic production as “any patented product, or pharmaceutical product, including components of that product, manufactured through a patented process, of the pharmaceutical sector including any drug, active ingredient of a drug, diagnostic, or vaccine needed to prevent or treat potentially life threatening public health problems.” Id.
\(^{111}\) See id.
\(^{112}\) See id.
\(^{113}\) See S. 3175 § 3(a).
\(^{114}\) See id.
\(^{115}\) See id.
\(^{116}\) See id.
Once the application has been submitted, the PTO must approve or deny the application within sixty days.\textsuperscript{117} A denied applicant must appeal the decision to the U.S. Court of Appeals for the Federal Circuit, subject to final review by the Supreme Court upon certiorari.\textsuperscript{118} If the application is approved, the generic company is limited to producing the medicine for only the importing country listed in the application, and must export the medicine only to the importing country.\textsuperscript{119} The compulsory license is effective for seven years, but the generic company may apply for a license renewal once, which would extend the license for an additional seven years.\textsuperscript{120} Moreover, if the generic company notifies the PTO that the original estimated quantity of the drug will not be sufficient to meet the importing country’s need, the PTO may increase the licensed drug quantity without need for a new license application.\textsuperscript{121} A compulsory license may cease to exist, however, if the PTO determines, pursuant to a petition by the patent holder, that the circumstances warranting the compulsory license no longer exist and will not reoccur.\textsuperscript{122}

The generic company is also responsible for distinctly labeling and packaging the medicine so that it is distinguishable from the patented drug, and is identifiable as created under the compulsory licensing system.\textsuperscript{123} However, this requirement may be waived if it is not feasible, or if doing so would significantly impact the price of producing the drug.\textsuperscript{124} Moreover, the requirement may be waived “under urgent circumstances for limited quantities.”\textsuperscript{125}

The Life-Saving Medicines Export Act also requires a generic company granted a compulsory license to pay remuneration to the patent holder within forty-five days after the generic company exported the drugs to the importing country.\textsuperscript{126} In order to set a reasonable royalty

\textsuperscript{117} See S. 3175 § 3(a). The PTO has the option of denying an application but requesting additional information. The generic company must submit the supplemental information within thirty days of the PTO’s request. The PTO then makes a final decision within sixty days of receipt of the additional information. See id.

\textsuperscript{118} See id. The Federal Circuit Court of Appeals may set aside the PTO decision if it finds the decision to be: (1) “arbitrary [or] capricious,” (2) “contrary to constitutional right,” (3) “in violation of a statutory right,” or (4) “without observance of procedure required by law.” Id.

\textsuperscript{119} See id.

\textsuperscript{120} See id.

\textsuperscript{121} See id.

\textsuperscript{122} See id.

\textsuperscript{123} See S. 3175 § 3(a).

\textsuperscript{124} See id.

\textsuperscript{125} Id.

\textsuperscript{126} See id.
amount, the PTO consults with Health and Human Services, the National Institutes of Health, the U.S. Agency for International Development, and the Centers of Disease Control.\textsuperscript{127} The remuneration is capped at four percent of the commercial value of the drug, but in determining the royalty amount, the PTO considers: “[T]he need for the [generic company] . . . to make a reasonable return sufficient to sustain a continued participation in humanitarian objectives,” “[t]he humanitarian and noncommercial reasons for issuing a compulsory license,” “[t]he economic value to the importing country,” “[t]he need for low-cost pharmaceutical products by persons in eligible countries, in the importing country,” “[t]he ordinary levels of profitability in the United States . . . and any relevant international trends in relevant prices as reported by the United Nations or other appropriate humanitarian organizations.”\textsuperscript{128} In addition, if the importing country is on the UN Human Development Index (“HDI”), or suffers from circumstances similar to a country on the index, the required royalty payment is much lower than the four percent cap.\textsuperscript{129}

The Life-Saving Medicines Export Act also provides safeguards to ensure that medicine production is not impeded by onerous procedures during times of emergency.\textsuperscript{130} Therefore, if the importing country is in a state of “a national emergency or other circumstances of extreme urgency,” the PTO may employ expedited approval procedures.\textsuperscript{131} Moreover, the PTO may waive any requirement of the compulsory licensing system—including the requirement that the generic company first negotiate with the patent holder—or may postpone the royalty calculation until after the application has been approved.\textsuperscript{132}

The Life-Saving Medicines Export Act also directs the PTO to establish the National Advisory Board on Implementation of the General Council Decision to provide guidance with the compulsory licensing system, including determining appropriate royalty amounts.\textsuperscript{133} Recognizing the importance of expert advice, the Board will include scholars and ex-

\begin{equation}
\frac{1 + (\text{total number of HDI countries}) - (\text{importing country’s HDI rank})}{(\text{total number of HDI countries})} \times 0.04
\end{equation}

See id.

\textsuperscript{127} See S. 3175 § 3(a).
\textsuperscript{128} See id.
\textsuperscript{129} See id. If the country is on the HDI, the rate for royalty calculation is as follows:

\textsuperscript{130} See id.
\textsuperscript{131} Id.
\textsuperscript{132} See id.
\textsuperscript{133} See S. 3175 § 5.
experts in fields affecting, as well as those impacted by, the compulsory licensing system.\textsuperscript{134}

III. CANADA’S BILL C-9: AN ACT TO AMEND THE PATENT ACT AND THE FOOD AND DRUGS ACT (“THE JEAN CHRÉTIEN PLEDGE TO AFRICA ACT”\textsuperscript{135})

On May 14, 2004, Canada amended its Patent Act to authorize compulsory licenses for the production of generic drugs for export to eligible developing countries.\textsuperscript{136} By enacting this legislation, Canada became the first Group of Eight\textsuperscript{137} country to implement the WTO General Council’s
Decision of August 2003. The stated purpose of the legislation is “to facilitate access to pharmaceutical products to address public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.” The Pledge to Africa Act received the support of NGOs, civil society groups, and even the pharmaceutical industry. Nevertheless, widespread criticism within these same groups resulted in a general consensus that the bill’s flaws may prevent it from achieving its goal of improving access to life-saving medicines. Harsher critics accuse the Canadian government of betraying people in developing countries by passing legislation that “perpetuate[s] inequitable access to medicines by inviting anti-competitive behaviour by multinational pharmaceutical companies, protecting these companies’ monopolies and [profiting] at the expense of the lives of patients.” During its drafting, however, the Canadian government implemented suggestions by brand name pharmaceutical companies, generic companies, and civil society organizations to address potential weaknesses with the legislation. Nevertheless, more
than three years after the Pledge to Africa Act was introduced into Canadian law, no developing country has received life-saving medicines through the new Canadian compulsory licensing system.\textsuperscript{144}

Under the Pledge to Africa Act, the Canadian government may issue a compulsory license for a defined set of patented medicines for export to a defined set of developing countries.\textsuperscript{145} The medicines available for generic production are limited to the pharmaceutical products that were on the WHO list of essential medicines\textsuperscript{146} and were patented in Canada at the time that the Pledge to Africa Act was enacted.\textsuperscript{147} The Pledge To Africa Act also limits export of the generic medicines to countries that are: LDCs,\textsuperscript{148} WTO member states that have not declined to use the system as importers, or WTO member states that have stated an intent to participate in the compulsory licensing system only if they face national emergency or insufficient manufacturing capacity for the medicine they seek under the license.\textsuperscript{149} However, the Pledge to Africa Act includes procedures for updating the lists of medicines and eligible countries.\textsuperscript{150} The Minister and the Minister of Health may recommend the addition of any patented product that addresses a health problem in a developing country.\textsuperscript{151}

\begin{itemize}
\item \textsuperscript{144} See infra note 177 and accompanying text.
\item \textsuperscript{145} See 2004 S.C., ch. 23 § 21.04, Schedule 1–4.
\item \textsuperscript{146} See WHO, Essential Medicines, http://www.who.int/medicines/services/essential_medicines_def/en/index.html (last visited Oct. 9, 2007). The WHO Expert Committee on the Selection and Use of Essential Medicine compiles the essential medicines list by selecting products that satisfy priority health care needs, and takes into consideration the disease prevalence, as well as the comparative efficacy, safety, and cost-effectiveness of medicines. See id.
\item \textsuperscript{147} See Lalita Acharya & Kristen Douglas, Canada Library of Parliament, Bill C-9: An Act to Amend the Patent Act and the Food and Drugs Act: Legislative Summary 2 (Mar. 3, 2004); Pledge to Africa Act, supra note 136, at Schedule 1.
\item \textsuperscript{148} See supra note 66 and accompanying text (defining least-developed country).
\item \textsuperscript{149} See Acharya & Douglas, supra note 147, at 2. The Pledge to Africa Act includes three schedules of eligible importing countries. Schedule two lists all countries that the UN has determined are LDCs. Schedule three lists all WTO member states that have not declined to use the compulsory licensing system to import medicines. Schedule four lists all WTO member states who have stated an intention to use the compulsory licensing system only in the event of a national emergency or other extreme urgency situation. See id.
\item \textsuperscript{150} See 2004 S.C., ch. 23 § 21.03.
\item \textsuperscript{151} See id. § 21.03(1)(a). Based on a recommendation by the Minister and Minister of Health, the Governor in Council may add “any patented product that may be used to address public health problems afflicting many developing and least-developed countries,
Moreover, the Minister of Foreign Affairs, the Minister for International Trade, and the Minister for International Cooperation may recommend additional eligible importing countries.\textsuperscript{152} Furthermore, a non-WTO member state may be added if it is on the Organization for Economic Cooperation and Development’s (“OECD”)\textsuperscript{153} list of countries that are eligible for official development assistance, the country faces “a national emergency or other circumstances of extreme urgency,” and has “insufficient[] pharmaceutical capacity to manufacture that product.”\textsuperscript{154}

Like the Life-Saving Medicines Export Act, the generic company must submit an application specifying the name and quantity of the drug it seeks to produce and export and its patented brand-name equivalent.\textsuperscript{155} In addition, the generic company must have made a written request to the patent holder for a voluntary license, and must wait at least thirty days after such unsuccessful negotiation before filing an application for the compulsory license.\textsuperscript{156}

The Pledge to Africa Act also requires that the generic company pay remuneration to the patent holder.\textsuperscript{157} The Governor in Council determines an appropriate royalty amount in light of the humanitarian and non-commercial reasons behind the compulsory license.\textsuperscript{158} However, the patent owner may seek a Federal Court order that requires a royalty payment greater than the amount that the Governor in Council has determined.\textsuperscript{159} The Federal Court may only order a higher royalty payment if the Court finds that the Governor in Council’s remuneration determination is inadequate, when considering the humanitarian and non-commercial reasons behind the compulsory license and the medicine’s economic value to the importing country.\textsuperscript{160}

When a compulsory license is granted in Canada, it is valid for two years, with the opportunity to renew the license for an additional two especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.” See 2004 S.C., ch. 23 § 21.03(1)(a)(i).
\textsuperscript{152} See id. §§ 21.03(1)(b)–(d).
\textsuperscript{153} The thirty member states of the Organization for Economic Co-operation and Development are “committed to democracy and the market economy.” OECD, About OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Oct. 9, 2007).
\textsuperscript{154} See id. §§ 21.03(1)(d)(ii).
\textsuperscript{155} See id. § 21.04(2). Compare id. with S. 3175 § 3(a) (discussing the Life-Saving Medicines Export Act compulsory license application).
\textsuperscript{156} See 2004 S.C., ch. 23 § 21.04(3)(c).
\textsuperscript{157} See id. § 21.08.
\textsuperscript{158} See id. §§ 21.08(1)–(2).
\textsuperscript{159} See id. §§ 21.08(4)–(6).
\textsuperscript{160} See id. § 21.08(7).
years. The generic company must produce medicine that is physically distinguishable from the patented equivalent through distinct “marking, embossing, labelling, and packaging.”

In addition, the Minister of Health must approve the generic drug as meeting the requirements of Canada’s Food and Drugs Act.

The patent owner may apply to the Federal Court for an order terminating the compulsory license. The patent holder must show that either the application for the compulsory license contained inaccurate information, or that the generic company did not follow provisions of the license, such as paying the specified remuneration to the patent holder or exporting only to the authorized importing country. The patent owner may assert that: (1) the compulsory license application contained inaccurate information; (2) the generic company failed to set up a Web site required to disclose information about the generic medicines; (3) the generic company failed to notify the patentee, importing country, or the medicine purchaser within fifteen days of exporting the medicines; (4) the generic company has failed to pay the required royalty within the prescribed time; (5) the generic company failed to provide the Commissioner or the patent holder with a copy of the agreement underlying the compulsory license application; (6) the medicines were re-exported with the generic company’s knowledge; (7) the medicines were exported to somewhere other than the authorized importing country; (7) the quantity of exported medicines exceeded the authorized amount; or (8) the medicines exported to a non-WTO member state have been used for commercial purposes.

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162. Id. § 21.04(3)(b). See generally Anthony P. Valach, Jr., TRIPS: Protecting the Rights of Patent Holders and Addressing Public Health Issues in Developing Countries, 4 CHI.-KENT J. INTELL. PROP. 156, 168–70 (2005) (explaining that the generic company must consider that changes to pill size, shape and color may incidentally affect the generic medicine’s bio-equivalence to the patented medicine).
165. See id.
166. See id. § 21.06 (requiring the generic company to establish a Web site to disclose information on the product, the importing country, and the distinguishing features of the generic medicine, as well as the date when the medicine is exported).
167. See id. § 21.07 (requiring the generic company to notify the parties involved that the generic medicines will be exported within fifteen days).
168. See id. § 21.16 (requiring the generic company to provide a copy of the underlying agreement and a statement defining both the monetary value of the agreement and the number of units to be sold pursuant to the agreement).
The Federal Court may also terminate the license if it finds that the underlying agreement to sell the generic medicines is “commercial in nature.”\textsuperscript{170} If the Court terminates the license because of a commercial agreement, the Federal Court may order the generic company to turn over any remaining medicines to the patent holder, as though the generic company had infringed on the patent.\textsuperscript{171}

The Pledge to Africa Act provides for an advisory committee to facilitate the administration of Canada’s compulsory licensing system.\textsuperscript{172} However, unlike the advisory board created pursuant to the Life-Saving Medicines Export Act,\textsuperscript{173} the Canadian advisory committee’s duties are extremely limited. The advisory committee only advises the Minister and the Minister of Health in the recommendations that the Minister and the Minister of Health make to the Governor in Council regarding additions and deletions to the list of approved patented products.\textsuperscript{174}

IV. A MORE EFFICIENT COMPULSORY LICENSING INFRASTRUCTURE IN LIGHT OF THE CRITICISMS OF THE PLEDGE TO AFRICA ACT

When the Life-Saving Medicines Export Act was introduced, U.S. lawmakers were confident that it addressed the flaws found in other countries’ similar legislation.\textsuperscript{175} Specifically, lawmakers identified key provisions of Canada’s compulsory licensing legislation that made generic companies reluctant to participate.\textsuperscript{176} The most striking criticism, however, is that more than three years after the legislation was passed, a

\textsuperscript{170} 2004 S.C., ch. 23 § 21.17. The agreement may be deemed “commercial in nature” if the generic medicine is sold for more than twenty-five percent of the price of either the patented medicine or any equivalent medicine that has been produced with the patent holder’s consent. However, this determination also takes into account the generic company’s need to make a reasonable return on the medicines, the normal profitability of commercial pharmaceutical agreements, and international pricing trends for products supplied for humanitarian purposes. See id. § 21.17(1)-(2). In finding a commercial agreement, the Federal Court may fashion a remedy on “any terms that it considers appropriate.” Id. § 21.17(3). Rather than terminating the license, the Court may instead require the generic company to pay the patent owner a royalty amount that adequately compensates for the commercial use of the medicine. See id. § 21.17(3)(b).

\textsuperscript{171} See id. § 21.17(4)(a). In the alternative, the patent holder may nevertheless permit the generic company to release the remaining medicines to the importing country. See id. § 21.17(4)(b).

\textsuperscript{172} See id. § 21.18.

\textsuperscript{173} See S. 3175 § 5. See also supra notes 133–34 and accompanying text.

\textsuperscript{174} See 2004 S.C., ch. 23 § 21.18.


\textsuperscript{176} See id.
The single pill has not left Canada. The Life-Saving Medicines Export Act was touted as addressing the concerns over a Canadian law that "permits dilatory and needless litigation, omits important medicines from a complex list of covered drugs, and creates unnecessary bureaucratic hoops." Nevertheless, even if the United States does succeed in addressing these so-called flaws, lawmakers must look at whether this is enough to allow the U.S. law to succeed. Unfortunately, no country has established a benchmark TRIPS-compliant compulsory licensing system that has effectively increased access to essential life-saving medicines. However, by addressing the concerns raised over the Pledge to Africa

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177. See Lisa Priest, Canadian Companies Agree to Share Generic AIDS drugs with Rwanda, GLOBE AND MAIL (Toronto), Aug. 9, 2007, at A3. However, the first pills may leave Canada in the near future. On July 19, 2007, Rwanda became the first country to inform the WTO of its intent to use the 2003 Decision to access life-saving medicines. See WTO: 2007 News Items, http://www.wto.org/english/news_e/news07_e/public_health_july07_e.htm (last visited Sept. 29, 2007). Rwanda, a country with 250,000 people infected with HIV, seeks to import antiretrovirals under Canada’s compulsory licensing system. See Lisa Priest, supra, at A3. Multinational pharmaceutical company Glaxo-SmithKline ("GSK") subsequently gave its consent under the Canadian compulsory licensing system to permit the Canadian company Apotex to produce an antiretroviral that contains two molecules that have been patented by GSK. See Press Release, Glaxo-SmithKline, GSK Gives Consent Under Canada’s Access to Medicines Regime for Generic Version of HIV/AIDS Medicine for Use in Rwanda (Aug. 8, 2007). Moreover, GSK has agreed to waive royalties provided that Apotex supplies the drugs to Rwanda on a no-profit basis. See id. On September 25, 2007, a compulsory license was granted to Apotex, permitting it to proceed with manufacturing the antiretroviral. See ApoTriavir Approved by Health Canada Under CAMR Provisions, ANTI-INFECTIVE DRUG NEWS, Sept. 25, 2007. If the agreement is completed, up to 16 million tablets of the antiretroviral will be sent to Rwanda, or enough to treat 21,000 Rwandans for one year or 200,000 Rwandans for one month. See Lisa Priest, supra, at A3. Apotex, however, cautioned that not all barriers to access have been removed. See id. Apotex must still reach similar agreements regarding the other patented molecules contained in the antiretroviral that are not patented by GSK. See id. (quoting Apotex’s director of public and government affairs: "The bottom line is that the patentees have not lifted all of the barriers to shipment. . . Apotex cannot ship tomorrow.").


179. It may be helpful to note Brazil’s Industrial Property Law permitting compulsory licensing. Although the law is not used to produce generic medicines, Brazil has successfully negotiated with multinational pharmaceutical companies by threatening to grant compulsory licensing to generic companies. As a result of these threats, patent holders have negotiated affordable antiretroviral drugs. Therefore, although Brazil did not issue a compulsory license, it attained a price reduction of essential medicines that may not have been possible without compulsory licensing legislation. See Rahul Rajkumar, The Central American Free Trade Agreement: An End Run Around the Doha Declaration on Trips and Public Health, 15 ALB. L.J. SCI. & TECH. 433, 443 (2005).
Act, the Life-Saving Medicines Export Act is off to a good start creating an effective compulsory licensing system. Most of the arguments over the Pledge to Africa Act point out that the Canadian compulsory licensing system incorporates stringent regulations that are not necessarily required by the WTO’s 2003 Decision.\textsuperscript{180} Moreover, critics emphasize that the Pledge to Africa Act involves burdensome bureaucratic red tape and procedural barriers, which may prevent essential medicines from getting to people that need them in developing countries.\textsuperscript{181} More importantly, however, a compulsory licensing system will only succeed if it gives generic companies the economic incentive to participate. If the Life-Saving Medicines Export Act does not provide sufficient financial motivation, generic companies will not produce affordable essential medicines, regardless of how many people might die as a result.\textsuperscript{182} Unfortunately, despite a praiseworthy attempt, the incentives provided by the Life-Saving Medicines Export Act will not be enough to succeed. If the U.S. government passes the legislation as it currently stands, it will follow in the footsteps of the Pledge to Africa Act; not a single pill will leave the United States.

\textit{A. Provisions Unnecessary to Comply with the WTO Agreements}

One focus of strong criticism of the Pledge to Africa Act is its limitation on medicines that can be produced under compulsory license.\textsuperscript{183} The Canadian government only permits compulsory licenses for pharmaceutical products that were on the WHO list of essential medicines and were protected by Canadian patent when the Pledge to Africa Act was enacted.\textsuperscript{180} See Canadian HIV/AIDS Legal Network, Canada Proceeds with Bill C-9 on Cheaper Medicine Exports: NGOs Say Initiative is Important, and Urge Other Countries to Avoid the Flaws in the Canadian Model, supra note 143.

\textsuperscript{181} See supra notes 141–42 and accompanying text (discussing criticism by NGOs, civil society groups, and the pharmaceutical industry).

\textsuperscript{182} See Richards, supra note 15, at 163.

\textsuperscript{183} The argument that the Pledge to Africa Act, as well as any other legislation of its kind, should not be limited to a specific list of medicines is grounded in a broad interpretation of the Doha Declaration. Paragraph 1 “recognize[s] the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.” Doha Declaration, supra note 51. As such, the Doha Declaration should extend to all public health needs. Furthermore, the Doha Declaration affirms “that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health.” Id. By making such a general statement, the WTO can be seen as addressing all health issues, and not just a set of specific diseases. See Frederick M. Abbott, The WTO Medicines Decision: World Pharmaceutical Trade and Protection of Public Health, 99 Am. J. Int’l L. 317, 328 (2005).
acted.\(^{184}\) However, this original list omits “even the most widely sought fixed-dose combination of anti-retrovirals.”\(^ {185}\) Although the Minister and the Minister of Health may review and approve new medicines,\(^ {186}\) this process may find itself stuck in bureaucratic red tape for months. The Life-Saving Medicines Export Act addresses this issue by permitting the production of any pharmaceutical product used to combat life-threatening public health problems.\(^ {187}\) Because it does not limit the list of approved medicines, the Life-Saving Medicines Act addresses current public health issues, as well as unforeseeable future issues. In addition, the proposed U.S. system eliminates the procedural barriers involved in maintaining and updating a list of approved medicines.

Critics of the Pledge to Africa Act also object strongly to the limitations on eligible importing countries. The original list includes UN-determined LDCs and WTO member states that have either: (1) not declined to import under the compulsory licensing system, or (2) stated an intention to use the system for national emergency or insufficient manu-

\(^{184}\) See 2004 S.C., ch. 23 Schedule 1. See also supra notes 146–47 and accompanying text. The Canadian government has amended the original list of permissible pharmaceutical products since the Pledge to Africa Act was passed. See Order Amending Schedule 1 to the Patent Act (Oseltamivir Phosphate) SOR/2006-204 (Can); Order Amending Schedule 1 to the Patent Act (Lamivudine + Nevirapine + Zidovudine) SOR/2005-276 (Can).

