A HUMAN RIGHTS COURT FOR AFRICA, AND AFRICANS

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African Unity (OAU), the OAU Assembly of Heads of State and Government (Assembly), adopted the Protocol in July 1998, some five-and-a-half years earlier. The African Court on Human and Peoples’ Rights (African Court or African Human Rights Court), after the election of eleven judges, is expected to start functioning in 2005 as an institution of the African Union (AU), which replaced the OAU in 2002. The goal of the African Court is to complement the protective mandate of the African Commission on Human and Peoples’ Rights (African Commission), which was established as the quasi-judicial implementation body of the African Charter on Human and Peoples’ Rights (African Charter) in 1987.


2. O’Shea, supra note 1, at 286 n.6.


Rather than provide a comprehensive overview of the Protocol, this Article will focus on the role of individuals, referred to as “Africans” in the title, before the African Court. I will ask the following questions: Do individuals have access to (including the standing to bring cases before) the new Court? Will the new Court be able to overcome the African Commission’s weaknesses with regard to individual communications? These questions will be explored in Parts II and III, and are framed by a brief historical introduction in Part I, while Parts IV and V discuss the broader legal context and some procedural issues bearing on the benefits to individuals of the African Court. There are two reasons I chose the “individual” as the prism through which to view the Protocol. First, individuals have emerged from the shadows of the Second World War into the spotlight of international law: exemplifying this trend are the recognition of individual rights in numerous human rights treaties, the acceptance of individual-complaint mechanisms, individual account-
ability for grave human rights violations before the International Criminal Tribunals for the ex-Yugoslavia (ICTY), Rwanda (ICTR), and the International Criminal Court (ICC), and the principle of universal jurisdiction.\(^9\) Second, it was mainly through individual complaints that the potential of the United Nations (UN) and regional human rights instruments has been unleashed, particularly in the African system.\(^10\) Put differently, the success of the African Court will be determined primarily by the way in which it deals with individuals as its natural and logical constituency.

I. INTRODUCTION AND HISTORICAL BACKGROUND

When the African human rights system was forged in the late 1970s and early 1980s, the possibility of an African human rights court was raised, but rejected.\(^11\) Participants in the drafting process concluded that the continent was not yet ready for a judicial institution to make pronouncements on human rights violations committed by states. In the introduction to the first document in the travaux préparatoires of the African Charter's substantive provisions, the main drafter, Keba M'Baye, highlighted the omission of a judicial institution, but explained that it was “thought premature to [establish a judicial institution] at this stage.”\(^12\) Prophetically, he added that the “ideal is, no doubt, a good and useful one which could be introduced in the

10. On the significant role and potential of NGOs in Africa, see, for example, Claude E. Welch, Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations (1995); Kwadwo Appiagyei-Atua, Human Rights NGO's and Their Role in the Promotion and Protection of Rights in Africa, 9 INT'L J. ON MINORITY GROUP RTS. 265 (2002).
11. See Keba M'Baye, Introduction to M'Baye Proposal, Draft African Charter on Human and Peoples' Rights of 1979, OAU Doc. CAB/LEG/67/1, para. 4, reprinted in HUMAN RIGHTS LAW 1999, supra note 1, at 65 (“The establishment of a Human Rights Court to redress cases of violation of human rights is not included in the Draft Charter. It is thought premature to do so at this stage. The idea is, no doubt, a good and useful one which could be introduced in the future by means of an additional protocol to the Charter.”). The only reference to a court in the later travaux préparatoires is the indication that a delegation proposed an amendment establishing an African court to judge crimes against mankind.
12. Id.
future by means of an additional protocol to the Charter.\textsuperscript{13} In response to questions posed at the subsequent ministerial meeting, M'Baye, as Chairman of the Committee of Experts, explained that the establishment of an African Human Rights Court was not a pressing concern because the Convention on the Elimination and the Suppression of the Crime of Apartheid already provided for “an international penal court” and the United Nations was considering the establishment of “an international court to repress crime against mankind.”\textsuperscript{14} This exchange implies, therefore, that the proposed African Court was initially envisioned as an instrument to punish crimes against humanity, including apartheid. An unnamed delegation proposed the establishment of a court “to judge crimes against mankind and violations of human rights,”\textsuperscript{15} thus extending the possible material jurisdiction of such a court beyond crimes against humanity. However, those at the meeting concluded that “it was untimely to discuss it,”\textsuperscript{16} and there is no indication that optional acceptance of a court’s jurisdiction – similar to the European compromise, which led to the establishment of the European Court of Human Rights (European Court)—was discussed.\textsuperscript{17}

\begin{footnotes}
13. Id.
15. Rapporteur’s Report, supra note 14, para. 117 (emphasis added).
16. Id.
17. See \textit{European Convention for the Protection of Human Rights and Fundamental Freedoms}, Nov. 4, 1950, (the European Court of Human Rights could only be established after eight states had accepted its optional jurisdiction) [hereinafter European Convention], \textit{available at} http://www.unhcr.md/article/conv.htm. The European Convention was fundamentally revised after the adoption of Protocol No. 11 thereto, entering into force on Nov. 1, 1998. \textit{See generally} Council of Europe, Explanatory Report and Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, \textit{Restructuring the Control Machinery Established Thereby}, 33 I.L.M. 943 (1994) [hereinafter Explanatory Report and Protocol No. 11]. Unless otherwise stated, all references to the European Convention in this article are to the 1950 version, not to its subsequent Protocols, because the African system’s structure more closely resembles the initial two-tiered system in Europe (which included both the European Commission of Human Rights and European Court of Human Rights) than the current system (which includes only the European Court of Human Rights).
\end{footnotes}
The inception of the African Charter can be traced to 1961, when a pan-African conference on the rule of law was held in Lagos, Nigeria. The conference, in “The Law of Lagos,” recommended that an African Convention on Human Rights be adopted and a court of appropriate jurisdiction be created. Significantly, the conference consisted of judges, practicing lawyers and law professors from 23 states, not merely of activists or NGOs. However, when the OAU was formed some two years later, judicial dispute resolution was not yet a priority and was, instead, overshadowed by preoccupations with sovereignty and territorial integrity. Under the 1963 OAU Charter, disputes were to be resolved by the Assembly of Heads of State and Government. The one legal institution provided for under the Charter, a legal committee, was never established.

This brief historical overview confirms that the establishment of the African Commission as a quasi-judicial body was deliberate. The African Commission was made unmistakably subservient to the Assembly, its political master, to which it had to refer serious cases and report annually. The vague and insufficiently grounded individual complaint procedure in the Charter was strengthened and secured by the African Commission’s Rules of Procedure and subsequent practice. States have, for
example, argued that only cases concerning massive or serious violations may be lodged with the African Commission. However, the African Commission has rejected such arguments, and remarked that its own practice has evolved to include individual complaints. Since its establishment in 1987, the African Commission’s mandate has been both promotional and protective. As part of its promotional mandate, the Commission has examined state reports, organized conferences, launched publications, and established Special Rapporteurs. Commissioners were assigned individual countries to which they have undertaken promotional missions. From 1988 to 1992, the African Commission received 173 individual complaints, an average of fewer than twelve per year, and finalized ninety communications between 1988 and 2001. It has dealt with only one inter-state communication, which still had not been finalized by the beginning of 2004. This does not compare favourably to the


27. Id. at 102, para. 42.
28. African Charter, supra note 1, art. 45 (sets out Commission’s general mandate).

29. Id.


31. These figures are based on my analysis of the Commission’s Annual Activity Reports, excluding those communications directed at non-state parties. Additionally, communications closely related to each other, either by content or by the state party complained against, have been counted together as one communication. With these exclusions, the Commission’s official register shows the receipt of 277 communications by the end of 2002.

32. “Finalized” denotes conclusion in a friendly settlement, or findings on admissibility and merits.

33. See 15th Ann. Activity Report, supra note 30, at 13 (stating Commission’s intention “to convene an Extraordinary Session to fully consider and
caseload before the European Commission of Human Rights (European Commission) in either the earlier or later part of its life cycle, but it does not significantly differ from the activity before the UN Human Rights Committee (HRC), the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee), or the UN Committee Against Torture (CAT Committee).

The idea of an African Human Rights Court took almost four decades to ripen into the Protocol adopted by the OAU Assembly on June 10, 1998, in Ouagadougou, Burkina Faso. The number of NGOs enjoying observer status with the African Commission had by then grown substantially, and the regular pre-session workshops provided a forum to raise support for the establishment of a court. Sessions of the African Commission became a forum where NGOs campaigned for a court. Thus, pioneered by NGOs, supported by the African Commission, and


36. Since its establishment in 1969, the CERD Committee has received seventeen complaints, twelve of which had been finalized by the beginning of 2000. See ANNE F. BAYEFSKY, THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY 467 (2000).

37. From 1988 through February, 2000, 154 complaints were registered with the CAT Committee and seventy-one have been finalized. See BAYEFSKY, supra note 36, at 466.


40. Among the many NGOs present at these workshops, the International Commission of Justice (International Commission) was very influential. It produced the first draft; although this draft was tabled at Cape Town, the International Commission’s Secretary General at the time, Adama Dieng, was a prominent figure in the process.
in receipt of high-level political backing, \(^{41}\) the movement for the creation of an African Court received the cautious support of the OAU Assembly in 1994. At its meeting in Tunis, the Assembly asked “the OAU Secretary-General to convene a meeting of government experts to ponder in conjunction with the African Commission ... over the means to enhance the efficiency of the Commission in considering in particular the establishment of an African Court.” \(^{42}\) This resolution came just as a window of opportunity opened up in Africa following the end of the Cold War. Democratization swept the continent and led to multi-party elections, eventuating political change in Zambia, Benin, South Africa, and Malawi. \(^{43}\) Tentative attitudes towards judicial institutions have gradually been assuaged by the establishment and greater reliance on domestic constitutional courts, paving the way for acceptance of a continental court. \(^{44}\) The end of the Cold War also saw the proliferation of new international judicial mechanisms, linking the adoption of the Protocol to a global trend. \(^{45}\)


\(^{41}\) At the Commission’s fourteenth session in 1993, then OAU Secretary General Salim Ahmed Salim stated that the time had come for an African Human Rights Court. See ANKUMAH, supra note 5, at 70.


acceptance of direct access to the African Court by individuals an automatic consequence of ratification.\textsuperscript{47} After the Council of Ministers discussed the draft, the Council referred it to another meeting of government experts for further discussion,\textsuperscript{48} which took place in Nouakchott, Mauritania, in April, 1997, and culminated in the second draft (Nouakchott Draft Protocol).\textsuperscript{49} This draft amended the Cape Town Draft Protocol in two significant respects. First, the number of ratifications required for the Protocol’s entry into force was increased from eleven to fifteen.\textsuperscript{50} Second, the Nouakchott Draft Protocol made optional a state’s acceptance of the African Court’s competence to receive petitions directly from individuals.\textsuperscript{51} A third meeting of government legal experts, this time enlarged to include diplomats, then took place in Addis Ababa, culminating in the third draft (Addis Ababa Draft Protocol).\textsuperscript{52} The changes mentioned above are re-
flected in the Addis Ababa Draft Protocol, which was the last draft version promulgated before it was submitted to a Conference of Ministers of Justice and Attorneys-General, where minor amendments were made. The OAU Assembly then endorsed it without amendment. 53

At its Twenty-fourth session in October, 1998, the African Commission urged member states to ratify the Protocol “within the shortest possible time.” 54 In that year, however, only two states (Burkina Faso and Senegal) ratified the Protocol. 55 For the next four years, the pace of ratification dropped to one country per year (Gambia in 1999, Mali in 2000, Uganda in 2001, and South Africa in 2002). 56 In 2003, the pace accelerated, with nine states (Algeria, Burundi, Comoros, Côte d’Ivoire, Lesotho, Libya, Mauritius, Rwanda, and Togo) ratifying. 57 By August 31, 2004, four more states (Gabon, Mozambique, Niger, and Nigeria) had become state parties to the Protocol, thus increasing the total number of state parties to nineteen. 58

There are several factors that may have precipitated this acceleration. The African Commission persisted in prodding states to ratify, as evidenced by a call in May, 2002, urging “all OAU member states to ratify or accede as soon as possible to the Protocol.” 59 In the late 1990s, human rights received strong backing from the OAU Assembly and Secretary-General. 60 The

53. See id. arts. 34(3), 34(6).
55. Id.
57. Id.
58. Id.
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OAU’s first ministerial conference on human rights in Africa was held in 1999, followed by a second (the first under AU auspices) in May, 2003, in Kigali, Rwanda. The Kigali Declaration notes “with concern” that only nine states had ratified the Protocol, and “appeals” to other states to follow suit, in particular “to enable [the Protocol] to come into force by July, 2003 as required by Dec. AHG/Dec. 117 (XXXVIII).” The sudden surge in acceptance may also be indicative of a spirit of greater commitment to African unity and the development of the AU and its institutions. The speed with which a simple majority of member states ratified the Protocol Establishing the Peace and Security Council and the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament exemplifies this trend. The institution of the first interstate communication forced governments to take notice of the African human rights system – it is more than coincidental that all three respondent states have ratified the Protocol. On a more cynical note, some states may have been motivated primarily by the prospect of bidding to host the African Court, an avenue open only to state parties to the Protocol. African enthusiasm and participation in establishing the ICC, and its entry into force in 2002, also left its mark on the parallel process of establishing the African Human Rights Court.

61. Id. at 1.
62. Id. para. 26.
65. Protocol to the African Charter, supra note 1, art. 25(1).
II. COMPLEMENTING THE COMMISSION: FROM QUASI-JUDICIAL TO JUDICIAL

The overarching aim of the African Court is to supplement the African Commission’s individual communications procedure.\footnote{See African Charter, supra note 1, art. 2} Therefore, the question is whether the African Court will be able to overcome the problems experienced by the Commission in dealing with these communications. Seven interlinked difficulties associated with the African Commission’s efforts, most resulting from its status as a quasi-judicial body, are now discussed, and the African Court’s ability, as a judicial institution, to rectify these deficiencies is investigated.

A. Nature of the Findings: From Recommendatory to Binding

The African Commission’s findings (or “reports”) are not considered final. They are merely “recommendations” to the political body that had given life to the African Commission, the OAU/AU Assembly.\footnote{See African Charter, supra note 1, art. 58(2) (note use of the term “recommendations”). See also ANKUMAH, supra note 5, at 74.} These findings become “final” only when they are contained in the African Commission’s Annual Activity Report and approved by the Assembly.\footnote{Whether the “adoption” of these findings by the OAU/AU “converts” them into legally binding decisions may depend on the legal force of those decisions. Although it is still somewhat unclear whether OAU decisions are legally binding, AU decisions are. Rules of Procedure of the Assembly of the Union, 1st Ord. Sess., art. 33 (July 2002), http://www.africa-union.org/rule_prot/rules_Assembly.pdf. See also Frans Viljoen & Lirette Louw, The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation, 48 J. AFR. L. 1, 9–10 (2004); OUGUERGOUZ, supra note 1, at 9.} This has weakened the impact of the African Commission’s findings by inhibiting state compliance.\footnote{See Viljoen & Louw, supra note 69, at 2.}
Conversely, the decisions of the African Court are final. They will not be subject to appeal (to any other judicial institution) or to political confirmation (by any body of the OAU/AU). The consequence is that these decisions will be unequivocally binding on state parties. State parties will not only “undertake to comply with the judgment in any case to which they are parties,” but also to “guarantee its execution.”

B. Remedies: From Uncertainty to Clarity

The African Commission has no clear legal basis to create remedies, which has led to inconsistent treatment in the punishment of African Charter violations. The African Commission’s remedies may be divided into three categories: no remedy, a very open-ended remedy, and a specific, detailed remedy. The omission of a remedy or the recommendation of an open-ended remedy leaves uncertain what is required of states,
thus impeding follow-up or implementation. For example, in Communication 224/98, *Media Rights Agenda v. Nigeria*, the respondent state was urged “to bring its laws in conformity with the provisions of the [African] Charter.” The African Commission’s failure to define the term “in conformity” may have been one of the reasons for Nigeria’s non-compliance. In contrast, there is a clear legal basis in the Protocol for the provision of remedies, allowing the African Court to make “appropriate orders to remedy the violation.”

C. Implementation: From an Ad Hoc System to a Comprehensive System

Given the non-binding nature of findings and the weak legal basis for remedies under the Charter, it is hardly surprising that implementation and enforcement of remedies has been weak. The African Commission has not instituted any sort of compliance system to gather information about states’ responses to the African Commission’s findings. Without the required information, the African Commission has remained passive with respect to the consequences of its findings.

While the African Commission has adopted no systematic compliance mechanism, some Commissioners have undertaken limited follow-up on an ad hoc basis. The most notable example

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79. Protocol to the African Charter, *supra* note 1, art. 27(1).


82. *See* OUGUERGOUZ, *supra* note 1, at 657.
is Commissioner Jainaba John’s questions to state parties regarding their implementation of decisions on individual communications during examination of state reports. Another example includes a recommendation, made as part of a remedy, that the state party discuss implementation of the decision in its periodic report. Additionally, remedies ordered in other decisions imply that some sort of follow-up will be undertaken.

Conversely, state parties to the Protocol specifically undertake to implement the findings, including ordered remedies. Institutional or systematic control over enforcement is provided in that the Executive Council must be notified of judgments and must monitor their execution on behalf of the Assembly. In its annual report to the Assembly, the African Court must specify instances of state non-compliance. Non-compliance may result in an AU decision, which in turn may lead to the imposition of sanctions as envisaged under the AU Constitutive Act.

**D. Accessibility: From Secrecy to Openness**

Confidentiality obscures the protective work of the African Commission. The requirement that “all measures taken” by the African Commission remain confidential until approved by the Assembly has been interpreted to include any information about individual communications. Sessions of the African Commission are therefore divided into public and private. The public portion of their sessions deals with promotional issues,

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83. See generally 15th Ann. Activity Report, supra note 30, annex 1 (indicating that states’ reports were considered by the African Commission during its Thirty–first Ord. Sess.).
85. See, e.g., SERAC Case, supra note 77.
86. Protocol to the African Charter, supra note 1, art. 30.
87. Id. art. 29(2).
88. Id. art. 31.
90. African Charter, supra note 1, art. 59(1).
including the examination of state reports; the private portion, which is closed to the public, deals mainly with communications.92 Because of this policy, decisions are often not accessible and are not widely disseminated. Additionally, there is no systematic publication of the African Commission’s decisions.93 This excessive confidentiality is one of the factors contributing to the low media profile and public awareness of the Commission in Africa.94

On the other hand, court proceedings in most countries are usually open to the press and public;95 the African Court is no different.96 Although the Protocol includes an exception allowing closed proceedings, in my view it is meant to be used only to protect witnesses in situations where individuals, complainants, or witnesses are seriously threatened.97 A reasoned judgment has to be “read in open court.”98 All AU members must be notified of decisions.99 However, no provision has been made for the publication of these reports; although such provisions should be covered in the Rules, there could be finance and resource implications.100

92. See Viljoen, Introduction to the African Commission, supra note 91.
93. The Commission’s most recent decisions are accessible online, and are reported in the Commission’s Annual Activity Reports. See www.achpr.org. Additionally, the Institute for Human Rights and Development, an NGO based in Banjul, The Gambia, has published a “Compilation of Decisions on Communications of the African Commission on Human and Peoples’ Rights.”
94. See ANKUMAH, supra note 5, at 38.
95. See generally AMERICAN BAR ASSOCIATION, COMMON LAW, COMMON VALUES, COMMON RIGHTS: ESSAYS ON OUR COMMON HERITAGE BY DISTINGUISHED BRITISH AND AMERICAN AUTHORS (2000) (discussing notions of procedural fairness in common law systems, as well as the importance of public scrutiny in the common law system).
96. Protocol to the African Charter, supra note 1, art. 10(1). See also Murray, Comparison Between the African and European Courts, supra note 5, at 215. The African Court’s Rules of Procedure should clarify under which circumstances in camera proceedings may take place. “Proceedings” should be interpreted broadly to include court documents, such as pleadings; these should be publicly accessible on the Court’s web site.
98. Protocol to the African Charter, supra note 1, art. 28(5).
99. Id. art. 29(1).
100. Id. art. 28(6) (requiring that the African Court provide reasons for its decisions, but not requiring publication).
E. Pace of the Process: From Delayed to More Immediate Justice?

The African Commission also has serious problems with delays in finalizing its communications. Often, a change of government has already taken place by the time the African Commission has reached a finding and recommended a remedy. For example, in the SERAC case, the delay between receipt of the communication and entry of the final decision was five years and seven months. To a very limited extent, the delay could be attributed to the state party because of its obstruction of the African Commission’s planned on-site mission to Nigeria. The complainant also contributed to the delay, as one postponement was made “pending the receipt of written submissions from the Complainants.” However, most of the de-

101. See generally Dinah Shelton, Ensuring Justice with Deliberate Speed: Case Management in the European Court of Human Rights and the United States Courts of Appeals, 21 HUM. RTS. L. J. 337 (2000). Institutional delay was one of the main justifications for the transformation of the European human rights system. The Explanatory Report to Protocol No. 11, establishing a single European Court of Human Rights, describes the extent of the problem:

The backlog of cases before the Commission is considerable. At the end of the Commission’s session in January 1994, the number of pending cases stood at 2,672, more than 1,487 of which had not yet been looked at by the Commission. It takes on average over 5 years for a case to be finally determined by the Court or the Committee of Ministers. Also, whereas up to 1988 there were never more than 25 cases referred to the Court in one year, 31 were referred in 1989, 61 in 1990, 93 in 1991, 50 in 1992 and 52 in 1993, and it is probable that the number will increase even more in the next few years ...

Explanatory Report and Protocol No. 11, supra note 17, at 948.


103. SERAC Case, supra note 77.

104. Id.

105. Id. para. 16.
lays can be attributed to the African Commission: the discussion of the Nigeria mission report and “lack of time” are cited as reasons why the case was postponed on only two occasions; more disconcerting are the numerous unexplained postponements.

However, recourse to the African Court may mean more, rather than less, delay. The supplementary nature of the African Court necessitates some duplication. Both the African Commission and Court are required to deal with admissibility and substantive questions, unless a case is submitted directly to the African Court. The ability of complainants to make direct submissions to the African Court depends on whether a state has made an optional declaration to that effect; the declaration is more the exception than the rule. However, once the African Court has deliberated on a judgment, it must render its written opinion within ninety days. Because state parties must comply with the African Court’s judgment “within the time stipulated by the Court,” the inference can be made that the African Court will set timeframes for compliance and that states will be required to abide by them. Nevertheless, requiring separate arguments and findings for two different institutions — the African Commission and the African Court — will inevitably lead to delays. These types of excessive delay were partially responsible for the merger of the European Commis-

106. *Id.* paras. 18–19. The mission took place from March 7–14, 1994; no final report has been adopted. See also Viljoen, *Overview of the African Regional Human Rights System*, supra note 5, at 181.

107. *SERAC Case*, supra note 77, paras. 21–32 (several postponements from the 24th to the 29th Session).

108. This argument has been crucial in transforming the European human rights machinery into a single judicial institution. See generally CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (3d ed. 2002) (discussing the integration of European human rights policies).


110. *Id.* art. 34(6).


112. Protocol to the African Charter, *supra* note 1, art. 28(1).

113. *Id.* art. 30.
sion and Court into one institution.\textsuperscript{114} This may well be the long-term solution for the African system if the coexistence of the African Commission and the African Court produces similar or even longer delays in finalizing cases.

\textbf{F. Urgent Cases: From Inadequacy to Efficiency?}

The African Charter does not provide for the adoption of interim or provisional measures.\textsuperscript{115} The African Commission’s Rules of Procedure fill this lacuna by providing that the African Commission may inform a state party on the “appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation.”\textsuperscript{116} Such measures may be indicated by the African Commission or, when it is not in session or in cases of urgency, by the Chair, in consultation with other members of the African Commission.\textsuperscript{117} The Chair may take “any necessary action” in urgent cases, but must report to the African Commission about action taken at the next session.\textsuperscript{118} The African Commission has used this competence in a limited number of cases. For example, the African Commission, based on a communication it received regarding Ken Saro-Wiwa and other Ogoni leaders, adopted interim measures asking the state (Nigeria) not to execute them until the Commission had made a decision.\textsuperscript{119} The Nigerian government did not comply,\textsuperscript{120} and in its subsequent decision the African Commission indicated that it considers interim measures binding on a state party.\textsuperscript{121} However, the African Commission’s regular procedure lacks a mechanism for dealing with communications of an urgent nature.\textsuperscript{122}

\textsuperscript{114} See Explanatory Report and Protocol No. 11, \textit{supra} note 17, at 944.

\textsuperscript{115} African Charter, \textit{supra} note 1 (no provisions for the adoption of interim measures).

\textsuperscript{116} Rules of Procedure, \textit{supra} note 25, R. 111(1).

\textsuperscript{117} \textit{Id.} R. 111(2).

\textsuperscript{118} \textit{Id.} R. 111(3).

\textsuperscript{119} Int'l Pen v. Nigeria, Communications 137/94, 139/94, 154/96, 161/97, 12\textsuperscript{th} Ann. Activity Report, \textit{supra} note 54, at 65 (Communications consolidated because all concerned the trial and detention of Ken Saro-Wiwa).

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.} at 72–73.

\textsuperscript{122} The following communications illustrate that the Commission lacks a mechanism for dealing with urgent matters. See Organisation Mondiale Contre la Torture v. Rwanda, Communications 27/89, 46/91, 49/91, 99/93, 10\textsuperscript{th}
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Under the Protocol, the African Court has a broad mandate to adopt “such provisional measures as it deems necessary” in cases “of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons.” The issue is whether the “adopted measures” are “judgments” that parties have undertaken to execute to be monitored by the AU Executive Council on behalf of the Assembly. The Protocol should be interpreted to include those measures. “Findings,” as defined in Article 27 (for example, a finding of violation, a remedy, or a provisional measure) are the dispositive part of the “judgment.” The terms “finding” and “judgment” are not mutually exclusive. The African Court could clarify this apparent uncertainty by denoting its “finding” on provisional measures as a “judgment,” an avenue followed in the other regional systems.

G. Profile: From Obscurity to Visibility?

Despite the vastness of the African continent and the frequency of human rights reports and allegations, very few communications have reached the African Commission. At the domestic level, many factors account for this small caseload, among them illiteracy, political instability or war, absence of civil society, lack of legal aid, lack of access to justice, onerous local remedies, dysfunctional court systems, and corruption. Commission-level factors are also responsible. The African Commission has been ineffective in disseminating information about its existence and its case law and has failed to exploit

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123. Protocol to the African Charter, supra note 1, art. 27(2).
125. See supra note 32 and accompanying text.
126. See Danish Centre for Human Rights, supra note 80, at 43. The African Commission activated an official website and began publishing its decisions on it in 2001, significantly improving the dissemination of information.
media exposure possibilities. Some of the Commission’s inadequacies, however, may be a result of its lack of resources and its seat in far-off Banjul.

To some extent, the mere existence of the African Court should generate greater media interest and exposure. A continental court is bound to have a much clearer identity in the minds of Africans. Ultimately, however, the African Court itself will have earned its legitimacy by securing a high profile through the accessibility and transparency of its procedures, the quality of its judgments and the fairness of its findings.

III. THE INDIVIDUAL BEFORE THE COURT

The coexistence of the African Court with the African Commission means that Africa will have a two-tiered human rights system, similar to the Inter-American system and the European system before Protocol No. 11’s entry into force in 1998. The Protocol describes the relationship between the two bodies as complementary and mutually reinforcing. Although the African Court may deal with individual and inter-state cases and has both contentious and advisory jurisdiction, this section will focus mainly on individual cases and contentious proceedings, where the rights of individuals are most at stake. The following issues specifically affecting individuals before the African Court are discussed here: standing to bring cases and the in-

127. See ANKUMAH, supra note 5, at 38–39 (African Commission’s restrictive interpretation of confidentiality principle featured in African Charter, art. 59, contributes to public’s lack of exposure to, and resultant lack of confidence in, Commission decisions). See also Danish Centre for Human Rights, supra note 80, at 34–35 (“Generally, interviewees agree that this is the worst area of the Commissioner’s (and its Secretariat’s) work, and one in which very little progress can be[] identified. The Secretariat has not ... consistently secured the presence of journalists at sessions, and has not organised a workshop for journalists to promote the African Charter.”).
128. See generally Explanatory Report and Protocol No. 11, supra note 17.
129. Protocol to the African Charter, supra note 1, pmbl. & art. 2.
130. Although the African Court has jurisdiction over inter-state complaints, states must still submit their complaints against other states to the Commission. Assuming that the African Commission determines that the case is admissible and that there is a violation on the merits, the Commission or one of the state parties, either the state lodging the complaint or the state against which the complaint had been lodged, may submit the case to the Court. Protocol to the African Charter, supra note 1, art. 5(1)(b) & (c).
volvement of individuals in proceedings before the African Court.

A. Standing in Contentious Cases: Submission of Individual Complaints to the Court

Article 5(1) of the Protocol allows the following parties to submit contentious cases to the African Court: “(a) The Commission; (b) The State Party which has lodged a complaint to the Commission; (c) The State Party against which the complaint has been lodged at the Commission; (d) The State Party whose citizen is a victim of human rights violation; (e) African Intergovernmental Organizations.”\(^{131}\) In addition, Article 5(3) provides that “[t]he Court may entitle relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.”\(^{132}\) Article 34(6) stipulates that “[a]t the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3).”\(^{133}\)

Thus, there are two roads leading to the African Court. The main road runs through the African Commission. Individuals are not allowed to lift the barrier (i.e., by “submitting cases”) that separates Commission and Court; the African Commission and the respondent state act as gatekeepers. The second road leads directly to the African Court, and bypasses the African Commission. However, only states may permit complainants to bypass the African Commission by making an Article 34(6) declaration to that effect.\(^{134}\) So far, only one of the nineteen ratifying states has made such a declaration.\(^{135}\) Because the optional declaration allowing direct access to the African Court is the exception rather than the rule, most cases reaching the African Court will start as communications to the African Commission. Once before the African Commission, however, individuals seem

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131. *Id.* art. 5(1)(a)(b)(c) & (d).
132. *Id.* art. 5(3).
133. *Id.* art. 34(6).
134. *Id.* art. 34(6).
135. See Niyizurugero, *supra* note 111.
to lose the capacity to influence the fate of their cases and, as a consequence, to impact the African Court’s agenda. 136

If strengthening the complaints’ mechanism to overcome deficiencies inherent in the African Commission’s findings is the rationale for establishing the African Court, then the Court should be allowed to play as important a role as possible. 137 Put another way, as many communications as possible should be able to reach the African Court. How appropriate is it, then, to rely on states against whom complaints have been lodged (respondent states) and the African Commission to set the process in motion?

1. Respondent States – Article 5(1)(c)

Reliance on respondent states is unlikely to unleash the African Court’s potential. If the African Commission continues to favor individuals, states will probably “appeal” the African Commission’s findings before the African Court on the grounds that the African Commission violated the Charter. If this happens in cases where the African Commission finds a violation by the state, the referral of matters to the African Court will depend on the initiative of respondent states. However, states may be reluctant to submit cases to the African Court because of the binding nature of its decisions. In other words, states may prefer the certainty of a non-binding finding against them over the possibility of a binding decision against them. Moreover, there seems to be little incentive for states prevailing at the Commission level to submit to a potentially disadvantageous Court judgment.

2. The Commission – Article 5(1)(a)

Because individuals or NGOs who submit complaints have no competence to refer matters and states are unlikely to do so, it is left to the African Commission to refer matters. The Inter-American experience illustrates the risk of relying on the African Commission to refer cases to the African Court. Although the Inter-American Court of Human Rights (Inter-American

136. Id.
137. See Murray, Comparison Between the African and European Courts, supra note 5, at 213 (arguing that the Court should be supplied with “a regular list of cases”).
Court) was established in 1980, it did not receive its first contentious case until 1986, followed by its second in 1990.

Since the Protocol does not explicitly require that the African Commission make findings on the admissibility and merits of a case before submitting it to the African Court, three possibilities present themselves. First, the African Commission may submit a case to the African Court without making any findings at all. Second, it could submit a case after making some findings, for example, after it had made a finding of fact, a finding on admissibility, or after unsuccessfully trying to negotiate a friendly settlement. Finally, the African Commission could submit a case to the African Court after its final disposition, i.e., a finding on the merits or a friendly settlement. This Article will now consider the following three Scenarios.

Scenario 1: In the first scenario, the African Commission could act as a mere conduit to the African Court. After a preliminary hearing at the Commission level, the African Court could decide on both admissibility and the merits of the case, or try to reach an amicable settlement. The African Court could also “overrule” the African Commission and remand the case to the Commission for additional findings.

This course would provide the type of access, best described as “Commission-mediated direct access,” similar to that of a complainant in a domestic court seeking direct access to the highest Constitutional Court without first exhausting the usual domestic constitutional remedies. Under South African constitutional law, for example, lower courts may be bypassed and

140. See generally Protocol to the African Charter, supra note 1.
141. Id. arts. 6(2) & 9.
142. See id. art. 6(3) (stating that “[t]he Court may consider cases or transfer them to the Commission”).
a matter may be referred directly to the Constitutional Court if it is “in the interests of justice” to do so.\(^\text{144}\)

The *travaux préparatoires* of the Protocol suggest that another consideration is the importance and urgency of the matter, such as allegations of serious or massive human rights violations.\(^\text{145}\) Frivolous and baseless complaints should not be allowed direct access to the African Court. However, Commission-mediated direct access would also eliminate the African Commission’s role in resolving the communication. Therefore, the criteria for direct referral to the African Court depends not only on the urgency of the matter, but also the ramifications of omitting the role of the African Commission.

For some matters, the African Commission’s role may be very important. For example, it may be argued that judicial officers are, by their nature, training, and experience, less equipped to deal with on-site investigations and negotiations than are quasi-judicial officers. If this is true, the African Commission would have an advantage in negotiating friendly settlements and would be better situated to conduct fact-finding, especially in situations where there have been massive violations that require on-site investigations.\(^\text{146}\) Therefore, the African Commission’s role should not be diminished in matters where these two

\(^{144}\) *Id.* R. 18(1)–(2). In *Bruce v. Fleecytez Johannesburg CC*, the South African Constitutional Court held that direct access is exceptional and indicated that a complainant’s prospects of success and the desirability of a court not to “sit as a court of first and last instance,” especially where no further appeal is available, played a part in its decision. 1998 (2) SALR 1143 (CC), paras. 7–8. In Germany, complainants in constitutional matters may approach the *Bundesverfassungsgericht* (German Constitutional Court) directly, but only in exceptional circumstances, i.e., when the Court determines that the matter is of general importance or that serious and unavoidable disadvantage to the complainant would otherwise result. Gesetz über das Bundesverfassungsgericht (Bundesverfassungsgerichts–Gesetz, BVerfGG), 12.3.1951 (BGBl. I S.243), art. 90(2) (Federal Constitutional Court Act) (amended July 16, 1998), http://www.iuscomp.org/gla/statutes/BVerfGG.htm.

\(^{145}\) In an earlier draft of the Protocol, which lacked the provision allowing states to make an optional declaration allowing individuals direct access to the court, the African Court was to have the discretion to allow direct access in “urgent cases or serious, systematic or massive violations of human rights.” Nouakchott Draft Protocol, *supra* note 49, art. 6(1).

\(^{146}\) *See, e.g.*, Frans Viljoen, *Some Arguments in Favour of and Against an African Court on Human and Peoples’ Rights*, in *THE AFRICAN SOCIETY OF INTERNATIONAL AND COMPARATIVE LAW, TENTH ANNUAL CONFERENCE 21, 43* (A.V. Lowe et al. eds., 1998) [hereinafter *Some Arguments in Favour*].
functions are at play. Instead, these two functions would be best performed not by judicial institutions, such as the African Court, but by quasi-judicial bodies like the African Commission where formality is less important and ad hoc procedures are more common.

In the pre-1998 European system, the European Commission fulfilled fact-finding functions.\(^{147}\) Although the European Court was entitled to engage in its own fact-finding,\(^{148}\) it did so only in “exceptional circumstances.”\(^{149}\) The European experience also demonstrates that friendly settlement is frequently a commission, not a court, role.\(^{150}\) By contrast, the Inter-American Court has been much more extensively involved in fact-finding.\(^{151}\) Oral proceedings before the Inter-American Court form an important part of this process.\(^{152}\) Although the Inter-American Court has indicated that fact-finding is primarily the role of the Inter-American Commission on Human Rights, it has nevertheless reviewed facts de novo.\(^{153}\) Indeed, the Inter-American Court has held that it is the sole judicial body with decision-making power, not a court of appeal for Commission decisions.\(^{154}\) How-

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\(^{149}\) See Cruz Varas Case, supra note 147, para. 74.

\(^{150}\) From 1955 to 1991, approximately twelve percent of all cases (128 cases) before the European Commission were settled amicably; in the European Court, only twenty-nine friendly settlements (term includes all cases “dropped as a result of actions taken by those who were involved in the case”) were reached between 1962 and 1991. Alexandre Kiss, Conciliation, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 703, 704–05 (R. St. J. Macdonald et al. eds., 1993).


\(^{152}\) Id.

\(^{153}\) Id.

\(^{154}\) Velasquez Rodriguez Case, Judgment on Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 1, para. 29 (June 26, 1987) (“The Court does not act as a court of review, of appeal or other similar court in its dealings with the Commission. Its power to examine and review all actions and decisions of the Commission derives from its character as sole judicial organ in matters con-
ever, the Inter-American Court is unlikely to use its power to conduct on-site investigations.155

Domestic courts engage in both settlement and fact-finding activities.156 Indeed, with the exception of appellate courts, most domestic courts engage in fact-finding on a daily basis.157 This demonstrates that there is nothing inherent in the judicial function that makes either fact-finding or dispute settlement inappropriate.158 To some extent, the three regional human rights courts all have settlement and fact-finding functions. In particular, under the African system, the Protocol’s direct access provision implies that the African Court will have to engage in both fact-finding and settlement without the African Commission’s intervention.159 These activities are therefore inescapably part of the African Court’s functions. In any event, the African Commission has not dealt very effectively with fact-

cerning the Convention.”), http://www.corteidh.or.cr/seriecpdf_ing/seriec_01_ing.pdf.


Though the Court, as any other judicial organ, does not lack the power to carry out its own investigations, particularly if these are necessary to provide the Court with the information it needs to discharge its functions, the Convention entrusts to the Commission the initial phase of the investigation into the allegations. The Commission also has a conciliatory function empowering it to propose friendly settlements as well as to make the appropriate recommendations to remedy the violation it has found to exist. It is also the body to which the States concerned initially provide all the pertinent information and submissions.

Id.


157. Id.

158. Id.

159. See generally Protocol to the African Charter, supra note 1, art. 34(6).
Its findings are often factually weak; additionally, the African Commission has been very reluctant to second-guess the factual findings of a domestic court.

Moreover, neither the Charter nor the Rules of Procedure accords the African Commission any role with regard to friendly settlement procedure. There are also very few instances where the African Commission has attempted to negotiate settlements. Because the African Commission lacks expertise and experience in this area, settlement should not be considered a consistent part of its practice. Indeed, it has no legal competence to settle cases. The Protocol states that the African Court “may try to reach an amicable settlement” in cases before it “in accordance with the provisions of the Charter.” The relevant provision of the Charter, Article 48, read with Article 47 and supplemented by Rule 98 of the Rules of Procedure, relates only to inter-state communications, thus restricting settlement efforts for state parties involved in those disputes. This means that even the African Court has limited authority with regard to settlement negotiations. However, even if this strict reading of the Protocol is adopted, the African Court is still likely to engage in settlement negotiations, scrutinizing and formalizing any agreement parties reach after referral of the case.


162. See OUGUERGOUZ, supra note 1, at 641.

163. See id. at 642–46 (analyzing the African Commission’s limited role in settlement).

164. Protocol to the African Charter, supra note 1, art. 9.

165. See African Charter, supra note 1, art. 48.

fore, “in accordance with the provisions of the Charter” could be interpreted to refer to the content of the agreement between the parties. Thus, as long as a case is before it, the African Court may try to reach a friendly settlement, but must ensure that the settlement is human rights friendly and comports with the Charter.\footnote{167}

It thus follows that many cases may be directly submitted to the African Court without undermining the African Commission’s role. In this scenario, the exhaustion of local remedies would also be relevant to the African Commission’s decision.\footnote{168}

Commission-mediated direct access arguably amounts to a de facto “declaration in terms of article 34(6)”\footnote{169} for states that had not made any \textit{de jure} declaration, giving rise to a situation where individuals could submit complaints to the African Court against states not accepting direct submissions, thus sidestepping the clear requirements of the Protocol.\footnote{170} A response to this argument, however, is that a declaration under Article 34(6) is made explicitly, for all cases, and that Commission-mediated direct access is exceptional and relates to the exigencies of a particular case without implying general acceptance. Moreover, Article 5 allows the African Commission to submit cases to the African Court without stipulating to either the ad-

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167. See Kiss, supra note 150, at 705 (procedure for friendly settlement in European system “based upon Rule 49 of the present Rules of the [European] Court”).
168. See African Charter, supra note 1, art. 56(5) (requiring the exhaustion of local remedies).
169. See Viljoen & Louw, supra note 69, at 3.
170. The Protocol does not explicitly provide that all cases must be decided by the African Commission before their submission to the Court. However, if the Commission submits all cases directly to the Court under art. 5(1) without making any findings, the optional declaration mechanism under art. 34(6) would be rendered unnecessary. Protocol to the African Charter, supra note 1, arts. 5(1), 34(6).
\end{verbatim}
missibility or the merits of the case. In any event, the African Court is competent to deal with both admissibility and merit.

Allowing for Commission-mediated direct access is the method best suited to give effect to the Preamble to the Protocol, (which links the African Court to the “achievement of the legitimate aspirations of the African peoples”) and does not detract from the Court’s main purpose of complementing and reinforcing the African Commission. Adopting this course would also reduce duplication and delays, important goals in a resource-constrained environment, and would guarantee greater “equality of arms” between the state and individual. Still, this should be seen as an exceptional way of reaching the African Court, not the rule.

Scenario 2: The African Commission could adopt a more fluid approach and submit a case to the African Court after partial review. This would require the African Commission to conduct admissibility findings. If such a course is adopted, the African system should emulate the European system; that is, the African Commission should not refer cases it has found to be inadmissible.

171. Id. art. 5 (silent as to any requirements African Commission must fulfil before submitting cases to the Court).
172. Id. art. 3.
173. Id. pmbl.
174. See id.
176. The African Court can still conduct admissibility findings. In fact, the grounds upon which the Court may base its admissibility findings are broader than the African Commission’s; unlike the Commission, the Court is not compelled to “base” its findings on the grounds established in art. 56 of the Charter, but need only take them into account. See Protocol to the African Charter, supra note 1, art. 6(2).
The African Commission could also conduct fact-finding and, if applicable, settlement negotiations. The African Commission’s role would be expanded from that described in scenario one; the African Commission would have the additional authority to refer matters to the African Court after making findings of fact, but before considering the merits. Proceedings before the African Court would then deal primarily with legal, rather than factual, questions. The Protocol does not exclude this possibility. While such an approach would necessitate improvement of the African Commission’s fact-finding techniques, it could also be advantageous. It could lead to a more efficient division of labor, fewer delays, and a better use of resources since witnesses would only testify once and only one set of arguments and pleadings would be required. In my opinion, such practical concerns will determine the viability of the co-existence of the Court and the Commission. This proposal thus differs from both the Inter-American and pre-Protocol No. 11 European systems by suggesting a solution appropriate to the African context.

To some extent, this scenario mirrors the Inter-American system, where the Inter-American Commission may refer a matter to the Inter-American Court after failing to reach a friendly settlement.

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178. See generally Murray, Evidence and Fact-finding, supra note 160. See also Ouguerougouz, supra note 1, at 641–46.

179. The African Court’s main role is to determine if there has been a violation of the African Charter. See Protocol to the African Charter, supra note 1, art. 27(1) (this provision, entitled “findings,” permits the Court to make orders to remedy human rights violations). It appears that the Court’s proceedings need not include factual inquiries, and could instead be restricted to questions of law. See id. art. 10. This possibility is supported by the language in art. 26, which states that the Court “shall hear submissions by all parties” and hold enquiries only “if deemed necessary.” Id. art 26(1).

180. See Murray, Comparison Between African and European Courts, supra note 5, at 198–99 (noting that in the pre–Protocol No. 11 European system, there was a presumption that the European Commission was primarily responsible for fact–finding). Murray argues that “a delegation of responsibility between a Commission that deals with disputes of facts and a Court which looks at cases of disputes of law ... might be useful for the African system.” Id.

181. American Convention on Human Rights, Nov. 22, 1969, art. 51, 9 I.L.M. 673, 689. (When a settlement is not reached in the Inter–American system, art. 51 allows the Inter–American Commission to “set forth its opin-
the Inter-American Commission to refer a contentious case to the Court, the Inter-American Court held that the Convention does not require “that the Commission determine that the Convention has been violated before the case may be referred by it to the Court.”

According to the Inter-American Court, factors such as the controversial nature of the issue, the novelty of the issue, and the general importance of the issue to the hemisphere at large may play a role in a decision to refer. To be clear, this scenario proposes that the African Commission submit to the African Court in as many cases as possible. Urgency need not be a criterion, thus making submission the rule rather than the exception.

**Scenario 3:** Under the third scenario, the African Commission would finalize communications before submitting them to the African Court. The Protocol “appear[s] to suggest” that the Commission will only refer cases after considering them, “thus following the approach of the previous European organs” and that of the Inter-American organs. Under the Inter-American system, the state is given a fixed term within which it must comply with the remedy. After the term’s expiration, the Inter-American Commission decides whether adequate measures were taken. If the Inter-American Commission finds a failure of state compliance, referral to the Inter-American Court is a rebuttable presumption; the Inter-American Commission “shall refer the case to the Court” unless it decides otherwise. When the state prevails, the Inter-American Commission has a “spec-

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183. Id. para. 25.

184. Murray, *Comparison Between the African and European Courts*, supra note 5, at 198 (arguing that based on art. 8 of the Protocol, the rules of the Court should be adopted “bearing in mind the complementarity between the Commission and the Court”).

185. American Convention, *supra* note 181, art. 51(2).

186. *Id.* art. 51(3).

187. Inter–American Commission Rules of Procedure, *supra* note 166, art. 44.
cial duty to consider the advisability of coming to the Court,” especially since the individual has no standing to take the matter further.188

Initially, the European system did not allow individuals to submit cases to the Court.189 However, Protocol No. 9 to the European Convention changed this policy and provided that “the person, non-governmental organisation or group of persons having lodged the complaint with the Commission” could also refer cases to the European Court in their own name and without the mediating presence of the European Commission.190 This referral was only provisional; a three-judge panel, including the judge from the state complained against, had to give its approval.191 The panel was to consider whether the matter raised a serious question of interpretation or application, but could also reject referral “for any other reason.”192

Thus far, the African Commission has decided in favor of individuals in most cases.193 Should the African Commission submit these cases to the African Court? Although there is an argument that all such cases should be referred to ensure that the recommendatory findings of the Commission are converted into legally binding decisions,194 the state should be allowed an opportunity to comply with the African Commission’s finding

189. See European Convention, supra note 17, art. 25.
191. Id.
192. Id.
193. In the first eleven years of its existence, the African Commission made final decisions on the merits in seventeen cases. Fifteen violations were found, and the Commission only found in favor of the state in two cases. See Viljoen, Overview of the African Regional Human Rights System, supra note 5, at 170–74. The Commission’s tendency to find in favor of individuals has continued (at least through the end of 2001). See Viljoen, Introduction to the African Commission, supra note 91, at 446–53.
194. In the pre-1998 European system, all admissible cases ended in final decisions, either by their submission to the European Court, or in binding decisions of the Committee of Ministers of the Council of Europe. See European Convention, supra note 17, art. 32. In the African system, the AU Executive Council is empowered to monitor the African Court’s judgements, but not the African Commission’s findings. These findings remain “recommendations” unless the AU Assembly confers legal status on them by “adopting” them. See Viljoen & Louw, supra note 69, at 9–10.
before the matter is referred to the African Court if compliance is the primary goal. This procedure would reflect the practice of the Inter-American Commission whereby, in the absence of compliance, the Inter-American Commission refers cases automatically to the Inter-American Court, unless there is a “reasoned decision” to the contrary. However, this could lead to further delays, would require improvement of the African Commission’s monitoring and follow-up procedure, and may be manipulated by states.

On the other hand, states are unlikely to subject cases decided against individuals to further scrutiny. The African Commission should, therefore, refer all cases decided against individuals to the African Court, unless some exceptional circumstance, such as manifest lack of substance, is present. If the African Commission adopted a standard requiring a “likelihood of success” for such referrals, the process could become too burdensome and lead to subjectivity in its findings. However, the African Commission could decide that resources and time should be prioritized for cases with a “good chance of winning” so as not to harm the public perception of the African Court and trigger the development of a negative jurisprudence.


A state may also submit a case to the African Court when one of its citizens “is a victim of human rights violation.” Because the Protocol does not also state that the citizen should have “lodged a complaint” with the African Commission as the other two sub-articles dealing with state submission do, the word “is” implies that there is some “objective truth.”

One interpretation is that this “objective truth” is equivalent to the state’s viewpoint. Therefore, this provision opens the door for states to submit cases directly to the African Court if the rights of its citizens are, in its opinion, violated by another state. Thus, some inter-state complaints, namely those which involve citizens, would be privileged, and the inter-state com-

195. Inter–American Commission Rules of Procedure, supra note 166, art. 43(2).
196. Padilla, supra note 139, at 191.
198. Id. art. 5(1)(b)–(c).
Another interpretation that fits better with the term "is a victim" is that the African Commission must have made a finding that the individual is, indeed, a victim. This is not satisfactory, as it would allow states to submit cases to the African Court only when the Commission has found a violation. If this interpretation is adopted, states must be willing to refer matters on behalf of their citizens, otherwise the African Court will not have jurisdiction.

It is possible that the drafters’ intention was only to emulate the pre-Protocol No. 11 European Convention, which allowed a state “whose national is alleged to be a victim” to refer a case to the European Court. Soering v. U.K presents a typical illustration of this provision’s application: the applicant, a German national, lodged a complaint against the United Kingdom, where he was residing at the time of the complaint. After the European Commission’s final report had been adopted and transferred to the Committee of Ministers, the Commission, respondent United Kingdom, and the German government successively referred the case to the European Court.

199. European Convention, supra note 17, art. 48.
201. It was referred by the European Commission on Jan. 25, 1989; the United Kingdom on Jan. 30, 1989; and Germany on Feb. 3, 1989. See LUKE CLEMENTS, EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION 74 (1994). See also Bob Ngozi Njoku v. Egypt, Communication 40/90, 11th Ann. Activity Report, supra note 161, at 27 (illustrating the potential usefulness of a provision allowing a state, whose citizen is an alleged victim, to refer a case to the African Court). A Nigerian national who was arrested while in the “transit zone” of Cairo Airport, and who was charged, convicted, and sentenced to life imprisonment on a drug–related offence in Egypt, directed a complaint to the Commission. Reluctant to interfere with the factual findings of the Egyptian courts, the Commission concluded that there was no violation of the African Charter. Under these circumstances, it is unlikely that the Commission or Egypt would have submitted the case to the Court, but Nigeria might have, had art. 5(1)(d) of the Protocol been in place at the time. See id. para. 60.
4. African Intergovernmental Organizations—Article 5(1)(e)

African intergovernmental organizations may also submit cases to the African Court. One such institution is the African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee), the implementing body of the African Charter on the Rights and Welfare of the African Child (African Children’s Charter). After finalizing a case, the African Children’s Committee has the same competence as the African Commission to refer cases to the African Court. It is possible that other intergovernmental organizations, such as regional economic arrangements, or even the AU itself, could submit cases directly to the African Court under Article 5(1)(e). Arguably, this provision enables the AU to submit a case against any AU member state so long as that state breached the AU Charter or any other human rights treaty ratified by that state. Therefore, depending on the disputed subject matter, the AU may access either of the two courts to be established under its auspices: the African Human Rights Court for human rights violations or the African Court of Justice for matters related to economic integration and politics.

204. See Protocol to the African Charter, supra note 1, art. 5(1)(e).
205. See id.
206. See id.
5. Direct Access – Article 5(3)

State consent, taking the form of a declaration under Article 34(6), is a prerequisite for direct access to the African Court.\(^{208}\) Although only one of the ratifying states has made an Article 34(6) declaration, the situation is not hopeless; state parties may make such declarations “at any time” subsequent to ratification.\(^{209}\)

The standing of individuals under the African Commission’s Charter has been quite broad. The Charter does not have the victim requirement found in other conventions (such as the International Covenant on Civil and Political Rights (ICCPR) or the European Convention),\(^{210}\) and allows individuals, groups or NGOs to lodge communications.\(^{211}\) Cases that reach the African Court after going through the African Commission must also fulfill these requirements.\(^{212}\) However, the Protocol does not

\(^{208}\) Art. 34(6) provides: “At the time of ratification ... or any time thereafter, the State shall make a declaration.” Protocol to the African Charter, supra note 1, art. 34(6). Plain language advocates take issue with the word “shall,” arguing that it is often unclear whether “shall” is used to denote a future action or compulsion. The use of “shall” in the Protocol cannot express compulsion, however, as the declaration is optional. To some extent it refers to the future, but, in essence, “shall” seems to express a discretionary competence.

\(^{209}\) Id. It has been suggested that this provision allows ad hoc declarations for the purpose of a particular case, or for a fixed period. It is difficult to conceive of a situation in which a state would make a case–specific declaration: direct submission of cases depends on the initiative of the individual, who can only commence an action if the state had already made the declaration. For a state to make a case–specific declaration, it would need to foresee that an individual intended to bring such a case. Period–specific declarations should be discouraged, as they invite regression and uncertainty.


\(^{211}\) See American Convention, supra note 181, art. 44 (broad provision permitting “any person or group of persons, or any nongovernmental entity” to lodge petitions with the Inter-American Commission).

\(^{212}\) See OUGUERGOUZ, supra note 1, at 732.
contain any language regarding cases brought directly to the African Court. Accordingly, it should not be construed as restrictive of victims’ access to the African Court.

Direct access is restricted to NGOs “with observer status before the Commission.” The African Commission has granted observer status to over 400 NGOs, both African and international. Although most cases submitted to the African Commission have been submitted by NGOs enjoying observer status, cases can also be brought in the name of an individual when the NGO does not have observer status.

Article 5(3) provides that the African Court “may entitle” individuals to submit cases directly before it so long as the state party has made an Article 34(6) declaration. This phrase should not be read to give the African Court additional discretion to refuse hearing a case. Granting the African Court a discretionary power of refusal would be unduly burdensome on individuals because they would be required to jump two procedural hurdles: the state’s acceptance of the optional Article 34(6) mechanism and the African Court’s discretionary approval. This discretionary language is rooted in the drafting history of the Protocol and was introduced when direct access was at the African Court’s discretion. However, since direct

213. Protocol to the African Charter, supra note 1, art. 5(3).
215. NGOs enjoying observer status that have submitted communications in their own name include Amnesty International, Civil Liberties Organisation (Nigeria), Constitutional Rights Project (Nigeria), International Pen and the Union Interafricaine des Droits de l’Homme. NGOs without observer status, including Centre for Independence of Judges and Lawyers, the Comité Culturel pour la Démocratie au Bénin and the Malawi African Association, have also submitted communications. See id; ŒUGUERGOUZ, supra note 1, app. 7, at 907–17.
216. Protocol to the African Charter, supra note 1, art. 5(3).
217. Id.
%2072p.170.doc; Cape Town Draft Protocol, supra note 47, art. 6(1); Nouakchott Draft Protocol, supra note 49, art. 6(1).
access became subject to an optional state declaration, the drafters’ failure to remove the language appears to be a mere oversight. Therefore, the provision should be interpreted to place authorization for direct access “within the sole domain” of state parties.\textsuperscript{219}

The Protocol also restricts the competence of groups to bring cases.\textsuperscript{220} This seems counterintuitive, in the light of the peoples’ concept inherent in the Charter. If the rights of individuals and peoples are the golden threads running through the Charter, the standing requirements must reflect that. As this is excluded, this aspect should be clarified in the Rules of the Court.

\textbf{B. Role of Individuals Before the Court}

The African Commission’s Rules of Procedure require that respondent states and complainants submit written information and observations on the admissibility and merits of the case,\textsuperscript{221} which allows the African Commission to consider the complainants’ arguments when making decisions.\textsuperscript{222} Additionally, despite the lack of any substantive provision within the Charter, the African Commission generally allows individuals or NGOs to be present at hearings or be represented during its consideration of communications lodged by those individuals or NGOs.\textsuperscript{223} However, no provision has been made for legal aid or for the awarding of costs in either the Charter or the Commission’s Rules of Procedure.

Individuals who bring a case directly before the African Court are entitled, as a “party to a case,” to be represented by a legal representative of their choice.\textsuperscript{224} But what about individuals who have lodged communications with the African Commission and whose cases are then submitted to the African Court, either by the Commission or the state? Under these circumstances, the individual remains “a party” to the case; the African Com-

\textsuperscript{219} OUGUERGOUZ, \textit{supra} note 1, at 724.
\textsuperscript{220} \textit{Id.} at 714–24 (discussing the jurisdiction of the African Court).
\textsuperscript{221} Rules of Procedure, \textit{supra} note 25, R. 119 (stating the Commission’s procedures for consideration of a communication).
\textsuperscript{222} Murray, \textit{Evidence and Fact-finding, supra} note 160, at 102–03 (noting that the Commission has relied primarily on written documents in making decisions).
\textsuperscript{223} \textit{Id.} at 104–06.
\textsuperscript{224} Protocol to the African Charter, \textit{supra} note 1, art. 10(2).
mission does not become a party to the case merely by submitting the case to the African Court, but, instead, initiates proceedings between the given parties before the Court. In the dual European system, the European Commission’s function was primarily to clarify and justify its own opinion and to ensure that all relevant information was placed before the European Court.\(^\text{225}\) The contention that the individual remains a party seems logical in light of the fact that state parties may refer cases to the African Court. It would be anomalous to accept that the individual loses its status as a party; it would mean that only states may be parties. It follows that individuals, as parties to the case, are also “entitled to be represented by a legal representative” of their choice when cases involving them are submitted to the African Court by either a state or the African Commission.\(^\text{226}\)

This interpretation corresponds with developments under the two other major human rights systems. Initially, neither the European nor the Inter-American systems allowed individuals to be present, nor be represented, or make representations to their courts.\(^\text{227}\) Gradually, though, the individual’s role grew and both systems allowed individuals the right to be present and represented. Thus, individuals could make submissions directly to the courts in both systems.\(^\text{228}\) In all but name, individuals were parties to the case.

Originally, the European Convention did not create a role for complainants in the process before the European Court.\(^\text{229}\) Gradually, however, the European Commission, on a discretionary basis, allowed individual complainants to be present as assistants to its lawyers.\(^\text{230}\) In its very first case, the European

\(^{225}\) See Clements, supra note 201, at 75.
\(^{226}\) Protocol to the African Charter, supra note 1, art. 10(2).
\(^{227}\) See American Convention, supra note 181, art. 57; Statute of the Inter-American Court, supra note 155, art. 28.
\(^{228}\) Pasqualucci, supra note 97, at 20–21.
\(^{229}\) Under Rule 1 of the original Rules of the European Court, the complainant was not regarded as a “party” to the proceedings before the Court. See Clements, supra note 201, at 75 (noting that the applicant’s status is much improved under the current Rules).
\(^{230}\) Rule 33(3)(d) in the 1992 Rules of the European Court required the European Court to ask applicants if they wished to participate in the proceedings, and, if so, to provide the particulars of their legal representatives. Under Rule 30(1) (also part of the 1992 Rules), applicants could be represented.
Court held that it should be informed of the applicant’s views.\textsuperscript{231} In a decision ten years later, the European Court held that the applicant’s lawyer could act as assistant to the European Commission’s delegates, but would “always [be] subject to the control and responsibility of the Delegates.”\textsuperscript{232} When the amended Rules of Court became effective in 1983, the European Commission became legally obligated to inform applicants of their rights and invite them to be represented at hearings.\textsuperscript{233}

In the Inter-American system, a similar pragmatic approach was adopted. The complainant’s lawyer was allowed to be part of the Inter-American Commission’s legal team, and could “present the petitioner’s argument in that capacity, though only under the control of the Commission.”\textsuperscript{234} However, serving as an “assistant” on the Inter-American Commission’s team was not ideal, as the interests and approach of the Inter-American Commission “as guardian of the Convention assisting the Court” and those of the complainant did not always coincide.\textsuperscript{235} Consequently, the Rules of Court for the Inter-American Court were amended in 1996 to allow the victims’ representatives to be appropriately qualified legal practitioners. \textit{See} Clements, \textit{supra} note 201, at 75.


\textsuperscript{233} Rules of the European Court of Human Rights, R. 30(1) & 33(3)(d) (entered into force Apr. 20, 1992) (pre-Protocol No. 11) \textit{[hereinafter 1992 Rules of European Court, reprinted in Clements, supra note 201, at 271–74].}

\textsuperscript{234} David J. Harris, \textit{Regional Protection of Human Rights: The Inter-American Achievement, in The Inter-American System of Human Rights 1, 25} (David J. Harris & Stephen Livingstone eds., 1998) (stating that the Commission may “hide a petitioner’s lawyer under its skirts”). Padilla, \textit{supra} note 139, at 192 (By designating victims or NGOs as “legal advisors,” the Inter-American Court essentially “permits the victim a place at the table alongside” the Commission and “allows the victim to actively participate in the litigation of the case.”).

present autonomous arguments “at the stage of reparations.” The 1996 amendments created a strange situation: a complainant could lodge a case before the Inter-American Commission, that is, be in complete control at the beginning of the case and could make presentations at the reparations phase before the Inter-American Court at the end of the case, but did not have autonomous standing during the proceedings. Subsequent amendments to the Rules in 2001, however, provided for complainant participation in all stages of the proceeding before the Inter-American Court.

The importance of the presence and participation of the individual, perhaps, boils down to the function of, and faith in, the African Commission. Sir Humphrey Waldock has suggested that the role of the African Commission in litigation before the African Court is “not litigious: it is ministerial.” The African Commission’s responsibility is to place the relevant elements of the case before the African Court, not to defend the individual’s case. This role should be juxtaposed with that of individuals and their representatives. Rejecting an early challenge to an individual’s presence at a hearing, the European Court said that the European Commission, in its role as “defender of the public interest,” must “make known the Applicant’s views to the Court as a means of throwing light on the points at issue … even if it does not share them.” Because “the whole of the proceedings before the Court are upon issues which concern the Applicant,” the Court held that it is “in the interests of the proper administration of justice that the Court should have knowledge” of the individual’s contentions. Therefore, in order to ensure a “genuine hearing of both sides in contention,” the African Court should interpret the Protocol to allow indi-

236. See Pasqualucci, supra note 97, at 20 (explaining that in the Inter-American system, under the 1996 Rules of the Court, art. 23, victims were allowed representation at the reparations stage of proceedings).
237. See Trindade, supra note 235, at 416.
238. See Pasqualucci, supra note 97, at 20 (Inter-American Court amended the definition of “parties to the case” to include the “victim or the alleged victim, the State, and, only procedurally, the Commission”).
241. Id. at 15.
242. Mahoney, supra note 231, at 131.
individuals to be represented in all hearings before it. The role of the African Commission, then, more clearly becomes that of guardian of the public interest.

IV. THE BROADER LEGAL CONTEXT

A. Subject Matter Jurisdiction in Contentious Cases

Article 3 provides that the African Court’s jurisdiction extends to the Charter, the Protocol and “other relevant human rights instruments ratified by the states concerned.” While the first two legal bases (the Charter and the Protocol) are not surprising, the third certainly is. At first glance, this provision seems to enlarge the subject matter of the African Court in contentious cases to include all other human rights instruments. The use of qualifiers such as “relevant,” “ratified,” “human rights” and “by the state concerned,” however, may actually serve to limit the Court’s subject matter jurisdiction.

The most important qualifier is “ratified,” which implies that the instruments referred to must be treaties, not merely declarations or other non-binding legal texts or instruments. African human rights treaties, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), the 1990 African Charter on the Rights and Welfare of the Child (African Children’s Committee) and the 2003 Protocol to the African Charter on the Rights of Women in Africa, should be considered first. Indeed, the Nouakchott Draft Protocol restricted the term “other treaties” to exactly this group by including the word “African” before

243. Protocol to the African Charter, supra note 1, art. 3(1).
244. The Protocol does not restrict the term “other relevant human rights instruments” in art. 3 to certain geographical regions or to certain institutional frameworks (e.g., the OAU/AU). See id.
245. Id.
248. See Protocol to the African Charter, supra note 1, art. 29(1).
The OAU/AU’s inclusion in the African Court’s jurisdictional scope seems logical considering the problematic dispute resolution mechanisms inherent in many of these treaties. For example, the OAU Refugee Convention’s lack of a dispute settlement mechanism has always been one of its weaknesses. Moreover, because the African Children’s Committee’s mandate is so similar to that of the African Commission, and suffers from the same institutional and functional weaknesses, it seems only logical to supplement and reinforce its protective mandate by introducing the African Court as a judicial body with competence over its provisions. African human rights instruments such as the 1976 Algiers Universal Declaration on the Rights of Peoples, the Kampala Declaration on Prison Conditions in Africa, and the numerous resolutions of the African Commission are excluded from serving as a basis for a contentious case because of their non-binding nature.

Reliance is further restricted to “human rights” treaties. Some treaties adopted under OAU auspices have a significant bearing on human rights, but are not human rights instruments in the narrow sense of that phrase. In one of its advisory opinions, the Inter-American Court distinguished “modern human rights treaties,” the objectives of which are “the protection of the basic rights of individual beings irrespective of their nationality,” from “multilateral treaties of the traditional type” that are “concluded to accomplish the reciprocal exchange of

249. Nouakchott Draft Protocol, supra note 49, at 259, art. 3(1).
251. Like the African Commission, the African Children’s Committee has a broad promotional mandate, including the competence to examine state reports, and to consider inter-state and individual communications. African Children’s Committee, supra note 247, at 45–46, arts. 42, 43 & 44.
rights for the mutual benefit of the contracting State. The main dividing line is that states assume obligations “towards all individuals within their jurisdiction” when they ratify human rights treaties, and not merely “in relation to other States.”

Thus, AU treaties such as the 1968 African Convention on the Conservation of Nature and Natural Resources and the 1977 Convention for the Elimination of Mercenarism in Africa are not included in the African Court’s jurisdiction under Article 3. Although these treaties place obligations upon states that have important human rights implications, they do not provide for human rights in the sense of direct entitlements or subjective rights available to individuals. Likewise, the AU Constitutive Act, the treaty establishing the African Economic Community (AEC Treaty) and regional economic treaties such as the Economic Community of West African States Treaty (ECOWAS Treaty) do not qualify as “human rights” treaties, despite making adherence to the African Charter part of their aims and objectives.


255. Id.


258. Although the purpose of the Convention on Nature is to ensure the conservation of natural resources such as soil and water, individuals do not have standing under the Convention to “enforce” these policies. Convention on Nature, supra note 256, arts. 4, 5.

Although all of these organizations consider human rights in the formulation and application of their policies, this fact alone cannot transform them into human rights organizations or their founding treaties into human rights instruments. This conclusion is supported by the fact that judicial institutions have already been or are being established to settle disputes arising from these treaties.

Because African states do not qualify as state parties to other regional human rights treaties, the omission of “African” implies that the Court can adjudicate matters arising under UN human rights treaties to which AU members, who are also UN members, are parties. The phrase “by the States concerned” implies that an individual communication may be directed to the African Court on the basis of a UN human rights treaty if the respondent state has ratified it. The problems arising from this expansion in jurisdictional scope are legion. For example, it would mean that a communication under the ICCPR could be submitted to either the HRC or the African Court. This may lead to divergence in jurisprudence and to forum-shopping where quasi-judicial and judicial institutions are compared and played off against one another. As Österdahl notes, it “may be a delicate matter for the African Court to apply an international convention to which non-African states are also parties, and to render judgments on how the Convention should

260. See, e.g., Treaty Establishing AEC, supra note 259, at 1253, art. 3(g); Treaty Establishing Common Market, supra note 259, at 1067, art. 6(e); Economic Community of West African States, supra note 259, at 668, art. 4(g).

261. See Treaty Establishing AEC, supra note 259, at 1253, arts. 4(1)(a), 6; Economic Community of West African States, supra note 259, at 668, arts. 3(1), 3(2)a–o.

262. For example, the AU Assembly adopted the Protocol to the African Charter, thus creating the African Court. See Protocol to the African Charter, supra note 1.

263. Membership in the Council of Europe or the Organization of American States (OAS) is a prerequisite for becoming a state party to either the European Convention or American Convention. European Convention, supra note 17, art. 66(1); American Convention, supra note 181, art. 74(1).


265. See Charney, supra note 45, at 699, 706.
be interpreted on a particular point.\textsuperscript{266} Even more strikingly, a state that had not accepted the optional individual complaints procedures under Article 34(6) may find that the African Court usurps jurisdiction against it under Article 3.\textsuperscript{267} Additionally, this interpretation would allow individuals to submit cases on the basis of UN treaties, such as the Covenant on Economic, Social and Cultural Rights, which ordinarily prohibit the submission of individual communications.\textsuperscript{268} A solution is to interpret “States concerned” as all state parties to the Protocol, not only the state against which the complaint is brought. Such a reading would at least restrict the African Court’s jurisdiction in contentious cases to UN treaties ratified by all state parties to the Protocol.\textsuperscript{269}

But the problems raised may remain illusory, at least for the time being. Nineteen states have ratified the Charter so far and only one has made an Article 34(6) declaration.\textsuperscript{270} Because direct access to the Court by individuals is restricted to states


\textsuperscript{267} For example, Lesotho is a state party to the African Charter and the Convention Against Torture (CAT). It has ratified the Protocol, but has not made the optional declaration under CAT allowing individuals to submit communications to the CAT Committee. Therefore, an individual may submit a contentious case to the African Court under the Protocol, alleging a violation by the Lesotho government, even though that individual could not submit a communication to the CAT Committee. \textit{Compare} Protocol to the African Charter, \textit{supra} note 1, art. 3, and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., 93d mtg. art. 21(1984), \url{http://www.un.org/documents/ga/res/39/a39r046.htm}.


\textsuperscript{269} This interpretation does not entirely solve the problem. For example, the Convention on the Rights of the Child has been ratified by all the state parties to the Protocol, and, thus, could potentially be interpreted by the African Court.

\textsuperscript{270} \textit{See List of Countries Which Have Signed, Ratified/Acceded to the Protocol,} \textit{supra} note 56.
making an optional declaration, the extended jurisdiction of Article 3 applies only to those states.\(^{271}\) Otherwise, cases must first be presented to the Commission using its normative legal framework, which is the African Charter; only violations of the African Charter may be brought before the African Commission.\(^{272}\) Moreover, even if those cases are referred to the Court (either before, during or after the Commission’s consideration), it is questionable whether the African Commission’s referral should be restricted to the legal basis of its findings.\(^{273}\) In my opinion, referral does not extend the initial legal basis under which the case was submitted. The extended jurisdictional basis, with its concomitant problems, will only arise in a relatively small percentage of cases.\(^{274}\) Individuals bringing cases directly before the African Court should have a much wider array of substantive rights to invoke than they had under the Charter.\(^{275}\)

**B. Legal Aid**

Although the Protocol provides that parties may be represented by lawyers of their choice,\(^{276}\) this “choice” may not be available to all individuals and NGOs if they lack the financial resources to retain their own lawyer. Although the Protocol adds that free legal representation “may be provided where the interests of justice so require,”\(^{277}\) the use of passive voice, which

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271. See Protocol to the African Charter, supra note 1, art. 3.
273. See Protocol to the African Charter, supra note 1, arts. 6(1), 6(3), 8.
274. See, e.g., Österdahl, supra note 266, at 137 (drawing the distinction between arts. 60 and 61 of the Protocol, which entitle the Commission to draw inspiration, and art. 3, which provides a legal basis for application).
275. Unfortunately, the travaux préparatoires of the Protocol do not provide an explanation for the African Court’s expansive jurisdiction, leaving one to speculate that it may have been influenced by a misreading of Articles 60 and 61 of the African Charter. The Protocol’s drafters also may have been influenced by the notion that all possible means should be brought to bear on states to ensure that their human rights obligations are observed.
276. See Protocol to the African Charter, supra note 1, art. 10(2) (stating that “any party to a case shall be entitled to be represented by a legal representative of the party’s choice”).
277. Id.
identifies neither the subject or the object of such legal aid, seems deliberate and implies that it may not be available to all parties. Because legal aid must contend for the African Court’s limited resources, either a special fund should be established to provide legal aid or states should assume responsibility for providing it. Neither possibility is prohibited by the Protocol, and the African Court itself should administer this as a regular part of its budget. The cost may not be great, as the text does not suggest that free representation should extend to local remedies, yet, many potential litigants will fail solely for lack of funds.