\(^{185}\) See Kiddell-Monroe, supra note 138.

\(^{186}\) See 2004 S.C., ch. 23 § 21.03(1)(a). See also supra note 151 and accompanying text. The medicine approval process was put to the test when a generic pharmaceutical company sought to add oseltamivir phosphate to Canada’s list of approved medicines. Oseltamivir, better known as the patented drug Tamiflu, is effective against various strains of influenza, such as the fatal H5N1 strain of avian flu. See Legal Network Calls for Compulsory Licensing of Tamiflu, NETWORK NEWS, Mar. 2006, at 6. On February 13, 2006, generic pharmaceutical company Biolyse formally requested that oseltamivir phosphate be added to the Patent Act’s Schedule 1 drugs that are eligible for export. See Letter from Joanne Csete, Executive Director, Canadian HIV/AIDS Legal Network, to Susan Bincoletto, Director General, Marketplace Framework Policy Branch, Industry Canada (July 26, 2006), available at www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=706. On July 1, 2006, the Departments of Industry and Health published a proposed order that would amend Schedule 1 of Canada’s Patent Act, which lists the approved medicines. See id. However, the Canadian federal government did not add oseltamivir to Schedule 1 until over seven months later. See Helen Branswell, Canada Agrees to Add Tamiflu to List of Drugs That Can Be Made Off Patent, CANADIAN PRESS, Sep 27, 2006.

\(^{187}\) See S. 3175 § 3(a). See also supra notes 110–12 and accompanying text. It is interesting to note that the United States called for a “limited approach” during WTO negotiation talks concerning the TRIPS Agreement, and wanted to limit the diseases that the Doha Declaration covered. By doing so, the United States sought to limit the number of patents that would be overridden by compulsory licenses and to diminish the risk that pharmaceutical revenues would be jeopardized. See Abbott, supra note 183, at 327–29.
facturing capacity. Additionally, a non-WTO member state may be added to the list of approved countries if it is on the OECD’s list of countries eligible for official development assistance. Nevertheless, because Canada’s original list includes only WTO members states, it fails to recognize that many developing countries’ citizens have no access to essential medicines, regardless of whether the country is a WTO member state or not. Although the Pledge to Africa Act includes procedures for adding eligible importing countries, such procedures cannot happen immediately, and a country may have to wait months to be reviewed and approved. In addition, as countries are added or removed from the UN list of LDCs or acquire WTO membership, Canada’s list of eligible countries must be updated, resulting in an additional administrative burden. The Life-Saving Medicines Export Act, on the other hand, avoids this unnecessary red tape; there is no specific list of eligible importing countries. Instead, the U.S. compulsory licensing system may export to: UN-determined LDCs, WTO members that have stated their intention to use the system, and non-WTO member states that lack adequate manufacturing capabilities to produce the requested drug. Therefore, the United States reduces the administrative costs of maintaining a list, and more importantly, does not exclude any countries that are in need of life-saving medicines.

188. See 2004 S.C., ch. 23 Schedules 2–4. See also supra notes 148–49 and accompanying text. Countries such as East Timor and Lebanon are excluded from the list of eligible importing companies because they are neither LDCs nor WTO members. See Policy Statement, Development & Peace, Urgent Appeal to Amend Bill for Cheap Medicines to HIV/AIDS Patients (Mar. 1, 2004), available at http://www.devp.org/testA/policy/declarations04_2-e.htm.

189. See 2004 S.C., ch. 23 §21.03(d)(ii). See also supra notes 153–54 and accompanying text.

190. MSF, Amending Canada’s Drug Patent Law: A Betrayal of Patients in Developing Countries, supra note 142, quoting Richard Elliott, Director of Legal Research and Policy at the Canadian HIV/AIDS Legal Network (“People in all developing countries struggle with poverty and public health needs, and should benefit from this important legislation regardless of whether their country belongs to the WTO.”).

191. See S. 3175 § 3(a). See also supra notes 106–07 and accompanying text. Again, as with the “limited approach” to medicines eligible for generic production under compulsory license, the United States ironically sought to limit the countries “with insufficient or no manufacturing capacities in the pharmaceutical sector” that were provided for in the Doha Declaration. Abbott, supra note 183, at 334–35. In doing so, the United States and other developing countries could limit the number of patents that would be overridden, as well as minimize the amount of revenues that would be lost by patent-owning pharmaceutical companies. See id.

192. See S. 3175 § 3(a). See also supra notes 106–07 and accompanying text.
The Pledge to Africa Act is also widely criticized for requiring generic companies to enter into export agreements only with state governments. Therefore, NGOs, such as Médecins Sans Frontières/Doctors without Borders, are not granted access to life-saving medicines under the Canadian system. International agencies and NGOs play a critical role in treating public health needs in developing countries and often have more knowledge about a country’s large-scale health epidemic than government officials. Moreover, NGOs may also know the best way to administer the life-saving medicines to improve public health. The Life-Saving Medicines Export Act acknowledges this problem and permits licensees to include the names of NGOs that will assist the importing country with the medicines. However, this provision does not permit export agreements between a generic company and an NGO. If an NGO seeks essential medicines, it must work with a country’s government to obtain these medicines. Moreover, if an NGO wants to supply essential medicines for a given disease in multiple countries, it must coordinate with each country’s government. NGOs may face roadblocks if a government lacks resources, or is simply reluctant, to collaborate in this effort. Unnecessary procedures such as these decrease the chances that essential medicines will reach people in need. Although the drafters of the Life-Saving Medicines Export Act specifically wanted to include NGOs in the U.S. compulsory licensing system, the existing provision is not optimal. Instead, generic companies should be permitted to enter into export agreements directly with NGOs, provided that the NGOs supply the generic medicines to eligible importing countries.

B. Procedural Barriers

The Pledge to Africa Act also creates “unnecessary bureaucratic hoops” by potentially requiring generic companies to unnecessarily file

193. See 2004 S.C., ch. 23 Schedules 2–4. See also supra notes 148–49 and accompanying text. In making amendments to the proposed Pledge to Africa Act, the Canadian government recognized the need for generic companies to contract directly with NGOs, and consequently proposed an amendment to address the issue. However, this amendment was removed in the process of last-minute changes. See Canadian HIV/AIDS Legal Network, Canada Proceeds with Bill C-9 on Cheaper Medicine Exports: NGOs Say Initiative is Important, and Urge Other Countries to Avoid the Flaws in the Canadian Model, supra note 143.

194. See Acharya & Douglas, supra note 147, at 2; Penner & Narayanan, supra note 138, at 467.

195. See Valach, supra note 162, at 172.

196. See id.

197. See S. 3175 § 3(a). See also supra note 109 and accompanying text.
many compulsory license applications. First, a Canadian compulsory license permits a generic company to produce a specific quantity of medicine for only one country. Therefore, if the importing country needs an increased quantity of the same medicine, the generic company must submit an application for a new license, which authorizes the additional drug quantity. A new application for an increased drug quantity, which could feasibly occur on a regular basis, is an unnecessary waste of time and resources. Moreover, if multiple countries need the medicine, the generic company must submit a compulsory license application for each country. Again, this requirement creates needless paperwork for both the generic company and the Canadian government. Second, the Governor in Council has only two options in deciding an application—either grant the application or deny it. Therefore, if the generic company fails to include one piece of necessary information, the application is denied and the generic company must start the application process from the beginning.

The Life-Saving Medicines Export Act addresses each of these deficiencies. First, a generic company need not submit separate applications if the quantity of medicine they seek to produce changes or multiple countries need the medicine. If the generic company discovers that the importing country needs additional medicines, the generic company notifies the PTO, and the PTO may increase the authorized amount of medicines if it is appropriate. Second, the Life-Saving Medicines Export Act provides for multi-country licenses, in which the generic company submits one application for authorization to export medicines to multiple specified countries. In addition, when the PTO considers a compulsory license application, it has three options for its decision. In addition to granting or denying the application, it may also deny the application with a request for more information, giving the generic company thirty days to respond without having to start a new application. A new application would not only require the burden of redundant paperwork, but would also require the generic company to request a voluntary license from the patent holder, and then wait an additional sixty days after submitting that request to submit a compulsory license application to the PTO.

199. See Valach, supra note 162, at 168.
200. See id. at 169.
201. See S. 3175 § 3(a). See also supra note 121 and accompanying text.
202. See S. 3175 § 3(a). See also supra note 108 and accompanying text.
The Pledge to Africa Act has also been criticized as “permitting dilatory and needless litigation.”\textsuperscript{203} The Pledge to Africa Act grants the patent holder the right to petition the Federal Court to review the authorized license for numerous reasons.\textsuperscript{204} Although many of the grounds for termination ensure that the compulsory licensing system is not abused, other grounds for termination penalize the generic company for technical administrative violations. For example, a license may be terminated if the generic company fails to maintain or update a Web site that is required by the Act, or fails to notify the proper parties during the exporting process.\textsuperscript{205} The patent holder may use these administrative grounds to frustrate the generic company or to delay the production of the essential medicines. Consequently, a generic company may be deterred from participating in the compulsory licensing system because of the threat of litigation.

In addition, the patent holder has the right to litigate in Federal Court over whether the export agreement is “commercial in nature.”\textsuperscript{206} Unlike the above-mentioned grounds for Federal Court, the Court applies a balancing test to determine whether an export agreement is commercial in nature.\textsuperscript{207} Because the result of a balancing test is always uncertain, and there is no case law that predicts the outcome, generic companies may be reluctant to take this risk, especially if they are not expecting high enough levels of profit from the license agreements to cover the cost of drawn-out litigation.

The Life-Saving Medicines Export Act reduces the grounds upon which the patent holder may challenge a compulsory license. A patent holder may petition the PTO for review of a compulsory license only if

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\item \textsuperscript{204} See 2004 S.C., ch. 23 §21.14; Penner & Narayanan, supra note 140, at 467–69 (“[A] more significant roadblock for the use of the authorization under the Pledge to Africa Act may be the potential uncertainty associated with any such authorization. This uncertainty arises from the ability of the Federal Court, at the request of the patentee, to review and possibly amend the terms of the authorization.”). See also supra notes 164–69 and accompanying text.
\item \textsuperscript{205} 2004 S.C., ch. 23 §21.14. Jim Keon, President of CGPA, explained that “[i]t is unlikely that a generic company would spend the time and money fighting the brands in court over these contracts . . . . Once the brand company initiated litigation, the generic firm would probably withdraw its request for a license.” CGPA, Government Amendments to Bill C-9 Fall Short, supra note 143. See also supra notes 164–69 and accompanying text.
\item \textsuperscript{206} See 2004 S.C., ch. 23 §21.17. See also supra notes 170–71 and accompanying text.
\item \textsuperscript{207} See 2004 S.C., ch. 23 §21.17(2). See also supra note 170 and accompanying text.
\end{itemize}
the patent owner believes that “the circumstances that have led to the
granting of the license cease to exist and it appears probable that such
circumstances will not reoccur.”208 Although it seems like this single
provision encompasses all of the enumerated administrative provisions of
the Pledge to Africa Act, the Life-Saving Medicines Export Act never-
theless does away with the provision permitting the patent holder to chal-
lenge a compulsory license because it is “commercial in nature.” As
such, this omission decreases the risk that a compulsory license will be
revoked after the generic company has spent multiple years and millions
of dollars developing the medicines.209

One must further analyze the Life-Saving Medicines Export Act to de-
termine whether it streamlines compulsory licensing while sustaining
compliance with the TRIPS agreement. One of the most important issues
a country must address is whether the law eliminates injunctive relief to
the patent holder.210 The Life-Saving Medicines Export Act avoids this
potential obstacle by amending the patent laws to expressly state that
production of medicines pursuant to the Life-Saving Medicines Export
Act does not constitute patent infringement.211 Therefore, patent holders
are not entitled to injunctive relief against the generic company.212

In addition, an optimal compulsory licensing system must eliminate
procedural barriers in times of exigency.213 The Life-Saving Medicines
Export Act provides for such expedited approval for “emergencies and
circumstances of extreme urgency,” including waiving the required prior
negotiation with the patent holder, as well as postponing the royalty de-
determination until after the compulsory license has been granted.214

Moreover, a compulsory licensing system is more efficient if it utilizes
administrative review procedures instead of judicial review.215 The Life-

208. S. 3175 § 3(a). See also supra note 122 and accompanying text.
209. See CGPA, Government Amendments to Bill C-9 Fall Short, supra note 143.
210. See JAMES LOVE, Four Practical Measures to Enhance Access to Medical Tech-
nologies, in NEGOTIATING HEALTH 241, 245 (Pedro Roffe et al. eds., 2006).
211. See S. 3175 § 4. See also supra note 104 and accompanying text.
212. Current patent laws provide the patent holder with injunctive relief. See 35 U.S.C.
§ 281 (“A patentee shall have remedy by civil action for infringement of his patent.”); 35
U.S.C. § 283 (“The several courts having jurisdiction of cases under this title may grant
injunctions in accordance with the principles of equity to prevent the violation of any
right secured by patent, on such terms as the court deems reasonable.”).
213. See LOVE, supra note 210, at 245.
214. S. 3175 § 3(a). See also supra notes 130–32 and accompanying text.
215. See LOVE, supra note 210, at 245 (identifying the need that “a remedy to an anti-
competitive practice be . . . administrative rather than a judicial procedure”). The Life-
Saving Medicines Export Act grants compulsory licenses to improve access to medicines,
and not to remedy anti-competitive pricing or practices. Nevertheless, the same analysis
Saving Medicines Export Act provides that a generic company may appeal the denial of its application for a compulsory license in the U.S. Federal Circuit Court of Appeals.\textsuperscript{216} Judicial review in the federal courts can be more time-consuming and the status of a compulsory licensing application may not be resolved for years. Therefore, initial review by an administrative body may be more desirable in the interest of expediency. An example of such an administrative body would be the PTO Board of Patent Appeals and Interferences, where a patent applicant may first appeal a final patent rejection before appealing to the U.S. Federal Circuit Court of Appeals.\textsuperscript{217}

Furthermore, a provision requiring compulsory licenses in certain cases should be considered. Such mandatory licensing is advantageous because it: reduces transaction costs and uncertainty about whether a compulsory license will be available, ensures that policy goals are served; prevents patent holders from coercing government officials into blocking a compulsory license; and stops opportunities for corruption by generic companies or patent holders.\textsuperscript{218} Nevertheless, it is difficult to think of a minimum basis for a mandatory compulsory license that would not face extreme resistance by both the pharmaceutical sector and IPR proponents. Consequently, the United States should omit any such mandatory provision from the Life-Saving Medicines Export Act and seek to establish a fundamental system, rather than risking the entire compulsory licensing system. Once a basic system is implemented pursuant to the 2003 Decision\textsuperscript{219} and successfully increases access to essential medicines, then legislators can consider additional provisions such as one granting mandatory authorization in limited circumstances.

The Life-Saving Medicines Export Act also attempts to create a compulsory licensing system that is smarter than its Canadian equivalent by creating an advisory board to consider the conflicting interests that a compulsory license would affect—the rights of both patent-owning and generic pharmaceutical companies, the severity of health pandemics, and the needs of impoverished countries.\textsuperscript{220} However, the advisory board’s

\begin{footnotesize}
\begin{enumerate}
\item See S. 3175 § 3(a). \textit{See also supra} note 118 and accompanying text.
\item \textit{See Love, supra} note 210, at 245.
\item \textit{See supra} Part I.C.
\item \textit{See S. 3175 § 5. See also supra} notes 133–34 and accompanying text.
\end{enumerate}
\end{footnotesize}
role is more significant under the Life-Savings Medicines Export Act than its Canadian counterpart, whose role is limited to only assisting in recommendations for approved medicines. Because a compulsory licensing system involves many conflicting interests, the National Advisory Board on Implementation of the General Council Decision was designed so that no interest is completely disregarded. Such an advisory board is critical in guiding the U.S. compulsory licensing system to success.

C. Economic Incentives

More important than procedural efficiencies is the need to provide generic companies with financial incentives. The CIPIH summarized this point best when it said: “Although their business models are different, generic companies share with the research-based industry the common motivation of serving the interests of their shareholders. The mechanism will not be used if the financial incentives for participation, taking account of the risks involved, are deemed inadequate.” The problem here is twofold. First, as a private, profit-seeking firm, a generic company will not produce essential medicines—even if they do save lives—if the market does not allow the generic company to meet its minimum rate of return on development of the medicines. Second, developing countries need these life-saving medicines the most, but lack the funding required to allow generic companies to meet their minimum rates of return.

Because it is outside of the scope of this Note to address the problem of poverty in developing countries, this Part focuses on whether the Life-Saving Medicines Export Act allows generic companies to exceed their minimum rates of return, thus motivating them to participate in the compulsory licensing system.

The Pledge to Africa Act, the model or template for the Life-Saving Medicines Export Act, also fails to provide adequate economic incentives. For instance, the two-year lifespan of a Canadian compulsory license lifespan is too short. Even though the license may be extended

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221. See 2004 S.C., ch. 23 § 21.18. See also supra notes 172–74 and accompanying text.
223. See RICHARDS, supra note 15, at 163.
224. See id.
225. See CGPA, Government Amendments to Bill C-9 Fall Short, supra note 143.
for an additional two years\textsuperscript{227} and the generic company may apply for another license after expiration of the first license, the short compulsory license term does not provide adequate economic incentives to produce drugs under the new system.\textsuperscript{228} The financial costs and associated risks of applying for a compulsory license may exceed the revenue generated during the short license term.\textsuperscript{229} Because a generic company must still incur R\&D costs—albeit not as high as new drug R\&D—the generic company must also be permitted to recover these costs during the lifespan of the compulsory license. The Life-Saving Medicines Export Act improves this situation by setting the lifespan of a U.S. compulsory license at seven years, with a potential extension for another seven years.\textsuperscript{230} Although the lifespan of a U.S. compulsory license is over three times as long as its Canadian equivalent, it is nevertheless still insufficient to allow a generic company to recoup its production costs. If a patent is set to expire in fewer than seven years, a generic company will not apply for a compulsory license to produce the medicine because it will fear that other companies will produce generic equivalents once the patent expires,\textsuperscript{231} which may undercut the generic company’s profits. Moreover, most of the generic company’s seven-year window will be devoted to the task of having to reverse-engineer the medicine without the patent holder’s assistance.\textsuperscript{232} Therefore, a generic company will refuse to participate when a short compulsory lifespan creates such a great risk of economic loss.

Moreover, a longer lifespan will not significantly increase the profits of a generic company when the compulsory license limits the quantity of medicines that can be produced, and consequently limits the profits that may be earned. Therefore, the United States must do more to ensure that the Life-Saving Medicines Export Act reduces the economic burdens that may deter generic companies from producing essential medicines for

\textsuperscript{227} See 2004 S.C., ch. 23 § 21.12(1)-(2). See also supra note 161 and accompanying text.
\textsuperscript{228} CANADIAN HIV/AIDS LEGAL NETWORK, THE JEAN CHRÉTIEN PLEDGE TO AFRICA ACT AND ITS IMPACT ON IMPROVING ACCESS TO HIV/AIDS TREATMENT IN DEVELOPING COUNTRIES 5, supra note 141.
\textsuperscript{229} See id.
\textsuperscript{230} See S. 3175 § 3(a). See also supra note 120 and accompanying text.
\textsuperscript{232} See id. at 30.
developing countries. Specifically, the United States must assess the costs and risks involved in producing medicines under the Life-Saving Medicines Export Act, and attempt to minimize both.

1. The Cost and Risk to the Generic Company

Even though a generic company does not incur the high costs of new drug R&D, it must bear the significant burden of front-end investment. The pharmaceutical industry is knowledge intensive, and most of the cost lies in R&D of new drugs. However, a generic company must still incur the costs of producing the medicine, which involves reverse-engineering the drugs without assistance from the patent holder. The patent specifications may not provide the generic company with enough information to facilitate quick and easy reproduction of the medicine. Moreover, the most efficient process for manufacturing the medicine may be protected by a different patent, which may be owned by yet another pharmaceutical company.

A generic company also incurs the cost of royalty payments to the patent holder, which must be paid within forty-five days of exporting the medicine, regardless of whether the generic company has seen any sales profit from the medicines. Although the Life-Saving Medicines Export Act caps the maximum royalty payment at four percent of the patented medicine’s commercial value, this payment may still be relatively costly. Because patented medicines enjoy market exclusivity, and are therefore priced high to recoup hefty R&D expenses, a seemingly low maximum royalty of four percent may nevertheless burden the generic company if the medicine has high commercial value.

Moreover, a generic company faces the risk that the market demand for the medicines will not be great enough within the importing country, despite the discounted prices, to meet supply. Because the generic company

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233. The WHO CIPHIH recognizes that generic companies, like patent-owning companies, are driven by corporate profits. See WHO CIPHIH, Public Health: Innovation and Intellectual Property Rights, supra note 17, at 120.
235. See PhRMA, Key Industry Facts/About PhRMA, supra note 19.
237. See PEDRO ROFFE WITH CHRISTOPH SPENNEMANN & JOHANNA VON BRAUN, From Paris to Doha: The WTO Doha Declaration on the TRIPS Agreement and Public Health, in NEGOTIATING HEALTH 9, 14 (Pedro Roffe et al. eds., 2006).
238. See id. at 14–15.
239. See S. 3175 § 3(a). See supra note 126 and accompanying text.
240. See S. 3175 § 3(a). See also supra note 128 and accompanying text.
241. See supra note 19 and accompanying text (discussing new drug development costs).
may only export the medicines to the specified importing country, the generic company must bear the loss if it is unable to sell enough medicine to that country.

2. Reducing the Cost and Risk to the Generic Company

First, turning to the generic drug production cost specifically addressed in the Life-Saving Medicines Export Act, a generic company licensee must pay remuneration to the patent holder. The determination of the amount of royalty payment is important because it must compensate the patent holder while also permitting the generic company to sell the medicine at a low price to the impoverished individuals who need access to these life-saving essential medicines.

While there are countless ways to calculate remuneration, James Love looks at four commonly used methods. First, the most basic royalty determination is outlined in the 2001 UN Development Programme Human Development Report, which recommends a royalty set at four percent of the selling price of the generic medicine. In addition, generic companies could pay an extra one to two percent for medicines with special therapeutic value, or one to two percent less when R&D has received at least partial public funding. Second, the Japanese Patent Office established a royalty standard of two to four percent, with higher rates paid to inventions with higher profit margins. This determination also takes into account the “utilization factor,” or the relative importance of the patent in the complete product. This determination works well where there are multiple patented products or processes covering one medicine, such as with HIV/AIDS combination drugs. Third, the Canadian royalty determination under the Pledge to Africa Act utilizes a sliding scale from 0.02 to 4 percent, with the highest royalty paid when medicines are imported by the most highly developed countries as determined by the Human Development Report:

\[
\frac{178 - (\text{importing country's HDI rank})}{177} \times 0.04
\]

While this royalty determination is only slightly connected to the affordability of medicines in the importing country, it also takes into account the generic manufacturing cost. Lastly, the more complex 2005 Tiered Royalty Method starts with a four percent royalty for high-income markets, which is decreased based on capacity to pay (as measured by per capita income or relative gross domestic product). Under this last method, royalties
The Life-Saving Medicines Export Act uses a case-by-case royalty determination considering several factors, yet also provides that an alternate royalty rate formula may be used, which closely resembles that of the Pledge to Africa Act. By using such a formula, a patent holder receives a lower royalty payment when the importing country is a less developed country. While the Life-Saving Medicines Export Act does factor in the humanitarian reasons for issuing the compulsory license, as well as the need for low-cost medicines, this royalty formula, as well as the discretion given in determining the royalty, fails to factor in the medicine’s therapeutic value or the ability of the generic company to pay the royalty amount. It is crucial that the PTO ensures that a royalty amount is low enough so that a generic company is not dissuaded from applying for a compulsory license.

While it has been argued that insufficient royalty payments would discourage R&D-based pharmaceutical companies from continuing their innovations, it is unlikely that these minimal royalty payments would have a significant impact on the patent holder. The pharmaceutical sector is the most lucrative industry in the United States and its profits more than make up for its R&D costs. In addition, the prices of generic medicines have arguably little correlation to the actual cost of producing the drugs, and therefore could be drastically reduced without undercutting funds for R&D innovations. Furthermore, the estimate of R&D costs by pharmaceutical companies does not factor in the generous tax incentives they receive. Therefore, because there would be no overwhelming burden placed on patent holders by reduced royalty payments for a relatively small market, there is no clear reason why the United

are therefore lower for countries with both low income and high incident of disease. See Love, supra note 210, at 246–48.

244. See S. 3175 § 3(a). See also supra notes 127–29 and accompanying text.
245. See S. 3175 § 3(a).
246. See Marcia Angell, The Truth About the Drug Companies, N.Y. REV. OF BOOKS, July 15, 2004. The Public Citizen’s Congress Watch reported that, in 2000, the drug industry ranked “more profitable than any other” in the Fortune 500 review of America’s largest companies. The eleven pharmaceutical companies in the Fortune 500 saw nineteen percent return on revenue, while all the other Fortune 500 countries saw only a five percent return on revenue. See Public Citizen’s Congress Watch, Rx R&D Myths: The Case Against the Drug Industry’s R&D “Scare Card” 11 (2001).
247. See Angell, supra note 246.
248. See Joseph, supra note 91, at 433. The Public Citizen’s Congress Watch noted that the pharmaceutical industry enjoys a thirty-four percent tax deduction on R&D expenditures. In addition, from 1993–1996, the industry’s effective tax rate, the tax liability owed to the government, was sixteen percent, compared to the twenty-seven percent paid by other industries. See Rx R&D Myths: The Case Against the Drug Industry’s R&D “Scare Card,” supra note 246, at 15–16.
States should lower royalty payments to ease the burden on generic companies.

In addition to ensuring low royalty payments, the Life-Saving Medicines Export Act must also reduce the front-end investment as much as possible for the generic company.\(^{249}\) The cost of manufacturing the generic medicines would be lower if the patent holder assisted the generic company in the re-engineering process. One possible way to motivate the patent holder to enter into such an agreement would be to set a higher royalty payment if the patent holder assists the generic company in developing the medicine. However, this alternative royalty calculation would need to take into account the cost to the patent holder in assisting the generic company, the cost savings to the generic company in receiving such assistance, and the need to keep the royalty payments as low as possible to permit the generic company to charge low drug prices to the importing country. In the alternative, public funding could offset the costs of the re-engineering effort. Options for public assistance include granting government subsidies to the generic company to be used solely to reverse-engineer the medicines, providing tax incentives to the generic company to help defray costs in general,\(^{250}\) or directly assisting with the development effort by directing government-run facilities to aid in the reverse-engineering effort.

In addition to the motivation created by lower front-end investment, a generic company is also more likely to produce generic medicines for export when the prospective market is large, and therefore, the generic company anticipates that sales will compensate its investment costs.\(^{251}\) While the Life-Saving Medicines Export Act does increase the potential market size by permitting multi-country applications,\(^{252}\) generic companies should be permitted to enter into export agreements directly with NGOs. The potential market size would be much greater, since NGOs could use the medicines to service multiple countries.\(^{253}\) However, de-

\(^{249}\) See Scherer & Watal, supra note 231, at 6.

\(^{250}\) See id. at 54–59. Section 170(e)(3) of the U.S. Internal Revenue Code permits corporations to deduct charitable donations “used by the donee solely for the care of the ill, the needy, or infants,” which would allow a pharmaceutical company to recover some of the cost of donated medicines. I.R.C. § 170(e)(3). However, as the tax law is currently designed, it is likely that the tax incentive is not great enough to encourage charitable donations of life-saving medicines, as the donor may incur substantial net cost in producing the medicines. Instead, the tax laws must be reworked to impose zero net cost on the donor. See Scherer & Watal, supra note 231, at 58.

\(^{251}\) See id. at 6.

\(^{252}\) See S. 3175 § 3(a). See also supra note 108 and accompanying text.

\(^{253}\) MSF, for instance, is an “international humanitarian aid organization that provides emergency medical assistance to populations in danger in more than [seventy] countries.”
spite such potentially large markets, there is still no guaranteed market for generic medicines. Just as patent protection ensures a patent holder that a sufficient market exists to allow the patent holder to meet its minimum rate of return, the Life-Saving Medicines Export Act also needs a mechanism to ensure a sufficient market. This may require the United States, or other financial donors, to enter into precommitments to purchase the generic medicines on behalf of the importing country if the importing country is unable to afford the medicines.254

CONCLUSION

Even though the TRIPS Agreement authorizes compulsory licensing255 and the 2003 Decision permits export of medicines produced under compulsory licenses,256 it is still unclear how a country can implement such a system effectively. While Canada’s Pledge to Africa Act was praised as the first legislation of its kind by a highly developed country, it has failed to increase access to essential life-saving medicines in the impoverished, underdeveloped world. Undoubtedly, the U.S. position on compulsory licenses for public health problems has made great progress since the days when the government staunchly opposed similar actions by South Africa in 1997.257 However, the United States still has a long way to go to do its part in improving access to medicines. In view of this goal, the United States hopes to follow in Canada’s footsteps with the Life-Saving Medicines Export Act. Unfortunately, as it stands, the Life-Saving Medicines Export Act may also suffer the same fate as the Pledge to Africa Act; even if the bill survives and is passed into law, it is not likely that generic companies or importing countries will be eager to participate in the U.S. system. Because developing countries do not make the most attractive market for profit-seeking generic companies, the United States must greatly increase the economic incentives and reduce the procedural barriers of the Life-Saving Medicines Export Act.


254. See WHO CMH, supra note 11, at 84 (using a similar argument to assert that precommitment by donors to purchase essential medicines would incentivize R&D-focused pharmaceutical companies to allocate resources to target diseases only affecting poorer developing countries).

255. See supra Part I.A.

256. See supra I.C.

257. See supra I.D.
Moreover, skeptics of compulsory licensing schema are reluctant to put great reliance on these licenses:

[P]olicy-makers should view non-voluntary licensing of patented inventions as but one item in an arsenal of tools that may be used to promote national systems of innovations . . . excessive reliance on compulsory licensing of patented inventions may simply mask deeper structural problems and make them harder to solve in the long run.258

These critics argue that differential pricing of patented medicines and voluntary license agreements should be favored over government-authorized compulsory licenses.259 However, given the substantial urgency for essential life-saving medicines to treat diseases such as the HIV/AIDS pandemic,260 the Life-Saving Medicines Export Act may be a good start in developing a temporary solution to the problem. It is understandable that a pharmaceutical patent holder must be rewarded for its medical innovations, and must also be permitted market exclusivity to recoup the economic outlay for its extensive R&D. Nevertheless, the United States must step up and address the public health crises of developing countries that those countries cannot tackle themselves. At the very least, the United States can succeed as it did with Cipro,261 and use the threat of compulsory licensing under the Life-Saving Medicines Export Act to compel patent-holding pharmaceutical companies to reduce prices, thereby increasing access to the most essential life-saving medicines for the world’s most destitute and powerless individuals.

Jennifer A. Lazo*

258. See ROFFE, supra note 237, at 14 (citing Jerome H. Reichman with Catherine Hasenzahl, Non-Voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under TRIPS, and an Overview of the Practice in Canada and the USA (UN Conference on Trade and Dev. & Int’l Ctr. for Trade and Sustainable Dev., Issue Paper No. 5, 2003)).

259. For a discussion on differential pricing and voluntary licensing agreements between patent holders and generic companies, see WHO CMH, supra note 11, at 87–91.

260. See supra notes 1–10 and accompanying text (discussing the status of the AIDS pandemic in 2006).

261. See supra notes 84–90 and accompanying text (explaining the anthrax scare in 2001 and the U.S. government’s threat to override the Cipro patent).

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THE EXTRATERRITORIAL REACH OF THE
BANKRUPTCY CODE’S AUTOMATIC STAY:
THEORY VS. PRACTICE

INTRODUCTION

One does not normally have any positive associations with filing for bankruptcy—and for good reason. After all, being bankrupt means lacking sufficient funds to pay debts, manage expenses, run a functioning business, or otherwise meet financial obligations; this predicament is neither comfortable nor enjoyable. However, the bright side of filing for bankruptcy in the United States—if it can be thought of as such—is that the U.S. justice system affords many rights and protections to debtors so that they do not have to face the perils of bankruptcy unaided. One such protection is the automatic stay provided for by § 362 of the United States Bankruptcy Code. Whenever a debtor files for bankruptcy, an estate consisting of all the debtor’s property is

1. BLACK’S LAW DICTIONARY 59–60 (2d pocket ed. 2001).
2. 11 U.S.C. § 362(a) (2005). This section states that:

[A] petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate or to collect, assess, or recover a claim against the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor’s tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

Id.
created. The automatic stay then operates to protect this property by prohibiting anyone from making a claim against the property in the estate. Put simply, once a debtor properly files for bankruptcy in a U.S. court, no creditor may initiate or continue a suit seeking to acquire any of the debtor’s assets.

At first blush, the automatic stay seems like the perfect protection mechanism for any given debtor; if a creditor acts to seize or lay claim to the assets of an individual who has filed a bankruptcy petition, the court can hold the creditor in violation of the automatic stay and declare the creditor’s actions void. However, while the automatic stay may operate flawlessly in theory, various problems can and do arise in its practical application. For example, what happens if a debtor owns property or assets that lie outside the boundaries of the United States? The language of 11 U.S.C. § 541(a) does indicate that the debtor’s estate is comprised of all of the debtor’s property, “wherever located.” Moreover, similar language is found in 28 U.S.C. § 1334(e). This statute, combined with 28 U.S.C. § 157(a), operates to give the bankruptcy court, through the district court in which the case is proceeding, “exclusive jurisdiction . . . [over] all of the property, wherever located . . . .” The plain meaning of this language would seem to imply that “wherever located” means “wherever in the world,” but does it in actuality? Realistically, can it?

What if the property in question is located in a foreign country such that it lies outside of the U.S. court’s in rem jurisdiction? Can the U.S. court still, in fact, control the property? Alternatively, what if the creditor mak-

7. 28 U.S.C. § 1334(e) (2005). This section states that:

the district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

Id.  
8. 28 U.S.C. § 157(a) (2005) (Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district).
ing a claim on a debtor’s property is a foreign entity such that the U.S. court lacks in personam jurisdiction? Without in personam jurisdiction, how can a U.S. court take actions against a creditor who violates the automatic stay? Worse still, what if a foreign court makes a ruling that operates to seize or compromise the property in question? How then could a U.S. court possibly declare such a ruling or action void?

This Note will examine the extraterritorial application of the automatic stay—both in theory and in practice. Specifically, it will discuss and analyze the problems of holding that the automatic stay applies extraterritorially in all situations, especially if the courts continue to hold that all acts which violate the automatic stay are void. While the rule that the automatic stay applies extraterritorially operates nicely in theory, the practical applications of such a holding have proven problematic, at least insofar as U.S. courts hold that extraterritorial violations of the automatic stay are void.10 Looking forward, this Note will suggest that the United States should explore the possibility of pursuing an international convention with other countries that also have stay provisions in their insolvency codes.11

Part I of this Note sets forth background information regarding the automatic stay and its extraterritorial application. Part II examines the practical problems that arise from holding that the automatic stay applies extraterritorially in all situations. Part III then discusses principles of international comity and questions of deference. Part IV goes on to examine stay provisions in foreign jurisdictions. Part V evaluates various aspects of both the United Nations Commission on International Trade Law’s (“UNCITRAL”) Model Law on Cross Border Insolvency and the European Community Insolvency Regulation (“EC Regulation”). Finally, Part VI compares the benefits and drawbacks of the two systems described in Part V and concludes that the best course of action for the

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The fact that Congress granted the district courts . . . power to enter orders affecting assets of the debtor, wherever located, does not preclude foreign courts from exercising jurisdiction over estate property located in their countries, a matter that raises such questions as to the extraterritorial effect of the automatic stay and the personal jurisdiction of the United States courts over the entity at whose behest the foreign court acts.

Id.

11. While the U.S. Bankruptcy Code and the insolvency codes of many other countries provide for an automatic stay, some other countries’ insolvency codes only allow for non-automatic stays—stays that are entered after a given action occurs, at the request of one of the parties, or at the discretion of the presiding court. See infra Part IV.A.
United States to undertake would be to pursue a convention similar to the EC Regulation.

I. THE AUTOMATIC STAY

Whenever an individual or other entity files a bankruptcy petition under Title 11 of the United States Code, an estate is created that embodies all of the debtor’s property, “wherever located and by whomever held.” Additionally, the filing of such a petition triggers an automatic stay that prohibits any individual or entity from commencing or continuing any action or proceeding against the debtor. In effect, the automatic stay seals the debtor’s estate such that all of the debtor’s assets are protected from creditors for the duration of the stay.

The automatic stay has several functions, one of which is to protect the debtor during his or her bankruptcy proceedings. Primarily, the automatic stay serves to “prevent the debtor’s estate from being picked to pieces by creditors” so that the bankruptcy court can distribute the debtor’s assets in a fair and equitable manner. The interests of the debtor are best served if all matters related to the bankruptcy are siphoned into one proceeding, thus avoiding a “chaotic and uncontrolled scramble for the debtor’s assets in a variety of uncoordinated proceedings in different courts.” Additionally, the automatic stay works to protect the estate and preserve it for the creditors’ benefit so that creditors are not forced to compete in a race to the courthouse, with the winner taking home the bulk of the assets. Finally, the automatic stay also “serves to protect and preserve the jurisdiction of the bankruptcy court so that the court can administer the debtor’s estate in an orderly fashion.”

The first court to consider the question of whether the automatic stay applies extraterritorially was a bankruptcy court in the Southern District

18. In re Rimsat, 98 F.3d at 961 (quoting In re Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982)); see also In re Falls Bldg., Ltd., 94 B.R. 471, 480–81 (Bankr. E.D. Tenn. 1988).
19. In re Nakash, 190 B.R. at 768.
20. Id.
of New York.  

There, the McLean court held that the automatic stay does indeed apply extraterritorially such that foreign entities, in addition to domestic entities, are bound by the language of 11 U.S.C. § 362(a). Since 1987, United States courts have uniformly upheld the extraterritorial application of the automatic stay. This trend, however, marks a departure from the general presumption that United States statutes do not apply outside the boundaries of the United States without express congressional intent.

In E.E.O.C. v. Arabian American Oil Co. ("Aramco"), Chief Justice Rehnquist reiterated the "long-standing presumption against extraterritoriality and validated it as a means by which to effectuate the unexpressed congressional intent that its laws are designed first and foremost to address domestic conditions." Rehnquist upheld the importance of this presumption as a means to prevent U.S. law from inadvertently clashing with laws of other nations, thus avoiding "international discord." In deciding Aramco, Rehnquist reasoned that courts

21. In re McLean Industries, 74 B.R. 589 (Bankr. S.D.N.Y. 1987). It is surprising that this question never arose until 1987, but that is apparently the earliest discussion of this problem. Additionally, since the McLean court does not cite to previous authority for the proposition that the automatic stay applies extraterritorially, it seems likely that this was indeed an issue of first impression in 1987.

22. Id. The debtor, a U.S. entity, owned twelve Econoships used to transport goods internationally. When the debtor filed a Chapter 11 petition, eight of the Econoships were returned to the United States, but four were arrested overseas in Singapore and Hong Kong. Courts of those countries issued arrest warrants for the vessels notwithstanding the automatic stay. Id. at 590–94.

23. Id. at 601 (citing In re McLean Industries, Inc, 68 B.R. 690, 694 (Bankr. S.D.N.Y. 1986)).


26. Green, supra note 25, at 88 (citing Arabian American Oil Co., 499 U.S. at 248). In Aramco, a U.S. citizen (Boureslan) was working for a U.S. corporation, Arabian American Oil Co. ("Aramco") in Saudi Arabia. Boureslan was fired and he sued in the United States under Title VII of the Civil Rights Acts of 1964. The question then arose as to whether this statute, and U.S. statutes in general, apply extraterritorially.

27. Id. (quoting Arabian American Oil Co., 499 U.S. at 248).
must assume that Congress legislates “against the backdrop of the presumption against extraterritoriality,” and set forth the rule that laws apply domestically unless Congress made a clear affirmative expression to the contrary. That being established, this Note will now explore the language of the automatic stay provision that portrays Congress’s intent that the provision apply extraterritorially.

Beginning more broadly, some have argued that Congress intended that the entire Bankruptcy Code have extraterritorial reach. The Ninth Circuit, for example, adopted this view in HSBC v. Simon (In re Simon) and held there that the bankruptcy discharge operated extraterritorially. One of the major factors that contributed to this holding is the specific language of 11 U.S.C. § 541(a). This statute states that when a debtor files a petition for bankruptcy under Title 11, an estate is created composed of all of the debtor’s property, “wherever located and by whomsoever held.” The Simon court found this language to be a clear expression of Congress’s intent that the Code should apply extraterritorially. Moreover, it seems necessary that the Bankruptcy Code should have extraterritorial reach in order to “effectuate its principle goals of asset preservation” and ensure fair distribution of the debtor’s property. Especially in today’s global marketplace, it defies logic that Congress intended strict guidelines and fair distribution of assets when U.S. entities were involved, but that these rules and guidelines should evaporate as soon as foreign entities come into the picture.

That Congress intended the automatic stay to apply extraterritorially is even more apparent. The language of the automatic stay provision itself demands that no entity commence or continue any action seeking to acquire property from the debtor, and 28 U.S.C. § 1334(e) puts all of the debtor’s property under the control of the district court in which the

28. Id. (quoting Arabian American Oil Co., 499 U.S. at 248).
29. Id. at 92 (“The language, structure and legislative history of the Bankruptcy Code all suggest that Congress fully intended for it to have extraterritorial application.”).
30. Hong Kong and Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 996 (9th Cir. 1998) (“Congress clearly intended the extraterritorial application of the Bankruptcy Code.”). Here, the debtor filed for Chapter 7 and received a discharge order. Afterwards, a foreign creditor who participated in the Chapter 7 proceeding sought to collect on the discharged debt outside of the United States. The question arose as to whether a U.S. Bankruptcy Court could sanction the foreign creditor, and the court held that the discharge operated extraterritorially. Id.
32. 153 F.3d at 996.
33. Green, supra note 25, at 93.
35. 11 U.S.C. § 541(a) created an estate comprised of all of the debtor’s property.
case is proceeding. This control is then passed to the bankruptcy court through 11 U.S.C. § 157(a). The report from the House of Representatives that accompanied the predecessor to 28 U.S.C. § 1334 “states that the intent of the statute was to ensure that “[t]he bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case.”” The language of 28 U.S.C. § 1334 and 11 U.S.C. § 541, viewed in light of their relationships to the automatic stay provision and coupled with the House report, seem to rebut the presumption against extraterritoriality and satisfy the standard set down by the Supreme Court in Aramco. However, even though many courts have held that the automatic stay applies extraterritorially, practical enforcement of the extraterritorial application has proven difficult. The next section will examine some decisions that have dealt with such problems.

II. PROBLEMS WITH HOLDING THAT THE AUTOMATIC STAY APPLIES EXTRATERRITORIALLY

In domestic bankruptcy disputes, the case law is clear that “the automatic stay ‘is effective immediately upon the filing of the petition, and any proceedings or actions described in section 362(a)(1) are void and without vitality if they occur after the automatic stay takes effect.’” If actions that violate the automatic stay are void and the automatic stay applies extraterritorially, logic dictates that extraterritorial actions that violate the automatic stay are likewise void. However, while many courts have held that the automatic stay applies extraterritorially, the practical reality is that the extraterritorial effect of the automatic stay may depend on whether a U.S. court has in personam jurisdiction over the violators or

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37. 28 U.S.C. § 157(a) (2005). Since 28 U.S.C. § 1334(e) specifically gives the district court jurisdiction over the debtor’s estate, the bankruptcy court would have no jurisdiction over the debtor’s assets without 28 U.S.C. § 157. Because section 157 passes jurisdiction of the debtor’s estate to the bankruptcy court in the district in which the district court sits, the bankruptcy court is able to administer the debtor’s estate.
41. See supra note 24.
whether a foreign court will choose to enforce the U.S. court’s orders.\footnote{28} As a court must first tackle jurisdictional issues before delving into the merits of a claim, an analysis of those jurisdictional issues which are prevalent in automatic stay cases follows below.

In order for a bankruptcy court to adjudicate a dispute, it (like any other court) must have appropriate jurisdiction. Specifically for cases involving the automatic stay, a court must have \textit{in personam} jurisdiction over relevant parties and \textit{in rem} jurisdiction over the property or assets in question. While 28 U.S.C. § 1334(e) confers upon a bankruptcy court \textit{in rem} jurisdiction over all of the debtor’s property “wherever located,”\footnote{43} this exercise of custody “creates a fiction that the property—regardless of its actual location—is legally located within the jurisdictional boundaries of the district court in which the court sits.”\footnote{44} Here, it seems that the Ninth Circuit hit the nail on the head: exercising \textit{in rem} jurisdiction through 28 U.S.C. § 1334(e) creates only a fiction that the bankruptcy court can control the debtor’s property if that property lies outside the territorial boundaries of the United States. In actuality, the courts of the country in which the property is physically located are the only entities that can determine what will happen to that property.\footnote{45} Moreover, if foreign creditors violate the automatic stay, U.S. bankruptcy courts cannot protect the debtor’s assets unless the courts can exercise \textit{in personam} jurisdiction over the violating entities.\footnote{46} This has often caused courts to “[strain] to find a basis for personal jurisdiction over foreign actors by relying on the legal fiction of \textit{in rem} jurisdiction.”\footnote{47}

\footnote{42. \textit{See, e.g.}, Sinatra v. Gucci \textit{(In re Gucci)}, 309 B.R. 679, 684 (Bankr. S.D.N.Y. 2004) (“As the property in question here is located in Rome, its fate ultimately will be determined by Italian courts, which will give such weight as they think appropriate to the decision below.”); Lykes Bros. Steamship Co., Inc., v. Hanseatic Marine Service \textit{(In re Lykes Bros. Steamship Co., Inc.)}, 207 B.R. 282, 288 (Bankr. M.D. Fla. 1997) (ordering sanctions and rulings against Hanseatic without a realistic enforcement mechanism); Nakash v. Zur \textit{(In re Nakash)}, 190 B.R. 763, 771 (Bankr. S.D.N.Y. 1996) (finding that the Israeli receiver violated the stay but refusing to impose sanctions at the time of the decision).