What role should the inability to exhaust local remedies, due to financial constraints, play in the African Court’s decision on admissibility, especially in a case of direct access?

Bringing a case before the African Court is bound to be an expensive exercise, as it would include the cost of a senior lawyer and travel expenses.

A passive interpretation of the Protocol leaves open the possibility that states may also benefit from legal aid. This should be applied only in exceptional circumstances, as states normally have their own legal staffs. Other factors to consider when awarding legal aid include at which stage of the proceedings application should be made and whether it should be made to judges or the Registrar. Additionally, since individuals should not be expected to pay costs incurred by governments, the African Court must decide whether to award costs. These aspects


279. See Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC–11/90, Inter–Am. Ct. H.R. (ser. A) No. 11, para. 31 (Aug. 10, 1990) (finding that indigents need not “exhaust the relevant domestic remedies” before appealing directing to the Inter–American Commission when a right granted under the American Convention is involved).

280. The practice in most international tribunals, including the African Commission, is that complainants are represented by lawyers. This would, in the absence of legal aid, impose significant financial burdens on complainants.

281. See, e.g., Murray, Comparison Between the African and European Courts, supra note 5, at 214.
need to be clarified in the Rules of Procedure or in an addendum thereto, as in the case of the European Court.  

C. Amici Curiae

Scholar Abdelsalam Mohamed has highlighted the role of *amicus curiae* briefs in the European and Inter-American Courts. In the Inter-American system, the competence of the Inter-American Court to hear any person whose evidence, statement or opinion it deems to be useful serves as the legal basis for allowing such briefs. In the era before Protocol No. 11, the European Court permitted third-party participation in proceedings based on a similarly-worded provision in its Rules of Court. As a result, NGOs with particular expertise, such as Amnesty International, Article 19 and America Watch, and academics or academic institutions that focus on the issues before courts have assisted these two Courts. Mohamed argues that the Nouakchott Draft Protocol supports an inference that the extension of this possibility to the African Court should be adopted. The Nouakchott Draft Protocol differs from the adopted text in an important respect in that the Protocol does not include the phrase “and other representations.” This seems to suggest a restriction on evidence. It is still debatable

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282. Legal aid under the European system has been described as “very limited and means–tested at state level.” Murray, *Comparison Between the African and European Courts*, supra note 5, at 214–15.


284. Inter-American Court Rules of Procedure, *supra* note 166, art 45(1).


288. Compare Nouakchott Draft Protocol, *supra* note 49, art. 25(2) (stating that the Court “may receive written and oral evidence and other representations”), *and* Protocol to the African Charter, *supra* note 1, art. 26(2) (similar provision, but Protocol lacks the phrase “other representation”).
whether the distinction between evidence and testimony is significant, which leaves the door open for the Rules to include amicus curiae briefs as part of the term “testimony.”

The most persuasive rationale for third-party arguments is that they may assist the African Court by providing it with comprehensive legal arguments. A court with relatively meager resources should embrace opportunities to hear supplementary arguments. However, such “friends of the Court” should refrain from stifling the voices of the parties, and hearing them should not become overly burdensome. Therefore, the African Court should first receive and peruse arguments made by parties, and then decide if third-party briefs make valuable contributions. The African Court may also decide to consider such arguments only in written form.

D. Advisory Opinions: Role for NGOs

Even if an advisory opinion is not binding on the party requesting it, it may have profound persuasive force and international repercussions. Advisory opinions have been used extensively and effectively in the Inter-American system. During its fledgling years, the Inter-American Court dealt with more advisory than contentious cases, primarily because the Inter-American Commission and respondent states were reluctant to submit contentious cases to the Inter-American Court. Former Inter-American Court Judge Thomas Buergenthal claims that this development was fortunate because it provided the Inter-American Court with a chance to consolidate itself, as

289. Evidence is defined as “something that tends to prove; ground for belief,” while testimony is defined as “a declaration or statement made under oath or affirmation by a witness in a court, often in response to questioning, to establish a fact.” Webster’s New World College Dictionary 493, 1480 (4th ed. 1999).

290. Mohamed, supra note 283, at 382–83.


292. Pasqualucci, supra note 97, at 80.

293. See David Harris, Regional Protection of Human Rights: The Inter-American Achievement, in The Inter-American System of Human Rights 1, 23 (David J. Harris & Stephen Livingstone eds., 1998) (noting the reluctance of the Commission to make referrals and the small number of states accepting the African Court’s optional jurisdiction).
governments in “fragile emerging democracies” found it “easier to give effect to an advisory opinion than to comply with a contentious decision in a case they lost.”

The situation faced by the Inter-American Court is clearly analogous to Africa, where democracy is still seeking a strong foothold.

Three entities may request advisory opinions and claim standing before the African Court: states, the AU and its organs, and a broader and undefined group called “African organisations.” As in the Inter-American system, state parties may make such requests; most of the Inter-American Court’s advisory opinions were given at the request of state parties. States requesting an advisory opinion from the African Court need not have ratified the Protocol, therefore, this aspect of the African Court’s jurisdiction is open to non-state parties.

The AU and any of its organs may also request advisory opinions. Such requests could be duplicative, however, as the African Court of Justice, once formed, is to have jurisdiction over the interpretation and application of the AU Constitutive Act; the African Court of Justice will also have advisory jurisdiction. Reading the two protocols together, it would seem that the AU should refer matters with a human rights focus to the African Court of Human Rights. Although allowing the AU and

295. See Österdahl, supra note 266, at 141 (noting that the “softer, less obliging channel of advisory opinions” may be more applicable outside a “well-functioning democratic environment characterised by the rule of law”).
296. Protocol to the African Charter, supra note 1, art. 4(1).
297. Id. See also American Convention, supra note 181, art. 64 (stating that a member state may request an advisory “opinion regarding the compatibility of any of its domestic laws with ... international instruments”).
298. See Protocol to the African Charter, supra note 1, arts. 3, 5 (states must be parties to the African Charter).
299. Id. art. 4(1).
300. AU Constitutive Act, supra note 89, art. 26. See Udombana, Toward the African Court, supra note 1, at 78.
301. Protocol of the Court of Justice, supra note 207, art. 44(1) (provides that AU organs, as well as a “Regional Economic Community” may request advisory opinions “on any legal question”). See also id. art. 20 (expansive formulation of Article 44(1) should be read with Article 20, which provides that the Court “shall have regard to” the broad category of “international treaties”).
other African intergovernmental organizations to request advisory opinions may seem problematic because they are not parties to the Protocol or the African Charter and, thus, cannot be held accountable for failure to comply with the Protocol’s provisions, the fact that they all subscribe to African Charter’s standards and goals makes it less so. Therefore, the African Human Rights Court should be the judicial institution to advise about human rights matters related to policy development and formulation.

Any “African organisation recognised by the AU” may also request an advisory opinion from the African Human Rights Court. In parts of the Protocol, the terms “African intergovernmental organisations” and “NGOs with observer status before the Commission” have been used. Thus, the word “organisation” is a generic term, and encompasses both intergovernmental and non-governmental bodies. However, the organizations must be “African;” an “African organisation” does not include NGOs enjoying observer status with the African Commission because members of that group need not be African. The organization must also be “recognised by the AU.” All African NGOs enjoying observer status with the African Commission should qualify as such; observer status should be regarded as a form of recognition by the AU. Regional economic arrangements such as ECOWAS and the Southern Africa Development Community (SADC), which are part of the AEC regional economic arrangements and building blocks of the AU, also qualify. Other African organizations should also be able to request advisory opinions, so long as their work is associated with the AU or AEC.

It is possible that NGOs requesting advisory opinions will try to use the procedure to bring disputes against states that have not accepted the African Court’s contentious jurisdiction. States and AU organs may also attempt to abuse the African Court’s advisory procedure by cloaking contentious cases as re-

302. Protocol to the African Charter, supra note 1, art. 4(1) (provides that the OAU, any of its organs “or any African organization recognized by the OAU” may approach the Court with a request for an advisory opinion).
303. Id.
304. Id. arts. 5(1)(e), 5(3) (respectively).
305. Id. art. 4(1).
306. Id. art. 5(3).
quests for advisory opinions. The potential for abuse by NGOs should not be overstated, however, as the African Court’s advisory opinions are only advisory and, thus, remain non-binding. 307

Advisory opinions may be requested on a legal matter relating to the Charter or “any other relevant human rights instruments.” The subject matter jurisdiction for advisory opinions is broader than for contentious cases and includes questions concerning any human rights “instrument,” those both non-binding and declaratory and those open to ratification and binding. Any conceivable human rights document may be invoked, as long as it is relevant. However, even though the African Court’s advisory subject matter jurisdiction is much broader than its contentious jurisdiction, it is less controversial because of its non-binding nature.

V. PROCEDURAL ISSUES

Other issues, such as the seat of the Court, the election of judges, the adoption of Rules of Procedure and the importance of resources, are likely to affect the success of individual cases before the African Court.

A. Seat of the Court

The seat of the African Court is not specified in the Protocol. Determination of the seat is left to the AU Assembly once the Protocol enters into force. 309 The seat must be “from among State parties” to the Protocol. 310 The seat of the African Commission, Banjul, presented numerous problems for individuals, particularly because of its inaccessibility and the cost of transportation to reach it. 311 Inadequate infrastructure and lack of immediate access to the media and important role-players also cause difficulties. 312 Therefore, the problems arising from the choice of Banjul as the African Commission’s seat should be avoided. The state in which the African Court is based should

308. Protocol to the African Charter, supra note 1, art. 4(1).
309. Id. art. 25.
310. Id. art. 25 (1).
311. Ankumah, supra note 5, at 186 (alluding to these factors).
312. See generally Danish Centre for Human Rights, supra note 80.
have: (1) political and economic stability; (2) a sustained record of democracy, good governance and domestic human rights protection; (3) a developed infrastructure, a travel hub and regular connections to international travel routes; (4) institutions of higher learning equipped and willing to support the Court and its Registry; (5) a good record of submitting state reports and other forms of cooperation (such as implementing recommendations) with the African Commission and UN treaty bodies; and (6) international media, diplomatic corps and international organizations. Ultimately, however, the decisive factor will be the state party’s commitment to undertake the financial and political responsibilities of housing the African Court.

Other factors may also have to be considered. Symbolism may play a role; for example, inviting venues include Dakar (Ile Gôrêé, emphasizing the post-colonial aspect), Cape Town (Robben Island, as a post-apartheid icon linked to the struggle against “foreign domination”) and Kigali (in post-genocide Rwanda). Another factor is the distance between the seats of the African Commission and the African Court. The European model, when it still functioned with dual institutions, provided for a joint seat at Strasbourg.\textsuperscript{313} In the Inter-American system, the seats of the Court and Commission are separated by vast distances–San José, Costa Rica, and Washington D.C.\textsuperscript{314} The geographic separation of these two institutions may account, at least partly, for the initial lack of cooperation between the Inter-American Commission and Court. In any event, discussions concerning the African Court’s location may prompt reconsideration of the Commission’s location.

\textbf{B. Election of Judges}

The African Court will consist of eleven judges elected for six-year terms.\textsuperscript{315} Unlike the European system, not every state

\textsuperscript{313} 1992 Rules of European Court, \textit{supra} note 233, at 265, R. 15.
\textsuperscript{315} Protocol to the African Charter, \textit{supra} note 1, art. 15. Judges may be re-elected once, and to ensure continuity only three judges of the initial group will serve a full six-year term. Four judges will serve only two years and four others will serve only four years. Judges are allocated terms in accordance
party will be represented on the African Court. In fact, a judge may not hear cases involving his or her own state. The elected judges choose their own President and Vice-President for a once-renewable term of two years. As the only judge serving on a full-time basis and residing at the seat of the African Court, the President is likely to play a very important role in the establishment and running of the African Court. The President will also work closely with the Registrar, whom the African Court appoints to this full-time position, and who also resides at the seat.

The phases of nomination and election of judges should be clearly distinguished. Only state parties to the Protocol may nominate candidates. When the Secretary General calls for nominations, each member state may nominate three individuals, two of whom must be nationals of that state. Thus, they may also nominate candidates from AU member states that have not accepted the Protocol. A list of these names is sent with lots drawn by the Chair of the AU commission (previously the OAU Secretary General). Id.


317. Protocol to the African Charter, supra note 1, art. 22. The exclusion of judge–nationals from hearings also differs from the ICJ's appointment of ad hoc judges from states involved in disputes before it. See Statute of the International Court of Justice, June 26, 1945, art. 31, 59 Stat. 1031, 33 U.N.T.S. 993, http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstatute.htm. See also Krisch, supra note 1, at 717 (noting that the Protocol position improves the perception of impartiality and may “represent a reaction to the problems of the Commission in this respect”). The intended impartiality of the African Court's judiciary is underscored throughout the Protocol. See Protocol to the African Charter, supra note 1, art. 11(1) (judges are “elected in an individual capacity”); id. art. 16 (judges must take an oath to “discharge their duties impartially and faithfully”).

318. Protocol to the African Charter, supra note 1, art. 21(1).

319. Id. art. 21(2).

320. Id. art. 24. Unlike the Protocol, the African Charter provides that the OAU Secretary General shall appoint the Secretary to the African Commission. The Commission's dissatisfaction with its inability to appoint or dismiss its Secretary may have influenced the Protocol's appointment provision for the African Court. Compare id., and African Charter, supra note 1, art. 41.

321. Protocol to the African Charter, supra note 1, art. 12(1).

322. Id. arts. 12(1), 13(1).

323. Id. art. 12(1).
to the members of the Assembly thirty days before its next ses-

The Assembly, composed of fifty-three states, chooses the judges from those nominated. This may seem inadvisable, but leaving the decision to the AU makes sense because any of the other states may become a state party during the general term of tenure, and should have some say in the composition of the African Court. Furthermore, the African Court is an AU institution, and the AU takes political responsibility for its functioning and the enforcement of its judgments. The African Court and AU are intertwined in many ways: the African Court is dependent on the AU for its budget, the AU Assembly has the final say over the removal of judges from office and determines, and may change, the African Court’s seat; the Court reports annually to the Assembly, specifying instances of non-compliance, and the monitoring judgments is the Assembly’s responsibility. Thus, the Assembly has a vested political and financial interest in and responsibility for the African Court. In any event, this methodology is also followed for the election of members to the African Commission.

The election process is guided by the qualifications of the candidate and the need for a balanced judiciary. Candidates must be AU nationals, not necessarily of state parties, must be “jurists” by profession, with specific and demonstrated human

324. Id. art. 13(2). At its third ordinary session, the AU decided to hold sessions no longer annually, but twice a year. Assembly of the African Union, 3rd Ann. Sess., AU Doc.Assembly/AU/Dec.53 (III) (July 6–8, 2004).

325. Protocol to the African Charter, supra note 1, art. 13; List of Countries Which Have Signed, Ratified/Acceded to the Protocol, supra note 56.

326. In the Inter-American system, state parties to the American Convention nominate and elect judges. American Convention, supra note 181, art. 53. In Europe, before Protocol No. 11, the Council of Europe, its Court and Parliamentary Assembly respectively, nominated and elected judges (one judge per state). European Convention, supra note 17, art. 59(1).

327. Protocol to the African Charter, supra note 1, art. 19(2).

328. Id. art. 25.

329. Id. art. 31.

330. Id. art. 29(2).

331. All fifty-three AU members have been state parties to the African Charter since 1999, so this distinction is no longer relevant. List of Countries Which Have Signed, Ratified/Acceded to the Protocol, supra note 56.

332. Protocol to the African Charter, supra note 1, arts. 11, 14.
rights expertise and experience ("competence and experience in the field of human rights") and should be "of high moral character." 334 Additionally, there must be "adequate gender representation" (not "equal," which, in any event, is impossible in a court of eleven judges), 335 as well as representation of geographical areas and Africa's "principal legal traditions." 336 This addresses a recurring problem with the election of members to the African Commission as there was occasionally overrepresentation or non-representation of a region. The Protocol correctly links geographic concerns to varying legal traditions. 337 It would, for instance, not make sense to ensure proportional representation for the West African region by electing two judges from Anglophone/common law countries. While the regional representation requirement may be met if each of the five regions is "represented" by at least one judge on the African Court, 338 greater attention should be paid to insuring that each legal tradition is represented, such as the Islamic/Shari’ah-based system, the

334. Id. art. 11(1).
335. Id. arts. 14(3), 12(2) (Article 12 requires that "due consideration" be given to "adequate gender representation."). See also AU Constitutive Act, supra note 89, art. 4(1) (defining the promotion of gender equality as one of the AU’s principles). Women are underrepresented in international law, including international judicial bodies; at the beginning of 2003, only eleven of the forty–three judges on the European Court were women. See INTERIGHTS, JUDICIAL INDEPENDENCE: LAW AND PRACTICE OF APPOINTMENTS TO THE EUROPEAN COURT OF HUMAN RIGHTS 32 (2003), at http://www.nchr. grid/downloads/Judicial_Appointments_to_ECHR.pdf. There has never been more than one woman of the seven judges on the Inter–American Court. See generally Inter-American Court of Human Rights, at http://www. corteidh.or.cr/general_ing/composition.html (providing the names of both current and former judges). It appears that female participation in quasi–judicial bodies is more generally accepted; the African Commission has seen its female representation increase from zero out of eleven in 1993 to five out of eleven in 2003, including its President (Commissioner Sawadogo). See generally African Commission on Human and Peoples’ Rights, at http://www. achpr.org/english/_info/members_en.html. Two of the seven members of the Inter–American Commission were women at the beginning of 2003. See generally Inter-American Commission on Human Rights, at www.cidh.org.
337. Id.
338. The nineteen ratifying states cover all five regions—north (two), west (seven), east (three, including the island states of Comoros and Mauritius), central (five) and south (two). See List of Countries Which Have Signed, Ratified/Acceded to the Protocol, supra note 56.
common law system, the civil law system, and the particular brand of mixed “Roman-Dutch law” in Southern Africa.\textsuperscript{339} The candidates’ personal profiles should be such as to insure that expertise of traditional African customary law and tradition is also represented.\textsuperscript{340}

Individuals have a role in the domestic nomination process and the AU’s election process. NGOs and individuals in state parties should involve themselves by nominating competent persons internally or by challenging incompetent or inappropriate candidates at the domestic level. For this to be possible, AU member states should ensure that the domestic nomination process is transparent and that a free exchange of information is readily available. These efforts should extend to the election process, which should be supported by civil society in all AU member states. It is important that the process be as transparent as possible, with the \textit{curriculum vitae} of a candidate subjected to public scrutiny. The Protocol provides that a judge’s position is incompatible with “any activity that might interfere with the independence or impartiality” of judges.\textsuperscript{341} Although the Rules of Procedure will prescribe what these activities are, efforts should be made to prevent the election of candidates who clearly elude these criteria.\textsuperscript{342} Such vigilance is necessary because judges have the competence to draft Rules of Procedure\textsuperscript{343} and, once elected, may do so to suit their personal ends.

\textbf{C. Adoption of Rules of Procedure}

The African Court “shall draw up its Rules and determine its procedures.”\textsuperscript{344} As the discussion above makes clear, these rules


\textsuperscript{340} See Protocol to the African Charter, \textit{supra} note 1, art. 14(2).

\textsuperscript{341} See \textit{id.} arts. 18, 8.

\textsuperscript{342} Some Commissioners served as ambassadors for their countries in other African states, inviting the perception that they exercise bias in their decision-making.

\textsuperscript{343} See Protocol to the African Charter, \textit{supra} note 1, art. 33.

\textsuperscript{344} \textit{Id.} art. 33.
may go a long way to strengthen or weaken the position of individuals before the African Court. As suggested by the Protocol,\textsuperscript{345} the African Court should consult the African Commission on numerous issues. Such discussions, to be held soon after the inauguration of the judges, may result in amendments to the Commission’s Rules of Procedure.\textsuperscript{346}

The Commission’s Rules of Procedure should clarify under which circumstances it may submit cases to the African Court. There are a number of possibilities. First, the Rules could provide for direct submission to the African Court, without consideration by the African Commission, under exceptional circumstances of immediate importance. Second, the Rules could allow the African Commission to submit a case after declaring it admissible and conducting fact-finding. If this possibility is accepted, the Commission’s Rules of Procedure must incorporate a clear fact-finding procedure. However, room must be left for the African Court to deal with the factual issues. Third, the Rules could determine which factors to account for when the African Commission refers a matter to the African Court after making a finding on the merits or after having amicably resolved the matter. Obviously, the Court’s Rules of Procedure must correspond with all these provisions and grant individuals a clear right to be represented before it, either personally or through counsel.

When parties before the African Court reach an amicable settlement, the African Court must scrutinize the agreement for its compliance with human rights, and must formally adopt it as a judgment in order to enable implementation or monitoring.\textsuperscript{347} Such judgments serve not only the interests of individual

\textsuperscript{345} Id. (providing that “[t]he Court shall consult the Commission as appropriate”).

\textsuperscript{346} See Badawi Elsheikh, supra note 1, at 258.

\textsuperscript{347} See Protocol to the African Charter, supra note 1, art. 9. A literal interpretation of “in accordance with the provisions of the Charter” would restrict the Court’s competence to deal with settlements because the African Charter only provides for settlement in communications between inter–state parties; it is silent on settlement negotiations involving individuals. African Charter, supra note 1, arts. 47–51. Another interpretation of that phrase is that the settlement in any case before the Court must be human-rights-friendly, or “in accordance with the (substance of the) provisions of the Charter.” See Protocol to the African Charter, supra note 1, art. 9. See also Euro-
parties before the African Court, but also the general interest of human rights protection. The judgment should indicate the precise nature of action required by the state, such as the nature of legislative amendments or the amount of compensation, and should specify a time period within which action must be taken.\textsuperscript{348}

The Commission’s Rules of Procedure should be amended to allow submission to the African Court, enabling the African Court to take provisional measures in urgent cases that have not yet been submitted to it for consideration.\textsuperscript{349} When a contentious case is pending before the African Court, individuals should be allowed to present a request for provisional measures directly to the African Court. They should also be allowed to present their views about state compliance.\textsuperscript{350}

Third-party arguments (\textit{amicus curiae} briefs) should be allowed, but only under suitable conditions.\textsuperscript{351} An emphasis on written submissions may, for example, ensure that the African Court only hears from those who set out views or authorities not covered by the parties or the African Commission.

\textbf{D. Importance of Resources}

The African Court’s establishment comes at a time of competing claims to limited resources.\textsuperscript{352} To a large extent, the AU
Constitutive Act is only a framework document that allows for the adoption of detailed “Protocols” to establish institutional organs.\footnote{353} The Constitutive Act stipulates such action with respect to the Pan-African Parliament, the Court of Justice, the African Central Bank, the African Monetary Fund and the African Investment Bank.\footnote{354} The Economic, Social and Cultural Council’s functions and organization shall be determined “by the Assembly.”\footnote{355}

When the AU was launched in 2002, few of its institutional components had been set up.\footnote{356} At present, three institutions — the Peace and Security Council, the Pan-African Parliament and the African Human Rights Court — are in the process of being established.\footnote{357} All functional treaty bodies are developed through phases: negotiation, adoption, formal acceptance, entry into force, and operationalization. The fifth phase of operationalization is sometimes underplayed, but it is of determinative importance. Institutional mechanisms and procedures are only words on paper without the personnel, paper, printers, buildings and infrastructure to make them a reality. Meager allocations of resources undermine independence. Over the years, the OAU has suffered from problems of inadequate financing. Despite numerous pleas by the OAU/AU Assembly that the necess...
sary resources should be allocated to the African Commission, funding for its activities is still lacking. Whatever modalities of coexistence are worked out, the fact remains that the African Court’s progress depends on a well-resourced and functional African Commission. It should be recalled that the African Children’s Committee was also launched recently and has not yet been provided with a functional Secretariat. Where institutional proliferation meets financial need, there are bound to be casualties.

A preliminary report on the financial implications of the African Court already indicates that the Court will not have adequate resources to meet its needs. The largest items are the projected salaries for the full-time President of the Court, the Registrar, a documents specialist, an accountant, two secretaries and two drivers/assistants. It is by no means certain that a legal officer/researcher will be included in the budget. By the same estimate, only $2,500 was budgeted for library books for the first year.

VI. CONCLUSION

The dawn of a new century has witnessed manifold institutional renewals at the regional level in Africa. These institutions, including the African Human Rights Court, should now be strengthened to ensure their growth, taking into account that the measure of their success will be the extent to which they are able to improve the lives of Africans. The key to unleashing the African Court’s potential lies in the hands of the Court itself.

360. Id. at 294.
361. Id. at 295.
First and foremost, the African Court must not become a white elephant — all institution and no cases to decide.\textsuperscript{362} To prevent this, the African Court must ensure that its Rules of Procedure allow access to individuals as extensively as the Protocol permits. The African Court must cooperate with the African Commission, whose Rules also need to be adapted. To summarize, it is suggested here that the African Commission should usually decide on the admissibility of communications, but not on their merits. Inadmissible cases should end at the Commission level. With respect to admissible cases, the African Commission should engage in fact-finding and make efforts to negotiate a friendly settlement before submitting the case to the African Court. In exceptional, urgent cases, the African Commission may refer the case to the African Court without addressing it at all. Such an approach will unlock the potential of the Court to supplement and strengthen the African Commission’s role in protecting individuals by ensuring that the deficiencies inherent in the quasi-judicial nature of the Commission are overcome without causing more delay and cost.

Allowing individuals the broadest possible standing before the African Court may well mean that the Commission’s protective role is restricted to admissibility findings in most cases and fact-finding in some cases. Such an approach would enable the African Commission to focus on that part of its mandate earmarked as promotional but which also serves definite protective ends. Its non-communication-based role should be enhanced by way of the resumption of on-site investigations, the improvement and extension of the examination of state reports, promotion and education of human rights generally and the Charter in particular, as well as proactive activities of Special Rapporteurs. This is the best reading one could give to the requirement of “complementarity” between the Commission and Court.\textsuperscript{363} The African Commission is retained and reinforced as the AU’s main quasi-judicial human rights institution while and the African Court is developed as its main judicial institution. This “complementarity” avoids duplication and delay.

For all the attention devoted to continental judicial institutions as manifestations of international human rights protec-

\textsuperscript{362} A variant on “all dressed up and nowhere to go.”
\textsuperscript{363} Protocol to the African Charter, \textit{supra} note 1, art. 8.
tion, their role and potential remain limited in comparison with national institutions. National courts have to be the port of first call for individuals, yet they are frequently ignored. There are beliefs, deeply embedded in many African states, that inform a reluctance to use law and courts to resolve disputes. Much of African life is “informal” and exists side-by-side with more “formal” aspects of life. Over-formalized legal systems reinforce this formality. Reliance on the law may be fanciful in a context of low literacy, inaccessible sources (even legislation and law reports), a lack of lawyers and legal aid, and conditions of poverty or conflict overshadowing other concerns. Legal norms are perceived as lacking legitimacy, as being transplants from some European metropolis, and as consisting of rules and norms that are juxtaposed unfavorably with traditional ways of life. As an instrument of a highly centralized authority, law does not penetrate into vast rural areas, thus remaining remote and inaccessible. Bureaucracies and courts are either dysfunctional or function very slowly, and are steeped in corruption.

International human rights law’s focus on “exhaustion of local remedies” takes too much for granted, and does not sufficiently account for these factors. International tribunals face many problems: overly formal systems, intimidating procedures, lack of information, inaccessible texts, the perception that their decisions reflect a regional consensus in which local specificities play only a minimal role, and the general remoteness of human rights ideology from the daily lives of individuals. These problems are compounded in the African regional human rights system. Exercising a quasi-judicial mandate, an effective African Commission bolstered by recourse to the African Human Rights Court could go some distance in solving these difficulties.


REPUTATIONAL FALLACIES IN INTERNATIONAL LAW: A COMPARATIVE REVIEW OF UNITED STATES AND CANADIAN TRADE ACTIONS

Colin B. Picker*

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Character was like a tree and reputation like its shadow.
The shadow is what we think of it; the tree was the real thing.

I. INTRODUCTION

Reputation is an important and complex issue for individuals, communities and nations. Like a shadow, reputation reflects the characteristics of an individual with varying degrees of precision. Reputation rarely provides a mirror image, rather, like a shadow, it is something that varies through time and the changing position of the world. As an initial matter, reputation is defined as “the common or general estimate of a person with respect to character or other qualities; the relative estimation or esteem in which a person or thing is held.”

The notion behind reputation is that individuals receive information about the behavior of others from third parties; this information is then used to decide whether or not to behave in a similar manner, and how to interact with the other person. Positive reputational information results in increased willingness to act cooperatively with the other person. As would be expected, the opposite reaction occurs when individuals are provided negative reputational information.

Reputation is not a phenomenon confined to individuals; states have reputations as well. Yet, the importance of a state’s reputation goes beyond the “shadow” cast, for a state’s reputation has the potential to undermine the “tree” itself. The potential harm of reputation derives from the fact that state reputa-

3. The Oxford English Dictionary 678 (2d ed. 1980). It is noteworthy that reputation is defined as an “estimate.” This concession within the definition of reputation—that it is not something that can be identified precisely—presents a fundamental problem for reliance on reputation as a compliance mechanism of international law: reputation, by its very definition, is imprecise. This imprecision can, and often does, lead to inaccuracies due to overestimation of positive or negative attributes.
5. Id. See also Manfred Milinski et al., Reputation Helps Solve the “Tragedy of the Commons,” 415 Nature 424, 424 (2002).
6. See Buskens, supra note 4.
tion is an important and vital component in the smooth operation of international law. With few traditional legal mechanisms to ensure that states comply with international law, it is arguable that reputation is an important, even crucial, mechanism for securing state compliance.\(^7\)

Similar to the reputations of individuals, state reputations can be highly inaccurate. State reputations may be flawed or bear little resemblance to the actions of the states themselves, creating “reputational fallacies.” In addition to concerns about accuracy, issues specific to states exist that are not present when examining the reputation of individuals. These state-specific issues tend to exacerbate reputational fallacies. A fundamental difference concerns the notion of state sovereignty. Sovereignty presupposes that states are “masters of their own domain” in all aspects—from governance to culture.\(^8\) Policies based entirely on self-interest are not only permitted within the world of state sovereignty, but are expected.\(^7\) Consequently, the

\(^7\) See, e.g., George W. Downs & Michael A. Jones, Reputation, Compliance and International Law, 31 J. LEGAL STUD. 95 (2002); Andrew T. Guzman, A Compliance-Based Theory of International Law, 90 CAL. L. REV. 1823, 1849 (2002); Claire R. Kelly, Realist Theory and Real Constraints, 44 VA. J. INT’L L. 545, 592 (2004); Steven R. Ratner, Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint, 5 THEORETICAL INQUIRIES L. 81, 93–94 (2004). Note that while there are many articles that discuss reputation within the context of state compliance, few other articles, if any, explore actual states’ reputations and the lessons that the international community may learn from increased scrutiny of state reputation.

\(^8\) See Colin B. Picker, A View from 40,000 Feet: International Law and the Invisible Hand of Technology, 23 CARDozo L. REV. 149, 178 (2001). While this postulate of international law has slowly changed in the post-WWII era as a result of developments in areas like human rights and modern communication technologies, sovereignty is still a fundamental basis of the international system. Id. at 179–82.

\(^9\) Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 YALE L.J. 1935, 1938 (2002). Thus, Canadian action pursuing a World Trade Organization (WTO) case in order to force Europe to accept shipments of asbestos, while considered reprehensible by the Europeans, and a blow to Canada’s reputation, was considered a sound action by the Canadians as it attempted to serve Canada’s interests. See Report of the WTO Appellate Body, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (Mar.12, 2001) (Doc# 01-1157), 40 I.L.M. 1193 (2001), available at http://www.worldtradelaw.net/reports/wtoab/ec-asbestos(ab).pdf [hereinafter WTO Asbestos Report].
nature of state sovereignty makes any examination of state reputation more complex than that of individuals. Another issue is that reputation is inherently subjective and normative. State reputations reflect the aggregate of individual subjective perceptions of behavior via culturally-anchored criteria that differ from state to state with varying societal goals, cultures, values, and characteristics. This heightened level of subjectivity presents a problem when attempting to characterize behavior for determinations of whether or not a state is a good international actor. Each of these issues increases the complexity of information used to inform reputational assessments and, therefore, may exacerbate reputation’s inherent imprecision.

Reputational fallacies raise important issues for international law. In particular, the utility of reputation as a compliance mechanism, when reputation does not accurately reflect state behavior, may impact the effectiveness of international law. This Article will examine the problem of reputational fallacies through a comparative examination of two states with very different reputations in the international trade arena: the United States and Canada. The ensuing examination of U.S. and Canadian trade actions explores whether each state’s reputation is logically connected to its actual behavior in the international trade arena. This Article ultimately concludes that there is little substantive support for each state’s reputational difference. While this Article’s examination is confined to the trade actions of the United States and Canada, it nonetheless suggests that reputation—as a means of enforcing state compliance with international obligations—is, at best, an inaccurate tool of inter-


11. An examination of U.S. and Canadian behavior in the entire realm of international law or international relations would be a substantial undertaking and is better left for development within a book.

12. This Article assumes Canada’s positive reputation, but see note 40 and accompanying text, then compares Canadian trade actions with those of the United States—a state routinely vilified for its trade actions. This Article does not seek to muddy the reputation of Canada, nor to improve that of the United States, but, rather, it seeks to show that reputation is, at best, a difficult and intrinsically inaccurate tool of international law.
national law. In fact, this Article suggests that reputation, at its worst, is harmful to international law compliance because it introduces fallacies and inefficiencies, as well as a whole host of other problems associated with its inherent inaccuracy.

Part II of this Article will briefly examine the concept of reputation and how it interacts with international law and international trade. It will also discuss some of the underlying problems associated with a comparative examination of reputation. Part III of the Article will engage in an in-depth examination of the reputations of two states, the United States and Canada, in an effort to determine whether their international trade reputations have any basis in reality. The Article will then, in Part IV, examine the utility of reputation in light of its likely inaccuracies, as well as seek to identify the actual sources of those reputations. Finally, the Article will consider the consequences of exposing reputational fallacies for the states involved as well as for the international legal system.

II. REPUTATION

A. Reputation and International Law

Reputation, as a tool of international law compliance, remains one of the most intriguing concepts in international law. Despite Professor Louis Henkin’s modern maxim that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,” international law compliance is not clearly understood. Henkin’s maxim, after all, begs the question of why states tend to comply with international law. The traditional view is that state com-


14. Indeed, while it is common to claim that U.S. behavior within the international legal system shows that the United States does not respect or comply with international law, the truth is that the United States, through its officials, diplomats, soldiers, citizens and so on, obeys international law thousands of times each day — from customs compliance with international standards to the rules of engagement of soldiers in combat zones. A few high profile examples of non-compliance should not mar the otherwise stellar U.S. record of international law compliance — this despite the fact that world attention will likely focus on the occasional example of U.S. conflict with inter-
Compliance results from a combination of factors—part carrot, part stick.\(^\text{15}\)

The carrots and sticks of state compliance, however, are directly linked to reputation. Specifically, several factors increase state compliance with international law: fear of retaliation, concern that next time no one will want to “play” with the state, a self-serving or altruistic interest in the successful operation and legitimacy of the international legal system, and a desire to avoid rogue-state status.\(^\text{16}\) Many of these factors have state reputation at their core.\(^\text{17}\) States’ fears that others will not “play” with them in the future is related to the fear that word will get out that they are “rule breakers.” Similarly, concern for a state’s image is, of course, a concern about reputation. The interest of states, guided either by self-interest or idealism, in the continuing vitality and legitimacy of the international legal system is also related to reputation. Indeed, the existence of a consistently disreputable state will naturally lead to questions concerning the legitimacy of a legal system that allows such flagrant rule-breaking and may cast doubt on the viability of international law.

In addition to the traditional carrots and sticks, other features of international law can be directly linked to reputation. New mechanisms to assist in the enforcement of international law, such as the employment of binding adjudication and related authorized retaliations, are directly related to reputation.\(^\text{18}\) An offending state’s reputation likely influences other nations to draw the inaccurate conclusion that the United States is regularly non-compliant.

\(^{15}\) There is much debate as to why international law is followed, with many reasons advanced. Examination of those reasons suggests that they can, for the most part, be considered either as “carrots” (such as sharing in the benefits of an effective international legal system) or as sticks (such as the employment of sanctions by other parties against rule-breakers). \textit{See John H. Jackson et al., Legal Problems of International Economic Relations: Cases, Materials and Text 173} (4th ed. 2002) (lists several of the reasons advanced for international law compliance).

\(^{16}\) \textit{See generally} Hongju Koh, \textit{supra} note 13 (providing a broad overview and critique of the historical and modern theories of state compliance with international law).

\(^{17}\) \textit{See Downs & Jones, supra} note 7, at 99–100.

states or international organizations when they decide to take the extreme step of instituting procedures that lead to retaliation. Resorting to international proceedings, an unusual step in the generally diplomatic world of international law, may be thought necessary to force a disreputable state with a reputation for showing disregard for its obligations under international legal system into compliance. Hence, both traditional factors and modern enforcement mechanisms that ensure state compliance with international law are related, in some respects, to reputation.

Just as reputation is a vital component of international law enforcement, inaccurate reputation may cause significant harm to the efficient operation of the international legal system. For example, state reputation can impact international adjudication and negotiations. With respect to international adjudication, inaccurate reputation may cloud the integrity of claims and of evidence and testimony. It may undermine a state’s ability to rely on good faith and equitable defenses. Inaccuracy may also reduce the incidence of support from other states, and could encourage other states to join the opposition either directly or

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19. Thus, when creating the WTO, the world trade system purposely moved away from the traditional diplomatic dispute resolution employed in the GATT in order to enforce compliance where the previous diplomatic system had frequently failed. See, e.g., Claude E. Barfield, Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization, 2 CHI. J. INT’L L. 403, 407 (2001). There may also be a feeling that it is time to teach such a disreputable state a “lesson” so as to encourage future compliance of its other international legal obligations. See John E. Noyes, The Functions of Compromissory Clauses in U.S. Treaties, 34 VA. J. INT’L L. 831, 835–38 (1994).

20. See infra Part III.A.–B.

21. Cf. Reena Sengupta, A Contest of Reputations: Media Strategy: Public Relations Can Be as Important as a Sound Legal Case, FIN. TIMES (London), Feb. 16, 2004, at 11 (negative impressions created by a lawsuit against corporate entities have significant impact upon corporate reputation and shareholder value; according to University of Chicago study, winning the case will do little to reverse the damage to reputation); Peter Nicolas, American–Style Justice in No Man’s Land, 36 GA. L. REV. 896, 955 (2002) (“If tribes earn a reputation for dishonoring contracts and then invoking the defense of sovereign immunity when sued in contract, it will impact their business reputation, and those contracting with them will either demand a contractual waiver of sovereign immunity or a higher contract price.”).
through some form of *amicus curiae* briefs. This issue is accentuated when two opposing states represent different ends of the reputational continuum. Detrimental reputational inaccuracies may be reflected in international negotiation as an inability of a state to have its negotiation positions accepted or supported. A state’s offers of concessions are mistrusted and/or discounted and may be rejected absent some form of guaranty or binding adjudication. Put simply, states operating under a

22. This claim is hard to prove, for rarely do states claim such activities as a consequence of reputation. However, the recent World Court Advisory case concerning Israel provides some support for this assertion. Forty-seven non-party states made submissions in the case; it is reasonable to assume that Israel’s reputation was part of the motivation for the overwhelming international response. *See* International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, July 9, 2004, 43 I.L.M. 1009 (2004), available at http://www.icj-cij.org/icjwww/idocket/imwp/advisory_opinion/. Additionally, and perhaps a bit cynically, it would not be surprising if reputation affects arbitrators or judges, hence impacting their decisions to some extent—they are, after all, human. While this Article makes no pronouncement on the merit of the claim, World Court Judge Schwebel’s vigorous dissent in *Nicaragua v. United States* could be interpreted to suggest that perhaps such phenomena was present in the minds of the judges in the majority opinion. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 266 (June 27). Thus, a state with a negative reputation will be operating under a handicap and will have a tougher time prevailing during adjudication. In contrast, a state with a good reputation will more likely have each of the factors above working to their benefit: having their testimony and evidence accorded greater weight, enjoying the support of other states in their adjudications, and receiving the benefit of the doubt from judges and arbitrators.

23. As an example, were North Korea (generally considered to be a rogue state) to be involved in a dispute with Finland (generally considered to be a law-abiding state) it would be surprising if their respective reputations did not play a role in the process. Intuitively, I believe this occurs in Canadian–U.S. trade adjudication, at least to some extent; however, proving such an assertion would be very difficult.

24. This is also hard to show as states will rarely characterize rejection of a position due to reputation, but it is likely that the position of the United States in international negotiations suffers as a consequence of its reputation.

25. *Cf.* Nicolas, *supra* note 21, at 955 (describing how reputation for claiming immunity from contractual obligations via a sovereign immunity defense may result in other parties being unwilling to contract with Native Americans).
reputational cloud will simply have a harder time achieving their negotiation goals.\(^{26}\)

Accordingly, there are significant costs to reputation. Where state reputation is not accurate, as with the international trade reputations of the United States and Canada, reputational costs are borne without legitimate reason.\(^{27}\) Invalid reputational costs, at best, are an inefficient tool of international relations, and, at worst, a powerfully destructive element in the development and maintenance of the international legal system. However, despite this danger, it must be re-emphasized that reputation is integral to the operation of international law. Thus, disavowing reputation as a compliance mechanism would likely have dramatic consequences for the continuing viability of international law. Therefore, this Article posits that reputation be examined within the context of international law and state behavior and resultant problems be resolved so that reputation may continue to be employed in international law. Reputation should be exposed for what it often is—an inaccurate and harmful tool of international law—and corrected through examination and exposure. Accordingly, this Article’s attempt to make the issue of reputation more transparent should contribute to a greater understanding and more accurate use of reputation in international law, thereby contributing to the continuing viability and development of the international system.

**B. Comparative Reputational Analysis**

A brief discussion of the pitfalls of comparative analysis in the international reputation context is merited before beginning the process of comparing the United States and Canada. Comparative analysis is always fraught with difficulties.\(^{28}\) The variables and differences among states can simply be too qualitatively and quantitatively difficult to allow for accurate comparison. Most notably, failure to take both legal and societal cul-

\(^{26}\) The special trade rules applied to China as a condition of its membership in the WTO may be described as of this variety, particularly the dumping and subsidies rules. *See* Raj Bhala, *Enter the Dragon: An Essay on China’s WTO Accession Saga*, 15 AM. U. INT’L L. REV. 1469, 1514 (2000).

\(^{27}\) *See infra* Part IV.B.2.

ture into account can result in a discontinuity between the asserted comparisons and the realities of the states and areas of study.\textsuperscript{29} With respect to reputation, where legal and societal cultures play such prominent roles, a comparative analysis may be especially vulnerable.\textsuperscript{30}

As an initial point, certain differences between the two countries are apparent.\textsuperscript{31} Indeed, the Canadian economy is radically

\textsuperscript{29}Id.

\textsuperscript{30}When there is an effort to draw broad international law lessons from an examination of a specific subset of international law, one would be remiss not to take into account the problems inherent in a comparative analysis across legal disciplines. Accordingly, it should be pointed out that this is a comparative analysis within the world of international trade. While international trade is a vital and highly dynamic part of the international legal system, it is also significantly different from many of the other fields within international law. This dynamism can clearly be seen in the vast scope and number of international economic law agreements negotiated in recent decades, including hundreds of regional trade agreements, bilateral investment treaties, and multilateral agreements such as the WTO. Indeed, WTO membership is starting to rival that of the United Nations—the WTO has gained 147 members and 31 observer/applicant members since it was created almost 10 years ago, compared with the 191 members of the UN. See WTO website at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm; UN website at http://www.un.org/Overview/unmember.html. Furthermore, resort to the WTO's dispute settlement body has produced a significant volume of decisions, easily rivaling that of the International Court of Justice. Over 300 cases have been filed with the WTO since 1995; comparatively, just over 100 contentious cases and 25 advisory opinions have come before the World Court since 1947. See WTO website at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm; World Court website at http://www.icj-cij.org/icjwww/idecisions.htm. Additionally, international economic law has strong institutions, including unusually strong (for international law) mechanisms to encourage state compliance. See, e.g., WTO Dispute Settlement Understanding, supra note 18, arts. 16, 17.14. Flowing through international trade—and in constant tension with the public international law component of international trade—is economic theory and its emphasis on market forces. Potentially, the role of economics in the field of international trade law could result in the reduction of the role of traditional norms of international law for international trade law, and their continuing replacement with economic values applied to state-to-state interactions. This difference between international trade/economic law and traditional public international law should be kept in mind throughout the Article.

\textsuperscript{31}This is a case of comparing apples and oranges. But like apples and oranges, while certain external appearances may suggest radical differences between them, they are in fact essentially the same thing — two pieces of fruit. See Scott A. Sanford, Apples and Oranges: A Comparison, in The Best of Annals of Improbable Research 93 (Marc Abrahams ed., 1998) (finding
different from that of the United States. For example, Canada imports and exports the vast bulk of its trade with just one country—the United States.\footnote{THE ECONOMIST, POCKET WORLD IN FIGURES 121 (2003).} Additionally, Canada has a continuous history of being heavily resource-dependent in its trade.\footnote{Id. at 120–21. \textit{See infra} Part III.B.1.} In contrast, U.S. trade is more widely diversified.\footnote{\textit{See} \textit{THE ECONOMIST}, supra note 32, at 223. \textit{See infra} Part III.B.1.} In addition, each state’s constitutional framework includes significant differences which impact their trade regimes and actions.\footnote{\textit{See infra} Part III.A.} Thus, this Article will not seek to show that these two states are identical. Rather, this Article simply illustrates that there are important similarities between the United States and Canada, without endeavoring to ascertain the reasons for those similarities or to engage in a highly detailed comparative examination of subtle underlying differences. A broad and general finding of comparability between the two states is sufficient for the purpose of this Article’s thesis.\footnote{But such a finding must nonetheless be grounded on an understanding of the problems inherent in comparative analysis, or the findings will themselves be less persuasive.} Having laid out the pitfalls and problems inherent in a comparative analysis, there is still a tremendous benefit to such examinations derived from lessons and problems highlighted in context rather than in isolation. Therefore, while the conclusions that flow from comparative analysis may be susceptible to attack, the benefits will frequently outweigh otherwise valid concerns.

III. AN EXAMPLE OF DISPARATE REPUTATIONS: CANADA, THE UNITED STATES, AND INTERNATIONAL TRADE

This section of the Article will compare the trade actions of Canada and the United States against the backdrop of their reputations in international trade.\footnote{Before starting what may be viewed as an attack on Canada, which it certainly is not, I feel compelled to note that I admire and respect Canada. I have enjoyed frequent visits to Canada and have traveled all over the country, from Nova Scotia to Whitehorse in the Yukon Territory. I believe Canada, like the United States, to be a wonderful country.} To begin, Canada is ad-
mired the world over. Indeed, Canada’s reputation among
other states is as positive as the United States’ is negative. This is as true in international law as in all other areas of their
foreign policies. The question, then, is whether this reputa-
tional disparity accurately reflects the behavior and policies of
the two neighbors. Comparative examination of such a complex
question for all aspects of international law would be too com-
plex and lengthy for this Article; hence, this Article will narrow
its focus to the reputational disparity between the United
States and Canada within international trade. Accordingly, as
the initial step in showing that reputation is a problematic de-
vice for controlling states, this Article will show the absence of a
legitimate basis for the difference in these two states’ interna-
tional trade reputations.

This Article does not endeavor to show that the United States
is a good actor or that Canada is a bad actor. Rather, the aim of
this analysis is to show that Canada has engaged in behavior
markedly similar to that of the United States—employing a
healthy mixture of altruistic measures contrasted with some
negative actions best explained as part of the routine behavior
of states in protecting their self-interest. Thus, Canada’s and
the United States’s disparate reputations will be shown as hav-
ing little foundation in reality.

The following analysis will identify several aspects of U.S.
trade policy that are heavily criticized, and then identify similar

38. See, e.g., Michael Doyon, Letter, Stop Playing Games with Iran,
TORONTO STAR, Aug. 2, 2004, at A19; Bill Redekop, International Trade Group
Optimistic on Prairie Berry, WINNIPEG FREE PRESS, July 21, 2004, at A5;
Robert Colapinto, The Clean-Up Act, CA MAG., May 1, 2004, at 20; compare
with Press Release, Bob Menendez Calls on State Department, Federal
Robert Robb, Kerry Can Imagine But He’s Just a Dreamer, ARIZONA REPUBLIC,

39. See infra Part III.

40. As noted before, reputation is hard to measure and prove empirically.
My “gut reaction” is that Canada’s reputation is better. However, the impres-
sion of one academic does not prove much. Accordingly, I interviewed interna-
tional trade practitioners from the various states’ trade bars, academia, and
from the trade offices of Canada and the United States. Their impressions
substantially accorded with mine.

41. See, e.g., WTO Asbestos Report, supra note 9 (complaint by Canada,
with Brazil and the United States as Third Party Participants, attempting to
force the sale of asbestos onto the European market).
or comparable Canadian actions. For U.S. trade policy, the primary issues examined are:

- a. International Trade Negotiations
- b. Trade Dispute Adjudication
- c. Protectionism
- d. Trade Distorting Regional Agreements
- e. Contentious Trade Issues
- f. Sanctions and Embargoes

Although there are other concerns integral to the examination of U.S. trade policy, these six are generally considered of primary importance.

After reviewing U.S. trade policy, the analysis focuses upon Canadian trade policy in an effort to discern whether Canada has engaged in similar or comparable behavior without incurring a reputational impact equivalent to that of the United States. Indeed, an examination of the trade policy issues in the previous paragraph will show that while Canada’s actions may not be as “egregious” as the United States in some areas, Canada is just as culpable in several others. Beyond some level of culpability, Canada also exemplifies behaviors that are directly comparable to U.S. policy, yet all without the large reputational cost borne by the United States. The following section explores each trade policy issue in detail and identifies behaviors

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42. For example, the United States is considered a difficult state with which to negotiate trade agreements. See infra Part III.A.
43. Including what issues the United States considers worth fighting over, how often the U.S. is labeled a “rule-breaker,” and the aggressiveness of the U.S. in pursuing trade adjudication with other states. See infra Part III.B.
44. For example, the United States is thought to employ excessive domestic protectionism—ranging from agricultural subsidies and application of dumping and countervailing duty laws to the aggressive use of unilateral trade sanctions. See infra Part III.C.
45. See infra notes 79–81 and accompanying text.
46. In particular, the use of international trade law to advance U.S. self-interests in such fields as genetically modified food, hormone additives, and widespread use of antibiotics in its livestock. See infra Part III.D.
47. The United States has used international trade law to further such “non-trade” issues as national security, labor rights, the environment, and human rights. See infra Part III.D.
48. See infra Part III.C.–D.
49. See infra Part III.C.–D.
50. See infra Part III.D.
and actions by Canada that are often comparable to the United States.

A. International Trade Negotiation

International trade agreements tend to follow a pattern. Stage one is trade negotiations. Negotiations are then followed by formal agreements with which states are expected to comply, with non-compliance resulting in interstate disputes which may be concluded through various dispute resolution mechanisms. Thus, it is only fitting that the comparison between the United States and Canada begin where trade law begins, with an examination of the states’ negotiating characteristics.

The U.S. constitutional structure makes it difficult for the United States to negotiate trade agreements. The constitutional requirement of separation of powers gives Congress certain powers over international trade, while giving other powers to the Executive branch. The problems inherent in dividing power over international trade are exacerbated by the constant congressional and presidential election cycles. Furthermore, Congressional participation in the development of trade agreements has historically been fraught with difficulty. The last time Congress engaged in detailed trade legislation, resulting in the Smoot-Hawley Tariff Act of 1930, the log-rolling and pork barrel politics encompassed within the legislation had devastat-


ing effects upon the world trading system during the 1930s. Compounding the problem, Congressional action sometimes suggests mistrust of the Executive branch, including Congress’s refusal to fully support executive deals negotiated without its approval. This lack of trust necessitated Fast Track and the later Trade Promotion Authority, itself a political “hot potato.” Understandably, states are loath to negotiate with the United States under these circumstances. Despite these problems, states do nonetheless negotiate with the United States. Indeed, given the role of the U.S. economy in the world, it would be nearly impossible for states to avoid dealing with the United States. Hence, despite the impediments, the United States has been a major player in the development of the world trading system.

Just as the United States has been integral to the development of the international trade regime, Canada has also played

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55. As exemplified in the confrontation over the results of the Kennedy Round (Final Act Embodying the Results of the 1964-67 Trade Conference, B.I.S.D. (15th Supp.) at 4 (1968) (consisting of multilateral negotiations against dumping practices)). See Renegotiations Amendment Act of 1968, Pub. L. No. 90-634, § 201, 82 Stat. 1345, 1347 (1968) (declaring that the Antidumping Act of 1921 still retains primacy over agreements entered into by the President during the Kennedy Round); S. Rep. No. 89-1341, at 3 (2d Sess. 1966) (expressing the Finance Committee’s concern that the Executive Branch has not been vested with authority to engage in international trade agreements within the Kennedy Round of negotiations, especially as the unfair trade practices involved have effects in the domestic economy, an area within legislative control).


58. See The Economist, supra note 32, at 24, 32 (the United States has the largest GDP in the world and ranks first for total world exports (accounting for just over 15% of all global exports)).
a significant role in international trade negotiations.\textsuperscript{59} The formation of the ground-breaking Canada-U.S. Free Trade Agreement\textsuperscript{60} (CUSFTA) was crucial in the development of the World Trade Organization (WTO).\textsuperscript{61} Thus, it was no surprise that Canada played a key role during the Uruguay Round negotiations that resulted in the international community adopting a new trade system to replace the General Agreement on Tariffs and Trade (GATT).\textsuperscript{62} While receiving help, it was Canadian trade negotiators who developed the contours of the system that was to become the WTO, including being the first to coin the name.\textsuperscript{63} In other words, even though anti-globalization protesters often describe the WTO as a U.S.-created monster, fair attribution, for whatever one believes about the WTO, should also go to Canada.

Regardless of these negotiation successes, Canada, like the United States, can be a difficult negotiating party.\textsuperscript{64} Just as with the United States, Canada’s constitutional structure makes international trade negotiations difficult. Canada’s Constitution provides the provinces with a joint role in certain foreign relations issues, including trade.\textsuperscript{65} Specifically, Canadian

\begin{itemize}
\item 61. See, e.g., id. at 411. The negotiation and development of the CUSFTA, with its broad coverage and binding dispute settlement mechanisms, showed that international trade agreements could provide greater coverage than that provided by the GATT. Id.
\item 62. Canada, along with the European Union, was instrumental in the proposal and acceptance of the idea of using the Uruguay Round to establish a new trade system to replace GATT. Id. See also Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, \textit{Legal Instruments—Results of the Uruguay Round} (1994), 33 I.L.M. 1125 (1994).
\item 63. Jackson, \textit{supra} note 59, at 45.
\item 64. See Hart, \textit{supra} note 60, at 193, 447 (presenting the view that Canadian negotiators were “chiselers” who would “seek[] much and give[] little” in GATT negotiations).
\item 65. Carl Grenier, \textit{States, Provinces, and Cross-Border International Trade}, 26 \textit{Can.-U.S. L.J.} 175 (2000). This is a consequence of the fact that the Canadian constitutional grant of trade authority to the Canadian federal government was originally interpreted narrowly by the Privy Council in London, and later by the Canadian Supreme Court. See Att’y Gen. of Can. v. Att’y Gen. of Ontario (Labour Conventions Case), [1937] 1 D.L.R. 673, 682; see also Patrick
provinces have significant authority over internal trade issues. Consequently, where international trade rules have an impact domestically, the federal government must work with the provincial government to assure provincial assent via provincial legislation. This was an issue in the implementation of the CUSFTA and the North American Free Trade Agreement (NAFTA), and could be problematic in the future if public or provincial attitudes move away from supporting free trade. Thus, constitutional federalism issues play a major role in Canada's participation in the world trade environment.

Constitutional divisions are not the only problem facing negotiators on both sides of the border; ratification and implementation of trade agreements are also problematic. Difficulties ratifying and implementing international trade agreements are well known. U.S. Congressional battles over NAFTA and the WTO and Trade Promotion Authority (previously known as Fast Track) received considerable world attention. Yet, Canada has had problems delivering ratification and implementation of international trade agreements as well. For example, the Mulroney government's successful and arduous negotiation

67. HART, supra note 60, at 388–90.
70. A related problem arises when the federal government uses international trade regulation for actions that would not be allowed under domestic regulation in that such actions may be perceived as discrimination against foreign parties. The result is inadvertent protectionism, but in truth the government's actions are a consequence of the Canadian constitutional division of powers between the federal and provincial governments. For an example of inadvertent protectionism, see Ethyl Corp. v. Can. (Award on Jurisdiction), 38 I.L.M. 708 (NAFTA Art. 11 Arbitral Tribunal 1999).
71. Bipartisan Trade Promotion Authority Act § 2101.
73. Brian Mulroney served as Canada's prime minister between September 17, 1984 and June 13, 1993. For a description of Mulroney's government's
of the CUSFTA was followed by a very tempestuous and uncertain implementation battle. The contentious implementation threatened to change the balance of power in the Canadian Parliament as well as endanger the Prime Minister’s position. Therefore, despite international focus upon U.S. ratification and implementation battles, both states have struggled with the issue.

Finally, the United States has been increasingly criticized for moving away from the multilateral trade development policy exemplified by the WTO and focusing too much energy on bilateral or regional trade agreements. The time, energy and resources expended by the United States on bilateral free trade agreements also detract from the ability and focus of the United States in multilateral negotiations, to the detriment of the WTO’s present round of negotiations. Additionally, while these agreements are beneficial to the parties involved, they have received tremendous criticism as trade-distorting meas-

74. Id. at 389.

75. Following the signing of the Agreement and introduction and implementation of legislation in 1988, the Mulroney government was forced by the Liberal opposition in the Canadian Senate to call an election, the main issue being the implementation of the trade agreement. Id. Nor was it assured that Mulroney would emerge victorious, and, indeed, the popular vote was split on the issue. Id. However, with its “first past the post” election system, the Conservatives actually won the majority needed to force the bill through and the trade agreement with the United States received the Canadian implementing legislation it needed. Id.

76. See Colin B. Picker, A Time to Fight Back: Ending the Abuse of Article XXIV (paper accepted for delivery at International Conference: The WTO at a Crossroads (13-14 December 2004, Faculty of Law, Bar Ilan University, Israel)), available at http://www.biu.ac.il/LAW/wto_conference_draft.htm (last visited Oct. 9, 2004). The United States currently has bilateral or regional trade agreements with Israel, Jordan, Canada, Mexico, Singapore, and Chile. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, REGIONAL TRADE AGREEMENTS, at http://www.ustr.gov/Trade_Agreements/Regional/Section_Index.html. In addition, there are ongoing negotiations with the rest of the Americas as part of the Free Trade Area of the Americas (FTAA), as well as with Australia, Morocco, Panama, Central America and the Southern African Customs Union. Id.

77. See Picker, supra note 76 (citing comparative ease of negotiating regional trade agreements as a factor in states’ preference over more time-consuming multilateral agreements).
ures. For example, it is more likely that a product will trade between two states when there is a free trade agreement, even if the most efficient supplier would be another state outside of the agreement.\(^{78}\)

Canada has similarly placed substantial focus upon development of numerous bilateral and regional trade agreements.\(^{79}\) Specifically, Canada is involved with NAFTA and bilateral agreements with Israel, Chile and Costa Rica.\(^{80}\) In addition, like the United States, there are also ongoing Canadian negotiations with Singapore, the European Free Trade Association, the Central America Four, and as part of the FTAA.\(^{81}\)

Furthermore, the proliferation of regional trade agreements can result in a different sort of harm to the international trade system — an institutional harm.\(^{82}\) Institutional harm occurs when countries resort to bilateral or regional agreements rather than multilateral agreements, resulting in the expenditure of significantly more of a country’s limited negotiating resources on regional agreements than on the ongoing WTO negotiations. Specifically, without strong commitment to the multilateral trade system—such as that provided in the early nineties by Canada in the development of the WTO—the WTO’s development will likely stagnate as countries achieve their trade goals through regional trade agreements.\(^{83}\) Canada’s expenditure of its limited resources and time on bilateral and regional negotiations has an increased potential to hamper continuing develop-

\(^{78}\) See Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 Harv. Int’l L.J. 419, 432 (2001) (discussing the effects on trade regionalism when an economically superior country enters into a bilateral agreement with an economically inferior one).


\(^{82}\) Picker, *supra* note 76. This novel concept is developed in a presentation by the author with likely publication.

\(^{83}\) *Jackson, supra* note 59, at 45.
ment of the WTO because these negotiations divert a large portion of the country’s limited negotiation resources away from the multilateral trade system. In comparison, the United States’ much larger office of the United States Trade Representative (USTR) affords the United States the ability to engage in regional trade agreement negotiations to a significantly greater extent than smaller or less populated states like Canada.  

As shown, the relative harm of regional trade agreement negotiations on the world’s multilateral trading system, the WTO, is therefore likely to be greater when a state like Canada expends its limited negotiating resources on them. In the end, while the United States is castigated as a problematic negotiating partner, examination of Canada’s negotiating characteristics shows it also has problems negotiating and delivering domestic assent to international trade agreements and with squandering scarce negotiating resources.

B. International Trade Adjudication

A state’s reputation is often shaped by its participation in international adjudication, either through the defense of state actions and legislation or through the aggressiveness with which a state seeks to have its international rights protected. Despite the fact that state-to-state dispute resolution is still the exception in foreign affairs, sometimes states choose to bring a case against another state. Diplomatic resolutions are the preferred state-to-state dispute resolution mechanism. Regardless, the modern international trade regimes of the WTO and NAFTA, in contrast to the prior GATT regime, provide for binding state-to-state adjudication. Most revolutionary of all, adjudication under modern trade regimes permits sanctions to

86. See id.
87. WTO Dispute Settlement Understanding, supra note 18; NAFTA, supra note 68, ch. 20.
bring states into compliance.\textsuperscript{88} Hence, these disputes provide a prime opportunity for formation of state reputations. The reputations resulting from trade adjudication can reflect (i) a state’s aggressiveness, (ii) how often its behavior either violates or appears to violate trade rules and, (iii) those actions a state is willing to go to “court” to defend. Accordingly, a comparison of U.S. and Canadian adjudications, from all three perspectives, may help identify similarities and differences that explain the differences and inaccuracies in reputations or help show that their reputations are inaccurate.

1. Aggressiveness

The frequency with which states resort to litigation reveals much about their aggressiveness. Traditionally, countries resolve issues behind closed doors through diplomatic channels.\textsuperscript{89} Taking the unusual step of filing a case against another country is a particularly aggressive action for a state. An examination of the number of cases filed by each country can be used to ascertain a state’s aggressiveness. Using the number of cases filed by individual states may be an imperfect measurement of aggressiveness,\textsuperscript{90} yet it provides a useful tool in comparing the United States and Canada and assessing whether they deserve their respective reputations.

\textsuperscript{88} See, e.g., WTO Dispute Settlement Understanding, supra note 18.

\textsuperscript{89} Alvarez, supra note 85, at 411.

\textsuperscript{90} Examination of the number of cases filed by a country can be a troubling and crude indicator because it involves a “moving target”—i.e., cases and disputes are not static. Furthermore, there may be plenty of disputes that go unreported in which other aggressive pressures are brought to bear but where a complaint is ultimately not filed. See Amelia Porges, Settling WTO Disputes: What Do Litigation Models Tell Us?, 19 OHIO ST. J. ON Disp. Resol. 141, 156 (2003). However, those details are not publicly available and hence will not have as large an impact on the reputation of a state as those that are more widely known to the public. A further problem with examining cases filed in an effort to get at reputation is that the filing of complaints may be limited by the capacity of the legal staff responsible for such cases. Neither the USTR nor the Canadian Department of Foreign Affairs and International Trade have unlimited resources to take on cases. See, e.g., supra text accompanying note 84. However, staff size in itself reflects the aggressiveness of the state, and so the limitation is itself a component in the formation of the reputation.
It is unsurprising that the United States has filed more cases than Canada, as its economy is greater and more diversified. In 2000, the Canadian GDP was $688 billion, while the U.S. GDP was nearly ten trillion dollars. The U.S. economy is over fourteen times the size of Canada’s. This alone suggests that the United States would have to file fourteen times more cases than Canada for the two to be comparable. Examining the actual number of the cases is quite revealing. As of January, 2004, the United States had filed seventy-three complaints with the WTO, while Canada had filed twenty-five. The United States has filed only three times as many cases as Canada. Thus, the United States has filed considerably fewer cases than would be expected considering the size of its economy.

Perhaps, however, a more relevant economic measurement for the purposes of this Article is the relative international trade figures. As an initial matter, it is important to note that Canada’s economy is heavily weighted to trade with the United States. With respect to trade in goods, Canada exports over 85% to and imports almost 74% of its trade from the United States; the United States exports approximately 23% of its trade to and imports 19% from Canada. However, looking at the total world trade figures is merely a starting point. In 2000, the United States had 15.44% of the total world exports, while Canada had 3.81%. In the same year, the United States imported $1.2 trillion and exported $781.9 billion (approximately $2 trillion in total trade), while Canada imported $244.6 billion and exported $284.6 billion ($529.2 billion in total trade).

91. THE ECONOMIST, supra note 32, at 121,122.
92. Id.
94. See WTO Dispute Settlement website, supra note 93.
95. THE ECONOMIST, supra note 32, at 121.
96. Id. at 121, 223.
97. Id. at 32.
98. Id. at 121, 223.
Thus, the U.S. aggregate international trade in goods is about four times greater than Canada’s. However, given that the WTO’s Dispute Settlement Understanding covers trade in services as well as goods, inclusion of trade in services is pertinent to the analysis. Canada’s trade in services in 2003 was $87 billion. The United States traded $500 billion worth of services in 2003. Thus, total trade in goods and services for the United States is approximately $2.5 trillion and for Canada is $616.2 billion. Therefore, we should expect the United States to have filed roughly four times the number of cases as Canada. However, despite Canada’s reputation, the analysis below shows that reality is at variance with expectation.

As previously noted, the United States has filed seventy-three complaints with the WTO and Canada has filed twenty-five. The United States has filed fewer than three times the cases Canada has filed. These figures are essentially consistent with the differing sizes of the two economies. Yet, an even greater differential between the number of WTO cases brought by Canada versus the United States should be expected. This is because the bulk of Canada’s trade is with one state and takes place under the auspices of NAFTA rather than the WTO. Accordingly, many of the disputes will not make it to the WTO’s dispute settlement institutions but, rather, will be resolved under NAFTA’s dispute mechanisms. Furthermore, because

100. Id. ($282 billion in exports, $218 billion in imports).
101. See SNAPSHOT OF WTO CASES, supra note 93.
Canada has a single primary trade destination, it would seem likely that trade tensions would be reduced due to familiarity and alternative avenues for dispute resolution (such as lobbying).  

When these factors are taken into account, one would expect Canada to have filed fewer cases with the WTO than it has. With the relative information in mind, the WTO figures support the view that both states are similarly litigious and, accordingly, similarly aggressive. Indeed, one could argue that Canada is the more aggressive state because its reputation suggests it would file fewer cases. This strongly supports the view that the reputations of the United States and Canada are not consistent with reality.

2. Rule-Breaking

While complaints filed by the United States and Canada may reflect how aggressively each state protects its interests, being named as a defendant in an international trade dispute may reflect perceptions of rule-breaking. To date, eighty-two complaints have been filed against the United States. Of the thirty-eight concluded so far, the United States has prevailed in four, twelve were resolved without adjudication, and the rest are in process. Canada, in contrast, has only been a defendant.

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104. See generally Gregory C. Shaffer, Defending Interests: Public Private Partnerships in WTO Litigation (2003) (describing the relationship of government and industry lobbyists in instituting, prosecuting and derailing trade cases and tensions with foreign companies and countries).

105. The perception that Canada is less aggressively litigious is based upon my interviews of trade practitioners and policymakers, see supra text accompanying note 40.

106. Cf. Sengupta, supra note 21 (describing the potentially irrecoverable reputational impact upon corporations when they are named as defendants in lawsuits).

107. Snapshot of WTO Cases, supra note 93.

108. Id. The United States has won on core issues in the following ten cases: Sections 301-310 of Trade Act of 1974 (EU); “Shrimp–Turtle” law (India, et al.) (compliance proceedings); CVD regulations (Canada); AD–steel plate (India); CVD–German steel (EU); Section 129(c)(1) URAA (Canada); Rules of origin–textiles and apparel products (India); AD–sunset review (Japan); CVD–softwood lumber (final) (Canada); AD–softwood lumber (final) (Canada). Id.

109. Id.
dant in seven cases. This is significantly less than one would expect given the relative sizes of the economies. Yet, when interstate disputes under NAFTA and CUSFTA are included, the numbers change. The U.S. numbers increase from eighty-two to eighty-seven, while Canada's increase from seven to ten. Respectively, this represents an increase of 6.1% for the United States, and 43% for Canada—showing the significance of NAFTA/CUSFTA dispute settlement for Canada as compared with the United States. The ratio of cases in which each state is a defendant also changes, with the United States appearing as a defendant less often. This expanded ratio compares more favorably with the size of each country's economy and takes into account the less diversified Canadian economy. While these numbers will change over time, they are sufficient to show that U.S. and Canadian behavior does not significantly differ with respect to perceived rule-breaking. Certainly, existing differences between the two countries are not sufficient to explain their disparate reputations.

3. Pivotal Cases

While empirical analysis helps compare U.S. and Canadian trade behaviors, NAFTA and the WTO's relatively short time of operation suggests that reliance upon this analysis alone may be problematic. Perhaps a better measure would be to examine...
ine the cases themselves, with a focus on the particularly high-profile disputes. The following section shows that both states may have expended resources on cases viewed with significant revulsion by other parts of the world, yet their reputations have not changed as a result.

Interestingly, the United States and Canada have frequently been involved in the same controversial cases. A classic example is the Beef Hormones case, where the United States was, and continues to be, castigated for its involvement. Depictions of the United States forcing hormone-laced beef on a health-conscious European community were widespread. Yet Canada was an equal partner in the dispute, though it escaped


116. WTO Report of the Appellate Body, European Communities–Measures Affecting Meat Products (Hormones), WT/DS26/AB/R (Jan. 16, 1998) [hereinafter WTO Beef Hormones case]. In the Beef Hormones case, the Appellate Body considered two panel reports, composed of the same three panelists, following a merger of the panel established at the request of the United States in May 1996 and the Panel established in October 1996 at the request of Canada. Id. para. 1. The complaint concerned a prohibition by the European Communities of imports of meat and meat products derived from cattle administered natural or synthetic hormones to promote growth. Id. para. 2. The Appellate Body concluded that the prohibitions violated the Agreement on the Application of Sanitary and Phytosanitary Measures, as the prohibitions were not based on risk assessment under Article 5.1. of that agreement. Id. para. 253.


with its reputation unscathed.\textsuperscript{119} Although the United States and Canada prevailed at the WTO, many Europeans remain very upset about the decision and have been slow to comply with the ruling.\textsuperscript{120} The decision engendered much passion in Europe,\textsuperscript{121} so much so that the EU has suffered serious trade retaliation as a result.\textsuperscript{122} The EU’s reaction to the Beef Hormones decision reflects a widely-held belief that Americans’ unhealthy lifestyle and an American culture is being foisted on the rest of the world—a culture rampant with large and noxious feedlots and concomitant use of hormones and antibiotics.\textsuperscript{123} Yet, despite its involvement in the case, the negative view of the United States has not been extended to Canada.\textsuperscript{124}

While Canada has been allied with the United States in many of the WTO’s most contentious cases, it has also had its own contentious cases. Indeed, perhaps one of the most notorious cases in the WTO pantheon is the Asbestos case, where Canada was squarely in the line of fire.\textsuperscript{125} The Asbestos case, described simply, was a case in which the EU defended against a Canadian challenge to a French import prohibition on asbestos products.\textsuperscript{126} While there were valid arguments concerning which

\textsuperscript{119} WTO Beef Hormones case, supra note 116. Canada and the United States brought simultaneous cases on the same issues. \textit{Id.}

\textsuperscript{120} Indeed, the Europeans recently announced that they would make permanent the ban on products containing at least one of the disputed hormones. \textit{See Office of the United States Trade Representative, WTO/NAFTA Dispute Settlement Update 2} (March 9, 2004), available at \url{http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file316_5697.pdf}.