\footnote{43. 28 U.S.C. § 1334(e) (2005).

\footnote{44. Hong Kong and Shanghai Banking Corp. v. Simon \textit{(In re Simon)}, 153 F.3d 991, 996 (9th Cir. 1998) (citing Katchen v. Landy, 382 U.S. 323, 327 (1966)).

\footnote{45. \textit{In re Gucci}}, 309 B.R. at 683–84.

\footnote{46. Hobson v. Travelstead \textit{(In re Travelstead)}, 227 B.R. 638, 655 (Bankr. D. Md. 1998) (“[I]n personam jurisdiction is required before the court may restrain a defendant from interfering with that property.”).

\footnote{47. Green, \textit{supra} note 25, at 109 (alteration added).}
useless in preventing the foreign creditors from continuing to violate the automatic stay. An examination of cases that exemplify these issues follows below.

A. Exercising In Personam Jurisdiction over Foreign Entities

As stated above, when faced with the difficult question of whether the automatic stay applies extraterritorially, U.S. bankruptcy courts have been in complete agreement in answering affirmatively. Moreover, when foreign entities violate the automatic stay by interfering with the debtor’s property after a U.S. bankruptcy petition has been filed, U.S. bankruptcy courts have consistently held that they have *in personam* jurisdiction over the violator. This holding is necessary because without *in personam* jurisdiction, the U.S. court would be unable to enforce its holding or in any way hold the violator accountable. However, the case law has made it quite clear that even if a bankruptcy court asserts *in personam* jurisdiction over the foreign entity, it may nevertheless be unable to prevent that entity from interfering with the debtor’s property without assistance from a foreign court. Examples of this phenomenon follow below.

1. *In re Lykes Bros. Steamship Co., Inc.*

Lykes, an international shipping company, filed a Chapter 11 petition in October of 1995. Prior to the petition date, Lykes charted two vessels from non-U.S. companies: the M/V Altonia from Altonia Schiffahrts-gesellschaft mbh & Co. and the M/V Arabella from the Andrea Shipping (PTH) Ltd. Lykes returned both ships to their respective owners before filing its bankruptcy petition, but both Altonia and Andrea claimed that Lykes owed them money based on pre-petition breaches of the charters.

48. See *supra* note 24.


50. *In re Travelstead*, 227 B.R. at 655 (“But even though the court may have *in rem* jurisdiction over the debtor’s property, *in personam* jurisdiction is required before the court may restrain a defendant from interfering with that property.”).

51. *In re Lykes Bros.*, 207 B.R. at 284.

52. *Id.* The text of the decision makes it clear that the M/V Arabella was chartered from a Singapore company, but it does not state from which country the M/V Altonia came.

53. *Id.* Altonia claimed that Lykes owes it approximately $130,000 and Andrea claimed that Lykes owes it about $30,000. *Id.*
Five days after Lykes had filed its Chapter 11 petition, Andrea and Altonia assigned their claims against Lykes to a German company called Hanseatic Marine Service GmbH; this action was held to violate the automatic stay.\textsuperscript{54} About five months later, in March of 1997, Hanseatic truly broke the peace by procuring the arrest of another of Lykes’ ships, the M/V Stella Lykes, in a court in Belgium “in order to compel payment of the pre-petition claims purportedly assigned by Andrea and Altonia.”\textsuperscript{55}

The\textit{Lykes} court properly began its analysis with a discussion as to whether it could exercise\textit{in personam} jurisdiction over the various defendants.\textsuperscript{56} The court dispensed with Andrea very quickly, asserting that it “[c]learly . . . has personal jurisdiction over Andrea Shipping because Andrea filed a claim . . . and has therefore consented to the jurisdiction of the United States Bankruptcy Court.”\textsuperscript{57} While the case law may be clear on this point, the court still found it difficult to require Andrea to act according to the court’s direction.\textsuperscript{58} Because Andrea was not a U.S.-based entity, the U.S. court was limited with regard to the sanctions it could realistically enforce against Andrea.\textsuperscript{59} Any sanctions that the court did impose would only be effective if Andrea had assets physically located in the United States—otherwise, Andrea (absent a court order from its country of incorporation) would have no incentive to submit to sanctions of a U.S. court.\textsuperscript{60}

\begin{footnotesize}
\textsuperscript{54.} Id. at 284–85. While the assignment of claims normally does not violate the automatic stay, the court found that Hanseatic was created for the sole purpose of avoiding the automatic stay seeing as it was actually created five days after the assignments were made. Therefore, the court held that this particular assignment did violate the stay.

\textsuperscript{55.} Id. at 285.

\textsuperscript{56.} Id.


\textsuperscript{58.} \textit{In re Lykes Bros.}, 207 B.R. at 286 (“Having voluntarily filed its proof of claim in this reorganization case, Andrea purposefully submitted itself to this Court’s jurisdiction and was obligated to comply with its orders and with its procedures. Neither it nor its purported transferee did so.”).


\end{footnotesize}
The *Lykes* court found that it had *in personam* jurisdiction over Altonia as well, but for a different reason. Here, the court relied on a minimum contacts analysis. This analysis is more compelling than the analysis regarding Andrea, but Altonia could also have chosen to disregard any orders made by this court unless Altonia owned assets that were physically located in the United States. If Altonia owned no assets in the United States and decided it no longer needed the benefits of dealing with the United States courts, why would it accept sanctions?

The most troubling part of this opinion is the single sentence that this court devoted to establishing its *in personam* jurisdiction over Hanseatic. Here, the court stated, “[w]hile nothing in the record warrants the conclusion that Hanseatic is subject to the personal jurisdiction of this Court, it cannot be gainsaid that this Court’s jurisdiction under 28 U.S.C. § 1334(d) grants this Court jurisdiction over all property of the estate wheresoever located.” In making this assertion, the court “acknowledged that there was no traditional basis upon which to base personal jurisdiction over [Hanseatic], ultimately relying on [Hanseatic’s] continuing knowledge that its actions . . . would have the effect of disrupting the debtor’s U.S. bankruptcy case and its property.” Based on this precariously justified assertion of *in personam* jurisdiction, the bankruptcy court went on to order that Hanseatic be enjoined from taking further steps to collect any assets from the debtor and that Hanseatic must...

62. Id. at 286–87. Here, the court discussed eight points from the record to demonstrate that Altonia did indeed have minimum contacts with the United States. Those points include the facts that Altonia: 1) entered into a charter with Lykes; 2) agreed to deliver the vessel to Lykes in New York; 3) agreed to accept re-delivery of the vessel in New York; 4) allowed the chartered vessel to call on ports in the United States; 5) agreed in the charter that all bills of lading issued under the charter be subject to the Carriage of Goods by Sea Act of the United States; 6) agreeing that Altonia would be bound by the U.S. Anti-Drug Abuse Act of 1986; 7) entered into a Certificate of Financial Responsibility with the United States Coast Guard, and; 8) agreed that Altonia would remain responsible for the navigation of the vessel, knowing that it would call on United States ports.
63. The reasoning with regard to Altonia is more compelling because the court had jurisdiction over Altonia independent of the instant bankruptcy proceedings—this seems more legitimate the “jurisdiction by ambush” to which Andrea was subject.
66. Id. Note that here the court cited to 28 U.S.C. § 1334(d) for the “wherever located” provision, but 28 U.S.C. § 1334(e) currently holds this language. In fact, § 1334(d) did contain the “wherever located” provision until the code was amended in 1994. This provision appears in § 1334(e) today.
67. Green, supra note 25, at 109 (alterations added).
immediately drop any open actions against the debtor anywhere in the world.68

How can this be? Under what set of bizarre and improbable circumstances would Hanseatic actually submit to the jurisdiction of the bankruptcy court and decide to follow its orders? At least Andrea and Altonia are companies that had previously had dealings with the United States, either through voluntary court proceedings or minimum contacts in business transactions.69 Because of these previous dealings, it is conceivable—if not probable—that these companies had assets in the United States and would therefore have agreed to comply with orders of the bankruptcy court.70 Hanseatic, however, is a completely different story. If the Lykes court was right—and it seems that it was—Hanseatic was created solely for the purpose of contravening the automatic stay and pursuing the debtor’s assets despite the previously filed Chapter 11 petition.71 Essentially, Hanseatic was only subject to the personal jurisdiction of the Lykes court because Hanseatic was in possession of Lykes’s vessel, as provided for by 28 U.S.C. § 1334(e).72 Only by relying on the fiction that the bankruptcy court can exercise in rem jurisdiction over the property,73 and by straining this fiction to an extreme degree in order to exercise in personam jurisdiction over the violator,74 could the bankruptcy court claim that it had the proper jurisdiction to issue orders to Hanseatic. This reasoning is dubious at best.

2. In re Nakash

Joseph Nakash was a member of the board of directors of an Israeli banking institution called The North American Bank, Ltd.75 The institution was declared insolvent, and Nakash filed a voluntary petition under Chapter 11 in the United States in October 1994. He filed this petition in response to a $160 million judgment entered against him in Israel in December 1993.76 In order to enforce the judgment, the Official Receiver of the State of Israel (the “receiver”) commenced an action in the Eastern

69. Id. at 285–87.
72. Id. at 287.
73. Hong Kong and Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 996 (9th Cir. 1998) (citing Katchen v. Landy, 382 U.S. 323, 327 (1966)).
74. Green, supra note 25, at 109.
76. Id.
District of New York, seeking an order of attachment.\textsuperscript{77} The district court granted the order.\textsuperscript{78} Then, on January 16, 1995, the receiver filed an involuntary petition in Israel against Nakash.\textsuperscript{79} Nakash responded by filing an adversary proceeding, claiming that the receiver had violated the automatic stay by filing the involuntary petition in Israel.\textsuperscript{80}

Like the \textit{Lykes} court, this court began with a discussion of jurisdiction.\textsuperscript{81} And, as in \textit{Lykes}, the bankruptcy court quickly established that it had \textit{in personam} jurisdiction over the receiver because the receiver had “submitted himself to the courts of the United States, including this court, by, \textit{inter alia}, seeking attachment in the Eastern District of New York . . . .”\textsuperscript{82} This exercise of jurisdiction is similar to that which the \textit{Lykes} court exercised over Andrea, but with one important distinction: Andrea was a foreign company whereas the receiver was an agent of a foreign government.\textsuperscript{83}

This raises the question of whether a bankruptcy court can sanction an agent of a foreign government.\textsuperscript{84} It seems clear that with Andrea, the U.S. court could have been able to lay some sanctions on its own, but with the receiver, the U.S. court is powerless to enforce any punishment at all (short of physically apprehending the receiver) without the assistance and approval of the Israeli government.\textsuperscript{85} Here, the differences be-

\textsuperscript{77} Id. at 767.
\textsuperscript{78} Id.
\textsuperscript{79} Id. This was the second involuntary petition that the receiver filed against Nakash in Israel. The first was in January 1993, but the Israeli court dismissed that proceeding. The receiver appealed and the Supreme Court of Israel reversed and remanded, but no hearing date was set. \textit{Id.} at 766–67.
\textsuperscript{80} \textit{In re Nakash}, 190 B.R. at 767.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 767–78 (citing Fotochrome, Inc v. Copal Co., Ltd., 517 F.2d 512 (2d Cir. 1975)); \textit{See also In re Deak & Co., Inc.}, 63 B.R. 422, 433 (Bankr. S.D.N.Y. 1986). The Nakash court also sought to strengthen its assertion by stating that in the process of seeking the attachment, the receiver appeared through New York counsel, filed pleadings, filed a proof of claim, and participated in a discovery exchange program.
\textsuperscript{84} While there are definitely Act of State and Foreign Sovereign Immunities Act issues lurking here, a discussion of these issues is beyond the scope of this Note. This discussion assumes that the Foreign Sovereign Immunities Act does not bar jurisdiction and that the Act of State Doctrine does not prohibit the U.S. court from sitting in judgment of the acts in question.
\textsuperscript{85} \textit{GMAM v. Globo Comunicacoes E Participacoes S.A. (In re Globo Comunicacoes E Participacoes S.A.)}, 317 B.R. 235, 250 (Bankr. S.D.N.Y. 2004) (“[T]he bankruptcy court may not be able to secure compliance with such orders except to the degree that it may either assert personal jurisdiction . . . or obtain cooperation from courts in foreign
tween the theoretical and practical approaches to handling the extraterritorial application of the automatic stay are glaringly evident; holding that the stay applies extraterritorially works well in theory, but ensuring that such a holding is respected is another matter entirely. Especially in this case, it seems extremely unlikely that an Israeli court would have approved of sanctions against the receiver in light of the fact that the Jerusalem court endorsed a motion by the receiver in which he requested permission from that court to file the 1995 involuntary petition notwithstanding the Chapter 11 proceedings. 86 While the Nakash court did find that the receiver violated the automatic stay, it could not declare the receiver’s actions void and chose to leave the issue of sanctions and damages for another time. 87 This decision, unlike that of the Lykes court, avoided a scenario in which a U.S. court issues an order that it cannot effectively enforce.

B. Exercising In Rem Jurisdiction Over Property Located Abroad

As noted above, 28 U.S.C. § 1334(e) gives the district court—and ultimately the associated bankruptcy court—jurisdiction over all of the debtor’s assets, “wherever located.” 88 It is from this statute that U.S. courts derive the fiction that the debtor’s property sits within the reach of the court and thus the power to exercise in rem jurisdiction over that property. 89 The major problem which emerges here is that this idea that 28 U.S.C. § 1334(e) actually gives a U.S. court in rem jurisdiction is just what the In re Simon court said it is: a fiction. 90 But what happens when a foreign court—a court in the country in which the debtor’s property actually sits—disagrees with the U.S. court and issues orders affecting the property? This was one major issue that surfaced in In re Gucci. 91

86. In re Nakash, 190 B.R. at 767.
87. Id. at 771.
89. Hong Kong and Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 996 (9th Cir. 1998) (citing Katchen v. Landy, 382 U.S. 323, 327 (1966)).
90. Id. See also Green, supra note 25, at 98.
1. *In re Gucci*

Paolo Gucci, the debtor, owned a store in Rome, Italy. In February 1994, he filed a Chapter 11 petition in the United States. A month later, his cousin, Maurizio, obtained an arbitration award against Paolo in Switzerland and registered a lien against the Rome property. Several years later, in May 2000, the trustee of Paolo’s estate filed suit against Maurizio’s estate alleging that Maurizio had violated the automatic stay by obtaining the Swiss award and registering the lien after Paolo had filed for Chapter 11. The bankruptcy court ruled for the trustee because “[t]he lien was registered pursuant to a decision of an Italian court after the automatic stay was in effect . . . .” Defendants appealed to the district court on several grounds, one of which being that the automatic stay should not have been applied in this case.

In analyzing this issue, the district court followed the model that other courts dealing with the extraterritorial application of the automatic stay had set forth and thus began with a jurisdictional discussion. Like many courts have done before, this court cited 28 U.S.C. § 1334(e) and 28 U.S.C. § 157(a), emphasizing the “wherever located” language. The court then went on to proclaim that this case did not involve—a conflict between the bankruptcy court and

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93. *In re Gucci*, No. 06-0496-bk, 2006 WL 2671970 at *1 (2d Cir. Sept. 18, 2006). This is an appellate decision that took place after the above-cited case (309 B.R. 679) was remanded and decided again by the district court. I cite to the appellate decision here because the above-cited case omitted background facts and the district court’s opinion on remand made an error as to the date of the Chapter 11 filing. That opinion stated that Paolo filed in February 2005, which cannot be correct. I believe February 1994 to be the correct date of the Chapter 11 filing as it makes sense in the timeline and because the courts that recount the background facts agree on all other dates.
94. The cases give no indication as to why Paolo Gucci, who owned property in Rome, filed Chapter 11 in the United States. One can only assume that he owned assets in the United States as well.
95. *In re Gucci*, No. 05-Civ-4444(DC), 2005 WL 3150709 at *1 (S.D.N.Y. Nov. 28, 2005).
96. *Id. at* 2.
97. 309 B.R. at 681.
98. *Id.*
99. *Id.* The only discussion here was about in rem jurisdiction—because of the nature of the claim, a discussion of in personam jurisdiction was not necessary. Specifically, the court was only concerned with being able to exercise jurisdiction over the store in Rome (in rem), and not a person or other legal entity requiring in personam jurisdiction. *Id.*
the Italian court.103 Here, defendants claimed that by ruling for Gucci below, the bankruptcy court declared an act of the Italian court void ab initio.104 However, the district court disagreed; it stated that the bankruptcy court declared void “the registration of the Italian judgment lien,” as a matter of U.S. law only.105 In other words, the only thing that the bankruptcy court declared void was the registration of this lien in the United States as it related to Gucci’s Chapter 11 case. The bankruptcy court—or any U.S. court for that matter—could not declare the judgment lien itself void because that lien was the result of an act of an Italian court.106 The court then went on to explain in greater detail:

The Bankruptcy Court neither purported to alter, nor could have altered, ownership interests in the Italian real estate in the same sense as in cases in which the property is within the physical power or territorial jurisdiction of an in rem court. The fact that Congress granted the district courts, and via their referral, the bankruptcy courts power to enter orders affecting assets of the debtor, wherever located, does not preclude foreign courts from exercising jurisdiction over estate property located in their countries, a matter that raises such questions as to the extraterritorial effect of the automatic stay and the personal jurisdiction of the United States courts over an entity at whose behest a foreign court acts.107

Finally, the district court concluded that since “the property in question here is located in Rome, its fate will ultimately be determined by Italian courts, which will give such weight as they think appropriate to the decision below.”108

This decision is extremely important because the court acknowledged and embraced the problem with holding that the automatic stay applies extraterritorially,109 unlike other courts, which simply held that the automatic stay does apply across borders without citing the difficulties and

103. Id. at 683.
104. Id.
105. Id. (emphasis in original).
106. Id.
107. Id. at 683–84 (citing 1 KING, ET AL., COLLIER ON BANKRUPTCY ¶ 3.01[5], at 3-32 to 3-33 (15th ed. rev. 2003)) (“[T]he extraterritorial jurisdiction of the United States courts for these purposes is in personam rather than in rem. If a creditor causes property of a title 11 estate to be seized in a foreign country, that creditor has violated the automatic stay. Whether that creditor can be punished, however, is a function of that creditor’s amenability to the United States process. By the same token, a United States court cannot control the action of the foreign court irrespective of section 1334(e).”).
109. Id.
consequences that invariably accompany such a holding.\textsuperscript{110} Once courts realize that the exercise of \textit{in rem} jurisdiction over property located abroad truly is a fiction,\textsuperscript{111} and that a holding predicated on that fiction may prove futile,\textsuperscript{112} U.S. courts and legislatures may begin to think about what can be done to avoid this unfavorable situation.

## III. International Comity and the Question of Deference

Upon being sued for allegedly violating the automatic stay, foreign creditors often defend themselves by asserting that the automatic stay should not apply to them for reasons of international comity.\textsuperscript{113} The Supreme Court defined the term “comity” over a century ago, and that classic definition is still consistently cited today:

> “Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.\textsuperscript{114}

Under principles of comity, U.S. courts normally “refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States.”\textsuperscript{115} However, comity is not a strict rule of law—rather, it is a rule of “practice, convenience and expediency.”\textsuperscript{116} Therefore, in instances in which extending comity to a foreign entity would mandate a result contrary to U.S. policy, the U.S. court should decline the foreign entity’s request.\textsuperscript{117} According to the Second Circuit, U.S. courts are not obligated to extend comity if doing so would be con-


\textsuperscript{111} Hong Kong and Shanghai Banking Corp. v. Simon (\textit{In re Simon}), 153 F.3d 991, 996 (9th Cir. 1998).

\textsuperscript{112} See \textit{In re Gucci}, 309 B.R. at 683–84. See also Green, supra note 25 at 98.


\textsuperscript{114} Hilton v. Guyot, 159 U.S. 113, 164–65 (1895).

\textsuperscript{115} Pravin Banker Associates, Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997).

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.}
So the question then arises: should U.S. courts grant comity to foreign laws or proceedings if it means allowing a foreign entity to violate the automatic stay?

A. In re Travelstead

Mr. Travelstead (the debtor) and Ms. Hobson had acquired a Dutch corporation called Blockless in which Travelstead owned an eighty percent interest and Hobson a twenty percent interest. In December 1995, the debtor borrowed AUS$4,900,000 from Blockless (with Hobson’s consent), but then failed to repay the loans when they were due. In May 1996, Hobson sued the debtor in the Netherlands to compel repayment, and a Dutch court ordered the debtor to repay immediately. Instead of repaying the loans, the debtor filed for Chapter 11 in the United States. Subsequently, Hobson petitioned the Dutch court to order the debtor to purchase all of her shares in Blockless, and the Dutch court complied. Travelstead then sued Hobson in the United States, alleging that her attempts to compel payment and her pursuit of the buyout order violated the automatic stay. In her defense, Hobson claimed that the U.S. court should abstain from hearing the case based on principles of international comity.

After an examination of U.S. case law setting forth the principles of international comity, the court addressed Hobson’s claim that the debtor’s Chapter 11 reorganization plan conflicted with the Dutch order. Specifically, Hobson asserted that the Dutch order required that the debtor repay Blockless immediately and that the debtor buy Hobson’s shares at the same time that she tendered them. The plan, on the other hand, provided that the debtor repay Blockless within two years and that the

118. Id. (quoting Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984)).
122. Id.
123. Id. The case does not specify why the debtor was able to file a U.S. Bankruptcy petition in this instance, but foreign debtors can file in the United States if they have a domicile in the United States or if they have assets located in the United States.
124. Id. at 643.
125. Id.
127. Id. at 656.
128. Id.
debtor could choose not to pay Hobson at the time she tendered her shares.129 Although the court recognized these differences, it ultimately decided that “the Plan defers to the Dutch Judgments far more than it conflicts with them,” because the claims themselves were preserved and determined under Dutch law.130 Therefore, the court determined that it was not proper or necessary to abstain from hearing the debtor’s case based on considerations of international comity.131

B. In re Nakash

The Israeli receiver, who filed an involuntary bankruptcy case against Nakash (the debtor) in Israel after the debtor filed for Chapter 11 in the United States,132 defended his case by asserting that even if the automatic stay applied extraterritorially, principles of international comity required that the U.S. court find that he did not violate the automatic stay.133 Specifically, the receiver asserted that subjecting him to the automatic stay would create a direct conflict between American and Israeli law.134 The court, however, chose to focus on the acts of the receiver himself rather than on the Israeli court’s ruling.135 The court ultimately ruled that comity did not require it to “respect or defer to the acts of a judgment creditor.”136

In reaching these decisions, the courts did not spell out their policy reasons for declining to grant comity with regard to the automatic stay. However, when one considers the primary purpose of the automatic stay—to “prevent the debtor’s estate from being picked to pieces by creditors”137 so that the bankruptcy court can distribute the debtor’s assets in a fair and equitable manner,138—one can readily surmise that extending comity by disregarding the automatic stay would be contrary to the policy of protecting a U.S. debtor and preserving the debtor’s estate for the benefit of the creditors. Therefore, since courts should not extend comity in instances in which doing so would be contrary to U.S. pol-

129. Id.
130. Id. at 657.
133. Id. at 770.
134. Id.
135. Id.
136. Id.
137. Underwood v. Hillard (In re Rimsat), 98 F.3d 965, 961 (7th Cir. 1996) (citing Martin-Trigona v. Champion Federal Savings and Loan Ass’n, 892 F.2d 575, 577 (7th Cir. 1989)).
icy, they should not extend comity to foreign actors when doing so would allow the actor to avoid the automatic stay.