\textsuperscript{123} \textit{See} Rountree, supra note 121, at 609.

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} WTO Asbestos Report, supra note 9.

\textsuperscript{126} The regulation in question was French Decree No. 96-1133 Concerning Asbestos and Products Containing Asbestos (Decree), which entered into force
provisions of the WTO were applicable to the disputed regulation, the case also challenged French attempts to protect themselves from what they considered harmful asbestos products. The Canadians, in contrast, argued that the first WTO panel erred in finding that the asbestos at issue poses a risk to human health.

Despite the fact that Canada approved the appointed experts, Canada challenged their findings that the asbestos was carcinogenic and could not be safely contained. The WTO Appellate body ruled against Canada on this issue, with some stinging commentary from one of the judges. It is hard to find a case less defensible. Yet, once again, international disdain for Canada’s position does not appear to have lingered for a suffi-


127. Canada maintained that the Decree fell within the scope of the Agreement on Technical Barriers to Trade (TBT Agreement), and that the Panel’s refusal to consider its allegations under this agreement should be reversed as an error of law. WTO Asbestos Report, supra note 9, para. 10–14. Specifically, Canada argued that the Panel incorrectly considered the prohibitions and exceptions in the Decree to be separate measures in determining whether the Decree constituted a “technical regulation” under the TBT Agreement; that it misinterpreted the definition of “technical regulation;” and that it erred in concluding that the TBT Agreement did not apply to a general prohibition like the one in the Decree. Id.

128. Id. para. 16.
129. Id. para 158 (Canada argued that the panel erred “in finding that there is a risk to human health associated with the manipulation of chrysotile-cement [asbestos] products.”).
130. Id. para. 19.
131. Id. para. 152. As stated in the opinion:

It is difficult for me to imagine what evidence relating to economic competitive relationships as reflected in end-uses and consumers' tastes and habits could outweigh and set at naught the undisputed deadly nature of chrysotile asbestos fibers, compared with PCG fibers, when inhaled by humans, and thereby compel a characterization of "likeness" of chrysotile asbestos and PCG fibers.

Id.
cient period to influence Canada's reputation in the same way that more defensible American positions have sullied the reputation of the United States.\footnote{132}

Though Canada has been involved in significantly fewer cases before the WTO, it is nonetheless easy to show its involvement, either directly or in a supportive role, in some of the most criticized cases among the WTO and other trade regimes.\footnote{133} Were one to simply look at the details of international trade cases involving the United States and Canada, it is unlikely that there would be a sufficient basis to support the differences in their trade reputations.

C. Protectionism

Trade reputations are not solely forged battles before dispute resolution bodies. They are also formed with respect to states' internal actions. Within the world trade system, good players are states that employ protectionist measures sparingly and transparently.\footnote{134} The United States, however, has the reputa-

\footnote{132. Shrimp–Turtle Case, supra note 115; Report of the WTO Appellate Body, European Communities–Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (September 9, 1997), 37 I.L.M. 243 (1998). The United States' involvement in the Turtles and Bananas cases was far more defensible, yet it still faced widespread criticism. See, e.g., Dolan, supra note 115. Additionally, I surveyed the law review articles available on the Westlaw database for articles comparing the Asbestos case to the Bananas case. This unscientific, yet telling, survey showed that significantly greater attention was provided to the American Bananas case than to the Canadian Asbestos case.

133. Similarly, there are other examples of contentious cases outside the WTO. For example, a particularly egregious case is the NAFTA case under CUSFTA regarding the U.S. lobster fisheries. NAFTA Arbitral Panel Report, United States Regulations on Lobster, USA-89-1807-01 (May 25, 1990) available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/FTA_Chapter_18/USA/uc89010e.pdf [hereinafter Lobsters Case]. In the Lobsters Case, Canada tried to have a U.S. conservation regulation on lobster catch sizes thrown out under the Free Trade Agreement. \textit{Id.} (The United States enacted an amendment to the Magnuson-Stevens Fishery Conservation and Management Act to prohibit the sale, transport in or from the United States of whole live lobsters smaller than the minimum possession size in effect under U.S. federal law). The Panel, however, ruled in favor of the United States, finding that the United States conservation measure was not in violation of the obligations of the United States under CUSFTA. \textit{Id.} para. 11.1.1–11.2.

134. \textit{See generally} WTO Agreement, supra note 117, pmbl.}
tion of aggressively employing its domestic trade remedies in a manner that results in protectionism.\textsuperscript{135} Further, it has a reputation for providing subsidies for a range of products in order to protect domestic industries.\textsuperscript{136} The United States is, consequently, not considered a good player with respect to protectionist trade policies.

In particular, the United States is criticized for its utilization and administration of safeguard, antidumping, and anti-subsidy (countervailing duty) remedies.\textsuperscript{137} Employment of these mechanisms is viewed, rightly or wrongly, as essentially protectionist.\textsuperscript{138} In part, as a direct response to the historical perception and criticism of the United States’ protectionist practices, the WTO negotiations included specific agreements on antidumping, countervailing duties, and safeguards.\textsuperscript{139} Indeed, antidumping and countervailing duty actions are almost synonymous with U.S. trade law.\textsuperscript{140}


\textsuperscript{140} Recent statistics show that the U.S. is responsible for 72% of countervailing duties, whereas Canada is responsible for 6%. J.G. Castel & C.M. Castle, Deep Economic Integration Between Canada and the United States,
Canada’s actions in this sphere, however, are not much different than those of the United States. Canada, like the United States, engages in a fair amount of activity that should perturb the international trading community. Canada, like other advanced industrialized states, is a heavy user and innovator of these and other trade remedies.\footnote{141} Indeed, Canada had the first antidumping law in 1904, a full sixteen years before the first real U.S antidumping law in 1921.\footnote{142} Another particularly problematic form of protectionism, known as the voluntary restraint agreement (VRA), originated in Canada.\footnote{143} Just as the world trading community’s response to U.S. protectionist mechanisms led to innovative agreements, the VRA was also explicitly prohibited in the WTO.\footnote{144} Similarly, it was prohibitive Canadian restrictions on foreign investments that led to the WTO’s Agreement on Trade Related Investment Measures (TRIMs).\footnote{145}

Examples of such similarity are not confined to history. Canada, like the United States, continues to have protectionist problems. These issues are raised in the generally neutral WTO report on Canada.\footnote{146} For example, despite significant reductions in the majority of goods subject to tariffs, Canada still maintains significant tariffs on textiles, boats, footwear, clothing, wine, cider, sugar, vegetables (during their growing sea-

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\textit{The Emergence of Strategic Innovation Policy and the Need for Trade Law Reform,} 7 MINN. J. GLOBAL TRADE 1, 9 n.28 (1998).

141. See WTO Trade Policy Review, supra note 79, at 41–48. E.g., more than thirty-five countries are subject to Canada’s antidumping measures. \textit{Id.} at 44.

142. HART, \textit{supra} note 60, at 182.

143. \textit{Id.} at 193.


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son), and on cut flowers. Another problematic area concerns the numerous State Trading Enterprises that cover such sectors as alcoholic beverages, dairy products, fish, and wheat.

A specific area of recent concern is the steel industry. The United States received tremendous criticism recently over the protection of its steel industry. The close ties between the U.S. and Canadian steel industries suggested that there was a serious possibility that Canada may have joined in this protectionism. Ottawa has managed, however, to avoid applying the same steel safeguards imposed by President Bush. Indeed, the Canadian International Trade Tribunal determined that tariffs should be imposed, although Ottawa ultimately rejected the recommendation. Nonetheless, Ottawa considered working closely with the United States on joint efforts to deal with this “problem” and in formation of the North American Steel Trade Committee to work out a joint response. Canada's continuing protectionist practices reinforce the similarities between the two states' trade behaviors.

This discussion should not be read as equating Canadian protectionist measures with the United States in all instances. For example, there is no Canadian equivalent to the globally unpopular U.S. section 301 of the Trade Act of 1974. Internationally, section 301 is perhaps the most despised domestic

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148. See, e.g., Michael T. Roberts, The Unique Role of State Trading Enterprises in World Agriculture Trade: Sifting Through Rhetoric, 6 Drake J. Agric. L. 287, 290 (2001) (“Loosely defined, STEs are enterprises authorized to engage in trade and owned, sanctioned, or otherwise supported by the government. Special or exclusive privileges granted by their governments allow STEs to influence through their purchases or sales the level or direction of trade in their commodities.”).
149. WTO Trade Policy Review, supra note 79, at 75; see also Roberts, supra note 148, at 294.
150. Indeed, steel is a primary focus of recent Canadian domestic trade measures. See, e.g., WTO Trade Policy Review, supra note 79, at 44–45.
152. Id.
153. Trade Act § 310 (The Act allows the President to take action against any country which has acted against the trade interests of the United States).
trade law. Indeed, the United States employment of section 301 provided the stimulus at the Uruguay Round for the creation of binding dispute settlement procedures to wean the United States from employment of its unilateral Section 301 actions. Alternatively, Canada has historically used globally unpopular protective devices, such as cultural protections, not available in the United States. At times these protective devices have fallen afoul of Canadian international trade commitments. A salient example of cultural protectionism can be found in the WTO Magazines case. In that case, Canada attempted to protect Canadian magazines by restricting foreign advertising in Canadian versions of foreign magazines. The WTO found Canadian measures to be a violation of Canada’s national treatment obligations under the WTO.

In addition to trade remedies, protections may also take the form of assistance to industry or other sectors of the economy. Indeed, large subsidies provided to agriculture have caused the United States’ reputation to suffer tremendously in recent years. Despite talk by the U.S. government of its commitment to trade liberalization and reducing barriers around the world, the farm subsidies in the Farm Security and Rural Investment

159. Id.
160. Id. at 479–80.
Act of 2002 (2002 Farm Act)\textsuperscript{162} shocked the global trading community.\textsuperscript{163} The 2002 Farm Act reversed the move towards liberalization of U.S. agriculture that started in the 1996 farm bill.\textsuperscript{164} The 2002 Farm Act authorized the expenditure of tens of billions of dollars in subsidies over a ten-year period.\textsuperscript{165} The international trading community was stunned and dismayed by this change of direction.\textsuperscript{166} The subsidies continue to impinge upon the United States’ reputation as a champion of free trade.\textsuperscript{167}

Canada has no shortage of domestic subsidies either, including significant protections for its vast agricultural sector.\textsuperscript{168} Historically, while Canada has pushed agricultural trade reform, it was politically unable to dispense with protections for some of its agricultural sectors.\textsuperscript{169} For example, Canada’s dairy and poultry sectors are protected from international competition.\textsuperscript{170} These sectors are regulated under a “supply management” framework.\textsuperscript{171} The dairy sector has received over a third of the government’s subsidy monies and has its production strictly controlled through the Canadian Milk Supply Management Committee.\textsuperscript{172} Other agricultural recipients of economic support include those sectors taking part in the Spring Credit Advance Program, which allows them to receive interest-free, govern-

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166. Johnson, supra note 163, at 442.
167. Id.
169. See Hart, supra note 60, at 446. Canada accomplished this by eliminating subsidies, rationalizing protectionist measures and generally moving the sector to be more in tune with the advances in other economic sectors. Id.
172. OECD AGRICULTURAL POLICIES, supra note 164, at 121.
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ment-guaranteed loans to assist in planting. Additional subsidies are supplied through the Crop Insurance Program, which has made record payments in recent years because of ongoing drought conditions. Admittedly, Canada has recently embarked on a New Agricultural Policy Framework. However, it remains unclear what impact this Framework will have on Canadian agricultural subsidies and protections.

As evidence of the impact these protections should have on Canada’s reputation, Canada’s agricultural protections have repeatedly been the subject of dispute settlement proceedings at the WTO and NAFTA. For example, the Canadian dairy and poultry supply management system was challenged in the first state-to-state settlement proceedings before the NAFTA. Thus, Canada, like the United States, has gone to great lengths to protect its agricultural sector.

To the extent agricultural protections influence world reputation, the similarity between Canadian and U.S. agricultural protections suggests that the reputations of the two should be comparable. Furthermore, agriculture is merely one example of the similarities between the two states in engaging in protectionist measures to safeguard domestic industries and interests. While there are differences in their protectionist styles,
these differences do not justify the significant differences in reputation.

D. Additional Evidence of Reputational Differences Between the United States and Canada

In addition to the previously mentioned trade irritants practiced by the United States, there are a host of peripheral issues that contribute to the U.S. position in the world trading system. Some of these issues will be discussed below; however, it should be noted that there are too many to be covered within the scope of this Article. Like the previous section, this section will compare U.S. actions and equivalent or comparable Canadian actions.

One of the most contentious international trade issues is the use of WTO commitments to open markets to new and troubling technological and scientific developments.\(^\text{179}\) Examples include the use of beef hormones, genetically–modified food, and widespread use of antibiotics in livestock.\(^\text{180}\) The United States is heavily criticized for pushing the technological envelope despite concerns about the harmful effects of these new technologies.\(^\text{181}\) Yet, in almost all of these areas the United States is not alone. Canada also pushes the envelope with respect to these same areas—no doubt a reflection of their similar economies.\(^\text{182}\)

Another divisive area in international trade is the inclusion of allegedly “non-trade”-related issues such as environmental, labor, and human rights into trade agreements.\(^\text{183}\) The United States has periodically pushed for the inclusion of environ-


\(^\text{180}\) Id.


\(^\text{182}\) See, \textit{e.g.}, \textit{WTO Trade Policy Review}, \textit{supra} note 79, at 17.

mental safeguards and labor rights in trade agreements.\textsuperscript{184} Their inclusion in NAFTA was at the United States’s instigation.\textsuperscript{185} These “non-trade”-related commitments are highly unpopular in much of the world.\textsuperscript{186} They are often considered unrelated to traditional notions of international trade and, instead, are thought of as attempts by interest groups in the developed world, such as organized labor, to provide hidden protectionist benefits.\textsuperscript{187} It is argued that enforcement of labor, environmental, and human rights provisions would erode the comparative advantage of developing states where, for example, labor inputs are cheap and environmental regulations are either unenforced or nonexistent.\textsuperscript{188} Perceptions of states’ human rights enforcement, conversely, are often viewed as easily manipulated by outside states for their own political goals. Furthermore, the content and coverage of human rights provisions can reflect the requesting party’s cultural biases.\textsuperscript{189}

Due in part to concerns, for example, that environmental issues will come back to haunt it, Canada has not been as assertive as the United States on these issues. Still, Canada has continued to argue for the inclusion of

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core labor standards and multilateral environmental agreements in the WTO.\(^\text{190}\)

A related area of great international concern is the use of trade to further national security and foreign policies.\(^\text{191}\) Of particular importance is use by the United States of unilateral export controls, sanctions, and embargoes to further its own foreign policy and national security goals.\(^\text{192}\) Controls, such as the embargo on Cuba,\(^\text{193}\) raise considerable ire around the world.\(^\text{194}\) This is particularly true when controls are imposed extraterritorially on non-U.S. persons.\(^\text{195}\) Sometimes, states even go so far as to enact laws specifically prohibiting their citizens from complying with U.S. laws.\(^\text{196}\) These U.S. actions have done much to tarnish its reputation.\(^\text{197}\)

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\(^{192}\) See, e.g., Iranian Assets Control Regulations, 31 C.F.R. Part 535.


Canada also has foreign policy and national security sanction laws. Yet, the bulk of Canada’s sanctions are multilateral, pursuant to United Nations Security Council resolutions. Nonetheless, Canada reserves the right to enact unilateral or multilateral sanctions that are not Security Council-authorized. Still, this is a far cry from the sanctions and embargoes pursued by the United States. Trade behaviors that further national security and foreign policy goals provide an example of differences between the two states, though one which may simply reflect U.S. involvement in geopolitics to an extent not shared by Canada. Thus, these few examples generally show that even in peripheral areas of international trade there are insufficient differences to justify the two states’ dissimilar reputations.

IV. REPUTATIONAL FALLACY AND INTERNATIONAL LAW

As discussed earlier, reputation is viewed as an important mechanism in the smooth operation of the international legal system. Yet, as the previous section demonstrates, reputation may not reflect the reality of state behavior. The disparity between a state’s reputation and its behavior leads to a few questions: (1) what is the source of this reputational disparity, (2) what is or should be the real role of reputation in international law, and (3) what are the consequences if state reputation is not reasonably related to state actions? In exploring possible answers to these questions, the following section will delve into potential factors outside the trade arena that may influence reputation. The discussion will then turn to the benefits for individual states and the international legal system when reputation is scrutinized and reputational fallacies are exposed.


199. See, e.g., The Special Economic Measures Act, R.S.C., ch. 17 § 4(1) (1992) (Can.) (allowing the Governor in Council to order seizure or freeze any property held by foreign states of foreign nationals when s/he believes there has been a grave breach of international peace and security).

200. See Guzman, supra note 7 and accompanying text.
A. Non-Trade Action Sources of International Legal Reputations

The previous section of this Article showed that similarities in the behavior of Canada and the United States in international trade produced disparate international reputations for the two states. While there may be a whole host of reasons for this phenomenon, two possible causes stand out: reputational spill-over and differing levels of interaction among states. In other words, the general reputation of the United States or Canada in international affairs spills over into the trade arena and/or other states have radically different levels of interaction vis-à-vis the United States and Canada, with a concomitantly different impact upon each state’s reputation.

States’ reputations are not based solely on a state’s activities within one specific field. Rather, their reputations reflect the whole gamut of their behavior across widely-dispersed fields. Reputation earned in one or more fields may “spill-over” into another field. Thus, isolating cause and effect in the creation of state reputation within one remote field can be difficult, if not impossible. While it is true that reputation can be established narrowly within a field by looking at a single action, when examining the field as a whole it is harder to isolate the cause of that reputation. This is especially true for a state such as the United States, which is very active in many parts of the international environment and tends to have a profound impact on the world in many different arenas.

Unfortunately, and for reasons beyond the scope of this Article, the generalized world impression of the United States is strongly negative. For example, the United States is the global symbol of negative market forces such as capitalism, globalization, and the spread of materialism—despite the fact that other states are equally involved in these movements.

201. A narrow area for establishing reputation could be paying United Nations membership dues; however, expanding the analysis to a state’s general relationship with the United Nations or other multilateral institutions makes determination of the exact factors influencing reputation extremely difficult. But see Downs & Jones, supra note 7, at 109–10 (claiming that states have multiple reputations in varying international arenas).


203. See Elemer Hankiss, Symbols of Destruction, in SOCIAL SCIENCE RESEARCH COUNCIL: ESSAYS ON 9/11 (2001) (describing the U.S. position as the
With the widespread unpopularity of these movements at various times, anti-Americanism has become commonplace.\textsuperscript{204} Indeed, there is now a visceral negative reaction by many around the world to anything American.\textsuperscript{205} Anti-Americanism has itself become a part of the world’s culture.\textsuperscript{206} True, there are periods where negative responses to America are momentarily replaced with a more positive view, such as after the World Trade Center attack,\textsuperscript{207} or in Eastern Europe for the brief period following the fall of Communism and the disintegration of the Soviet Union.\textsuperscript{208} However, the default view is that America and its international activities reflect the wrong side of an issue.\textsuperscript{209} Given the depth of feeling arrayed against the United States, it would not be surprising if some negative feelings were directed at the activities of the United States in international trade, regardless of actual U.S. trade activities.

Consequently, the world’s negative view of U.S. trade activities, and its correspondingly more positive view of Canada’s, is predictable in light of the “spill-over” effect. The “spill-over” effect appears to exist despite the fact that specialized state officials may come to know the reputation of a state in a specific field. This may occur because a state, while having different compliance rates within specific fields, will still have an overarching reputation driven by national strategies, domestic politics, constitutional concerns, traditional relationships, and so
The overarching reputation may spill over into the minds of practitioners and government officials. These individuals, normally focused on narrow parts of specific fields, may then be affected by the overarching reputation and believe that the overarching reputation represents a state better than their individual perceptions based on a limited level of interaction.

Another possible explanation for the reputational difference between the United States and Canada is the radically different levels of interaction they have with other states. A different relative presence on the world stage is likely to produce different reputations. It is clear that most states interact with Canada far less frequently than with the United States. As noted earlier, Canada’s economy is less diversified and smaller than the United States. Canada also trades almost exclusively with the United States. Therefore, only a small portion of Canada’s comparatively smaller volume of trade impacts other states. As a result, Canadian policies, trade, and governmental actions have less opportunity to upset other states. In contrast, the much larger U.S. economy trades a relatively small portion of its economy, roughly 22%, with Canada. This leaves a considerable amount of U.S. trade for the rest of the world, thus providing significantly greater opportunity for conflict.

An economic data analysis supports the conclusion that increased contacts with other states may influence reputation. In 2000, Canadian exports and imports from non-U.S. economies accounted for just under $107 billion. The United States, in contrast, exported and imported $1,589 billion from non-

210. But see, Downs & Jones, supra note 7, at 101–04 (arguing that reputation will be field-specific, and arguing against the “unitary” reputation theorists).

211. Perhaps more troubling than the infection of trade specialists with the overarching reputation, despite their perceptions to the contrary, is the corresponding inference that the generation of the overarching reputation may occur despite the respective trade activities of the United States and Canada. In other words, there is very little that could be done by each of these states within international trade to alter their reputations.


213. See The Economist, supra note 32, at 122 (85% of Canada’s trade is with the United States).

214. Id. at 223.

215. Id. at 121.
Canadian economies. In other words, the United States has roughly fifteen times as much trade interaction with other states as Canada does, and, hence, roughly fifteen times as much opportunity to create a reputation with those states. It is therefore reasonably predictable that states will think more about their impression of the United States, whereas they will have little or no experience with Canada upon which to make a reputational determination. Furthermore, if one does not have experience with another state, it is difficult to form a negative view of that state. In contrast, interacting with the United States is bound to cause both negative and positive experiences—though the negative tends to be focused upon by individuals and the media.

As with reputational spill-over, interaction between states is, in significant part, out of the hands of the states themselves. Neither the United States nor Canada is able to easily change its level of interaction with other states. Certainly, U.S. trade policy-makers will not be able to single-handedly change the global reputation of the United States that spills over into the trade field. This impotence is a significant issue for the utility of reputation in international law.

B. Reputational Fallacy: Problems and Solutions

The impact of state reputation can be significant, hence, reputation needs to be accurate and reflect the real behavior of states. Reputations will often be out of the control of the states themselves, therefore an international effort to correct or compensate for reputational fallacies is vital to the health of the international legal system. Accordingly, states’ reputations must be thoroughly examined. Discovery of inaccurate reputation must be exposed. Such exposure will produce tangible benefits for the individual states themselves and for the international law system as a whole.

216. Id. at 223.
218. See infra Part I, IV.B.2.
219. See infra Part IV.B.1.–B.2.
1. Exposure of the Fallacy and the Individual States

Correcting a reputational falsehood can have immediate impact upon states that act similarly but have different reputations, such as the United States and Canada. Exposure of the falsehood may, as an initial matter, serve to publicize the problem and therefore bring it to the attention of trade specialists, some of whom will hopefully be instrumental in the development of the world trading regime. Specialists may also find discussion of reputational fallacies helpful in understanding attitudes toward states during multilateral proceedings. Discussion of reputational fallacies may also serve broader goals than simply informing experienced negotiators. It may also provide specific benefits to the individual states that have lived under a false reputation—states that often believed the reputation to be accurate, even as to themselves. Thus, for example, exposure of the reputational fallacies associated with the United States and Canada may bring specific therapeutic and instrumental benefits to each country.

Discussion of reputational fallacies may prove to be of therapeutic benefit to Americans. Many Americans traveling overseas are embarrassed by perceptions of U.S. behavior—perceptions often shared by Americans themselves. This perception is evinced by Americans who masquerade as Canadians while traveling in Europe by sporting a Canadian flag on their backpacks! While such a scenario is not a serious issue, it reflects the worldview of Americans when placed in international settings that may include more serious venues than the banter in a youth hostel lounge, including venues such as multilateral


221. See, e.g., Alice Thomas, Water Bottles A Sure Sign of Yanks Abroad, COLUMBUS DISPATCH, Aug. 12, 2004, at B8 (“feeling like moving targets, Americans abroad have adopted their own kind of camouflage...[some] have been known to attach Canadian flags to their backpacks”); Nicholas Stein, Newsmen and Con Men: That Trustworthy Canadian Accent Works Very Well With American TV Audiences. But Trustworthiness Has an Evil Twin..., FORTUNE, Feb. 23, 2004, at 56 (“when American teenagers travel abroad, many affix a Canadian flag to their backpacks — the maple leaf often gets a warmer reception than the Stars and Stripes.”).
negotiations and other international law activities vital for the interests of the United States. As the comparative analysis of U.S. and Canadian reputation suggests, the United States is, in many ways, just another state, albeit one with greater presence and muscle. Accordingly, at least with respect to international trade, there is no reason for an American to hide behind a Canadian flag. 222 Therapeutically, it would do Americans good to know that the United States is just another state.

Canada could also benefit therapeutically from the discussion of reputational fallacies. Canada’s national self-image, Anglo-Canada’s at least, at times has been defined in terms of being unlike the United States. 223 Even if this is true only in small measure, understanding reputational fallacies associated with Canada and the United States may help purge this element of the Canadian national character. Perhaps the realization that Canada and the United States are similar in their external relations will free Canada from comparing itself with the United States when considering its own identity. Canada is sufficiently unique that it need not compare itself to the United States in order to fully realize its own identity. Canada’s real identity does not lie within the fallacies propagated on the foreign stage, but, rather, on its own unique history and culture.

In addition to providing therapeutic benefits to both Canada and the United States, exposing their reputational fallacies should also produce tangible bilateral and multilateral benefits in the world trading system. Purging their reputational fallacies should impact the United States–Canada relationship, placing it on a more accurate footing. Increased understanding of the actual attributes of each nation would contribute to the

222. Ironically, in matters of trade law, if not in other areas as well, the masquerade is likely to be successful given the remarkable level of similarity between the two states.

223. See, e.g., John Sullivan, The Lessons of Madrid: Canadians Are in Mass Denial About Terrorism, WINNIPEG FREE PRESS, March 21, 2004, at B6 (suggesting humorously, but nevertheless exposing something of Canadian’s national self-image, that “[t]he United States’ contributions to world culture are bourbon and the 12-bar blues; ours is anti-Americanism.”). Atkey, supra note 156, at 179. This is not to suggest that Canadians are averse to engaging in scathing self criticism, see, e.g., Murray Dobbin, Canada Is a World-Class Trade Bully, NAT’L POST, Nov. 12, 2001, available at 2001 WL 29559593. Though, given their world reputation, they may be the only real critics of their own policies.
development of this important bilateral relationship, as well as provide a better basis for joint involvement at the multilateral stage.

A truer understanding of each state’s behaviors and actions may serve to “normalize” the relationship between the United States and Canada. Canadians should benefit from a more balanced view of U.S. trade policy when they realize the substantial similarity of the two states in this field. Similarly, showing the United States that Canada has similar trade behaviors and is not a characterless “goody two-shoes” should help the United States appreciate Canada for its strength and independence on the world stage. Hopefully, this will encourage the United States not to take for granted its special relationship with Canada. Given the substantial integration of the two states economically, socially, and geographically, such normalization is long overdue.  

The multilateral trading system will also benefit from debunking U.S. and Canadian reputational fallacies. Canada will profit by being regarded in a truer light during negotiations. The United States will benefit from international recognition that it is not so different from the more favorably-viewed Canada. Clarification that Canadian behavior is substantially similar to that of the United States should result in a realization by other international actors that the United States is just like everybody else—though spotlighted more often than other nations—and, hence, should receive equal treatment regarding its trade actions. Increased honesty in assessment of states should allow increasingly transparent and honest negotiations, thus, allowing states and their negotiators to more accurately respond to specific proposals, rather than the reputation of the state advancing the proposal. This should serve to place Canada, the United States, and other states on a more level footing during negotiations and international interactions.

224. See, e.g., NAFTA, supra note 68 (a trade agreement that affects both the U.S. and Canadian economies). Remember the recent electrical blackouts throughout the Northeast of the continent were transnational. See CNN.com, Power Returns to Most Areas Hit by Blackout, Aug. 15, 2003 (the blackout affected areas from Michigan to New York in the United States, and as far north as Toronto, Canada), available at http://www.cnn.com/2003/US/08/15/power.outage/.
2. Exposure of the Fallacy and the International Legal System

In addition to helping states directly impacted by an inaccurate reputation, exposure of reputational fallacies will also positively impact the international legal system. As an initial matter, employment of inaccurate reputation disrupts the utility of reputation as an enforcement mechanism. After all, it is difficult to shame a perceived rule-breaking state into compliance when that state’s reputation of being a rule-breaker is inaccurate. Furthermore, it is questionable what a state can do to change its behavior, and hence its reputation, if it is already in compliance with relevant areas of international law. Additionally, as was shown in the trade context, a state may have little ability to change its reputation in a specific field. Thus, while the United States may make behavioral changes and modify some rules out of shame or fear of sullying its reputation, its reputation is unlikely to change. This scenario exemplifies why it is crucial to ensure that reputation be accurate.

The consequences of these scenarios—that a state is the victim of inaccurate reputation and that other states can behave the same and be viewed more positively—may undermine respect for the international system and/or encourage unlawful activity by states. After all, a state may believe that compliance with international law is not beneficial if it will continue to be regarded as disreputable when compared with other similarly situated states, regardless of its actual behavior. Similarly, the legitimacy of the international legal system becomes questionable when states that behave similarly are not subject to the same sanctions—in this case, the sanction of a bad reputation and all the accompanying negative consequences.

In addition, inefficiencies will be introduced into the system. For example, if the world’s view of America’s employment of domestic trade mechanisms, such as antidumping actions, was inaccurate, then antidumping provisions of the WTO or the ongoing negotiations on dumping actions during the present negotiating round may consequently be unnecessary, inefficient, or out of touch with reality. This may not be the case, however, it

226. Even if some modification of U.S. reputation resulted from behavioral changes, the United States is still likely to suffer a relatively worse reputation than states which exhibit substantially similar behavior.
provides an effective example of how reputational fallacies can impact the larger international legal system. Accordingly, exposure of reputational fallacies and recognition of the potential distortions and consequences for the international legal system are necessary to protect the system from illegitimacy, inefficiencies, and unjust results for specific states.

V. CONCLUSION

Reputation can play a useful role in international law. Among other things, it can inform other states of a state’s behavioral propensities. Reputation may also serve to encourage state compliance with international law, as states attempt to shake off the effects of a negative reputation. However, as shown in the context of the international trade reputations of the United States and Canada, state reputations share much in common with individual reputation and village gossip—they can represent unsupported assumptions and reflect views derived from unrelated fields and activities. While it would not be proper to extrapolate the findings in this Article to states’ reputations in all fields, nonetheless it concludes that concern regarding reputations and their accuracy is merited. Reputational fallacy is especially problematic considering the impact that reputation can have on interstate interactions — from international dispute adjudication to negotiations. Additionally, fallacies can have a negative impact within a state and contribute to an invalid self-image. They may also contribute to strained relations between neighboring states, as with the United States and Canada. Accordingly, it is important to establish the accuracy of reputations, or work to make them more accurate through increased transparency and information dissemination.

Understanding that reputational inaccuracies are commonplace is the first step in exposing reputational fallacies. Due to the normative foundations of reputation determinations, it may not be possible, or desirable, to establish whether a state is a good or bad actor. Therefore, at a minimum, accurate state reputations can and should be established comparatively. Thus, examination of different states’ actions in international law fields will elucidate whether states should have different
reputations based on different behaviors. Purging reputational fallacies from international law is entirely possible. Removal of reputational fallacies in the international system would mean that states with similar behaviors would have comparable reputations in each field. Additionally, field-specific reputation would not be impacted by reputations from other unrelated fields or by a state’s level of interaction with other states. Achieving this goal will go a long way towards minimizing the negative impacts of fallacious reputations on states and the international legal system.

227. Indeed, such empirical research into reputation has occurred in the field of transnational corruption and bribery, where reputation is established through surveys of those directly involved in the transactions at issue. See TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTION INDEX 2003, at http://www.transparency.org/cpi/2003/cpi2003.en.html. Published annually, Transparency International’s research is invariably surprising in its ability to show that the incidence of bribery among countries is not always what one would expect. Id. A perfect example is the relative position of the United States and Chile (positions: 18th and 20th least corrupt, respectively), or Italy and Kuwait (tied at 35th least corrupt) or that Hong Kong is considered less corrupt than the United States. Id.
TRIPS AGREEMENT: TOWARDS A BETTER PROTECTION FOR GEOGRAPHICAL INDICATIONS?

José Manuel Cortés Martín

I. INTRODUCTION

Geographical Indications (GIs) are intellectual property rights. Like trademarks or commercial names, GIs are distinctive signs which permit the identification of products on the market. They do not, however, protect products or production methods as such, but, rather, confer to all producers from a given geographical area the exclusive right to use a distinctive sign to identify their products if they possess a given quality, reputation, or other characteristic attributable to their geographical origins.

Prior to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS or the TRIPS Agreement), source indications with geographical significance comprised two categories: appellations of origin and indications of source. ApPELLA-

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2. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, art. 1.2, 33 I.L.M. 81 (1994) [hereinafter TRIPS] (“For the purposes of this Agreement, the term ‘intellectual property’ refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.”). Section 3 of TRIPS refers to Geographical Indications. TRIPS came into force in 1995, and had effect in developed countries – including the United States – as of January 1, 1996. Developing countries, however, had until January 1, 2000 to comply with the TRIPS standards with respect to GIs and the least-developed countries have until January 1, 2006 to comply.
3. Historically, GIs have been given various definitions, but TRIPS defines them as, “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.” Id. art. 22.1.
tions of origin signify not only the geographical region from which products originate but also specific features of the products which result from the natural and human factors in their particular locale.\textsuperscript{4} Indications of source merely state where the product was made.\textsuperscript{5} The TRIPS Agreement created a single category for such indications, GIs, which is broader than indications of source, but does not incorporate the natural and human factors of appellations of origin.\textsuperscript{6} For purposes of this discussion, the TRIPS definition of GIs is the most relevant. GIs are instruments designed to protect a product’s reputation\textsuperscript{7} and differ from patents and copyrights in that they are not specifically designed to reward innovation.\textsuperscript{8} Rather, they reward producers situated in a certain region who follow production practices and customs associated with that region.\textsuperscript{9} GIs reward goodwill and reputation created or built up by a group of producers over


\textsuperscript{5} See F. Addor & A. Grazzioli, \textit{Geographical Indications Beyond Wines and Spirits – A Roadmap for a Better Protection for Geographical Indications in the WTO TRIPS Agreement}, \textit{5 J. of World Intel. Prop.} 865, 867 (2002) (defining an indication as, “any expression or sign used to indicate that a product or a service originates in a country, region, or a specific place without any element of quality or reputation”).

\textsuperscript{6} See TRIPS, \textit{supra} note 2, art. 22.1 (“Geographical indicators are, for purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”).

\textsuperscript{7} See id. art. 22.2.

\textsuperscript{8} A patent for an invention is the grant of a property right to the inventor, issued by the Patent Office. \textit{Id.} art. 27. A copyright is the legal right granted to an artist, author, computer user, musician, playwright, publisher, or distributor to exclusive publication, production, sale, or distribution of a literary, musical, dramatic, or artistic work. \textit{Id.} art. 9.

\textsuperscript{9} TRIPS, \textit{supra} note 2, art. 22.1.
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many years and, in this sense, operate to maintain traditional knowledge and practices.\(^{10}\)

GIs benefit consumers by providing reliable information and assurances of authenticity\(^{11}\) and, if used in a proper, well-protected way, can become effective marketing tools of great economic value.\(^{12}\) Indeed, GIs convey the cultural identity of nations and regions and make it possible to add value to a country’s natural riches and to its population’s skills.\(^{13}\) In order for these benefits to become a reality, it is necessary to protect GIs at the international level.

Historically, GIs have received little international protection. Before 1994, the protection of GIs in international fora was limited to three international instruments under the auspices of the World Intellectual Property Organization (WIPO): the Paris Convention;\(^{14}\) the Madrid Agreement;\(^{15}\) and the Lisbon Agreement.\(^{16}\) The Paris Convention is a widely-recognized international agreement, while the other two suffer from limited membership.\(^{17}\) It was during the Uruguay Round\(^{18}\) that trade in in-
tangibles was included, for the first time, in multilateral trade negotiations, resulting in, among others, the TRIPS Agreement, which technically is Annex C of the treaty that created the World Trade Organization (WTO). TRIPS covers a broad range of intellectual property rights and regulates the availability, scope, and use of these intangible assets. The inclusion of GIs caused heated debates during the Uruguay Round and continues to generate discussion between the new and old world. Like many aspects of the Uruguay Round negotiations, the disagreement among Members impeded the creation of a complete system for the international protection of GIs.

Regrettably, compared to other intellectual property rights, protection of GIs at the international level remains inadequate. In addition to the legal uncertainty that TRIPS provisions continue to generate, many countries feel that the current level of protection provided for GIs fails to prevent free-riding on the reputation of genuine GIs. WTO Negotiators in the Uruguay Round visited Oct. 19, 2004). As of October 4, 2004, only twenty-two States are members of the Lisbon Agreement. A list of the Members of the Lisbon Agreement is published on the WIPO website, at http://www.wipo.int/treaties/en/documents/pdfj-lisbon.pdf (last visited Oct. 19, 2004).

18. The World Trade Organization is the outcome of a "negotiating" process – the Uruguay Round of Multilateral Trade Negotiations – launched by Ministers of GATT Members, who met at a Special Session of the GATT Contracting Parties at Punta del Este, Uruguay, in September 1986. The negotiations and process ended with the signing of the Final Act of the Marrakesh Agreement in April 1994 at Marrakesh, Morocco.

19. See TRIPS, supra note 2 (the intellectual property rights covered by the TRIPS Agreement are Copyright and Related Rights, Trademarks, Industrial Designs, Patents, Layout-Designs (Topographies) of Integrated Circuits, Protection of Undisclosed Information, and Control of Anti-Competitive Practices in Contractual Licenses).

20. See id. arts. 22, 63.

21. See Jorg Reinbothe & Anthony Howard, The State of Play in the Negotiations on TRIPS (GATT/Uruguay Round), 13 EUR. INTELL. PROP. REV. 157, 161 (1991). On the one hand, some European countries, representing the old world, have a long tradition of protecting this type of intellectual property. On the other hand, the United States, Canada, Australia, and New Zealand, among others, representing the new world, have not historically had separate laws to protect GIs, apart from their respective systems of trademarks.

22. See WTO Council for TRIPS, Communication from Bulgaria, Cuba, Cyprus, the Czech Republic, the European Communities and their Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzer-
Round were conscious of these deficiencies and, thus, mandated ongoing negotiations to continue the commitment toward improving intellectual property rights. One of these areas is negotiations concerning the establishment of a multilateral system of GI notification and registration. These negotiations began in 1995 and have yet to produce any real results. While some countries are in favor of granting further GI protection, others wish to maintain the status quo.

The purpose of this Article is, first, to describe how the WTO strives to secure effective protection for GIs, and, second, to explore the prospects for further development based upon these ongoing negotiations. In order to accomplish these objectives, the Article must first review the international protection of GIs prior to and under the TRIPS Agreement, followed by reviews and critiques of the various proposals for a multilateral system of registration set forth during negotiations. Next, the Article considers the appropriateness of expanding the system to establish additional protection for products other than wines and spirits. The Article then concludes by arguing in favor of further GI protection and for WTO Members to shoulder their responsibility by providing greater protection for GIs. Doing so ensures that TRIPS remains an effective multinational treaty and sets an example for compliance by other Members. This compliance would be particularly helpful for developing countries which are becoming aware that products identified with their country, or a given region within their country, can contribute mightily to their economic development.

II. INTERNATIONAL PROTECTION OF GEOGRAPHICAL INDICATIONS PRIOR TO THE TRIPS AGREEMENT

As stated in Section I, prior to the TRIPS Agreement, the Paris Convention, Madrid Agreement, and Lisbon Agree-


24. See TRIPS, supra note 2, art. 23.4.

ment were the only noteworthy international treaties which provided GI protection. Unfortunately, the Paris Convention suffered from vagueness in terms of GIs, while the Madrid and Lisbon Agreements suffered from limited memberships.

A. The Paris Convention

Undoubtedly, the Paris Convention became the most important treaty adopted in the late nineteenth century because it influenced intellectual property laws adopted by many countries throughout the twentieth century. This treaty was the first multilateral agreement to provide protection for GIs, although it was rather general and weak when compared to the protections afforded by the TRIPS Agreement.

The Paris Convention’s large number of Member States agreed mainly to border measures for false indications without defining the conditions for protection. Under the Paris Con-

27. Lisbon Agreement, supra note 4.
28. The Paris Convention was agreed to in 1883 and was complemented by the Madrid Protocol of 1891. It was further revised in Brussels (1900), Washington (1911), The Hague (1925), London (1934), Lisbon (1958), Stockholm (1967), and amended in 1979. The Paris Convention, as of August 25, 2004, had 168 signatory states. The complete list of signatory countries, as of July 15, 2004 is available at http://www.wipo.int/treaties/en/documents/pdf/d-paris.pdf (last visited Aug. 25, 2004). Up to the last decade, the history of the Paris Convention has been the history of international harmonization of industrial property laws and procedures. The 1883 Paris Convention laid the foundation for this movement. See Friedrich-Karl Beier, One Hundred Years of International Cooperation – The Role of the Paris Convention in the Past, Present and Future, 15 INT’L REV. OF INDUS. PROP. AND COPYRIGHT L. 1 (1984) (stating that “[t]he Paris Convention became the basic instrument for the protection of inventions, industrial designs trademarks and trade names, and for the protection against unfair competition on a worldwide level”). Typical for the time, the movement for extension and harmonization of the regimes for the protection of industrial property had its origins in industrialized Europe. The accession to the Convention by other countries shows how quickly the ideals of the Convention spread eastward.

29. See generally JOSÉ MANUEL CORTÉS MARTÍN, LA PROTECCIÓN DE LAS INDICACIONES GEOGRÁFICAS EN EL COMERCIO INTERNACIONAL E INTRACOMUNITARIO, 125–30 (2003).
30. See Albrecht Conrad, The Protection of Geographical Indications in the TRIPS Agreement, 86 TRADEMARK REP. 11, 28 (1996) (stating that the Paris Convention has more than a hundred members, but does not contain substantial provisions for the protection of GIs).
vention, Members must seize or prohibit imports with false indications of source, producer, manufacturer, or merchant.\(^{31}\) In its original form, Members acted only in cases of serious fraud.\(^{32}\) Article 10 of the Paris Convention mandates the seizure of goods in cases of “direct or indirect use of a false indication of the [source of the good or the] identity of the producer, manufacturer or merchant....”\(^{33}\) In 1958, Article 10\(^{bis}\)(3) was added to prohibit indications that were “liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods.”\(^{34}\) Significantly, the word “characteristics” replaced the phrase “the origin.”\(^{35}\) This provision serves as the basis for protection against misleading GIs. However, the Paris Convention fails to provide any remedies in case of infringement of this provision.

B. The Madrid Agreement

The Madrid Agreement provides specific rules for the repression of false and deceptive indications of source, thus exceeding the level of protection given to GIs by the Paris Convention.\(^{36}\) Members having signed this agreement agree mainly to implement border measures and prevent the dilution of GIs into generic terms.\(^{37}\)

31. Paris Convention, supra note 14, arts. 9, 10.
33. Paris Convention, supra note 14, art. 10.
34. Id. art. 10bis.
35. In the Lisbon Conference, the Austrian Delegation proposed to reform Art. 10bis of the Paris Convention, including the word “origin,” so that GIs were protected by this disposition. However, the firm opposition of the United States prevented this reform. See STEPHEN P. LADAS, 3 PATENTS, TRADEMARKS AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION 1579 (1975).
36. Madrid Agreement, supra note 15, art. 1(1) (“All goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.”).
37. Over time, some product names on product labels have become generic and are used regardless of place of origin. See Council Regulation on the Protection of Geographical Indication and Designations of Origin for Agricultural Products and Foodstuffs (EEC) N. 2081/92 (July 14, 1992), art. 3, reprinted in 208 EUR. COMMUNITY OFFICIAL J. 1 (defining generic terms as “the name of an
The Madrid Agreement was amended in 1934 by adding Article 3bis, which prohibits the use of false representations on the product itself and in advertising or other forms of public announcements. In addition to providing more specific protection, the Madrid Agreement included controversial areas of protection, most significantly Article 4, which prohibits Members from treating GIs of wines as generic terms. However, few states signed the Madrid Agreement due largely to its expansive view of GI protection; several Paris Convention Members preferred to enter into bilateral agreements with the purpose of protecting GIs internationally. Due to its weak support, the impact of the Madrid Agreement has been minimal.

agricultural product or a foodstuff which, although it relates to the place or the region where this product or foodstuff was originally produced or marketed, has become the common name of an agricultural product or a foodstuff (“The countries to which this Agreement applies also undertake to prohibit the use, in connection with the sale or display or offering for sale of any goods, of all indications in the nature of publicity capable of deceiving the public as to the source of the goods, and appearing on signs, advertisements, invoices, wine lists, business letters or papers, or any other commercial communication.”).

38. Madrid Agreement, supra note 15, art. 3bis (“The countries to which this Agreement applies also undertake to prohibit the use, in connection with the sale or display or offering for sale of any goods, of all indications in the nature of publicity capable of deceiving the public as to the source of the goods, and appearing on signs, advertisements, invoices, wine lists, business letters or papers, or any other commercial communication.”).

39. Id. art. 4.

40. Bilateral and plurilateral (including regional) agreements may also serve the purpose of protecting GIs internationally. A number of countries have already entered into these types of agreements. These agreements can adopt the form of a specific treaty referring only to GIs by listing them, such as the agreement adopted by Germany and France in 1960 for the protection of indications of source, appellations of origin, and other geographical indications. This became the model for numerous bilateral agreements signed by European countries. See Roland Knaak, The Protection of Geographical Indications According to the TRIPs Agreement, 18 IIC STUDIES, STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW, FROM GATT TO TRIPS – THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 117, 122–23 (Friedrich-Karl Beier & Gerhard Schrieker eds., 1996) (discussing bilateral agreements on indications of source). Regional and bilateral agreements in force which provide protection to GIs have been submitted to the Council for TRIPS according to Article 4(d) of the TRIPS Agreement. See WTO Council for TRIPS, Note by the Secretariat, Overview of Existing International Notification and Registration Systems for Geographical Indications Relating to Products other than Wines and Spirits, IP/C/W/85/Add.1 (July 2, 1999) (Doc. # 99-2747), paras. 4–5, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.
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C. The Lisbon Agreement

The Lisbon Agreement was enacted in 1958 as an attempt to achieve effective and enforceable protection for appellations of origin. It provided for strict protection through an international registration system and was modeled after the registration system for trademarks devised under the Madrid Agreement Concerning the International Registration of Marks. Signatories of the Lisbon Agreement were emphasizing that the protection of appellations of origins should be as comprehensive as those for trademarks. The main feature of the Lisbon Agreement is that appellations of origin are to be recognized and protected as such, both in the country of origin and registered at an agency of the WIPO. Article 1 states that once an appellation of origin is registered, it is to be protected in other Member countries. According to Article 3, the Members must prohibit imitations under their respective domestic laws, including the use of terms as “like,” “type,” or “style,” which may be used along with the indication. Article 6 provides that no appellation of origin can be considered generic in any other Member country, so long as it is protected in the country of origin. However, such strict protection would require a change of national laws for many non-Member countries. Because of its strict protection and lack of flexibility, the Lisbon Agreement has few signatories.

41. Lisbon Agreement, supra note 4.
42. Id. art. 5.
43. Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389. This Agreement was revised in Brussels (Dec. 14, 1900), Washington, D.C. (June 2, 1911), The Hague (Nov. 6, 1925), London (June 2, 1934), Nice (June 15, 1957), Stockholm (July 14, 1967), and amended one final time (Sept. 28, 1979).
44. Lisbon Agreement, supra note 4, art. 5.
45. Id. art. 1.
46. Id. art. 3.
47. Id. art. 6.
48. Conrad, supra note 30, at 26 (citing this as one of various reasons more countries did not sign onto the Agreement).
49. Id. at 23 (noting that despite a high standard of protection for GIs, the Lisbon Agreement was one of the models used for drafting the TRIPS provisions).
III. PROTECTION OF GEOGRAPHICAL INDICATIONS UNDER THE TRIPS AGREEMENT

A. GIs Continue to Be a Source of Controversy in TRIPS Negotiations

The treaties signed under the WIPO incur similar difficulties: either the scope of protection remains undefined and effective protection depends upon the good will of each Member country, or the agreement requires a standard of uniformity that is simply non-existent. The three previously-mentioned agreements exemplify how difficult it has been to strike a balance on the appropriate level of GI protection which would find support by a broad consensus of the international community. Nevertheless, these agreements set the stage for the more successful TRIPS Agreement. The Uruguay Rounds of the General Agreement on Tariffs and Trade (GATT)\(^50\) provided the opportunity to include GIs in an international agreement that would guarantee protection. TRIPS is a monumental step forward in the area of GIs in that, with more than 147 signatories, it is the first widely-accepted international treaty in which all signatories are bound to protect GIs through substantive provisions and to enforce its application according to minimum standards.\(^51\) It also provides for a strong dispute settlement mechanism under the WTO.\(^52\) Additionally, TRIPS provides for periodic review\(^53\) and renegotiations aimed at increasing GI protection.\(^54\)

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50. GATT was first signed in 1947. Wesley A. Cann, Jr., Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism, 26 YALE J. INT’L L. 413, 414 (2001). The agreement was designed to provide an international forum that encouraged free trade between member states by regulating and reducing tariffs on traded goods and by providing a common mechanism for resolving trade disputes. Id. at 418.

51. See TRIPS, supra note 2, art. 1 (“Members shall give effect to the provisions of this Agreement. Members may, but shall not be obligated to, implement in their domestic law more extensive protections than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.”).

52. Id. art. 64.

53. Id. art. 71.

54. Id. art. 23.
One of the features of the TRIPS Agreement at the time of its adoption was that not all categories of intellectual property rights regulated therein had the same degree of legal or doctrinal development nor the same degree of acceptance among countries. In the case of GIs, the appropriate legal treatment and level of protection continued to be fiercely debated between WTO Members. The debate over GI protection did not follow the usual North-South divide; instead, the dispute creates a dichotomy of states, with “emigrant” nations on one side and “immigrant” nations on the other.

55. As previously discussed, prior to the TRIPS Agreement some international treaties, such as the Paris Convention, the Madrid Agreement, and the Lisbon Agreement, contained provisions on the protection of indications of source and appellations of origin. Even though they contained strong provisions for the protection of appellations of origin, their practical results were meager. This is because the Paris Convention included only a general provision on this matter, and because the Madrid and Lisbon Agreements had limited membership. See discussion, supra Parts II.A–C.

56. See Reinbothe & Howard, supra note 21, at 158; see also Leigh Ann Lindquist, Champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPs Agreement, 27 GA. J. INT’L & COMP. L., 309, 311–12 (1999) (“The inclusion of these [protections of geographical indications of source] caused heated debates during the Uruguay GATT Rounds and continues to generate discussion. The article that causes most debate is Article 23 which deals with the protection of [GIs] for wines and spirits.”).

57. Traditionally, developed and developing countries have tended to be in opposite groups in the GATT-WTO system. With some limited exceptions, this trend of opposition in North-South politics continues today. Developing countries have organized themselves into alliances such as the African Group and the Least-Developed Countries Group. But, in other issues, the developing countries do not share common interests and may find themselves on opposite sides of a negotiation. A number of different coalitions among different groups of developing countries have emerged for this reason. The differences can be found in subjects of immense importance to developing countries, such as agriculture. See WTO, Understanding the WTO: Developing Countries. Some Issues Raised, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm (last visited Oct. 18, 2004).

58. “Emigrant” countries include those in Europe, Africa and parts of Asia, whereas “immigrant” countries include the United States, Australia, and Latin American countries. Especially for European countries, GIs have a long and proud tradition. Since antiquity, their existence has served to distinguish products and to indicate source, serving a similar function to that of present-day trademarks. See Dr. A. Grigoriev, Opening Remarks, Symposium on the International Protection of Geographical Indications, Nov. 9–10, 1989, cited in M.G. Coerper, The Protection of Geographical Indications in the United States
the European Union, Switzerland and former Eastern bloc countries and a selection of developing nations – support extensive GI protection, while countries like Australia, New Zealand and the United States ally with Latin American nations and other “immigrant” nations to oppose GI protection.⁵⁹

During negotiations, GI protection was a very sensitive issue. Only at the very end of the Uruguay Round was an agreement concerning GIs reached, and this was largely due to the parties’ ability to link GIs with the agricultural negotiations taking place at the time. Although the issue of intellectual property was included in the Uruguay Round at the very beginning, early proposals were initially tabled by negotiators. In effect, the first texts presented during the Uruguay Round negotiations came to light almost a year after the Montreal Midterm Review of the negotiation process in 1988.⁶¹

B. Protection Granted to Geographical Indications under Section 3 of the TRIPS Agreement

According to the TRIPS Agreement, GIs are subject to the same general principles applicable to all categories of intelle-
tual property rights included in the Agreement, primarily the “minimum standards,” the “national treatment,” and the “most-favored-nation clause.” Apart from these, Section 3 of the TRIPS Agreement regulates the availability, scope, and use of these intangible assets.

The structure of Section 3 is quite simple and clear. First, Article 22 provides general protection for all GIs. In this respect, WTO Members should provide legal tools so that interested parties can prevent the designation or presentation of a good that indicates that the good originates in a geographical area other than the true place of origin. They can also prevent

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62. TRIPS, supra note 2, art. 1 (“Members shall give effect to the provisions of this Agreement. Members may, but shall not be obligated to implement in their domestic law more extensive protection than is required by this Agreement.”).

63. See id. art. 3 (“Each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection …”). See generally Gail E. Evans, The Principle of National Treatment and the International Protection of Industrial Property, 18 EUR. INTELL. PROP. REV. 149, 160 (1996).

64. See TRIPS, supra note 2, art. 4 (“With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members….”). See generally Wolfgang Fikentscher, TRIPS and the Most Favored Nation Clause, in CURRENT ISSUES IN INTELLECTUAL PROPERTY 137–45 (J. Straus ed., 1995).

65. Both the Paris Convention and the Lisbon Agreement had a clear influence on the provisions of the TRIPS Agreement in general, but particularly in the case of GIs. Substantive provisions contained in Articles 1 to 12 and 19 of the Paris Convention (1967) were “incorporated” in the TRIPS Agreement with respect to the minimum standards concerning: the availability, scope, and use of intellectual property; the enforcement of the intellectual property rights; and, the acquisition and maintenance of intellectual property rights and related inter partes procedures. This has had at least three important consequences: (i) Members of the WTO are to comply with the substantive provisions of the Paris Convention, mainly Articles 1 through 12 and Article 19, even if they were not signatories of that Convention; (ii) all WTO Members are bound by the same Act of the Paris Convention (Stockholm Act of 1967); and (iii) the provisions of the Paris Convention incorporated in the TRIPS Agreement became subject to the WTO dispute settlement mechanism.

66. TRIPS, supra note 2, art. 22. Among the protections, Article 22.2 requires Members to provide the legal means for interested parties to prevent the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin. Id.
any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention.  

Another important element of Article 22 is that inconsistent use of a GI which does not mislead the public as to its true origin should not be considered an infringement of TRIPS.  

Additionally, Article 22 mandates that Members should refuse or invalidate the registration of a trademark which contains or consists of a GI, but only if such use of the trademark would be misleading.  

Moreover, there is no obligation to protect GIs which are unprotected in their country of origin or have fallen into disuse in that country.  Thus, protection abroad is dependent on continuing domestic protection. 

In addition to the general protection contained in Article 22, Article 23 accords additional protection for wines and spirits. This additional protection encompasses three main elements. First, it provides the legal means for interested parties to prevent the use of GIs which erroneously identify wine and spirits not originating in the place indicated by the GI. Second, it mandates the refusal or invalidation of the registration of a trademark for wines or spirits which contains or consists of a GI at the request of an interested party. Third, it calls on Mem-

67. See id. Article 10bis of the Paris Convention was amended to prohibit indications that were “liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods.” Paris Convention, supra note 14, art. 10bis.

68. Misleading the public consists of any “act or practice, in the course of industrial or commercial activities, that misleads, or is likely to mislead, the public with respect to an enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition.” See WIPO, Model Provisions on Protection Against Unfair Competition, art. 4, Geneva, 1996. Also, according to Article 22(b), whether the use of a GI constitutes an act of unfair competition is governed exclusively by Article 10bis of the Paris Convention.

69. TRIPS, supra note 2, art. 22.

70. Id. art. 24.9.

71. Id. art. 23.

72. This is so even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind,” “type,” “style,” “imitation,” or the like.

73. TRIPS, supra note 2, art. 23.2 (“The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, ex officio if a Member’s legislation
bers to negotiate for increased protections.\(^74\) These provisions give GIs for wines and spirits stronger protection than those provided in Article 22 for other products.

Lastly, Section 3 of TRIPS establishes a series of exemptions to GI protection in an endeavor to accommodate past registration and use.\(^75\) The first of these exemptions provides that nothing in Section 3 prevents a Member from continuing to use another Member's GI if it has used it continuously in the past with regard to the same goods or services.\(^76\) Article 24.5 provides the second exemption allowing for continued use of previously acquired trademarks.\(^77\) The third exception refers to generic terms and allows a country not to protect a GI if the relevant indication is identical to common names of such goods or services.\(^78\)

C. Negotiation and Review of TRIPS Section on Geographical Indications

Proposals by the European Community (EC), the United States, and Switzerland were indispensable to framing eventual obligations concerning GIs. For example, key elements like Article 23’s “additional protection” for wines and spirits and for a multilateral register for indications of wines and spirits were

so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.”).

74. Id. art. 24.1 (“Members agree to enter into negotiations aimed at increasing the protection of individual [GIs] under Article 23.”). It must be noted that this third protection actually lies in Article 24 and not in Article 23, which deals exclusively with wines and spirits. Some countries are of the opinion that this obligation applies to all geographical indications, and not only to those concerning wine and spirits. This topic is explored in further detail, infra, Part V.B.

75. See id. art. 24.

76. Id. art. 24.4 (either, (a) for at least 10 years preceding April 15, 1994 or, (b) in good faith preceding that date).

77. Id. art. 24.5. Article 24.5 provides that when a trademark has been acquired or registered in good faith before the date of application of the Agreement to that Member or before the GI was protected in its country of origin, measures adopted to implement Section 3 shall not prejudice eligibility for or the validity of the registration of a trademark or the right to use a trademark on the basis that such trademark is identical with, or similar to, a geographical indication.

78. Id. art. 24.6. Also, the right to use a personal name is not to be prejudiced under Section 3 of the Agreement. Id.
present in the EC Proposal. The eventual framework reflects “a very sensitive compromise in an area that was one of the most difficult to negotiate.”\footnote{Matthijs C. Geuze, Protection of Geographical Indications Under the TRIPS Agreement and Related Work of the World Trade Organization, in Symposium on the Protection of Geographical Indications in the Worldwide Context, Oct. 24–25, 1997, 41 (1999) [hereinafter Symposium 1997].} WTO negotiators did not resolve all the issues that were on the table, but instead agreed to include within the TRIPS Agreement a “Built-In Agenda” for future negotiations that was designed to facilitate continued negotiations toward international protection of this legal category.

IV. NEGOTIATIONS FOR A MULTILATERAL SYSTEM OF REGISTRATION

A. Terms of Reference in Article 23.4: Facilitate; Voluntariness; Registration and its Legal Effects; Wines and Spirits

Under the TRIPS system, WTO Members must open negotiations in the TRIPS Council to establish a multilateral notification and registration system for GIs.\footnote{See TRIPS, supra note 2, art. 68.} The precise terms of this obligation are in Article 23.4, which states that “[i]n order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral geographical system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.”\footnote{This article was introduced in TRIPS at the request of the European Community, although this Proposal contemplated coverage applicable to all GIs and not only to those of the wine sector. WTO Negotiating Group on TRIPS, Draft Agreement on Trade-Related Aspects of Intellectual Property Rights, presented by the European Community, MTN.GNG/NG11/W/68, art. 21(3) (Mar. 29, 1990) (Doc #90-0178), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (“In order to facilitate the protection of geographical indications including appellations of origin, the establishment of an international register for protected indications should be provided for. In appropriate cases the use of documents certifying the right to use the relevant geographical indication should be provided for.”). The Proposal was included in the text that the President of the Negotiations Group presented in July 1990. See WTO Negotiating Group on TRIPS, Status of Work in the Negotiating Group, Chairman’s Report to the GNG, MTN.GNG/NG11/W/76 (July 23,
1. Facilitate

As the plain language of the provision suggests, the objective of the creation of a register is to facilitate GI protections, thus providing the necessary means to identify and make public, in a transparent way, those GIs that Members should already protect. Identification is required because, when compared with other intellectual property rights, such as patents and trademarks, GIs are often difficult to recognize.\(^{82}\) TRIPS unquestionably constitutes a dramatic step forward in protecting wine and spirit GIs and, as such, the term “to facilitate” used in this provision must be understood to identify GIs that Members are already bound to protect, not via future multilateral registration but, rather, by present provisions of Part II, Section 3.

Article 23.4, along with the general definition of GIs in Article 22.1, implies that the register is only for GIs which fulfill criteria established in the TRIPS Agreement. Specifically, the provision suggests that only those that identify a good as originating in the territory of a Member will be able to accede to the multilateral register.

1990) (Doc #90-0444). During the autumn of that year, some countries were in favor of the creation of this register in the Uruguay Round and they even presented, in an informal way, some proposals which contemplated, in a detailed and systematic way, the creation of this register. These Proposals were debated by the Negotiations Group. However, other countries were committed solely to examining this question in the future. This disagreement was reflected in the project presented by the President of the Negotiations Group to the Ministerial Meeting of Brussels in December, 1990. See WTO Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations – Part 1 – Revision, MTN.TNC/W/35-1/Rev.1 (Dec. 3, 1990) (“In order to facilitate the protection of geographical indications, the Committee shall [examine the establishment of] a multilateral system of notification and registration of geographical indication eligible for protection in the PARTIES participating in the system.”). Finally, the Negotiations Group decided to establish a commitment of future works exclusively applicable to GIs of the wine sector, as reflected in the final text of Article 23.4. TRIPS, \(supra\) note 2, at art. 23.4.

82. See Conrad, \(supra\) note 30, at 12. One of the many problems related to recognition involves defining boundaries. As Conrad suggests, “one of the notorious problems involved in the protection of geographical names arises from the fact that in most cases they do not identify a single business source and therefore it is often difficult to establish the boundaries of the region that can legitimately claim use of the name.” \(Id\). The other problem with GI identification involves genericness. \(See id\).
2. Voluntariness

An ideal system would require all WTO Members to participate. However, a literal reading of Article 23.4 only establishes a voluntary participatory system. This raises the issue of whether a system based on voluntary participation could bind WTO Members once a GI has been registered. The logical answer seems to be that a voluntary system could only bind participating Members. However, for reasons of transparency and efficiency it is preferable that all WTO Members be subjected to such registering, since a system whereby GIs are recognized and protected in some Member territories but not others surely creates legal and economic uncertainty, thus undermining the objective of the protection. Indeed, Article 23.4 calls for the establishment of a multilateral system of notification and registration of GIs, and a multilateral system can only be understood as requiring all parties to the WTO Agreement to be bound to protect registered GIs. Unlike plurilateral trade agreements, which bind only signatories, a multilateral system must be understood to include all WTO Members. Therefore, in the lexicon of the WTO, “plurilateral” must be understood as referring to a system in which participation is entirely voluntary, whereas “multilateral” is understood to bind all Members.

83. See TRIPS, supra note 2, art. 23.4. Indeed, this position is supported by its wording: “...eligible for protection in those Members participating in the system.” Id.

84. The Agreement establishing the WTO expressly affirms that although the four Plurilateral Trade Agreements (Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement and the International Bovine Meat Agreement) are part of the WTO Agreement, they create neither obligations nor rights for Members that have not accepted them. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 1 (1994), art II.3, 33 I.L.M. 1125, 1144 [hereinafter WTO Agreement].

85. WTO Council for TRIPS, Special Session, Minutes of Meeting, TN/IP/M/4 (Feb. 6, 2003) (Doc #03-0786), para. 21, available at http://docs online.wto.org/gen_search.asp?searchmode=simple. The representative of the European Communities stated that “a multilateral system was a system that somehow should concern all Members.” Id. Where systems and treaties in other areas of the WTO did not concern all WTO Members, they were termed “plurilateral,” such as the Agreement on Government Procurement. Id. In his delegation's view, “that was not just a purely theoretical interpretation.” In the same sense, the representative of Switzerland stated,
Certainly, the phrase “Members participating in the system” at the end of Article 23.4 seems to refer to voluntary participation. But, in my opinion, this reference can be interpreted as meaning no more than those Members who chose to participate by registering their GIs in the system. Under this interpretation, a participating Member would still be obligated to afford protection to GIs registered by other Members, even though it chooses not to register its own GIs. Nonetheless, the protection of registered GIs must be obligatory for all by virtue not only of the mandate of Article 23.4, but also via the other provisions of Part II, Section 3, particularly Article 24.1. This provisional

The meaning of the term “multilateral” could only be determined by comparing it with the term “plurilateral.” In the WTO context, while “plurilateral” was understood to refer to a system in which participation was fully voluntary, for instance, the Agreement on Government Procurement, “multilateral systems” were instruments which bound all WTO Members.

Id. para. 28.

86 From a general perspective, it must be recalled that the WTO Agreement has eliminated the imbalances caused by the collateral agreements, also referred to as “Codes,” concluded after the Tokyo Round (1973–1979), which, in most cases, differentiated the norms and procedures for decision-making and dispute resolution and whose acceptance among the Contracting Parties was limited. However, some free-rider countries, countries which have assumed only the minimum level of obligations have tried to benefit from the Most Favored Nation (MFN) clause of Article I of GATT. These countries demanded the advantages resulting from these Codes, which they themselves have ignored. To avoid these imbalances, Article II.3 of the WTO Agreement states specifically that the MFN Clause is not applied to the four Plurilateral Agreements. See Luis Norberto González Alonso, Política Comercial y Relaciones Exteriores de la Unión Europea, 159 (1998). It must be observed, however, that nothing equal has been established in the section of the TRIPS Agreement relative to GI protection. Therefore, if we admitted that the multilateral register of GIs only must bind participant countries, nothing in it would prevent the other WTO Members from demanding the application of the MFN Clause established specifically in TRIPS, Article 4. Fikentscher, supra note 64, at 141. In the case of particular collateral agreements concluded within the framework of Section 3, Part II of TRIPS, the MFN Clause cannot apply because Article 24 urges the conclusion of bilateral or plurilateral agreements, thus revoking, in these specific cases, the benefits of this fundamental principle of the WTO system. However, from my point of view, this interpretation need not be accepted. Consider that a preliminary version of the TRIPS Agreement specifically established the following exemption to the MFN Clause for bilateral or multilateral agreements about GI protection:
intersection results in a system of obligatory GI protection for all because it prohibits any country from refusing to negotiate to improve the protection of individual GIs. Thus, the notification of a GI to the register is equivalent to a request to open negotiations.

3. Registration and Its Legal Effects

There remains the question of how “registration” in Article 23.4 should be understood. One view is that registration refers to a specific way of implementing TRIPS requirements that differs from the common law approach based on case law. Registration in the field of intellectual property is normally understood as involving the grant of a title of protection with a genuine legal effect. Under a system where registration has

PARTIES agree that the preceding paragraphs shall not prevent the conclusion pursuant to Article 19 of the Paris Convention (1967) of bilateral or multilateral agreements concerning the rights under those paragraphs, with a view to increasing the protection for specific geographical or other indications, and further agree that any advantage, favor, privilege or immunity deriving from such agreements are exempted from the obligations under point 7 of Part II of this agreement.

WTO Negotiating Group on TRIPS, Status of Work in the Negotiating Group, Chairman’s Report to the GNG, MTN.GNG/NG11/W/76 (July 23, 1990) (Doc #90-0444), para. 4.2. However, this provision was not ultimately retained in the final wording of the Agreement, which leads to the conclusion that this principle would be applied totally to bilateral agreements relative to GIs protection.

87. TRIPS, supra note 2, art. 24.1 (“Members agree to enter into negotiations aimed at increasing the protection of individual [GIs] under Article 23....”).


90. The creation of legal effects upon registration is perhaps best highlighted by the Madrid Agreement. Under the system created by the Madrid Agreement, the effect of an international application is to require each of the designated contracting parties to protect the subject matter in accordance
no legal effect, the act of registration would not add value to that of notification and therefore would not comport with Article 23.4.\(^\text{91}\) To give it such enhanced value, registration should follow a phase of examination which would give it greater legitimacy.\(^\text{92}\)

As with other titles of intellectual property, registration must confer a presumption of legality. The legal implications of this interpretation based upon Article 23.4 would be a presumption of eligibility for protection in the markets of all WTO Members for all GIs inscribed into the multilateral register. Equally important, the registration system must provide a forum for dispute resolution where Members can challenge the presumption of validity and its legal effects for those GIs which are alleged to lack the requirements mandated under TRIPS. In effect, Article 23.4 implies that the future system of notification and registration need not affect the TRIPS Agreement’s rights and obligations. Instead, the register functions to assist in facilitating the protections arising from the TRIPS Agreement by means of developing more transparent and efficient procedures. In this sense, the register does not increase obligations nor diminish acquired rights.

The alternative view focuses on the text of Article 1, which states, “Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”\(^\text{93}\) Thus, the regis-


\(^{92}\) Id. para. 110 (quoting the Switzerland representative, as arguing that the “provisions of an examination and a challenge procedure gave legitimacy to the listing in the multilateral register.”).

\(^{93}\) TRIPS, supra note 2, art 1.
tration system need not supplant national systems of GI protection. In this sense, it continues to be the prerogative of Members to choose the legal means that best responds to their interests.

4. Wines and Spirits

Article 23.4 next addresses GIs for wine exclusively. However, the Ministerial Conference of Singapore of 1996 also included in the scope of its application the provision of spirits, as evidenced by the Ministerial Declaration of the Report of Council TRIPS of 1996, in which Section 34 affirmed the following:

In regard to GIs ... the Council will initiate ... preliminary work on issues relevant to the negotiations specified in Article 23.4 of the TRIPS Agreement ... Issues relevant to the notification and registration system for spirits will be part of this preliminary work. All of the above work would be conducted without prejudice to the rights and obligations of Members under the TRIPS Agreement....