IV. AUTOMATIC STAY PROVISIONS AROUND THE GLOBE: A COMPARATIVE EXERCISE ENABLING DEVELOPMENT TOWARDS FEASIBLE SOLUTIONS

A. Automatic Stay Provisions in Foreign Jurisdictions

The United States is not the only country in the world whose bankruptcy code has adopted an automatic stay provision—far from it. In particular, many European Union (“EU”) countries have incorporated automatic stay provisions into their bankruptcy codes. Others have adopted stay provisions that are not automatic, but are triggered by an action or at the discretion of the court or one of the parties. Some of these provisions are similar to the U.S. automatic stay, while others are very different with regard to scope, duration, and severity. Before addressing a solution to a problem, one must understand all aspects of that problem. Since international insolvency is a two-way street, understanding how foreign countries treat their bankruptcy proceedings is essential to developing an international solution that foreign countries will receive favorably.

1. France

In order to better enable businesses to restructure while continuing to operate, France instituted a new preservation procedure in its Commercial Code. Similar to Chapter 11 of the U.S. Bankruptcy Code, the preservation procedure provides for a restructuring plan to be drawn up by the debtor so that the debtor can repay its liabilities and continue to

140. The European Union consists of twenty-seven member states: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. For more information, see EUROPA, http://europa.eu/abc/european_countries/index_en.htm (last visited Aug. 1, 2007).
142. Id. at 150, 337, 384.
143. Id.
144. Id. at 150.
operate simultaneously. According to the Code, the preservation procedure is available to any debtor who can show that he is in a situation that will probably lead to a suspension of payments. In order to best protect the debtor during his period of restructuring, “the institution of a preservation proceeding triggers a stay of proceedings.” Specifically, the opening of a procedure begins with an “observation period,” during which secured creditors are not entitled to enforce their security. This is similar to U.S. law in that a stay is automatically triggered, but differs in that the French stay will not last indefinitely.

2. Ireland

Under Ireland’s Companies Act of 1990, the issuing of a bankruptcy petition immediately triggers a “protection period.” Under this protection period, no proceedings can be opened or continued against the debtor without permission from the court. This protection period begins on the date the petition is filed and lasts for a maximum of one hundred days. As with France’s stay provision, Ireland’s is similar to the U.S. automatic stay in that other proceedings are stayed automatically and immediately, but the stay does not last for the entire length of the insolvency proceedings. Additionally, it is significant that Ireland’s stay provision states that proceedings already in motion cannot be continued. This idea is also found in U.S. law, but it is not prevalent in the bankruptcy laws of many other EU countries.

3. Italy

Italian bankruptcy proceedings are similar to U.S. Chapter 7 actions in that they are aimed at liquidating the debtor’s assets and paying off creditors on a priority basis. One of the main effects of an Italian bankruptcy petition is a “stay of enforcement proceedings,” under which

145. Id. at 150–51.
146. Id. at 151.
147. SCHMERLER & SILKENAT, supra note 141, at 151.
148. Id. at 153. This “observation period” lasts for six months, and it can be extended for an additional six months if the bankruptcy court grants leave. However, it is unclear how this stay affects proceedings that are already underway.
150. SCHMERLER & SILKENAT, supra note 141, at 228.
151. Id.
152. Id.
154. SCHMERLER & SILKENAT, supra note 141, at 228.
155. Id. at 259.
“creditors are not entitled to start or continue any enforcement proceedings over the assets of the company.” Like U.S. and Irish law, the Italian stay is also automatic and covers actions already in motion.

4. The Netherlands

The stay provision in the Netherlands is much less stringent than are stay provisions of most other countries. Primarily, a stay will not automatically go into effect upon the filing of a bankruptcy petition; rather, a stay will only be entered at the request of the receiver or an interested party. Secondly, if the court does issue a stay order, the order will only last for a maximum of two months, with one possible two-month extension. Lastly, the stay order will not completely bar creditors from acting against the debtor; instead, it will prevent third parties from taking “recourse against any asset falling within the bankruptcy estate” or “claim any assets which are in control of the debtor or the receiver” without permission from the court. Unlike the other stays that have been discussed thus far, this stay still enables creditors to act against the debtor—just not without court permission.

5. Spain

Spain’s stay provision, like some others discussed above, operates much more as a “waiting period” than an actual stay of proceedings. Specifically, once a bankruptcy petition is filed, secured creditors are prevented from enforcing their security until the earlier of one of two dates: the date when the debtor allows secured creditors to act, or the date one year from when the petition was filed if liquidation has not yet begun. The purpose of this waiting period, just as we have seen in other jurisdictions, is to “protect the viability of the debtor’s business” while the insolvency proceedings are underway. However, it is important to note that this waiting period only applies if the assets in question relate to the “debtor’s ordinary business.” If they do not, secured creditors can institute enforcement proceedings at any time. This is a direct contrast with U.S. law, under which an estate comprised of all the

156. Id.
157. Id.
158. Id. at 345.
159. Id.
160. Schmerler & Silkenat, supra note 141, at 345.
161. Id. at 370.
162. Id.
163. Id.
164. Id.
debtor’s assets is created, and creditors are stayed from acting against any asset in the estate.\textsuperscript{165}

6. The United Kingdom

Once an insolvency administration begins in the United Kingdom, a statutory moratorium goes into effect.\textsuperscript{166} This moratorium, like many other stay provisions discussed above, has the effect of preventing creditors from reaching the debtor’s assets for the duration of the moratorium.\textsuperscript{167} Specifically, the moratorium mandates that creditors may not take any steps towards enforcing any security held by the debtor.\textsuperscript{168} As with the U.S. automatic stay, the U.K. moratorium remains in effect for as long as the debtor remains in its bankruptcy administration.\textsuperscript{169}


Given the fact that many countries other than the United States have stay provisions—some automatic—in their bankruptcy codes, an obvious question arises: if foreign states claim extraterritorial application of their stay provisions, will and should U.S. courts respect those claims of extraterritorial reach? This question has been answered affirmatively by \textit{In re Artimm}\textsuperscript{170} and \textit{In re Rosacometta}.\textsuperscript{171}

Both \textit{Artimm} and \textit{Rosacometta} dealt with the extraterritorial application of the Italian automatic stay.\textsuperscript{172} In both cases, bankruptcy proceedings were already underway in Italy, and the Italian trustee for the debtor brought an ancillary case in the United States under § 304 of the U.S. Bankruptcy Code\textsuperscript{173} in order to prevent U.S. creditors from acting on assets that the debtor possessed in the United States.\textsuperscript{174} The \textit{Artimm} court began its discussion of the Italian automatic stay by citing that stay provision and finding that Italian law maintains that the Italian automatic
stay applies extraterritorially. The court then went on to discuss the applicable EU law and found that under that law, the Italian automatic stay would apply throughout the European Union. The court reasoned that the EU law supported the determination that the Italian automatic stay should apply extraterritorially, and also added that

[i]t is particularly appropriate that a United States Bankruptcy court recognize the extraterritorial reach of the Italian automatic stay [because] . . . the United States cannot expect that foreign courts will recognize the extraterritorial reach of its own automatic stay . . . if its courts do not equally recognize the impact in the United States of a foreign automatic stay.177

In *In re Rosacometta*, decided three years after *In re Artimm*, the court relied heavily upon the *Artimm* decision in order to arrive at the same conclusion. This cooperative attitude within the realm of international insolvencies is essential in order to handle these insolvencies in our increasingly global marketplace.179

V. WORKING TOWARDS SOLUTIONS: EC REGULATION 1346/2000 AND UNCITRAL’S MODEL LAW ON CROSS-BORDER INSOLVENCY

Having already recognized this problem, various international bodies within our global community have begun proposing legislation to facilitate extraterritorially-applicable automatic stay provisions. Two legislative acts that have already been implemented could provide viable solutions: the European Union’s EC Regulation 1346/2000 and UNCITRAL’s Model Law on Cross-Border Insolvency.

A. EC Regulation 1346/2000

On May 29, 2000, the European Union passed Council Regulation No. 1346/2000 (“EC Regulation”). The European Union realized that cross-border insolvencies were becoming more and more prevalent in the increasingly global market, and it therefore took measures to promote

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175. *In re Artimm*, 278 B.R. at 840.
176. *Id.* at 841.
177. *Id.*
efficient operation of international insolvencies.\textsuperscript{181} Under this regulation, there are two kinds of insolvency proceedings that can be opened: main proceedings and secondary proceedings.\textsuperscript{182} Main proceedings can only be opened in the member state in which a debtor has the center of his interests, and secondary proceedings can be opened in any other member state in which “the debtor has an establishment.”\textsuperscript{183} While secondary proceedings may run parallel to main proceedings, a secondary proceeding can only affect the assets located in the member state in which it is opened.\textsuperscript{184}

In order to maintain stability among the various proceedings, the court which has jurisdiction over a main proceeding is able to “order provisional and protective measures from the time of the request to open proceedings.”\textsuperscript{185} This ability includes the power to order protective measures as to assets belonging to the debtor that are located in another member state.\textsuperscript{186} The regulation has clearly stated the purpose and import of these provisions: “to guarantee the effectiveness of the insolvency proceedings.”\textsuperscript{187}

Perhaps the most important section of the EC Regulation is Article 4: Law Applicable. This section sets forth provisions describing which member state’s laws predominate in situations in which the laws of multiple member states conflict with one another.\textsuperscript{188} Specifically, this article grants power to the member state in which a main proceeding is open to determine which assets make up the debtor’s estate and “the effects of the insolvency proceedings on proceedings brought by individual creditors.”\textsuperscript{189} The effect of this article is that if the member state in which the main proceeding is taking place has a stay provision (automatic or otherwise), that stay applies in every other member state. The only exception to this rule is with regard to lawsuits already pending.\textsuperscript{190} Under Article 15 of the EC Regulation, if a lawsuit is pending in one state and a main proceeding opens in another, the law of the first state shall apply with regard to the pending proceeding.\textsuperscript{191}

\begin{itemize}
\item \textsuperscript{181} Id. Recital (2).
\item \textsuperscript{182} Id. Recital (12).
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id. Recital (16).
\item \textsuperscript{186} EC Regulation, \textit{supra} note 180, Recital (16).
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Id. art. 4.
\item \textsuperscript{189} Id. art. 4(2)(b), 4(2)(f).
\item \textsuperscript{190} Id. art. 4(2)(f).
\item \textsuperscript{191} Id. art. 15.
\end{itemize}
B. UNCITRAL

In 1997, UNCITRAL adopted its Model Law on Cross-Border Insolvency ("Model Law"). In adopting this Model Law, UNCITRAL, in keeping with its “mandate to further the progressive harmonization and unification of the law of international trade,” sought to “provide effective mechanisms for dealing with cases of cross-border insolvency.” Specifically, the Model Law is designed to encourage cooperation among bankruptcy courts from different countries, promote “fair and efficient administration” of international insolvencies, and maximize the value of the debtor’s assets for the benefit of all interested parties.

According to Article 1, the Model Law should apply in two situations: when a foreign court or representative is seeking the assistance of the state which has enacted the law, or when the state which has enacted the law is seeking assistance in a foreign state. The Model Law, like the EC Regulation, is based on the premise that there are two kinds of foreign proceedings: foreign main proceedings and foreign non-main proceedings. These definitions are virtually the same as those provided by the EC Regulation: a foreign main proceeding is a proceeding in a foreign state in which the debtor has the “centre of its main interests,” whereas a foreign non-main proceeding is a proceeding (aside from the main proceeding) in a state in which “the debtor has an establishment.”

The crux of UNCITRAL’s Model Law, as relevant to international automatic stay enforcement, is that the Law allows a representative of a foreign main proceeding to apply for recognition within a state that has adopted the Model Law. Most importantly, once a State operating under the Model Law recognizes a foreign main proceeding, an automatic stay goes into effect and prohibits the commencement or continuation of actions against the debtor, as well as any other act of “execution against the debtor’s assets.” This idea seems to be at the heart of what the

193. Id. Annex para. 1, at 76.
194. Id. Preamble at 7.
195. Id. Preamble (c) at 7.
196. Id. art. 1(a)–(b).
197. Id. art 2(a)–(c).
198. UNCITRAL Model Law, supra note 192, art 2(b).
199. Id. art 2(c). The term “Establishment” is defined in Article 2(f) as “any place of operations where the debtor carries out a non-transitory economic activity with human beings and good or services.”
200. Id. art.15.
201. Id. art. 20(1).
United States is looking for in claiming extraterritorial application of its automatic stay. However, it is crucial to note that an important exception exists in Article 6 of the Model Law which allows a country to decline to recognize a foreign proceeding or afford it rights regarding a stay if doing so would be contrary to the policy considerations of that country.202

VI. AN ANSWER FOR THE UNITED STATES?


It seems obvious that the United States views UNCITRAL’s Model Law as a step in the right direction based on the recent addition of Chapter 15 to the United States Bankruptcy Code.203 This chapter, entitled “Ancillary and Other Cross-Border Cases,”204 is directly based on UNCITRAL’s Model Law.205 Like the Model Law, the purpose of Chapter 15 is to “provide effective mechanisms for dealing with cases of cross-border insolvency.”206 Chapter 15 applies in four situations: 1) when a foreign court or representative seeks assistance in the United States in connection to a foreign insolvency; 2) when a foreign court or representative seeks assistance in connection with a case proceeding under U.S. bankruptcy law; 3) when foreign and domestic bankruptcy cases concerning the same debtor are proceeding concurrently; or 4) when interested parties in a foreign country have some interest in participating in or requesting the commencement of a case under Chapter 15.207 There are also several exceptions set out in section 1501(c),208 but the bottom line is that “a foreign corporation that is not a railroad or a banking institution and that has a residence, domicile, place of business, or property in the United States can obtain relief under Chapter 15.”209

As is the case with UNCTIRAL’s Model Law, Chapter 15 operates largely on the premise that foreign proceedings must be classified either as foreign main proceedings or as foreign non-main proceedings.210 The

202. Id. art 6.
203. Elkin, supra note 179 at 15. While Chapter 15 first became effective on October 17, 2005, it was signed into law on April 20, 2005 as part of the Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005. Id.
205. Elkin, supra note 179 at 15.
206. 11 U.S.C § 1501(a) (2005).
210. 11 U.S.C. § 1502(4)–(5) (2005); Elkin, supra note 179 at 24 (“One of the most significant provisions of Chapter 15 adopted from the European Insolvency Regulation
definitions of foreign main proceeding and foreign non-main proceeding are the same under Chapter 15 as they are under UNCITRAL’s Model Law.\textsuperscript{211} Additionally, the stay provisions in Chapter 15 operate just as their counterparts do in the Model Law: under § 1519, a foreign representative can request a stay once a petition for recognition is filed,\textsuperscript{212} and under § 1520, an automatic stay goes into effect as soon as recognition of a foreign main proceeding is granted.\textsuperscript{213} This automatic stay “applies immediately with respect to the debtor and all property of the debtor that is located within the territorial jurisdiction of the United States.”\textsuperscript{214}

However, looking to the Model Law and Chapter 15 to ensure extraterritorial recognition of the U.S. automatic stay presents several major problems. Primarily, only twelve countries in addition to the United States have adopted the Model Law at this point in time.\textsuperscript{215} With only twelve other countries signed on, proceedings against a U.S. debtor will only be stayed to any degree of certainty (assuming the U.S. proceeding is recognized as a foreign main proceeding) in those twelve countries. Moreover, there is nothing stopping even those countries that have adopted the Model Law from failing to grant a stay if doing so would be contrary to the public policy of that country.\textsuperscript{216} Since foreign countries

\textsuperscript{211} See UNCITRAL Model Law, supra note 192, art. 2(a)–(c); 11 U.S.C. § 1502(4)–(5) (2005) (defining a foreign main proceeding as “a foreign proceeding pending in the country where the debtor has the center of its main interests” and a foreign non-main proceeding as “a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.” An establishment, as set out in 11 U.S.C. § 1502(2), means “any place of operations where the debtor carries out a nontransitory economic activity.”).


\textsuperscript{214} 11 U.S.C. § 1520, n.2 (2005). Unlike the automatic stay initiated by the filing of a domestic bankruptcy petition, this automatic stay specifically does not claim worldwide jurisdiction, but limits itself to the territorial jurisdiction of the United States. It seems that because a main proceeding has been recognized abroad and the Chapter 15 proceeding is merely ancillary, worldwide application of this automatic stay is unnecessary.


\textsuperscript{216} 11 U.S.C. § 1506 (2005); UNCITRAL Model Law, supra note 192, art. 6.
have vastly different insolvency codes and foreign and domestic value systems than does the United States, it seems evident that the “catch-all” policy exception will create inconsistency in the application of the Model Law from country to country. Because of this exception, the United States would be in essentially the same position it is now: it would need to rely on the discretion of foreign courts in order to attain extraterritorial recognition of its automatic stay. Since that is the unfavorable situation the United States is seeking to avoid, relying on UNCITRAL’s Model Law—though a step in the right direction—is an inadequate solution.

B. Looking Further: A Convention is the Key

Another possible solution is for the United States to seek a treaty or convention resembling the EC Regulation discussed above.\(^{217}\) If the United States became a party to such a treaty, its ultimate goal would be achieved: the § 362 automatic stay would apply within the boundaries of all other signing countries provided that the U.S. proceeding is the main proceeding in any given case.\(^{218}\) While this approach also requires action on the part of foreign countries in that those countries would have to sign the convention, the United States would be taking an active role in soliciting signatures rather than the passive role of waiting for the rest of the world to adopt UNCITRAL’s Model Law. Furthermore, it seems plausible that other countries would be amenable to such a convention given that the EC Regulation already exists, and various countries—as evidenced by the growing popularity of the UNCITRAL’s Model Law—are now thinking more carefully about how to best handle cross-border insolvencies in our global marketplace.

However, this solution too is imperfect. The § 362 automatic stay is far more sweeping and inclusive than the stay provisions of many other countries, including most of the EU countries discussed above.\(^{219}\) Therefore, it seems plausible that other countries with less-inclusive stay provisions may not want the United States as a member to such a treaty for fear of having a very broad stay provision thrust upon them should a main proceeding open in the United States. Additionally, the EC Regulation has an important exception for suits already pending: if a main proceeding were to open in the United States with a non-main proceeding already pending in another signing country, the laws of that other country would determine whether the pending proceedings should be stayed.\(^{220}\)

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217. EC Regulation, supra note 180.
218. Id. art. 4.
219. See supra Part IV.A.
220. EC Regulation, supra note 180, art. 15.
This notion is contrary to the § 362 automatic stay. \(^{221}\) If the United States were to pursue an international convention to ensure extraterritorial recognition of its automatic stay, it would most likely have to be willing to compromise the rigidity and inclusiveness of § 362 so as to make the convention appealing to potential signers. However, even with these drawbacks, pursuing such a convention seems like a favorable option in order to ensure that U.S. debtors are protected when their insolvency proceedings reach beyond the territorial boundaries of the United States.

**CONCLUSION**

The automatic stay in 11 U.S.C. § 362(a) is an essential component of the U.S. insolvency process. The automatic stay mandates that once a debtor has filed a bankruptcy petition in the United States, no creditor may initiate or continue any proceedings against that debtor or otherwise make a claim to any of the debtor’s property. \(^{222}\) In order to best protect debtors and creditors in our expanding global marketplace, U.S. courts have continually held that the automatic stay applies even to foreign creditors and to property located outside the territorial boundaries of the United States. \(^{223}\) However, this holding creates problems in situations in which either a foreign creditor seizes a U.S. debtor’s assets such that a U.S. court cannot impose sanctions upon the creditor, or a foreign court refuses to recognize that property within its own territorial jurisdiction is subject to the control of U.S. courts. \(^{224}\) In short, the extraterritorial reach of the automatic stay operates well in theory but can falter in its practical application.

Although there is no clear or perfect answer to this problem, several international bodies have adopted policies that could serve as a solution. One possibility is UNCITRAL’s Model Law on Cross-Border Insolvency. \(^{225}\) Relying on the Model Law seems like an attractive prospect because Article 20 states that once a state operating under the Model Law recognizes a foreign main proceeding, an automatic stay goes into effect that prohibits the commencement or continuation of actions against the debtor or any other act of “execution against the debtor’s assets.” \(^{226}\) However, the Model Law’s effectiveness in protecting the extraterritorial application of the U.S. automatic stay is wholly dependent on

\(^{223}\) See supra note 24.
\(^{225}\) UNCITRAL Model Law, *supra* note 192.
\(^{226}\) *Id.* art. 20(1).
other countries opting to adopt the Model law; thus far, only twelve other
countries have done so.227 Furthermore, even if every other country in the
world were to adopt the Model Law, it contains a catch-all provision ena-
bling a country to decline to recognize a foreign proceeding or stay pro-
vision if doing so would be contrary to the policy considerations of that
country.228

A more attractive prospective solution is for the United States to seek a
treaty or convention resembling EC Regulation 1346/2000.229 Under the
EC Regulation, once a given proceeding is categorized as a main pro-
ceeding, the automatic stay of the country in which the main proceeding
is pending applies in all other member states.230 Under such a conven-
tion, if a main proceeding is pending in the United States, the § 362
automatic stay would apply in all other signing countries. There is an
exception in the EC Regulation to this rule that excludes suits already
pending,231 but this may be a small price for the United States to pay in
order to ensure extraterritorial recognition of its automatic stay in the
vast majority of situations.

David P. Stromes*

227. See supra note 215.
228. UNCITRAL Model Law, supra note 192, art. 6.
229. EC Regulation, supra note 180.
230. Id. art. 4(2)(b), 4(2)(f).
231. Id. art. 4(2)(f).

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TRIPS ENFORCEMENT IN CHINA: A CASE FOR JUDICIAL TRANSPARENCY

INTRODUCTION

Complaints of weak intellectual property right (“IPR”) enforcement in China are legion. This widespread criticism is understandable in light of the immense scale of the problem. For example, in 2005 the U.S. Trade Representative (“USTR”) proclaimed that IPR infringement rates in China had been estimated at over ninety percent “for virtually every form of intellectual property.” Over eighty percent of all IPR infringing products seized at the U.S. border in 2006 came from China. These figures persist in spite of China’s membership in the World Trade Organization (“WTO”) Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). TRIPS members are expected to meet certain minimum standards of IPR protection. If a member violates these standards, other members may bring a case to the WTO Dispute Settlement Body (“DSB”) to demand compliance of the offending member. After several years of threats and harsh rhetoric, on April 10, 2007, the

4. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments–Results of the Uruguay Round, 33 I.L.M. 1125 (1994), available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs [hereinafter TRIPS] (“Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.”).
5. See infra Part I.C.
6. See, e.g., Rick Valliere, U.S. Continues to Press China for Stricter Enforcement of Intellectual Property Rights, PAT., TRADEMARK & COPYRIGHT J., vol. 72 No. 1788, Oct. 6, 2006 (“Christian Israel, deputy assistant secretary for technology policy at the Department of Commerce, said that bringing a first intellectual property case against China under the World Trade Organization is ‘under serious consideration.’”); Kathleen E. McLaughlin, EU Trade Chief Warns China Failure to Meet IPR, WTO Commitments May Spark Backlash, PAT., TRADEMARK & COPYRIGHT J., vol. 72 No. 1774, June 16, 2006 (“Assistant U.S. Trade Representative Tim Stratford told a commission in Washington that a WTO case against China over IPR is ‘very possible.’ Stratford said the U.S. government is laying the foundation for a formal complaint with the trade body.”); Christopher S. Rugaber, USTR Cites Russia, China for IPR Violations, but Avoids Punitive Action, PAT., TRADEMARK & COPYRIGHT J., vol. 72 No. 1768, May 5, 2006 (“[T]he USTR


Piracy and counterfeiting levels in China remain unacceptably high . . . . Inadequate protection of intellectual property rights in China costs U.S. firms and workers billions of dollars each year . . . .” While the United States and China have been able to work cooperatively and pragmatically on a range of IPR issues, and China has taken numerous steps to improve its protection and enforcement of intellectual property rights, we have not been able to agree on several important changes to China’s legal regime that we believe are required by China’s WTO commitments.

Id. The U.S. request for consultations focused on four specific areas of concern: “Thresholds for Criminal Liability,” “Disposal of Infringing Goods,” “Denial of Copyright Protection to Works Awaiting Censorship Review,” and “Scope of Criminal Law on Piracy.”
TRIPS enforcement standards with respect to certain aspects of China’s criminal law and certain Chinese provisions for disposal of infringing products by customs authorities.  

The delay in U.S. action against China may reflect uncertainty in adjudicating a TRIPS enforcement claim before the DSB. Another explanation for the deferral of a WTO case is that the United States first gave bilateral negotiations with China an opportunity to resolve enforcement issues. More crucial to U.S. hesitance, perhaps, were the practical barriers to effective DSB resolution of TRIPS enforcement claims, including: the limited type of claims that may be heard, the vagueness of the TRIPS enforcement standard, a potentially high standard of proof, and deference to decisions of national resource allocation. These impediments certainly justified pause in pursuing a WTO case that could have negative diplomatic implications, and they may still limit the strength
of the pending U.S. case. Even a favorable DSB decision may not pro-
provide the breadth and depth of overall improvement in IPR enforcement
that the United States seeks.14

A direct attack on China’s implementing enforcement provisions is not
the only path for challenging China’s IPR enforcement, and it does not
address all of China’s weaknesses related to IPR enforcement. China has
implemented the substantive provisions of TRIPS in its domestic law,15
which private right holders may use to bring claims in local dispute reso-
lution settings.16 Civil litigation is an important method for resolving IPR

14. The U.S. case only addresses criminal enforcement of IPRs and destruction of
infringing goods by customs authorities; thus it ignores inadequate civil recourse in China
for patent infringement and cases of copyright and trademark infringement that are below
criminal thresholds. See infra note 54 and accompanying text. In addition, the TRIPS
preamble provides that “the provision of effective and appropriate means for the en-
forcement of trade-related intellectual property rights [should] tak[e] into account differ-
ences in national legal systems.” TRIPS pmbl. Cf. Sol Picciotto, Private Rights vs. Public
Standards in the WTO for a Margin of Appreciation in the Interpretation of the WTO
Agreements 3 (Paper Presented at the International Conference: Beyond the Washington
Consensus—Governance and the Public Domain in Contrasting Economies: The Cases of
(proposing the application of the “margin of appreciation” standard that has been devel-
oped in European human rights law to WTO obligations). The principle of granting some
amount of deference to national legal systems, when combined with a fuzzy standard for
enforcement in Article 41(1) of TRIPS, see infra note 181 and accompanying text, may
lead the DSB to hold China accountable to a level of IPR enforcement that falls short of
expectations. See infra note 184 and accompanying text.

15. See infra note 105 and accompanying text.

16. See Mart Leesti & Tom Pengelly, Institutional Issues for Developing Countries in
Intellectual Property Policymaking, Administration & Enforcement (Comm’n on Intellectu-
pdfs/study_papers/sp9_pengelly_study.pdf.

[A]s articulated in the preamble to the TRIPS Agreement, “... intellectual
property rights are private rights.” The impact of this concept is that IPR re-
gimes should lean heavily towards supporting the resolution of disputes arising
over intellectual property assets between parties under civil law and so reduce
the enforcement burden on the state to the minimum.

Id. at 17.
disputes in western countries, and China has taken steps to promote its courts as a desirable forum for bringing IPR claims. Problems with China’s judicial system, however, impede potential litigants.

Corruption, local protectionism, and political influence undermine the judicial system in China. TRIPS enforcement provisions include procedures for ensuring “fair and equitable” judicial resolution of disputes, but a challenge to China’s compliance with these procedures would encounter the same difficulties as the current U.S. case. An alternative approach, or at least a parallel objective, should be to focus on China’s compliance with the transparency provisions in Article 63(1) of TRIPS—specifically, the requirement to publish certain judicial decisions.

China’s judicial decision-making remains opaque, as few written opinions are published, and even fewer reach the public unaltered by China’s highest court. If the United States were to challenge China in the DSB on Article 63(1) transparency, a reasonable interpretation and application of that provision should find China not in conformity. A more transparent judicial system in China would create a fair and predictable environment for private litigants to protect their rights, which would improve overall IPR enforcement.

17. DANIEL C.K. CHOW, A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA 212 (2002).
18. See infra Part II.C.
19. See DELI YANG, INTELLECTUAL PROPERTY AND DOING BUSINESS IN CHINA 213–216 (2003) [hereinafter YANG, DOING BUSINESS IN CHINA]. A survey of thirty-five companies with business in China concluded that litigation was the least preferred strategy of resolving IP-related issues. Id. An important factor in deterring companies from litigation in China was inadequacy of judicial enforcement. Id.
21. TRIPS art. 42 (“members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement.”) (footnote omitted). See also TRIPS art. 41(2) (“Procedures concerning the enforcement of intellectual property rights shall be fair and equitable.”).
22. See infra Part III.C.
23. TRIPS art. 63(1).
24. See infra Part II.C.
25. Transparency in governmental operations is a critical factor for foreign investors because it reduces uncertainty and suppresses corruption. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PUBLIC SECTOR TRANSPARENCY AND THE INTERNATIONAL INVESTOR 8 (2003). In China, the lack of transparency in intellectual property enforcement systems has inhibited IPR holders. See CHOW, supra note 17, at 212–213. Greater transparency in the Chinese judiciary would encourage more foreign technology-based investment in China, and would lead those investors to seek IPR enforcement through civil litigation.
Part I of this Note describes certain TRIPS provisions, including those related to enforcement of IPRs. Part II discusses IPR protection in China under the TRIPS agreement, which is affected by Chinese legal culture. Part III explores adjudication before the DSB as a path for achieving improved IPR enforcement in China by analyzing the efficacy of the current U.S. case. It concludes that TRIPS limits its members’ capacity to directly improve IPR enforcement among other members, specifically China, through the DSB. Part IV recognizes that private right owners are ultimately responsible for enforcing their rights in China, but are limited by the shortcomings of the domestic judicial system. Thus, Part IV proposes a solution for better enforcement that focuses on improved transparency, based on Article 63(1) of TRIPS, for effecting change in China’s judicial system.

I. TRIPS

A. TRIPS Objectives and Principles

TRIPS establishes a set of minimum standards for IPR protection among members. The central theme of TRIPS is to create a system of rights creation and protection that reflects Western standards, but with enough flexibility for developing nations with limited institutional capacity to adhere to the agreement. TRIPS allows developed countries to collect “technology rents” for their intellectual property in the developing world, but also strives to help developing countries acquire and integrate new technologies through foreign investment, which is called

26. Susy Frankel, WTO Application of “The Customary Rules of Interpretation of Public International Law” to Intellectual Property, 46 VA. J. INT’L L. 365, 375 (2006) (“A feature of the TRIPS Agreement that affects its interpretation is its nature as an agreement of minimum standards that aims to have a certain level of intellectual property protection across all WTO members. It is a ‘low-level’ harmonization agreement, and provides minimum standards for protection of intellectual property rights, which may be implemented in different ways at the domestic level.”).

27. See TRIPS pmbl. (recognizing the need for “the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems,” and “the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations”).

28. Technology rents are capital returns for intellectual property producers who license to or extract payment from intellectual property users, provided the existence of intellectual property rights. See Frederick M. Abbott, Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism, 8 J. INT’L ECON. L. 77, 80 (2005) [hereinafter Abbott, Toward a New Era].
technology transfer. There is a specific requirement in TRIPS to ensure technology flows from developed countries to the least-developed countries. But even without an express requirement for technology transfer to the other developing countries, there is a general theory that intellectual property protection stimulates acquisition of new technologies, so long as there are appropriate controls to govern such activity.

Private businesses may follow several different modes of foreign investment that introduce new technology to a developing country. A basic example is the selling of goods in the country. Goods that contain useful technology can be studied and reverse engineered. A company may take it one step further and license technology to a foreign entity for manufacture and sale within the country. If a company wants to maintain greater control over technology being manufactured in the country, it may become a multinational enterprise by gaining a total or partial stake in a foreign entity and license the technology to that entity. Foreign investors may also open research and development facilities abroad to create new technology. In each case, the state of IPR protection is a critical factor in deciding whether to invest and in the investment strategy.

29. See TRIPS art. 7.

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Id.

30. TRIPS art. 66(2) (“Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”). China is not considered a least-developed country. See WTO Membership, supra note 3.


32. Choy, supra note 17, at 31.


34. Choy, supra note 17, at 32.

35. Id. at 34–35.

36. Id. at 35–36.

37. See id. at 6–7.
B. TRIPS Provisions

1. Substantive Rights

Part II of TRIPS sets forth the substantive rights to be protected. TRIPS negotiators found it practical to rely on existing international intellectual property standards.\(^{38}\) Therefore, TRIPS incorporates the Paris Convention for the Protection of Industrial Property (1967), the Berne Convention for the Protection of Literary and Artistic Works (1971), and the Treaty on Intellectual Property in Respect of Integrated Circuits (1989) into the main body of protected rights.\(^{39}\) It would have been infeasible not to include these agreements because they were entrenched in legal institutions and industry practice.\(^{40}\) TRIPS also added some new rights, including provisions related to rental rights, trademarks, service marks, and geographical indications.\(^{41}\) Although these additions expanded the field of international intellectual property, the distinguishing feature of TRIPS is the inclusion of enforcement provisions.\(^{42}\) There was a pressing need for such a system of enforceable rights, the lack of which was the main failure of the “Paris-Berne” system.\(^{43}\)

2. Enforcement Procedures

Part III of TRIPS contains provisions related to the enforcement of the rights enumerated in Part II of the agreement. Article 41 outlines general enforcement obligations, including, in paragraph 1, that “Members shall ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property.”\(^{42}\)

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40. Gervais, supra note 38, at 68.
41. Id. at 69.
42. Id. (“There was no precedent for this in the field of intellectual property at the multilateral level.”).
43. See Jose Felgueroso, TRIPS and the Dispute Settlement Understanding: The First Six Years, 30 AIPLA Q.J. 165, 171–172 (2002). (“[T]he international system of intellectual property rights instituted by the Paris and Berne Conventions, and administered by the WIPO, was fragmented and unenforceable. . . . In contrast, through the WTO, any Member State may bring a complaint before an international trade panel to enforce rights and obligations recognized in the TRIPS Agreement.”).
tual property rights.”

Paragraph 5 of Article 41 qualifies this standard for enforcement because it excuses members from creating a distinct judicial system for IPR cases, upgrading law enforcement capability, or devoting more resources to IPR enforcement than any other type of law enforcement. The freedom of resource allocation seems to undermine effective enforcement, especially in member countries with weak overall law enforcement. According to one scholar, however, there is no excuse for failing to meet TRIPS enforcement obligations if no increase in resources is needed. But the degree to which a member must exercise its enforcement procedures in light of Article 41(5), if any, remains questionable.

There are civil and criminal procedures and remedies for violations. On the civil side, TRIPS allows for a dual system of judicial and administrative decision-making. Articles 42–49 include basic requirements for judicial and administrative systems, such as the right to notice of claim, representation by independent legal counsel, standards of evidence, and remedies such as injunctions. TRIPS also requires that administrative decisions be subject to judicial review, and that litigants have the opportunity for appeal from initial judicial decisions, at least on questions of law.

The required criminal procedures are in Article 61, which applies to “wilful trademark counterfeiting or copyright piracy on a commercial scale.” Regarding other cases of infringement, there are no criminal enforcement requirements. But members have the option to “provide for criminal procedures and penalties . . . in other cases . . . in particular where they are committed wilfully and on a commercial scale.” If a

44. TRIPS art. 41(1) (emphasis added).
45. TRIPS art. 41(5).
46. Gervais, supra note 38, at 289.
47. TRIPS Part III, §§ 2, 5.
48. TRIPS arts. 42, 49.
49. TRIPS arts. 42–49.
50. TRIPS art. 41(4).
51. TRIPS art. 61.
52. See id.
53. Id.

Id.
member does not adopt criminal procedures that apply to any “other cases,” then cases of patent infringement and trademark and copyright infringement not deemed to be on a commercial scale are not subject to criminal prosecution. Private right owners have sole responsibility for taking action in such cases.

3. Transparency

TRIPS continues the theme of transparent compliance with treaty obligations that lies at the heart of WTO agreements. Article 63 includes several provisions that require making domestic intellectual property laws and decisions publicly available to right owners, notifying laws to the Council for TRIPS for review, and providing members with information on certain cases of interest. Specifically, Article 63(1) states in part:

Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published . . . in such a manner as to enable governments and right holders to become acquainted with them.

The procedure to make laws and regulations publicly available is by notification as provided for in Article 63(2). Article 63 offers no specific procedure for publishing “final judicial decisions and administrative rulings of general application.” As such, it is not exactly clear what is re-

54. See trP.


56. The Council for TRIPS is charged with monitoring members’ compliance with TRIPS obligations. TRIPS art. 68.

57. TRIPS arts. 63(1)–63(3).

58. TRIPS art. 63(1) (emphasis added).

59. GerVais, supra note 38, at 335.

60. See TRIPS art. 63.
quired for members to comply with this clause. Notification of laws and regulations can only confirm nominal compliance with TRIPS standards.\textsuperscript{61} Publication of judicial decisions, however, makes transparent the application of substantive law during litigation,\textsuperscript{62} which in turn reveals how effective civil enforcement is in practice.\textsuperscript{63} This aspect of transparency should not be discounted in any application of Article 63(1).

\section*{C. WTO Dispute Settlement}

Article 64(1) grants members access to the WTO dispute settlement mechanism, as defined in the Understanding on Rules and Procedures Governing the Settlement of Disputes,\textsuperscript{64} for disputes arising under TRIPS.\textsuperscript{65} This mechanism, referred to as the Dispute Settlement Body ("DSB"),\textsuperscript{66} allows a member to bring a complaint against another member.\textsuperscript{67} The first step in bringing a complaint is to submit a request for consultation to another member\textsuperscript{68} and to notify this action to the DSB.\textsuperscript{69} The request must identify the legal basis for the complaint.\textsuperscript{70} A mutually agreed solution is the preferred outcome,\textsuperscript{71} but if the consulting parties cannot settle the dispute within specified time limits, the complaining

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\begin{itemize}
\item \textsuperscript{61} See J.H. Reichman, \textit{Enforcing the Enforcement Procedures of the TRIPS Agreement}, 37 VA. J. INT’L L. 335, 339 (1997) [hereinafter Reichman, \textit{Enforcing the Enforcement Procedures}] ("[A]dopting legislation that complies with international minimum standards becomes only the starting point. States must further apply these laws in ways that will stand up to external scrutiny . . . then they must adequately enforce them in compliance with detailed criteria concerning procedural and administrative matters . . . .") (footnote omitted).
\item \textsuperscript{62} See \textit{Transparency Paper}, supra note 55, at para. 11 ("Lack of transparency . . . is not only a problem concerning the legislation and rules . . . but is often related to the application of the rules.").
\item \textsuperscript{63} See Chris X. Lin, \textit{A Quiet Revolution: An Overview of China’s Judicial Reform}, 4 ASIAN-PAC. L. & POL’Y J. 255, 309 (2003) ("[A]llowing the public to see how a court reaches its decision ultimately results in greater fairness of the judicial process and increases the public’s trust in the system.").
\item \textsuperscript{65} TRIPS art. 64(1).
\item \textsuperscript{66} DSU art. 2(1).
\item \textsuperscript{67} DSU art. 2(1).
\item \textsuperscript{68} See \textit{Yang Guohua, Bryan Mercurio & Li Yongjie}, \textit{WTO Dispute Settlement Understanding: A Detailed Interpretation} 39 (2005).
\item \textsuperscript{69} \textit{Id.} at 42.
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} DSU art. 3(7).
\end{itemize}
party may request that a DSB panel be established.\textsuperscript{72} The U.S. case against China reached this impasse during consultations in early June 2007, and on August 13, 2007 the United States requested the formation of a DSB panel.\textsuperscript{73}

A DSB panel is composed of three panelists appointed by the parties,\textsuperscript{74} and is only allowed to review claims within its terms of reference, which are the relevant provisions the parties agree upon.\textsuperscript{75} The goal of the panel is to produce a report that includes “the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.”\textsuperscript{76} The DSB established a panel in the U.S.–China case on September 25, 2007, and the panel will make its report available in late 2008.\textsuperscript{77}

A party to the dispute may appeal the panel report to the Appellate Body, a standing body of the DSB with expertise in international trade law.\textsuperscript{78} An appeal is limited to issues of law addressed by the DSB panel,\textsuperscript{79} and the Appellate Body has unqualified authority to “uphold,
modify or reverse” the panel’s legal conclusions on those issues.\(^\text{80}\) If a panel or the Appellate Body finds a particular measure is inconsistent with a member’s treaty obligations, it must recommend that the DSB request the offending member to remedy the inconsistency.\(^\text{81}\) The coercive element to such a request is the threat of trade sanctions, which the DSB may grant if the losing party to a dispute does not implement a report.\(^\text{82}\)

There are normally three types of complaints that may be brought to the DSB: violation complaints; non-violation complaints; and situation complaints.\(^\text{83}\) Complaints under TRIPS, however, are restricted to violation complaints because there is disagreement as to the impact of allowing non-violation complaints or situation complaints.\(^\text{84}\) Outside of

\(^\text{80}\) DSU art. 17(13).
\(^\text{81}\) \textit{Yang}, Mercurio & Li, supra note 68, at 223.
\(^\text{82}\) Felgueroso, \textit{supra} note 43, at 178–180. During TRIPS negotiations, there was debate over whether to bring TRIPS under the WTO dispute settlement mechanism, or to create a separate mechanism for TRIPS. \textit{See Gervais, supra} note 38, at 22. Because TRIPS does provide access to the DSB, members can seek retaliatory measures, such as trade sanctions, in other areas of trade for failure to meet TRIPS obligations. DSU art. 22(3).
\(^\text{83}\) The DSU incorporates these three grounds for a complaint by referencing Article XXIII of GATT. DSU art. 3(1). There is a basis for a complaint if any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation

General Agreement on Tariffs and Trade art. XXIII(1), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. The types of complaints provided for in paragraphs (a), (b), and (c) are referred to as violation, non-violation, and situation complaints, respectively. \textit{See, e.g.}, Debra P. Steger, \textit{The Jurisdiction of the World Trade Organization}, 98 \textit{Am. Soc’y Int’l L. Proc.} 142, 143 (2004).

\(^\text{84}\) \textit{See} TRIPS art. 64(2) (“Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.”). The moratorium on non-violation complaints has been extended indefinitely. \textit{See Council for TRIPS, Minutes of Meeting}, para. 89, IP/C/M/54 (July 26, 2007) (“[T]he TRIPS Council [will] continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 . . . . It was agreed that in the meantime, Members would not initiate such complaints under the TRIPS
TRIPS, non-violation complaints may target any measure taken by a member that thwarts the expected benefits of an agreement, regardless of whether a measure directly conflicts with a particular provision in the agreement.\(^8\)” Non-violation complaints thus allow for much broader attacks than violation complaints, which are only useful for challenging particular implementations of, or failures to implement, specific provisions.\(^8\) Situation complaints a fortiori allow for even broader attacks than non-violation complaints. The bar against non-violation and situation complaints narrows the ability to enforce TRIPS obligations by confining challenges to the text of the agreement.

II. CHINESE IPR PROTECTION UNDER TRIPS

A. China’s Brief History in the WTO

China acceded to the WTO on December 11, 2001 after 15 years of negotiations.\(^8\) China’s accession protocol mandated membership in TRIPS and the other multilateral WTO agreements.\(^8\) The developed nations that controlled the agenda of the Uruguay Round,\(^8\) the United States, the European Communities, Japan, and Switzerland, negotiated TRIPS mainly as a way to collect technology rents, although ostensibly they aimed to benefit developing countries.\(^9\) China’s accession to the WTO was, in some opinions, yet another opportunity for these developed countries to protect economic interests by exerting more influence over

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8. See Yang, Mercurio & Li, supra note 68, at 308.
86. See GATT art. XXIII(1)(a).
87. WTO Membership, supra note 3.
China’s legal system. China, however, has maintained that it will still benefit from TRIPS-based IPR protections.