Ministers did not distinguish between wines and spirits despite their competence to do so. Against this background, spirits were included in the Council’s work; any other course of action would have been contradictory to the Ministerial Conference decision. Nevertheless, some Members continued to fight against this extension, alleging that the Singapore Ministerial Declaration only included “spirits” in the scope of preliminary work to be carried out under Article 23.4. For these Members, the pronouncement in Paragraph 18 of the Doha Ministerial Declaration to the TRIPS Council to "complet[e] the work started ... on the implementation of Article 23.4...." confirms the intention of the Minister that, with the exception of GIs for spirits, the multilateral system be established in accordance

95. Id.
with the mandate provided in Article 23.4. Those Members believe that spirits should be included in the “preliminary work” of the Council, but that they did not fall within the scope of “negotiations” which were envisaged only for wines. As a result, those Members believe that references to spirits should be understood as relating to such work without the inference of negotiations.

The Doha Ministerial Conference attempted to clarify doubts about the coverage of the multilateral register. In the Declaration passed at the Conference, the Ministers affirmed the convenience of negotiating the establishment of a multilateral system of notification and registration of GIs for wines and spirits. Nevertheless, WTO Members have different interpreta-

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98. To reflect the current limitation of the mandate established in Article 23.4 of TRIPS to wines, these WTO Members affirm that the term “and spirits” should appear in brackets in all the Proposals. See Minutes of June 28, 2002 Meeting, supra note 91, para. 18. However, the Chairperson, during the debates, said that Members have a very clear mandate to negotiate the establishment of a multilateral system of notification and registration of GIs for wines and spirits by the Fifth Session of the Ministerial Conference. He added that a Special Session is required to fulfill the mandate in its entirety and not to go beyond the mandate. Id. at paras. 20, 137; WTO Council for TRIPS, Special Session, Minutes of Meeting, TN/IP/M/5, para. 31 (Apr. 28, 2003) (Doc. #03-2231), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple [hereinafter Minutes of Feb. 21, 2003 Meeting].


100. See Doha Ministerial Declaration, supra note 96. The Doha Ministerial Declaration notes that the TRIPS Council will handle this under the Declara-
tions of this mandate. Some Members argue that the Ministerial Declarations, like those approved in Singapore or Doha, are mere political declarations that cannot extend, generalize, or modify what has been settled by an international treaty.\textsuperscript{103} Others affirm that Ministerial Conferences can modify the literal sense of some provisions of such treaties\textsuperscript{102} because of the

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\textsuperscript{101} In the final phase of negotiations of the Doha Ministerial Declaration, enough divergences arose among WTO Members as to whether this Declaration could or could not establish new mandates of negotiation not strictly established under the WTO Agreements. The Communication presented by Argentina rejected any legal relevance to the Doha Declaration with respect to the extension of additional GI protection to products other than wines and spirits, when no specific disposition existed in the WTO Agreements.\textsuperscript{102} Id. at para. 12.

\textsuperscript{102} It is doubtful that the Doha Ministerial Declaration could be defined as an interpretation of the Ministerial Conference following the recommendations established in Article IX.2 of the WTo Agreement, since the parties did not show any evidence of consideration of this provision when drafting the
authority of interpretation attributed to the Ministerial Conference on Treaties signed in the Uruguay Round.\textsuperscript{103}

Thus far, the focus of the analysis has been on how the mandate established in Article 23.4 of TRIPS should be interpreted. The next section advances the debate by outlining a few main proposals presented by the TRIPS Council about the notification and registration system of GIs.

\textbf{B. Differing Proposals on the Nature of the Registration System}

The submissions that have been presented at the TRIPS Council for the establishment of a multilateral notification and registration system for GIs can be divided into two camps. The first is a minimalist approach defended by the United States, Australia, New Zealand, Japan, along with many Latin American countries. These nations advocate a voluntary system


characterized by its transparency. It would create no legal rights, and consequently, the inscription of a GI would not require protection by other Members. The second proposal advocating a minimalist approach is presented by Hong Kong, China, in which the inscription of a GI into the register would lack a process of substantive examination or opposition at the multilateral level. The inscription would be put into effect only after a cursory, formal examination of the GI subject to notification and questions relating to the conformity of a GI with Article 22.1. The applicability of the exceptions would remain in the local jurisdiction in accordance with domestic law. The obligation to give legal effect to registration under the system would only be binding on participating Members.

The second group advocates a maximalist approach. Members of the European Union, Switzerland, former Eastern bloc countries, and a selection of developing countries champion this view. The maximalist approach supports a compulsory system in which a GI would benefit from unconditional protection in the markets of all Members upon its inscription in the register.

1. The Minimalist Approach

i) The United States-led Proposal

The primary proposal advocating a minimalist approach was presented by the United States, Canada, Chile and Japan (U.S.-led Proposal). The system of notification and registration of...
GIs urged in this approach is characterized solely by its informative nature. The system proposed would not create legal rights, and consequently, the inscription of a GI would not require protection by other Members. Under this proposal, registration follows receipt by the administering body of notifications from participating Members. It includes notification in a searchable database of all GIs for wines and spirits and affirms the principle that GIs are territorial rights and, therefore, the conditions for granting and exercising them must be established in national legislations of WTO Members. For that reason, the minimalist approach conceives of a voluntary system of notification and registration. This means that any GI for wines or spirits established in accordance with national legislation is entitled to protection under Part II, Section 3, of the TRIPS, regardless of whether it is registered in the WTO database.

Members wishing to participate in this system submit to the Secretariat a list of domestic GIs eligible for protection under their national legislation, indicating the date, if any, on which protection will expire. Subsequent notifications include additional domestic GIs eligible for protection under a Member's national legislation and any previously-notified GIs no longer eligible for such protection. Following receipt of notifications, support to the minimalist approach is Colombia, Costa Rica, Ecuador, El Salvador, the Philippines, Guatemala, Honduras, Namibia, the Dominican Republic and Chinese Taipei. WTO Council for TRIPS, Special Session, Multilateral System of Notification of Geographical Indications for Wines (and Spirits), WTO Doc. TN/IP/W/5 (Oct. 23, 2002) (Doc. #02-5799), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. The October 29, 2002 Communication represents the most recent contribution from these countries to the debate on the establishment of a multilateral system of notification and registry of GIs.

105. U.S.-led Proposal, supra note 104, art. 3.
106. Id.
107. Id. para. 4.
108. Id. para. 3.
109. Id. The lists shall provide, with respect to each indication, the WTO Member that notified the indication, the expiration date of protection, if any, and any other multilateral agreement for GIs under which the indication is protected. The database, in turn, would include: the GI for the wine or spirit that has been notified, the WTO Member which has made the notification, the date on which the indication is protected by the notifying Member, the expiration date, if any, and any agreement under which the indication is protected.
110. Id. para. 2.
the Secretariat will compile a database of all notified GIs for wines and spirits and distribute copies to all Members.111 After the initial notification, the Secretariat will revise the database of notified GIs, adding or deleting indications in accordance with Members’ notifications. Moreover, the proposal states that, in accordance with Article 23.3, identical or similar GIs may be submitted by more than one WTO Member, provided that the GI is recognized by each notifying WTO Member in accordance with its national regime for protecting GIs.

With regard to the effects under national legislation, participants would be legally bound to consult the database, along with other sources of information, when making decisions regarding the recognition and protection of GIs for wines and spirits.112 Registration in the multilateral system would not give rise to any presumption regarding eligibility for protection given the territorial nature of GIs and the application of Article 24 exceptions, which would remain in force under national law. Non-participants would be encouraged to refer to the database, along with other sources of information, in making such decisions under their national legislation.113 Thus, Members’ participation would be limited to receiving these lists, among other sources of information, when they must make decisions on the protection in their territories of GIs of other Members.114

111. Id. (“The Secretariat shall have no discretion to decline acceptance of a GI notified by a WTO Member.”).
112. See id.
113. Id. The proposal asserts that

[i]nformation obtained from WTO Multilateral Systems for Wines and Spirits would be taken into account in making those decisions in accordance with that national legislation. . . . WTO Members not participating in the system will be encouraged to refer to the WTO Multilateral System for Wines and Spirits, along with other sources of information, in making decisions under their national legislation. . . . in order to ensure that such decisions are based on the most complete information available.

Id.

114. This assertion appears to conform with U.S. law, in which the right of an interested party to challenge the use of a particular GI in the United States does not extend to the right to challenge the compliance by the United States with its obligations under the TRIPS Agreement. See 19 U.S.C. § 3512(c).
With regard to appeals or objections, the proposal sets out that decisions concerning protection for GIs, regardless of whether the WTO is notified, should occur at the national level at the request of interested parties. Should any appeal or objection result in a final decision that a domestic GI is ineligible for protection, that Member should notify the Secretariat during the subsequent notification period.

ii) Hong Kong Proposal

The second proposal advocating the minimalist approach was presented by Hong Kong. Although this proposal attempts to reconcile the minimalist approach of the U.S.-led Proposal with the maximalist approach of the European Community, it is not truly a middle-ground proposal. Instead, it is much closer to the other minimalist proposals.

The Hong Kong Proposal proffers a multilateral system that would involve only a cursory formal examination of the GI subject to notification. This would contain basic information

116. Apart from the proposal relative to the multilateral register, the United States presented another proposal arguing that one acceptable means of protecting GIs would be protection through the trademark system. See WTO Council for TRIPS, Suggested Method for Domestic Recognition of Geographical Indications for WTO Members to Produce a List of Nationally-Protected Geographical Indications, IP/C/W/134 (Mar. 11, 1999) (Doc #99-0979), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. According to this proposal, using the trademark system to protect GIs would have the main advantage that no additional commitment of resources would be required to protect GIs. In other words, a government’s use of its existing trademark regime to protect GIs would involve only government resources already committed to the trademark system for applications, registrations, oppositions, cancellations, adjudication, and enforcement. However, in my opinion, while the trademark regime may be advantageous to the United States, it is not an ideal model for multilateral GI protection.
118. Id. sec. III.4.i (“The multilateral system involves only a formality examination of the geographical indication subject to notification. Provided that basic information identifying the geographical indication, its ownership, and
identifying the GI and its ownership and the basis on which it would be entered in the register.\textsuperscript{119} In terms of formal legal effects, registration on the multilateral register would constitute prima facie evidence of: (a) ownership; (b) that the indication was within the definition under Article 22.1; and (c) that it was protected in the country of origin.\textsuperscript{120} These three issues would be deemed valid unless evidence to the contrary was produced by an opposing party.\textsuperscript{121} If such a party adduced evidence to the contrary, then national tribunals would weigh all the evidence and decide whether the issues and questions were proved to the standard required by the proceedings.\textsuperscript{122} According to the Hong Kong Proposal, this rebuttable presumption would help the presumed owner of the GI discharge the legal burden of proof on the three issues in the course of domestic proceedings.\textsuperscript{123} Consequently, according to the Hong Kong Proposal, this would facilitate GI protection through Members’ domestic legal systems.\textsuperscript{124} The proposed framework would not change substantive legal rights of either party to a proceeding. For instance, questions relating to the conformity of a GI with Article 22.1 would remain in the local jurisdiction in accordance with domestic law. Questions relating to the applicability of the exceptions under Article 22.4 would continue to be decided by Members’ domestic authorities. Inscription in the multilateral register would not have any legal effect or create any presumption in relation to these issues, except as it related to Article 24.9.\textsuperscript{125}

\textsuperscript{119} Id. annex A, para. B.1 (“The examination process does not involve substantive examination.”).
\textsuperscript{120} Id. annex A, para. D.2.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id. sec.III.4.v.
\textsuperscript{124} Id.
\textsuperscript{125} Id. sec.III.4.iv.

Registration should be accepted by participating Members’ domestic courts, tribunals or administrative bodies as \textit{prima facie} evidence of: (a) ownership; (b) that the indication is within the definition of ‘geographical indications’ under Article 22.1 of the TRIPS Agreement; and (c) that it is protected in the country of origin. The intention is that the issues will be deemed to have been proved unless evidence to
The system would also not deal with competing claims for GIs, which would continue under national law. However, the Hong Kong Proposal suffers greatly because the lack of a substantive examination or opposition at the multilateral level limits the legal effects of registration to the rights holder.

With regard to participation, the Proposal establishes a voluntary system under which Members would be free to participate and make notifications of GIs protected in their territories. The obligation to give legal effect to registration under the system would only be binding on participating Members.

iii) Shortcomings of the Minimalist Approach

The U.S.-led Proposal offers as its main objective a minimalist, limited information system in which national GIs would be notified and incorporated automatically. However, the legal effects that, in principle, the inscription of a GI in the database would have are not specified, explicitly or implicitly. This

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the contrary is produced by the other party to the proceedings before domestic courts, tribunals or administrative bodies when dealing with matters related to geographical indications. In effect, a rebuttable presumption is created in favor of owners of geographical indications in relation to the three relevant issues.

Id.

126. Id. annex A, para. E. (“Participation in the system is voluntary which means that: 1. Members should be free to participate and notify GIs protected in their territories; 2. The obligation to give legal effect to registrations under the system will only be binding upon Members choosing to participate in the system.”).

127. Id.

128. Milo G. Coerper, Certification Marks as a Means of Protecting Geographical Indications, 1997-1998 A.B.A. SEC. INTELL. PROP. L., ANN. REP., COMMITTEE 202, http://www.abanet.org/intelprop/97-98rep/202.html (supporting this proposal, Coerper states that the system should not be obligatory for all WTO Members, but it could be a system of merely informative nature). See also Lynne Beresford, The Protection of Geographical Indications in the United States, in SYMPOSIUM ON THE INTERNATIONAL PROTECTION OF GEOGRAPHICAL INDICATIONS 48 (1999) (indicating that any registration system that finally is created would have to avoid the creation of additional obligations for WTO Members) [hereinafter Symposium 1999].

129. In the Meeting of the TRIPS Council on April 21–22, 1999, the U.S. Representative stated, “[t]he fact that a particular geographical indication was registered would not automatically oblige a Member to protect that geographical indication if it were not entitled to such protection under that Member’s TRIPS-consistent national law.” WTO Council for TRIPS, Minutes
proposal does not provide for a system with a truly multilateral character. It attempts to be no more than an information system where national GIs may be notified and automatically listed on a database to be established in the future by the WTO. Therefore, it is difficult to understand the added value of the system envisioned in the U.S.-led Proposal. Although the burden on the WTO would be limited under this proposal, the costs entailed would not be compensated by any benefits other than those already existing at the national level and under notifications made on the basis of Article 63.2.

A multilateral register clearly implies multilateral protection, and this must be the key element in establishing such a register. However, the U.S.-led Proposal is limited to creating a

130. See WTO Council for TRIPS, Communication from the European Communities and their Member States, WTO IP/C/W/260 (May 30, 2001) (Doc. #01-2709), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. The Communication lists criticisms of the minimalist approach. For example, it states, “[i]n a number of respects, [the U.S.-led Proposal] does not seem to constitute more than a mere database. It is not clear to us how the facilitation of the protection of [GIs], as requested in Article 23.4 of the TRIPS Agreement, would be ensured by a system limited to a mere database.” Id.

131. Article 63.2 states:

Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6ter of the Paris Convention (1967).

132. See WTO Council for TRIPS, Communication from the European Communities and their Member States, WTO IP/C/W/260 (May 30, 2001) (Doc. #01-2709), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. The EC attacks the minimalist approach for failure to understand the scope of the terms “notification” and “registration.” As used in the U.S.-led Proposal, “notification implies only transparency of information in a vol-
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record rather than a true registration, as it only refers to legal effects under national legislation. 133 The system does not provide for a mechanism to filter out names that should not be protected and, therefore, risks creating more confusion than clarity. 134 The proposal is silent on the need for elements of proof, for the assessment of eligibility, or for an opposition procedure — elements which are indispensable to a future multilateral register. 135 It is impossible under this approach to ensure that terms that do not meet the provisions of Articles 22.1 or 24.9, or which fall under one of the exceptions provided for in Article 24, are denied eligibility.

The U.S.-led Proposal also does not establish procedures to resolve possible litigation, an indispensable procedure for any future multilateral register. 136 At the same time, the proposal leaves open the possibility for Members to end or interrupt their participation without legal ramifications. The great uncer-

133. U.S.-led Proposal, supra note 104, art. 3. (“Any [GI] for wines or spirits established in accordance with national legislation is entitled to protection under Section 3 of Part II of the TRIPS Agreement, whether or not it is registered in the WTO database.” (emphasis added)).

134. Minutes of June 28, 2002 Meeting, supra note 91, para. 75.

135. The U.S.-led Proposal makes reference neither to national legislation providing for protection, nor to the date on which each GI first received protection.

136. Argentina, Australia, Canada, Chile, New Zealand and the United States clarify that if an opposition system is to be established, the right to invoke the exceptions provided for in Article 24 would be undermined because they would have to be used through the system and would be subject to the successful result of the opposition procedure. WTO Council for TRIPS, Special Session, Multilateral System of Notification of Geographical Indications for Wines (and Spirits), WTO Doc. TN/IP/W/6 (Oct. 29, 2002) (Doc. #02-5938), para. 22, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. Nevertheless, from my point of view, the establishment of this opposition system would have the ability to systemize the application of these exceptions and in no case would they be undermined, as its application could continue to be demanded by WTO Members. However, Article 24.1 demands the continuous obligation for all WTO Members to accept negotiations on the continuity of the application of these exceptions. TRIPS, supra note 2, art. 24.1 (“Members shall be willing to consider the continued applicability of these provisions to individual GIs whose use was the subject of such negotiations.”).
tainty regarding the legal effects of the system may thus increase litigation and, consequently, administrative costs.\textsuperscript{137}

As to the voluntary system upon which the U.S.-led Proposal insisted, it is unclear whether non-participating Members would be bound to give protection according to Article 23.\textsuperscript{138} If non-participating Members were not bound, the protections announced in Article 23.4 would be undermined. The literal meaning of the U.S.-led Proposal is based on a political commitment without legal force:\textsuperscript{139} authorities would be bound to refer to the register, yet the register gives rise to no national legal commitment.\textsuperscript{140} The U.S.-led Proposal also does not provide for any monitoring mechanism which requires national authorities to “refer” to the lists of GIs on the database. As a result, these national authorities will not know whether to rely on the information included in the system when making a determination on the protection of a GI.\textsuperscript{141}

For these reasons, it is difficult to understand how the mandate to facilitate the protection of GIs established in Article 23.4 would be fulfilled through this system. This proposal would establish a mere juxtaposition of existing national protection systems in a database without legal effects. As such, its value would be minimal. Assuredly, Article 23.4 calls for more ambitious action than this proposal offers. The proposal concentrates on the first part of the job, namely the establishment of a notification system, while the register would simply compile

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\begin{itemize}
\item \textsuperscript{137} Minutes of June 28, 2002 Meeting, \textit{supra} note 91, para. 69.
\item \textsuperscript{138} U.S.-led Proposal, \textit{supra} note 104, art 4 (“The proposed system is entirely voluntary and would not impose undue burdens.”).
\item \textsuperscript{139} In the U.S.-led Proposal, the proponents of this system expressly establish that WTO Members not participating in the system will be encouraged to refer to the WTO Multilateral System for Wines and Spirits, along with other sources of information, in making decisions under their national legislation involving recognition or protection of GIs for wines and spirits in order to ensure that such decisions are based on the most complete information available....
\item \textsuperscript{140} Id. art. 3. This Communication also clarifies that this system will not generate specific obligations for the Members that decide not to participate.
\item \textsuperscript{141} Minutes of Feb. 21, 2003 Meeting, \textit{supra} note 98, para. 66.
\end{itemize}
participating Members' information. This does not satisfy the requirement of producing legal effects that registration inherently entails in the context of intellectual property rights. A database which national authorities might or might not be required to refer to does not constitute a registration system in the intellectual property context. The costs of establishing and operating such a system should not be measured in absolute terms but, rather, in relation to the benefit offered by the system. If transparency alone is the only advantage offered by the proposed U.S.-led system, it might not be sufficient to justify its costs. To “facilitate” the legal protection of GIs under Article 23.4, a multilateral system should help administering bodies implement, and producers and consumers avail themselves of, legal protection.

The U.S.-led proposal wrongly emphasizes the convenience of using national systems of trademark protection for GIs. Traditionally, confusion has existed between certification marks and GIs, fundamentally because of their similarities.

In my opinion, however, this interpretation is incompatible with the TRIPS Agreement, which clearly defines GIs as intellectual property rights and as private rights.

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142. The EC Communication takes the view that the U.S.-led Proposal conflates “notification” and “registration” into one concept because registration carries with it no legal effects. See WTO Council for TRIPS, Communication from the European Communities and their Member States, WTO IP/C/W/260 (May 30, 2001) (Doc. #01-2709), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (“It would appear that the provisions on notification and registration are identical in the [U.S.-led Proposal].”).

143. This can be deduced from other sections of TRIPS which employ the word “registration,” most notably in Part II, Section 2, on trademarks. TRIPS, supra note 2, arts. 15, 18–19.

144. See Minutes of June 28, 2002 Meeting, supra note 91, paras. 68, 81.

145. U.S.-led Proposal, supra note 104 (“The proposed system does this by providing an uncomplicated and efficient system for notification and registration of the geographical indications for wines and spirits that we recognized in the national systems of individual WTO Members.”).

146. Burkhart Goebel, Geographical Indications and Trademarks – The Road from Doha, 93 TRADEMARK REP. 964, 982 (“Although GIs are recognized as a type of intellectual property pursuant to Art. 1 (2) of the TRIPS Agreement, it is sometimes argued that GIs cannot be considered as another form of intellectual property right since protection to the individual using a GI is effectuated only as a reflex of protecting a certain regional collective goodwill.”). In my opinion, however, this interpretation is incompatible with the TRIPS Agreement, which clearly defines GIs as intellectual property rights and as private rights.
property rights. Requirements applied to certification marks are much simpler than those applied to GIs. Also, the procedures to protect certification trademarks are different from those used for the protection of GIs. In addition, a trademark has a limited duration. Although its registry is renewable, GIs have no expiration date so long as they are protected in their country of origin. Finally, a trademark system does not protect GIs against

147. A conflict not definitively resolved is the relationship between Article 16 of TRIPS (which grants the holder of a registered trademark the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade signs for goods or services which are identical or similar to those with registered trademarks where such use would result in a likelihood of confusion) and the provisions of Part II, Section 3 of TRIPS about the conflict between GIs and trademarks (Articles 22.3, 23.2 and 24.5 of TRIPS, which establish that geographical trademarks that mislead the public can only coexist with GIs when they exist prior to the adoption of TRIPS, granting, consequently, a certain priority to the GIs in conflict). Some authors deduce from Article 16 that this conflict must be resolved according to the principle “First in Time, First in Right” to make compatible public and private interests promoted by both parties. For these authors, GIs must be seen as a “sign” in the Article 16 sense, which would let the holder of a previously registered trademark prevent the use of a concrete GI if there exists a likelihood of confusion. See Norma Dawson, Locating Geographical Indications – Perspectives From English Law, 90 TRADMARK REP. 590, 599 (2000); Harte Bavadamm, Geographical Indications and Trademarks: Harmony or Conflict?, in Symposium 1999, supra note 128, at 61; Clark W. Lackert, Geographical Indication: What Does the TRIPS Agreement Require?, 109 TRADMARK WORLD 22, 39 (1998); Florent Gevers, Topical Issues of the Protection of Geographical Indications, in SYMPOSIUM ON THE PROTECTION OF GEOGRAPHICAL INDICATIONS IN THE WORLDWIDE CONTEXT 154–55 (1997); Vincent E. O’Brien, Appellations of Origin and Brands of Geographical Significance: A Conflict with Potentially Serious Commercial Implications, 23 INT’L WINE L. ASSOC. BULL. 34 (2000), available at http://www.aidv.org/bulletin/bull23_09-2000.htm; D. J. Ryan, The Protection of Geographical Indications, in ESTUDIOS SOBRE PROPIEDAD INDUSTRIAL HOMENAJE A M. CURREL 425 (2000); W. Taylor, The Overlap Between Trademarks and Geographical Indications, 5 INT’L WINE L. ASSOC. BULL. 18 (1999), available at http://www.aidv.org/bulletin/bull31_04-2003.htm. In regard to the relationship between GIs and trademarks, the International Trademark Association (INTA) adopted a resolution in 1997 supporting the “First in Time, First in Right” principle. INTA, Request for Action by the INTA Board of Directors, Protection of Geographical Indications and Trademarks, Sept. 24, 1997, at http://www.inta.org/policy/res_geoindtms.html (last visited Oct. 18, 2004). However, from my point of view, Articles 2–24 of TRIPS are lex specialis which takes precedence over the general rule for the protection of trademarks set out in Article 16.

148. See TRIPS, supra note 2, art. 24.9 (“There shall be no obligation under this Agreement to protect geographical indications which are not or cease to
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abusive use in translated form, in connection with modifiers such as “like,” “kind,” “style,” “type,” or “imitation,” or in conjunction with the true origin of the producer. Thus, although the system of certification marks may have certain advantages, in no case could it replace a specific system of protection of GIs, whose creation Article 23.4 demands.  

The incompatibility of the U.S.-led proposed system with the obligations arising from TRIPS can hardly be overstated. If the trademark system was capable of providing absolute protection to GIs, the question relative to such protection would have been resolved in the trademarks section of TRIPS. In TRIPS, the

be protected in their country of origin, or which have fallen into disuse in that country.

149. Possibly, as Michael Maher has stated, GIs and trademarks might communicate different information to the consumer. Maher, supra note 12, at 1925 n.47.

A consumer presumably understands that a product may be produced by any business in the region identified by the geographical indication. The geographic term may describe not only the product’s geographic origin, but also might connote specific qualities, features, or characteristics associated with similar products from that location, regardless of the individual identity of their producer.

Id.

150. The U.S.-led Proposal suggests that the protection system of GIs through the trademarks system is perfectly compatible with TRIPS, thus fulfilling all the prescriptions of Part II, Section 3 of TRIPS, in addition to the principle of national treatment established in Art. 3. See WTO Council for TRIPS, Suggested Method for Domestic Recognition of Geographical Indications for WTO Members to Produce a List of Nationally-Protected Geographical Indications, IP/C/W/134 (Mar. 11, 1999) (Doc #99-0979), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. This compatibility was reiterated by the United States in the Meeting of the TRIPS Council held on April 21–22, 1999. See WTO Council for TRIPS, Minutes of Meeting, IP/C/M/23 (June 2, 1999) (Doc. #99-2220), para. 51, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. In this meeting, the U.S. Representative affirmed that the protection of GIs by means of certification marks is a system which is compatible with the TRIPS Agreement and constitutes a way to fulfill the Section III obligations. At the same time, however, the U.S. Representative admitted that it was not the only system compatible with the Agreement. See also, Eleanor Meltzer, Geographical Indications: Point of View of Governments, Address Before the Worldwide Symposium on Geographical Indications (July 9–11, 2003) (outlining the U.S. position that the trademark regime can protect GIs and the shortcomings of the EC approach), available at http://www.wipo.int/meetings/2003/geo-ind/en/program/index.htm.
specific nature of GI protection is embodied in the reference made in Article 22.1 to the quality and particular characteristics of a product coming from a specific area. A link with production in a specific area is, however, alien to the trademark system. The bond with production in a certain zone is not linked to the trademarks system established in Part II, Section 2 of the Agreement. For these reasons, giving priority to the trademark system would simply deny the specificity and the interests of having an ad hoc regime, such as that embodied in Part II, Section 3. Also, it is necessary to keep in mind that trademark protection systems and examination requests relative to those trademarks differ among states. The U.S.-led Proposal would have the effect of transferring the faculty that corresponds with the origin country to decide on the existence of the GIs to the country where the registry request has appeared.

Likewise, it is highly questionable whether the elements of the Hong Kong Proposal could achieve the purpose of the mandated multilateral system enunciated in Article 23.4. Similar to the U.S.-led Proposal, this proposal envisions a voluntary element because Members would be free to notify and register their GIs, but enforcement would vary substantially.\(^{151}\) Seemingly the multilateral system would have legal effects for some Members, but it would really serve as a plurilateral instrument. With regard to the formal examination proposed by the Hong Kong plan, such a simple examination would not facilitate protection\(^{152}\) because of the significant risk that such a system would contain unreliable information.

The Hong Kong Proposal also established a renewable ten-year term of protection.\(^{153}\) This was inspired by the system of protection of trademarks. Nothing in the future system should prejudice how Members implement their obligations under TRIPS, a point of the utmost importance to all delegations. The Hong Kong Proposal fails to understand that, unlike the case of trademarks, TRIPS does not require GI renewal. Rather, GI protection under TRIPS appears to be available for as long it

\(^{151}\) Hong Kong Proposal, *supra* note 117, annex A, para. E.

\(^{152}\) *Id.* annex A, para. B ("The examination process does not involve substantive examination.").

\(^{153}\) *Id.* annex A, para. C.
was given in the country of origin. Undoubtedly, a renewal system would prove more difficult and costly.

2. The Maximalist Approach

i) The EC Proposal

The proposal advocating maximum protection and legal effect for the GI registration and notification system was presented by the EC and its Member States (EC Proposal). This proposal provides for a full registration system and combines elements from the Lisbon Agreement and EC Regulation 2081/92. This proposal favors clarity and legal certainty on the protection of GIs by advocating for the creation of a system that has

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154. There is no indication in Articles 22–24 that a GI is subject to a shorter period requiring renewal measures.


157. Under the Regulation (EEC) N. 2081/92 the protected designation of origin (PDO) allows agricultural producers in Member States an exclusive right to the name of a particular foodstuff that is determined to be unique because the production, processing, or preparation takes place in a specific area using local expertise and resources. The protected geographical indication (PGI) also gives an exclusive right to a name for foodstuffs, but unlike the PDO, it does not require unique characteristics associated with a specific geographical environment. EEC N. 2081/92, supra note 37. Instead, the PGI grants protection for products due to their reputation. See also S. D. Goldberg, Who will Raise the White Flag? The Battle Between the United States and the European Union over the Protection of Geographical Indications, 22 U.PA. J. INT'L ECON. L. 107, 141–44 (2001); CORTÉS MARTÍN, supra note 29, at 325–451.
several stages. In the first stage, Members notify their domestic GIs together with regional, bilateral, or multilateral agreements protecting such GIs and proof of compliance with the definition of GIs to the Secretariat. In the second stage, the Secretariat notifies all Members of the submission. The Members then have an eighteen-month period in which to examine the submission. During that period, each Member may challenge the registration of the GI on any of the following four


159. EC Proposal, supra note 155.

Notification to the Secretariat shall be accompanied by ... prima facie evidence of the geographical indication’s conformity with the provisions of the Agreement.... Each participating Member may provide any other information it considers useful for the Agreement’s implementation and for national application of the Prohibition on the use of geographical indications for non-originating products. Id. (emphasis added). As to the question of what kind of proof would be appropriate, Members should not limit themselves as to what should be recognized as acceptable proof, in order to take into account the different legal systems in WTO Members. It could be the relevant legislation, but it could also be national certificates of registration, information on the original characteristics of the product, statistics of production, national regulations on the quality applicable to the product and the existence of producers’ associations. Certainly, elements of proof should fully support an application for registration, and when objections to a registration are being raised, they should fully support the objections.

160. Id. para. C.

161. Id.
grounds for opposition: non-compliance with the general definition of a GI; absence of protection in the country of origin, genericness, and that the use of the GI would be misleading. During the eighteen months following the publication by the Secretariat, the Members would be able to examine the GI's legitimacy by requesting explanations from the Member who presented the registration request. During this period, if a Member properly challenged the protection of a proposed GI, bilateral negotiations would be undertaken with the aim of reaching an agreement.

As far as who must demonstrate the grounds for opposition, the EC Proposal establishes that, in accordance with the TRIPS provisions and the normal legal practice in the WTO, the Member invoking the benefit must demonstrate that it has fulfilled the necessary conditions. According to this principle, Members must invoke the exception and prove its applicability if the Member trying to register the GI does not agree.

Once the period of eighteen months from publication ends, the GI would be inscribed in the register. If, during that time, there has been no opposition, the EC Proposal establishes that

162. See TRIPS, supra note 2, art. 22.1.
163. See id. art. 25.9.
164. See id. art. 24.6.
165. See id. art. 22.4.
166. EC Proposal, supra note 155, sec. C.2.
168. EC Proposal, supra note 155. The proposal speaks of “justified opposition,” although nothing is said of who judges whether opposition is justified. Id. para. C.2. From my point of view, TRIPS Council can play a decisive role in the development of this function, in association with the tasks entrusted to it in Articles 24.2 and 68.
169. Id.
no Member will be able to reject the protection alleging that it does not fulfill the conditions demanded in the general definition. Members also may not allege that the GI, although literally true as to the territory in which the goods originated, falsely represents that the goods originated in another territory. Moreover, Members may not allege that the GI deals with a generic term. It is possible, however, to deduce sensu contrario that the other exceptions to the protection will continue to allowed to be demanded by any Member.

From its inscription in the register, the GI would benefit from unconditional protection in the markets of all Members, as it would then be considered prima facie compatible with the definition in Article 22.1 and consequently deserving of protection. Nevertheless, such presumption could be refuted if use of a GI was the object of a controversy before a national tribunal. The register would protect GIs of other Members, since national jurisdictions and trademarks offices would have concise and clear information at their disposition. The list of GIs that had been registered would be published so that all the operators might know the inscription in the register. Consequently, the GIs would benefit from the presumption of protection. In addition, the EC Proposal mandates that Members will have to establish legal means so that the interested parties use the registration as a presumption of GI protection.

170. See TRIPS, supra note 2, art. 22.1.
171. See id. art. 22.4.
172. See id. art. 24.6.
173. Although in accordance with Article 24.1 of TRIPS, this WTO Member must agree to enter into negotiations aimed at increasing the protection of individual GIs. Furthermore, the provisions of paragraphs 4–8 of Article 24 may not be used by the WTO Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual GIs whose use was the subject of such negotiations. See Knaak, supra note 40, at 135.
174. EC Proposal, supra note 155.
175. Id.
Concerning the problem of homonymous GIs, the proposal establishes the principle of coexistence in order to avoid deceptive practices vis-à-vis the consumer. Negotiations could take place at that point between Members to avoid such fraud. Further, once any opposition procedure has been concluded, the GI would be registered by the Secretariat and thereby benefit from unconditional TRIPS-level protection. Finally, the EC Proposal establishes that the registration system should take into account future developments, such as when a GI was no longer used or a new GI had come into being.

ii) Critical Appraisal: Why the EC Proposal Works Best

The EC Proposal is the only one that facilitates multilateral GI protection as Article 23.4 prescribes. The principal characteristic of the EC Proposal is its concept of a full registration system. Although voluntary, the system proposed by the EC would provide that once a GI was registered it would bind all WTO Members. Rights to oppose registration would counterbalance this legal obligation. It, therefore, does not create new obligations, as any Member would have the opportunity to oppose a registration under the EC Proposal.

But, is a system which creates legal effects at the international level really necessary to facilitate protection? There are several reasons why it is necessary, but the most important is that international legal effects would make GI protection easier to implement by providing that registered GIs benefit from a presumption of eligibility for protection. The system would enable producers to reduce costs as they would have easier access to the legal means available to them to secure and enforce

176. *See TRIPS, supra* note 2, art. 23.3. Homonymous geographical indications entail the use of two or more identical geographical indications used to designate the geographical origin of products stemming from different countries. The most frequent cases of homonymous geographical indications concern the names of regions which are located in different countries. An example for such a region would be an area situated along a river running through several countries, such as the Rhine.

177. EC Proposal, *supra* note 155, para. D.

178. *Id.* para. E.

179. *Id.* para. C.2.

180. *Id.* art. 11.
the level of protection prescribed in Articles 22 and 23.\textsuperscript{181} Producers would not feel compelled to seek protection of their GIs by way of prevention in Member countries. Occasional free-riding of a notified GI would be discouraged because producers using GIs registered by other countries would have to bear the burden of proof and incur litigation costs.

In case of litigation, the register would be a tool for these producers to “facilitate” the protection of their GIs by shifting the burden of proof. This could be particularly valuable for producers in developing countries who might not otherwise have the means to assert their rights in all markets. The notification, examination, and opposition phases should therefore be considered an investment in the system’s viability; the costs involved would be offset by the benefit that would be derived from effective protection.\textsuperscript{182} Without a presumption of eligibility, in most cases it would be difficult, if not impossible, for the average right-holder of a GI to enforce his rights under Article 23, because he would have to build a case from scratch before local courts. In certain cases, litigants would be thousands of kilometers from home and under completely different legal systems. This inconvenience would threaten the Members’ clear intention to provide Article 23-level protection to GIs for wines and spirits. Under the EC Proposal, producers with a policy of international expansion would be able to save costs when defending their names around the world.

Public administrations would have timely information that allows them, for example, not to register trademarks containing such GIs, as prescribed by Article 23.2. As a result, a system with legal effects at the international level is necessary to facilitate protection because usurpation would diminish and, in turn, litigation and administration costs would decrease. Again, this

\textsuperscript{181} Id.

\textsuperscript{182} The representative of Switzerland stated in the TRIPS Council meeting held on November 28, 2002, that “[t]he notification, examination and opposition phases should therefore be considered as an investment for the usefulness and viability of the system; the costs involved would be off-set by the benefit derived from a real facilitated protection.” WTO Council for TRIPS, Special Session, Minutes of Meeting, TN/IP/M/4 (Feb. 6, 2003) (Doc #03-0786), para. 94, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.
means that the EC Proposal would make GI protection easier to implement. Under the proposal, registered GIs benefit from a presumption of eligibility for protection; moreover, piracy is discouraged. These two features benefit all parties: producers, consumers, and administrations.183

Nevertheless, the EC Proposal is not free from criticism. Certain aspects create difficulties. In particular, the reach of the effects of decisions adopted within the opposition procedures are exclusively limited to the parties.184 This limitation of effects could easily lead to a situation where a notified GI which does not satisfy Article 22.1, or which constitutes a generic term opposed successfully by Members, would have to be protected by non-participating Members opposing the procedure. This would lead to the incongruity of two different categories of GIs: those inscribed in the register to which all Members would have to give total protection, and those whose registration would have been rejected by some Members. Those who had not objected would be forced to grant total protection. It is clear that this would harm legitimate commercial interests in all markets, not only for Members who did not oppose within the term and, for that reason, are forced to protect the registered indication, but also Members who carried out the opposition successfully.185

183. But see, Goebel, supra note 146, at 986 n.72 (arguing that most of the existing multilateral systems of notification and registration, such as under Art. 6ter of the Paris Convention, the Hague Agreement in the field of industrial designs and the Madrid Protocol in the field of trademarks, all rely ultimately on determinations under domestic law to determine eligibility and protection). See WTO Council for TRIPS, Special Session, Revised Note by the Secretariat, Discussion of the Establishment of a Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits: Compilation of Issues and Points, TN/IP/W7Rev.1 (May 23, 2003) (Doc. #03-2761), para. 57, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

184. The EC Proposal states explicitly that “Members who have not challenged, within 18 months, the registration of an individual geographical indication under provision C.2 shall not refuse its protection on the basis of Articles 22.1, 22.4 and 24.6 of the TRIPS Agreement.” EC Proposal, supra note 155, para. D.

185. See Goldberg, supra note 157, at 117.

This result seems to violate TRIPS in two ways: (1) if a Member can only oppose an application based on reasons stemming from the TRIPS Agreement, then a successful opposition means the geographical indication is not protectable under TRIPS; and (2) if only the op-
Certainly, some exceptions provided in the TRIPS Agreement have a specific character depending on national markets. Thus, the question of whether a GI has become a generic term under 24.6 could surface in a national market, but not necessarily in others. But, other reasons for successful opposition have a more general reach and, subsequently, must prevent the protection in all markets to obtain the true objective of Article 23.4. Hence, when a proposed GI to the register does not fulfill the criteria of the general definition of Article 22.1, it must not be allowed to accede to the register at all in order to avoid undermining the credibility of the system.

In order to avoid these problems, the system must differentiate between absolute and relative reasons for opposition. The absolute opposition would be based on paragraphs 1 or 4 of Article 22. The relative reasons for opposition would consist of the exceptions to the protection established in paragraphs 4, 5 or 6 of Article 24. GIs having been opposed with a favorable result on the basis of the relative reasons for opposition could be registered, and Members who did not participate in the opposition procedure will be unable to deny protection. The refusal of the protection will be justified solely by the Member who has

posing Member need not protect the geographical indication, then it seems that the MFN Clause under Article 4 would be violated. A way to solve this problem with the EC Proposal is: when a geographical indication is successfully opposed, it should not be registered at all.

Id. 186. The system proposed by Hungary provides for a “multilateral possibility to challenge the registration of a notified geographical indication and that the results of a successful challenge, where appropriate, should apply on an erga omnes basis.” WTO Council of TRIPS, Communication from Hungary, Incorporation of Elements Raised by Hungary in IP/C/W/234 Into the Proposal by the European Communities and their Member States on the Establishment of a Multilateral System Notification and Registration of Geographical Indications, IP/C/W/255 (May 3, 2001) (Doc #01-2271), para. 2, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

187. The two grounds for absolute opposition involve failure to meet the definitional standards of Article 22, Paragraph 1. The other absolute bar is Paragraph 4 which states, “[t]he protections under paragraphs 1, 2 and 3 shall be applicable against a [GI] which, although literally true as to the territory, region, or locality in which the goods originate, falsely represent to the public that the goods originate in another territory.” TRIPS, supra note 2, art. 22.4.

188. Article 24, paragraphs 4, 5 and 6 involve previous use, use by a trademark, and genericness within a Member State, respectively. Id. art. 24.
opposed the register with a favorable result, and this information must be entered into the register.\textsuperscript{189}

189. Apart from these proposals presented by WTO Members, non-governmental organizations (NGOs) are also trying to participate in these negotiations, as is shown by the paper presented by the INTA about the multilateral system for the notification and registration of GIs, and by the International Chamber of Commerce, regarding the expansion of additional protection for products other than wines and spirits. The INTA submitted its Proposal for the system in April 2003. International Trademark Association, \textit{Establishment of a Multilateral System of Notification and the Registration of the Geographical Indications for Wines and Spirits Pursuant to TRIPS Article 23(4)}, Feb. 28, 2003, \textit{available at} http://www.inta.org/downloads/tap_GIpaper.pdf. INTA recognizes that GIs need to be enforceable, without creating undue barriers to trade. “INTA is convinced that it is possible to achieve a harmonious co-existence of protection systems for GIs and other intellectual property rights, including trademarks....” Conflicts between these rights should be resolved pursuant to the well-established intellectual property principles of territoriality, exclusivity, and priority. INTA believes that no means of intellectual property protection is superior or inferior to another. INTA is of the opinion that the facilitation of the protection of GIs through the system should be based on the experience gained under other multilateral instruments for the protection of intellectual property rights, in particular, the Patent Cooperation Treaty (PCT) and the Madrid System. From those two well-established systems INTA extracts a number of features and conditions for the multinational protection of intellectual property rights:

\begin{itemize}
  \item The international notification/registration should be based on the existence of a national application/registration; the notification should be facilitated through an international body; the examination of whether the intellectual property right at issue meets the protection requirements should be carried-out in the country where protection is sought; third parties shall be able to challenge the application and/or registration before the national offices and for national courts in the country where protection is sought.
\end{itemize} \textit{Id.} at 3. Dealing with the substantive examination of GIs and with possible third-party rights through the established and largely well-trained national courts and administrative bodies will provide a particular advantage for smaller and medium-sized companies. For those companies, the costs for persuading a government to take up their case to the WTO will be prohibitive. \textit{Id.} at 5. The owner of a medium-sized company

who owns a trademark registration conflicting with a GI in fifty countries would have to persuade the governments of fifty countries to raise an objection with the WTO in order to defend the exclusivity of his prior trademark. The costs involved in such exercise will considerably exceed the costs of filing opposition proceedings or a cancellation action before... the respective national courts.

\textit{Id.} “Furthermore, in many cases the trademark owner will not succeed in persuading a government to raise an objection on its behalf, since such an
V. EXPANSION OF THE SYSTEM: ADDITIONAL PROTECTION FOR PRODUCTS OTHER THAN WINES AND SPIRITS

The second battleground over GIs is the expansion of Article 23 protection for products other than wines and spirits.\(^{190}\) Indeed, a large group of WTO Members, especially developing countries,\(^{191}\) have proposed before the TRIPS Council the elimination of existing deficiencies in the sphere of GI protection with a view to applying the same level of protection of wines and spirits to all other products.\(^{192}\) As a result of the pressure

objection may conflict with the specific government interests in the protection of its own GIs. \textit{Id.} at 6. For that reason, INTA recommends that the system should follow a Madrid-like or PCT-like approach and include the following key-elements: notification/registration through an international body to the participating states, \textit{ex officio} examination of protectability in the country of protection, refusal/opposition on the basis of prior (trademark) rights, ability to challenge the registration in the national courts. \textit{Id.}

A system built on these concepts will facilitate - according to INTA document - the protection of GIs, in the same way that the Madrid System facilitates the protection of trademarks and the PCT facilitates the protection of patents. At the same time, it will recognize that GIs are what they are deemed to be under TRIPS, an intellectual property right, the importance and the value of which equals, but not surpasses, trademarks and patents.

\textit{Id.}

190. See Addor & Grazzioli, \textit{supra} note 5, at 896 (affirming that, “the improved protection of geographical indications for all products on a level similar to the one granted at present for wines and spirits, would promise trade and investments advantages, in particular for all these developing and developed countries which depend on exports of primary commodities”).

191. The issue of extension is of particular interest to developing countries because of the importance of the remunerative marketing of their agricultural, handicraft and artisan production. In addition, GIs have features that respond to the needs of indigenous and local communities and farmers. See \textit{id.}, at 893–95.

192. The call for extension of additional protection for GIs to products other than wines and spirits was confirmed in the Communication from Bulgaria, Cyprus, Cuba, Czech Republic, the European Community and their Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, Slovakia, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey, see WTO Council for TRIPS, \textit{Communication from Bulgaria, Cuba, Cyprus, the Czech Republic, the European Communities and Their Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey}, IP/C/W/353 (June 24, 2002) (Doc. #02-3484), available at \url{http://docsonline.wto.org/gen_search.asp?searchmode}
exerted by developing countries, this issue ranks very high on the negotiating agenda of the WTO. 193

A. The TRIPS Agreement’s Preferential Treatment of Wines and Spirits

Presently, TRIPS provides two levels of protection for the same intellectual property right. Article 22’s base level of protection is limited to cases where the public is misled as to the true geographical origin of a product or where GI use constitutes an act of unfair competition. Article 23 enhances the level of protection for wine and spirit GIs beyond that provided for in Article 22. The “misleading test” as applied to Article 22 is a burdensome requirement tailored to suit laws for protection against unfair competition or protection of consumers, but not protection of intellectual property. In particular, the condition that existing protection only apply to the extent needed to prevent “misleading the public” results in wide legal uncertainty. Unlike Article 23, Article 22 does not prevent the use of GIs in translation194 or if they are accompanied by expressions such as “style,” “type,” “kind,” or “imitation,” thus enabling free-riding on renowned GIs. Nor does it prevent free-riding on the efforts and hard work employed to make a GI renowned. All such free-


194 Goebel argues that one way of dealing with this issue is to try to define more adequately the scope of protection provided for under Article 23. Goebel, supra note 146, at 989 (“Instead of providing general protection for ‘use in translation’ the scope of protection should properly be defined as use in translation, if that translation is associated by the relevant consumer groups with the geographical origin of the product.”).
riding should be prohibited to avoid the risk of GIs becoming generic terms.\footnote{195}

Differential treatment of GIs under Article 23 can be explained as a product of negotiations of the Uruguay Round. The relevant provisions are the result of trade-offs specific to circumstances prevailing at the time of the negotiations, particularly during the Brussels Ministerial Conference in 1990.\footnote{196} This was, to some extent, due to the link at that time between negotiations on GIs and agriculture.\footnote{197} Today, there are no economic or systemic reasons for protecting some GIs and not others. As the sponsors of additional protection for products other than wines and spirits have stated, the risk of confusion between products which originate in a specific region and have special qualities, and products which use the same denomination, but do not have these qualities is damaging to any product.\footnote{198}

**B. Advocating for Expansion of GI Protection to Other Products**

The economic and political significance of GIs grows as increasing quality awareness and requirements increase demand for products of a specific geographical origin.\footnote{199} The added value of exported goods increases chances for legitimate goods to reach the market, which is part of the global vision for a multilateral trading system.\footnote{200} Hence, since the end of the Uruguay Round, the awareness of the need for additional protection for products other than wines and spirits has continuously in-
creased and spread among WTO Members. Extension of Article 23-level protection would provide an adequate level of protection to GIs for all products, facilitating product identification by the consumer and, therefore, enhancing consumer choice. Extension would open new market opportunities by preventing trade distortions. The benefits resulting from extension would foster the development of local rural communities and encourage a high-quality agricultural and industrial policy. As is the case for products protected via trademarks, those benefiting from adequate GI protection would be in a better position to benefit from enhanced access to third-world markets. As such, a strong GI regime would bring economic benefits to producers worldwide, and not only to producers in countries where the local protection of GIs is already stronger than in the WTO.

When considering extending GI protection, it is imperative to emphasize that the proposal presented by the sponsors of additional protection for products other than wines and spirits does not seek to require re-appropriation of terms and indications considered generic. The exceptions provisions of Article 24.6 would continue to apply to such indications. The goal of the extension proposal is to prevent GIs, which are not generic, from becoming generic. The proposal presented by these WTO Members also concerns other disadvantages resulting from the insufficient protection provided by Article 22, such as the burden of proof required under that provision to defend a GI against misuse.

The creation of comprehensive GI protection is not incompatible with the smooth future development of business activities in a country. The same problem has been satisfactorily addressed in the context of wines and spirits, as TRIPS already provides enough flexibility, such as exceptions and transitional periods ensuring that disruption of trade does not occur. Transitional periods and exceptions can accommodate the in-

201. Id.
202. Maher, supra note 12, at 1881 (noting that GIs are important tools for consumer protection and product differentiation in the wine industry).
203. Switzerland Proposal for Extension, supra note 192.
204. Id. sec. III, para. F.
205. Id.
206. Id. sec. III, para. E.
207. Id. sec. II.4. See, e.g., TRIPS, supra note 2, art. 24.4.
terests of producers and make re-labeling unnecessary. Therefore, extension, as such, will not affect the production and export of products.

In summary, the rationale of extension is that GIs for all products deserve the same level of protection as that which applies currently only to wines and spirits. In order to establish such uniform protection for all products and broaden Article 23.1 protections to other products, some WTO Members have proposed removing the reference in Article 23.1 to wines and spirits, and preventing the use of a GI “identifying products of the same category” not originating in the place referred to by it. This would eradicate the existing imbalance in Part II, Section 3, thus providing the same level of effective protection to GIs for all products.

However, many countries, including Argentina, Australia, Canada, Chile, Japan, Mexico, New Zealand, and the United States, have strongly opposed extension, partly because they believe there is no evidence that protection currently available for products other than wines and spirits is inadequate. They also object because they feel that extending protections would create unnecessary obligations, be significantly costly, and generate limited benefits, if any. Additionally, New Zealand, for example, believes that an extension to the scope of goods covered by Article 23 would be premature. The majority of these countries has been consistently obstinate about giving strong protection to GIs. While these countries wish to approach negotiations over protection for GIs and expansion of TRIPS slowly, Members that could benefit the most are ready to move full speed ahead.

208. Switzerland Proposal for Extension, supra note 192, art. III.B.12.
209. Id. sec. II.
211. See, e.g., Meltzer, supra note 150, para. 19.
VI. FUTURE PROSPECTS IN MULTILATERAL NEGOTIATIONS

The main proposals presented thus far aimed at ensuring effective protection for GIs can be categorized as incompatible, thus, the negotiations on these proposals in the TRIPS Council have been stalled. The views of the different Members are divided, not only by the legal effects of the registration system for GIs, but also by the question of the extension of GIs to products other than wines and spirits. 213

With respect to the notification and registration system for GIs, the maximalist approach — represented by the EC Proposal — seems best suited to achieve the objective of facilitating the protection of GIs as prescribed in Article 23.4. Nevertheless, some countries have shown their opposition to the proposal, alleging that this would demand the creation of an exceedingly complex and legally ambitious system. 214 By contrast, those in favor of the U.S.-led Proposal state that the European system would establish new legal obligations for WTO Members 215 since they could be bound to verify hundreds of different

213. As a general matter, it has been argued that developing countries may find it in their interest to use GIs as a tool to help create and maintain both domestic and export markets for distinctive goods originating in their territory. See Ralph S. Brown, New Wine in Old Bottles: The Protection of France’s Wine Classification System Beyond Its Borders, 12 B.U. Int’l L.J. 471 (1994).


215. While the European Community is proposing the creation of a register for all foodstuffs, other nations are challenging the very blueprint for this register. At the conclusion of the 1999 Special 301 Review, the United States initiated a WTO dispute-settlement case against the EC based on TRIPS deficiencies in EEC Regulation 2081/92. See WTO, Request for Consultations by the United States, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS174/1 (June 7, 1999) (Doc. #99-2282), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. The United States argues that EEC Regulation 2081/92’s reciprocity requirement violates the National Treatment Principle of Article 3 of the TRIPS Agreement and does not provide sufficient protection to pre-existing trademarks that are similar or identical to a GI and appears to be inconsistent with the European Communities’ obligations under TRIPS. The United States argues that the WTO rules require the EC to afford the same GI protection to non-EC states that it offers its own nationals - regardless of whether the non-EC nation has similar GI standards. This could mean that this Regulation does not provide the same treatment to other nationals and products originating outside the EC that it provides to the EC’s own nationals and products; does not accord immediately and unconditionally
GIs and face onerous opposition procedures, which will be especially burdensome for Members with limited resources. More-

to the nationals and products of each WTO Member any advantage, favor, privilege or immunity granted to the nationals and products of other WTO Members; diminishes the legal protection for trademarks (including to prevent the use of an identical or similar sign that is likely to); does not provide legal means for interested parties to prevent the misleading use of a GI; does not define a GI in a manner that is consistent with the definition provided in the TRIPS; is not sufficiently transparent; and does not provide adequate enforcement procedures. Invoking the first step to resolving a trade dispute at the WTO, the United States requested private consultations with the EC before deciding whether to initiate formal dispute settlement proceedings. See WTO Request for Consultations by the United States, Addendum, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS174/1/Add.1 (Apr. 10, 2003) (Doc. #03-1960), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. However, these consultations failed to resolve the dispute. The U.S.-amended complaint alleged that the EC regulation also violated the MFN Clause of TRIPS. Fifteen WTO Members have joined the consultations: Australia, Mexico, New Zealand, Sri Lanka, India, Argentina, Hungary, Malta, Bulgaria, the Czech Republic, Cyprus, Slovenia, Turkey, Romania and the Slovak Republic. See, e.g., WTO, Communication from Australia, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Request to Join Consultations, WT/DS174/4 (Apr. 23, 2003) (Doc #03-2161), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. Finally, the United States asked the Dispute Settlement Body to establish a panel. WTO, Request for the Establishment of a Panel by the United States, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS174/20 (Aug. 19, 2003) (Doc. #03-4330), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. Many other Members also requested to join these consultations. See, e.g. WTO, Request for the Establishment of a Panel by the Australia, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS290/18 (Aug. 19, 2003) (Doc. #03-4315), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple). In addition to these concerns, the United States raises objections to wine import certification practices instituted by the EC, as well as labeling requirements specifically relating to an EC attempt to phase out the usage of semi-generic names (i.e., Burgundy, Champagne, Chablis) on non-EC wines and other “traditional expressions” (primarily geographical indications) used to describe wine. See generally USTR National Trade Estimate Report on Foreign Trade Barriers, available at http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/Section_Index.html (last visited Oct. 20, 2004); ROBERT M. MACLEAN & BETTINA VOLPI, EU TRADE BARRIER REGULATION: TACKLING UNFAIR FOREIGN TRADE PRACTICES (2000). 216. Minutes of September 17, 1998 Meeting, supra note 99, para. 41.
over, the creation of a system with these characteristics would consume a great amount of resources. 217 These countries opposing the maximalist approach have also insisted that such an approach is incompatible with means used by many WTO Members to protect GIs, such as certification marks, unfair competition law, and common law.

Whether the system should be expanded to establish additional protection for products other than wines and spirits is also hotly contested. A large group of Members, predominantly from developing countries,218 supports expansion because the legal system currently provided under TRIPS, including its exceptions, is insufficient for providing strong protection for GIs. These Members believe that additional protection granted for some GIs constitutes arbitrary discrimination against all other products. Conversely, there is another group of countries which believes that additional protection granted only for certain products in the TRIPS Agreement reflects the balance reached in multilateral trade negotiations, and should not, thus, be altered at this stage.219

217. Id.; see also id. para. 45 (declarations of the Australian representative). Likewise, in the meeting held on March 21, 2000, the Australian representative affirmed that it had not been considered necessary under the TRIPS Agreement to override or preempt national decision-making processes on trademark or patent protection to create default global protection for individual intellectual property rights, even for well-known marks which were viewed by some as having global reach. GIs should not become default global rights without reference to the specific commercial conditions and legal situations in the jurisdiction of each Member concerned. WTO, Council for TRIPS, Minutes of Meeting, IP/C/M/26 (May 24, 2000) (Doc. #00-2113), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

218. The call for extension of additional protection for GIs to products other than wines and spirits is being demanded by the following developing countries: Bulgaria, Cyprus, Cuba, Czech Republic, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, Slovakia, Slovenia, Sri Lanka, Thailand, and Turkey.

219. Opponents, such as the United States, Canada, Argentina, El Salvador, and the Philippines, say that while an international register protecting all foodstuffs may sound appealing, it raises many potential problems. First, they argue that an international register is not necessary because Article 22 already provides sufficient protection for all foodstuffs and many countries have simply not resorted to using Article 22 TRIPS in protecting their products. Second, while the EC and other advocates claim that an international register would benefit all WTO Members (especially developing countries), opponents counter that developing countries have few domestic GIs and
To date,\(^ {220} \) the qualities that best describe the negotiations are a lack of dynamism and an unwillingness of some Members to advance questions established in the Built-In Agenda.\(^ {221} \) This

would, instead, find themselves having to provide extensive legal protection for a large number of foreign GIs. Furthermore, opponents argue that the EC Proposal will not offer protection to nearly as many products as it has stated because many of these product names have become generic terms (which do not receive GI protection under the TRIPS). Third, opponents claim that a global register would impose major costs on producers and consumers. An international register, they say, will force companies to analyze every export market to ensure that their product names are not illegally using a GI protected under that registry. A business using such a GI could be forced to re-name and re-package its goods, the costs of which might be passed along to consumers in the form of higher prices. Finally, they point out that the EC has had numerous problems with its own domestic GI regulation, and suggest that the WTO first create an international register for wines, evaluate its effectiveness, and then discuss the possibility of creating an international register for all other foodstuffs.


\(^ {221} \) The Council for TRIPS met on April 7, 2004, for its first special (negotiating) session since the Cancun Ministerial Conference, to continue negotiations on a multilateral register for GIs for wines and spirits. Discussions focused on the key outstanding issues in the negotiating mandate provided in the TRIPS Agreement, with fundamental divisions remaining among Members. Discussions at the meeting broadly fell under the two key outstanding issues related to “participation” and “legal effect.” The meeting made virtually no headway, with one observer noting that in contrast to other negotiating areas, such as agriculture, the TRIPS discussions had not even entered the "listening" phase. TRIPS Council Scrutinises GI Negotiating Mandate, 8 BRIDGES WEEKLY TRADE NEWS DIGEST 6 (2004), available at http://www.ictsd.com/weekly/04-04-22/BRIDGESWeekly8-14.pdf (last visited Oct. 20, 2004). The supporters of the joint proposal believe that the European approach, which would allow Members to challenge proposed registrations and would require registered terms to be protected in all WTO Member countries, would amount to “TRIPS-plus” by increasing the obligations under the TRIPS. In response, the new grouping called the “Friends of Geographical
paralysis is made more evident when these negotiations are compared with those of the Uruguay Round, during which there was considerable pressure. Currently, no pressure exists, nor are there the commitments to negotiate that existed during the Uruguay Round where certain chapters of the final agreement could be combined with others.

Indications,” which included more than 50 Members, noted that such a database would be unreliable – and consequently not “facilitate” protection – if Members were unable to challenge a term internationally. They believe that allowing Members to opt out of the system would make it “plurilateral” rather than “multilateral,” as required by the mandate. Rather than increasing obligations, they stated that the system would simply facilitate Members’ compliance with existing obligations under the Agreement. Hungary also pointed out that, in any case, even the “joint proposal” could be regarded as “TRIPS-plus” as it would require a notification that does not currently exists. See id.

222. Coerper has stated that “There is no time schedule for such “negotiations,” nor does it appear that any establishment of such a system need be mandatory – it could be merely informative – as regards to the wine appellations notified and registered by the various members. See Milo G. Coerper, Certification Marks as a Means of Protecting Wine Appellations in the United States, IPL NEWSLETTER (A.B.A. Sec. Intell. Prop. L.), Spring 1998, at 24.

223. Sergio Escudero, TRIPs: el alcance de la protección de las indicaciones geográficas, in TEMAS DE DERECHO INDUSTRIAL Y DE LA COMPETENCIA: PROPIEDAD INTELECTUAL EN EL GATT 163 (Carlos Correa ed., 1997) (highlighting that for some countries, the United States, among others, it is inopportune to conduct the negotiation now. For this author, nothing guarantees the register will be created because there is not a specified period to achieve this goal.). See also Coerper, Certification Marks as a Means of Protecting Wine Appellations in the United States, supra note 222, at 25 (emphasizing the absence of any precise timetable to carry out the negotiations as the main problem the creation of the multilateral register). Nevertheless, it can be clearly deduced that Article 24.1 TRIPS is a commitment for Members to enter into negotiations to increase the protection of certain GIs. This pactum de negociando seems, in any case, to include the duty for any WTO Member to negotiate in good faith and avoid illegal delays. See North Sea Continental Shelf Cases (FRG v. Den.; FRG v. Neth.), 1969 I.C.J. 3, 46 (Feb. 20) (“The parties to a negotiation] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.”). Another scholar states:

The idea that states are under an obligation to negotiate, at least in those situations where the extent of their rights can only be defined by reference to the rights of other states, is both the pragmatic and logical consequence of the interdependence of states in the modern world and of the general recognition, by states, practitioners, and students, of international relations of that interdependence.
Nevertheless, the future is certainly not discouraging. In fact, the apparent paralysis that has surrounded the debate in the TRIPS Council could change in the short run. To begin, the Doha Ministerial Declaration placed the protection of GIs on the agenda\textsuperscript{224} of WTO trade negotiations,\textsuperscript{225} fixing a precise schedule of negotiation that impels creation of the registration system for GIs and expansion of protection for products other than wine and spirits.\textsuperscript{226} This mandate provides a definitive impetus to the negotiations that, up to the present day, have been suspended by Members reluctant to accord protection to this legal category. According to the Declaration, the negotiations must conclude no later than January 1, 2005,\textsuperscript{227} and will be supervised by a Trade Negotiations Committee which will act under the authority of the General Council.\textsuperscript{228} Furthermore, these statements have been reaffirmed by the General Council of the WTO in the Decision about the Doha Work Programme adopted on August 1, 2004.\textsuperscript{229}


224. See Abbott, supra note 23.


226. \textit{Id. para. 18}.

With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights ... on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of GIs provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this Declaration.

\textit{Id.}

227. \textit{Id. para. 45}.

228. \textit{Id. para. 46} (“Issues related to the extension of the protection of GIs provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS, which shall report to the Trade Negotiations Committee, established under paragraph 46 of this Declaration, by the end of 2002 for appropriate action.”).


The (General) Council requests the Director-General to continue with his consultative process on all outstanding implementation issues under paragraph 12(b) of the Doha Ministerial Declaration, including
A. The Importance of GI Protection to Developing Countries May Serve as a Catalyst to Further Negotiation

It is apparent from recent debates that developing countries are becoming aware of the importance of GIs as instruments that contribute to the development of their economies. Although these countries might have shown greater interest in this subject during the Uruguay Round, lamentably, they did not understand the importance of an effective system of GI protection to defending their cultural, technical and traditional patrimony.

on issues related to the extension of the protection of geographical indications provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits, if need be by appointing Chairpersons of concerned WTO bodies as his Friends and/or by holding dedicated consultations. The Director-General shall report to the TNC (Trade Negotiations Committee) and the General Council no later than May 2005. The Council shall review progress and take any appropriate action no later than July 2005.

230. Compare Heald, supra note 11, at 656 with E. Durán & C. Michalopoulos, Intellectual Property Rights and Developing Countries in the WTO Millennium Round, 2 J. OF WORLD INTELL. PROP. 860 (1999). Heald asserts that increasing protection of GIs will stimulate the exports from developing countries in agricultural and crafts products under the identification of an exclusive GI. In this respect, he mentions the success that is experienced in the U.S. market with Chilean wine. On the other hand, Durán and Michalopoulos assert that there is no evidence that all developing countries will benefit from an extended protection of GIs because this will depend on whether the country is a producer of the merchandise whose GI is protected.

231. During the Uruguay Round, Switzerland showed great interest in protecting GIs for crafts products such as “Swiss Made” for clocks or the image of the Matterhorn for chocolates, see Communication from Switzerland, NG11/W/73, in Negotiating Group on TRIPS, Meeting of Negotiating Group of May 14–16, 1990, Note by the Secretariat, MTN.GNG/NG11/21 (June 22, 1990) (Doc. #90-0360), para. 41, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. Some developing countries also rejected limiting the additional protection to wines and spirits, wanted the protection system to cover products of interest to their economies such as coffee, tea or tobacco. See, e.g., WTO, Note by the Secretariat, Meeting of the Negotiating Group, MTN.GNG/NG11/28 (Nov. 29, 1990) (Doc. #90-0713), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. Unfortunately, however, most of these countries did not understand the importance that the system could have in defending its cultural, technical and traditional patrimony, and let the opportunity go. Because of that, these countries will have to make concessions to take up such negotiations again at the present time.
patrimonies. As a result, these countries now will likely be forced to make concessions in order to begin the negotiations again. Even so, pressure exerted by these countries to establish the registration system for GIs and for extension can certainly advance the negotiations.

B. Geographical Indications and Traditional Knowledge

Another factor which could influence the negotiations on the improvement of GI protection is the pressure exerted by some developing countries to establish a mechanism for protection of traditional knowledge within the framework of intellectual property. These Members place great value in the contribution to development objectives that protection of this knowledge can make. The use of GIs for products of indigenous and local

232. See generally Downes, supra note 156, at 268–73 (arguing that intellectual property rights hurt the traditional economies of developing countries, but that GIs may be an intellectual property right more advantageous to their developing economies).

233. In a Communication from Bolivia, Colombia, Ecuador, Nicaragua, and Peru, these countries define traditional knowledge as:

Innovations, creations and cultural expressions generated or preserved by its present possessors, who may be defined and identified as individuals or whole communities, natural or legal persons, who are holders of rights. The economic, commercial and cultural value of this traditional knowledge for its possessors warrants and justifies a legitimate interest that this knowledge be recognized as subject matter of intellectual property. This expectation on the part of those concerned that their traditional knowledge should be given legal recognition has found expression in an increasing number of national, regional and international forums, and is quite as legitimate as the expectations which in the past justified the recognition of the new subjects of intellectual property that were mentioned above by way of example.


234. Apart from development objectives, WTO Members have alleged some other reasons to remedy these problems about the protection of traditional knowledge. These are, among others, a common economic interest, in the sense that traditional knowledge is a valuable global resource and, hence, international efforts to secure its protection should be actively supported. See, e.g., WTO Council for TRIPS, Minutes of Meeting, IP/C/M/32 (Aug. 23, 2001)
More specifically, it has been argued that traditional knowledge has the potential of being translated into commercial benefits by providing leads for the development of useful products and processes, in particular in the pharmaceutical and agricultural sectors, saving time and cost for the biotechnology industry. WTO Council for TRIPS, Minutes of Meeting, IP/C/M/28 (Nov. 23, 2000) (Doc. #00-5002), para. 136, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (comments by the Brazilian representative) [hereinafter Minutes of Sept. 21–22, 2000 Meeting]; WTO Committee on Trade and Environment, Council of TRIPS, Submission by India, Protection of Biodiversity and Traditional Knowledge – The Indian Experience, IP/C/W/198 (July 14, 2000) (Doc #00-2889), available at http://www.docsonline.wto.org/gen_search.asp?searchmode=simple. For these reasons, it is in the common interest of mankind to provide conditions that would be favorable to the preservation of traditional knowledge and the continuing vitality of the peoples and communities which generate and develop it. See WTO Council for TRIPS, Minutes of Meeting, IP/C/M/30 (June 1, 2001) (Doc. #01-2746), paras. 153, 184, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (comments by Venezuelan and Ecuador representatives, respectively). Other reasons are based on equity: given the important economic value of traditional knowledge, the holders of traditional knowledge should share in the economic benefits derived from that knowledge. WTO Council for TRIPS, Communication from Bolivia, Columbia, Ecuador, Nicaragua, and Peru, Review of the Provisions of Article 27.3(b), Proposal on Protection of the Intellectual Property Rights Relating to the Traditional Knowledge of Local and Indigenous Communities, IP/C/W/165 (Nov. 3, 1999) (Doc #99-4753), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. Given that TRIPS requires countries with traditional and indigenous communities to provide intellectual property protection for a broad range of subject matters, including new ones such as plant varieties, biological materials, layout designs and computer software, it is only equitable that traditional knowledge should be given legal recognition. Id.; WTO Council for TRIPS, Communication from Cuba, Honduras, Paraguay and Venezuela, Review of Implementation of the Agreement under Article 71.1, Proposal on Protection of the Intellectual Property Rights of the Traditional Knowledge of Local and Indigenous Communities, IP/C/W/166 (Nov. 5, 1999) (Doc. #99-4791), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. These countries also have raised an argument for food security, pointing out that local farming communities have over the years developed knowledge systems for the conservation and sustainable use of biological diversity, including through the selection and breeding of plant varieties. The well-established practices of saving, sharing and replanting seeds sustain these communities and ensure their food security. See, e.g., Minutes of Sept. 21–22, 2000 Meeting, supra note 234, at para. 142 (comments by the Kenya representative); WTO Council for TRIPS, Communication from Mauritius on behalf of the African Group, Review of the Provisions of Article 27.3(b), IP/C/W/206 (Sept. 20, 2000) (Doc #00-3760), available at
communities’ traditional knowledge could be valuable tools for such communities seeking to gain economic benefits from their traditional knowledge or to prevent its objectionable commercial use by outsiders. GIs respond to certain indigenous concerns more effectively than do other intellectual property rights. In particular, rights to control GIs can be maintained in perpetuity; they do not confer a monopoly right over the use of certain

http://docsonline.wto.org/gen_search.asp?searchmode=simple. Finally, environmental protection is suggested as a reason to use GIs to protect traditional knowledge of indigenous peoples and local communities because traditional knowledge is central to their ability to operate in an environmentally sustainable way and to conserve genetic and other natural resources. Protection of traditional knowledge is therefore, according to these countries, closely linked to the protection of the environment. See WTO Council for TRIPS, Minutes of Meeting, IP/C/M/30 (June 1, 2001) (Doc. #01-2746), para. 184, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (comments Ecuador representatives).


236. To date, the debate on intellectual property rights and biodiversity has focused on patents and on plant breeders’ rights. Downes, supra note 156, at 269. However, the potential value of GIs warrants greater attention. See, e.g., GRAHAM DUTFIELD, CAN THE TRIPS AGREEMENT PROTECT BIOLOGICAL AND CULTURAL DIVERSITY? 20–23 (African Centre for Technology Studies, Biopolicy International Series No. 19, 1997).

237. Survey of Existing Forms of Intellectual Property Protection for Traditional Knowledge, supra note 235. In the WTO, the view has been expressed that under certain circumstances GIs could be a particularly important way of protecting traditional knowledge. For example, the European Community has stated that in the context of traditional knowledge, geographical indications could play a complementary role in protecting traditional products under certain circumstances. See WTO Council for TRIPS, Minutes of Meeting, IP/C/M/32 (Aug. 23, 2001) (Doc. #01-4090), para. 136 (comments by Venezuelan representatives), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.
information, but simply limit the class of people who may use a specific symbol. 238

The concession of patents or other intellectual property rights to people other than populations where the traditional knowledge originated has preoccupied more and more countries. 239 They are just beginning to demand the establishment of international measures of protection. Considering that most of these products are made following traditional methods which enjoy a quality, reputation, or other characteristic that can be attributed to their geographical origin, these products could benefit from GI protection; such protection could, at least, play a complementary role in their protection. 240 It would be worthwhile to explore the role that GIs could play in promoting the goals of the Convention on Biological Diversity, 241 which recognizes the existence of defined geographical areas that require regulation

238. See Downes, supra note 156, at 271 (noting that GIs are designed to reward goodwill and reputation created or built up by a group of producers over many years and in some cases over centuries).

239. The Basmati case is a good example of granting a patent to people other than the populations that originated the knowledge. Basmati is a variety of rice from the Punjab provinces of India and Pakistan. The rice is a slender, aromatic long grain variety that originated in this region and is a major export crop for both countries. Annual basmati exports are worth about $300 million, and represent the livelihood of thousands of farmers. The “Battle for Basmati” started in 1997 when the U.S. rice breeding firm RiceTec Inc. was awarded a patent (US5663484) relating to plants and seeds, seeking a monopoly on various rice lines, including some having characteristics similar to Basmati lines. Concerned about the potential effect on exports, India requested a re-examination of this patent in 2000. The patentee, in response to this request, withdrew a number of claims including those covering basmati type lines. Further claims were also withdrawn following concerns raised by the USPTO. The dispute has, however, moved on from the patent to the misuse of the name “Basmati.” In some countries the term “Basmati” can be applied only to the long grain aromatic rice grown in India and Pakistan, while in others it is considered generic. For additional information on this case, see Jayashree Watal, Intellectual Property Rights in the WTO and Developing Countries 272–73 (2001).

240. GIs are especially suitable for use by indigenous and local communities since they are based upon collective traditions and a collective decision-making process, protect and reward traditions while allowing evolution, emphasize the relationships between human cultures and their local land and environment, are not freely transferable from one owner to another, and can be maintained as long as the collective tradition is maintained.

to aid in conservation. The original products of these areas could be classified as GIs if the producers decide to link their collective norms and connected traditional knowledge to the conservation. The creation of GIs could bring economic rewards to communities seeking to market products based upon sustainable, traditional production practices.

Notable in this respect are observations of WIPO’s intergovernmental committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore that some forms of intellectual property rights cover the content of knowledge, others a specific expression, and others a distinctive sign or

242. One example of indigenous peoples’ use of identification of origin as a tool to protect cultural forms and their use comes from the southwestern region of the United States. There, artisans of several Native American tribes earn as much as $800 million annually from commercial sales of arts and crafts. For instance, the distinctive styles of Pueblo pottery, silver jewelry, and other items such as drums are well known. Styles and designs are considered a cultural heritage. In Zuni, a design may be the property of a certain family and no person outside that family has the right to use it. These indigenous communities were concerned that non-indigenous producers were using non-traditional methods to produce similar products that they passed off as indigenous traditional goods. In response, the state of New Mexico enacted the Indian Arts and Crafts Protection Law. The law places a duty on retailers of native arts and crafts to investigate whether goods are produced by indigenous persons by hand using natural materials. Only if a good passes this test can it be labeled "an authentic, Indian, hand-made piece." Controversy continues because the law does not address whether goods are produced by traditional methods. Although this example is unrelated to biodiversity, it offers significant lessons for indigenous control of traditional knowledge. See Sandra Lee Pinel & Michael J. Evans, Tribal Sovereignty and the Control of Knowledge, in INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES, A SOURCEBOOK 41, 44–48 (Tom Greaves ed., 1994). Through similar mechanisms, there may be opportunities to gain benefits from products of biological resources produced through traditional methods or based on traditional knowledge. See generally DAVID R. DOWNES & SARAH A. LAIRD, INNOVATIVE MECHANISMS FOR SHARING BENEFITS OF BIODIVERSITY AND RELATED KNOWLEDGE: CASE STUDIES ON GEOGRAPHICAL INDICATIONS AND TRADEMARKS (UNCTAD Biotrade Initiative, The Center for International and Environmental Law ed., 1999), available at http://www.ciel.org/Publications/publaw.html (last visited Aug. 16, 2004).

243. DOWNES & LAIRD, supra note 242, at 10 (“[M]ore than other major types of intellectual property, geographical indications have features that respond to norms for use and management of bioresources and traditional knowledge that are characteristic of the culture of many indigenous and local economies.”).
Thus, the possibility of a product being protected by these complementary, though overlapping, instruments of intellectual property is very real. By way of example, consider handicrafts: their technical content may be protected as a technical idea, while GIs could protect their cultural value. One important finding of the Committee’s “Review of Existing Intellectual Property Protection of Traditional Knowledge” was that while many countries considered few intellectual property instruments suitable for protecting traditional knowledge, some looked favorably upon GIs.

VII. CONCLUSION

What is the best way to protect, at an international level, the names of well-known products, such as Rioja wine or Idaho Potatoes, which have reputations known by consumers around the world? Do current international rules provide sufficient safeguards, or should governments implement another system of more effective protection? These are the questions that need to be solved by WTO Members within the scope of the Built-In Agenda of the TRIPS Agreement.

The analysis of the TRIPS Agreement’s provisions emphasizes that it offers legal instruments for the protection of future GIs while also protecting the illegal use of GIs already in use before the TRIPS Agreement went into effect. Although these


246. It could be said that the “sins of the past,” the expression so often used to talk about the first legislative developments relative to GI protection, still have not been purified. This expression has often been used to describe the incapacity of the first international legislative developments to prevent GIs which had properly functioned to indicate that a product came from a certain place, but were later transformed in another country into a generic designation of a type of product. This expression is mentioned often by scholars. See, e.g., GERVAS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS, supra note 60, at 203; Albrecht Krieger, La revision de l’Arrangement de Lisbonne
provisions undoubtedly represent a considerable improvement in international protection with respect to that which existed under WIPO, TRIPS did not create a complete system for the international protection of GIs. Quite the contrary, these provisions continue generating considerable legal uncertainty. This is also true with regard to the existing imbalance between protection levels, leading to an additional level of GI protection for wines and spirits, as compared to other products.

For these reasons, the work on TRIPS is far from finished and the debate between new and old world countries continues to be divisive in the furtherance of TRIPS’ goal of protecting intellectual property and global economic interests. By virtue of the program incorporated into the text of the Agreement, the provisions relative to the protection of GIs do not constitute a body of static norms; thus, the Agreement must evolve towards a more effective model of protection.

However, until now, debates in the TRIPS Council have been deadlocked. Different Members are divided over the nature, reach, effects, and coverage of the registration system for GIs. With respect to the notification and registration system for GIs, the minimalist approach presents the great disadvantage of limiting itself to creating a simple database without consistent legal effects. This approach is not of a multilateral character and does not help facilitate WTO protection for GIs. The proposal is silent on the need for elements of proof or an opposition procedure — elements indispensable to a future multilateral register. Therefore, this system risks creating more confusion than clarity about which products should be given Article 23-level protection.

The maximalist approach, as represented in the EC Proposal, is better suited to achieve the objective of facilitating the protection of GIs as prescribed in Article 23.4. The system proposed would be truly multilateral, as mandated in Article 23.4, because it would have legal effects on all Members. It would thus facilitate protection already available under the TRIPS

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contenant la protection des appellations d’origine, 9 LA PROPRIÉTÉ INDUSTRIELLE 399, 406 (1974) (Krieger cites to the term “péchés du passé” (“sins of the past”) but attributes the expression to Moser v. Filseck); Knaak, supra note 40, at 116; Dawson, supra note 147, at 590 (“this must be seen as a bargaining position, not a crime and still less a sin.”).
Agreement and would, therefore, favor legitimate users of GIs, consumers, and administrations alike. It would also guarantee legal certainty as one of the key elements of the multilateral system. From my point of view, it is clear that only a meaningful and truly multilateral system could fulfill the mandate that had been contained in the Built-In Agenda of TRIPS. Nevertheless, some countries have shown their opposition to the latter proposal by alleging that this would demand creation of an overly complex system.

Opinions are also divided with respect to the extension of GI protection provided under Article 23 to products other than wines and spirits. For some countries, the legal system provided under the TRIPS Agreement is insufficient. Moreover, additional protection granted for wines and spirits constitutes arbitrary discrimination against all other products. But, for another group of countries, the additional protection granted only for certain types of products reflects the balance reached in the multilateral trade negotiations.

Nevertheless, the apparent paralysis that has surrounded the debate in the TRIPS Council could change soon. GIs are on the agenda of WTO trade negotiations, which establishes a precise negotiating schedule for the creation of the registration system and the expansion of additional protection for products other than wine and spirits, assuming that the necessary consensus is reached. This has been recently reaffirmed by the General Council of the WTO.

In addition, when approaching the negotiations of the Built-In Agenda, the TRIPS Council must consider the repercussions from the perspective of commerce and development in developing countries. The subject of GIs is of particular interest to developing countries because of the importance to those countries of the remunerative marketing of their agricultural production. Additionally, the assistance of GI protection to traditional knowledge would be vital. Undoubtedly, expansion of the full scope of the TRIPS GI regime is an effective demonstration of the relevance of the Agreement to their economic circumstances. Resistance to this extension may communicate an unfortunate message to those countries about the political real-
polity of the international intellectual property rights regime.\textsuperscript{247} Therefore, WTO members should accept their responsibility to provide greater protection for GIs. By doing so, they will assist in ensuring that TRIPS remains an effective multinational treaty by setting an international example for compliance.

ROMANIA, BULGARIA, THE UNITED STATES AND THE EUROPEAN UNION: 
THE RULES OF EMPOWERMENT AT THE OUTSKIRTS OF EUROPE

Dana Neacsu*

I. INTRODUCTION

After the collapse of the Soviet Union, the United States came to Eastern Europe spreading the gospel of democracy and the American Rule of Law.¹ In addition to encouraging Western ideology, the United States was there to forge new economic relationships and, following the terrorist attacks of September 11, 2001, to accelerate the creation of military alliances through membership in the North Atlantic Treaty Organization (NATO) and the newly-formed “coalition of the willing.”² Romania and Bulgaria, among other former Soviet satellites, welcomed the invitation.³

Romania and Bulgaria are small countries which share similar economic pressures as they attempt to emerge from troubled

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¹ American Bar Association, Central European and Eurasian Law Initiative (“CEELI is a public service project of the American Bar Association that advances the rule of law in the world by supporting the legal reform process in Central and Eastern Europe and the New Independent States of the former Soviet Union.”), at http://www.abanet.org/ceeli/ (last visited Oct. 18, 2004).


³ Harvey Waterman, Dessie Zagorcheva & Dan Reiter, Correspondence: NATO and Democracy, 26 INT’L SECURITY 221, 225 (2001/2002).
political histories. 4 When the United States, with its military budget of $399 billion, 5 approached Romania and Bulgaria seeking support for its global war against terror, both countries experienced a major transformation on a local and international level. In what seems like a perfect example of Andy Warhol's notoriety allotment, for fifteen minutes the West gazed at them in disbelief. 6

Bulgaria and Romania, often intertwined by the West due to their geographic proximity and common past, 7 hope that the new spotlight will lead to an enhanced international status as they embark on a two-pronged strategy to achieve European rapprochement via membership in NATO and the European Union (EU). This Article argues, first, that Romania and Bulgaria would never have achieved the Western recognition they enjoy today without shifts in U.S. foreign policy following the September 11th attacks. Both NATO and the EU ignored Romania and Bulgaria during prior enlargement waves, which relegated them to "the other Europe." 8 When Romania and Bulgaria pledged allegiance to U.S. war interests, however, an invitation to join NATO by 2004 followed. 9

This Article also suggests that if Bulgarian and Romanian NATO membership proves sufficient to ensure the kind of political stability on Europe's eastern border that both the United States and the EU desire, Romania and Bulgaria may witness a setback in their second strategic prong of EU accession. Furthermore, given the current tension over the war in Iraq be-

4. C.I.A. THE WORLD FACTBOOK (2004) (one million people live below the poverty line in Bulgaria and ten million people, half of the population, live below the poverty line in Romania, at http://www.cia.gov/cia/publications/factbook (last visited Aug. 5, 2004)).
5. Id.
6. Glenn McNatt, Here, the "Setting" is More Worthy Than the "Stone," BALT. SUN, Sept. 4, 2004, at 1D ("In the 1960s, Pop artist Andy Warhol famously predicted that in the future 'everyone will be famous for 15 minutes'.").
tween the United States and some European countries, the EU may be hesitant to add two pro-American, former Soviet satellites to its membership.  

Part II of this Article provides some background for Romania’s and Bulgaria’s geopolitical positions in broader Europe. Part III looks at NATO enlargement, the impact of U.S. foreign policy following September 11th, and Romania’s and Bulgaria’s positions in both of these movements. Part IV examines the EU and Romania’s and Bulgaria’s accession processes in light of their past Soviet alliances and current U.S. involvement. The Article concludes by considering the impact of NATO involvement on EU membership for Romania and Bulgaria.

II. ROMANIA AND BULGARIA: IN THE WESTERN SPOTLIGHT

When the United States returned to a “pre-Watergate imperial presidency” and arrived in the forgotten Balkan area of Europe (where country names change as quickly as Parisian fashion), Romania and Bulgaria welcomed the nation. Until then, both countries wrestled with the negative Western perception that they were unsuitable for foreign investment. Although Romania and Bulgaria offered foreign investors cheap labor, currently fewer than two Euros per hour, most Western companies steered clear because of their endemic corruption. As a result, Romania and Bulgaria were left out of the post-Cold War capitalist prosperity witnessed by Hungary, the Czech Republic, Poland, and Slovakia.

The two countries are frequently paired together because they share major cultural characteristics; their majority religion

13. See generally MARIA Todorova, IMAGINING THE BALKANS (1997); Voina-Motoc, supra note 8, at 170–83.
is Orthodox Christianity and “they combine an old tradition of rural underdeveloped societies with a recent tradition of high communist socioeconomic interventionism.” As a result of these characteristics, many in the West regard Romania and Bulgaria as non-European, located, as the scholar Samuel P. Harrington describes, behind a cultural “Velvet Curtain” which buffers Western Europe from undesired Eastern cultural influences.

Until the end of the nineteenth century, Bulgaria and Romania spent a few centuries of their history under Ottoman rule. Upon gaining independence from the Ottoman Empire in the latter part of the nineteenth century, Romania and Bulgaria attempted to redefine their national identities by merging their previously fragmented territories. From those enhanced national positions, both countries began the long and complex process of promoting their European identities. During the interwar period, Romania and Bulgaria were mainly under authoritarian rule and, by the end of World War II, were formally allied with the Union of Soviet Socialist Republics (USSR). As during their isolation under Ottoman rule, Romania and Bulgaria again found themselves outside Europe, this time behind the Iron Curtain. The non-Western label stayed with Romania and Bulgaria until they renounced Soviet rule at the end of the

17. Samuel P. Huntington, The Clash of Civilizations?, 72 FOREIGN AFFAIRS 30, 30–31 (1993) (arguing that since the end of the Cold War, cultural divisions (between Western Christianity, on the one hand, and Orthodox Christianity and Islam, on the other) have replaced ideological and political boundaries). But see Mungiu-Pippidi & Mindruta, supra note 16, at 195.
19. Larrabee, supra note 7, at 74, 81.
20. NICOLAE IORG, LE ROLE DES ROUMAINS DANS LA LATINITE : CONFERENCE FAITE A L’ACADEMIE ROUMAINE [THE ROLE OF ROMANIANS IN LATIN CULTURE] 5–6 (1919) (Iorga defined the location of Romania as “South Eastern Europe”).
21. Larrabee, supra note 7, at 60. See also Todorova, supra note 13, at 140 (Romania and Bulgaria were perceived as “a homogenous appendix of the USSR”).
twentieth century,\textsuperscript{23} at which time both countries expected to join Europe and become successful capitalist societies.\textsuperscript{24} Western Europe did not, however, lay down a welcome mat, and Romania and Bulgaria found themselves still in “Europe’s own near abroad.”\textsuperscript{25}

Whether as a matter of national pride, economic need, or both, Romania and Bulgaria see promise in aligning themselves with the West, in particular Western Europe.\textsuperscript{26} To achieve this goal, both countries are vying for membership in the EU and NATO — two regional and, sometimes, adversarial organizations.\textsuperscript{27} Membership in the EU seems a rational desire from both a symbolic and an economic perspective as it can bring European identity and prosperity.\textsuperscript{28} NATO membership, on the other hand, is a more problematic choice. Undeniably, NATO membership can propel countries like Bulgaria and Romania to more visible positions in the Western world. However, while NATO membership establishes Romania’s and Bulgaria’s pro-Western positions, it may not ally them more closely with Europe.\textsuperscript{29} Additionally, NATO’s military requirements will certainly strain the meager budgets of these incipient democracies and may even erode their social and political progress, both important in their own right and as criteria for EU accession.

\begin{thebibliography}{99}
\bibitem{Kramer2003a} Id. at 179.
\bibitem{Rupnik2003} Rupnik, \textit{supra} note 15, at 116 (“Imitation of existing Western models and reconnection with pre-communist past were seen as the quickest path to democracy and prosperity.”).
\bibitem{Barany2003} Barany, \textit{supra} note 9, at 64.
\end{thebibliography}
III. NATO: THE POINT OF CONVERGENCE FOR THE UNITED STATES, EUROPE, AND THE OTHER EUROPE

A. NATO Enlargement and the Post-Cold War Era

NATO was formed as a military organization in 1949 in response to Cold War politics and U.S. President Truman’s doctrine of Soviet containment. The original members were ten European countries, the United States, and Canada. Greece and Turkey joined in 1952, the Federal Republic of Germany in 1955, and Spain in 1982. After the Cold War, NATO added the Czech Republic, Hungary, and Poland, all former members of the defunct Warsaw Pact. Today, there are twenty-six NATO members, among them Romania and Bulgaria as well as several other former Soviet states.

This post-Cold War enlargement has been defined as promoting the neo-Wilsonian premise that “international organization, democracy, peace, and trade are all mutually reinforcing.” The official U.S. position is that NATO enlargement will influence and commit new members to adopt the values of Western democracy. Similarly, NATO proponents believe that taking in new members from Central and Eastern Europe will revitalize NATO by “expanding the frontiers of a stable and democratic Europe.” Certainly, NATO members such as Poland, Hungary, and the Czech Republic perceive their membership as “an

30. NATO IN THE 21ST CENTURY, supra note 2, at 6.
31. Id.
32. Id. at 7.
35. Reiter, supra note 33, at 44.
36. Barany, supra note 9, at 65 (“U.S. president Bill Clinton claimed that NATO could ‘do for Europe’s East what it did for Europe’s West: prevent a return to local rivalries, strengthen democracy against future threats,’ and create the conditions for prosperity.”).
agreement to [adopt NATO's] rules and accede to its demands, to be put into regular contact with its officials and its military officers and its institutions and procedures, and to provide pervasive encouragement to reform and a ubiquitous presence of examples of how it is done if you are 'Western.'”

Despite the collapse of the Soviet Union, some scholars believe that support for Cold War alliances and the U.S. unilateral military approach to foreign relations remain intact. From this perspective, the 2003 Iraq invasion is a logical continuation of these inclinations. Paradoxically, however, the unilateral militarism directed against Iraq, a former Soviet protectorate, is at the same time empowering Romania and Bulgaria, two other former Soviet satellites.

**B. The United States and the Second Wave of NATO Enlargement**

The U.S. war on terror following the September 11th attacks instigated a second wave of NATO enlargement. This effort was commenced in November, 2002, when President Bush formally invited seven former Soviet satellite countries (including Bulgaria and Romania) to join NATO. This was not the first instance of U.S. military involvement in Southeastern Europe: the disintegration of the former Yugoslavia forced the United States and NATO to establish a presence in the area. In contrast to 1995, when the United States used NATO to conduct

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38. Waterman et al., supra note 3, at 224–25.
40. For an in-depth analysis of unilateralism as one of the salient elements of the current administration's security strategy, and its roots in U.S. history, see JOHN LEWIS GADDIS, SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE 22-26 (2004).
41. Id. at 22.
air strikes in Yugoslavia, this time, the United States offered NATO membership as a reward for support of the war in Iraq. In order to put together its “coalition of the willing,” the United States recruited Romania and Bulgaria, as well as other former Soviet satellites such as Albania and Georgia. To the United States, these states “had the resolve and fortitude to act against [Iraq’s] threat to peace” where the “United Nations Security Council [had] not lived up to its responsibilities.” Given Romania’s and Bulgaria’s economic positions and political histories, it appears unlikely that either Romania (considered by some to be “the region’s undisputed basket case”) or Bulgaria would have been invited to join NATO absent their participation in the U.S. coalition.

C. Romania and Bulgaria as Members of NATO and the “Coalition of the Willing”

Romania and Bulgaria embraced the invitation to join NATO and extended assistance to the United States more than either country ever had. While Bulgaria only provided NATO with an air corridor during the war in Kosovo, it currently has

44. Carlos L. Yordán, Resolving the Bosnian Conflict: European Solutions, 27 Fletcher F. of World Aff. 147, 148 (2003) (“[T]he U.S. solution involved a mix of diplomacy and the use of NATO air strikes.”).


48. Barany, supra note 9, at 71. See also Bulgaria: NATO Member a Year After Iraqi War, ANSA English Media Service, Mar. 19, 2004, available at 2004 WL 64007654 (Bulgaria’s NATO membership “would have been impossible without a green light from the United States.”).

49. Barany, supra note 9, at 72.

50. Id.
troops in both Afghanistan and Iraq.\textsuperscript{51} Similarly, during the war in Yugoslavia, Romania limited its NATO contribution to the terms of the economic embargo. Now it, too, has troops in both Afghanistan and Iraq.\textsuperscript{52} This marks a dramatic shift for Romania and Bulgaria, from involuntary subservience to the former Soviet Union spawned by fear of Soviet occupation,\textsuperscript{53} to voluntary acquiescence to the United States prior to the reward of NATO membership.\textsuperscript{54}

As many commentators have pointed out, economic prosperity, more than military capacity, is necessary to consolidate democracy.\textsuperscript{55} However, it appears unlikely that Bulgaria and Romania will reap economic benefits from the presence of NATO troops in their territories. In the past, entire German villages built their futures around U.S. military bases; today, the United States plans to cut its NATO spending, in part by reducing the total number of soldiers it has stationed in Germany, rather than relocating them to cheaper places like Bulgaria and Romania.\textsuperscript{56} Furthermore, NATO membership may play a nefarious role in helping Romania’s and Bulgaria’s military sectors achieve budgetary allocations at the expense of other sectors like public education and health care.\textsuperscript{57}

Moreover, it is likely that Romania and Bulgaria will endure more economic adversity as a result of their military involvement.\textsuperscript{58} For example, the United States has asked Bulgaria to forgive Iraq’s pre-1989 debt of two billion dollars, which repre-


\textsuperscript{52} Powell Thanks Romania for Help in Afghanistan and Iraq (Oct. 27, 2003), at http://usinfo.state.gov/sa/Archive/2004/Jan/30-258852.html.

\textsuperscript{53} Kramer, supra note 23, at 200.

\textsuperscript{54} See generally Norms and Nannies: The Impact of International Organizations on the Central and East European States (Ronald H. Linden ed., 2002) (discussing how Western leaders use membership in NATO and the EU to gain acceptance of their norms and standards).

\textsuperscript{55} Waterman et al., supra note 3, at 233.

\textsuperscript{56} Judy Dempsey, US Plans to Cut Troops in Europe by a Third, FINANCIAL TIMES, at 4 (Feb. 3, 2004).

\textsuperscript{57} See Reiter, supra note 33, at 51.

resents 10% of its Gross Domestic Product (GDP).\textsuperscript{59} Iraq’s debt to Romania is valued at $1.7 billion,\textsuperscript{60} and will likely remain unpaid so long as Romania is a close U.S. ally.\textsuperscript{61} In exchange for these sacrifices, neither Romania nor Bulgaria has received financial support for its involvement in the war or any Iraqi reconstruction contracts.\textsuperscript{62} Although there is quid pro quo with respect to Romania’s and Bulgaria’s NATO membership, and possibly some future economic relief as a result of their coalition involvement, NATO membership will not provide the economic and political stability these young democracies so desperately need.

Finally, successful NATO membership may have the unexpected impact of impeding Romania’s and Bulgaria’s accessions to the EU. The growing division between rich and poor at the outskirts of Europe clearly raises the risk of unrest and chaos for Western Europe.\textsuperscript{63} This is one reason why the EU has increased its membership in the border regions.\textsuperscript{64} NATO’s involvement in Eastern Europe may provide enough stability to make EU expansion unnecessary.\textsuperscript{65} At the same time, in light of the current tensions between the United States and Europe over the war on terror, Romania’s and Bulgaria’s increased involvement in NATO may make them too pro-United States for Europe.\textsuperscript{66}

Although Romania’s and Bulgaria’s involvement in the coalition has put both countries on the map, it has also exposed

\begin{itemize}
\item \textsuperscript{59} Interview by Irina Grozdeva with Marc Grossman, Undersecretary for Political Affairs (July 22, 2004), available at http://www.state.gov/p/34816pf.htm.
\item \textsuperscript{60} Romania, a New and Close American Ally, supra note 58.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Tomiuc, supra note 29. The goal of EU enlargement (to “improve [the EU’s] capacity to safeguard Europe’s environment, to combat crime, to improve social conditions and to manage migratory pressures”) is evidence that the EU is concerned with this risk. Enlargement Strategy Paper, supra note 37, at 4.
\item \textsuperscript{64} Enlargement Strategy Paper, supra note 37, at 3.
\item \textsuperscript{65} Rob de Wijk, European Military Reform for a Global Partnership, 27 Wash. Q. 197, 197-210 (2003) (arguing for NATO’s historical and current role ensuring security on both sides of the Atlantic).
\item \textsuperscript{66} Jan Zielonka, Challenges of EU Enlargement, 15 J. Democracy 22, 25-26 (2004).
\end{itemize}
them to European scrutiny over the war in Iraq. France and Germany, in particular, have voiced criticism of Romania’s and Bulgaria’s participation.

IV. THE EUROPEAN UNION AND THE OUTSKIRTS OF EUROPE

A. The Emergence of the European Union

The EU originated in the 1948 Hague Congress and the 1950 Schuman Declaration, which sought economic solutions to post-World War II problems in Germany and France. Under Winston Churchill’s leadership, it excluded both the Communist Left and the Far Right from participating. These, however, were mostly symbolic beginnings. The real landmark institutions of the EU are the Treaty of Paris establishing the European Coal and Steel Community (ECSC), and the two Treaties of Rome establishing the European Economic Community (EEC) and the European Atomic Energy Community. The ECSC and the EEC share the same six original members: Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.

The EEC Treaty included provisions for a customs union, a common commercial policy, a common transport policy, and a limited monetary policy. In addition to these economic provi-

67. Doug Berreuter and John Lis, Broadening the Transatlantic Relationship, 27 WASH. Q. 147, 147 (2003) (the war in Iraq brought transatlantic tensions to center stage).

68. Ken Adelman, Romania Knows - Been There; Ready to Help Iraq, National Review Online (Nov. 4, 2003), at http://www.nationalreview.com/comment/adelman200311040812.asp (“While no great military might, and with gobs of domestic priorities grabbing its leaders, Romania posts 1,800 troops in the two newly liberated nations. Other Europeans — especially French and Germans — ask why Romanians divert scarce resources to aid these Islamic states.”).

69. DESCIMAL DINAN, EUROPE RECAST: A HISTORY OF EUROPEAN UNION 37 (2004) (Robert Schuman, France’s Foreign Minister, linked the consolidation of French and German coal markets to the goal of wider European integration).

70. Id. at 23.


73. DINAN, supra note 69, at 46–57.

74. Id. at 77.
sions, the EEC Treaty formulated political and judicial institutions: the European Commission, the European Parliament, and the European Court. 75 These new institutions, as well as the subsequent Single European Act, 76 further buttressed the supranational character of the EEC and opened the doors to European integration. 77

Though, officially, the EEC remained an economic organization until the 1990s, European integration commenced with its inception. 78 Given the EU’s complex origins, it should come as no surprise that its accession process requires both a political and economic analysis of each candidate for membership. 79 Such scrutiny occurred even when Britain, Ireland, and Denmark acceded in the 1970s, 80 as well as during Greece’s accession in 1981, and Spain’s and Portugal’s in 1986. 81 For each of these countries, the accession process lasted six years. 82

During the 1990s, new challenges of globalization and short-lived, but propitious, economic times changed the official nature of the EEC. 83 As a result of the EEC’s focus on the implementation of the single market program, a greater sense of political and economic integration ensued. 84 Finally, the EEC gave way to the EU in December 1991, and started to resemble a federation in many political and economic respects. 85 This shift concluded with the Treaty on European Union. 86 During this time, the EU was focused on regional economic and social issues, with mixed results: “the single market remained a work in progress; unemployment stayed stubbornly high; sustainable develop-

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75. Id.
77. DINAN, supra note 69, at 205.
78. Id. at 206.
80. DINAN, supra note 69, at 135–47.
81. Id. at 169–71.
82. Id. at 190.
83. Id. at 205.
84. Id. at 216–19.
ment [...] was easier to proclaim than to achieve; and agriculture and cohesion seemed impervious to reform.”

Despite these challenges, or perhaps in response to them, the EU took on the task of enlargement towards the East. The first wave brought in Austria, Sweden, and Finland in the mid-1990s; the next was intended to address Cold War remnants in Central and Eastern Europe. The former Soviet satellites which, after achieving independence, dreamed of rejoining capitalist Europe, welcomed this move. The first such entrée occurred in 1990, when the EU presented Europe Agreements to some former Soviet satellites. These agreements were part of a pre-accession strategy and provided a bilateral legal and political framework tailored to support the state’s political and economic transition towards capitalism.

The first Europe Agreements were signed in 1991 with Hungary, Poland, the Czech Republic, and the Slovak Republic. In 1993, agreements were signed with Romania and Bulgaria, and in 1995 and 1996 similar agreements were signed with other Central and Eastern European countries. This network established a free trade area for industrial goods. By the beginning of the twenty-first century, this block of former Soviet satellites represented the EU’s second largest trading partner after the United States.

Although the EU signed Europe Agreements with its Eastern neighbors, it did not seriously consider them potential candidates for accession until the Copenhagen European Council in 1993. For the first time, the Copenhagen Conclusions identi-
fied the political and economic conditions an applicant had to satisfy to become a member.98

Documents of accession particularized the economic and political conditions each state must achieve. States achieve membership when existing EU members sign the Accession Treaty and the candidate ratifies it.99 Between 1994 and 1996, ten countries closer to the West, including Poland and the Czech Republic, ended their pre-accession phases and concluded applications for EU membership.100

The process of accession, as described in the 1995 EU Commission’s White Paper,101 is based on a “structured dialogue” aimed at integrating candidates into the EU single market.102 Guided by that document, in 1997 the Commission recommended commencing accession negotiations with five former Soviet satellites: the Czech Republic, Hungary, Poland, Estonia, and Slovenia.103

In 2000, the EU opened accession negotiations with Latvia, Lithuania, Slovakia, Bulgaria, and Romania.104 Romania and Bulgaria, however, were omitted from the Commission’s 2002 recommendations for accession, due to their poor economic and political performance.105 Eventually, all of the above, except

98. Id. at 25.

[The] candidate countries must have achieved “stability of institutions guaranteeing protection of minorities.” They must also be able to guarantee “the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.” Membership assumes “the candidate’s ability to take on obligations of membership including adherence to the aims of political, economic, and monetary union.”

Id.

100. D INAN, supra note 69, at 274.
102. Id. at 3.
103. D INAN, supra note 69, at 276.
104. Id. at 277.
105. Id. at 279.
Romania and Bulgaria, became EU members on May 1, 2004.\footnote{Zielonka, supra note 66, at 22.} The new members, however, cannot fully participate in the EU but, instead, benefit from limited transitional arrangements known as derogations from the \textit{acquis communautaire} (the laws and rules of the EU).\footnote{Kirstyn Inglis, \textit{The Accession Treaty and its Transitional Arrangements: A Twilight Zone for the New Members of the Union}, in \textit{EU ENLARGEMENT: A LEGAL APPROACH} 77 (Christophe Hillion ed., 2004). See also Michael Dougan, \textit{A Spectre is Haunting Europe...Free Movement of Persons and the Eastern Enlargement}, in \textit{EU ENLARGEMENT: A LEGAL APPROACH} 111 (Christophe Hillion ed., 2004) (free movement of workers is one area of the \textit{acquis} for which the EU has negotiated transitional derogations).}

\section*{B. Romania and Bulgaria: The Accession Process}


Since Romania made its bid for EU membership, it has consistently occupied last place among negotiating countries.\footnote{King, supra note 25, at 257.} Commentators describe its economic and political record as dismal.\footnote{Id. at 256.} In fact, despite a Latin heritage which could link it to France, Spain, and Italy, the EU views Romania's political, social, and cultural heritage as an obstacle to its integration into EU institutions.\footnote{Id.} This is quite a damaging perception for the
Romanian bid considering the EU’s historical emphasis on a regional cultural identity.\(^{114}\)

Despite Romanian and Bulgarian commonalities, Geoffrey Van Orden, Vice Chairman of the EU Foreign Affairs Committee, has made an effort to distinguish Bulgaria, insisting that its accession date should not be tied to that of any other state.\(^{115}\)

Even while the European Parliament debated whether to call for a reorientation of the EU’s accession strategy with Romania,\(^{116}\) Commissioner Franz Fischler was giving hope to Bulgaria that its accession treaty could be signed in 2005.\(^{117}\)

In June 2004, however, Günther Verheugen, the EU Commissioner responsible for EU enlargement, contradicted that statement and reaffirmed the 2007 accession date for Bulgaria.\(^{118}\)

Verheugen warned that Bulgaria’s economic development was being impeded by problems with corruption and organized crime.\(^{119}\)

Romania’s main problem has been its inability to establish a market economy. Since the regime change in 1989, the standard of living for ordinary people has been steadily declining: in 1999, more than one-third of Romanians lived in poverty.\(^{120}\)

Internally, some saw this decline as evidence of a functioning market economy.\(^{121}\)

Unlike the previous regime’s corruption,

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\(^{118}\) Crime and Corruption Keep Investors Away from Bulgaria, Warns Verheugen, supra note 14 (Verheugen stated: “Everyone can be assured Bulgaria will be a full, equal, and responsible member of the EU by January 2007.”).

\(^{119}\) Id.


\(^{121}\) Ioana Speteanu, Grabbe: ‘Cartea aderarii se joaca la masa politicului,’ 48 CAPITAL, Nov. 27, 2003, at 7 (Romanian journalists debate whether the EU
which allowed wealth stratification, the current regime makes it legal for few to prosper at the expense of many. However, Romanians see the sacrifice of half of the Romanian population supporting a free market economy with their poverty and unemployment, where EU officials see Romanian socioeconomic collapse.

Although Bulgaria closed its accession negotiation chapters by the summer of 2004 while Romania has closed only twenty-seven chapters, the EU has not officially decided to split the two countries’ accession processes. As recently as October 2004 the Commission has stated that it “expects Romania to assume the obligations of membership in accordance with the envisaged time frame.” Thus, it appears that the Commission’s vision for a 2007 accession date for both states may come to fruition. Furthermore, the differences between Romania’s and Bulgaria’s accession progress will likely remain inconsequential against the backdrop of interplay between the EU and the United States, which will dictate the changes in that part of the world.

As a result of economic need and their desire to belong to Western Europe, Romania and Bulgaria were willing to endure seven years of pre-accession negotiations over economic and political criteria. Their prospects, even if all goes well, appear to be “a sort of twilight zone, somewhere between the terms of economic criteria (functioning market economy) are properly defined).

122. UNITED NATIONS DEVELOPMENT PROGRAMME, supra note 120, at 6.
123. See WORLD FACTBOOK, supra note 4.
128. Bulgaria and Romania are poorer than the newly-admitted EU members, which themselves are strikingly poor by comparison to Western Europe. See Alina Mungiu-Pippidi, Beyond the New Borders, 15 J. DEMOCRACY 48, 50 (2004).
pre-accession strategy and membership on a par” with existing member states.\textsuperscript{130}

V. CONCLUSION: THE IMPACT OF NATO INVOLVEMENT ON EU ACCESSION

While Romania and Bulgaria see EU membership as the ticket to economic prosperity, for the EU such enlargement only makes sense as a measure to ensure political stability within European borders and to increase the EU’s role as a counterweight to U.S. supremacy.\textsuperscript{131} In this sense, Romania’s and Bulgaria’s chances and timelines for accession depend not only on meeting internal requirements, but also on the nature of the interplay among the EU, NATO, and the United States.

The addition of ten new members in May 2004 has already prompted concerns about the EU’s future and whether it should take an intergovernmental or supranational form.\textsuperscript{132} Some observers characterize the 2004 enlargement as an act of “West European charity toward neighbors in the continent’s East,” but recognize that the EU is also acting in its own self-interest.\textsuperscript{133}

The issue is further complicated by inconsistencies between popular opinion demonstrated by polling data and the official EU position on enlargement. In a 2003 survey conducted among 1,453 executives at major European companies, 57% considered the EU to have achieved its critical mass at twenty-five states and only 6% supported the candidacies of Bulgaria and Romania.\textsuperscript{134} Nevertheless, the official position is that the EU is centrally concerned with “moving from division to unity, from a propensity for conflict to stability, and from economic inequality to better life-chances in the different parts of Europe.”\textsuperscript{135}

\textsuperscript{130} Inglis, supra note 107, at 108.
\textsuperscript{131} See generally ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003) (Rationalizing Europe’s aspiration to balance the United States’ world power).
\textsuperscript{133} Zielonka, supra note 66, at 22.
\textsuperscript{135} Enlargement Strategy Paper, supra note 37, at 3.
Even if the official position promotes enlargement, the future direction of the EU is difficult to ascertain, with possible results ranging from a “United States of Europe” to a conglomerate of states with few institutions in common, a “kind of neomedieval empire.” It is also possible that some of the problems the EU faces may already be determinative of its future. For example, there is increasing hostility towards the work forces of new members; borders are, therefore, likely to remain hard and well-fixed. Furthermore, there is currently little consensus about unified EU political bodies, such as its Parliament, suggesting that the EU will never become a federation reminiscent of the United States.

On the other hand, if the EU gives way to more institutional supranationalism by building on its existing supranational monetary policy, integrating countries with different cultural and religious backgrounds may affect the EU’s capacity to function through compromise rather than majority rule. The prospect of such a shift may result in a preemptive halt to accession of “Velvet Curtain” countries such as Romania and Bulgaria.

Also at play is the impression among Western European countries that the EU must provide a counterbalance to the United States. As such, the EU may be wary of bringing in too many pro-U.S. states. New EU members, and candidates such as Romania and Bulgaria, run the risk of being perceived as “American Trojan horse[s]” due to their NATO and coalition involvement. Compounding the problem for Romania and Bulgaria is the fact that the EU is also nervous about former Soviet values, such as “paternalism, populism, and corruption” entering the EU through the 2004 and later enlargements. Thus, their pro-Soviet past and pro-American present leave Romania and Bulgaria stuck between the proverbial rock and hard place.

137. Id. at 33.
138. TORBÖRN, supra note 132, at 140–59.
139. Zielonka, supra note 66, at 25.
140. Id.
141. Id. at 31.
A FOUNDATION OF GRANITE OR SAND? THE INTERNATIONAL CRIMINAL COURT AND UNITED STATES BILATERAL IMMUNITY AGREEMENTS

INTRODUCTION

Scholars of international law heralded the signing of the July 1998 Rome Statute, establishing the International Criminal Court, as long overdue, auspicious, controversial, or simply wrong. Nowhere in international law has a debate raged so fiercely over the legitimacy of a court, the evolution of the controlling law and the need for global cooperation as it has in the field of international criminal law. For many organizations and political bodies, many of which had labored indefatigably to salvage and promote human rights, the establishment of the Court stood as the physical embodiment of their efforts. After decades of flagrant human rights violations coupled with

1. Hereinafter “ICC.”
4. Upon the ratification of the Rome Statute, Amnesty International published a favorable commendation of the ICC and its goal of eradicating unaccountable perpetrators of human rights violations. “This is a very important moment in the struggle for international justice, because it means that people suspected of committing crimes against humanity, war crimes or genocide – no matter what their rank – may be tried by the court.” Amnesty International further praised the mission and the authority of the court when it wrote, “A message is being sent around the world that people planning the worst crimes and human rights violations can no longer do so in the knowledge that they won’t be held accountable.” Press Release, Amnesty International, The International Criminal Court – a Historic Development in the Fight for Justice (Nov. 4, 2002), available at http://www.amnesty.org.
impunity, a concerted initiative for an international criminal court was launched in the General Assembly in 1991. But breathing life into the Court proved to be a Herculean task for the international community, resulting in a half-decade struggle to determine (1) which crimes would fall under the jurisdiction of the Court; (2) what structure and rules would be implemented for its effective operation; and (3) from what source would the Court derive its jurisdiction – from state consent, territoriality or universal jurisdiction?

Under Article 12 of the Rome Statute, the ICC’s jurisdiction originates from state consent, which manifests itself through either territorial or nationality jurisdiction. Alternatively, the ICC’s ultimate and most compelling source of authority may rest, however, in the philosophical natural laws underpinning the relationship between the international community’s rights

5. On the eve of its one year anniversary, the ICC stated, “In the past century, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.” Press Kit, International Criminal Court, First Anniversary of the Court (Jul. 1, 2003), available at http://www.icc-cpi.int/php/index.php.


7. For the purposes of this article, the word “state” means “country,” which is the customary vernacular of international law scholarship and practice.

8. *Infra* note 34.


10. “Preconditions to the exercise of jurisdiction: A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.” Id. art. 12 (1).

11. [T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the court in accordance with paragraph 3: The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; The State of which the person accused of the crime is a national.

_Id._ art. 12(2)(a)-(b).
2004] INTERNATIONAL CRIMINAL COURT

and the correlative duties vested in the states. Where such a relationship exists, the states are under an obligation to uphold and defend not only their citizens’ rights but also the rights of the international community at large. This obligation springs from a complex relationship between international crimes, *jus cogens* and obligations *erga omnes* that has developed in customary international law. Where that relationship imposes an affirmative duty on a state to adjudicate, convict and punish violators of international human rights, a state cannot shirk that duty.

This complex relationship between the international communities’ right to prosecution and the states’ duties to comply is not sufficiently protected, however, by consent or territorial-based jurisdiction. Instead, universal jurisdiction provides the strongest basis underpinning the ICC’s authority, allowing for a more effective and formidable court.

Under the Rome Statutes’ principle of complimentarity, the authority of the ICC is triggered when a state is unable or unwilling to fulfill its duties to the international community, which demand that the state adjudicate international criminal offenses subject to universal

17. “[T]he Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.” Rome Statute, *supra* note 9, at art. 17(1)(a)-(b).
Essentially, this means that the state’s duty is then discharged to the ICC, under the *jus cogens* and obligations *erga omnes* doctrines of customary international law. Any treaty or agreement violating or impeding that discharge of duty violates customary international law.

As of May 2004, ninety-four states had ratified the Rome Statute. The United States is not one of these countries, and has been vociferous in its opposition, expressing strong reservations over the legitimacy of the ICC and its jurisdiction over United States citizens. Less than five years after the Rome Statute authorized the ICC’s creation, the United States launched an unprecedented campaign to secure bilateral immunity agreements. The agreements explicitly exempt United

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18. *Id.* art. 17(1)(a)-(b).

19. On the discharge of duty to the ICC, Amnesty International wrote that the states that ratified the Rome Statute “have accepted the primary obligation to investigate and prosecute people accused of the crimes and when they are unable or unwilling to do so the International Criminal Court may bring them to justice.” Press Release, Amnesty International, *The International Criminal Court,* *supra* note 4.


23. The United States has engaged in a widespread campaign to undermine and marginalize the ICC to prevent it from becoming an effective instrument of justice. ... The bilateral agreements sought by Washington would require states to send an American national requested by the ICC back to the U.S. instead of surrendering him/her to the ICC. Importantly, Washington’s agreement would remove the ICC’s oversight function, which is the fundamental principle underpinning the Rome Statute and is critical to close the door on impunity.

States citizens from the ICC’s reach. The United States’ efforts to obtain immunity agreements have invigorated the debate over the ICC’s legitimacy and underline the importance of the court’s jurisdictional basis.

Part I of this note defines and identifies international crimes subject to universal jurisdiction and within the scope of the International Criminal Court. Part II discusses a state’s duty under recognized doctrines of international law to punish perpetrators of those international crimes and the correlative right held by the international community to expect and demand adjudication. Part III suggests that if a state is unable or unwilling to prosecute those crimes, the state must discharge that duty to the ICC. Part IV asserts that the United States’ bilateral immunity agreements restricting the authority of the ICC contravene the United States’ duty to the international community and hence are illegal under *jus cogens*.

In April of 1999, less than a year after the signing of the Rome Statute and the birth of the ICC, a human rights crisis of mass proportions raged in Kosovo. Academics, politicians, diplomats, and the media all grappled with the following issues: (1) humanitarian intervention; (2) genocide and other international crimes of that nature; (3) a state’s privilege or obligation to intervene, prevent, or punish such crimes; and, (4) where to fit the ICC into the landscape of international criminal law. One commentator, writing on the unheeded threats made by the Clinton administration to Slobodan Milosevic to impose war-crime prosecutions, concluded, “These threats have had no visi-

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27. *Id.*
ble effect, and thus provide yet another compelling piece of evidence why the new International Criminal Court – created in nearby Rome just this last summer – rests on a foundation of sand.

By firmly establishing that the ICC’s jurisdiction is implicitly derived from universal jurisdiction, regardless of consent, nationality, or territorial jurisdiction, the ICC’s foundation would be solid, as the protection the ICC affords to the relationship between rights and duties could not be eroded by bilateral immunity agreements or any other attempts to limit its scope and reach.

I. INTERNATIONAL CRIMES SUBJECT TO UNIVERSAL JURISDICTION AND THE INTERNATIONAL CRIMINAL COURT

A. The Birth of International Crimes

Before World War II and the Nuremberg trials, very few crimes enjoyed the status of “international crimes.” While two crimes, piracy\(^\text{29}\) and slavery\(^\text{30}\), had gained general consensus as subject to universal jurisdiction, it was not without considerable debate.\(^\text{31}\) In the early twentieth century not all scholars were persuaded that universal jurisdiction applied. As a result, a debate raged in the scholarly rhetoric as to what form of jurisdiction was best applied to these crimes committed on the high seas and across international borders.\(^\text{32}\)

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28. Id.

29. “A pirate is defined as one who, without legal authority from any State, attacks a ship with intention to appropriate what belongs to it.” In re Piracy Jure Gentium (1934) AC 586, 594-95 (internal quotes omitted).


32. Subscribing to the universal jurisdiction paradigm, Shaw wrote:

Universal jurisdiction over piracy has been accepted under international law for many centuries and constitutes a long-established principle of the world community. All states may both arrest and punish pirates, provided of course that they have been apprehended on the high seas or within the territory of the state concerned. The punishment of the offenders takes place whatever their nationality and wherever they happen to carry out their criminal activities.

Id.
Some international legal scholars clung tenaciously to their preference for adjudication of criminal acts in domestic courts as opposed to international forums.\textsuperscript{33} The twentieth-century scholar Georg Schwarzenberger, subscribing to the “state-sovereignty” or “territorial”\textsuperscript{34} international legal theory, concluded in 1950 that “international criminal law in any true sense does not exist.”\textsuperscript{35} “Territorial” scholars, such as Schwarzenberger, concluded that the crime of piracy was adjudicable only in domestic courts.\textsuperscript{36} On the other hand, “naturalist” scholars,\textsuperscript{37} including scholars who prescribe to universal jurisd-


\textsuperscript{34} The territorial principle of criminal jurisdiction is that “courts of the place where the crime is committed may exercise jurisdiction.” IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (5th ed. 1998). Brownlie discusses the practical advantages of this theory of international criminal jurisdiction, including amongst them “a convenience of the forum and the presumed involvement of the interests of the state where the crime is committed.” \textit{Id.} Shaw writes, in further support of the territorial principle, “That a country should be able to prosecute for offenses committed upon its soil is a logical manifestation of a world order of independent states and is entirely reasonable since the authorities of a state are responsible for the conduct of law and the maintenance of good order within that state.” \textit{SHAW, INTERNATIONAL LAW}, supra note 31, at 458-59.

\textsuperscript{35} Murphy, \textit{International Crimes, supra note 33}, at 362. Schwarzenberger and others of his school of thought held solidly to the opinion that “an international criminal law that is meant to be applied to the world powers is a contradiction in terms. It presupposes an international authority which is superior to these states.” \textit{Id.}

\textsuperscript{36} Schwarzenberger held that all crimes were of a nature most effectively handled in domestic courts:

The rules of international law both on piracy \textit{jure gentium} and war crimes constitute prescription to States to suppress piracy within their own jurisdiction and to exercise proper control over their own armed forces, and an authorization to other States to assume an extraordinary criminal jurisdiction under their own municipal law in the case of piracy \textit{jure gentium} and of war crimes committed prior to capture by the enemy.

\textit{Id.}

\textsuperscript{37} Two theories of international jurisdiction seem to fit nicely under the naturalist theory – that of the “universality” principle, which “justifies the repression of some types of crime as a matter of international public policy,”
diction, believed piracy was in the domain of the international community, subject to global jurisdiction because of its universally detrimental effects. Pirates traversing international waters often brandished the flag of their country of origin; yet they did not sail under the authority of that or any country. Further, piracy was more palatably a crime subject to universal jurisdiction because (1) the crime occurred in international waters or on the “high seas”; (2) the pirate showed allegiance to no country (only to himself); and (3) consequently, the pirate had abandoned the protection or safeguards of his proclaimed state of affiliation.

Slavery, also characterized by perpetration on the high seas and transnational, borderless activities, shared an early birth as an established international crime. The preponderance of scholars and practitioners of international law now readily acknowledge that states have a right to exert universal jurisdic-

and the more general “crimes under international law,” which expands the domain of the universality principle to incorporate crimes that “breach international law.” Universality when taken to this broader expanse allows that some crimes “may be punished by any state which obtains custody of persons suspected of responsibility.” BROWNLIE, supra note 34, at 307-08.

38. The United Nations and scholars subscribing to universality ideologies arrived at a different view than the “territorial” scholars, advancing in the 1958 Geneva Convention on the High Seas that “the view of ‘piracy’ as a crime against international law seek[s] only a tribunal with jurisdiction to apply that law and punish the criminal.” Murphy, International Crimes, supra note 33, at 363, citing A. RUBIN, THE LAW OF PIRACY 319-37 (1988).

39. In Re Piracy Jure Gentium, the Privy Council called the pirate “a sea brigand. He has no right to any flag and is justiciable by all.” In re Piracy Jure Gentium (1934) AC 586, 594-95.

40. The Privy Council justified universal jurisdiction over the crime of piracy by distinguishing crimes committed on “terra firma” [firm land] as falling under the domain of the “municipal law of each country” from crimes committed on the “high seas,” which were “justiciable by any State anywhere.” Id. at 589. The Privy Council also held that the pirate, by committing his acts of piracy, “placed himself beyond the protection of any State. He is no longer a national, but “hostis humani generis.” Id.

41. The 1815 Declaration of the Congress of Vienna “equated traffic in slavery to piracy.” Since that time, slavery has been subjected to the same “universal condemnation that existed with respect to piracy.” M. Cherif Bassiouni, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, 42 VA. J. INT’L L. 81, 112-13 (2001), citing M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS 637-734 (1997).
tion over piracy and slavery, the first acts to come under the heading of “international crimes.”

B. Nuremburg and Beyond

The question of whether criminal acts could transcend the traditional domestic-modeled jurisdictions and demand a more expansive accountability to an international legal body was presented to the international community with an unprecedented urgency in the aftermath of World War II. This period, marked by an unparalleled human rights crisis, initiated a debate and ultimately an affirmation that some crimes reach such proportion and level of atrocity as to demand accountability to humanity at large. At Nuremburg, the Military Tribunal “proclaimed the existence of two ‘new’ crimes under international law – crimes against peace and crimes against humanity.”

42. See Shaw, International Law, supra note 31, at 470; Bassiouni, Universal Jurisdiction, supra note 41, at 112-13.
43. Murphy, International Crimes, supra note 33, at 364; Shaw, International Law, supra note 31, at 471.
44. In the aftermath of World War II, the widespread effect and heinous nature of the war crimes committed under the Nazi regime caused outrage in the international community and it seemed the natural progression of international law to try the perpetrators of these atrocious acts. Yet this was not the first time war crimes had been addressed in the international arena. In 1927, in the wake of World War I, French Extradition Law provided that “acts committed in the course of a civil war would not be protected as political offences if they were acts of odious barbarism and vandalism prohibited by the laws of war.” I.A. Shearer, Extradition in International Law 186 (1971) (internal quotes omitted). Therefore, the trials at Nuremberg were consistent with a growing global effort towards eradicating war crimes and holding those responsible for their instigation liable. Id. at 185-87.

The Statute of the International Tribunal for the Former Yugoslavia provided that

| Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character and that crimes against humanity refer to inhumane acts of a very serious nature, such as willful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. |

This proclamation advanced a growing list of international crimes and evidenced an emergent awareness of the necessary international accountability required to squelch crimes committed against humanity as a whole.\textsuperscript{46} All the individuals involved in prosecuting at the Nuremberg trials recognized the global responsibility to vindicate the crimes that had occurred under Hitler and his Nazi regime.\textsuperscript{47} At Nuremburg, a foundation was laid down for future international remedies for international crimes.\textsuperscript{48}

Hence, in the immediate years following World War II, crimes such as “genocide,”\textsuperscript{49} “ethnic cleansing”\textsuperscript{50} and “war crimes”\textsuperscript{51} re-

\begin{quote}
The Statute of the International Tribunal for Rwanda defines crimes against humanity as crimes committed “as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds,” encompassing “murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts.” Statute of the International Tribunal for Rwanda, art. 3, Security Council Resolution 955 (1994).

\textsuperscript{46} Murphy, \textit{International Crimes}, supra note 33, at 364, citing the Judgment of the International Military Tribunal, 6 FRD 69, 107 (1946). Murphy contends that the Charter of the Nuremberg Tribunal and the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly on December 9, 1948, both affirming the “new crimes,” support the proposition that punishment for crimes against peace and against humanity is “recognized broadly as international customary law.” \textit{Id.}; see also Peter Burns, \textit{An International Criminal Tribunal: The Difficult Union of Principle and Politics}, in \textit{THE PROSECUTION OF INTERNATIONAL CRIMES} 127 (Roger Clark & Madeleine Sann eds., 1994).

\textsuperscript{47} Justice Jackson, as Chief Prosecutor for the United States, said in his opening statement,

\begin{quote}
The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. ... That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason. We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow.
\end{quote}


\textsuperscript{48} \textit{Id.}

\textsuperscript{49} Genocide, as defined by the United Nations Security Council in Article 2 of the Statute of the International Tribunal for Rwanda, includes any of the following acts
ceived universal condemnation from the international community. The development of customary international law defining these crimes and promoting their prosecution has led to global cooperation in creating ad hoc tribunals, such as the In-

[C]ommitted with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group.


51. The four Geneva “Red Cross” Conventions of 1949 extended universal jurisdiction over “grave breaches” of crimes against humanity, which included “willful killing, torture or inhuman treatment, unlawful deportation of protected persons and the taking of hostages.” The list was later extended to include “attacking civilian populations.” SHAW, INTERNATIONAL LAW, supra note 31, at 471, citing G. I. D. DRAPER, THE RED CROSS CONVENTIONS, 105 (1958).

52. “War crimes and genocide are now widely accepted as being susceptible to universal jurisdiction.” REBECCA WALLACE, INTERNATIONAL LAW 114 (2002). In support of this rule of customary international law, Wallace points to two separate instances, the first, the Eichmann Case, in which Israel claimed jurisdiction on grounds that “a universal course (pertaining to the whole of mankind), [ ] vests the right to prosecute and punish crimes of this order in every state within the family of nations.” Id. at 114; see also, Attorney-General of the Government of Israel v. Eichmann 36 I.L.R. 5 (1961); Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Tex. L. Rev. 785 (1988). Randall notes that Israel’s assertion of jurisdiction over Eichmann was distinct from previous Nazi trials in that “the state of Israel did not exist when Eichmann committed his crimes.” However, “the fact that Israel was not a state when Eichmann acted does not affect the legitimacy of Israel’s jurisdiction under the universality principle.” Id., at 814.

Second, Wallace finds support for universal jurisdiction over war crimes and genocide in the Charter of the Nuremberg Military Tribunal, art. 6, “which referred to crimes against peace, violations of the laws and customs of war, and crimes against humanity and for which there was to be individual responsibility... [T]he judgment[s] of the Tribunal are now accepted as international law.” WALLACE, supra at 52.
ternational Criminal Tribunals for Rwanda and the former Yugoslavia, international courts, such as the War Crimes Tribunals in Sierra Leone and Cambodia, and forums such as the South African Human Rights Commission and the Inter-American Commission on Human Rights, all sufficiently equipped with the legal tools and precedents to try the perpetrators of international crimes.

The growing body of international documents that address war crimes and crimes against humanity strive to effectively and efficiently make those who perpetrate them accountable before any competent body, domestic or international, capable and willing. In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide set guidelines for punishing genocide. The Convention declared genocide punishable during times of war as well as “in the absence of international armed conflict” and classified genocide as a “crime under international law” subject to universal jurisdiction.

Almost thirty years later, in 1973, the United Nations General Assembly passed Resolution 3074, “Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity,” which declared that “States shall co-


56. See SHAW, INTERNATIONAL LAW, supra note 31, at 472. Following World War II, many of the international documents and bilateral and multilateral treaties promulgated in an effort to apprehend and try those responsible for war crimes avoided the use of the word ‘extradition’ in an effort to “give States the widest latitude in resorting to measures of rendition.” SHEARER, supra note 44, at 186.


operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.”

Although the resolution specified that “every State has the right to try its own nationals for war crimes or crimes against humanity” and asserted that “persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes,” the resolution does not preclude or exclude other States from apprehending and prosecuting perpetrators of war crimes and in fact calls for State cooperation.

After Nuremberg, the international community gradually amassed a substantial list of international crimes, evidenced through treaties, General Assembly and Security Council Resolutions, and case law under which states had the privilege to adjudicate criminals under the doctrine of universal jurisdiction, regardless of whether the crimes had been perpetrated within their domestic borders or by their nationals. International crimes of torture, slavery and/or deportation or forcible transfer of population, whether or not they were on a “massive” scale or “systematically” carried out, were firmly rooted in that doctrine. Torture, defined as any act by which “severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining... information or confession, punishing him for an act he has committed or is suspected... or intimidat-

60. Id. ¶ 2-3, 5.
61. Id. at 366.
ing him or other persons,” is one of the oldest practiced and most widely condemned crimes under international law. Thus, all States clearly have a privilege (more commonly labeled a right in scholarly vernacular) either to extradite an alleged torturer or try him where he is found on the basis of universality of jurisdiction.

Even the jurisprudence of the United States condemns torture and acknowledges universal jurisdiction over the torturer, no matter where the crime was committed, analogizing the torturer to “the pirate and slave trader before him – hostis humani generis, an enemy of mankind.” In Filartiga v. Pena-Irala, the United States Court of Appeals for the Second Circuit held that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torture is found and served with process by an alien within our borders [there is] federal jurisdiction.”


65. See Rodley, supra note 58, at 182-83.

66. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

67. Id. at 878.

The Filartiga family, citizens of Paraguay, brought this action in the Eastern District of New York against Americo Norberto Pena-Irala, a citizen of Paraguay and the former Inspector General of Police in Asuncion, Paraguay. The Filartigas claimed that their son had been tortured and killed by Pena as retaliation for the father’s political activities and beliefs and had autopsies demonstrating that the seventeen-year-old boy’s death “was the result of professional methods of torture.” When the Filartigas brought an initial action against Pena in Paraguay their attorney was also tortured and subsequently disbarred on trumped-up charges. At the time of this suit in the United States, the suit in Paraguay had been pending over four years. The Second
In addition to the well established international crimes subject to universal jurisdiction that allow states to extradite or try perpetrators, an additional body of crimes is gradually gaining a foothold in the international community and may eventually afford states the same privilege to try and punish the perpetrator where found. Examples of international activities that have long since plagued the global community, and are rapidly evolving into “international crimes” that in the near future may be subject to adjudication under the doctrine of universal jurisdiction, include drug trafficking and international terrorism.

Circuit based its jurisdiction over Pena on the practices and obligations of the international community.

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture... civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun.

Id, at 878-79, 890.

68. From the “Single Convention on Narcotic Drugs” in 1960 to the bilateral and multilateral treaties in the following decades, which expanded extraditable offenses to include violations of narcotics laws, there is an ever-increasing movement towards the addition of trafficking in narcotic drugs to the ranks of crimes subject to universal jurisdiction. See Christopher L. Blakesley, Terrorism, Drugs, International Law, and the Protection of Human Liberty: A Comparative Study of International Law, Its Nature, Role, and Impact in Matters of Terrorism, Drug Trafficking, War, and Extradition 140, 214 (1992), citing the 1986 Supplementary Extradition Treaty Between the United States and the Federal Republic of Germany; citing the United States–French Supplementary Treaty taken from the United States Draft Extradition Convention; see also Molly McConville, A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court, 37 AM. CRIM. L. REV. 75 (2000) (advancing the need for an international court and universal jurisdiction over drug traffickers); Report of the Task Force on an International Criminal Court of the American Bar Association 5 (1994) (One of the original jurisdiction proposals for the International Criminal Court was that it have limited jurisdiction over international drug trafficking only).

69. See Murphy, International Crimes, supra note 33, at 369-70, citing 1936 Convention for the Suppression of Illicit Traffic in Dangerous Drugs, 198 LNTS 229 (Murphy notes that this Convention called for “drug traffickers to be punished by all governments, regardless of the criminal’s nationality or the place where the crime was committed.”); also citing Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf.
Drug Trafficking’s escalation into the echelons of international crimes is increasingly due to the fact that the crime is often transnational, includes or breeds other forms of crime, and demonstrates a serious threat to “international peace and security.” See generally, McConville, A Global War on Drugs, supra note 68, at 75.

70. The General Assembly Resolution on “Protection of Human Rights and Fundamental Freedoms While Countering Terrorism” reiterated the World Conference on Human Rights of June 1993 by stating that

[A]cts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments, and...the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism.


“Whether the crimes covered by the anti-terrorist conventions may be classified as “international crimes” is debatable. At the very least, they establish a legal framework for states parties to cooperate toward punishment of the perpetrators of these crimes.” Murphy, International Crimes, supra note 33, at 368. See also Dinah L. Shelton, The Relationship of International Human Rights Law and Humanitarian Law to the Political Offense Exception to Extradition, in NEW DIRECTIONS IN HUMAN RIGHTS 149-50 (Ellen L. Lutz et al. eds., 1989). As early as the 1970s, the European community recognized the need for global cooperation in apprehending and prosecuting terrorists. See BLAKESLEY, supra note 68, at 140-42, citing The European Convention on the Suppression of Terrorism, opened for signature Jan. 27, 1977, E.T.S. No. 90, reprinted in 15 I.L.M. 1272-76 (1976).

States which were a party to the European Convention on the Suppression of Terrorism “obtaining custody of a person who has allegedly engaged in that specified violent conduct [are] obligated to prosecute or extradite that person.” European Convention, supra at art. 7.

Immediately following the terrorist attacks on New York City and Washington, D.C., the Security Council issued Resolution 1368, in which it called on all States “to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and [stressed] that those responsible for aiding, supporting or harbouring [sic] the perpetrators, organizers and sponsors of these acts will be held accountable.” S.C. Res. 1368, U.N. SCOR, 56th Year, 4370th mtg. at 1, U.N. Doc. S/RES/1368 (2001).

Under Resolution 1377, the Security Council stressed “continuing international efforts to broaden the understanding among civilizations and to address regional conflicts and the full range of global issues, including development issues [in order to] contribute to international cooperation and collaboration, which themselves are necessary to sustain the broadest possible fight against international terrorism.” The UN also called on all States to “become parties as soon as possible to the relevant international conventions
C. Crimes within the Jurisdiction of the International Criminal Court

Considering the legal scholarship and development of international criminal law in the preceding century, the Rome Statute astutely placed the following three crimes squarely within the jurisdiction of the International Criminal Court: genocide, crimes against humanity and war crimes. All three were unarguably crimes of universal jurisdiction under customary international law.

Genocide was defined as

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group.


71. Rome Statute, supra note 9, at art. 5(1).
72. See Murphy, International Crimes, supra note 33, at 364.
73. Rome Statute, supra note 9, at art. 6(a)-(e).
74. Rome Statute, supra note 9, at art. 7.
75. Extermination “includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.” Id. at art. 7(2)(b).
76. Enslavement was defined as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” Id. at art. 7(2)(c).
77. Deportation or forcible transfer of population is defined as “forced displacement of the persons concerned by expulsion or other coercive acts from
prisonment, torture,\textsuperscript{78} rape, sexual slavery, enforced prostitution, enforced disappearance of persons\textsuperscript{79} or “other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” committed as part of “a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”\textsuperscript{80} Sex crimes were also listed as crimes against humanity, including “forced pregnancy,”\textsuperscript{81} enforced sterilization, or any other form of sexual violence of comparable gravity.\textsuperscript{82}

War crimes were also defined in the statute in great and painstaking detail. First, war crimes are described as “grave breaches of the Geneva Conventions of 12 August 1949” [including but not limited to] willful killing; torture or inhumane treatment, and willfully causing great suffering, or serious injury to body or health.\textsuperscript{83} Also included in the definition of war crimes were “other serious violations of the laws and customs applicable in international armed conflict” such as “intentionally directing attacks against the civilian population…or against individual civilians not taking direct part in hostilities.”\textsuperscript{84} The Statute also defined certain acts as war crimes, regardless of the conflict’s character—international or domestic.\textsuperscript{85}

\begin{itemize}
\item the area in which they are lawfully present, without grounds permitted under international law.” \textit{Id.} at art. 7(2)(d).
\item 78. Torture is defined as “intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, law sanctions.” \textit{Id.} at art. 7(2)(e).
\item 79. Enforced disappearance of persons is defined as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.” \textit{Id.} at art. 7(2)(i).
\item 80. \textit{Id.} at art. 7(1).
\item 81. Forced pregnancy is defined as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.” \textit{Id.} at art. 7(2)(f).
\item 82. \textit{Id.} at art. 7(1)(g).
\item 83. \textit{Id.} at art. 8(2)(a).
\item 84. \textit{Id.} at art. 8(2)(b)(i).
\item 85. \textit{Id.} at art. 8(2)(c).
\end{itemize}
II. STATE DUTY TO ADJUDICATE INTERNATIONAL CRIMES OF
UNIVERSAL JURISDICTION: INTERPLAY OF RIGHTS AND DUTIES

In 1913, Wesley Newcomb Hohfeld introduced a legal paradigm regarding rights and duties that established a correlative relationship between the holder of a right and the holder of a duty.® Groundbreaking and controversial, Hohfeld’s assertion that for every legal right there was a correlative duty, created a context in which legal jurists could determine whether a party had a distinct right for which it was owed a duty or conversely a privilege for which there was no correlative right.® A “right” was a claim, enforceable by state power, “that others act in a certain manner in relation to the right-holder.”® According to Hohfeld, a right was “much more complex than a mere legal advantage.”® The weaker claim of privilege, often confused as a right, entailed “permission to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts.”® Hohfeld was primarily concerned with clarifying “the fundamental difference

87. According to Joseph William Singer, Hohfeld’s paradigm evoked a great deal of contention among legal scholars and practitioners, some of whom believed it “path breaking” or a “brilliant innovation” and others who thought it “naïve.” Other scholars debated over whether Hohfeld’s model was too broad (the eight terms – rights, privileges, powers, immunities, no-rights, duties, disabilities and liabilities – should be trimmed) or too narrow (the terms must be increased to create a more usable paradigm, taking into consideration other kinds of legal relationships). Joseph William Singer, The Legal Rights Debate In Analytical Jurisprudence From Bentham to Hohfeld, 1982 Wis. L. Rev. 975, 978, 989-90, 992 (1982).
89. Singer, Legal Rights Debate, supra note 87, at 986.
In their review of Richard Primus’ book The American Language of Rights, Jack N. Rakove and Elizabeth Beaumont introduce three reasons for exerting rights in conjunction with Hohfeld’s definition. First, a right may be asserted to “claim general authority for specific propositions,” secondly, “to attempt to entrench politically precarious practices,” and lastly “to declare particular practices or propositions to be of special importance.” Jack N. Rakove & Elizabeth Beaumont, Rights Talk in the Past Tense, 52 Stan. L. Rev. 1865, 1873 (2000) (book review).
91. Singer, Legal Rights Debate, supra note 87, at 986.
between legal liberties ([with corresponding] privileges) and legal rights [with corresponding duties].

Although Hohfeld did not originally discuss his paradigm in the framework of human rights, eventually his model was applied to the determination of what human rights or “moral rights” were true rights or “legal claims” and which were mere privileges or “liberties.” Genuine rights cannot be “created” or “bestowed” by a State, as can liberties or privileges. Rather, States in a Hohfeldian context may only choose to ignore or recognize human rights, and despite an attempt to ignore or disavow those rights, the State’s correlative duty to the right remains. Human rights law represents a distinct area of the law in which legal and moral rights and duties intersect and over-

92. Singer holds that Hohfeld’s motivation for creating this paradigm was to clear up a centuries-long confusion between rights and privileges. Hohfeld “criticized his predecessors for not understanding the ‘fundamental and important difference between a right (or claim) and a privilege or liberty.’” Hohfeld’s paradigm clearly established that difference, employing “correlatives [to] express a single legal relation from the point of view of two parties.” Id. at 987. Hohfeld sought to end the use of the word “right” when the legal jurist or scholar more precisely intended to “invoke any of the other entitlements.” Rakove & Beaumont, Rights Talk, supra note 89, at 1873.


94. Id. at 45-46.

95. Donovan discussed human rights in this context as “rights beyond the reach of the state because it is not within the state’s power to deprive us of our humanity other than, perhaps, to kill us. The contrast is presumably between inalienable human rights and merely civil rights that the state can control, bestow and withdraw.” He reinforced that true human rights are “inalienable.” Id.

Whether or not certain human rights are inherently born of “natural law” or are identified by another theoretical philosophy, as societies develop and change “[States’] understanding and grants of rights to their members must also change and develop.” Donovan’s concept of emerging human rights coexists with a practice in which “rights will necessarily be recognized and enforced piecemeal. The category of ‘human rights’ is therefore a cluster right that has accreted over time as new rights have been identified and new categories of persons encompassed.” Id. at 56.

lap, creating “a range of express, implied, correlative, regional, and emergent human duties, obligations, and responsibilities.”

In addition to its duty to ensure that human rights are maintained within its domestic borders, a state also has a role in apprehending and trying those who violate international criminal laws under the doctrine of universal jurisdiction. A subject of ongoing debate is whether that role, under the Hohfeldian paradigm, is a mere privilege with no corresponding right or rather an outright obligation with a correlative right vested in the international community. A state’s privilege, often re-

96. Saul wrote that “many legal duties are based on, or codify, pre-existing moral duties, although all moral duties are not necessarily legally enforceable ones.” He defined a “duty” as a “task or action that a person is bound to perform for moral or legal reasons,” and an “obligation” as “a moral or legal requirement.” Despite an attempt to distinguish the two, Saul conceded “both duty and obligation are allied with the idea of coercion, in that they are burdens imposed on, or required of, someone.” Saul, In the Shadow of Human Rights, supra note 90, at 575, 580 (internal quotes omitted). See also Donovan, Incremental Extension of Rights, supra note 93, at 52 (“Because some legal rights are obviously not moral rights, the relationship between the two is neither that of synonyms nor subsets, but instead constitutes a third relationship: Legal rights and moral rights are independent but intersecting categories”).


98. “Universal jurisdiction may be exercised by a state without any jurisdictional connection or link between the place of commission, the perpetrator’s nationality, the victim’s nationality, and the enforcing state.” The rationale behind universal jurisdiction is to “enhance world order by ensuring accountability for the perpetration of certain crimes.” Bassiouni, Universal Jurisdiction for International Crimes, supra note 41, at 88-89.