Some critics doubt that a strong Western-style IPR regime is essential for driving technology transfer to developing countries. For instance, many developed countries, including the United States, first relied on intellectual property appropriation for economic growth before instituting intellectual property protections. Indeed, China’s economic surge has relied on appropriation of technology, rather than protection of technology. Nevertheless, China accepts the premise that it must increase IPR protection to become a fully developed country. Tian Lipu, the commissioner of the State Intellectual Property Office of the People’s

91. See Peerenboom, supra note 20, at 249.
93. See Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy: Executive Summary 28 (2002), available at http://www.iprcommission.org/papers/pdfs/final_report/CIPR_Exec_Sumfinal.pdf. See also Maskus, supra note 33, at 223; Frederick M. Abbott, The WTO TRIPS Agreement and Global Economic Development, 72 Chi.-Kent L. Rev. 385, 391 (1996) (“The arguments suggesting that higher levels of IPRs protection will benefit the developing countries are logical. They may in small or large part be correct. But the train of logic is not supported by empirical evidence.”).
95. Abbott, Toward a New Era, supra note 28, at 81–82.
Republic of China ("SIPO"), recognizes the need for China to transition from "made in China" to "invented in China."97 Since China has become a member of TRIPS, there has been a large increase in the number of U.S. and other foreign businesses applying for patent protection in China.98 There has also been a great increase in the number of Patent Cooperation Treaty ("PCT") applications from China to the World Intellectual Property Organization ("WIPO").99 These are signs that China is moving toward a technology-based economy. This progress may not continue, however, if technology investors find China to be an inhospitable environment for defending their rights.100

B. Compliance with TRIPS Provisions

As part of its obligations of becoming a member, China was required to amend its patent, copyright, and trademark law to be in compliance with TRIPS.101 The transitional review mechanism required notification of laws and regulations to the Council for TRIPS.102 The Council also

97. Kathleen E. McLaughlin, Chinese IP Official Says Country is Working to Protect Ideas and Brands, PAT., TRADEMARK & COPYRIGHT J., vol. 71 No. 1758, Feb. 24, 2006. Tian Lipu was responding to an interviewer’s characterization of China as the “world’s factory.” Id. Toward moving beyond this status, he said that “China has not only established a complete intellectual property legal regime and a law enforcement framework that are in conformity with international practice, but also an effective IPR protection mechanism.” Id. (the quoted interview is available at http://english.gov.cn/chinatoday/ft/060208_interview.htm).


99. Daniel Prazin, International Patent Applications Up in 2005, Sparked by East Asia, PAT., TRADEMARK & COPYRIGHT J., vol. 71 No. 1756, Feb. 10, 2006. Applications received from China (and Hong Kong) increased by 43.7 percent in 2005. Id. PCT applications do not provide any enforceable protection, but provide developing countries a means to process patent applications. Applications are filed with a national patent office or with WIPO and are then examined for patentability in one of several examining offices. WIPO, Summary of the Patent Cooperation Treaty (PCT) (1970), http://www.wipo.int/treaties/en/registration/pct/summary_pct.html. Based on an opinion of patentability from the examining office, an applicant may decide to seek an actual patent in any PCT contracting country. Id. Developing countries without sufficient resources to examine patents may rely on the PCT opinion in deciding whether to grant a patent. See id.


101. Accession, supra note 88, Annex 1A § VI(a).

102. TRIPS art. 63(2). There is a transitional review mechanism in place that uses question checklists relating to each area of intellectual property. The member being re-
provided a separate checklist of questions for China to answer to ensure that enforcement laws and practices were in compliance with Part III of TRIPS. The transitional review of China is not complete, but to date China’s laws are generally in compliance with substantive TRIPS provisions. The United States, however, remains dissatisfied with China’s implementation of Article 61, relating to criminal procedures and remedies.

In December 2004, China issued a judicial interpretation that lowered thresholds for criminal liability. Despite this move, the United States still claimed the Chinese thresholds for criminal liability were too high and thus under-inclusive of activity that should be deemed criminal. In April, 2007, just days before the U.S. announcement of a WTO case, China once again issued a judicial interpretation lowering its criminal...
threshold levels. The USTR dismissed this measure, stating that “China recently announced it has dropped its quantity threshold from 1000 to 500 . . . but the reduced threshold still creates a major safe harbor problem. The thresholds are so high that they appear to permit pirates and counterfeiters to operate on a commercial scale.”

Even if China were to further amend its IPR criminal law, China would still face criticism that it does not take enough action to stop illegal and infringing activity. According to one SIPO spokesman, bribery of local officials is often required to investigate infringements. In cases that do receive consideration, China chooses to rely on “toothless administrative enforcement,” rather than turn the cases over to police. As a result, “infringers continue to consider administrative seizures and fines as a cost of doing business.” Because of these practices, less than one percent of copyright and trademark cases are criminally investigated. The piracy rate for copyright-related products in China remains around ninety percent. One may argue that these figures indicate China’s lack of IPR enforcement in criminal cases is beyond any discretionary limits, and amounts to a lack of “effective action” under Article 41(1). This argument only begs the question: how much enforcement constitutes “effective action”?

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110. Request for Consultations, supra note 8.


112. 2006 SPECIAL REPORT, supra note 108, at 18.

113. Id.

114. Id. at 17.

115. 2007 SPECIAL REPORT, supra note 2, at 18 (“[O]verall piracy and counterfeiting levels remained unacceptably high in 2006. The U.S. copyright industries estimate that 85 percent to 93 percent of all copyrighted material sold in China were pirated, indicating little or no improvement over 2005.”).

116. See Hughes Statement, supra note 13, at 9 (“With intellectual property infringement in China being ‘open and notorious,’ it would seem that the present enforcement system broadly fails this Article 41 standard.”) (footnote omitted).
C. The Chinese Judicial System

China has a four-tiered court system with the Supreme People’s Court at the highest level, followed by the Higher People’s Courts, Intermediate People’s Courts, and Basic People’s Courts.117 In 1993, the government created IPR tribunals in Beijing’s Intermediate and Higher People’s Courts, and in 1996, an IPR tribunal was established in the Supreme People’s Court.118 There are also other “grass roots” IPR courts being formed outside Beijing.119 The Chief Justice of the Supreme People’s Court IPR Tribunal has created a Web site where he posts various news about IPR enforcement in China.120 Although TRIPS does not require any special courts for intellectual property cases,121 China’s initiatives demonstrate an added commitment to civil IPR enforcement. For China’s new courts to provide effective IPR enforcement, however, China must also commit to reforming judicial culture.

Certain cultural features prevent impartial judicial decision-making in China. For example, formal legal processes are often foregone in favor of guanxi, or “informal relationships.”122 In Chinese society, guanxi is an important means for regulating social, economic, and political functions,123 but in the judicial system the practice has resulted in widespread corruption.124 The use of personal connections has inevitably led to bribery of judges.125 Local protectionism is another pervasive problem in China’s judicial system.126 Judges are subject to removal by the local people’s congresses, which creates political pressure to rule in favor of

118. Slate, supra note 105, at 679–680.
119. Id. at 680.
120. Id. at 687. The Chinese version of the Web site is available at http://www.chinaiprlaw.cn. The English version is available at http://www.chinaiprlaw.com/english/default.htm. However, the English version does not appear to have been updated since 2005.
121. See supra note 45 and accompanying text.
122. POTTER, supra note 117, at 30.
123. Id. at 12–13.
124. Id. at 30. See also Peerenboom, supra note 20, at 227 (“In other countries, courts usually serve as one of the main ways to attack corruption. However, the low stature of the PRC courts, and their dependence on local governments for funding make them unlikely candidates to hold the line against corruption . . . . Moreover, the judiciary itself has been plagued by corruption.”).
125. Id. at 31.
126. Peerenboom, supra note 20, at 194–195 (“By far the most prevalent source of external interference in the judicial process is not the CCP but local government officials.”).
local agencies and businesses. Furthermore, the Chinese legal philosophy of instrumentalism regards law as a tool for implementing policy. As such, the government produces broadly worded laws that allow local judges to rule with great discretion and no real consistency.

China’s judicial weaknesses are due in part to the structure of the Chinese government. The 1982 Constitution (amended in 2004) gives a textual commitment to an independent judiciary, but the practical operation of the government precludes any true independence. Further, vesting more power in the judiciary, such as the power “to interpret the Constitution,” is implicitly prohibited by the Constitution. Thus, while China’s economic transformation has been a driving force behind legal reform, China’s judicial system remains a legacy of the old command economy model. The judiciary remains under the strict control of the

127. Id. at 195.
129. Id. at 11.
130. Article 126 states “The people’s courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.” Xian Fa art. 126 (1982) (P.R.C.), available at http://english.peopledaily.com.cn/constitution/constitution.html (the 1982 Constitution was amended in 2004 for the fourth time).
132. The enumerated powers of the Standing Committee of the National People’s Congress include the power “[t]o interpret the Constitution and supervise its enforcement” and “[t]o interpret statutes.” Xian Fa art. 67, §§ 1, 4. The positive grant of power to the Standing Committee under Articles 67(1) and 67(4) of the Constitution has negative implications for the power of the judiciary. See Killion, supra note 131, at 70 (“Expanding Chinese courts’ power of judicial review to include the power to interpret the Constitution and laws of China . . . directly contravenes articles 67(1) and 67(4) of the 1982 Constitution . . . .”).
133. Yu, Post-WTO China, supra note 13, at 914–918. Yu argues that the development and transformation of intellectual property law in China was at least in part organic. The millennium amendments to the Chinese copyright, trademark, and patent laws were as much a response to internal market stimuli as conforming to WTO standards. Id.
Chinese Communist Party. There has been some decentralization of control within the party, but this apportioning of political power has only contributed to local protectionism. In the context of IPR protection, this problem is acute where “Chinese provincial authorities, ‘far away over the mountains,’ benefit financially or politically from the proceeds of piracy or, instead, turn a blind eye to powerful local interests that do.”

There is no comprehensive and searchable system for reporting judicial decisions in China. The Supreme People’s Court publishes the Gazette of the Supreme People’s Court of the People’s Republic of China, but it only contains selected and highly edited cases. Lower court decisions may appear in the Gazette, but they are subject to revision by the high court. The scarcity of published decisions in part reflects the fact that

136. Id. at 385.
137. Id. at 395.
139. Benjamin Liebman, *China’s Network Justice*, 8 CHI. J. INT’L L. 257, 289 (2007) (“There is no formal system for publication of cases in China, nor is there a mechanism for searching the cases that are made publicly available.”).
140. Karen Halverson, *China’s WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT’L & COMP. L. REV. 319, 360 (2004) (“Since 1985, the SPC has . . . published its decisions, or selected and revised versions of lower court decisions . . . . “); Brent T. Yonehara, Comment, *Enter the Dragon: China’s WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws*, 9 UCLA ENT. L. REV. 389, 409 (2002) (“[T]he only opinions published are those that the Supreme People’s Court deems relevant, and there is no precise standard to determine which opinion is deemed a relevant case for publication.”); Nanping Liu, “Legal Precedents” with Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court, 5 J. CHINESE L. 107, 115–116 (1991) [hereinafter Nanping Liu, “Legal Precedents”] (“The Court does not simply publish verbatim what it regards as the important opinions of lower courts. Instead, the Court, after selecting desirable cases, will substantially edit or rewrite most of the selected cases in order to make them understood and followed the way the Court wants.”). The Supreme People’s Court maintains a Web site that posts cases published in the Gazette, which is available at http://www.court.gov.cn.
141. Halverson, supra note 140, at 360; Nanping Liu, “Legal Precedents”, supra note 140, at 115 (“Most of the cases reported in the Gazette are from decisions of lower courts, which reach the Supreme Court through ‘the internal reporting channel.’”).
the Chinese legal system does not recognize cases as a source of law. Many legal scholars on China’s judiciary, however, believe that cases should be treated as authoritative. Some progressive Chinese judges are taking the initiative to bind themselves to higher court decisions. But, regardless of whether cases serve as precedent, judicial opinions offer guidance on how the courts are applying the law. To the extent that certain Chinese judicial decisions indicate the way in which courts might rule in the future, it would be useful for litigants to have access to such decisions. Furthermore, public access to judicial decisions could help elevate the level of judicial ethics.

142. See Lin, supra note 63, at 309 (“[O]ne must bear in mind that the [sic] China has followed a continental legal system model in which court decisions did not have binding precedential value.”).

143. See Liebman, supra note 139, at 289 (“China is officially a civil law system and does not formally recognize court precedent as such. As with other civil law systems, however, written cases and formal guidance from higher courts do play an important role.”) (footnote omitted); Lin, supra note 63, at 300 (“The latest round of debate within the Chinese legal community indicates that there is now a general consensus that at least some court decisions should be treated as binding precedents for lower courts.”); Peter K. Yu, From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century, 50 AM. U. L. REV. 131, 220, n.446 (2001) [hereinafter Yu, China in the Twenty-First Century] (“The fact seems to be that Chinese court decisions have elements of both common-law and civil law. When the author raised that point with President of the Supreme People’s Court of China Ren Jianxin and asked which he thought dominated, President Ren’s answer in reflection was—’Neither, it is Chinese law with Chinese characteristics.’ And so it is; but nevertheless those ‘Chinese characteristics’ seem to carry with them decisions which have de facto binding and precedential effect.”) (quoting RONALD C. BROWN, UNDERSTANDING CHINESE COURT AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 82 (1997)). Cf. Nanping Liu, “Legal Precedents”, supra note 140, at 117 (“[A]n intentional vagueness has been injected into the force of published cases in the Gazette due to the statement [by the Court’s spokesman] that reported cases are intended ‘to provide guidance to lower courts.’”).

144. See Lin, supra note 63, at 300–303.

145. Eu Jin Chua, The Law of the People’s Republic of China: An Introduction for International Investors, 7 CHI. J. INT’L L. 133, 136 (2006) (“Although there is no system of binding case precedent in China, such written decisions can at least provide guidance to the public and legal practitioners.”).

146. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT—THE INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 640–642 (2004) [hereinafter RESOURCE BOOK] (“[J]udicial decisions are an important indication of the approach a society takes toward the protection of IP and the extent to which rights holders’ interests prevail or not over the general interest in the availability of IPR-affected goods or services.”); Yu, China in the Twenty-First Century, supra note 143, at 220 (“[T]he United States can encourage and assist the Chinese courts . . . to publish their decisions (in both English and Chinese) to guide the general public and foreign businesses.”).

147. Lin, supra note 63, at 310.
The courts in China have historically been held in low esteem. Nevertheless, Chinese citizens have begun to accept litigation as a viable alternative for dispute settlement. Many foreign companies, however, have been reluctant to test the local system. In a survey of U.S. and British companies doing business in China, litigation was perceived as the least reliable way to resolve IPR disputes, as compared with consultation and commercial settlement. The USTR “continues to hear complaints of a lack of consistent, uniform and fair enforcement of China’s IPR laws and regulations in the civil courts.” The inadequacy of China’s courts is a critical concern in addressing weak overall IPR enforcement, not only because certain types of cases, such as patent infringement, must rely on civil enforcement, but also because private right holders must turn to civil actions in response to weak criminal enforcement.

III. ADDRESSING ENFORCEMENT PROBLEMS IN CHINA

Even if China’s enforcement procedures meet TRIPS standards, some action is required to ensure more than token enforcement in practice. In other words, the enforcement procedures must be enforced. The trade-based approach of TRIPS provides access to the DSB of the WTO to enforce IPR commitments among members. This was a major innovation for the international protection of IPRs. The United States now seeks to enlist the coercive power of the DSB by undertaking the current challenge to China’s IPR enforcement in the WTO. An exploration of the U.S. strategy, however, reveals some limitations for TRIPS enforcement within the DSB framework.

148. Peerenboom, supra note 20, at 216.
149. Lubman, supra note 135, at 387.
150. See Yang, Doing Business in China, supra note 19, at 215.
151. Id. at 215–216. See also Chua, supra note 145, at 149 (“Given the relative uncertainty of engaging the Chinese judiciary, foreign investors have sought to use arbitration as the preferred means of dispute resolution in China. Chinese arbitral institutions such as CIETAC [China International Economic and Trade Arbitration Commission] continue to display the desire to improve and provide a viable alternative to relying on the Chinese courts . . . .”).
154. See Reichman, Enforcing the Enforcement Procedures, supra note 61, at 339.
155. Id. at 344.
156. See TRIPS art. 64(1).
A. The U.S. Case

In accord with the predominant rhetoric of the USTR over the past few years, the first claim the United States submitted in its request for a DSB panel is as follows:

As a result of [China’s] thresholds . . . there are cases of willful trademark counterfeiting and copyright piracy on a commercial scale in which China has not provided for criminal procedures and penalties . . . [and] cases . . . for which the remedies of imprisonment and/or monetary fine sufficient to provide a deterrent are not available in China. . . . Furthermore, . . . as a result of the thresholds . . . China fails to ensure that enforcement procedures as specified in Part III of the TRIPS Agreement are available under its law so as to permit effective action against any act of willful trademark counterfeiting or copyright piracy on a commercial scale.

China’s measures thus appear to be inconsistent with China’s obligations under Articles 61 and 41.1 of the TRIPS Agreement.158

The United States also claims that “China’s measures for disposing of confiscated goods that infringe intellectual property rights appear to be inconsistent with China’s obligations under the TRIPS Agreement,” specifically Article 59, which is based on the principles in Article 46.159 The final U.S. claim is that China’s copyright law denies copyright protection to “works whose publication or distribution in China is prohibited,” so on this ground too China is in violation of Articles 41(1) and 61.160 Two of these three claims are based on combining Article 41(1) and Article 61. This is the strategy most commentators anticipated161 because it takes into account the problems toward which the USTR has directed the most criticism.162 Therefore, the following analysis concentrates on the claims involving Articles 41(1) and 61.

158. Request for a Panel, supra note 73.
159. Id. “[C]ompetent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46.” TRIPS art. 59. Under Article 46, goods are to be “disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder,” and goods may be destroyed “unless this would be contrary to existing constitutional requirements.” TRIPS art. 46.
160. Request for a Panel, supra note 73.
161. See, e.g., Yu, Post-WTO China, supra note 13, at 934; Slate, supra note 105, at 673; Hughes Statement, supra note 13, at 5–6.
162. 2007 SPECIAL REPORT, supra note 2, at 19.
B. What Does “Permit Effective Action” Mean?

The possible key to achieving enforcement of China’s TRIPS enforcement provisions in the pending U.S. case is the clause “Members shall ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights” in Article 41(1). The relationship, however, between each of the enforcement procedures in Articles 42–61 and the words “permit effective action” is ambiguous. It is not clear whether “permit effective action” is a standard for evaluating members’ procedures for practical compliance with the corresponding TRIPS obligations, or a requirement for administrators to exercise the enforcement procedures to some minimum degree. Thus, to determine how to apply Article 41(1), a DSB panel must address this inquiry: does Article 41(1) only require members to draft enforcement procedures that, if applied in any cases of infringement, would produce effective results, or to actually apply their enforcement procedures in cases of infringement so that acts of infringement are, in sum, effectively addressed, or both; and, in either case, what criteria are necessary to prove a member’s failure to permit effective action?

One scholar suggests that Article 41(1) allows for facial challenges to members’ laws and a somewhat broader category of challenges based on “administrative, police, and judicial practices,” but that it is not susceptible to an interpretation that would allow general lack of enforcement claims. A requirement for members to exercise their enforcement provisions to some minimum degree does seem at odds with the passive phrasing of “permit effective action.” But if China, for example, never

163. See TRIPS art. 41(1). See also Hughes Statement, supra note 13; supra Part I.B.2.
164. In the TRIPS enforcement cases to date, no DSB panel has had to decide how to interpret Article 41(1). These cases never reached a DSB panel because they were decided by mutually agreed solution. See TRIPS Enforcement Cases, supra note 10. See also Hughes Statement, supra note 13, at 6 (“[T]here is no precedent at the WTO for how to interpret these international treaty obligations to provide ‘effective’ enforcement procedures for intellectual property.”).
165. See Hughes Statement, supra note 13, at 8–11. An example of a facial challenge is: “thresholds . . . for criminal prosecution are so high as to leave substantial amounts of obviously ‘commercial’ activity invulnerable to criminal prosecution, [thus] the law [is], on its face, incompatible with Article 61.” Id. at 8. A slightly broader challenge that Hughes finds permissible under Article 41(1) is to use evidence of IPR enforcement practices to demonstrate that the application of IPR law amounts to less than effective action. See id. at 9–10. Hughes comments that a complaint based on overall weak enforcement would fall under one of the currently barred categories of non-violation or situation complaints. Id. at 11. Thus he assumes that a requirement to use enforcement procedures is not ingrained in the text of Article 41(1).
exercised its enforcement procedures—if the government declined to prosecute criminal cases, and judges and administrators ignored proper adjudicatory procedures—they would soon become dead letters and membership in TRIPS would be merely symbolic. TRIPS would be a more elaborate regime than its predecessors, but it would still be ineffective—a system that could compel adoption of enforcement procedures but could not compel their use.166 This need not be, however, as there are interpretive arguments a DSB panel could employ to breathe life into Article 41(1).

The principle of effective interpretation, which has been applied in the WTO context, imparts that each TRIPS provision should be given effect if possible.167 In light of this principle, the phrase “permit effective action” must mean something more than a superficial, or even evidentiary, test to apply to members’ enforcement procedures. The enforcement procedures have built-in standards for members’ laws to meet. For example, Article 61 requires remedies for criminal acts of infringement that “provide a deterrent”168 and Article 45 empowers judicial authorities to order civil damages “adequate to compensate” right holders.169 The words “permit effective action,” if intended to modify Articles 42–61, do not add anything to the standards contained therein. If the procedural action in question is to provide a deterrent, no more is gained by requiring an “effective” deterrent. Any remedy that is not effective would not be considered a deterrent, so the word “effective” in such an interpretation is merely superfluous. But a remedy that is considered a deterrent would not have effect if it were not applied at all. Thus, an effective interpretation would give independent force to “permit effective action” as an implicit requirement to utilize the enforcement procedures.

166. This would be true, assuming Article 41(1) does not require application of enforcement procedures, unless the TRIPS Council lifted the moratorium on non-violation and situation complaints. See supra note 84 and accompanying text.

167. See Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5 J. INT’L ECON. L. 17, 58 (2002) (“The principle of effective interpretation or ‘l’effet utile’ . . . reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance, one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty.”) (quoting Panel Report, *Canada–Term of Patent Protection*, n.30, WT/DS170/R (May 5, 2000)).