Ratner proposes two main purposes for universal jurisdiction: a symbolic one, “as a statement of international concern about the severity of the act” and as a practical one, “as a means of improving enforcement that generally presupposes universal jurisdiction and requires states to extradite or prosecute offenders.” Ratner, Schizophrenias of International Criminal Law, supra note 97, at 253.

99. Ratner concludes that states do have a right under universal jurisdiction to try international crimes but no obligation or duty to do so. Addressing genocide in particular, he wrote, “[C]ustomary international law clearly recognizes the right (though not the duty) of a state to prosecute for genocide
ferred to as a *right* outside the Hohfeldian paradigm, to try for international crimes developed into a rule of customary international law over the latter half of the twentieth century, despite criticism and opposition from some international law practitioners.100

When applying the doctrine of universal jurisdiction to Hohfeld’s categories of correlative rights and duties and corresponding non-rights and privileges,101 a state’s right to try international crimes clearly subject to universal jurisdiction is recognized under customary international law as an indisputable Hohfeldian privilege.102 Therefore, when a state finds the perpetrator, national or not, of a recognized international crime such as piracy, slavery, genocide, war crimes and crimes against humanity on its soil, it has the privilege to try that individual regardless of the location of his crime.103 As a mere

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100. Critiquing reports published by Amnesty International and Human Rights Watch, renowned international scholar M. Cherif Bassiouni cautioned, “Universal jurisdiction is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations, profess it to be.” Bassiouni, *Universal Jurisdiction*, supra note 41, at 83, n.1.

Despite scholarly controversy, it is a fact that “many states have jurisdiction to try offenses that have taken place outside their territory.” Shaw, *International Law* supra note 31 at 453, 470. Even Bassiouni concedes in his article that universal jurisdiction exists for certain international crimes, whether through *jus cogens* or customary international law, but should be utilized cautiously. See generally, Bassiouni, *Universal Jurisdiction*, supra note 41.


privilege, however, the international community has no correlative right to demand that the state apprehend and try the international criminal; rather, under Hohfeld’s paradigm, they have a non-right, which bestows no expectation that the individual state has or will fulfill a duty or obligation to try.104

Without establishing a duty invested in the states, the international community only has the ability to encourage the state to exert its privilege; it cannot enforce a right.105 Yet, as the list of international crimes continues to evolve,106 and new crimes such as drug trafficking and terrorism slowly begin gaining recognition as possible crimes subject to universal jurisdiction,107 other crimes formerly justiciable as a state’s privilege may have metamorphosed into crimes for which a state has a duty to adjudicate.108

105. For a brief discussion of the pressures international organizations place on states to exert authority under universal jurisdiction, see Bassiouni, Universal Jurisdiction, supra note 41, at 83, n.1.
106. The Restatement, in its discussion of the customary law of human rights, qualifies a short list of acts that violate those laws, which includes genocide, slavery, slave trade, and a consistent pattern of gross violations of internationally recognized human rights. In a comment, the writers of the Restatement qualify, “the list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future.” If the rights continue to evolve, then clearly the privilege to try crimes that violate those rights would grow apace. Restatement (Third) of Foreign Relations Law of the United States § 702 cmt. a (1987).

The Reporters’ Notes also indicate that other rights may “already have become customary law and international law may develop to include additional rights.” It is even noted that an argument has been advanced that “customary international law is already more comprehensive than here indicated.” Restatement (Third) of Foreign Relations Law of the United States § 702 Rep. n.1 (1987).
107. Murphy, International Crimes, supra note 33, at 369-70, citing 1936 Convention for the Suppression of Illicit Traffic in Dangerous Drugs, 198 LNTS 229, supra note 69; Blakesley, supra note 68, at 140-41.
108. On the evolution of international crimes subject to universal jurisdiction, see generally Bartram S. Brown, The Evolving Concept of Universal Jurisdiction, 35 New Eng. L. Rev. 383 (2001). “As the fundamental values and norms of the international system have evolved, so too has the number of
Among international legal scholars, there is an emerging consensus that for particular international crimes a state’s privilege to apprehend and try perpetrators has undoubtedly ripened into an affirmative duty or obligation.109 Utilizing Hohfeld’s paradigm, this maturation of a privilege into a duty stems from the developing relationship of the international community to the actual international crimes.110 If some international crimes transcend a non-right status and assume the label of right, then the correlative duty must be vested somewhere.111 The principle that those rights have correlative duties intrinsically vested in individual states has gained a great deal of weight, rooted in the international doctrines of jus cogens and obligations erga omnes.112

In order to establish that states have an obligation to adjudicate international crimes subject to universal jurisdiction, it must first be established that certain rights are indeed held by the international community.113 Applying the Hohfeldian model, legal academic Ben Saul asserted, “In civil rights and human rights law, the most commonly recognized duties are correlative duties, referring to those duties that complement specific rights... [A] right is a legal advantage that entails a correspond-

111. Id.
113. André de Hoogh, Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States 56-57 (1996). In a discussion on the ILC-draft on State responsibility, de Hoogh discusses theories behind international crimes and corresponding state responsibilities and obligations, particularly regarding “safeguarding the human being... prohibiting slavery, genocide and apartheid.” Id. at 56.
ing duty or disadvantage.”

Major human rights treaties, the rhetoric of which spans the last two centuries and has gained increasing prominence in the last half century, support the belief that “the primary responsibility for the protection of human rights falls upon State Parties.” The preamble to the Universal Declaration of Human Rights reinforces that sentiment when stating that citizens of the world have “equal and inalienable rights,” which “should be protected by the rule of law.”

The Restatement on Foreign Relations addresses those rights promulgated in the Declaration and acknowledges that some rights enjoy a more conscientious protection. “All the rights proclaimed in the Universal Declaration and protected by the principal International Covenants are internationally recognized human rights, but some rights are fundamental and intrinsic to human dignity.” Subsequently, States have the correlative duty to uphold the “fundamental and intrinsic” rights that belong to the International Community as a whole.

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114. Saul, In the Shadow of Human Rights, supra note 90, at 585.

115. Saul turned for support to human rights documents as old as the French Revolution’s 1789 Declaration of the Rights of Man and of the Citizen and more recently the preamble of the Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and the 1966 International Convention on Economic, Social and Cultural Rights. It must be pointed out here, however, that many of the “rights” listed in early documents like the 1688 English Bill of Rights or the 1789 French Declaration of the Rights of Man are, under the Hohfeldian paradigm, “privileges” as opposed to “rights”. Id. at 588, 610.

116. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). Although some of the “rights” listed would fall under “privileges or liberties” in the Hohfeldian model, traditional rights to which the State owed a correlative duty included the “right to life, liberty and security of person,” the right not to be held “in slavery or servitude,” and the right not to be “subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Universal Declaration of Human Rights, Id. at art. 3-5.


118. Id.

119. See Murumba, The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets, supra note 109, at 5 (“As originally conceived in the Universal Declaration, and in antecedent natural law theorizing, human rights were principally the claims of individuals against or upon the state or the society it represented. In Hohfeldian terms, the state had the primary duties correlative to these rights” (internal quotes omitted)); see also
der the Declaration, “Everyone 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.”

Under the Hohfeldian model, the implication exists that the correlative duty to provide an effective remedy lies with the States. In the late twentieth century, momentum increased for a mandatory requirement upon states to extradite for the commission of all international crimes for which there is universal jurisdiction, even in the absence of an extradition treaty. Such a requirement would consequently transform extradition for international crimes from a state privilege to a state duty.

Beyond the scope of universal jurisdiction, there are standard customs and general principles of international law involving extradition under treaties, which many states utilize to bring “international crimes” under their jurisdiction. Under the General Assembly’s 1990 Model Treaty on Extradition, the obligation/duty is analogous to a contract, where the State required to extradite under the treaty owes a duty correlative to the right of the State demanding extradition. Furthermore, an argument can be made, implementing the human rights application of Hohfeld, that states are under a moral obligation, arising under natural law, that exists whether or not extradition is concretely embedded in a treaty.

While many international...
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crimes have come under universal jurisdiction as a rule of customary international law, the United Nations and other international bodies began at the end of the 20th Century to push codification of universal jurisdiction over these crimes, particularly through the Model Treaty on Extradition.127 In addition to affirming the human rights application to the correlative right/duty contract-model, the Model Treaty encourages states to update existing treaties, or enter into treaties that conform to “recent developments in international law,” which include the consideration and application of universal jurisdiction where appropriate.128

Earlier treaties dealing with multilateral extradition set basic guidelines for extradition, establishing safeguards that are applicable when applied to international crimes subject to or exempt from universal jurisdiction.129 Under the 1957 European Convention on Extradition, an obligation to extradite under existing extradition treaties was upheld for cases where the conditions for extradition had been fulfilled, including “a minimum degree of seriousness”130 and “double criminality.”131 However, where no treaty exists, if it were established that extradition and adjudication for certain international crimes were no longer privileges but rather duties, confronted States would be

127. Model Treaty on Extradition, supra note 124; see also Murphy, International Crimes, supra note 33, at 377.
130. The offense must be punishable with a custodial sentence of at least a year. Id.
131. The offense for which extradition is requested should be punishable under the laws of both the requesting and the requested state. Id.
obligated to comply with the requirements of universal jurisdiction.\textsuperscript{132}

This duty to comply with the obligations of universal jurisdiction arises under the extrinsically bound international concepts of obligations \textit{erga omnes}\textsuperscript{133} and \textit{jus cogens}.\textsuperscript{134} Obligations \textit{erga omnes} “flow from a class of norms the performance of which is owed to the international community as a whole.” The con-


\textsuperscript{133} The Latin expression \textit{erga omnes} means “towards all.” In the \textit{Barcelona Traction} case, the International Court of Justice used the term in its dicta to describe an obligation a State or States had to the International Community. “In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations \textit{erga omnes}.” The Court further expounded on the concept by contextualizing it in a human rights framework. “Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” \textit{Barcelona Traction, Light and Power Co. (Belg. v. Spain)}, Limited: Second Phase, 1970 I.C.J. 3, p. 33-34; see also \textit{Maurizio Ragazzi, \textit{THE CONCEPT OF INTERNATIONAL OBLIGATIONS \textit{ERGA OMNES}}} 1-2 (1997).

\textsuperscript{134} \textit{Jus cogens} has been described as “rules to protect some common concerns of the subjects of law. A contractual arrangement, despite its being \textit{inter parties}, may nevertheless affect such general values and interests as are considered indispensable by a society at a given time.” \textit{Laurie Hannikainen, \textit{PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS}} 1 (1988).

The \textit{1969 Vienna Convention on the Law of Treaties} stipulated in Art. 53 that

A treaty is void if, at the time of its conclusion, it \textit{conflicts with a peremptory norm of general international law}. For the purposes of the present Convention a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.


According to Ragazzi, “The origins of the concept of \textit{jus cogens} are usually traced back to some writings of the earlier part of this century, but the concept has not been utilized with any degree of consistency in the practice of States and by international tribunals in the period before the adoption of the Vienna Convention.” \textit{Ragazzi, \textit{INTERNATIONAL OBLIGATIONS \textit{ERGA OMNES}}, supra note 133, at 44-45.}

cept, despite its inherent logic, has only in the past half-century worked its way into the international legal vernacular. Jus cogens norms function “to protect the society and its institutions from harmful consequences of individual agreements.”

Lending to the confusion is the fact that beyond acts of slavery, which have long since engendered the protection of jus cogens, “relatively few examples of jus cogens enjoy unanimous support; for many proposed peremptory rules, there are bound to be enthusiastic and lukewarm supporters, as well as open and hidden opponents.”

Therefore, some legal scholars, like Maurizio Ragazzi, conclude that the relationship between obligations erga omnes and jus cogens in the context of human rights is still developing and “uncertain.” Yet, other international scholars hold to an emerging and flourishing consensus that both concepts have distinct viability and applicability to international human rights law.

Perhaps nowhere are jus cogens and obligations erga omnes more compatible than when applied to human rights and international crimes subject to universal jurisdiction.

136. RAGAZZI, INTERNATIONAL OBLIGATIONS ERGA OMNES, supra note 133, at 12. Ragazzi points to documents arising in the wake of the Barcelona Traction case of the 1970s: “After the Barcelona Traction case, references to the concept of obligations erga omnes have occurred both in judgments and advisory opinions rendered by the International Court and pleadings of the parties” (citing in particular to the cases on Nicaragua, East Timor and Bosnia-Herzegovina).

Because “the precise implications in practice of the concept of obligations erga omnes have not yet been established, and the idea of an action popularis in international law is not well accepted,” obligations erga omnes are difficult to define and harder still to identify. JØRGENSEN, RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES, supra note 13, at 94.

137. HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW, supra note 134, at 1.

138. RAGAZZI, INTERNATIONAL OBLIGATIONS ERGA OMNES, supra note 133, at 57.

139. Id. at 48-49.

140. Orlin & Scheinin, Introduction to THE JURISPRUDENCE OF HUMAN RIGHTS LAW, supra note 95 at 1.

141. Ragazzi concludes that the similarities between jus cogens and obligations erga omnes stem from three factors. First, “like obligations erga omnes, norms of jus cogens are meant to protect the common interests of States and basic moral values.” Secondly, “classic examples of norms of jus cogens which emerged during the codification of the law of treaties largely coincide with the examples of obligations erga omnes given in the Barcelona Traction case.”
Kenneth Randall noted, “Universal crimes, obligations _erga omnes_ and peremptory norms may be viewed as doctrinal siblings, sharing the common lineage of a modern world legal order based on global peace and human dignity.”

At the Florence Conference on State Responsibility, a model was advanced to show the intricate relationship between _jus cogens_, obligations _erga omnes_ and international crimes, where a large circle represented obligations _erga omnes_, within it a smaller circle representing _jus cogens_, and within that a smaller circle, representing international crimes.

By analyzing why legal theorists link the three concepts together, one can arrive at a another model for their interrelatedness: “The intention behind the _erga omnes_ theory... is to sound the death knell of narrow bilateralism and sanctified egoism for the sake of the universal protection of fundamental norms relating, in particular, to human rights.” Similar to the _jus cogens_ doctrine and its relation to the theory of international crimes, “[obligations _erga omnes_] is inspired by highly respectable ethical considerations.” When discussing interna-
tional crimes, Ragazzi warns legal jurists to take caution, no matter what paradigm is utilized, not to lose sight of the existing “rights and remedies” under established international law.  

The Restatement on Foreign Relations expressly addresses violations of customary human rights law in the context of jus cogens and obligations erga omnes, reinforcing the direct relationship between the two doctrines and international crimes.  

The writers of the Restatement explicitly assert that not all human rights are peremptory norms or jus cogens, but that genocide, slavery or slave trade, and torture, among a lengthier list of international crimes, emphatically are. Any international agreement “that violates them is void.” A clear duty exists for states to abide by the principles of jus cogens in regard to those listed international crimes. The Restatement unequivocally states that the responsibility is “to all states” – hence to the international community. “Violations of the rules stated… are violations of obligations to all other states.” Additionally, the writers of the Restatement hold that if the obligations to the international community are violated “any state may invoke the ordinary remedies available to a state when its rights under customary law are violated.”

146. Ragazzi includes a very detailed breakdown of international crimes, as provided by the International Law Commission, which includes “(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security… (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, apartheid…” RAGAZZI, INTERNATIONAL OBLIGATIONS ERGA OMNES, supra note 133, at 15.


149. Id.


151. Those obligations are obligations erga omnes. Id.

152. Id. (emphasis added).
Genocide,153 an indisputable international crime with universal jurisdiction, is a prime example of an international crime to which the States owe the international community obligations _erga omnes_ not to commit or tolerate and to which the _jus cogens_ norm applies.154 The writers of the Restatement list genocide first on their list of crimes that violate customary laws of human rights.155 William Schabas asserts that the sources of international law support the coexistence of the three concepts – international crimes, _jus cogens_ and obligations _erga omnes_ – as a rule of customary international law.156

In the case against Serbia, Judge _ad hoc_ Elihu Lauterpacht wrote that “the duty to “prevent” genocide is a duty that rests upon all parties and is a duty owed by each party to every other.”157

In the judgment on the preliminary objections raised by the Federal Republic of Yugoslavia, that International Court

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153. Under the 1948 Convention on the Prevention and Punishment of Genocide, Art. 1 stated that “genocide, whether committed in time of peace or time of war, is a crime under international law.” Convention on the Prevention and Punishment of the Crime of Genocide, U.N. GAOR Res. 260 (III) A, 78 U.N.T.S. 277 (Dec. 9, 1948). “This treaty is now considered a rule of modern customary international law, binding on all states (whether they have ratified the Convention or not) and requiring them to prosecute acts of genocide.” GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 228 (2000).


156. Turning to the sources of international law, Schabas discusses four International Court of Justice cases arising as a result of breaches of the Genocide Convention, namely Pakistan against India (1972), Bosnia and Herzegovina against Yugoslavia (1993) and the Yugoslavia counter-claim (1997), and the Yugoslavia claim against members of the North Atlantic Treaty Organization (NATO) (1999). Schabas also references the _Barcelona Traction_ case and its “oft-cited remark about the _erga omnes_ nature of the prohibition of genocide.” He refers to the _Nuclear Weapons_ case, in which some states argued, “The prohibition of genocide (as set out in the Genocide Convention) was a relevant rule of customary law applicable to the question of nuclear weapons.” The court did take into consideration that line of argument in deciding the _Nuclear Weapons_ case. It greatly qualified, however, the application of prohibition against genocide to the matter at hand. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, supra note 154, at 474-75.

157. _Id._ at 493.
addressed obligations *erga omnes*, writing, “[T]he rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*. The Court noted that the obligations each State thus has to prevent and to punish the crime of genocide are not territorially limited by the Convention.”

Ragazzi proposes that the right vested in the International Community, to which the corresponding duty lies with the States, is not limited to the act of genocide, but rather suggests that “the character *erga omnes* would not be restricted to the prohibition of genocide, but would attach in general to the ‘rights and obligations enshrined by the Convention’, an expression that would seem to include the obligations to prevent and *punish* acts of genocide.”

The Restatement reinforces the doctrine that all states have a duty to adjudicate, convict and punish those who perpetuate the crime of genocide. Parties bound by the Genocide Convention “are bound also by the provisions requiring states to punish persons guilty of conspiracy, direct and public incitement, or attempt to commit genocide…and to extradite persons accused of genocide.”

If a state failed to act in accordance with its re-
sponsibilities to adjudicate, punish, or extradite perpetrators of genocide, that state would seriously “breach on a widespread scale” an “international obligation of essential importance for safeguarding the human being…”

An ongoing debate regarding the doctrine of humanitarian intervention is often coupled with any discussion of a state’s duty to adjudicate and punish genocide. A healthy dispute continues to rage regarding its permissibility, absent any discussion of privileges or obligations. The debate dates well before the

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Geneva and Genocide Conventions were adopted, their prohibitions against war crimes and genocide were regarded as customary international law.


164. As early as Germany’s aggressions of 1933, states of the world considered whether they had a right (or in a Hofeldian context a privilege) to intervene when human rights were violated. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, supra note 154, at 491. The Geneva Convention did not specify that a state had the privilege or the duty to intervene in episodes of genocide. Id.

More recently, during the humanitarian intervention undertaken in Kosovo, President William Clinton stated, “We should not countenance genocide or ethnic cleansing anywhere in the world if we have the power to stop it.” Bob Davis, Pledging a ‘Clinton Doctrine’ for Foreign Policy Creates Concerns for Adversaries and Allies Alike, WALL. ST. J., Aug. 6, 1999, at A12. This statement presupposed a right to try and punish when stating that genocide should not be “countenanced” and proposed an independent state’s privilege to intervene in its cessation or prevention.

165. HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW, supra note 134, at 80-81.

In the case of Yugoslavia, Judge Lauterpacht concluded that customary international law – looking primarily at the practice of the states – might regretfully hold that “inactivity” on the parts of states to genocidal conduct is “permissible.” This would reinforce the concept that under the rules of customary international law, there is no duty, if indeed even a privilege, for an independent state to take actions with the purpose of preventing or ending genocide. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, supra note 154, at 495.


And yet other scholars hold that humanitarian intervention is a rule of customary international law. International Law Professor Jack Goldsmith concluded, “If you read the letter of international law, it does not expressly provide an exception for a humanitarian intervention. But many people think such an exception does exist as a matter of custom and practice.” William Glaberson, Conflict in the Balkans: The Law: Legal Scholars Support Case for Using Force, N.Y. TIMES, Mar. 27, 1999, at A8.
establishment of the United Nations and has been a part of international rhetoric since the nineteenth century. Due to fear of over-use and misapplication, the international community including the United Nations has shied away from writing a direct rule for its application. Failing to do so has enabled its continued abuse and done nothing to mitigate its dangers. Despite initial breakdown in the dialogue over whether humanitarian intervention is a legitimate means, many scholars make compelling arguments that along with the duty to try, convict, and punish perpetrators of genocide, there is also a right – or a Hohfeldian privilege – to prevent genocide through the use of humanitarian intervention. Yet a fervent confidence exists among select academics that humanitarian intervention may soon, if it has not already, mature into a state’s duty where international crimes subject to obligations erga om-
nes and the peremptory norms of *jus cogens* appear. Nevertheless, for many international legal academics, a state’s duty to launch a humanitarian intervention may still be a “maybe.”

The triumvirate of *jus cogens*, obligations *erga omnes*, and international crimes attach to other crimes subject to universal jurisdiction similar in makeup to genocide, prompting the states to fulfill their duty to the international community and to prosecute. For crimes against humanity and war crimes, which “by virtue of their level of atrocity, attract universal jurisdiction,” the obligation to punish, rooted in obligations *erga omnes*, must exist. Almost two-thirds of all states have, either through legislation, treaties, or constitutions, granted their courts authority to “exercise universal jurisdiction over some conduct amounting to war crimes…”

171. During the United States deliberations on whether or not to involve itself in the conflict raging in Rwanda, State Department spokeswoman Christine Shelley said that the “United States was not prepared to declare that genocide was taking place in Rwanda because ‘there are obligations which arise in connection with the use of the term.’” *Id.* at 495 (citing PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES, STORIES FROM RWANDA 153 (1998)).

172. According to Michael Walzer, a political philosopher at the Institute for Advanced Study at Princeton University, the doctrine of humanitarian intervention may suggest a state “ha[s] a right, and maybe an obligation, to go in and stop it if you can.” Peter Steinfels, *Reshaping Pacifism to Fight Anguish in Reshaped World*, N.Y. TIMES, Dec. 21, 1992, at A1.

173. “Customary international law also recognizes any crime that is universally condemned by the international community as a *jus cogens* international crime, which gives rise to obligations *erga omnes*. In accordance with customary international law, an obligation *erga omnes* requires a state party to extradite or prosecute perpetrators of these crimes found within its territory.” Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 The United States Government’s Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 913-14 (2002).

Ragazzi writes, “[W]hile it is true that the concept of obligations *erga omnes* can and does contribute to the protection and promotion of human rights, it is equally true that human rights are instrumental to the consolidation of such concepts as obligations *erga omnes*.” *Ragazzi, International Obligations Erga Omnes, supra* note 133, at 135.


five states have implemented some form of legislation granting their courts universal jurisdiction over “persons suspected of at least some crimes against humanity.” 

Torture is one crime against humanity often addressed in legislative grants of jurisdiction to domestic courts. However, even if a state does not incorporate grants of jurisdiction into its legislative or constitutional bodies, customary international law still grants jurisdiction. In the Congo v. Belgium case brought before the International Court of Justice, Judges Kooijmans and Buergenthal concluded, “[E]xercising extraterritorial jurisdiction is obligatory when the conditions of the post-war conventions are met.”

In addition to genocide, war crimes and crimes against humanity, *jus cogens* and obligations *erga omnes* are firmly recognized as having dominion over the international crime of aggression. Chapter VII of the Charter of the United Nations addresses Acts of Aggression, stating that the Security Council
“shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” In the Barcelona Traction case, the first example cited by the court of an obligation *erga omnes* is the “outlawing of acts of aggression.

Where a state is unable or unwilling to judge and punish perpetrators of genocide, war crimes or crimes against humanity, the duty to adjudicate does not disappear. Under the continued use of Hohfeldian paradigm, the international community has not relinquished its right to retribution; hence the duty remains. If a right exists, the correlative duty cannot “impede” that right. In addition, the holder of the right can demand the “performance of other subjects’ obligations.” Because a breach


182. RAGAZZI, INTERNATIONAL OBLIGATIONS ERGA OMNES, supra note 133, at 74; see also DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES, supra note 113, at 56, citing the ILC-draft, Commentary Article 19, Part One, 95-96 on State responsibility (Paragraph 3(a) states that “a serious breach of international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression” may result in an international crime).


184. Id. Although historically some countries have conducted “fact-finding followed by forgiveness” as a means of exercising reconciliation for human rights violations, this method of resolution is unacceptable under the concept of obligations *erga omnes*. The practice of “Truth and Reconciliation” is inconsistent “with the view that crimes against humanity attract an *erga omnes* obligation to prosecute and punish.” States such as Bolivia, Uruguay, Chile, El Salvador, Haiti and Argentina, to name a few, violated their duty to the international community by failing to prosecute and punish and instead imposing a Truth and Reconciliation process upon individuals and regimes that carried out gross violations of human rights. See generally, ROBERTSON, CRIMES AGAINST HUMANITY, supra note 153, at 266-78. See also, Mark S. Ellis, The International Criminal Court and Its Implication for Domestic Law and National Capacity Building, 15 FLA. J. INT’L L. 215, 229 (2002).

185. DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES, supra note 113, at 67 (“If a right has been validly conferred by a permissive rule, a correlative obligation must be seen to exist not to impede the exercise of such a right”).

186. Id. “The necessity of correlative rights is postulated on the basis that there must always be, at least theoretically and to begin with, another subject of international law entitled to demand the performance of an obligation.” Id.
of those obligations “generally affect[s] particular or all States,” when a state breaches, the obligation or duty must be adopted by another state or international forum in order for the international community to see its rights safeguarded and preserved.

Increasing support for the view that states cannot harbor perpetrators of international crimes has strengthened. “Under the aut dedere aut judicare (extradite or prosecute) rule, [states] are required to exercise jurisdiction over such persons no matter where the crime occurred or to extradite them to a state able and willing to do so.” If no such state exists then the state should surrender them to an international criminal court “with jurisdiction over the suspect and the crime.”

III. THE INTERNATIONAL CRIMINAL COURT: WHEN STATES CANNOT OR WILL NOT FULFILL THEIR OBLIGATION IT SHOULD BE DISCHARGED TO THE CRIMINAL COURT

The ICC was established to function complementarily to national criminal jurisdiction. The ICC was never intended to replace domestic courts prosecuting war crimes, genocide and crimes against humanity; rather, the concept of complementarity was embraced as a safeguard against fears that the court

De Hoogh notes another compelling necessity that drives the right/obligation paradigm is the urgency for “an imperative... kind of measure against repetition.” Prosecution, conviction and punishment for those responsible for the commission of an international crime can secure that assurance. Id. at 165.

187. This suggests that the “international community” at large would suffer the effects of the breach.
188. DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES, supra note 113, at 68.
189. AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION, supra note 175, at Introduction.
190. Id.
191. Id.
192. The Preamble to the Rome Statute of the International Criminal Court emphasizes that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,” but that where a state cannot fulfill its obligation the court exists to compliment national criminal jurisdiction. Rome Statute, supra note 9, at Preamble & Art. 1.
193. Complementarity means that “instead of replacing national jurisdictions, the Court will intervene only in those situations where national justice systems are unavailable or ineffective. Unlike the Yugoslav and Rwanda Tribunals, the ICC does not have ‘primacy’ over national jurisdictions.”
could potentially usurp the role of functional domestic courts in their capacity to adjudicate such crimes. If a state is able to perform its obligation to try perpetrators of these three international crimes, the ICC cannot intervene; where a state is unable or unwilling to act, however, that state’s obligation will be discharged to the ICC for full and proper adjudication.

In 1994, the American Bar Association’s Task Force on the ICC strongly favored a court “complementary in nature.” Prompted by a fear that the ICC would challenge state sovereignty and erode existing domestic judicial schemes, complementary jurisdiction seemed the ideal way for the court to assure that the international goal of punishing and eradicating international crimes like genocide did not undermine functional state courts that could adjudicate with agility and conscientiousness. Subsequently, the ICC was established in 1998 under the principle of “complementarity,” which relegated the ICC to a deferential role, second in line to adjudicate a crime only after the state failed to administer justice.


194. “[T]he concept of complementarity can be viewed as a procedural and substantive safeguard against a supranational institution curtailing the sovereign rights of nations. It ensures that the judgments of a domestic court are not replaced by the judgments of an international court.” Ellis, The International Criminal Court, supra note 2, at 219.

195. “[U]nder the concept of complementarity, the ICC will only have jurisdiction if there is a breakdown in the national system of justice or a state simply fails to act.” Id. at 221-22.


197. There was a recommendation by the Task Force that care be taken “to assure that ongoing efforts at mutual legal assistance are not undermined. Structures must be created that supplement and reinforce existing schemes. The rule of law must be strengthened and not eroded as a result of the creation of an international criminal court.” Id. at 49.


The United States had great fear, however, that the ICC would override state sovereignty by abandoning complementarity. “Therefore, the United States may remain apprehensive until the ICC demonstrates its reasoning and intent over time.” Id. at 20. That apprehension was manifested in
Extradition has generated much academic and political concern over the past century. The difficulties arising under a state’s “extradite or prosecute” dilemma fueled much of the early ICC debates. Where the state is unwilling to extradite or prosecute, the Rome Statute established that the ICC can step in and exert its jurisdiction. Unwillingness may be manifested through sham trials or a state “going through the motions” of investigating and instigating a criminal prosecution where none is forthcoming. Of course it may consist of no trial at all. One scholar suggested that in order for a government/judicial system to be labeled unwilling there must be a

the United States decision to refrain from participating in the court under the Bush Administration. That refusal on the part of the United States to support the ICC has been predicted as a great undermining of the court and increasing its likelihood of potential failure. Scholar Leila Nadya Sadat wrote in 2000, “Sadly, one of the major obstacles to the Court’s successful establishment is the refusal of the United States to participate in the creation of this new international institution. There is not doubt that the failure of the United States to join and to support the League of Nations contributed to the ultimate demise of that institution, and one wonders whether the ICC is similarly doomed before it is even established.” Leila Nadya Sadat, The Evolution of the ICC: From the Hague to Rome and Back Again, in The United States and the International Criminal Court: National Security and International Law 41 (Sarah B. Sewall & Carl Kaysen eds., 2000).

199. See Report of the Task Force on an International Criminal Court, supra note 68, at 47.

One of the greatest frustrations in the United States’ war on drugs has long been the inability to extradite targeted drug kingpins to the United States to stand trial. Addressing the House of Representatives Subcommittee on Criminal Justice, Drug Policy and Human Rights, Chairman John Mica stated that the key to successful international law enforcement was extradition, particularly with regards to South America. The lack of an extradition treaty with Mexico was considered an impediment to the United States’ ability to effectively counter drug trafficking and other related international crimes. International Law: The Importance of Extradition: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources, 106th Cong. 1-3 (1999) (statement of Rep. John L. Mica, Chairman, Subcomm. on Criminal Justice, Drug Policy, and Human Resources).


201. See Rome Statute, supra note 9, at art. 17(3).

“systematic pattern of judicial inaction in pertinent cases,” not a failure to successfully prosecute one or two individual cases.\textsuperscript{203}

Conversely, a state may be willing to prosecute human rights abuses, but unable to do so. Under the Rome Statute, a state is unable to prosecute when “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”\textsuperscript{204} Scholar Mark Ellis proposed four likely categories for states unable to carry out proceedings: (1) states entangled in conflict (domestic or international); (2) states experiencing political unrest or economic crisis; (3) states in transition; and (4) states entirely lacking a judicial system satisfying the international standard.\textsuperscript{205} Similarly, Mauro Politi offered that certain situations would trigger the court’s awareness of a state unable to adjudicate, such as the “total or partial collapse of a national judicial system” or the “presence of [a] sham proceeding [ ] undertaken to shield the accused from criminal responsibility.”\textsuperscript{206}

A wealth of examples arises out of the South American states. Chile and Argentina, countries which saw gross human rights violations during the mid-twentieth century under brutal dictatorships, were in many senses unable to properly try perpetrators, despite a willingness to do so, due to the grants of amnesty or pardons written into law to shield the defendants.\textsuperscript{207} This situation fits into Ellis’ second and third paradigms.\textsuperscript{208} States experiencing political unrest may, according to Ellis, threaten the “independence of the judiciary and its proper functioning.”\textsuperscript{209}

A good example of this type of judicial breakdown can be seen in the political pressure and military threats directed at judges in Uruguay, resulting in unsuccessful initiatives against human rights violations until the 2000 election of a president commit-

\textsuperscript{204} Rome Statute, supra note 9, at art. 17(3).
\textsuperscript{205} Ellis, The International Criminal Court, supra note 2, at 238.
\textsuperscript{206} Politi, The Rome Statute of the ICC, supra note 193, at 15.
\textsuperscript{208} Ellis, The International Criminal Court, supra note 2, at 238.
\textsuperscript{209} Id. at 239.
ted to investigating disappearances and kidnapped children. The creation of the ICC was seen by scholars and proponents of accountability in these fragile democracies of South America as a maturation of international law, evidenced by the establishment of this forum for adjudication, the sole function of which was to fulfill the states’ duties to adjudicate where the governments were unable to do so.

Because states have a duty to prosecute international crimes under obligations *erga omnes*, the ICC assures that the duty, the right correlative to which is vested in the international community, is fulfilled. If the state is unable to promote and protect human rights through prosecuting those who violate them, the duty vested in the state can be fulfilled by the ICC. Even states not party to the Rome Statute have an obligation not to frustrate its purpose. To do so contravenes the discharge of a state’s obligation to a forum that is capable of satisfying the state’s duty when the state is unable to do so. This violates the norms of *jus cogens* and obligations *erga omnes*.

211. Id. at 446.
213. The current system of international guarantees is essentially based, both at the universal and at the regional level, on procedures aimed at establishing whether States observe their obligations to promote and protect human rights, as set forth in customary rules or treaty provisions. When violations occur, the purpose of such procedures is to make a finding in this respect and to set a pressure on the State in order that it conforms to its obligations.

Id.
214. Giuseppe Nesi, *The Obligation to Cooperate with the International Criminal Court and States Not Party to the Statute*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 223 (Mauro Politi & Giuseppe Nesi eds., 2001). Giuseppe Nesi concludes that “an obligation to cooperate even for States not Parties that do not sign any cooperation agreement with the Court could be deduced from instruments different from the Statute.” He is referring to instruments establishing universal jurisdiction and *jus cogens* over the crimes under the jurisdiction of the Court, such as the Geneva Convention on Genocide. Id. at 222.
which mandate that the state punish those who commit crimes of genocide, crimes against humanity and war crimes.\textsuperscript{215} The establishment of the ICC assures that the obligation of the States to the international community will be carried out, strengthening the system of accountability.\textsuperscript{216}

This argument for discharging a state’s duty to the ICC finds greatest strength in universal jurisdiction, despite the ICC’s purported basis on state consent.\textsuperscript{217} Early in the ICC’s inception, modern scholars, international practitioners and forward-thinking states pushed for jurisdiction based on universal jurisdiction, rather than on the consent of states.\textsuperscript{218} In order for the ICC to effectively complement domestic courts such jurisdiction was seen as essential and feasible since the ICC only had jurisdiction over crimes already recognized as subject to universal jurisdiction.\textsuperscript{219} Under that proposition, a state’s consent to the ICC was irrelevant; if a state could not or would not fulfill its duty to prosecute, then automatically the duty would flow to the ICC, which would exert its authority through universal jurisdic-

\textsuperscript{215} Id.
\textsuperscript{216} Pocar, \textit{The Rome Statute of the International Criminal Court and Human Rights}, \textit{supra} note 212, at 72.
\textsuperscript{218} Germany proposed that state consent should be irrelevant. Sounding very much like proponents of universal jurisdiction, the German proposal for the ICC’s basis of jurisdiction stated,

Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide[,] crimes against humanity[,] and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed... Given this background there is no reason why the ICC – established on the basis of a Treaty concluded by the largest number of States – should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves.


\textsuperscript{219} Miskowiak, \textit{The International Criminal Court}, \textit{supra} note 217, at 33; see also Jennifer Elsea, \textit{International Criminal Court: Overview and Selected Legal Issues} 18-25 (2003); Schabas, \textit{An Introduction to the International Criminal Court}, \textit{supra} note 202, at 60.
Despite the ICC's ultimate establishment as consent based, the fundamental existence of obligations *erga omnes* and the principles of universal jurisdiction override that consent-based jurisdiction and compel all states to refrain from interfering with the satisfaction of the international community's right to try perpetrators of human rights violations.\(^{221}\)

### IV. THE UNITED STATES’ BILATERAL IMMUNITY AGREEMENTS CONFlict WITH A STATE’S DUTY TO EXTRADITE FOR INTERNATIONAL CRIMES

In 1994, when the jurisdiction of the ICC, its interplay with the states, and the basis for its authority were all the subject of hot debate, the American Bar Association’s Task Force monitored the progress towards the establishment of the ICC.\(^{222}\) Discussions regarding the basis of the ICC’s jurisdiction clearly incorporated a recognition and assertion that *jus cogens* would be the earmark of the court’s foundation, the cement that bound the ICC’s jurisdiction over crimes violating “fundamental norms.”\(^{223}\) Less than ten years later, phrases like *jus cogens* and fundamental international norms were no longer included in the United States’ vocabulary when analyzing or weighing the ICC’s authority.\(^{224}\) Distracted by unfounded fears that the ICC

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221. *Id.* at 33-35.
223. Bowing to development in international law, the Task Force conceded:

[T]here cannot any longer be a principled objection by Americans to the use of 'fundamental norms.' The United States for many years took the position that there was no such thing as *jus cogens* and that therefore it could not be bound by a customary norm to which it had not manifested its assent during the formative period of the norm. However, the Vienna Convention on the Law of Treaties, in Article 53, has now put that matter to rest.

*Id.* at 11.

224. In 1998, the United States, after years of input on the language, jurisdiction, authority and structure of the court, voted against the ICC along with China, Iran, Iraq, Israel and Libya. However, before leaving office, President William Clinton authorized the United States signing of the Rome Statute on December 31, 2000. The statute was not submitted to the Senate for ratification, and less than two years later in May 2002, the Bush administration nul-
would use its authority to prosecute a political agenda, the United States’ focus shifted further away from the underpinnings of the ICC and its inherent jurisdiction over certain international crimes, and instead challenged the ICC’s authority over Americans and its purportedly limitless autonomy.  

Pointing to General Pinochet’s extradition to Spain to stand trial for human rights violations executed under his dictatorship in Chile, United States politicians feared machinations by the ICC to attempt jurisdiction over American Service-members despite the United States’ withdrawal from participation in the ICC. The legitimacy of the ICC came under attack and the United States Congress passed the American Servicemembers’ Act, prohibiting cooperation with the ICC and restricting U.S. participation in peacekeeping missions where a risk of ICC prosecution existed. It also began blocking military aid to countries unless they signed agreements shielding U.S. troops present in their territory from extradition to the ICC. 

Simultaneously, the United States launched its bilateral immunity campaign to assure that United States citizens would
never be under the jurisdiction of the ICC, no matter where they lived or were stationed, no matter what international crimes they committed. In agreeing to the immunity agreements, foreign governments promised not to honor subpoenas or warrants issued by the ICC against Americans. By November 2003, seventy countries had signed immunity agreements. The immunity agreements established that the two agreeing states would not extradite each other’s citizens to the ICC without mutual consent. Justifying the bilateral immunity agreements by pointing to the Rome Statute’s Article 98, the United States stated that the ICC itself allowed for these immunities.

230. Chibueze, United States Objection to the International Criminal Court, supra note 203, at 50.

The United States’ Article 98 Proposal ironically reaffirms the complementary nature of the ICC and its inability to supplant functional national criminal jurisdiction. However, it still assures that “absent the expressed consent” of the United States or the signatory state, citizens shall not be “surrendered or transferred by any means to the International Criminal Court for any purpose or surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender or transfer to the International Criminal Court.” U.S. Government Article 98 Proposal, available at www.hrw.org (last visited on Aug. 23, 2004).

231. Article 98 of the Rome Statute states:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender. Rome Statute, supra note 9, at art. 98.

David Scheffer, the Clinton administration diplomat who negotiated Article 98, rebutted the Bush interpretation of Article 98, stating that the provision was “designed for U.S. military forces stationed overseas, as well as diplomats and Peace Corps workers. ‘We didn’t care about mercenaries.’”
These Article 98 or bilateral immunity agreements contravene a state’s established obligation under customary international law to prosecute and punish perpetrators of international crimes and, where failing to do so, the ability of the ICC to fulfill the state’s obligation to the international community. Governments and international law scholars around the world have deemed the agreements illegal for various reasons under international law. Under jus cogens, a treaty cannot violate certain international norms, and under obligations erga omnes there is an international norm that bequeaths a duty to states to apprehend, prosecute and punish those who perpetrate the international crimes of genocide, war crimes and crimes against humanity. A bilateral immunity agreement that con-

232. Additionally, international legal scholars have argued that the bilateral immunity agreements are illegal under the customary international law principle of pacta sunt servanda, “which obligates a state party not to do anything that will undermine its treaty obligations. State parties to the ICC agreed in Article 88 to ‘ensure that there are procedures available under their national law for all forms of cooperation listed in Part 9 of the Rome Statute.” Bilateral Immunity Agreements undermine a state’s ability to comply with the terms of the treaty and accordingly are illegal. Chibueze, United States Objection to the International Criminal Court, supra note 203, at 51.
235. Swiss Foreign Ministry legal adviser Nicolas Michel stated that his country favored “a strong and independent court,” and that the US’ attempts to excuse itself from the court’s jurisdiction would “weaken the court.” Neuffer, Delegates Discuss US Effort to Limit War Crimes Tribunal, supra note 220, at A13.
travenes that established duty, under *jus cogens*, must be illegal.\(^{237}\)

The greatest concern has consistently been the fear that United States' actions would undermine the ICC, which indeed they have.\(^{238}\) By undermining the ICC and frustrating states' attempts to cooperate with the ICC, the United States commits a small disservice compared to the infringement on the international communities' rights, thwarted by the encouragement of states' shirking their obligations to “ensure that people responsible for these crimes [i.e. genocide, war crimes, and crimes against humanity], as the most serious crimes under international law, are brought to justice.”\(^{239}\)

V. CONCLUSION

Although the ICC has based its authority on consent and territoriality,\(^{240}\) its most persuasive and sound basis rests on universal jurisdiction.\(^{241}\) The crimes over which the ICC has jurisdiction are crimes against humanity,\(^{242}\) war crimes\(^{243}\) and genocide.\(^{244}\) All three have gained firm recognition as crimes over which there is universal jurisdiction, and are collectively accepted as crimes for which the state has at minimum a *privilege*, under Hohfeld’s paradigm, to prosecute perpetrators. Stronger still is the fact that these three crimes have matured into crimes for which there is a *duty*, an obligation *erga omnes*, invested in the states, to prosecute and punish those who commit these crimes.\(^{245}\)

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\(^{237}\) Id.


\(^{239}\) NGOs Express Disappointment at Reports that Australia May Sign U.S. ICC Immunity Agreement: Historic ICC Supporter Has Stronger Role to Play, M2 PRESSWIRE, July 11, 2003, at *1.

\(^{240}\) *Rome Statute*, supra note 9, at art. 12.


\(^{242}\) *Rome Statute*, supra note 9, at art. 7.

\(^{243}\) *Rome Statute*, supra note 9, at art. 8.

\(^{244}\) *Rome Statute*, supra note 9, at art. 6.

\(^{245}\) Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 The United States Government’s Role in the Promotion, Implementation,*
Under *jus cogens* as established by the Vienna Convention, an independent treaty is illegal if it conflicts “with a peremptory norm of general international law.”

The United States, in its efforts to immunize its citizens from international criminal accountability, has introduced into the international forum bilateral immunity agreements that directly contravene the discharge of unable or unwilling states’ duties to prosecute international crimes to the ICC.

When that duty is contravened, the outstanding right, vested in the international community, a right bound and transfixed by obligations *erga omnes*, is left with an unfulfilled correlative duty for which it is owed completion.

If indeed a time arises when the United States’ bilateral immunity agreements are used as a shield from the ICC, *jus cogens*, in its intricate relationship with obligations *erga omnes* and international crimes, demands that the bilateral immunity agreements be viewed as illegal – unenforceable and unable to contravene the proper role of the ICC in its complementary capacity. The failure to do so would do more than simply undermine the ICC; it would shake the delicate and solidifying foundation made up of the union between states’ obligations, the international community’s rights, and the international crimes that compel the relationship between the two. The failure to employ *jus cogens* in enforcing the illegality of Article 98 immunity agreements will surely weaken that fragile foundation, and what could have continued to mature into a concrete relationship between rights, duties and the adjudication of international crimes will crumble, too weak to assert its legitimate and

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legal authority based on the sound principles of universal jurisdiction.

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*B.S., State University of New York at Geneseo (2000); J.D. Brooklyn Law School (expected 2005). I would like to extend my warmest thanks to my mom, Sally Atari, for all her encouragement – my personal cheerleader – and to David L. Contreras and my dad, Vincent Ettari, for all their financial, emotional, and physical support during law school, for allowing me to bounce ideas off them, and for always participating in exhilarating (if not reluctant) debates, helping me to articulate and crystallize my focus and my stand. Additionally, I would like to thank Samuel Murumba for his patience, astounding knowledge and guidance in writing this Note and Ursula Bentele for being the kind of mentor and friend that aspiring law students dream of encountering and learning from during law school. Finally, I would like to dedicate this Note to Dr. Charles R. Bailey (1938-2000): a great scholar of the French Revolution. For three years – from the beginning of college – he was a father-figure for me, the awkward sixteen-year-old college freshman. He made it possible for me to hold letters touched and even some penned by George Washington, Alexander Hamilton and other great revolutionaries. He reveled in each of my historical discoveries and fed my hunger for learning, just as he’d done for so many students before. I will always aspire to be the type of scholar and caring, nurturing soul who was Dr. Bailey.*
ÜBERSEERING: A EUROPEAN COMPANY PASSPORT

INTRODUCTION

Today more than ever, market players realize that entering into business transactions with “foreigners” involves more than a mere exchange of goods and services....freedom of establishment and the abolition of national barriers bring intensified competition. Consequently, company managers are urged to take daring initiatives: a complete transfer of business undertakings might well turn out to be necessary in order to survive.¹

One of the fundamental goals of the European Community (EC) is the establishment of a common market,² an objective codified in the Treaty Establishing the European Community.³ During the last ten years, European nations have taken boundless steps to remove the physical, fiscal, and technical barriers that divided them.⁴ The results have been rewarding. The common market has already created over 2.5 million jobs

¹ Stephan Rammeloo, Corporations in Private International Law 1 (2001) [hereinafter Rammeloo].

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Id. At present, the following countries are Member States of the EC: Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Europa, The European Union at a Glance, at http://europa.eu.int/abc/index_en.htm (last visited Oct. 5, 2004).
³ EC Treaty, supra note 2, part 1 art. 2.
⁴ See generally Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final (describing the completion of the European market in terms of the removal of “physical, technical and fiscal” barriers).
and added about 900 billion euros to the economy. Studies show that if integration is completed, an additional five billion euros will flow into the economy. Nevertheless, this goal may not be realized if member states do not continue to take the necessary steps to integrate.

Company law is one area of law that is criticized for not keeping up with the integration process. By treaty, EC citizens have the right to set up a business in any member state and receive the same treatment as a national doing business in that state. This is referred to as the freedom of establishment, and

6. Id.

The IMA’s study, prepared by the Centre for European Economic Research, a German institute whose initials are ZEW, estimates that a single market could bring Euro 5 billion ($5.8 billion) or more than a year in added economic benefits, and increase Europeans’ pension pots by about 9%. Such sums may be largely guesswork, but the obstacles to trading are clearly formidable and costly.

Id.

7. Id.

9. EC TREATY, supra note 2, art. 48 (ex 58). It states that:

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

Id. States and member states, in this Note, refer to the EC states.
10. EC TREATY, supra note 2, art. 42 (ex 52). It states that:

Restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Id.
is codified in Articles 42 and 48 of the Treaty Establishing the European Community (The EC Treaty). However, companies with headquarters in more than one member state or companies that want to move from one state to another still face substantial barriers. Article 293 of the EC Treaty requires member states to negotiate and secure cross-border recognition for companies, but states’ attempts to secure such recognition have been fruitless. In 1956, member states negotiated the Hague Conference on the Mutual Recognition of Companies, which would have made recognition mandatory between signatories. The Convention, however, was defeated. A similar draft treaty was defeated in 1968. Currently, member states are deadlocked on this issue. Lack of consensus about corporate recognition is neither consistent with the goal of a single market nor practical in an economic area where business transactions often involve more than one member state and corporations are major players in the economy.

Not surprisingly, companies have found themselves at the center of the multi-national corporate recognition dispute. For this reason, changes in the law have been prompted by litiga-
tion initiated by companies. This Note examines the most recent European Court of Justice (ECJ) decision on the recognition of companies in the matter of Überseering v. Nordic Construction Company.20 This case, decided in June 2002, arises out of Germany’s refusal to recognize a Dutch corporation with its headquarters in Germany. In the decision, the court held that the freedom of establishment preempts certain national laws that preclude recognition. The decision is significant because it expands the scope of the freedom of establishment and prohibits member states from refusing to recognize companies that move their headquarters from one state to another.

Part I of this Note provides background on corporate recognition theory in Europe and explains the legal and social importance of recognition theories. Also, Part I illustrates attempts by the ECJ and the European legislature to alleviate legal problems that arise when a European corporation wants to move its headquarters to a new member state. Next, Part II of this Note discusses Überseering and the court’s reasoning in that case. Part III examines the practical implications of the Überseering decision and how the Überseering decision requires member states to recognize companies that are formed in the European Union under certain circumstances. Finally, this Note concludes that although the Überseering decision does not entirely solve the problem of corporate recognition, it instructs new companies to forum-shop for a jurisdiction that will later allow them to emigrate to a new member state. A new company must carefully choose its state of registration because the Überseering court interprets the freedom of establishment as giving a company the right to move to a new state, but not to emigrate from its home state.

While the court could have gone further in its holding and made corporate recognition mandatory in all circumstances, the Überseering result is ultimately favorable to the goal of a single market because a recent European law creating a corporate form21 that is recognized throughout Europe largely excludes

new companies.\textsuperscript{22} Thus, the Überseering ruling at least partially fills the vacuum left by that law.

I. BACKGROUND: THE STATE OF CORPORATE LAW IN EUROPE

A. An Overview of European Corporate Recognition Doctrines

Each EC member state adheres to one of two fundamental corporate recognition doctrines: either the “real seat” or “place of incorporation” theory.\textsuperscript{23} Under the “place of incorporation” doctrine, the laws of the member state where the company is registered govern the company’s internal affairs.\textsuperscript{24} Those laws will govern the company’s legal personality even if it moves into another state.\textsuperscript{25} Under this theory, courts in the new state will recognize the company’s legal personality and apply the foreign laws that govern the company’s internal affairs if an internal affairs issue arises.\textsuperscript{26} This doctrine is subscribed to in Ireland, the U.K., Denmark, the Netherlands, and Switzerland.\textsuperscript{27}

The “place of incorporation” doctrine is beneficial for several reasons. First, it allows a company to move its headquarters freely from one state to another state without losing its legal identity.\textsuperscript{28} If desirable, a company can move to a more competi-

\textsuperscript{22} Id. at arts. 4(2), 17, 32, 35–37. The requirements under the statute are also described infra in Part I (D) of this Note.


\textsuperscript{25} Id.

\textsuperscript{26} Id.

\textsuperscript{27} See David Charny, Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the “Race to the Bottom” in the European Communities, 423 HARV. INT’L L.J. 423, 428 (1991). See also Werner F. Ebke, The “Real Seat” Doctrine in the Conflict of Corporate Laws, 36 INT’L LAW. 1015, 1016 (2002) [hereinafter Ebke, The “Real Seat” Doctrine]. This doctrine is also adhered to in the United States. See REV. MODEL BUS. CORP. ACT 15.05(c) (1984) (“This Act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this State.”). Note that Switzerland is not an EU Member State.

\textsuperscript{28} RAMMELOO, supra note 1, at 16.
tive market without being dissolved. Second, the “place of incorporation” theory gives management the autonomy to choose a jurisdiction that has laws most conducive to the company’s purpose. Finally, this theory makes it easy to ascertain the law applicable to a company’s internal affairs because the applicable law does not change even if the company moves to a new jurisdiction. This is a positive result for third parties such as creditors who want predictability as to which law will apply to an entity with a head-office in more than one state. Also, this is a positive result for companies because they avoid complicated res judicata issues when all European courts apply a uniform set of laws to their internal affairs.

By contrast, under the “real seat” doctrine, a company’s internal affairs are governed by the laws of the member state where the company has its “real seat,” or headquarters. German courts have described the “real seat” as “the location where the internal management decisions are transformed into day-to-day activities of the company.” A company must register or incorporate in the member state where it has its center of administration; and if it does not, the company will not be recognized as a legal entity. Under this view, if a company wants to move its headquarters to a new member state, it must dissolve and reincorporate. Dissolution is costly and impractical because of taxes and legal fees. Germany, France, Italy and Austria subscribe to the “real seat” doctrine.

29. Id.
30. See Wymeersch, supra note 23, at 2.
31. RAMMELOO, supra note 1, at 17.
32. See id.
36. See Ebke, Centros Mysteries, supra note 33, at 624–25.
The “real seat” doctrine is favorable for a number of reasons. First, it does not burden local creditors with the task of re-searching foreign corporate law. Second, the “real seat” doctrine allows member states to apply their laws to all companies headquartered in their territory. Presumably local lawmakers have the greatest interest in the activities of local companies, and they will enforce policy that is beneficial to the community as well as to the company. Finally, the “real seat” doctrine keeps companies from seeking out foreign legal systems that are more favorable to management and less favorable to shareholders, workers, or creditors. In fact, the “real seat” doctrine was originally conceived for this purpose. Contemporary scholars still fear that if the “real seat” doctrine ceased to exist, many managers would reincorporate under lenient foreign legal systems to the detriment of local constituencies.

partnership, subjugating all its shareholders to unlimited liability.”) [hereinafter Dammann, Corporations Free Choice].
39. Roth, supra note 34, at 202. According to Roth:

Conflicts rules allocate the burden of and the expenditures for information with regard to legal orders potenitally unknown to parties. In this respect, the incorporation and the real seat doctrine obviously reflect strongly divergent conflicts policies with regard to adequate allocation of information costs considering the company as a legal product.
Id.

40. See Wymeersch, supra note 23, at 2.
41. See RAMMELOO, supra note 1, at 14.
42. Id. at 18. This argument is known as a “race to the bottom” argument. See William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L.J. 663, 666 (1974) (coining the phrase “race to the bottom” in the corporate context).
43. See Charny, supra note 27, at 423, 428.
B. Multi-State Business and the Transfer of the Seat

The practical differences between “place of incorporation” jurisdictions and “real seat” jurisdictions materialize when a company moves from one jurisdiction to another. If a company wants to move its headquarters to a different European state, a few important legal questions arise. First, whether the original home state will allow the company to move without dissolution; second, whether the new state (the host state) will recognize the company as a legal entity; and third, whether the new state will apply the laws of the place of incorporation, thus recognizing the company’s legal personality.

Let us suppose company X sets up a branch in neighboring member state Y. Its operation in Y is very successful. Company X opens a factory and an office building in state Y to handle its business there, and soon its sales in state Y account for most of its business. In addition, a new shareholder from state Y becomes a 51% stakeholder in company X. The growth in business seems to have shifted the real seat of company X to state Y.46

In another hypothetical, suppose a company in state J decides to move its headquarters to a new office building in state K because property taxes are lower in state K (which may be only a few miles away from the old building in state J). Again, a company has transferred its seat or headquarters from one member state to another. The consequences of these changes differ depending on whether the states follow the “place of incorporation” doctrine or the “real seat” doctrine.

If the companies in the hypothetical moved from one “place of incorporation” state to another (from the U.K. to the Netherlands, for example), the legal consequences are few. The companies will have to settle with local tax authorities in the origi-
nal state, but, otherwise, the new state will recognize the companies as foreign legal entities.

If the companies moved their headquarters from a “real seat” state to a “place of incorporation” state, the “place of incorporation” state will recognize the companies’ identities. The “place of incorporation” state will apply the laws of the original place of incorporation to the company. However, most “real seat” states will not allow companies to move abroad without forcing the company to wind up and dissolve. For this reason, it is usually impracticable, if not impossible, for a company to move from a “real seat” state to a “place of incorporation” state.


48. See Ebke, The “Real Seat” Doctrine, supra note 27, at 1015, 1016. See Dammann, Corporations Free Choice, supra note 37, at 19-21. Some “place of incorporation” states, including the U.K. and Ireland, do not simply allow corporations to change their domicile and retain the laws of their home state. Id. Corporations from those states will have to move by effecting a merger.

49. See Roth, supra note 34, at 184. The Roth piece gives this example:

A German limited company (GmbH) that moves its centre of administration, but not its registered seat, to England (moving out) will be treated as a company still governed by German law: The German conflicts rule leads to an application of the English conflicts rule, which in turn calls for the application of the law of incorporation (in this case German law).

50. See Rammeloo, supra note 1. German law prohibits a company from moving out of Germany. Id. at 192. France may allow such a transfer after a unanimous shareholders vote and an agreement with the host state, but it is uncertain that such a transfer is actually envisioned under French law. Id. at 215–16. Italian law allows domestic companies to emigrate, but does not allow foreign companies to immigrate without dissolution. Id. at 224. See also Wymeersch, supra note 23, at 10, 11. She states that:

In other jurisdictions [apart from Germany, where it is never allowed], the emigration is allowed under certain conditions. These vary according to jurisdictions: In Spain, there should be a treaty in force between the exit and the entry state...In France, the majority opinion defends that the seat may be transferred without dissolution of the company...This rule allows the supermajority decision only in case France has concluded an international convention with the entry state about the maintenance of legal personality. However, as obviously France has not entered into any such convention, the rule is inapplicable.
If the companies moved their headquarters from a “place of incorporation” state to a “real seat” state, the result will be just as severe. The “real seat” state will refuse to recognize the companies unless they dissolve and reincorporate under its laws.\footnote{Dissolution entails paying legal fees and, in most cases, capital gains taxes on all assets.} The most complicated scenario arises if the companies moved from one “real seat” state to another. The original states of incorporation probably will not permit the companies to emigrate without dissolving.\footnote{Then, even if the companies move, the host state will deny recognition and require the companies to reincorporate. Companies wanting to move their headquarters in or out of a “real seat” state face considerable obstacles and may find such a move impossible. EC law does little to alleviate the disadvantage that those companies face.} Passing a “corporate headquarters transfer” directive could solve the problems presented by the “real seat” and “place of incorporation” doctrines. Scholars and the European Commission have considered this solution.\footnote{The High Level Group on Company Law Experts, part of the European Commission, requested the creation of a 14th directive dealing exclusively with...}

\footnotesize{\textit{Id.} See Dammann, \textit{Corporations Free Choice, supra} note 37, at 10.\footnote{\textit{Id.} at 9.}
\footnotesize{Id. at 9.}\footnote{See Rammeloo, \textit{supra} note 1, at 192, 215. See also Wymeersch, \textit{supra} note 23, at 10, 11. Dammann, \textit{Corporations Free Choice, supra} note 37, at 16 (for a company to successfully transfer and reincorporate under a new state’s legal system, a state must either “allow corporations to perform a so-called identity-preserving transfer of domicile” or reincorporate through a cross border merger but, “in the European Community... corporations will often find that neither of the two above-described options [are] available”). Germany, for example, does not allow domestic companies to transfer their domicile or to merge with a foreign corporation. \textit{Id.} at 19, 21.}
\footnotesize{Id. at 21.}\footnote{See Kersting, \textit{supra} note 24, at 67. See also High Level Group Report, \textit{supra} note 8, at 111. Ebke proposed another possible solution to the problem of divergent corporate law theories in Europe in his response to the \textit{Centros} case. He suggested that, as in the U.S., European academics, judges and lawyers could create a code of best practices or a model law for Europe to propel the movement toward integration. \textit{See} Ebke, \textit{Centros Mysteries, supra} note 33, at 658, 659. He points particularly to the ALI’s Principles of Corporate Governance and the ABA’s Revised Model Business Corporation Act. \textit{Id.} See Ebke, \textit{Centros Mysteries, supra} note 33, at 658, 659. He points particularly to the ALI’s Principles of Corporate Governance and the ABA’s Revised Model Business Corporation Act. \textit{Id.}}
\footnotesize{\textit{Id.}}
\footnotesize{\textit{Id.} See Kersting, \textit{supra} note 24, at 67. See also High Level Group Report, \textit{supra} note 8, at 111. Ebke proposed another possible solution to the problem of divergent corporate law theories in Europe in his response to the \textit{Centros} case. He suggested that, as in the U.S., European academics, judges and lawyers could create a code of best practices or a model law for Europe to propel the movement toward integration. \textit{See} Ebke, \textit{Centros Mysteries, supra} note 33, at 658, 659. He points particularly to the ALI’s Principles of Corporate Governance and the ABA’s Revised Model Business Corporation Act. \textit{Id.} See Ebke, \textit{Centros Mysteries, supra} note 33, at 658, 659. He points particularly to the ALI’s Principles of Corporate Governance and the ABA’s Revised Model Business Corporation Act. \textit{Id.}}
\footnotesize{\textit{Id.}}
the seat-transfer issue. The Commission plans to present a proposal for the directive sometime within the near future. However, there is no guarantee that a directive will be ratified or that it will completely solve the conflict between the “real seat” and “place of incorporation” doctrine. Recent legislation dealing with similar issues has been vetoed or badly compromised by competing interests within the Union.

C. Beyond Recognition: The “Real Seat” Doctrine and the Protection of Labor Laws and Minimum Capital Contributions

European states have different linguistic, cultural, historical, and legal backgrounds, and thus, have an interest in preserving their local values through the use of local law. States follow the “real seat” approach because they want to protect other national laws from being sidestepped by forum-shopping. At the center of the Überseering dispute are laws requiring minimum capital deposits and laws requiring labor participation in management. Although laws concerning labor mainly affect large companies and minimum capital requirements mainly

56. High Level Group Report, supra note 8, at 111.
60. See James L. Gibson and Gregory A. Caldeira, The Legal Culture of Europe, 30 LAW & SOC’Y REV. 55, 80 (1996) (“We fully expect that differences in legal cultures will play an even greater role in the ways in which EC law gets implemented within each of the Member States.”). See also Jens C. Dammann, Freedom of Choice in European Corporate Law, 29 YALE J. INT’L L. 477, 485–87 (2004).
62. Id.
affect smaller, less capitalized companies, both laws protect other constituents such as workers and creditors, respectively. Many European states impose a minimum capital requirement on entities that request limited liability. Theoretically, the requirement protects creditors and potential tort victims by assuring that assets are paid into the company. European Union law also provides minimum capital requirements for public companies. Moreover, a recent law passed by the legislature establishing a European corporate form imposes a minimum capital requirement of 120,000 Euros. In recent years, however, the ECJ has cast a skeptical eye on minimum capital requirements imposed by member states. In the Centros case, for example, the court suggested that minimum capital requirements did not achieve the goal of protecting creditors because concerned creditors could easily protect themselves by asking for some type of security interest or personal guarantee. Nevertheless, the current state of European Community law does not indicate that minimum capital requirements will soon

63. Minimum capital requirements are imposed in Belgium, Denmark, France, Germany, Greece, Ireland (only public companies), Italy, Luxembourg, the Netherlands, Portugal and Spain. Setting Up a Company in the European Community: A Country by Country Guide (1989) [hereinafter Setting Up a Company in the European Community]. Similar laws exist in the U.S. if corporations have stock with par value. See, e.g., N.Y. Bus. Corp. Law §§ 504, 506, 513(a) (“Upon issue by a corporation of shares with a par value, the consideration received therefore shall constitute stated capital to the extent of the par value of such shares.”). However, corporations often have the option to issue no-par stock. See, e.g., N.Y. Bus. Corp. Law § 501(a) (“Each class shall consist of either shares with par value or shares without par value.”).


65. Second Council Directive 77/91/EEC, of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, 1977 O.J. (L 26).

66. Id.


68. SE Statute, supra note 21, art. 4(2).
not indicate that minimum capital requirements will soon be a thing of the past.

Many EC member states also have laws requiring some form of labor participation in corporate management. ⁶⁹ France, the Netherlands, Belgium, and a number of other member states have groups called “works councils” ⁷⁰ that allow workers informational and consulting rights within companies. ⁷¹ However, Germany hosts the most debated system of worker participation in Europe. ⁷² Co-determination is the German practice by which large companies are required to have labor representation on

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⁶⁹ See generally Setting Up a Company in the European Community, supra note 63. In Belgium, public and private companies that have more than 100 employees must have a “Works Council” that meets once per month to review employment policies. Id. at 28, 35. In Denmark, in public and private companies with more than thirty five workers, employees can demand representation on the board of directors, and if the majority of the employees are in favor, labor can demand equal representation on the board. Id. at 48, 61. In Ireland, in semi-state-owned public and private companies, employees can participate in some board activities. Id. at 124, 128. In Luxembourg, public and private companies with more than fifteen employees must have a workers delegation and must hold at least six meetings per year. In companies with more than 150 employees, there must be a joint works council that is comprised of an equal number of employees and employers. Id. at 166-167, 174. In the Netherlands, public and private companies with more than thirty-five employees must create a “Works Council” whose approval is necessary for certain actions. Id. at 186, 194. Finland, Austria, and Sweden also have laws that require workers in a public limited liability company to be represented by an administrative organ of the company. See also Carla Tavares da Costa & Alexander de Meester Bilreiro, The European Company Statute 73 (2003) [hereinafter Costa].

⁷⁰ Groups of Companies in the EEC 17, 147, 253 (Eddy Wymeersch ed. 1993) [hereinafter Groups of Companies]. In Belgium: “The Law of 20 September 1948 provides for the installation of a works or ‘enterprise council’ in the more important enterprises when there [are]…100 or more employees.” Id. at 17. In the Netherlands: “The right of employees to have a say in corporate policy is concerned-is mainly embodied in the so-called ‘structural provisions’ and the Works Councils Act 1979.” Id. A company with more than 100 employees must have a works council. Id. at 253.

⁷¹ Id.

⁷² Groups of Companies, supra note 70, at 90-92. In Germany, “in contrast to other legal systems, workers are entitled to co-determination in accordance with German Business Constitution Law 47(1).” Id. at 91. See also Benjamin A. Streeter, III, Co-Determination in West Germany – Through the Best (and Worst) of Times, 58 Chi.-Kent L. Rev. 981, 984, 998 (1982).
Under German law, a company must have a two-tiered board, composed of the *Aufsichtsrat* (the upper level or supervisory board) and a *Vorstand* (lower level or management board). If a company has more than 500 employees, one third of the members of the *Aufsichtsrat* must be labor representatives. Half of the *Aufsichtsrat* must be comprised of labor representatives in companies that are either in the iron, coal or steel industry or have more than 2,000 employees. Co-determination in Germany began in the hard times after the Second World War as a concession to employees to compensate for the lack of cash available for wages. In the contemporary setting, co-determination is viewed as a political arrangement that affects wealth distribution and extends the value of democracy to the private sphere. German company law is designed not only to maximize shareholder wealth, but also to serve the workforce. The “real seat” doctrine is a tool that preserves Germany’s demanding co-determination provisions by preventing companies from incorporating under more lenient legal systems where workers have no place in corporate governance.

**D. The Societas Europaea**

Since the commencement of the European Union, lawmakers have suggested that a European corporate form would be useful

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74. *Id.*
75. *Setting Up a Company in the European Community*, *supra* note 63, at 93, 101. This includes both public and private companies. *Id.*
76. *Id.*
79. *See* Jens Dammann, *The Future of Codetermination After Centros: Will German Corporate Law Move Closer to the US Model?*, 8 *Fordham J. Corp. & Fin. L.* 607, 608 (2003) (arguing that the *Centros* decision does not destroy co-determination but will bring changes in European corporate law) [hereinafter Dammann, *Codetermination After Centros*].
80. *Costa, supra* note 69, at 5.
in the common market. The European Commission submitted drafts of a Societas Europaea (“SE”) corporate form in 1970, 1975, 1989, and 1991. The original SE proposal was vetoed by member states because the draft was too far beyond the reach of national corporate law. The 1989 and 1991 versions of the SE statute were grounded in national law, but still were unsatisfactory to states because of disagreements about codetermination in Germany under the SE system. Finally, a compromise was reached. On October 8, 2001, the Council passed regulation 2157/2001 establishing the SE.

The SE statute provides an alternative international corporate form that is recognized throughout Europe. Its primary purpose is to provide companies with the means to expand over state lines without the high transaction costs associated with setting up subsidiaries in multiple states and legal systems. Unlike other national corporate forms (especially those in “real seat” states), a SE can transfer its headquarters from one member state to another without dissolution. Also, the SE could provide a company in a “real seat” jurisdiction with the means to move to another member state.

81. See, e.g., Johan de Bruycker, EC Company Law—The European Company v. the European Economic Interest Grouping and the Harmonization of the National Company Laws, 21 GA. J. INT’L & COMP. L. 191, 192, 199-200 (1991). See also Modernizing Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward: Communication from the Commission to the Council and The European Parliament, COM (2003) final at 284 1.1. Thus far, no directive dealing with these conflict of laws issues has been agreed upon, but a European corporate form has been passed. The 10th and 14th directives would have dealt with harmonization in merger and acquisition law, but they did not pass. High Level Group Report, supra note 8, at 111. See also Blaurock, supra note 12, at 384.
82. Id.
83. COSTA, supra note 69, at 5.
84. Id.
85. Id.
87. SE Statute, supra note 21. See also COSTA, supra note 69, at 5.
88. See COSTA, supra note 69, at 11.
89. SE Statute, supra note 21, art. 1(3). See also Lombardo and Pasotti, supra note 59, at 4.
However, the availability of the SE is limited. A SE can be formed in only four ways: by a merger of companies from different member states; by the creation of a holding company with components in different member states; by the creation of a SE subsidiary of companies from at least two member states, or by the conversion of a public limited company that has, for at least two years, had a subsidiary in another member state. Additionally, the SE imposes a minimum paid-in capital requirement of 120,000 Euros. Because of these formation requirements, the SE is mainly a viable option for large companies.

Unlike the corporate forms used in the individual member states, the SE statute resolves the difficulties related to recognition and the choice of applicable law if the SE moves its headquarters. Recognition is mandatory under the SE statute but the SE must register in the state where it has headquarters. The company laws of the state of registration govern the company. If the SE wishes to move its headquarters to a new member state, it can do so without dissolution. However, the company must re-register and subject itself to the laws of the new member state. If the company fails to register in the state of its headquarters, the statute imposes sanctions such as

http://www.ecki.org/wp ("Hence, for instance, the formation by a merger of an SE of the Irish type between an 'active' Portuguese company and a newly formed Irish shell company totally owned by the former would be legal.") [hereinafter Enriques, Arbitrage].

91. SE Statute, supra note 21, art. 17.
92. Id. at art. 32.
93. Id. at arts. 35-36.
94. Id. at art. 37.


97. SE Statute, supra note 21, art. 1(3) ("The SE shall have legal personality.").
98. Id. at art. 5.
99. Id. at art. 8.
100. Companies can object to laws of a new member state unless those laws are considered part of public interest. Id. at art. 8(14).
liquidation. Conclusively, a company formed under the laws of a “place of incorporation” member state can move to another “place of incorporation” member state without dissolution and without changing the laws applicable to its internal affairs. Thus, companies in a “place of incorporation” member state may find that their national corporate form is more versatile than the SE form.

In addition to providing a minimum capital requirement, the SE statute also provides guidelines for labor participation. These guidelines are located in a supplemental directive. In the directive, priority is given to the agreements between management and employees before the entity became a SE. The directive has a default provision if an agreement cannot be reached because the SE spans jurisdictions where different groups of workers have different rights of participation. The default provision includes mandatory worker participation if most of the employees of the combined entities of the SE had participation rights before the SE was formed. The law is structured so that a company domiciled in a state where worker participation is mandatory cannot escape this requirement by becoming a SE.

The SE simplifies some multinational corporate activities, but it is not a viable solution for all companies. First of all, transaction costs associated with the SE will initially be restrictive since the statute has yet to be interpreted by courts. The statute leaves room for interpretation because it does not draw

101. Id. at art. 64.
102. See Navacelle, supra note 96, at 200.
103. See Wymeersch, supra note 23, at 31–32 (“Before the court rendered its opinion in the Überseering case, [the SE was a] considerable innovation[]. One will have to determine to what extent Überseering will have a dampening effect of the innovative function of the Statute’s rule.”).
105. Id. at Preamble, section 18.
106. Id. at Annex.
107. Id. at Preamble, section 18.
108. Id. at Preamble, section 3.
bright lines between SE law and national law. Second, the problem of cross-border recognition still exists because the SE form is not available for all companies and excludes less capitalized companies. Third, companies in “place of incorporation” states may find that their national laws are more flexible than the SE. Finally, companies in “real seat” states may avoid the SE in order to pursue creative ways to avoid worker participation. Thus, even with the introduction of a SE statute, most European companies will still face difficulties if they desire to move their headquarters to a new state.

E. Case Law Interpreting Corporate Mobility Under The EC Treaty

1. The Daily Mail Case

In recent years, the ECJ has made several important rulings interpreting the effect of the freedom of establishment on corporate entities. In the Daily Mail case, Daily Mail and General Trust (“Daily Mail”), an investment holding company, sought to change its principal place of business from the U.K. to the Netherlands. The U.K., which is a “place of incorporation” state, permits a U.K. company to move its principal place of business to another state without dissolution. However, a company must obtain permission from the local government to move its head office because in the U.K., a company is liable for taxes in the jurisdiction of its headquarters. Daily Mail asked local officials for permission to move, but moved without an answer because it believed that the freedom of establishment permitted it to move its headquarters to a new member

109. Enriques, Arbitrage, supra note 90, at 10, 11 (“The boundaries between nations and EU law will have to be determined.”). See also Lombardo and Pasotti, supra note 59, at 18.
110. High Level Group Report, supra note 8, at 117 (admitting a need for a statute dealing with small and midsize companies, called “SME’s”).
111. Id. at 114 (“Opponents [to the SE] also argue that the European corporate environment should not be cluttered up with yet another legal form”).
113. Id. at para. 5.
114. Id. at paras. 6, 7.
115. Id. at para. 6.
state without authorization from its home state. Its purpose for moving, as perceived by the court, was to avoid British capital gains taxes. In this case, the ECJ ruled that the freedom of establishment did not apply to a company that transfers its headquarters to another member state. Therefore, the tax authorities had the right to decline Daily Mail’s request to move out of the U.K. The court reasoned that corporations are unlike humans in that corporations only exist because of a privilege extended by national law. Thus, the freedom of establishment provides them only limited rights. Although the Daily Mail court narrowly defined the effect of the freedom of establishment on companies, subsequent decisions suggest that the Daily Mail interpretation was colored by the possible existence of tax evasion. Daily Mail has not been completely overturned, but has been viewed narrowly by the ECJ in subsequent decisions.

2. The Centros Case

In the Centros case, Danish nationals Mr. and Mrs. Bryde registered a company in the U.K. in order to do business through a branch in Denmark. They structured the corporate entity in this way to avoid the minimum capital requirement imposed in Denmark. When the Brydes attempted to register their branch, Danish authorities refused their application based on the conclusion that the U.K. wing of the business existed only as a fraudulent holding company for the Danish branch. The court disagreed and ruled that registering a company in another member state to avoid minimum capital laws is not fraud, even if the company does not intend to do business in the

116. Id. at para. 8.
117. Id. at para. 8.
118. Id. at para. 25.
119. Id. at para. 24.
120. Id. at para. 19 (“Unlike natural persons, companies are creatures of the law and in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.”).
122. Id. at paras. 3, 4, 14.
123. Id. at paras. 7, 23.
state of incorporation.  

Under the freedom of establishment, when a company is properly formed in accordance with the laws of a member state, other member states must recognize a branch of that company.  

After the Centros decision, proponents of the “real seat” doctrine wondered if allowing foreign companies to operate branches in “real seat” states would undermine their doctrine.  

They feared any company could incorporate aboard and operate in a “real seat” state under the guise of a branch to avoid local law.  

In Centros, the court also ruled that member states have the right to make laws that impose additional requirements on foreign corporations, so long as those laws are “applied in a non-discriminatory manner, justified by imperative requirements in the general interest [of society], do not go beyond what is necessary,” and “are suitable for securing the attainment of the objective which they pursue.”  

The court held that because creditors were already on notice that the Brydes’ company was a foreign corporation, and thus could have asked for a guarantee or security interest if they were concerned, Danish minimum capital requirements did not meet this four-part “necessity” test.

124. Id. at paras. 17, 18, 29. The court has reaffirmed this test in a recent case. See Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., [2003] ECJ CELEX LEXIS 444, at para. 133.  


126. See generally Dammann, Codetermination After Centros, supra note 79 (arguing that codetermination will probably survive the scrutiny of the European Court of Justice). See also Ebke, Centros Mysteries, supra note 33 (discussing the effects of Centros on national law). But see Holst, supra note 44 (arguing that Centros may not change the conflict of laws in the EU, but member states probably should change them voluntarily to increase efficiency).  

127. RAMELLOO, supra note 1, at 72. In regard to Centros he explains that:

A number of German commentators seem to be convinced that this ruling means that member states are obliged to relinquish the Sitz-theorie...From now on, natural and legal foreign persons alike should be welcomed in Germany or any other member state of the European Union; the latter category would no longer have to worry about adjusting their structure to the company laws of the state of establishment. Germany had better get used to...companies established abroad, having their real seat on German territory.  

Id.  


129. Id. at para. 37.
This part of the decision left member states wondering whether worker participation requirements would pass the four-part test in *Centros*. Their question was answered in part by the Überseering decision.

II. THE ÜBERSEERING DECISION AND THE CONTINUED EXPANSION OF THE FREEDOM OF ESTABLISHMENT

A. The Factual Background

Überseering BV (Besloen Vennootschap), a company that was registered under Dutch corporate law in August, 1990, was acquired by two German citizens in December, 1995. Three years earlier, Überseering had hired Nordic Construction Company Baumanagement GmbH (“NCC”), the defendants in this case, to paint a structure on a piece of property that it acquired in Germany. Claiming that the work was defective, Überseering sued NCC for breach of contract in a German regional court. The court dismissed the case, ruling that Überseering lacked standing to bring the suit. Under German conflict of laws, which follows the “real seat” doctrine, a court must apply German law to a company with its headquarters or center of administration in Germany. The court concluded that when German nationals purchased the shares of Überseering, the company’s center of administration inadvertently shifted to Germany. Since the company did not register in Germany, the court refused to recognize the entity. Although this conclusion is not codified, it is strictly adhered to in German courts. It is also worth noting that German law will recognize an unregistered foreign corporation as a defendant. Before bringing

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130. *See generally* Dammann, *Codetermination After Centros*, *supra* note 79.
132. *Id.* at para. 7.
133. *Id.* at para. 6.
134. *Id.* at paras. 6, 8. Überseering sued in the lower German court, which is called the *Landgericht*. *Id.*
135. *Id.* at paras. 8, 9.
136. *Id.* at para. 4.
137. *Id.* at para. 9.
138. *Id.*
this case, Überseering defended a case in a German court against one of its architects.\textsuperscript{139}

The German appeals court, the Oberlandesgericht, affirmed the decision of the lower court.\textsuperscript{140} The Bundesgerichtshof,\textsuperscript{141} the highest court, requested a preliminary ruling from the ECJ.\textsuperscript{142} The question was framed as follows:

whether, where a company formed in accordance with the legislation of a Member State (A) in which it has its registered office is deemed, under the law of another Member State (B), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity, and therefore the capacity to bring legal proceedings before its national courts in order to enforce rights under a contract with a company established in Member State B.\textsuperscript{143}

The court concluded that Articles 43 and 48 preclude member state B (or Germany, in this case) from refusing to recognize company A (Überseering in this case).\textsuperscript{144} Thus, a company can move its headquarters from an “incorporation” state to a “real seat” state and gain recognition if the company was properly formed in accordance with the laws of any member state. The court found Überseering analogous to Centros because both examine the relationship between a host state and a corporation.\textsuperscript{145} The court held that despite the broad language in the Daily Mail decision, it is distinguishable from this case because\textsuperscript{146} it applies to restrictions on a company’s ability to move

\begin{itemize}
  \item \textsuperscript{139} \textit{Id.} at para. 12.
  \item \textsuperscript{140} \textit{Id.} at para. 10.
  \item \textsuperscript{141} \textit{Id.} at para. 11.
  \item \textsuperscript{142} \textit{Id.} at para. 21.
  \item \textsuperscript{143} \textit{Id.} at para. 22.
  \item \textsuperscript{144} \textit{Id.} at para. 94. The decision states:
    
    Such objectives cannot, however, justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment.

\textit{Id.}

\item \textsuperscript{145} \textit{Id.} at 40.
\end{itemize}
out of its home state, not a company’s right to recognition in a host state.\textsuperscript{147}

\textbf{B. Überseering’s Holding and Reasoning}

The defendant, NCC, was joined in its argument by Germany, Spain and Italy. These parties gave three major arguments in favor of the German interpretation of the freedom of establishment. First, they claimed that corporate recognition is not mandatory under current EC law without individual state consent.\textsuperscript{148} Second, they maintained that the facts of \textit{Daily Mail}, and not \textit{Centros}, are analogous to the present proceeding.\textsuperscript{149} And third, they argued that protecting German substantive labor and capital laws justified sanctions against foreign companies that operated in Germany.\textsuperscript{150}

The defendants further argued that a state is under no obligation to recognize a foreign company unless it consents by convention or treaty.\textsuperscript{151} According to the Treaty Establishing the European Community, “Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals...the mutual recognition of companies or firms.”\textsuperscript{152} The negotiations that followed the Treaty produced the Convention on the Mutual Recognition of Companies and Legal Persons,\textsuperscript{153} but it was never entered into force.\textsuperscript{154} The defendants maintained that the text of the Treaty Establishing the European Community proves that the framers of the EC acknowledged differences in recognition standards

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at paras. 69-71. \\
\item \textit{Id.} at paras. 23, 24. \\
\item \textit{Id.} at paras. 29, 31. \\
\item \textit{Id.} at paras. 88, 89. \\
\item \textit{Id.} at para. 23. \\
\item Überseering, [2002] E.C.R. I-9919, paras. 25, 26. \\
\item \textit{Id.} at paras. 26-28. \\
\end{enumerate}
\end{footnotesize}
within the Community and elected to keep those differences intact.\textsuperscript{155} Therefore, the defendants asserted that Germany has no obligation to recognize a foreign company's existence.\textsuperscript{156}

The court rejected this argument\textsuperscript{157} and agreed with the European Commission which joined the Netherlands, the U.K. and the European Free Trade Surveillance Authority (“EFTA”) in making arguments on behalf of Überseering. These parties asserted that ECJ case law should facilitate harmonization in areas when it is necessary to uphold the freedom of establishment.\textsuperscript{158} Article 293 affords states the opportunity to negotiate for the mutual recognition of companies, but not the right to deny recognition.\textsuperscript{159} The court found that the right to recognition falls within the freedom of establishment\textsuperscript{160} and that companies that are formed in accordance with the law of a member state and have their central administration and principal place of business in a member state are entitled to the same benefits as natural persons.\textsuperscript{161} Likewise, in the EC, commercial establishments can set up and manage a business under the same conditions as domestic businesses without losing their legal personality. This mandatory recognition approach to the freedom of establishment is consistent with \textit{Centros}.

The defendants also encouraged the court to follow its precedent in the \textit{Daily Mail} case, which restricts the application of the freedom of establishment to companies. In \textit{Daily Mail}, the court plainly stated that the freedom of establishment does not extend to the transfer of a company's seat.\textsuperscript{162} In Überseering,

\begin{itemize}
\item \textsuperscript{155} \textit{Id.} at para. 26.
\item \textsuperscript{156} \textit{Id.} at para. 26.
\item Spain also argues that the “General Programme for the abolition of restrictions on the freedom of establishment, adopted in Brussels on Dec. 18, 1961,” mentions that companies should have a continuous link with the economy of a member state in order to take advantage of the abolitions of restrictions on freedom of establishment. \textit{Id.} at paras. 33, 34. The court holds that this requirement only applies to companies that do not have a link to the EU. \textit{Id.} at para. 74.
\item \textsuperscript{157} \textit{Id.} at para. 60 (“It is not necessary for the Member States to adopt a convention on the mutual recognition of companies in order for companies meeting the conditions set out in Article 48 EC to exercise the freedom of establishment conferred on them by Articles 43 EC and 48 EC.”).
\item \textsuperscript{158} \textit{Id.} at para. 37.
\item \textsuperscript{159} \textit{Id.} at paras. 54, 55, 56, 98.
\item \textsuperscript{160} \textit{Id.} at para. 54.
\item \textsuperscript{161} \textit{Id.} at para. 56.
\item \textsuperscript{162} \textit{Id} at para. 24.
\end{itemize}
the court distinguished *Daily Mail* because that case “concerned relations between a company and the Member State under whose laws it had been incorporated” and “the present case concerns the recognition by one Member State of a company incorporated under the law of another Member State.” Also, it noted that *Daily Mail* was not a case about the denial of a company’s legal personality. Therefore, *Daily Mail* is still good law when applied to a company and its home state, but not when applied to a company and a foreign state.

Finally, the defendants argued that the restrictions on Überseering were justified by the need to protect third parties through German labor law, tax law, minimum capital law, and private company law. While the court gave a nod to these interests, it concluded that none of them outweighed the fundamental right of recognition provided for by the freedom of establishment. The court also noted that “it is not certain that requirements associated with a minimum amount of share capital are an effective way of protecting creditors,” and German capital laws are, “in some respects less strict” than those in other states. However, the decision concedes that in some instances laws that protect the “general good” could justify a restriction on a corporation’s the freedom of establishment.

### III. EFFECTS AND ANALYSIS OF ÜBERSEERING

#### A. The Practical Effects of Überseering on SE’s and Domestic Companies

In Überseering, the court expanded Centros by once again finding that the freedom of establishment preempts state con-

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163. *Id.* at para. 62.
164. *Id.* at para. 62.
165. *Id.* at paras. 87-90.
166. Überseering, [2002] E.C.R. I-9919, paras. 36, 92, 93. See also Centros, [1999] E.C.R. I-1459, para. 37 (the laws must “be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest” [of society], “they must not go beyond what is necessary” and they must “be suitable for securing the attainment of the objective which they pursue”).
168. *Id.* at para. 92.
conflict of laws theories. Before Überseering, many scholars believed that the freedom of establishment only preempted laws that applied to a company’s secondary establishment. The Überseering court did not view the freedom of establishment in such narrow terms. It held that “Article 48 provides for the progressive abolition of restrictions on the freedom of establishment of individuals,” and companies, not just their subsidiaries, are to be treated the same as individuals. However, the holding is ambiguous when applied to companies that are registered in “real seat” states. Also, the combination of the Überseering holding and the SE statute presents new questions.

1. Moving From a “Place of Incorporation” State to Another “Place of Incorporation” State

Prior to Überseering, a company from a “place of incorporation” state could move its center of administration to another “place of incorporation” state and the new state would recognize the company as a legal entity. The Überseering decision does not change this result, but it does confirm the assertion in Centros that “it is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even taxation authorities may, in certain circumstances and

169. See generally Dominic E. Robertson, Überseering, Nailing the Coffin on Sitztheorie?, 24 THE COMPANY LAWYER 184 (2003) (arguing that the Überseering decision supports an expansive view of the freedom of establishment and narrows the validity of the “real seat” doctrine).
170. Ebke, Centros Mysteries, supra note 33, at 654.
171. VILLERS, supra note 16, at 18.
174. Ebke, The “Real Seat” Doctrine, supra note 27, at 36. But see Damman, Corporations Free Choice, supra note 37, at 19. Some states, even those that adhere strictly to the place of incorporation doctrine do not allow corporations to change their “statutory domicile and retain their legal personality.” Id. This is probably because the states do not want to forgo tax collection.
subject to certain conditions, justify restrictions on the freedom of establishment 175 so long as the restrictions do not negate the freedom of establishment. 176 Presumably, a host state could impose special guarantees for creditors 177 or special capital regulations 178 on foreign companies, but it cannot require companies to reincorporate as a prerequisite to recognition. 179 Companies would be wise to consider the possible range of requirements that may fall under the “general good” exception before moving to a new state. 180 For example, after the decision in Centros, the Danish government imposed a tax requirement on foreign companies in lieu of a minimum capital requirement. 181 Likewise, Germany still may find a way to require labor participation in foreign companies that are doing business in Germany without offending the freedom of establishment. 182

However, in the recent Inspire Art 183 case, the ECJ gave a strict interpretation to the “general good” exception. This strict interpretation, along with the court’s refusal to apply the “general good” exception in Überseering, may indicate a high bar for the application of the exception. In Inspire Art, a pseudo-foreign company that was registered in the U.K. and operating in the Netherlands 184 argued that aggressive Dutch laws demanding additional requirements for foreign corporations 185 en-

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176. Id. at para. 81.
178. See Roth, supra note 34, at 201.
181. Kersting, supra note 24, at 63 (“In a reaction to Centros, Denmark has enacted a tax law that requires foreign corporations to put up a guarantee,” which is “the equivalent of the minimum capital requirement.”).
182. Id.
184. Id. at paras. 34, 35.
185. Id. at paras. 23-28. Dutch law imposes special requirements on formally foreign companies: companies who are registered outside of the Netherlands, but conduct no business in their state of registration. The requirements include “various obligations concerning the company’s registration in the commercial register, an indication of that status in all the documents produced by it, the minimum share capital and the drawing-up, production and publication of the annual documents.” Id. The law also imposes “penalties in case of non-compliance with those provisions.” Id. at para. 23. The law also states that “directors [are] to be jointly and severally liable with the company for legal acts carried out in the name of the company during their directorship
croached upon the freedom of establishment because they imposed obligations on foreign companies that “render the right of establishment markedly less attractive for those companies.”

In its response, the Netherlands claimed that extra requirements for foreign corporations were justified because of “overriding reasons related to the public interest” such as “counter[ing] fraud, protect[ing] creditors and ensur[ing] that tax inspections are effective and that business dealings are fair.” In this case, the court found that the extra requirements imposed by the Netherlands were discriminatory. It held that if national laws treat foreign companies differently from national companies, then those laws are contrary to EC law. Thus, Inspire Art and Überseering maintain that a “general good” exception exists, but exceptions that are discriminatory or unduly burdensome violate the freedom of establishment.

2. Moving From a “Place of Incorporation” State to a “Real Seat” State

Prior to Überseering, if a company moved its center of administration from a “place of incorporation” state to a “real seat” state, the “real seat” state would refuse to recognize the company. The court attacked this result and held that denying recognition in such a case would offend the freedom of estab-

until the requirement of registration in the commercial register has been fulfilled.” Id. at para. 25. In addition, the law requires that “it [is] to be indicated that the company is formally foreign and prohibits the making of statements in documents or publications which give the false impression that the undertaking belongs to a Netherlands legal person.” Id. at para. 26. Moreover, the law says, “the subscribed capital of a formally foreign company must be at least equal to the minimum amount required of Netherlands limited companies.” Id. at para. 27. And it requires that “until the conditions relating to capital and paid-up share capital have been satisfied, the directors are jointly and severally liable with the company for all legal acts carried out during their directorship which are binding on the company.” Id. “The directors of a formally foreign company are likewise jointly and severally responsible for the company’s acts if the capital subscribed and paid-up falls below the minimum required, having originally satisfied the minimum capital requirement...” Id. at para. 28.

186. Id. at para. 90.
187. Id. at para. 109.
188. Id. at paras. 127, 128.
189. Id. at para. 64.
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lishment. However, crucial questions about such a move still remain. For example, the court requires that a “real seat” host state recognize a European foreign company in its territory. But, the court does not specify whether the host state must apply internal affairs law from the state of registration. Thus, it is still unclear how far the host state must go in recognizing the legal personality of the company or whether current case law, taken as a whole, sufficiently requires member states to apply the law of a corporation’s place of registration.

In Überseering, the court stated that “[t]he location of the registered office, central administration or principal place of business constitutes the connecting factor with the legal system of a particular Member State in the same way as does nationality in the case of a natural person.” Of course states will likely want to assert their own laws wherever possible. However, it is unclear if a member state can refuse to apply the laws of the place of incorporation without offending the freedom of establishment.

Apart from offending the EC Treaty, the possibility that a host state will apply its own law to the internal affairs of a foreign corporation gives rise to practical considerations. If the laws of the original state of registration do not apply to a company residing in a host state, complicated res judicata situations could occur if internal affairs issues are adjudicated in both the home and host state. Presumably, these inconsistencies will give rise to burdensome legal expenses and come as a surprise to creditors. This is especially true in a case like Überseering, where there is no indication that the plaintiff intentionally moved its center of administration to Germany, or that other member states would consider Überseering’s actions a

193. Id. at para. 57. But see High Level Group Report, supra note 8, at 106. Third states are likely not to be involved in the transfer of the seat, but if they are, they should apply the law of the state of incorporation. Id.
194. Dammann, Corporations Free Choice, supra note 37, at 15.
196. Ebke, Centros Mysteries, supra note 33, at 654.
transfer of its seat. In Überseering, the EFTA persuasively argued that:

the refusal to recognise Überseering’s right to be a party to legal proceedings in Germany by reason of the apparently unsolicited transfer of its actual centre of administration to Germany is indicative of the lack of certainty which may be caused in cross-border transactions when the different private international law rules of the Member States are applied. Since characterization as a company’s actual centre of administration turns, to a large extent, on the facts, it is always possible that different national legal systems and, within them, different courts may have divergent views on what is an actual centre of administration. Moreover, it is increasingly difficult to identify a company’s actual centre of administration in an international, computerized economy, in which the physical presence of decision-makers becomes increasingly unnecessary.

The EFTA poses a valid issue unsolved by Überseering. Under current case law, the issue of “legal personality” and applicable law appear to be at the discretion of the member states so long as states do not negate the freedom of establishment in their interpretation.

3. Moving Out of a “Real Seat” State and Into Either a “Place of Incorporation” State or a “Real Seat” State

When a company wants to move its center of administration out of a “real seat” state and into another state, Überseering requires the new state to recognize the company. However, the holding does not guarantee a company’s ability to move from its original state without permission. Even in the recent Inspire Art case, the court continued to distinguish the company-host state relationship interpreted in Centros, Überseering and Inspire Art, and the company-home state relationship interpreted in Daily Mail. Writers in this area question the fairness of

198. Id. at para. 51 (emphasis added).
199. Wymeersch, supra note 23, at 10, 11 (“In Germany, and according to some legal writers in France as well, the emigration results in the company being completely dissolved.”).
granting EC companies the freedom to immigrate to a new member state, without granting them the broad right to emigrate from their home state.\footnote{201}{See Roth, supra note 34, at 206. See also Wymeersch, supra note 23, at 10.}

One scholar suggested that the four-part ‘necessity test’ in \textit{Centros} be used to evaluate state restrictions on the emigration of domestic companies.\footnote{202}{Wymeersch, supra note 23, at 28–29.} This proposal is reasonable because it takes into account the valid concerns states may have about companies moving and failing to settle with creditors or tax authorities.\footnote{203}{\textit{Id.}} However, under current EC law, member states can trap domestic companies that want to move out of their territory without justification. Whether the denial of the right to \textit{emigrate} is a negation of the freedom of establishment will have to be considered in future decisions.

4. Moving with the SE Form

\textit{Überseering} is, in some ways, inconsistent with the SE statute. On one hand, \textit{Überseering} requires a host state to recognize a European company operating within its borders even if the company is incorporated in another state.\footnote{204}{\textit{Überseering}, [2002] E.C.R. I-9919, para 82.} That requirement follows a “place of incorporation” approach, although it does not endorse all elements of the “place of incorporation” doctrine.\footnote{205}{Enriques, \textit{Arbitrage}, supra note 90, at 6. See infra Part III B (1) of this Note.} On the other hand, the SE statute requires the SE to register in the state of its headquarters, which is synonymous with the “real seat” doctrine.\footnote{206}{Lombardo and Pasotti, supra note 59, at 10 (“Article 7 SE-Reg. makes a clear choice in favor of the real seat theory as the conflict of law rule to be applied to European Companies registered in the Member States.”).} Therefore, if a SE moves its headquarters from one state to another without reregistering in the new state, the \textit{Überseering} court would require recognition under the freedom of establishment,\footnote{207}{\textit{Id.} at para. 81.} but the SE statute would impose sanctions such as dissolution.\footnote{208}{SE Statute, supra note 21, art. 8. If the company fails to register in the state where it has its real seat, it could be dissolved. \textit{Id.} at art. 64.} The introduction of the SE and the decision in the \textit{Überseering} case were nearly con-
temporaneous,\textsuperscript{209} therefore a practical application of both regimes is probably necessary to see if this conflict is of any consequence.

Despite inconsistencies with each other, both the SE statute and the Überseering holding are beneficial. Some companies may decide that although Überseering facilitates mobility for domestic companies, the SE statute is beneficial because its renvoi technique to national law provides clarity as to what law applies to the entity’s internal affairs.\textsuperscript{210} Also, because the SE statute is the result of a political compromise, states are less likely to disfavor SE’s.\textsuperscript{211} \textit{Inspire Art} provides an illustration of the types of laws that member states pass to restrain disfavored types of foreign corporations. However, since Überseering was couched in constitutional terms, the SE statute’s registration requirement may turn out to be an anomaly.\textsuperscript{212}

B. Analysis

1. The “Real Seat” Doctrine in the Wake of Überseering

Some academics view the Überseering decision as a clear message that the “real seat” doctrine is preempted by the freedom of establishment.\textsuperscript{213} Authors went so far as to say that the whole idea of a “real seat” or “center of administration” is outdated in today’s world of modern technology and superior communication.\textsuperscript{214} These conclusions stem logically from Überseering because the court ignored German conflict of laws rules stemming from the “real seat” doctrine and because Überseering’s center of administration was ubiquitous.\textsuperscript{215}

However, it is unlikely that the Überseering decision is broad enough to eradicate the “real seat” doctrine completely. First, the Überseering decision does not allow companies the freedom to move out of their home state. Thus, the free movement asso-

\begin{itemize}
\item \textsuperscript{209} The SE statute was adopted at the end of 2001 and the Überseering decision was published in June 2002.
\item \textsuperscript{210} Enriques, Arbitrage, supra note 90, at 10.
\item \textsuperscript{211} Lombardo and Pasotti, supra note 59, at 8.
\item \textsuperscript{212} Id. at 12.
\item \textsuperscript{213} See, e.g., Dammann, Corporations Free Choice, supra note 37, at 6.
\item \textsuperscript{214} Enriques, supra note 90, at 6. See also Überseering, [2002] E.C.R. I-9919, para. 51.
\end{itemize}
associated with the “place of incorporation” doctrine is still unrealized for many EC companies. 216 Second, the decision does not go so far as to suggest that the use of a “territorial” or “real seat” approach is inappropriate in all circumstances. On the contrary, it signals that either the “location of the[] registered office, central administration or principal place of business” could connect a company to a legal system. 217 Moreover, the recent SE Statute, and even the defeated Draft 14 directive, endorse some aspects of the “real seat” doctrine. 218 Thus, it cannot be concluded that the Überseering decision marks the end of the “real seat” doctrine altogether.

2. Forum-Shopping and Arbitrage After Überseering

The right to move corporate headquarters or set up a branch in any EC state could cause companies to forum-shop for corporate charters, 219 favorable tax regimes or mobility. Scholars

216. See Roth, supra note 34, at 207 (“It is to be deplored that the Court goes only half the way: The judgment is a disappointment as to the issue of moving out.”). See also Wymeersch, supra note 23, at 18 (“The court’s reasoning leaves substantial uneasiness: the argument that freedom of establishment related only to immigration, but leaves the states free to deal with emigration... is rather theoretical and leaves reality aside.”). See also Cerioni, supra note 191, at 129. That author states that:

The Court has adopted an halfway approach towards the acceptance of the incorporation system, because this system can be regarded as recognized to be the general rule just from the point of view of the host Member State but not from the point of view of the State in which a company is formed and from which this company may wish to migrate. (emphasis in original).

Id.


218. Lombardo and Pasotti, Network Economics Approach, supra note 59, at 10. Also, because the Überseering decision goes beyond the rights of mobility granted by the legislative body, it may prompt new legislation that protects the “real seat” doctrine.

219. See Dammann, Corporations Free Choice, supra note 37, at 6–7. See also Cerioni, supra note 191, at 129. According to Cerioni:

Second, and as a result, the present state of national company laws after the Überseering ruling EC law may essentially offer new opportunities for intra-EC ‘migration’ to those companies formed in countries adopting the incorporation system. In principle, these companies are not prevented from moving their ‘primary establishment’ abroad and, for this reason, could add a new dimension to their ‘fo-
speculate that the Überseering decision pushes Europe further towards a regime of free choice in the adoption of corporate charters, although scholars disagree as to whether this phenomenon will cause a negative race-to-the-bottom or a positive race-to-the-top for corporate charters.\footnote{220} Scholars also speculate that the Überseering decision will prompt existing companies to move their headquarters to host states with the most favorable tax regime.\footnote{221} This Note proposes, in addition, that companies will consider forum-shopping for mobility. If a company registers in a state that allows domestic companies to move out, then the company can later relocate for better proximity to labor or natural resources, or to alter its tax regime. Being able to make this type of move is particularly important in the EC context, because the internal market is expanding, and in the future, tax incentives and inexpensive labor or resources may be located in a state that is not even a member of the EC today.

Moreover, as one scholar pointed out “The Member States adopting the incorporation system tend to be—within the EC—the States characterized by a tradition of liberal company law and, at the same time, by the most favorable tax regimes in various respects.”\footnote{222} Thus, it is possible that the increased mobility will cause companies to migrate toward liberal states, and cause states that prohibit emigration, impose high taxes, and inflict tough, conservative corporate laws to become more competitive.

3. The Result

Although the Überseering decision does not dispose of the “real seat” doctrine or give clear rules for corporate mobility, the result is proper considering the goal of a common market, the spirit of compromise within the Union, and the narrow question presented to the court. Corporations are a major force in the...
European economy, and true integration cannot be achieved when companies are denied recognition. However, the court in Ürberseering was not well positioned to solve deep-rooted differences in corporate and conflict of laws doctrines within the European Community. Thus, many questions are left open after the decision.

This Note asserts that Ürberseering, whether intentionally or not, applies the freedom of establishment in a way most beneficial to new companies. This is a positive result because new companies are the very entities that are excluded from the SE statute. Before Ürberseering, a new company that wanted to move its headquarters out of a “real seat” state would have to wait until it had the capital and interstate connections to become a SE. New companies now have another option that old companies, already established in states that restrict emigration, do not have. Based on Centros, new entities in “real seat” states can register shell corporations in “place of incorporation” states merely to reap the benefits of the foreign legal regime. After Ürberseering, it is apparent that a company can register a shell corporation in a “place of incorporation” state, set up its headquarters in any state, and move its headquarters to any state. Hence, new companies in “real seat” states will be inclined to register in a member state that permits mobility and emigration of domestic corporations. Without this option, many new companies would be left to register in “real seat” states that will not allow them to move out, even if such a move became economically beneficial. Ürberseering allows new companies to forum-shop for mobility and later move their headquarters to a state with the labor resources, natural resources, consumer markets, tax regime, and/or corporate regulations necessary to ensure continued success in the ever-expanding and ever-changing European marketplace.

223. High Level Group Report, supra note 8, at 114.
224. SE Statute, supra note 21, at arts. 4(2), 17, 32, 35, 36, 37. 
226. But see Roth, supra note 34, at 208 (It is unclear if the “law stands on equal footing with regard to the formation of companies.”). Id. at 208.
IV. CONCLUSION

Unless a European directive is adopted, different national systems of corporate recognition will persist in Europe. Both theories of corporate recognition discussed in this Note have benefits. However, the “place of incorporation” doctrine coexists best with the goal of a single European market because it recognizes foreign companies and the laws that govern their internal affairs and it allows companies to move to a new state. Nonetheless, various European member states prefer the “real seat” doctrine because it gives them control over the legal entities in their territory.

Moreover, both of these national systems of corporate recognition are being chipped away by the decisions of the European Court of Justice and by new statutes and directives. Presently, a hybrid system of recognition exists in Europe. It consists of national rules, EC rules, and a somewhat substantial zone of ambiguity between the two regimes. The Überseering decision is important because it sends a clear message that ambiguities will be resolved in favor of the Community and the single market.

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THE PLIGHT OF THE PATAGONIAN TOOTHFISH: LESSONS FROM THE VOLGA CASE

I. INTRODUCTION

Warnings from policy makers, scientists, fishing communities, and environmental groups have recently increased in pitch: the oceans once thought to contain limitless, renewable bounties of fish are, in fact, in a state of crisis.1 Evidence of the widespread dwindling and collapsing of fish populations is dangerous to ignore.2 One source estimates that 70 percent of the world's commercial fisheries have been fully exploited, overexploited, or depleted.3 Although various factors contribute to the depletion of the oceans' fish, such as pollution, climate change, and mistaken understandings of marine ecosystems, overfishing by human beings is a major cause of fish depopulation.4 Certain species are dangerously overfished, in


2. See EARLE, supra note 1, at 169 (“T]he ocean cannot sustain the massive removal of wildlife needed to keep Japan and other nations supplied with present levels of food taken from the sea.”); P EW O CEANS COMM’N, supra note 1, at 73 (“D]emand for seafood is rising, yet the total global wild fisheries catch has leveled out since the mid-1990s as fish stocks have become depleted. In the U.S., 30 percent of the known wild fishery stocks are already overfished or in the process of being depleted through overfishing.”); Dep't St. Oceans and Fisheries, supra note 1 (“Many of the world’s primary fishery resources are under stress. A number of key fish stocks have collapsed from overfishing and environmental degradation . . . while others have become depleted.”).


large part due to illegal, unreported, and unregulated fishing (IUU fishing).\(^5\) IUU fishing can have a devastating impact on already-fragile fish populations; it can cause the collapse of a fishery, or significantly undermine efforts to rebuild depleted stocks.\(^6\) Patagonian toothfish (toothfish), commonly known in the United States as Chilean sea bass, are threatened by ram-


Overfishing occurs when “fish are killed faster than they can reproduce....” Tim Eichenberg & Mitchell Shapson, The Promise of Johannesburg: Fisheries and the World Summit on Sustainable Development, 34 GOLDEN GATE U. L. REV. 587, 596 (2004). In the opinion of nineteen prominent scientists, “ecological extinction caused by overfishing preceded all other human disturbance to coastal ecosystems, including pollution, degradation of water quality, and anthropogenic climate change.” Id. In 2003, the European Commission observed that 76% of all fisheries-related infringement procedures brought against member states could be attributed to overfishing claims in contravention of fisheries obligations, despite the imminent collapse of certain fish stocks. Who Plays by the Fisheries Rules?, supra.

5. According to the Food and Agriculture Organization of the United Nations (“FAO”), the term “IUU fishing” describes various activities:

Some IUU fishers operate in areas where fishing is not permitted. Some employ banned technologies, outlawed net types, or flaunt fishing regulations in other ways. Others under-report how big their catches are—or don’t report them at all. In some cases, in fact, catches of commercially-valuable fish species may be surpassing permitted levels by over 300 percent due to IUU fishing . . . .


Concerned that illegal, unreported and unregulated fishing threatens seriously to deplete populations of certain fish species and significantly damage marine ecosystems and that illegal, unreported and unregulated fishing has a detrimental impact on sustainable fisheries, including the food security and the economies of many States . . . .

Several international and regional organizations regulate IUU fishing in regions where toothfish poaching occurs. Unfortunately, enforcement problems encumber conservation measures established under these instruments, making it difficult to stop IUU fishing.

The primary international instrument governing the law of the sea, including the conservation of living marine resources, is the Third United Nations Convention on the Law of the Sea (UNCLOS or Convention), which was adopted in 1982 and entered into force in 1994. UNCLOS is a vital instrument with strong conservationist goals. It is therefore lamentable that the tribunal established under UNCLOS to hear fishing disputes has given insufficient consideration to these fundamental conservationist objectives. In a series of judgments ending with the Volga case, the International Tribunal of the Law of the Sea (Tribunal or ITLOS) narrowly interpreted key UNCLOS

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7. See generally TRAFFIC Lauds Detention of Suspected 'Pirate' Toothfish Fishing Vessel, but the Chase Must Continue: Greater International Cooperation Needed in Addressing Illegal Fisheries, TRAFFIC Network, Aug. 28, 2003, available at http://www.traffic.org/news/pirate_toothfish.html (“Patagonian Toothfish is highly valued in restaurants in Japan and the USA . . ., which are the largest consumer markets for Patagonian Toothfish, followed by Canada and the EU . . . . TRAFFIC studies revealed that IUU catch may account for half of all Patagonian Toothfish traded internationally . . . .”).


10. The Convention’s preamble conveys the intention of member states to “promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment. . . .” UNCLOS, supra note 8, at 25 (preamble) [hereinafter UNCLOS Preamble].


12. ITLOS is “an independent judicial body established by the Convention to adjudicate disputes arising out of the interpretation and application of the Convention.” General Information—Overview, International Tribunal for the
enforcement and dispute resolution provisions. This restrictive interpretation created an additional obstacle for coastal states\(^\text{13}\) seeking to deter and punish IUU fishing inside their national waters. The negative impact of these judgments is twofold: first, they diminish an individual state’s power to punish and deter IUU fishing within its exclusive economic zone (EEZ).\(^\text{14}\) Second, the judgments interfere with regional organizations’ efforts to deter IUU fishing in defined areas. The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) is a regional organization that regulates toothfish harvesting in the Antarctic waters.\(^\text{15}\) Although UNCLOS strongly encourages regional cooperation among its members to conserve natural resources,\(^\text{16}\) the Volga line of cases undermines certain CCAMLR toothfish conservation measures.\(^\text{17}\)

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13. The term “coastal state” in this Note refers to coastal states that are parties to UNCLOS.

14. UNCLOS delineates the EEZ as follows: “The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.” UNCLOS, supra note 8, art. 57. UNCLOS grants states sovereign rights to regulate fishing within their EEZs. Id. arts. 56(1), 61–62.


16. UNCLOS provides:

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

UNCLOS, supra note 8, art. 197.

17. See infra Part IV.C–D. for a discussion of the impact of Volga on CCAMLR conservation measures.
The disputing states in the Volga case, the Russian Federation and Australia, were both parties to UNCLOS and the CCAMLR Convention at the time of the events leading to their dispute. The Volga, a Russian-owned fishing vessel flying the Russian Federation’s flag, had obtained a commercial license to fish within the Russian Federation’s EEZ, in the open sea, and in the coastal zones of foreign states. Australian authorities observed the Volga fleeing from Australia’s EEZ, boarded it, and discovered 131,422 tons of illegally-caught toothfish. Australian authorities pursued enforcement measures available to them under Australian law; they imposed financial and nonfinancial conditions for the release of the Volga and brought criminal charges against the master and crew. With regard to the boat, Russia argued that Australia’s conditions of release were unreasonable vis-à-vis UNCLOS Article 73(2), which requires the “prompt release” of vessels upon the posting of a “reasonable bond.” ITLOS, narrowly interpreting Articles

18. The “Volga” Case, Separate Opinion of Judge Cot, para. 5; (stating that by April 1997, both countries had ratified UNCLOS), available at http://www.itlos.org/start2_en.html (last visited Oct. 10, 2004). The facts of the Volga case are provided in greater detail infra Part IV.B.

19. The “Volga” Case, paras. 30–31. A flag state is “[t]he state in which a fishing vessel is registered.” BLACK MARKET FOR WHITE GOLD, supra note 15, at 4. A flag state has the power to regulate the fishing activities of a ship flying its flag. See Ian J. Popick, Comment, Are There Really Plenty of Fish in the Sea? The World Trade Organization’s Presence is Effectively Frustrating the International Community’s Attempts to Conserve the Chilean Sea Bass, 50 EMORY L.J. 939, 964 (2001). UNCLOS requires that nationals of other states fishing inside a coastal state’s EEZ “comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.” UNCLOS, supra note 8, art. 62(4). FAO is concerned with the phenomenon of “flags of convenience,” in which states allow vessels from other states to fly their flags, yet fail to ensure that these vessels respect fishing laws. FAO Newsroom, supra note 5.

20. The “Volga” Case, para. 32.

21. Id. para. 51.

22. For details of the conditions of release, see infra Part IV.B.


24. UNCLOS Article 73 provides:

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure
73(2) and 292, agreed with Russia that Australia’s conditions of release were unreasonable.\textsuperscript{25}

The Tribunal’s interpretation of UNCLOS Articles 73(2) and 292 is likely to impede Australia’s efforts to deter IUU fishing within its EEZ, and is therefore at odds with the Convention’s central conservationist objectives.\textsuperscript{26} For Australia to deter IUU fishing, it must be allowed to set conditions of release of a vessel that create a financial disincentive to IUU fishers. Foreign poachers reap ample rewards in the marketplace for illegally-caught toothfish.\textsuperscript{27} If the cost of obtaining the release of a vessel is relatively inconsequential compared to IUU fishing profits, IUU fishing will continue.\textsuperscript{28}

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compliance with the laws and regulations adopted by it in conformity with this Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

UNCLOS, \textit{supra} note 8, art. 73.

25. The “\textit{Volga}” Case, para. 88 (“[T]he Tribunal considers that the bond as sought by Australia is not reasonable within the meaning of article 292 of the Convention.”). UNCLOS provides: “Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.” UNCLOS, \textit{supra} note 8, art. 292(4). For the full text of Article 292, which contains the dispute resolution procedures for prompt release cases, see \textit{infra} note 81.


27. \textit{See} \textit{Black Market for White Gold}, \textit{supra} note 15, at 7 (“With dockside prices ranging as high as $10.00 to $12.00 per pound, toothfish has rapidly become one of the most lucrative, illegal fishing target species globally: a good haul can bring $3 million.”).

28. This Note does not ignore the right of foreign vessels accused of IUU fishing to be free from arbitrary or excessive punishment. Rather, it argues that in the \textit{Volga} line of cases, ITLOS unnecessarily tipped the scales in favor of foreign pirate fishers. The tension between a foreign state’s right to UNCLOS’s procedural remedies and a coastal state’s right to punish IUU fishing is aptly characterized as “the complex balance between due process and due deterrence.” Gorina-Ysern, \textit{supra} note 8, at 687–88.
Part II of this Note provides the background to the toothfish crisis. Part III surveys UNCLOS enforcement and dispute resolution provisions pertaining to IUU fishing, in particular Articles 73 and 292. It also introduces the CCAMLR Convention, and highlights some of its shortcomings. Part IV examines the Volga case, the latest in a line of prompt release cases heard by the Tribunal. It focuses on the Tribunal’s interpretation of key UNCLOS provisions, Articles 73 and 292, and the impact of its interpretation on coastal states' efforts to combat IUU fishing of toothfish. Part V explores alternative, broader interpretations of Article 73(2) to be applied in future prompt release cases. These interpretations are more consistent with UNCLOS’s strong conservationist spirit and with the sovereign rights it confers on coastal states, without favoring the rights of coastal states over those of flag states. Part VI, the conclusion, suggests amending UNCLOS Article 73(2) to cure the incompatibility of the Tribunal’s extant interpretation of Article 73(2) and the dire need to prevent toothfish depletion.

II. THE PLIGHT OF THE PATAGONIAN TOOTHFISH

Toothfish are deep-sea fish found in the waters of Antarctica which can live up to fifty years and grow to over two hundred pounds. Toothfish are overfished and illegally fished, to the extent that some believe they are on the “brink of extinction.”


Illegal fishing, in particular, undermines toothfish conservation efforts.\textsuperscript{33} By one estimate, the Australian fishery will be gone in five to fifteen years.\textsuperscript{34} Although CCAMLR tries to counter IUU fishing by imposing allowable catch levels and other conservation measures, large quantities of toothfish are harvested using banned fishing methods, and in excess of CCAMLR catch quotas.\textsuperscript{35}

IUU fishing of toothfish is rampant for several reasons.\textsuperscript{36} First, it is easy for illegally-caught fish to saturate the market.\textsuperscript{37} Unless properly documented, they can be sold on the market by virtue of mere possession, without marketable title conferred by a valid fishing license.\textsuperscript{38} Over sixteen thousand tons of toothfish were legally harvested in the Antarctic in 2000;\textsuperscript{39} some estimate that up to twice that amount were illegally harvested.\textsuperscript{40} One group estimates that almost 80 percent of toothfish sold in the


\textsuperscript{35} Illegal, Unregulated and Unreported (IUU) Fishing, CCAMLR website, at http://www.ccamlr.org/pu/E/sc/fish-monit/iuu-intro.htm (last visited Oct. 9, 2004) (“Substantial catches of toothfish (\textit{Dissostichus} spp.) have been taken by longline fishing well in excess of allowable catches agreed by the CCAMLR.”). Longliners are vessels that lay baited, hooked lines of up to one mile in length for approximately twenty-four hours before retrieving the catch. See Frequently Asked Questions, Division of Commercial Fisheries, Alaska Department of Fish and Game website, at http://cf.adfg.state.ak.us/geninfo/about/faq/cf_faq.php (last visited Oct. 9, 2004).

\textsuperscript{36} This list of factors is not intended to be exhaustive.

\textsuperscript{37} See Lea Brilmayer & Natalie Klein, \textit{Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator}, 33 N.Y.U. J. INT’L L. & POL. 703, 752–53 (2001) (“Once the fish are taken to port, it is unlikely that any buyer can determine whether the fish were lawfully taken from a particular maritime area.”).

\textsuperscript{38} See id.

\textsuperscript{39} Fact Sheet: Chilean Sea Bass, supra note 31. Generally, legal fishing occurs when a coastal state licenses fishing rights in its to foreign fishers, granting them legal title to catch removed in compliance with the license. See Brilmayer & Klein, supra note 37, at 752.

\textsuperscript{40} Fact Sheet: Chilean Sea Bass, supra note 31.
world is illegally obtained.\textsuperscript{41} This can happen because buyers 
cannot distinguish between lawfully and unlawfully harvested 
fish.\textsuperscript{42} It is, moreover, unrealistic to expect restaurants and 
their patrons to enquire whether their dinner was legally 
caught.\textsuperscript{43}

Another cause of rampant IUU fishing is the strong market 
demand for toothfish. The major markets for toothfish are the 
United States, Japan, and the European Union,\textsuperscript{44} with the 
United States importing 15 to 20 percent of the world market.\textsuperscript{45}
Market prices are high, earning toothfish the nickname “white

\begin{footnotesize}
\begin{enumerate}
\item[41.] Jack Williams, \textit{Australians Nab Suspected Illegal Fishing Boat After 4,000-mile Chase}, \textsc{USA Today}, Aug. 30, 2003, \textit{available at} http://
\textsc{www.usatoday.com/weather/resources/coldscience/2003-08-30-toothfish-
caught_x.htm} (citing figures provided by the National Environmental Trust in 
Washington). \textit{See also Australia Arms Toothfish Patrol}, \textsc{BBC News}, \textit{supra}
note 32 (“[P]oachers are thought to take more than four times the amount of 
toothfish caught legally.”).
\item[42.] Brilmayer & Klein, \textit{supra} note 37, at 752–53.
\item[43.] \textsc{Black Market for White Gold}, \textit{supra} note 15, at 8 (”[I]t is virtually 

impossible for a consumer in the U.S. to know if the Chilean Sea Bass they 
[sic] purchase in a restaurant or grocery store is legal or illegal.”). The following 
excerpt from an interview presents one chef’s perspective on the overfishing 
crisis:

\begin{quote}
\textbf{[Question:]} There are concerns these days about fish, too, for example 
about certain species that have been depleted.
\textbf{[Answer:]} As a chef, it’s tough to go into that war. Don’t eat sword-
fish tomorrow, but do you eat cod? It changes. Where I’m from, cod 
is now overfished. It’s senseless for us to take a hard line on it. It’s 
tough to be a Greenpeace man and a chef at the same time. In my 
head, I would like to support all that, but we also have a restaurant 
where we serve people to make them happy, and that’s the reality.
\end{quote}
Hugo Lindgren, \textit{Questions for Marcus Samuelsson: Big Fish Story: The Ethio-
pian-born Swedish Chef is Going Japanese}, \textsc{N.Y. Times Magazine}, Oct. 26,
2003, at 25.
\item[44.] \textsc{Fact Sheet: Chilean Sea Bass, supra} note 31.
\item[45.] \textsc{NOAA News Release, supra} note 30. This figure pertains to legal 
imports only. \textsc{Id.} In general, U.S. seafood consumption is on the rise, with per 
capita consumption reaching 15.6 per person in 2002, almost one pound more 
from the 2001 level. \textsc{Americans Ate More Seafood in 2002}, \textit{Press Release No.}
nmfs.gov/docs/2002consumption.pdf. According to the National Environmental 
Trust, the United States imported 85 percent of legally-caught 
CCAMLR toothfish in 2003. \textsc{Black Market for White Gold, supra} note 15, 
at 11.
\end{enumerate}
\end{footnotesize}
gold.” On the docks, prices are as high as $10.00 to $12.00 per pound. Clearly, there is financial incentive for pirate fishers to ignore the risks involved with illegal activities. A dramatic example of such risk-taking occurred in 2003, when Australian authorities pursued a pirate fishing boat for twenty-one days through 4,000 miles of the stormy, icy Southern Ocean. Australian authorities captured the boat, which contained illegally-caught toothfish, the estimated value of which was as high as one million U.S. dollars.

Finally, some states are simply unable to patrol their EEZs, leaving the door wide open to poachers. Developing countries, in particular, lack the financial and technological resources necessary to deter IUU fishing. The Food and Agriculture Organization of the United Nations (FAO) encourages states to assist developing countries in meeting their obligations under international and regional instruments.


49. Williams, supra note 41.

50. Id.


52. See Brilmayer & Klein, supra note 37, at 754.

53. IPOA-IUU, supra note 6, § V.
III. UNCLOS PROVISIONS RELEVANT TO IUU FISHING; CCAMLR CONVENTION

A. UNCLOS Delineation of Ocean Zones

UNCLOS delineates three main ocean zones and their relevant jurisdictions: the territorial sea, the EEZ, and the high seas. Every coastal state has a territorial sea with a breadth of twelve nautical miles over which that state is sovereign. The EEZ, extending two hundred nautical miles from the coastline, is the area in which a coastal state has sovereign rights over the management of its natural resources, including jurisdiction over “the protection and preservation of the marine environment.”

The high seas are defined as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.” States are prohibited from claiming sovereign rights to any part of the high seas. Their nationals, however, may fish on the high seas to the extent permissible under international and regional treaties governing the conservation of the living resources on the high seas. Treaties may,
for example, impose allowable catch limits on certain species. Subsection 304
It is sometimes difficult to distinguish between IUU fishing occurring inside a state’s EEZ and permissible fishing on the high seas. For example, a foreign vessel may hover just outside a coastal state’s EEZ to capture fish as they swim from within the EEZ to the high seas.

B. UNCLOS Dispute Settlement Provisions

UNCLOS dispute resolution mechanisms, found in Part XV of the Convention, are divided into three basic sections. Section One (General Provisions) authorizes disputing parties to choose any “peaceful means” of dispute resolution, either independently or under a general, regional or bilateral agreement, provided that the resulting decision is binding. If the states fail to peacefully resolve their dispute, they are subject to the options set forth in Section Two (Compulsory Procedures Entailing Binding Decisions). Under Section Two, states may choose to bring their dispute before ITLOS, the International Court of Justice (ICJ), or one of two arbitration tribunals. Under UNCLOS, both the ICJ and ITLOS have jurisdiction to hear cases requiring the interpretation or application of UNCLOS, however, parties may not submit the same case to both courts, nor is forum-shopping permitted. However, applications for prompt release, such as the Volga case, have been heard by the

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63. See id. art. 119(1).
64. Brilmayer & Klein, supra note 37, at 752. This may be illegal under UNCLOS. Id.
66. UNCLOS, supra note 8, art. 279.
67. Id. art. 282.
68. Id. art. 286.
69. Id. art. 287(1). However, “unless the parties otherwise agree, the jurisdiction of the Tribunal is mandatory in cases relating to the prompt release of vessels and crews under article 292 of the Convention and to provisional measures pending the constitution of an arbitral tribunal under article 290, paragraph 5, of the Convention.” Overview ITLOS, supra note 12.
Finally, Section Three indicates certain types of disputes that are exempt from Section Two’s compulsory dispute settlement scheme, which includes disputes over maritime boundaries, issues before the U.N. Security Council, military matters, and certain fisheries and marine scientific research conflicts.

C. Enforcement Problems

When IUU fishing occurs inside a coastal state’s EEZ, the state may impose its national laws rather than submit the dispute to UNCLOS’s binding settlement procedures. This may be preferable in instances where a coastal state’s domestic fishing laws are stricter, hence more protective, than those permissible under UNCLOS. Some states, however, are unable to enforce their national fishing laws for lack of financial or technical resources. Others simply choose not to enforce their own laws. In such situations, IUU fishing goes unchecked, in direct opposition to the spirit of UNCLOS.

Another, perhaps obvious, enforcement problem is that states fail to ratify or implement UNCLOS and other fisheries man-

71. The UNCLOS drafters bestowed on ITLOS the compulsory residual jurisdiction to interpret prompt release cases, therefore relevant case law will mostly be found with ITLOS. Erik Franckx, “Reasonable Bond” in the Practice of the International Tribunal for the Law of the Sea, 32 CAL. W. INT’L L.J. 303, 309 (2002).


73. Kimball, supra note 72, at 9. UNCLOS provides that:

Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity . . . and the terms and conditions established in its conservation and management law and regulations.

UNCLOS, supra note 8, art. 297(3)(a).

74. See Eichenberg & Shapson, supra note 4, at 607.

75. See Brilmayer & Klein, supra note 37, at 754.
agement treaties. Following the Round Table on the Sustainable Development of Global Fisheries, with Particular Reference to Enforcement against IUU Fishing on the on the High Seas in June, 2003, the Secretary-General on Oceans and the Law of the Sea reported that “few States had ratified and implemented these instruments.” International instruments that regulate IUU fishing have, thus, been ineffective “due to a lack of political will, priority, capacity and resources to ratify or accede to and implement them.”

Therefore, although dispute resolution mechanisms are available under UNCLOS and other instruments, enforcement problems weaken their effectiveness in the battle to end IUU fishing.

D. UNCLOS Enforcement and Dispute Resolution in Prompt Release Cases: Article 73(2)

If a coastal state believes a foreign vessel has violated its EEZ, as Australia did in the Volga case, UNCLOS Article 73(1) authorizes the coastal state to seize the offending vessel. A coastal state is authorized to board and inspect a vessel, arrest


78. IPOA-IUU, supra note 6, para. 1.

79. UNCLOS, supra note 8, art. 73(1). For the full text of Article 73, see supra note 24.
the crew, and implement judicial proceedings against a foreign party that violates its national fisheries laws.\textsuperscript{80} If, however, the coastal state fails to promptly release the vessel once the foreign state has posted a reasonable bond, UNCLOS Article 292 authorizes the foreign state to file an application for prompt release with the competent court or tribunal.\textsuperscript{81} This is what happened in the \textit{Volga} case; when Russia and Australia failed to agree on the conditions of release of the \textit{Volga} and its crew, Russia filed an application for prompt release with ITLOS.\textsuperscript{82}

\begin{itemize}
\item[80.] \textit{Id.}
\item[81.] Article 292 describes the procedures that apply in prompt release disputes:
\item[1.] Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties, or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.
\item[2.] The application for release may be made only by or on behalf of the flag State of the vessel.
\item[3.] The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.
\item[4.] Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.
\item[82.] Conversely, if the disputing states resolve their conflict within ten days, perhaps under the enforcement provisions of bilateral agreement or regional convention, UNCLOS prompt release mechanisms do not come into play. Some disputes end at this stage because the flag state simply prefers to pay the bond to avoid protracted proceedings.
E. The CCAMLR Convention

The CCAMLR Convention is a regional treaty that came into force in 1982 with the purpose of conserving marine life in the Southern Ocean, while permitting the rational harvesting of living resources. CCAMLR uses scientific advice as a basis for its conservation measures. Its approach is ecosystem-based, meaning it does not limit its focus to individual species, but "take[s] into account ecological links between species." Parties to the CCAMLR Convention agree to conduct their harvesting activities in the Southern Ocean in accordance with the "prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment." To that end, the CCAMLR Convention designates the quantity of a given species that may be harvested inside the Convention area. With regard to toothfish, it imposes annual catch limits, prohibits harvesting in certain ocean areas, requires compliance with its Catch Documentation Scheme, and requires vessels flagged by CCAMLR member states to use a Vessel Monitoring System (VMS).

Unfortunately, CCAMLR's conservation scheme is impeded in several ways. First, it is very difficult for member states to police the Southern Ocean, which is vast and inhospitable.


The Southern Ocean surrounds the continent of Antarctica and is clearly delimited by the Antarctic Convergence (or Polar Front), which is formed where cold Antarctic waters meet warmer waters to the north. The Antarctic Convergence acts as an effective biological barrier, and the Southern Ocean is therefore substantially a closed ecosystem.  

Id. Patagonian toothfish are found primarily in the Southern Ocean and adjacent waters. COLTO Fact Sheet, supra note 15.

84. General Introduction, CCAMLR website, supra note 83.

85. Id. For example, one of the Convention's early concerns was the effect of excessive krill catches on other marine life that fed on krill, as well as its effect on krill populations themselves. Id.

86. CCAMLR Convention, supra note 29, art. II(3)(a).

87. Id. art. IX(2)(a).

88. BLACK MARKET FOR WHITE GOLD, supra note 15, at 8.

89. Id. at 17–18. VMS devices monitor the location of fishing vessels in order to determine where their catches are made. Id.

90. COLTO Fact Sheet, supra note 15.
ond, some experts believe CCAMLR's estimates of the decline in
toothfish populations are conservative, and that some popula-
tions are in fact commercially extinct.\footnote{BLACK MARKET FOR WHITE GOLD, supra note 15, at 11.} If this is true, CCAMLR's current conservation efforts would be insufficient in
light of the actual level of toothfish depopulation. Another ob-
stacle to CCAMLR's conservation measures is its overall lack of
enforcement capabilities; it cannot punish member states that
violate CCAMLR Convention rules.\footnote{BLACK MARKET FOR WHITE GOLD, supra note 15, at 18.} CCAMLR members rely
on “public pressure” to encourage offending nations to comply
with the rules.\footnote{Eichenberg & Shapson, supra note 4, at 615–16.} Some members simply fail to enforce the con-
vention’s requirements.\footnote{BLACK MARKET FOR WHITE GOLD, supra note 15, at 18.} For example, a flag state may fail to
observe CCAMLR’s toothfish catch limits.\footnote{Eichenberg & Shapson, supra note 4, at 615.} Finally, other trea-
ties, such as UNCLOS, may restrict the scope of CCAMLR’s
effectiveness. ITLOS's narrow interpretation of the term “rea-
sonable bond” in prompt release cases limits CCAMLR’s ability

(a) all species which although not necessarily now threatened with
extinction may become so unless trade in specimens of such species is
subject to strict regulation in order to avoid utilization incompatible
with their survival; and

(b) other species which must be subject to regulation in order that
trade in specimens of certain species referred to in sub-paragraph (a)
of this paragraph may be brought under effective control.


Very recently, CCAMLR indicated that pirate fishing of toothfish in its
convention region significantly declined in 2004. \textit{Toothfish Pirates Reducing
the Plunder, Figures Show}, N.Z. HERALD, Nov. 12, 2004, available at http://www.nzherald.co.nz/storydisplay.cfm?storyID=3609369&thesession=news&thesubsection=general. However, the report of CCAMLR’s 23\textsuperscript{rd} annual
meeting, which will presumably provide relevant data, is not available at the
time of this Note’s publication.
to enforce CCAMLR Convention conservation measures. In
Volga, for example, ITLOS concluded that Australia could not, as a condition of release, require the Volga to carry a VMS device and comply with other CCAMLR requirements.96

IV. THE VOLGA CASE

A. Pre-Volga Prompt Release Cases

Since it began hearing cases in 1996,97 six of the Tribunal's twelve judgments involved prompt release disputes.98 Volga was the sixth application for prompt release heard by ITLOS.99 In four of the six cases, a coastal state seized a foreign vessel containing large quantities of illegally-caught toothfish.100 These cases illustrate the Tribunal’s approach to prompt release disputes, specifically its balancing approach, with which it weighs the interests of the flag state, which seeks release of its vessel, against those of the coastal state, which seeks to punish and deter IUU fishing.

This balancing approach at first appears consistent with the goal of UNCLOS Article 292, namely to balance the interests of coastal and flag states.101 This Note argues, however, that the Tribunal’s balancing approach is flawed. Despite its stated objective to balance the interests of the disputing parties, the Tribunal has invariably undervalued or ignored factors favoring a

96. See infra Part IV.C–D. for an analysis of the Tribunal’s interpretation of the term “reasonable bond” and the impact of this interpretation on deterring IUU fishing.
100. See id. at 311–22. In addition to the Volga case, the prompt release cases are: The “Camouco” Case (Panama v. France), ITLOS Case No. 5 (2000); The “Monte Confurco” Case (Seychelles v. France), ITLOS Case No. 6 (2000); and The “Grand Prince” Case (Belize v. France), ITLOS Case No. 8 (2001). Id. at 311. These judgments are available at http://www.itlos.org/start2_en.html (last visited Oct. 10, 2004).
101. See Franckx, supra note 71, at 305.
coastal state’s sovereign right to punish IUU fishing within its EEZ. The balancing approach, moreover, is ill-defined, mutable, and applied inconsistently from case to case to serve the desired outcome of obtaining the release of a seized vessel. Although the Tribunal is in its relative infancy and has heard only a handful of prompt release cases, these judgments could hamper the ability of individual states and regional organizations to deter IUU fishing. The balancing test is therefore flawed because it gives insufficient weight to marine life conservation, an essential UNCLOS value, and because it lacks the specificity needed to provide sufficient notice to states.

B. Facts of the Volga Case and the Dispute over the Conditions of Release

The Volga was owned by a Russian company, and its master was a Russian national. After Australian authorities boarded the vessel on February 7, 2002, they informed the master that the Volga had been apprehended under Australia’s Fisheries Management Act of 1991 because it had been fishing illegally inside Australia’s EEZ. The master and crew were detained pursuant to the Act. On February 20, 2002, Australia notified the master that the boat, nets, traps, equipment, and catch had been seized. Three crew members, all Spanish nationals, were charged with the indictable, strict liability offense of commercial fishing without a license within Australia’s EEZ.

Russia contended that Australian authorities had violated UNCLOS Article 72(3) when they set what Russia considered unreasonable conditions for the release of the Volga and crew. The conditions for release of the crew, approved by the Full

102. See infra Part IV(C)(3) for more on the inherent inconsistencies in the Tribunal’s balancing approach.
103. For an analysis of the Tribunal’s balancing approach in Volga, see infra Part IV.C.
104. The “Volga” Case, para. 2. The Volga’s fishing license required that its activities comply with fishing industry rules and international agreements. Derrington & White, supra note 99, at 364.
105. The “Volga” Case, paras. 33–34.
106. Id. para. 35. The master died in an Australian hospital without being charged with any offense. Id. para. 42.
107. Id. para. 36.
108. Id. paras. 38–39.
Court of the Supreme Court of Western Australia, were: AU$75,000\textsuperscript{109} cash for each crew member, the surrender of all passports and seaman’s papers, and the requirement that the crew remain in Perth.\textsuperscript{110} The Volga’s owner posted bail for the crew.\textsuperscript{111} The crux of the Volga case, however, was the dispute over the terms of release of the vessel, which were twofold: Australia demanded a security in the amount of AU$3,332,500 and imposed additional, non-financial conditions.\textsuperscript{112} As non-financial conditions of release, Australia required the Volga to carry a VMS during the course of the legal proceedings, and to observe CCAMLR conservation rules.\textsuperscript{113} The boat’s owner rejected Australia’s conditions of release as unreasonable, and agreed only to post the considerably lower amount of AU$500,000.\textsuperscript{114} The Tribunal ultimately held that the bond for release of the Volga should be AU$1,920,000,\textsuperscript{115} representing the value of the vessel.

\begin{itemize}
\item \textsuperscript{110} The “Volga” Case, para. 41.
\item \textsuperscript{111} Id. para. 42. Russia, however, maintained that the terms of release of the crew were “not envisaged by article 73(2)” and thus “not permissible or reasonable in terms of the Convention.” Id. para. 48.
\item \textsuperscript{112} Australia set the following conditions of release for the Volga:
\begin{itemize}
\item [A] security to be lodged amounting to AU$ 3,332,500, for release of the vessel. The security amount is based on what Australia considers reasonable in respect of three elements:
\begin{itemize}
\item assessed value of the vessel, fuel, lubricants and fishing equipment
\item potential fines
\item carriage of a fully operational VMS [Vessel Monitoring System] and observance of CCAMLR . . . conservation measures until the conclusion of legal proceedings.
\end{itemize}
\end{itemize}
Id. para. 53. The AU$3,332,500 security consisted of the value of the vessel, fuel, and lubricants (AU$1,920,000); potential fines imposed on crew members pending criminal proceedings (AU$412,500); and security for the VMS system and observance of CCAMLR rules (AU$1,000,000). Id. para. 72. Australian authorities sold the 131,422 tons of toothfish found on the Volga for nearly two million Australian dollars, which they held in trust pending the outcome of legal proceedings. Id. para. 51.
\item \textsuperscript{113} Id. Recall that both Russia and Australia were CCAMLR members and were therefore required to carry VMS equipment. See supra text accompanying note 17.
\item \textsuperscript{114} The “Volga” Case, para. 54.
\item \textsuperscript{115} Id. para. 90.
\end{itemize}
fuel, and lubricants, and rejected Australia’s additional, nonfinancial conditions.

C. The Tribunal’s Balancing Approach: The Question of Reasonableness

In Volga, the Tribunal had to determine whether the bond and conditions set by Australia were reasonable under UNCLOS Article 73(2). UNCLOS does not define the term “reasonable.” The Tribunal characterizes its task in prompt release cases as to determine whether a prompt release claim against a detaining state is “well-founded.” To that end, the Tribunal developed its balancing approach.

In Volga, the Tribunal had to balance the Russian Federation’s contention that the conditions of release of the vessel and crew were unreasonable against Australia’s position that the bond was reasonable based on “the value of the Volga, its fuel, lubricants and fishing equipment; the gravity of the offences and potential penalties; the level of international concern over illegal fishing; and the need to secure compliance with Australian laws and international obligations pending the completion of domestic proceedings.” To determine the reasonableness of the requested AU$3,332,500 security, the Tribunal considered factors it had deemed relevant in prior prompt release cases, in particular: “the gravity of the alleged offences, the penalties imposed or imposable under laws of the detaining State, the value of the detained vessel and of the cargo seized, [and] the amount of bond imposed by the detaining State and its form.” The Tribunal did not intend this list of factors to be exhaus-

116. Id. paras. 58–61.
117. See Franckx, supra note 71, at 306–09. ITLOS’s Rules of the Tribunal provide that the Tribunal’s task in prompt release cases is to determine whether a claim that a detaining state has not complied with prompt release provisions is “well-founded,” and if well-founded, the “amount, nature and form of the bond or financial security.” Id. at 308.
118. Id. (citing the Tribunal’s Rules).
119. The “Volga” Case, para. 60.
120. Id. para. 61.
121. Id. para. 63 (citing the judgment in the “Camouco” case (2000)). Because Article 292 disputes are subject to obligatory third-party settlement, usually by ITLOS, case law on the reasonableness criterion will tend to be consistent. See Franckx, supra 71, at 325–26.
Rather, the assessment of reasonableness was to be made on a case-by-case basis.\textsuperscript{121}

1. Gravity of the Offense

The Tribunal failed to allocate sufficient weight to the gravity of the Russian Federation’s offense, namely IUU fishing of a fragile species. Moreover, it did not articulate a clear basis for rejecting the two indications of gravity asserted by Australia: first, the potential penalties for IUU fishing within Australia’s EEZ, which constituted evidence that Australia considered IUU fishing a serious matter, and, second, that IUU fishing was a problem of significant international concern, particularly in the CCAMLR Convention region, where there was a “serious depletion of the stocks of Patagonian toothfish ….\textsuperscript{124}

After conceding that the offenses were grave\textsuperscript{125} and that international fishing concerns were a factor in its balancing test, the Tribunal nevertheless suggested that these concerns were neither dispositive nor necessary to the balancing equation.\textsuperscript{126} Gravity was, rather, an ancillary or optional factor that the Tribunal “may” consider when evaluating the reasonableness of penalties.\textsuperscript{127} The Tribunal implied that it deemed itself precluded from considering the gravity of the offense in a meaningful way because it perceived its primary “purpose” to be securing the prompt release of the \textit{Volga}.\textsuperscript{128} To secure prompt release of the vessel, then, the Tribunal would need to downplay factors supporting Australia’s position. This approach invariably favors the foreign state’s interests over those of the detaining state: the imposition of any bond or condition of release that

\begin{itemize}
\item [\textsuperscript{122}] The “\textit{Volga}” Case, para. 64 (citing the judgment in the “\textit{Monte Confurco}” Case (2000)). The Tribunal emphasized in \textit{Monte Confurco} that it did not wish to “lay down rigid rules as to the exact weight to be attached to each of them.” \textit{Id}.  
\item [\textsuperscript{123}] See \textit{id.} para. 65 (citing the \textit{Monte Confurco} case).  
\item [\textsuperscript{124}] \textit{Id.} para. 67.  
\item [\textsuperscript{125}] \textit{Id.} para. 68 (“The Tribunal takes note of the the submissions of the Respondent. The Tribunal understands the international concerns about illegal, unregulated and unreported fishing and appreciates the objective taken by States, including the States Parties to CCAMLR, to deal with the problem.”). \textit{Id}.  
\item [\textsuperscript{126}] See \textit{id.} para. 69.  
\item [\textsuperscript{127}] \textit{Id}.  
\item [\textsuperscript{128}] See \textit{id}.  
\end{itemize}
interferes with prompt release will be given insufficient weight.\textsuperscript{129} It would seem, therefore, that the Tribunal’s balancing test is flexible to the point of being illusory. One is left to wonder whether the Tribunal is giving mere lip service coastal states’ sovereign rights under UNCLOS to manage marine resources within their EEZs.

2. Non-financial Conditions of Release

The Tribunal construed the term “bond or other security” in Article 73(2) to exclude non-financial conditions.\textsuperscript{130} It pointed to the text of Article 292 and other UNCLOS provisions in which appears the term “bond or other financial security” for the “context” and concluded that the “object and purpose” of this language in Article 73(2) dictated nothing more than purely financial conditions.\textsuperscript{131} To support this conclusion, the Tribunal observed that, had the UNCLOS drafters intended to permit non-financial conditions of release, they would have written them into the Convention.\textsuperscript{132} The Tribunal, thus, restricted its inquiry to a plain meaning textual analysis. It declined to consider whether a coastal state is “entitled” to impose non-financial conditions under the Convention “in the exercise of its sovereign rights.”\textsuperscript{133} Perhaps the task of reconciling Australia’s sovereign rights under UNCLOS with the mandates of Articles 73(2) and

\begin{itemize}
  \item 129. The Tribunal was equally dismissive of the gravity of the offense factor in pre-Volga prompt release cases:

  [W]ith respect to the other relevant factors, namely the gravity of the offences and the range of penalties applicable, the Tribunal usually simply states that it “takes note” of the submissions made, without any further indication of the weight given to the evidence or elements. Especially in the Monte Conforuco Case this technique sharply contrasted with the considerable efforts of France to develop the argument regarding gravity of the offense [sic] before the Tribunal.