168. TRIPS art. 61.

169. TRIPS art. 45.
The Vienna Convention on the Law of Treaties, which has also been applied by DSB panels, guides one to interpret the provisions of an agreement “in their context and in the light of its objective and purpose.” The meaning of Article 41(1) is equivocal, so it is proper to look to the purpose of TRIPS in the first instance. One statement of the purpose of TRIPS, and perhaps the most fundamental, is “to promote effective and adequate protection of intellectual property rights.” An interpretation of Article 41(1) that finds a requirement to exercise enforcement procedures promotes IPR protection more than an interpretation to the contrary. Also, without such a requirement, the civil procedures in Articles 43–48 would be rendered inert. These articles all employ the language “the judicial authorities shall have the authority” with respect to ordering certain actions, for example, to produce evidence, to desist from infringing activity, to pay damages, and to dispose of infringing goods. By itself, this language allows complete discretion of a member’s judiciary to implement TRIPS civil procedures. Without more, for instance, some minimum level of commitment to use these procedures where appropriate, TRIPS civil procedures could not provide the bite so many commentators attribute to the Agreement. Therefore, to read Article 41(1) in light of the purpose of TRIPS, and to also take account of the context of Article 41(1) in relation to Articles 43–48, one must favor an interpretation that activates Articles 43–48. Again, such an interpretation would be a minimum requirement for governments to use their enforcement procedures. While this interpretation would provide

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172. See U.S. Shrimp Case, supra note 170, para. 114 (“Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.”).
173. TRIPS pmbl.
174. TRIPS arts. 43–48.
175. See, e.g., Ralph Oman, Copyright Piracy in China, 5 J. MARSHALL REV. INTELL. PROP. L. 583, 585 (2006) (“The [enforcement and dispute settlement provisions] give teeth, for the first time, to the settlement of IP disputes between member countries.”); Shira Pelmutter, Future Directions in International Copyright, 16 CARDOZO ARTS & ENT. L.J. 369, 375 (1998) (“[TRIPS] sets out a long list of detailed enforcement mechanisms . . . [a]nd . . . it utilizes the WTO dispute resolution system, giving teeth to the treaty’s requirements.”); Reichman, Enforcing the Enforcement Procedures, supra note 61, at 339 (“[T]he enforcement and dispute-settlement provisions of the TRIPS Agreement put teeth into the pre-existing intellectual property conventions . . . .”).
the United States much greater latitude in challenging China’s IPR enforcement, it is yet to be revealed whether the DSB will interpret Article 41(1) as such.

C. Shortcomings of the U.S. Approach

It does not appear that the United States is poised to urge the DSB panel to adopt the broad interpretation of Article 41(1) proposed above. Particularly, the first U.S. claim argues that “as a result of the thresholds . . . China fails to ensure that enforcement procedures . . . are available under its law so as to permit effective action” and thus “China’s measures . . . appear to be inconsistent with . . . Articles 61 and 41.1.”176 If the United States relies solely on these narrow arguments, it preemptively restricts its case’s potential. If the United States chooses to argue that China fails to adequately use TRIPS enforcement provisions, however, the DSB could determine that this failure is not a matter of compliance with Article 41(1), but rather a frustration of the purpose of the agreement. Because such claims fall outside the category of violation complaints, the DSB could not address that issue.177 This would not mean, however, that the DSB offers no recourse for enforcement-based claims. The combined power of the enforcement procedures and dispute settlement mechanism is what set TRIPS apart from prior international intellectual property agreements.178 That power would only be suited, however, to challenge domestic law, rather than domestic inaction.179 Indeed, the U.S. claims do identify the specific provisions of Chinese law intended to implement the TRIPS obligations that the United States con-

176. Request for a Panel, supra note 73.
177. If lack of enforcement in China only amounted to a general dissatisfaction based on expected TRIPS benefits, rather than a compliance problem, there would be no recourse to the DSB. Such disappointments could only be addressed through non-violation and situation complaints, which are currently barred. See supra note 84 and accompanying text. In China’s case, complaints based on the failure to take action may not even amount to a non-violation complaint, which would need to identify “the application . . . of any measure” that frustrated the agreement. See GATT art. XXIII(1)(b) (emphasis added). Complaints based on the failure to take any measures may thus only qualify under the never-used category of situation complaints. See supra note 84. See also Hughes Statement, supra note 13, at 11 (noting that if the moratorium on non-violation and situation complaints were lifted, “the United States might be able to show that its benefits as a WTO Member—access to the Chinese market—have been impaired by judicial regulations or practices (‘any measure’ under ‘b’) or simply by the general non-enforcement of IP (‘any other situation’ under ‘c’))” (quoting GATT art. XXIII(1)).
179. See Hughes Statement, supra note 13, at 8–9.
siders unmet. In attacking these provisions, the United States will verify that China’s laws are in compliance with TRIPS, but it will achieve only nominal enforcement.

Even if the DSB decided that the U.S. claims under Article 41(1), however argued, were properly before it, the standard that enforcement procedures “permit effective action” is extremely vague, which makes the result unpredictable. The absence of DSB interpretations regarding TRIPS enforcement claims makes it difficult to gauge the merits of the case against China. WTO members have brought over 360 cases to the DSB since 1995, but only four have been related to TRIPS enforcement. The few enforcement cases to date gave no indication how the DSB would interpret the effective action requirement because each was settled before reaching a DSB panel. If the facts the United States presents show no intent to disregard the enforcement standard, however it is construed, the DSB is likely to rule in favor of China because TRIPS guarantees deference to the “differences in national legal systems.”

The standard of proof required for an Article 41(1) violation might be difficult to meet, except perhaps for a strictly facial challenge, because a complainant must “prove a negative, i.e. that there is no IP enforcement sufficient to ‘permit effective action’ and so as to ‘constitute a deterrent to further infringements.’” At the very least, proof that the enforcement procedures are not permitting effective action seems to require

180. See Request for a Panel, supra 73.
182. Index of Disputes Issues, supra note 10. The United States was the complainant in each of these cases. The two cases brought most recently were against Greece and the European Communities for the same claim related to broadcasting copyrighted motion pictures and television programs in Greece. Id.
183. See TRIPS Enforcement Cases, supra note 10.
184. See Reichman & Lange, supra note 181, at 35–36 (“[T]he TRIPS Agreement expressly mandates respect for . . . ‘differences in national legal systems.’ These differences, coupled with the ambiguities of the procedural standards as drafted, invite decision-makers to take local circumstances into account when seeking to evaluate actual or potential conflicts between states. . . . In close cases, countries may claim that the weak level of enforcement meted out to a particular subject matter stems from doubts about the requisite scope of protection required under the substantive standards, and not from culpable laxity in applying the enforcement procedures as such.”) (quoting the TRIPS Preamble) (footnote omitted).
185. Hughes Statement, supra note 13, at 12.
broad evidence of inadequate enforcement. The dispute settlement mechanism was not intended to be a forum for members to bring individual claims for their citizens. One commentator compares the Appellate Body of the DSB to the U.S. Supreme Court in that neither is designed to resolve the multitude of infractions occurring within its jurisdiction. Although this analogy is not perfect, it exemplifies the type of role the DSB is meant to serve. The DSB would likely not be persuaded by a claim asserting a lack of “effective” enforcement based on a single incident, or even several incidents. Furthermore, members are expected to use judgment and exercise self-restraint when considering a case before the DSB, which may suggest a duty to gather compelling evidence.

In October 2005, the USTR requested information from China pursuant to Article 63(3) on certain enforcement statistics. Article 63(3) allows a member to obtain information regarding particular judicial decisions or administrative rulings. The USTR request appeared to be an attempt to gather evidence for a potential complaint, which was applauded by U.S. industry as a critical first step to attacking copyright piracy in China. However, China, however, asserted there was no legal basis for the U.S. request and refused to provide any information. Under Article 63(3), members may only request information related to “specific” cases and rulings in which they have an interest. Thus, because the U.S. re-

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186. If an implementing domestic law complied with the corresponding TRIPS provision on its face, then it is logical that some significant amount of evidence would be required to show the law was not permitting effective action.
190. TRIPS art. 63(3). A member must have “reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement . . . ” in order to obtain such information. Id.
192. See New WTO Probe, supra note 6. The Chinese delegate at a TRIPS Council meeting claimed the U.S. request was too broad and that only information about specific cases could be requested. See id.
193. See supra note 190.
quest was very broad, China’s denial of information may have been justified.

Given China’s defiant attitude toward such requests, the United States, now looking to present evidence to the DSB panel, may have to identify many cases of weak enforcement practices in which it had an interest in order to make requests for information under Article 63(3) that China will comply with. This could prove a daunting task and impede the ability of the United States to prove its claims. If China remained unresponsive to Article 63(3) requests, the United States could initiate a case against China for failure to comply with Article 63(3), but this would greatly delay any decision in the current U.S. case.

The theme of deference to national implementation of TRIPS standards stated in the agreement’s preamble and somewhat more specifically rendered in Article 41(5) also poses an obstacle to the U.S. case. “[Part III] does not . . . affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.”195 With respect to criminal enforcement under Article 61, this deference seems to allow China complete discretion to prosecute cases of willful counterfeiting and piracy.

Another limiting factor for the U.S. case is that it focuses primarily on lack of criminal enforcement in China, with the exception of the claim relating to disposal of infringing goods, which targets customs practices.196 Even a successful action under Article 61 would not provide a complete solution to inadequate enforcement. Criminal prosecution is only required for certain cases of trademark and copyright misappropriation—the most “blatant and egregious forms of infringing activity.”197 In all other cases, private right owners must rely entirely on civil procedures to obtain remedies for infringement. As noted above, China has focused attention on the courts for settling IPR disputes.198 In light of the shortcomings of China’s judicial system—corruption, local protectionism, and

194. See Request Letter, supra note 189 (“China has identified numbers of specific judicial decisions and administrative rulings . . . reflecting the application of criminal, administrative, and civil remedies for IPR infringement in various public statements. . . . I am attaching to this letter a list of six clarifications requested by my government concerning the specific cases identified by China for the years 2001 through 2004, as well as any comparable cases that China may have identified for that period or during 2005.”).
195. TRIPS pmbl., art. 41(5).
196. See supra notes 158–160 and accompanying text.
198. See supra Part II.C.
political control—a the United States could potentially bring a complaint against China under one of Articles 42–49, relating to civil procedures. Either Article 41(1) or Article 41(2), which requires procedures to be “fair and equitable,” might be used in combination with any of Articles 42–49 to challenge compliance of civil proceedings in China with TRIPS standards.

Any potential complaint involving the inadequacy of civil judicial enforcement, however, is also limited by Article 41(5), which states: “[Part III] does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general . . . .” The agreement was intended to create standards that the varied judicial systems of the world could meet. Thus, a DSB panel might be reluctant to condemn any specific procedures China has implemented with respect to its obligations under TRIPS civil procedure provisions.

IV. IMPROVING TRIPS ENFORCEMENT THROUGH TRANSPARENCY

As discussed above, there are several obstacles to a successful WTO complaint based on Article 41(1) and any of the TRIPS enforcement procedures in Articles 42–61: a complaint alleging the failure to use TRIPS enforcement procedures to some minimum degree might be characterized as a non-violation or situation complaint, the vague standard of “effective action” makes the outcome of a DSB ruling uncertain, proving a lack of “effective action” seems to require gathering broad evidence (in either a case targeting a member’s IPR enforcement practices or a member’s lack of action to enforce its IPR enforcement laws), and TRIPS respects members’ allocation of prosecutorial resources and existing judicial systems based on Article 41(5). A solution for improving IPR enforcement in China must circumvent these limitations.

A. A Path to Better Enforcement

The United States should consider a WTO case against China under Article 63(1) based on China’s failure to meet the judicial decisions pub-
lishing requirement. If a DSB panel found that China was not in compliance with Article 63(1), and China remedied its violation of that provision, mere compliance with the procedural publication requirement would have its own substantive effects that would lead to better enforcement.

As mentioned above, market forces helped propel China’s legal reform.205 Those same forces would impel change in the judicial system if more information were available in the judicial information marketplace.206 A successful challenge to China’s judiciary under Article 63(1) transparency would produce better knowledge of how judges are applying the law, and would possibly identify when corruption and political influence have been determinative in particular cases.207 As one commentator asserted, “sunlight is the best disinfectant.”208 In such an environment, more businesses would be likely to pursue a remedy in court for alleged infringements.209 With improved transparency, increased challenges in China’s courts would exert upward pressure on the political powers to reform the operation of the judicial system to adapt to the needs of litigants.210

205. See supra note 133 and accompanying text.
206. See Liebman, supra note 139, at 311 (“The criticism born of greater informational freedom can correct injustice, prevent corruption, and otherwise ensure a more fair legal system.”). A complementary effect of the spread of more information on judicial decision-making is an increase in consistency in the application of the law. See id. Liebman, in confronting the lack of information available even to judges, argues:

The easier it is for judges to communicate, the easier it is to develop a consistent set of rules across the country. Cheaper communications make it easier for courts to apply the law consistently—a major and often overlooked problem (at least in Western writing on Chinese law). That, in turn, gives judges the power to appeal to the potent principle that similar cases should be decided similarly.

Id. (footnote omitted).
207. See Lin, supra note 63, at 309–310.
208. Id. (quoting DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 211–212 (2003)).
209. See supra note 25 and accompanying text.
210. One commentator, writing in anticipation of China’s entrance into the WTO, suggested that litigating in Chinese courts was important for challenging the existing legal culture. Michael N. Schlesinger, A Sleeping Giant Awakens: The Development of Intellectual Property Law in China, 9 J. CHINESE L. 93, 139–140 (1995). Even after China’s accession to the WTO, the courts remain an essential forum for pressing further reform, especially in view of the limitations of the WTO dispute settlement mechanism. See supra Part III.C.
The success of a challenge under Article 63(1) depends on the level of judicial transparency it requires, as determined by a DSB interpretation, and whether China’s judicial system meets this level.

B. Interpretation of Article 63(1)

Article 63(1) limits the judicial publishing requirement to “final” decisions. Based on its plain meaning, a “final” decision is one that is either issued by the highest court, or not subject to further appeal. Although the definition of a final decision may seem clear, it may become more complicated in application to the relevant legal system. In China, the finality of any judicial decision is debated because different branches of government may reexamine cases almost ad infinitum. For Article 63(1) to have any effect in China, however, some level of judicial decision-making must be deemed to produce a “final decision.”

One commentator has proposed two different methods of imposing “finality” on Chinese court decisions for international legal purposes. The first method is to allow China to determine which decisions are “legally effective,” and to declare these decisions final. Although this approach is flexible, and may be contoured to the Chinese judicial system, its application would be complex. Furthermore, in the case of a publishing requirement, this discretionary approach would allow China to unduly restrict publication. A second method is to simply determine a level of “artificial” finality, for example by declaring that decisions of the Supreme People’s Court are final. This approach seems more reasonable, as it assures a uniform rule for publication, and does not allow for inter-

\[211. \text{TRIPS art. 63(1).}
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\[212. \text{RESOURCE BOOK, supra note 146, at 642.}
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\[213. \text{Id.}
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\[214. \text{See Nanping Liu, A Vulnerable Justice, supra note 131.}
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\[215. \text{See id. at 94.}
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[Justice in China is so vulnerable that many different persons or institutions may step in to challenge a decision of the court, and make the various “final” decisions meaningless. . . . However, such a game does not appear suitable or enjoyable for international players, particularly for jurisdictions that insist on finality of a judgement [sic] as part of the requirements for recognition and enforcement.}

\[216. \text{Id. at 91–96.}
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\[217. \text{Id. at 92.}
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\[218. \text{Id. at 92–93.}
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\[219. \text{Id. at 94.}
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ference with the rule once it is established. In a WTO case, the DSB could simply determine this artificial level of finality based on the specific structure of the Chinese judicial system. Decisions in any IPR cases that have reached the Supreme People’s Court and decisions by any IPR tribunal that may no longer be appealed to another court should be deemed “final,” and should therefore be published.

Another issue with interpreting the publishing requirement is what content published judicial decisions must provide. Article 41(3) says decisions “shall preferably be in writing and reasoned,”220 but these should be seen as more than just preferences. If decisions are to be published, this assumes they must be in writing. There also should be some reasoning provided in a written decision, because a decision without any reasoning is not useful even if it is published. One Shanghai court has taken the radical step of providing detailed reasoning in its opinions, including dissenting opinions.221 In reference to the rationale behind this bold step, one commentator stated that “allowing the public to see how a court reaches its decision ultimately results in greater fairness of the judicial process and increases the public’s trust in the system.”222 This judicial ethic could be adopted by a DSB panel in its interpretation of Article 63(1), which in turn would spread the practice of writing reasoned, published opinions throughout China’s courts.

C. Practical Application of Article 63(1) and Implications of a Transparency Approach

China does not meet the Article 63(1) transparency requirement for publishing judicial decisions, based on the reasonable interpretation of Article 63(1) presented above. The selective publishing of some decisions does not satisfy the imperative language in Article 63(1) that judicial decisions “shall be published.”223 Furthermore, the editing of lower court decisions disregards the essential purpose of publishing judicial decisions—to inform private right holders how the courts are applying the law.224 The Chinese judicial system, although not truly independent,

220. TRIPS art. 41(3).
221. Lin, supra note 63, at 309. See also RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 287 (2002) (“As in some civil law counties, written decisions in China have usually been fairly brief and generally did not contain dissents nor extensive discussion of the reasoning of the court. However, judges are now expected to include legal analysis and reasoning in their opinions. In some cases, judicial opinions have swelled to twenty or thirty pages.”).
222. Lin, supra note 63, at 309.
223. See TRIPS art. 63(1).
224. See RESOURCE BOOK, supra note 146, at 641–642.
has the capability to implement a DSB decision requiring a system for reporting judicial decisions. In 2002, the Supreme People’s Court issued two judicial interpretations: *Provisions on Certain Issues Related to Hearing of International Trade Administration Cases* and *Provisions on the Jurisdictional Matters Concerning Foreign-Related Civil and Commercial Disputes.* These interpretations demonstrate the Court’s authority to promulgate rules and its willingness to adopt WTO-promoted international norms.

A case under Article 63(1) avoids the problems inherent in a case under Article 41(1) in combination with an enforcement procedure. The United States would directly challenge China’s compliance with a specific provision, which meets the definition of a violation complaint and is within the competence of the DSB for disputes arising under TRIPS. The requirement for judicial transparency is a rule, rather than a vague standard, and thus should be easier to apply. There is no extensive amount of evidence to gather in a complaint under Article 63(1)—all that is required is a comparison of China’s efforts at a judicial publication system (primarily the Gazette) with what constitutes a proper Article 63(1) publishing system. A requirement to publish judicial decisions does not interfere with China’s prerogative to choose the best way to implement TRIPS standards. Transparency does not dictate what the law should be, just that it be known. The procedural requirement in Article 63(1) to publish judicial decisions does not violate the principle in Article 41(5) that members shall not be required to adopt a distinct judicial system under the agreement. If Article 63(1) and Article 41(5) are to be read as consistent with each other, judicial transparency cannot be interpreted to impose any offensive structural changes on the judicial system. In addition, a DSB panel would be likely to look favorably upon a transparency claim, given the fundamental importance of transparency within the WTO system.

This transparency solution does not provide the immediate and direct results that a heavy-handed, top-down approach might achieve. It is an indirect and long-term solution that can stimulate organic changes in China’s judiciary, a feature absent in an administrative decree or temporary crackdown on infringement. Unfortunately, this transparency strategy may prove to be a difficult sell to the USTR. It is not nearly as at-

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226. *See supra* notes 83–84 and accompanying text.
227. TRIPS art. 1.
228. TRIPS art. 41(5).
230. *See supra* note 55.
tractive as a complaint that could get China to take action by increasing criminal prosecutions. The USTR, however, should see increased judicial transparency as another way to foster U.S. investment opportunities. Private investors are eager to engage in China’s markets.\(^{231}\) In the absence of full transparency, investors are deterred because they overestimate legal risks.\(^{232}\) Greater transparency would increase private investment in China, and industry leaders in the United States should make this argument to persuade the USTR to clear the way for safe investments in China through increased judicial transparency.

**CONCLUSION**

Although still considered a developing country, China represents the largest potential market in the WTO.\(^{233}\) Therefore, inadequate IPR enforcement in China has a large impact on the United States and other developed countries. Not only does weak IPR enforcement negatively affect private investment decisions and the level of success of any such investments, but it has broader implications for the trade relationship between the United States and China.\(^{234}\) Greater IPR protection would help

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231. See, e.g., Wayne M. Morrison, Congressional Research Service Issue Brief for Congress: China’s Economic Conditions 5 (Jan. 12, 2006) (“China’s trade and investment reforms and incentives led to a surge in foreign direct investment (FDI) . . . .”).


Lack of transparency deters potential investors from entering markets. When companies are unsure about the existing legal regime on investment in a certain country, they tend to overestimate the risk associated with that country well beyond reality. And risk is costly. In general terms, the lack of information distorts economic decisions, including the decisions to invest in a certain activity or in a given country.

Id. (footnote omitted). See also Hughes Statement, supra note 13, at 4 (“[C]ontinuing lack of transparency cannot help but affect any outsider’s conclusions about whether China is meeting its TRIPS enforcement obligations.”).

233. See Christopher Duncan, Out of Conformity: China’s Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession, 18 Am. U. Int’l L. Rev. 399, 446 (2002) (“China is the WTO’s largest member . . . .”); Morrison, China-U.S. Trade Issues, supra note 100, summary (“With a huge population and a rapidly expanding economy, China is a potentially huge market for U.S. exporters.”).

234. See Jason Subler, Portman Presses China on Market Access, IPR; Urges China to Be Active in Doha Talks, PAT., TRADEMARK & COPYRIGHT J., vol. 71 No. 1745, Nov. 18, 2005 (“The piracy not only deprives U.S. companies of their ability to participate in the Chinese market, it also affects them worldwide,” [USTR Robert Portman] asserted. ‘Piracy disproportionately affects U.S. exports, because they’re often knowledge-based exports.’”).
balance trade between the United States and China.\textsuperscript{235} Thus, the state of IPR protection is a primary concern for U.S. economic policy-makers.

Compliance with TRIPS should also be a primary concern for Chinese policy-makers because it offers the opportunity for China to become a mature technology-economy through technology transfer. China has already made great strides in revising its IPR laws and in establishing specialized courts; however, cultural practices remain a hindrance to IPR enforcement. Although TRIPS is just one instrument with which to exert pressure on China to improve enforcement practices, it has the potential to be the most far-reaching.

If the United States initiated a case against China in the DSB to increase judicial transparency based on Article 63(1) of TRIPS, private litigants would have a more predictable atmosphere in which to enforce their rights. This would be an incremental step in judicial reform, with broader implications of helping to create a more independent judiciary. The risk of not having a transparent and independent judicial system is losing the confidence of foreign investors, an outcome that would reduce technology-based investments and stall China’s economic progress. A reasonable interpretation of Article 63(1) that requires China to implement a transparent and informative judicial reporting system, and compliance by China, would encourage investors and promote technology transfer. TRIPS is described as a set of minimum standards for IPR protection, and China offers a test case to determine whether these minimum standards will be met by more than minimum enforcement.

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\textsuperscript{235} Failure to protect IPRs, among other factors, contributes to the U.S. trade deficit. \textsc{U.S.-China Econ. and Sec. Review Comm’n}, 110th Cong., Report to Congress 2 (1st Sess. 2007). Indeed, the first clause of the TRIPS Preamble begins, “Desiring to reduce distortions and impediments to international trade.” TRIPS pmbl. U.S. Census Bureau statistics indicate that the U.S. trade deficit with China reached $232.5 billion in 2006. \textsc{U.S.-China Econ. and Sec. Review Comm’n, supra}, at 2. \textit{But cf. IPR Not a Main Factor Affecting Sino-US Trade Balance}, News Guangdong, Apr. 4, 2006, http://www.newsgd.com/news/china1/200604120011.htm (“China’s Minister of Commerce, Bo Xilai, . . . denied [IPR] protection was the main factor in the trade imbalance with the United States . . . . He said it was exaggerating to say that China’s insufficient IPR protection had greatly affected US interests in bilateral trade.”).

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