  130. The “Volga” Case, para. 76. (“In these proceedings, the question to be decided is whether the ‘bond or other security’ mentioned in article 73 paragraph 2 of the Convention may include such conditions.”).

  131. \textit{Id.} para. 77. Article 73(2) does not contain the qualifying word “financial” where it refers to the “other security,” whereas Article 292(1) contains the term “other financial security.” For the full text of these provisions, see, respectively, \textit{supra} notes 24 and 81.

  132. The “Volga” Case, para. 77.

  133. \textit{Id.} para. 76.
\end{itemize}
292 was too daunting. Instead, the Tribunal narrowly construed Articles 73(2) and 292.

3. The Balancing Approach Offers Poor Guidance to UNCLOS Member States

The balancing test, as articulated and applied by the Tribunal in the Volga line of cases, offers poor guidance to national judges who set the amount of bond on a seized vessel.\(^{134}\) Similarly, the test is a poor guide for national legislatures charged with setting the guidelines for their courts. The risk is that, despite the dire need to deter IUU fishing, judges and legislatures will act cautiously by setting low bonds, in order to avoid the inconvenience of prompt release disputes, in anticipation of losing such disputes, or simply out of confusion with regard to the meaning of the term “reasonable bond.” In this sense, the effect of the Tribunal’s standard of reasonableness in prompt release disputes, to the extent one can be defined, is contrary to the conservationist spirit of UNCLOS with respect to IUU fishing.\(^{135}\)

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134. In the prompt release cases that preceded Volga, the balancing test lacked cohesiveness, and thus was a poor guide to states:

The interaction among the different relevant factors, the fact that the list of factors is said to be non-exhaustive, and the Tribunal’s manifest refusal to clarify the interrelation of the factors, have made a horizontal analysis of the different cases, in order to try to discern some predictability for future cases, a very difficult, if not impossible, exercise.

Franckx, supra note 71, at 337. Consequently, there is a danger that the Tribunal’s loose guidance will make it easier for national courts to manipulate the factors in its balancing test to come up with their desired result:

The lack of precision, caused by the unwillingness of the Tribunal to narrow further the general contours set thus far, could have a negative influence on national judges who might try to “misuse” the broad framework created by the Tribunal. Members of the Tribunal have noted that “national adjudication bodies welcome this guidance”....

Franckx, supra note 71, at 338. A national judge must apply domestic fishing laws and also comply with the standard expressed in international instruments. See Bernard H. Oxman & Vincent P. Bantz, International Decision: The “Camouco” (Panama v. France) (Judgment). ITLOS Case No. 5, 94 A.J.I.L. 713, 720 (2000) (criticizing a French judge’s failure to invoke UNCLOS in his reasoning when determining the amount bond in the Camouco case, when under French law treaties trump statutes).

135. In his Separate Opinion, Judge Cot explained:
D. Separate and Dissenting Opinions to the Volga Case

It is reassuring that several members of the Volga Tribunal acknowledge that illegal fishing of toothfish is a grave offense, and that the majority’s holding will likely impede coastal states’ efforts to combat it. In his Separate Opinion, Judge Jean-Pierre Cot emphasized the need to “clarify the difficulties encountered by States in combating [IUU fishing] in the Southern Ocean.” He articulated a specific concern for the plight of toothfish, and an awareness that the majority’s ruling may frustrate CCAMLR’s efforts to protect toothfish. Judge Cot’s reference to the financial lure of toothfish poaching underscored the need for stinging financial penalties, in the form of hefty bonds. Unlike the majority, Judge Cot emphasized Australia’s legitimate sovereign rights under UNCLOS to take necessary enforcement and deterrence measures to combat IUU fishing inside its EEZ. These rights include the right to determine ap-

CCAMLR’s verdict on the devastation caused by illegal fishing in the region is damning. The proceeds of illegal fishing appear to be greater than those of licensed fishing—at least that was CCAMLR’s estimate for the 1997/98 season—and therefore more than double the level of catches regarded as the maximum to ensure the preservation of the species. If the parties to the Convention do not manage to put an end to these practices, stocks of Patagonian toothfish will be completely wiped out within about ten years.


Id. para. 2.

137. See supra note 135.

138. The Volga

 achieved an illegal catch of 100 tonnes of Patagonian toothfish in nine weeks, which was sold by the Australian authorities for the sum of AU$ 1,932,579, while the vessel, its fuel oil and its fishing gear were estimated at AU$ 1,920,000. . . .With a full hold, the fish caught illegally in the course of a fishing season are worth more than twice the price of the vessel.

Id. para. 7.

139. According to Judge Cot:

The measures taken by Australia, both in terms of prevention and enforcement, clearly fall within the scope of the efforts made by international organizations to combat [IUU fishing]. They come under article 56 of [UNCLOS] and have been taken in pursuance of the sovereign rights exercised by coastal States for the purpose of exploring,
propriate monetary penalties, the amount of which UNCLOS neither limits nor defines. The Tribunal, Judge Cot points out, should not interfere with these sovereign rights.

Judge Cot, however, drew the line at the form of bond a state may impose, agreeing with the majority's conclusion that UNCLOS Articles 73(2) and 292 authorize a coastal state to set a bond or security that is strictly financial in nature, but not non-financial conditions. The effect of such non-financial conditions, he reasoned, might upset the tension between the rights of coastal and flag states, by giving the coastal state additional "coercive power."

Judge Ad Hoc Ivan Shearer, in his dissenting opinion, agreed with the opinions expressed by Judge Cot, but went one step further. With regard to the monetary amount of a bond or security permissible under UNCLOS, Judge Shearer concluded that "illegal fishing must be punished with a high and deterrent level of monetary penalty." To support this conclusion, he emphasized that the Volga had the capacity to hold 275.6 tons of fish, so that its potential illegal catch greatly exceeded the

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Id. para. 11.
140. Id.
141. Id. para. 12 ("The Tribunal has a duty to respect the implementation by the coastal State of its sovereign rights with regard to the conservation of living recourses, particularly as these measures should be seen within the context of a concerted effort within the FAO and CCAMLR."). However, a state may not take arbitrary actions within the scope of its sovereign rights. Id.
142. The "Volga" Case, Separate Opinion of Judge Cot, para. 26. Australia required that the Volga be equipped with a VMS device and respect CCAMLR regulations. See supra note 112, and accompanying text.
143. Id.
144. The "Volga" Case, Dissenting Opinion of Judge Ad Hoc Ivan Shearer, para. 12.
145. It is worth noting the significance of there being more than one dissent in the Volga case: "This was not a lone dissent (so often the fate of the ad hoc judge), and that makes it more difficult, however large the majority, to dismiss the merits of the opinion. Judge Anderson dissented too, and for largely similar reasons." Ryszard Piotrowicz, The Song of the Volga Boatmen—Please Release Me, AUSTRALIAN L. J., 160, 162 (2003).
146. The "Volga" Case, Dissenting Opinion of Judge Ad Hoc Ivan Shearer, para. 11.
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actual catch found on board, or 131 tons of toothfish.\textsuperscript{147} that, as parties to UNCLOS and the CCAMLR Convention, Australia and Russia were required to conserve living resources; and that it is difficult for states to patrol the Southern Ocean, where weather is “bleak and cold, with high winds and heavy seas.”\textsuperscript{148}

On the question of the permissibility of non-financial conditions of release, Judge Shearer faulted the majority for its “narrow interpretation” of the provisions of Articles 73(2) and 292.\textsuperscript{149} He pointed out that Russia had, in fact, quantified in monetary terms the requirement that the \textit{Volga} carry a VMS.\textsuperscript{150} There is, then, a financial component to this condition, which could be considered a form of bond.\textsuperscript{151} Judge Shearer further observed that even a narrow interpretation of the terms “bond” and “financial security”\textsuperscript{152} does not necessarily preclude non-financial

\begin{itemize}
\item a security to cover the assessed value of the vessel, fuel, lubricants and fishing equipment (AU$ 1,920,000);
\item an amount (AU$ 412,500) to secure payment of potential fines imposed in the criminal proceedings that are still pending against members of the crew;
\item a security (AU$ 1,000,000) related to the carriage of a fully operational VMS and observance of CCAMLR conservation measures.
\end{itemize}

The “\textit{Volga}” Case, para. 72.

150. \textit{Id.} para. 16. Note, too, that the majority’s characterization of the bond imposed by Australia accords financial values to each of the non-financial conditions of release:

In the short period since the conclusion of the Convention in 1982, and in the even shorter period since its entry into force in 1994, there have been catastrophic declines in the stocks of many fish species throughout the world. The words “bond” and “financial security” should be given a liberal and purposive interpretation in order to enable the Tribunal to take full account of the measures—including those made possible by modern technology—found necessary by many coastal States (and mandated by regional and sub-regional fisheries

\textsuperscript{147} \textit{Id.} para. 6.
\textsuperscript{148} \textit{Id.} paras. 9–10.
\textsuperscript{149} \textit{Id.} para. 17.
\textsuperscript{150} \textit{Id.} para. 16. Note, too, that the majority’s characterization of the bond imposed by Australia accords financial values to each of the non-financial conditions of release:

\textsuperscript{151} Judge Shearer criticizes the majority’s narrow interpretation of Articles 73(2) and 292:

\textsuperscript{152} In the short period since the conclusion of the Convention in 1982, and in the even shorter period since its entry into force in 1994, there have been catastrophic declines in the stocks of many fish species throughout the world. The words “bond” and “financial security” should be given a liberal and purposive interpretation in order to enable the Tribunal to take full account of the measures—including those made possible by modern technology—found necessary by many coastal States (and mandated by regional and sub-regional fisheries
“associated conditions that are not of themselves financial in nature.” He analogized that requiring a vessel to carry a VMS device is similar to the practice of national criminal courts that set bail conditions in an effort to deter recidivism. For example, an individual released on bail might be prohibited from certain conduct as a condition of release. It is unclear whether Judge Shearer found support for this analogy implicit in the text of UNCLOS, or as an extension of customary national practice or international customary law, or simply as a matter of common sense.

Finally, Judge Shearer compared the authentic French text of Article 73(2) to the English language version, observing that the literal meaning of the French version “imported a wider margin of appreciation for the setting of bonds by national authorities than that imported by the word ‘reasonable’....” Judge David H. Anderson, in his dissenting opinion, concluded that a literal reading of Article 73(2) does, in fact, permit non-financial conditions of release of the Volga. First, he found that Article 73 “contains no explicit restriction upon the imposition of non-financial conditions for release of arrested vessels.” He further found that, although the term “other se-
curity” probably refers to a financial security, the term “bond” has both a financial and legal meaning. Where Article 73 is concerned, “bond” has the legal meaning associated with criminal procedure, as opposed to a purely financial meaning associated with investment matters. Judge Anderson illustrated his point by analogy to the setting of bail bonds under U.S. States and English domestic law; both allow the inclusion of conditions. Thus, when the Tribunal assesses the reasonableness of a given bond, it should examine the reasonableness of three elements: the amount, form and conditions of the bond. A non-financial, “good behaviour bond” with the legitimate purpose of deterring additional poaching by a released vessel would therefore constitute a bond within the literal meaning of Article 73(2).

V. ARGUMENTS FAVORING A BROADER INTERPRETATION OF ARTICLE 73(2)

It is too soon to predict the impact the opinions of judges Cot, Shearer, and Anderson on future ITLOS prompt release cases. Judge Anderson optimistically suggested that, with the Volga case, the Tribunal had “gone further than it did in the Monte

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159. Id. para. 8.
160. Id. para. 9.
161. Id. para. 10.
162. Id. paras. 12–13.
163. Id. para. 14.
164. Id. para. 20. Judge Anderson indicates that the use of a “good behaviour bond” would be justifiable in the Volga case because the Volga appeared likely to re-offend; it apparently ignored warnings issued by Australian authorities and “spent much of the period between its warning and its arrest fishing in the CCAMLR Area, including the EEZ.” Id. para. 22(a). Moreover, were the Volga released, “it may well be nigh impossible to keep track of the Volga in Antarctic waters, including the Australian EEZ, especially if it is not carrying VMS.” Id. para. 22(e).
165. Ryszard Piotrowicz concludes:

This is an important decision. It shows the potential for a clear division in the tribunal with regard to the meaning of reasonable bonds. Until now a majority, six out of 11, of the cases before the tribunal, have concerned prompt release. It is therefore very likely that the issue will arise again and soon. Judges Shearer and Anderson have given their colleagues plenty of food . . . for thought. Piotrowicz, supra note 145, at 163.
Confurco case two years earlier.”\textsuperscript{166} Whereas in the earlier case the Tribunal “simply took note”\textsuperscript{167} of the detaining state’s concerns over the serious situation caused by IUU fishing, in Volga: “[t]he Tribunal understands the international concerns about [IUU Fishing] and appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR, to handle the problem.”\textsuperscript{168} But, no matter how understanding and appreciative the Tribunal may be, the majority’s narrow reasoning does not imply a change of course. To the contrary, the Volga case stalls the creation of a judicial precedent under which coastal states may impose high, deterrent penalties and additional, non-financial conditions of release.\textsuperscript{169}

A. The Impact of Volga on the IUU Fishing of Toothfish

As the Volga case demonstrates, the Tribunal’s focus is predominantly procedural with regard to reasonable bond disputes, to the detriment of the overall spirit and substance of UNCLOS. This undermines coastal states’ ability to deter IUU fishing by imposing meaningful financial penalties.\textsuperscript{170} In the case of toothfish, poachers clearly find it worthwhile to risk typical penal-

\textsuperscript{166} The “Volga” Case, Dissenting Opinion of Judge David H. Anderson, at para. 2.\textsuperscript{167} Id.\textsuperscript{168} The “Volga” Case, para. 68. In the Camouco judgment, which preceded the Monte Confurco case by several months, the Tribunal likewise simply “[took] note of the gravity of the alleged offences,” without acknowledging IUU fishing and efforts to prevent toothfish poaching. The “Camouco” Case (Panama v. France), ITLOS case No. 5, para. 68 (2000). Moreover, the Tribunal “failed to reveal precisely how the amount of the bond was determined, [although] the Tribunal did identify the factors it took into account.” Oxman & Bantz, supra note 134, at 720. In the Grand Prince case, the Tribunal never reached a discussion of the gravity of the offense, finding on a separate issue that it did not have jurisdiction to hear the application. The “Grand Prince” Case (Belize v. France) ITLOS Case No. 8, para. 93 (2001).\textsuperscript{169} See Gorina-Ysern, supra note 8, at 676–77.\textsuperscript{170} The risk of excessive, arbitrary, or discriminatory penalties is offset by certain UNCLOS provisions. For example, UNCLOS prohibits discrimination when setting allowable catch rates and other conservation measures for the high seas: “States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.” UNCLOS, supra note 8, art. 119(3).
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ties. Moreover, after the Volga case, Australia and other coastal states might be inclined to refrain from imposing higher bonds if the amount, if contested before ITLOS, is likely to be struck down. Finally, if the Tribunal continues to interpret Article 73 in a way that disfavors national and regional conservation regulations, such as Australian laws and CCAMLR Convention rules, efforts to sustain toothfish populations are likely to fail.

B. Defending the Tribunal’s Approach

The Tribunal is relatively new. UNCLOS entered into force in November, 1994, and the ITLOS bench was elected in 1996. It handed down its first prompt release decision in 1997, the M/V Saiga case. In M/V Saiga, the Tribunal set a “low burden” standard for the flag state to meet in order to prevail in its application for release. This legal standard arguably “does violence to the balance the Convention strikes concerning the scope of permissible third-party oversight of coastal state activities in their EEZs, making it too easy to subject coast state detentions of foreign flag vessels to international judicial review.” However, the Tribunal may have been justified in playing it safe. Perhaps it is unreasonable to expect a fairly new court to “assert bold and innovative interpretations of the Convention”; it is understandable that it would “exert its authority only incrementally.” Even CCAMLR members have expressed deference to ITLOS, despite its rulings on the prompt release cases.

171. See Swashbuckling Customs, supra note 46; COLTO Media Alert, supra note 46.
174. See Noyes, supra note 172, at 307.
175. Id.
176. Id. at 307–08.
177. CCAMLR-XXI Meeting, supra note 91, para. 8.67. Sweden stated that:

ITLOS has just begun its work, but it has dealt with several cases concerning prompt release of vessels. If there is a legal development within the praxis of the Tribunal in respect of what is to be consid-
tency and efficiency in jurisprudence, praise the Tribunal’s work in prompt release cases for having those attributes.\textsuperscript{178} Finally, the Tribunal faces a difficult task. UNCLOS is difficult to interpret and apply because it is “built upon the compromise and accommodation of the different interests at stake, and is therefore deliberately ambiguous in many respects.”\textsuperscript{179}

\section*{C. Arguments For and Against Amending Article 73(2) of UNCLOS}

If we accept the \textit{Volga} court’s view that the Tribunal is constrained from liberally construing the term “reasonable bond,”\textsuperscript{180} then perhaps the focus should shift from interpreting the Convention to amending it.

It is possible that the Convention’s drafters foresaw neither the vast collapse of fish populations nor the extent to which IUU fishing would increase. During the Third United Nations Conference on the Law of the Sea between 1974 and 1982,\textsuperscript{181} non-coastal states raised the issue of fishing rights to surplus populations living inside the coastal states’ EEZs. Because they debated what to do with surplus fish populations, it appears that, at the time, states did not seriously contemplate the potential extinction of these resources.\textsuperscript{182} Perhaps they did not

\begin{itemize}
\item \textit{Id.} 178. See Tim Stephens & Donald R. Rothwell, Case Note, \textit{The Volga (Russian Fed’n v. Australia)}, I.T.L.O.S. No. 11 (Dec. 23, 2002), 35 J. MAR. L. & COM. 283, 291 (2004) (“The speed and efficiency with which the Tribunal handled this case demonstrates its effectiveness in such cases. This can only lead to further confidence in its ability to address prompt release matters.”).

\item Stephens and Rothwell, nevertheless, acknowledge that the Tribunal appeared to ignore the serious and widespread problem of IUU fishing in Australia’s EEZ, in violation of Australian fisheries laws and CCAMLR conservation efforts. \textit{Id.} at 288.


\item The “Volga” Case, para. 76.

\item \textit{JUDA}, supra note 58, at 213.

\item \textit{Id.} at 217 (“Should the emphasis of the EEZ regime be on some concept of full utilization of resources, requiring that others be allowed to fish in those
envisage advances in fishing technology that would facilitate IUU fishing.\textsuperscript{183} Had they foreseen today’s decline in some living marine resources, the UNCLOS drafters might have modified Article 73 to unambiguously allow coastal states greater discretion to deter IUU Fishing within their EEZs. Perhaps, too, the drafters did not anticipate the high cost to coastal states of monitoring and patrolling EEZs,\textsuperscript{184} which now justifies demanding high bonds in exchange for the release of rogue vessels.

UNCLOS provides procedures for amending the Convention.\textsuperscript{185} At the Twenty-First Meeting of CCAMLR in 2002, members debated the pros and cons of amending Article 73(2).\textsuperscript{186} Australia submitted a proposal to amend Article 73(2) to exempt vessels that were detained for IUU fishing in the CCAMLR Convention Area.\textsuperscript{187} This would prevent such vessels from re-offending after posting bond\textsuperscript{188} pending the resolution of litigation on the merits.

The response to Australia’s proposal was decidedly lukewarm. Several participating countries expressed concern that the amendment procedure would be protracted and complicated.\textsuperscript{189} France worried that it might entail the inconvenience of “having to appear before the tribunal in Hamburg, Germany.”\textsuperscript{190} The United Kingdom tempered its sympathy for the Australian initiative with doubts that the proposed amendment

\begin{itemize}
  \item\textsuperscript{183} According to Earle,
  
  In the decade since the 1982 convention, advances in fishing technology, from the deployment of thousands of miles of lightweight, inexpensive drift nets to the use of sophisticated sonar and even satellite observation techniques to locate populations of fish and squid, have led to swift and devastating reductions in what once seemed to be “limitless” populations.
  
  \textbf{Earle, supra} note 1, at 162.
  
  \textsuperscript{184} The “Volga” Case, Separate Opinion of Judge Cot, at para. 9.
  
  \textsuperscript{185} UNCLOS, supra note 8, arts. 311-16. Prior to submitting a proposed amendment, a period of ten years from the date of entry into force must expire. UNCLOS entered into force in November, 1994, therefore this ten-year period has recently expired.
  
  \textsuperscript{186} CCAMLR-XXI Meeting, \textit{supra} note 91, paras. 8.62–.73.
  
  \textsuperscript{187} \textit{Id.} para. 8.62.
  
  \textsuperscript{188} \textit{Id.}
  
  \textsuperscript{189} \textit{Id.} paras. 8.63, 8.66, 8.71.
  
  \textsuperscript{190} \textit{Id.} para. 8.71.
\end{itemize}
would fix the problem.\textsuperscript{191} If Article 73(2) were eliminated, a coastal state would no longer be obligated to release a vessel on bond, which could have consequences for the detaining state if the Tribunal later determined that the vessel was not guilty of IUU fishing; the detaining state might have to pay considerable compensation for keeping the boat in port.\textsuperscript{192} The United Kingdom was also concerned that such an amendment might be contrary to the object and purpose of the Convention, namely to "strike[e] a very careful balance between the rights of Coastal States and the rights of fishing states, and Article 72(3) is part of that balance."\textsuperscript{193}

Other states endorsed the United Kingdom's "cautious" approach,\textsuperscript{194} articulating conservative or passive positions. Sweden, commenting that UNCLOS "is a package deal,"\textsuperscript{195} which balances the rights of flag states and coastal states, concluded that there is too great a risk of disturbing the balance by amending Article 73.\textsuperscript{196} Neither Sweden nor the United Kingdom wished to second-guess or offend ITLOS.\textsuperscript{197} Chile suggested that, rather than amend UNCLOS, "if ITLOS decisions continued to constitute a cause for concern, the matter could be raised in other forums, such as the U.N. Oceans Consultation, UNCLOS Parties Meeting, or as intervening States at ITLOS proceedings."\textsuperscript{198} France found the proposed amendment "disproportionate in relation to the problem" without further explanation.\textsuperscript{199}

191. \textit{Id}. para. 8.64.
192. \textit{Id}.
193. \textit{Id}.
196. \textit{Id}.
197. \textit{Id}. para. 8.64 ("We also think it may send the wrong message as to our faith in [ITLOS], an institution set up by UNCLOS. If States think ITLOS is taking the wrong approach, the correct place to raise that issue is within the tribunal."). \textit{See also id}. para. 8.67 ("It is the view of Sweden that it is important to have confidence in the UNCLOS system and in the work of the Tribunal.").
198. \textit{Id}. para. 8.65.
199. \textit{Id}. para. 8.71.
VI. CONCLUSION

The Tribunal and CCAMLR should revisit the idea of amending Article 73(2) in greater depth and provide coastal states with specific, alternative solutions before Patagonian toothfish are both off our dinner plates and gone from the oceans. At the very least, an in-depth assessment of Australia’s proposed amendment is in order. Perhaps there is a way to amend Article 73(2) without completely abolishing it. This Note proposes a less drastic revision. For example, Article 73(2) could be amended to unambiguously permit additional, non-financial conditions of release, provided they are reasonable under the facts of a given conflict. Further, the amendment could permit higher financial bonds or securities in the case of repeat offenders or large-scale IUU fishing operators.

CCAMLR should, at the very least, investigate Chile’s alternative suggestions, or devise others. Pending an amendment or other international solutions, Australia has increased domestic fines for illegal foreign fishers and taken the bold step of sending an armed ship to patrol its waters to deter toothfish poachers. Meanwhile, it remains to be seen how ITLOS will app-


roach its next prompt release judgment. By then, sadly, it may be too late for the toothfish.

Adrienne J. Oppenheim*
CHINA’S ONE-CHILD POLICY: ILLEGAL CHILDREN AND THE FAMILY PLANNING LAW

I. INTRODUCTION

How sad it is to be a woman!
Nothing on earth is held so cheap.
Boys stand leaning at the door
Like gods fallen out of heaven.
Their hearts brave the Four Oceans,
The wind and dust of a thousand miles.
No one is glad when a girl is born:
By her the family sets no store.¹

Fu Xuan wrote these lines long ago, but little seems to have changed in the ensuing centuries to alter the inferior status of Chinese women. True, Chinese women no longer serve as concubines or bind their feet,² but their births are often decried as catastrophes in a society where families are only permitted one child.³ Chi An, whose fight against China’s one-child policy (OCP) was recounted by Steven Mosher, describes the circumstances surrounding her birth as dismal at best.⁴ While her elder brother was ushered into the world with cere-

3. Mary H. Hansel, China’s One-Child Policy’s Effects on Women and the Paradox of Persecution and Trafficking, 11 S. CAL. REV. L. & WOMEN’S STUD. 369, 377 (2002) (explaining that couples are under intense pressure to produce a son, with mothers losing face if they give birth to a girl instead).
monial feasts that would leave her grandparents in debt for years, she says of her own birth, “[s]o uneventful was my coming into the world that no one remembers the exact date on which it happened.”

This preference for sons, exacerbated by the OCP, has created widely skewed male-to-female population ratios in China; the result is a dire shortage of women, especially in rural areas, and a resurrection of the ancient practice of wife-buying. Although some women are trafficked in violation of international law, Chinese women now actively participate in their own sale at bridal auctions where bride prices can reach 15,000 yuan ($1,800). But China’s 1980 Marriage Law prohibiting the exaction of monies or gifts for marriage makes these marriages illegal. Therefore, the children of these unions, as well as those children born “out-of-plan,” have no legal identity.

5. Id.
7. See Elizabeth Spahn, Shattered Jade, Broken Shoe: Foreign Economic Development and the Sexual Exploitation of Women in China, 50 M.E. L. REV. 255, 277–78 (arguing that economic reform combined with the OCP has created a “massive modern resurgence in the sale of women and children”). Wife-buying includes not only bride prices agreed upon between families, but the internal trafficking of Chinese women. Id.
8. Women are often brought into China, notably from Vietnam and Thailand, to be sold as brides or prostitutes. According to Vietnam’s Ministry of Public Security, between 1991 and 1999 at least 22,000 women and children were illegally sent to China. The real figure could be much higher. Moreover, authorities from China’s Guangxi province reported that 80 percent of Vietnamese women illegally residing there were victims of trafficking. Protecting Children From Modern Day Slavery: UNICEF Calls for Intensified Efforts to Protect Children at Regional Conference on Human Trafficking, UNICEF Report, at http://www.unicef.org.vn/traffick.htm (last visited Oct. 2, 2004).
9. See, e.g., Peter Goff, Costly Women, S. CHINA MORNING POST, Aug. 5, 2003, at 11 (noting that while the average bride price was approximately 3,000 yuan ($360) a few years ago, the norm now is approximately 15,000 yuan ($1,800)). All conversions of Chinese yuan to American dollars reflect an exchange rate of $1 to 8.277 yuan, the rate current as of Nov. 13, 2003, and then rounded to the nearest $10 increment.
11. “Out of plan” refers to those births unauthorized by the state, either because the couple did not have a birth quota or had exceeded the number of children permitted by the OCP.
quently, China faces the burgeoning problem of a large floating population unable to qualify for basic government services such as education and health care.\(^\text{13}\)

This Note will explore the incidental effects of the OCP, specifically, the rapidly rising woman shortage and the growing practice of wife-buying in the context of conflicting legal goals. By prioritizing the OCP, China faces a dilemma. It can either ignore the prohibitions against wife-buying in its Marriage Law and allow trafficking to continue, thus implicitly endorsing the discrimination of women, in opposition to its status as a party to the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW);\(^\text{14}\) or it can enforce the Marriage Law’s prohibitions and produce an even larger class of unauthorized children, in violation of China’s commitment to the Convention on the Rights of the Child.\(^\text{15}\)

Part II of this Note explores the background of the OCP and the events leading to its codification. In Part III, the Note analyzes the effects of the OCP, primarily on women and unauthorized children. Part IV explains China’s law in the context of the OCP, particularly the conflict between the OCP and statutes concerning marriage and the welfare of children. Finally, Part V assesses the legal ramifications of the OCP, both in China and the international community.

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15. Convention on the Rights of the Child, G.A. Res. 44/25, annex 445 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (Article 2(2) states that “[s]tate parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.”).
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II. BACKGROUND: THE ONE-CHILD POLICY

A. History of the OCP

China had a population of approximately 540 million people when the People's Republic of China (PRC) took control in 1949. Just three decades later, the population had exploded to more than 800 million. This population explosion came at the urging of Mao Ze-Dong, who referred to birth control as a bourgeois plot to visit “bloodless genocide” upon the Chinese people. Mao’s population policy, however, also reflected the need of the PRC’s agrarian society for more workers.

By the late 1970s, Chinese officials had determined that China’s arable land could no longer sustain its growing population. With a population of 1.25 billion at the end of 1998, China must provide for twenty-two percent of the world’s population on only seven percent of the world’s arable land. The government first attempted to conquer the population problem with the “wan, xi, shao” campaign, or the “Later, Longer,
CHINA’S ONE-CHILD POLICY

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Fewer” policy.23 The campaign ordered couples to wait until later in life to marry, to wait longer between births, and to cap the number of children per family at two.24 However, when population specialists determined that a two-child policy would not help them realize their goal of zero population growth by 2000, the PRC abandoned the campaign and implemented the one-child policy.25

Chinese officials have cited numerous reasons to justify the OCP, among them, declining health and living standards, particularly a lack of housing, food, and jobs for its people.26 The government has emphasized that compulsory population reduction is necessary and should be pursued even if the personal costs to families are high.27 Shen Gaoxing, director of the Education Department of China’s State Family Planning Commission, claimed in 1984 that “[i]f we had adopted an appropriate policy during the 1950s and 1960s we would not have had to advocate a one-child-per-couple policy now.”28

Although the OCP has been in effect since 1979,29 the PRC did not adopt a single coherent law to regulate family planning un-

23. See Peng, supra note 21, at 52–53 (noting that the policy set the minimum marriage age at twenty-five for males and twenty-three for females, promoted a two-child norm, and recommended a birth interval of four years).


25. Id. at 97, citing H. Yuan Tien, Redirection of the Chinese Family: Ramifications of Minimal Reproduction 3 (Working Paper No. 67, 1984) (explaining that with a two-child policy, China’s population would increase at a rate of nine to ten births per every one thousand people).


27. See Li, supra note 18, at 150. Population control has been cited as the most important step in the economic development of China, with the alternatives being poverty, high infant mortality and malnutrition. Id. The government used slogans such as “with two children you can afford a 14-inch TV, with one child you can afford a 21-inch TV” to encourage families to have fewer children. Patrick Goodenough, China’s Gender Imbalance Stems From ‘Family Planning’ Policy, CNS NEWS, Apr. 6, 2001 [hereinafter China’s Gender Imbalance], at http://cnsnews.com/ViewForeignBureaus.asp?Page=/ForeignBureaus\archive\200104\For20010406a.html.


til recently.\textsuperscript{30} The adoption of the Law of the People’s Republic of China on the Population and Family Planning (Family Planning Law) essentially codified the OCP.\textsuperscript{31} While family planning regulations were included in other laws, notable among them the Constitution of the People’s Republic of China\textsuperscript{32} and the 1980 Marriage Law of the People’s Republic of China,\textsuperscript{33} their provisions are not specific. For example, the 1980 Marriage Law finds that both a husband and wife have a duty to practice family planning, but does not set out any procedures for doing so.\textsuperscript{34} The minimum age requirement for marriage, a relic of the “wan, xi, shao” campaign contained in Article 6 of the Marriage Law, is another tool used by the government to control the population.\textsuperscript{35} The Family Planning Law, however, goes further and codifies the essential element of the OCP. It states that each family may have only one child unless they satisfy the special criteria for a second child established in other regulations.\textsuperscript{36}

\textbf{B. Exceptions to the OCP}

Although China’s population control policy is known as the OCP, this is slightly misleading. At first, the OCP was enacted


\textsuperscript{31} Id. at 200.


\textsuperscript{33} See \textit{MARRIAGE LAW}, supra note 10. Article 2 provides: “A marriage system based on the free choice of partners, on monogamy and on equality between man and woman shall be applied. The lawful rights and interests of women, children and old people shall be practised. Family planning shall be practised.” \textit{Id.} See also \textit{MARRIAGE LAW OF THE PEOPLE’S REPUBLIC OF CHINA (REVISED)}, English version (effective Apr. 28, 2001) (retaining the same language) [hereinafter \textit{MARRIAGE LAW (REVISED)}], at http://www.isinolaw.com.

\textsuperscript{34} \textit{MARRIAGE LAW, supra} note 10, art. 12.

\textsuperscript{35} Anthony M.W. Law & Alisa W.C. Kwan, \textit{Family Law in Chinese Law} 423 (Wang Guiguo & John Mo eds., 1999). See also \textit{MARRIAGE LAW (REVISED)}, supra note 33, art. 6 (providing: “No marriage may be contracted before the male party has reached 22 years of age and the female party 20 years of age. Late marriage and later childbirth shall be encouraged.”).

uniformly throughout China; it has since been changed to accommodate the concerns of rural farmers.\textsuperscript{37} In rural areas, the policy is often thought of as the one-son-or-two-child plan.\textsuperscript{38} If the first child is a girl, couples may apply for a second-birth permit; these permits usually cost approximately 4,000 yuan (US $500).\textsuperscript{39} This policy reflects both the needs of an agriculturally based society in which sons are critical for the continued livelihood of the family,\textsuperscript{40} and the beliefs of Chinese rural peasants that they are dishonoring their ancestors if they do not extend the male line.\textsuperscript{41}

There are several other exceptions to the OCP. Multiple births, such as twins or triplets, are usually not a violation of the policy.\textsuperscript{42} Moreover, when both parents have no siblings of their own or have just returned from living overseas, the government often permits them a second child as a reward.\textsuperscript{43} Members of minority groups are usually permitted more than one child, although this policy varies by region and minority group.\textsuperscript{44} Finally, if a child is killed or dies of a non-genetic ill-

\textsuperscript{37} See Bouman, supra note 24, at 97.

\textsuperscript{38} Chu Junhong, \textit{Prenatal Sex Determination and Sex-Selective Abortion in Rural Central China; Statistical Data Included}, \textit{Population & Dev. Rev.} No. 2, Vol. 27, at 259 (June 1, 2001).

\textsuperscript{39} \textit{Id.} (noting that while couples are technically not allowed a second child if the first child is a boy, impoverished local governments will sometimes agree to officially register the second boy for approximately 12,000 yuan (US$1,500)).

\textsuperscript{40} \textit{Id.} at 97.


\textsuperscript{43} See Bezlova, \textit{China to Formalize}, supra note 22.

\textsuperscript{44} See Gregory, \textit{supra} note 18, at 53 (noting that non-Han Chinese, not under the auspices of the OCP until 1989, must now comply, but are usually permitted three or four children instead of only one). Minority groups that inhabit sparsely populated regions may usually have as many children as they wish because of manpower needs. Most Han Chinese are not willing to move to these areas, making population growth the only affordable or practical labor source. There are also religious reasons for allowing ethnic minorities, of which there are 55 different groups, to have more children. See Schmidt, \textit{supra} note 42, at 8.
ness, couples are usually permitted another child.\footnote{See Goodenough, China’s Gender Imbalance, supra note 27 (noting that “sterilization, one of the principal forms of birth control, may also be performed when parents suffer from alleged ‘genetic disorders,’ a practice justified by the eugenic objective of ‘improving the quality of the population.’”).} However, even if a second child is permitted, local governments typically require that couples wait five years before having the second child to diminish the woman’s fertile period and thus her ability to even conceive a second child.\footnote{Lita Linzer Schwartz & Natalie K. Isser, Endangered Children: Neonaticide, Infanticide, and Filicide 26 (2000).}

\section*{C. Implementation of the OCP}

While enforcement of the OCP varies by region, national government directives and resolutions explicate implementation measures.\footnote{See Li, supra note 18, at 152.} First, couples must be married and must be issued birth permits prior to attempting to conceive a child.\footnote{Unfair Burdens, supra note 13. See also Tara A. Gellman, The Blurred Line Between Aiding Progress and Sanctioning Abuse: United States Appropriations, the UNFPA and Family Planning in the P.R.C., 17 NY.L. SCH. J. HUM. RTS. 1063, 1066 (2001) (a birth permit is also referred to as a “birth-allowed certificate” or a “family-planning certificate”).} In some areas, couples may have to wait for years for the permission to conceive because of the number of couples planning to have babies within that community.\footnote{See Li, supra note 18, at 152.} After bearing the permitted number of children, women are required to wear an intrauterine device (IUD) or be sterilized.\footnote{Ann Noonan, One-Child Crackdown, NATIONAL REVIEW, Aug. 16, 2001, http://www.nationalreview.com/comment/comment-noonan081601.shtml.} While the policy initially called for either spouse to use “effective” and “long term” contraception after the birth of one child,\footnote{See Li, supra note 18, at 153.} the government tightened restrictions in 1982, and required IUD insertion for women with one child.\footnote{Michael Weisskopf, Abortion Policy Tears at China’s Society, WASHINGTON POST, Jan. 7, 1985, at A1 [hereinafter Abortion Policy].} Women who proceed with unauthorized pregnancies, especially after having the permitted number of children, are forced to terminate the pregnancy.\footnote{See Unfair Burdens, supra note 13.} Women may be required to undergo forcible abortion, even as late as the...
ninth month of pregnancy. Moreover, after unplanned births, one spouse must be sterilized. Between 1979 and 1984, 31 million women and 9.3 million men were sterilized, totaling almost one-third of all married productive couples.

Despite the adoption of the national Family Planning Law, implementation and enforcement of the OCP is still carried out ad hoc by significantly different local regulations. Implementation has thus been a top-down process, with the central government placing serious restrictions on the intimate aspects of individuals’ lives. The OCP has been implemented by party directives, not the rule of law. Local authorities must enforce the policy and meet birth quotas set by the central government. Failure to meet quotas can result in demotion, salary reduction, and disciplinary sanctions for government officials. As Ann Noonan explains:

This has led to the use of local informants to discover unauthorized pregnancies, monitoring women’s menses at the work

54. Noonan, supra note 50. See also Weisskopf, Abortion Policy, supra note 52 (noting that as late as the 1950s, abortion was criminally punishable as murder in China); Patrick Goodenough, China’s ‘One-Child Policy’ Results in Forced Abortions, Infanticide, CNS NEWS, Feb. 14, 2001 (stating that a 1999 report by the International Planned Parenthood Foundation estimates that approximately 750,000 Chinese girls are aborted each year) [hereinafter China’s ‘One-Child Policy’], http://www.cnsnews.com/ViewPrint.asp?Page=\ForeignBureaus\archive\200102\For20010214c.html.

55. See Li, supra note 18, at 153. See also Weisskopf, Abortion Policy, supra note 52 (noting that sterilization is required for one member of every couple with two or more children).

56. See Weisskopf, Abortion Policy, supra note 52. See also Kristof, China’s Crackdown, supra note 41 (stating that the proportion of couples sterilized or using contraception rose to 83.4% in 1992 from 71.1% in 1988); Unfair Burdens, supra note 13 (Only 16.9 percent of sexually active men use any form of contraception at all, primarily because contraception use by men is considered insulting in China’s male-dominated society. Consequently, men tend to be ignorant of reproductive issues, and consider abortion to be a method of contraception.).


58. See Li, supra note 18, at 151.

59. Id. (explaining that government officials handle all aspects of implementing the policy, including the meting out of punishments).

60. Id. at 152.
place, and the implementation of draconian measures which include violence against women, forcible late-term abortions, forced IUD insertion, forced sterilization, the detention of pregnant women or their family members, and destruction of “over-birth” families’ homes.  

While each province and city is awarded an annual quota for births, local officials, including members of neighborhood committees and production units, are responsible for apportioning the number of births among their members. Work units and neighborhood committees decide not only how many children a family may have, but when they may have a child. Women who fail to receive birth quotas are often induced to abort, even if it is their first child.

D. Compliance With the OCP

Compliance with the OCP is induced in a number of ways, and the consequences of noncompliance fall under several categories. In some areas, the OCP is strictly enforced and those in noncompliance are subject to the most severe penalties, while in other areas even national policies are not enforced. Penalties openly imposed by the policy include fines, disqualifications for benefits, administrative demotion and dismissal from employment. These penalties differ significantly among regions.

61. Noonan, supra note 50.
62. Gregory, supra note 18, at 52.
63. See, e.g., Moshier, supra note 4, at 146 (noting that prior to marriage, couples are read the official policy on birth planning; a woman must receive a quota from her work unit before getting pregnant and must use contraception until receiving that quota).
64. Id. Chi An, as director of her work unit’s family planning clinic, took extensive measures to ensure that her work unit complied with the birth quotas. Women illegally pregnant were forced into isolated storerooms for family planning study sessions and kept there for days or even weeks until they “voluntarily” consented to an abortion. Id. at 268–70.
65. See Li, supra note 18, at 153.
66. Id. at 154–55.
67. Id. at 154. See, e.g., Tianjin Family Planning Regulations, reprinted in Forced Abortion and Sterilization in China: The View From the Inside: Hearing Before the Subcommittee on International Operations and Human Rights of the House Committee on International Relations, 105th Cong. 2 (June 10, 1998) [hereinafter Hearings].
For example, in Chongqing, a family with more than one child may face sanctions that include the deprivation of farmland or fines of up to three times the couple’s annual income; in Guangdong, however, fines for an extra child are considered a form of tax on the affluent or a matter of bribing the right people. In other regions, such as Fujian, the standard fine for children born outside family planning rules is twice a family’s gross annual income, with additional unauthorized births incurring fines assessed in increments of 50 percent of annual income per child. In Guangzhou, a fine may be 30 to 50 percent of an average resident’s income over a seven-year period.

Another form of inducement includes police-sanctioned psychological intimidation, mandatory study sessions, visits by authorities and menstrual cycle monitoring. The Chinese government claims that its family planning policy “combines government guidance with the voluntary participation of the people,” yet Steven Mosher provides a chilling account of voluntary compliance:

There are cases in China where brute force is used to perform abortion and sterilization. But more commonly, the Chinese government abides by its own Orwellian definition of voluntary, which is to say that you can fine the woman; you can lock her up; you can subject her to morning-to-night brainwashing sessions; you can cut off the electricity to her house; you can fire her from her job; you can fire her husband from his job; and you can fire her parents from their jobs. All of this psychological mauling, sleep deprivation, arrest, and grueling mistreatment is inflicted upon these women in order to break their will to resist. But as long as the pregnant women walk the last few steps to the local medical clinic under their own


71. See Li, supra note 18, at 154. See also Hansel, supra note 3, at 373.

power, then the abortions that follow are said to be “voluntary.”

The national government gives local officials great autonomy in its methods of persuasion. As Shen Guoxiang, director of the State Family Planning Commission in 1990, noted, “Normally the women are willing to abort. But if they are not, then the local cadres come ‘round to persuade them a little.’

A final tactic to induce compliance involves the use of force by government agents, and often includes physical brutality, property destruction, detention, beatings and demolition of residences. In some areas, terrorizing women and their families has become routine for population control officials. For example, local officials often collapse the houses of women who refuse to abort their unauthorized children; in one village, officials pulled down the houses of six women pregnant with their second or later child and forbid other families in the village from providing them with shelter. Chinese women and their families have little to no recourse against local officials and there is no evidence of prosecutions of local officials who have abused their authority.

74. See Kynge, supra note 68.
75. Id.
76. See Li, supra note 18, at 158. See also Hansel, supra note 3, at 373 (noting that violence is used most often in cases of extreme policy violations; for example, government officials blew up the home of a family with three children).
77. See Unfair Burdens, supra note 13 (explaining that because national law does not prohibit any specific enforcement measures as cruel or illegitimate, local authorities have the implicit power to use any means they wish).
III. EFFECTS OF THE OCP ON WOMEN

A. Positive Impact on Population Growth

Thus far, the OCP has been fairly effective at achieving the PRC’s main objective: the reduction of the birth rate.\(^{80}\) Chinese officials claim that the OCP has prevented 330 million births in the past three decades.\(^{81}\) Moreover, because of China’s large population, the OCP has played a significant role in reducing worldwide population growth; the average growth rate in Asia, excluding China, was 0.3 percent higher than China’s between 1980 and 1990.\(^{82}\) According to the government, the OCP has reduced the average number of children per woman in China from 5.8 in 1970 to 1.8 today.\(^{83}\) Many demographers, however, place the rate closer to 2.1, while some estimate that it is as high as 2.6 children per woman.\(^{84}\) Despite the demographic discrepancies, the PRC attributes nationwide gains to the OCP, among them a 35 percent rise in China’s GDP since 1995, increased grain output sufficient to allow China to feed its own population, lower mortality rates and improved educational opportunities.\(^{85}\)

Nevertheless, the government is concerned with reports from the 2000 census indicating that rural couples are not complying with the OCP.\(^{86}\) While China’s census office adjusted its raw figures somewhat to account for unregistered children,\(^{87}\) unannounced spot checks by China’s State Statistics Bureau indicate that the Census has undercounted by up to 40 percent in some areas.

\(^{80}\) Hansel, supra note 3, at 376.
\(^{81}\) Bezlova, China to Formalize, supra note 22.
\(^{82}\) Peng, supra note 21, at 62.
\(^{83}\) Rosenthal, Rural Flouting of One-Child Policy, supra note 69.
\(^{84}\) U.S. Embassy, Beijing, P.R.C., available at http://www.usembassy-china.org/cn/english/sandt/fertl21.htm (Oct. 1997). Demographers consider 2.1 children per woman to be the replacement rate, the rate at which a population must reproduce to maintain it population size. Id.
\(^{86}\) Noonan, supra note 50.
\(^{87}\) Unregistered children are those children born outside the system. Families who have more than one child will often attempt to hide those children from the government. The result is an uncounted floating population ineligible for state benefits such as education and health care. See generally Report on CEDAW, supra note 12.
villages. The PRC remains optimistic about the OCP and its results, however, and even claims that “the idea of family planning and the importance of reproductive health have been widely accepted by the public.”

B. Negative Consequences

The OCP, however, has engendered a myriad of negative consequences, notably the rise of sex discrimination against women and its contingent repercussions. Men vastly outnumber women in China; there are 60 million more men than women in China today. Female babies are considered expendable, and sex-selective abortions and infanticides have become commonplace solutions for eliminating unwanted girl children. Many girls who survive selection are abandoned to orphanages, sold on the baby black market, or endure second-class lives, where

89. *See China Holds Back Population Growth*, supra note 85 (noting that China has successfully held population growth to the natural rate of one percent in the past five years).
90. Bezlova, *China to Formalize*, supra note 22 (statement by Shi Chunjing, vice director of the Regulation Department of the State Family Planning Commission, in support of the Family Planning Law).
91. Hansel, supra note 3, at 376. *See also Michael Weisskopf, China’s Birth Control Policy Drives Some to Kill Baby Girls*, *Washington Post*, Jan. 8, 1985, at A1 (Women absorb the blame when the child is female, often finding themselves subject to beatings, the scorn of their families and divorce. The pressure on women to produce a son has reportedly driven women to suicide or mental institutions.) [hereinafter *Drives Some to Kill Baby Girls*]; Penny Kane & Ching Y. Choi, *China’s One Child Family Policy*, *Brit. Med. J.* (1999) (noting that China has one of the highest suicide rates in the world for women in their reproductive years).
93. *See Kane & Choi, supra note 91.*
94. *See Goodenough, China’s ‘One-Child Policy,’* supra note 54.
95. *Death by Default: A Policy of Fatal Neglect in China’s State Orphanages 2–3*, Human Rights Watch (1996) (noting that the vast majority of children in orphanages have consistently been healthy infant girls) [hereinafter *Death by Default*].
96. Hannah Beech Xicheng, *China’s Infant Cash Crop*, *Time Pac.*, Jan. 29, 2001 (While some women are selling their extra children because they violate the OCP, other women, often from extremely impoverished villages, have become full-time baby machines, rationalizing that it is cheaper to raise babies for sale than pigs.), available at http://www.time.com/time/pacific/magazine/20010129/china.html.
they are concealed from the government because their parents did not register them. 97 Ironically, the abduction and trafficking of Chinese women is rapidly increasing as men, especially in rural areas, attempt to accommodate for the shortage of wives and mothers created by their discrimination against female children. 98

C. China’s Preference for Male Children

Confucian tenets largely defined a woman’s status in the traditional Chinese social structure. 99 Every woman grew up knowing the four virtues:

[F]irst, a woman should know her place in the universe and behave in compliance with the natural order of things; second, she should guard her words and not chatter too much or bore others; third, she must be clea[n] and adorn herself to please men; and fourth, she should not shirk from her household duties. 100

The traditional Chinese marriage was preeminently a contract and the most common means of recruiting female labor into families. 101 Wives were bought and sold in the market for productive and reproductive labor. While bridegrooms’ families occasionally paid dowries, the bride price was the predominant economic feature of the marriage and reflected the net gain to the husband’s family in obtaining the bride’s labor. 102 A daughter was often considered an outsider from the moment of her birth. 103 Because she would no longer bring economic benefit to her own family once she was given to her husband’s family, a daughter was “like spilled water.” 104

97. See Abrams, supra note 69.
98. Hansel, supra note 3, at 377. See also Kane & Choi, supra note 91.
99. Cardillo, supra note 1, at 88.
102. Id.
103. Cardillo, supra note 1, at 88.
104. Id.
When the Communist government took control of China in 1949, however, the status of women seemed poised for a change. The PRC worked to establish women as equals, both legally and by making them part of the class struggle under the slogan, “women hold up half the sky.” The education and propaganda campaigns of the new Communist regime had an effect, and skewed sex ratios improved between 1949 and 1970. As Judith Banister, a social science professor at Hong Kong University of Science and Technology, noted, “Mao, for all his failings, did say that ‘women hold up half the sky,’ ... and it did have an impact. The attack on the patriarchal family was very strong and very effective.”

Women did not hold up half the sky for long. When severe economic hardships shattered much of Mao’s ideology in the 1960s and early 1970s, the OCP was adopted to counter overpopulation, famine and poverty. With the aid of modern technology, namely ultrasound machines, many Chinese reverted to traditional practices, promoting the birth of sons over daughters. While Confucian ideology does play a role in son preference, the concerns of parents for their economic futures is also determinative. When Mao was alive and in power, those working in state-owned industries could depend on the “iron rice bowl” to provide for them in their old age, but his death


108. Id.

109. Cardillo, supra note 1, at 89.


111. Cardillo, supra note 1, at 90.

112. See Woo, supra note 106, at 150. The “iron rice bowl” is a metaphor for the Chinese social security system created to provide food and shelter for all Chinese citizens from womb to tomb. Benefits included subsidized medical care, housing, education and a pension upon retirement. Id.
and the decline of those industries destroyed that security. Article 49 of China’s Constitution requires that “children who have come of age...support and assist their parents.” Chinese courts have expansively interpreted the duty of support to include not only financial assistance, but also the personal care and spiritual comfort of a parent. Although Chinese law is gender neutral with regard to support duties, i.e., women have the same obligation as men to provide for their parents, the reality is far different. First, seventy percent of the jobs targeted for elimination in antiquated state-owned industries were held by women. In many cases, women simply do not have the economic means to support a family. Second, women typically “belong” to the family they marry into, meaning that they could not care for the elders in their birth family or work in the family business. Sons, on the other hand, “come with a lifetime guarantee of security. They will work in the fields, support elderly parents and carry on the family line.” These cultural as-

113. See James Walsh, Born to Be Second Class; in China, Old Biases Against Women Have Emerged Once Again, TIME, Sept. 11, 1995, at 46.
114. CONSTITUTION, supra note 32, art. 49.
115. Frances H. Foster, Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment, 32 U.C. DAVIS L. REV. 77, 100 (1998). The Constitution and the Marriage Law provide that “the following family members have duties of support: (1) spouses, (2) parents and children (including natural, adoptive, and stepparents and stepchildren), (3) grandparents and grandchildren (if the grandchildren’s parents are deceased), and (4) siblings (if their parents are dead or destitute).” Id. at 97.
116. See id. See also Woo, supra note 106, at 151–52. While women constituted 38 percent of the labor force in the 1980s, China’s focus on privatization and economic efficiency during the 1990s has made unemployment a serious problem, with women bearing the brunt of it. Moreover, women have typically been segregated into light industries, such as service, textile and food processing, making their normal earnings less than that of men. Id.
117. NICHOLAS D. KRISTOF & SHERYL WUDUNN, CHINA WAKES 216 (1994) (While women may have greater economic opportunities today, they encounter greater discrimination. Most jobs available to women “are on assembly lines in the noisiest, dirtiest industries.”).
118. Hansel, supra note 3, at 378. See also Woo, supra note 106, at 153 (noting that women “bear the double burden of home and work”). But see Peng, supra note 21, at 59 (arguing that the responsibility for the elderly falls on women, thus preventing them from working outside the home).
119. Disappearing Girls; In China and South Korea, a Gender Gap Causes Worries, ASIAWEEK, Mar. 3, 1995, at 32 [hereinafter Disappearing Girls]. According to Confucius, the failure to carry on the family line was the way to
sumptions, compounded with economic disenfranchisement and magnified by the OCP, continue to oppress Chinese women and are the leading cause of sex-selective practices in China.\textsuperscript{120}

\textbf{D. Sex-Selective Abortion, Female Infanticide, and Abandonment}

Millions of girls, some five percent of female babies that should be born every year, are considered missing,\textsuperscript{121} victims of sex-selective abortion, female infanticide, abandonment, and non-registration.\textsuperscript{122} As many as 15 million babies have disappeared since the introduction of the OCP.\textsuperscript{123} Sex-selective abortions, often voluntarily sought by couples, have become extremely common.\textsuperscript{124} Although the PRC has outlawed sex-selective abortions,\textsuperscript{125} the State Statistical Bureau acknowledged in a 1996 report that the practice was still common in rural areas.\textsuperscript{126} In 1999, the International Planned Parenthood Federation estimated that, after gender screening, 500,000 to 750,000 Chinese girls are aborted annually.\textsuperscript{127} Regulations and laws have been ineffective thus far in enforcing the ban on prenatal sex-selection because the root cause of prenatal sex-selection—son preference—persists.\textsuperscript{128} The ubiquity of ultrasound technol-

\begin{flushright}
\textsuperscript{120}Hansel, \textit{supra} note 3, at 378.  \\
\textsuperscript{121}“Missing,” as used here, means that these women are missing from China’s population, either because they were never born (sex-selective abortion), were killed during their infancy, or are unregistered and thus not included in the Census.  \\
\textsuperscript{123}Soifianni Subki, \textit{Open Arms for Daughters Too}, NEW STRAIT TIMES, Apr. 21, 2003, at 1.  \\
\textsuperscript{124}Id. at 379.  \\
\textsuperscript{125}Report on CEDAW, \textit{supra} note 12, at 88. Prenatal sex selection was outlawed in 1986 by the Ministry of Health and the State Family Planning Commission with the Notice on Forbidding Prenatal Sex Determination. Junhong, \textit{supra} note 38, at 2.  \\
\textsuperscript{126}Xiao Yu, \textit{Young Women Threaten Plan to Control Numbers}, S. CHINA MORNING POST, Oct. 9, 1996, at 10.  \\
\textsuperscript{127}See Goodenough, \textit{China’s Gender Imbalance}, \textit{supra} note 27.  \\
\textsuperscript{128}Junhong, \textit{supra} note 38, at 3. 
\end{flushright}
ogy and the readiness of physicians to violate the law to engage in the lucrative sex-determination trade make enforcement extremely difficult, especially when officials are willing to look the other way.

Infanticide is a criminal offense but, despite the continued practice, prosecutions are extremely unusual. Abandonment, also a criminal offense, surged in the 1980s, primarily because of the OCP. Ninety-five percent of children in orphanages are healthy infant girls. Placement in an orphanage, however, does not guarantee life. Most children die shortly after admission into an orphanage, primarily from neglect, starvation, and exposure. For example, in the Nanning orphanage in Guangxi province, staff and regular visitors “freely admitted that 90 percent of the 50 to 60 baby girls who arrived at the orphanage each month would end their lives there.” Moreover, most abandoned children do not even make it to an orphanage,

129. Jodi Danis, Recent Development: Sexism and “The Superfluous Female”: Arguments For Regulating Pre-Implantation Sex Selection, 18 HARV. WOMEN’S L.J. 219, 234–35 (1995) (noting that “many sociologists and obstetric practitioners acknowledge that widespread use of the technology may create a demographic sex imbalance favoring males”).

130. See Junhong, supra note 38, at 3 (observing that private connections and bribing make regulations against prenatal sex determination impossible to enforce).

131. Report on CEDAW, supra note 12, at 88. See also Li, supra note 18, at 116 (The large discrepancy between male and female babies cannot be explained solely by aborted female fetuses and concealed girl children. This leads some to conclude that female infanticide is not a rare phenomenon, but a factual reality.).

132. China Country Report, supra note 70 (noting that abandonment is punishable by fines and a five-year prison term).

133. Death by Default, supra note 95, at 2–3.

134. Hansel, supra note 3, at 381.

135. See Tom Hilditch, A Holocaust of Girls, S. CHINA MORNING POST, Sept. 1995, at 39, reprinted in WORLD PRESS REVIEW (explaining that orphanage deaths tend to be the product of “sheer neglect”), available at http://acc6.its.brooklyn.cuny.edu/~phalsall/texts/c-wnhol.html. See also Death by Default, supra note 95, at 3 (commenting that “[m]any institutions...appeared to be operating as little more than assembly lines for the elimination of unwanted orphans, with an annual turnover of admissions and deaths far exceeding the number of beds available”).

136. See generally Death by Default, supra note 95.

137. Hilditch, supra note 135 (noting that the conditions at the Nanning orphanage are by no means exclusive to that orphanage, but are prevalent elsewhere).
but are placed in general-purpose institutions with even higher mortality rates.\footnote{138 DEATH BY DEFAULT, supra note 95, at 3. Only two-fifths of China’s institutionalized orphans are placed in “child welfare institutes;” the rest are held in all-purpose “social-welfare institutes” where the inmates include elderly, mentally ill, severely retarded and physically disabled individuals. \textit{Id. at} 79.} Despite these problems, however, a 1991 report by the Hunan Civil Affairs Bureau did not find a single successful case of prosecution for abandonment.\footnote{139 \textit{Report on CEDAW}, supra note 12, at 89.} Moreover, the Chinese government has shown itself to be unwilling to tackle the problem. In its initial report to the Committee on the Rights of the Child, the government stated that Chinese law only considers abandonment a crime “where the circumstances are grave enough.”\footnote{140 \textit{Id.} (noting that the government is reluctant to enforce regulations against child abandonment because it is seen as implicit criticism of the OCP).}

\textbf{E. Woman Shortage}

The Chinese cultural preference for boys, exacerbated by the OCP, is largely responsible for an alarming increase in the ratio of boys to girls,\footnote{141 Rosenthal, \textit{Rural Flouting of One-Child Policy}, supra note 69.} arousing the concerns of both policymakers and scholars in China.\footnote{142 Junhong, \textit{supra} note 38, at 1.} While statistics vary widely,\footnote{143 One study indicated that ratios were skewed as high as 131 males to 100 females. See Graham Hutchings, \textit{Female Infanticide in China ‘Will Lead to Army of Bachelors,’} \textit{LONDON TELEGRAPH REP., available at http://www.reagan.com/HotTopics.main?HotMike/document-4.11.1997.6.html.}} a 1995 mini-census by the Chinese government recorded a ratio of 118 boys to every 100 girls.\footnote{144 Chu, \textit{supra} note 107.} Considering that the worldwide biological norm is 106 males for every 100 females, China has a serious gender gap.\footnote{145 \textit{Disappearing Girls}, supra note 119. The natural, biological gender gap tends to even out by age 20, as males typically have a higher casualty rate than females. \textit{Id.}} In some rural areas, a study has indicated that the sex ratio at birth was 125.9 males to 100 females, while the sex composition for all living children was 126.1 boys to 100 girls.\footnote{146 Junhong, \textit{supra} note 38, at 5 (explaining that the differences in ratios reflects the practice of bearing children until a son arrives).} Generally, this skewed sex ratio can be attributed to three factors: (1) unregistered female births, (2) excess
female infant mortality, and (3) heightened prenatal sex-selective abortion of female fetuses.\textsuperscript{147} However, a survey of rural communities conducted by Chu Junhong found that prenatal sex determination was the primary cause of the rising sex ratio.\textsuperscript{148}

This gender gap translates into a severe woman shortage.\textsuperscript{149} There are now almost 100 million more men than women in China.\textsuperscript{150} Meanwhile, 400,000 to 500,000 more boys than girls are born annually.\textsuperscript{151} Unmarried men outnumber unmarried women by three to one,\textsuperscript{152} and some estimate that China has close to 70 million bachelors who will never wed.\textsuperscript{153} The surplus of single men from ages 20 to 44 is about 26 million now, enough to displace the populations of Arizona and Texas.\textsuperscript{154}

Optimists have predicted that the gender gap will lead to an improved social status for women.\textsuperscript{155} Historically, however, when gender discrimination produced similar, albeit much less worrisome, women shortages in China, the status of Chinese women did not improve.\textsuperscript{156} Even these optimists concede that the imbalance is also likely to lead to an increase in rape and prostitution, thus mitigating any slight improvements Chinese women might gain.\textsuperscript{157} Indeed, women in societies with large gender gaps tend to experience a variety of negative consequences.\textsuperscript{158} As Scott Smith and Katherine Trent explain:

\begin{itemize}
\item \textsuperscript{147} Id. at 1.
\item \textsuperscript{148} Id. at 2.
\item \textsuperscript{149} Hansel, supra note 3, at 383.
\item \textsuperscript{150} Calum Macleod, \textit{Life Begins Again For Chinese Girl Sold as Slave at 12}, \textit{Independent} (London), May 17, 2000, at 14 [hereinafter \textit{Life Begins Again}].
\item \textsuperscript{151} Disappearing Girls, supra note 119.
\item \textsuperscript{152} Maureen Freely, \textit{Freely Speech: Lives, Damned Lives and Statistics}, \textit{Guardian} (London), Aug. 19, 1994, at T5 (noting that for singles over thirty years of age, unmarried men outnumber unmarried women by thirty to one).
\item \textsuperscript{153} Disappearing Girls, supra note 119. \textit{See also} Valerie M. Hudson & Andrea M. Den Boer, \textit{Bare Branches: The Security Implications of Asia's Surplus Male Population} 179–81 (2004) (noting that some sources suggest that China may already have as many as ninety million bachelors).
\item \textsuperscript{154} Hansel, supra note 3, at 383.
\item \textsuperscript{155} Freely, supra note 152.
\item \textsuperscript{156} Junhong, supra note 38, at 11.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Hudson & Den Boer, supra note 153, at 202–03 (noting that it seems counterintuitive that women's social status would decline “as laws of supply
It is somewhat paradoxical that the increased “valuation” of women that accompanies high sex ratios severely limits their life options. Our results suggest that an undersupply of women, combined with men’s overwhelming structural power, leads to high marriage and fertility rates and low rates of divorce and illegitimacy. But high sex ratios also serve to delimit and constrain the roles women occupy. Hence, where women are in short supply, their levels of literacy and labor-force participation are low, both relative to men in their own society and to women in low-sex-ratio societies. Their suicide rate, relative to men’s, is also high. It would appear, then, given the current distribution of structural power, the relative undersupply of females entails few benefits and many costs to women.\textsuperscript{159}

Although no one is certain how the woman shortage will impact China,\textsuperscript{160} commentators argue that the gender gap will create social calamity “in a culture where getting married and having children is still a must—an act of filial duty.”\textsuperscript{161} These surplus young bachelors are referred to as “guang gun-er,” or bare branches, in China;\textsuperscript{162} the fear is that this frustrated “army of bachelors” could create serious social perils and instability.\textsuperscript{163} According to evolutionary psychologist Robert Wright, and demand would suggest that . . . the relative scarcity of women would increase their value and thus make them more powerful”).

159. Id. at 203. Women in high-sex-ratio societies are more likely to be kidnapped or sold. Additionally, the age of female consent tends to drop, meaning that girls are married when they are very young; in some cases, before menarche. Id. at 203–04.
160. Junhong, supra note 38, at 11. See also Hansel, supra note 3, at 383–84 (commenting that recently, Chinese male immigrants have unsuccessfully attempted to lodge asylum claims in Western countries, claiming refugee status based on an inability to marry and reproduce).
161. Chu, supra note 107.
162. HUDSON & DEN BOER, supra note 153, at 187–88. One Chinese citizen explained:

This is a metaphor, which indicates that the unmarried men have nothing attached, just like bare branches. Bare branches give people an impression of bleakness and loneliness. It is quite similar to the lives of the unmarried men. They have no warm families, which can give them support and comfort; they have no children, who can take care of them when they become old.

Id.
163. Chu, supra note 107.
Womenless men ...compete with special ferocity. An unmarried man between twenty-four and thirty-five years of age is about three times as likely to murder another male as is a married man the same age. Some of this difference no doubt reflects the kind of men that do and don't get married to begin with, but ...a good part of the difference may lie in “the pacifying effect” of marriage. Murder isn't the only thing an “un-pacified” man is more likely to do. He is also more likely to incur various risks—committing robbery, for example—to gain the resources that may attract women. He is more likely to rape.164

In fact, woman shortages have led to instability in the past: Mao’s Communist revolution gained the support of poor young men by promising to find them wives.165

F. Trafficking of Women

The dearth of available women has already created a more immediate problem: the abduction and trafficking of women.166 Trafficking usually involves the abduction, displacement and sale (or trade) of women.167 Increasingly, women in China are kidnapped and sold into marriage to men desperate for wives,168 primarily because “the demand by men for marriageable women cannot be met by local brides.”169 While economics may drive many peasant families to buy from a trafficker because it is cheaper to buy a wife than to pay a bride price,170 the result is the same: women have become “tradable commodities.”171

Often, women are lured away from their homes and families with false promises of employment.172 Others are forcibly kid-

165. Chu, supra note 107.
166. Hansel, supra note 3, at 384. See also China Country Report, supra note 70 (noting that “a key reason for the abduction and sale of women is a serious imbalance in sex ratios in certain localities”).
167. See, e.g., Chu, supra note 107.
168. Junhong, supra note 38, at 11. See also Chu, supra note 107.
170. Calum Macleod, Life Begins Again, supra note 150 (noting that buying a wife costs approximately 3,000 yuan, while bride prices usually exceed 10,000 yuan).
171. KRISTOF & WUDUNN, supra note 117, at 216.
172. Chu, supra note 107.
napped. Once they reach their destination, these women are sold as wives, usually to farmers in the hinterlands. Even babies have been brought into the cycle; traffickers have been arrested while selling baby girls to be reared as child brides for rural farmers.

Even though trafficking is illegal in China, the trade thrives, reflecting both the gender gap and the extremely low status of rural women. In the past few years, China has stepped up its efforts to halt the trade and demonstrated its commitment with highly publicized arrests, death sentences and rescues. Despite the national campaign to combat the trafficking of women and children, however, conservative estimates of abducted women run into the tens of thousands each year. Perhaps even more worrisome is that the publicity sur-

178. See, e.g., John Schaubule, *Child Bride Reveals China’s Shame*, AGE (Melbourne), Apr. 7, 2000, at 10 (telling the story of the liberation of Kang Minge, along with her one-year-old son, from life as a kidnapped child bride after two years, from age twelve to fourteen, as the wife of a farmer).
179. John Pomfret, *China Cracks Down on Abductions of Women, Kids*, WASHINGTON POST, May 11, 2000, at A23 (noting that thus far eight human traffickers have been executed).
180. Rosenthal, *Harsh Chinese Realities, supra* note 177. See also Elliot, *supra* note 173 (commenting that while the Chinese police arrested 143,000 people for participation in the slave trade and freed 88,000 kidnapped women and children between 1991 and 1996, brides often participate voluntarily); Pomfret, *supra* note 179 (noting that 10,000 kidnapping victims were freed in a five week period, demonstrating both the alarming growth in abductions as well as China’s renewed commitment to halt the trade).
181. *Trafficking in Persons Report*, U.S. Dept. of State, June 2003 (stating that, while the PRC does not fully comply with the minimum requirements for the elimination of trafficking, it is making significant efforts to do so, notably through public awareness campaigns against domestic bride abuses).
rounding the government’s efforts against trafficking does not reflect reality.\(^{183}\) Despite its claims, the government has failed to initiate a comprehensive campaign of arrests and prosecutions, particularly of officials who collude in the trafficking, of parents who sell their daughters, or of buyers.\(^{184}\) Moreover, because many peasants regard wife-buying as normal, they usually sympathize with the buyer, often to the point of helping him keep his new wife imprisoned.\(^{185}\) As Liu Bohong, a Beijing social worker, noted, “Local people will defend the man who buys a wife….Everyone sympathizes with him.”\(^{186}\) Escape is extremely difficult. Families of abducted women usually have no idea where their daughter has gone, and paying an investigator to find and rescue her costs about $500, or ten years of a rural family’s income.\(^{187}\)

G. Resurgence of Bride Price in Marriage Transactions

The scarcity of women has altered the economics of marriage in another way: the resurgence of the bride price as an element of marriage brokering.\(^{188}\) While the sale of women was permitted as late as 1906, the practice was eventually eradicated altogether by the Communist Party.\(^{189}\) In fact, under the Marriage Law, the “exaction of money and gifts in connection with the marriage” is prohibited.\(^{190}\) Despite the prohibition, the payment

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were 32,679 abducted women living in one county, most of them trafficked from other provinces).

183. Report on CEDAW, supra note 12, at 7 (stating that the government severely restricts reporting on trafficking, making it difficult to expose enforcement deficiencies).

184. Id. at 19. See also Schuble, supra note 178 (noting that Professor Hong Daode, of the University of Political Science and Law of China, commented that Chinese law targeted kidnappers, “but did not adequately punish buyers”).

185. KRISTOF & WUDUNN, supra note 117, at 216 (For example, when a woman sold to a Shaanxi peasant tried to escape, she was tied to the bed. The second time, the peasant beat her, and the third time, “he gouged out her eyes.”).

186. Elliot, supra note 173. See also KRISTOF & WUDUNN, supra note 117, at 216 (noting that local peasants often erect barricades to keep authorities out of their village).


188. Id.

189. Spahn, supra note 7, at 277.

190. MARRIAGE LAW (REVISED), supra note 33, art. 3.
of a bride price never completely faded out of practice, and the gender gap created by the OCP has caused a rapid increase in the bride price in the past few years. Bride prices have increased tenfold, from “ten (10) to forty (40) percent of the average net income of a rural family…to sixty-three (63) to one hundred eight-nine (189) percent of the average net family income.”

Bride prices were outlawed primarily because they hindered the achievement of gender equality. A woman was essentially sold to the groom’s family and the bride price served as compensation to her family for her upbringing. The reemergence of the ancient practice of selling women reflects the view of women as commodities to be traded for cash or even livestock. Rural women are increasingly becoming willing participants in their own sale, seeing it as an opportunity to mitigate their families’ poverty. Because of serious gaps in China’s legal framework, a woman’s willingness to participate in her own sale de-criminalizes the sale. Although the trafficking of

191. See, e.g., MOSHER, supra note 4, at 150–51. Even after the Communist Revolution, bride prices were extracted from the families of grooms. Chi An explained:

It was custom in China for the bride to ask the groom’s family to buy her presents. The traditional bride price was six or nine ounces of pure gold in the form of heavy earrings, bracelets, and rings. Worn as jewelry during good times, they provided a hedge against famine during bad. After the revolution the Party forbade the buying and selling of gold. Now girls generally asked for the “three things that go round and the one that sounds,” namely, a bike, a sewing machine, a watch, and a radio. Sometimes they also demanded the “forty-eight legs,” a household of furniture, the legs of which totaled forty-eight.

Id.

192. Spahn, supra note 7, at 277.

193. Id.

194. Han, supra note 105, at 798 (explaining that the extraction of bride price from the groom’s family led to “mercenary marriages’ where women, especially from poor families, were bought and sold as commodities”).

195. Id. at 793 (noting that “marriage meant that females became legally divorced from their birth families”).

196. Id. Goff, supra note 9.

197. See, e.g., KRISTOF & WUDUNN, supra note 117, at 212 (recounting the story of an unmarried peasant buying a mentally retarded woman from a wife dealer with a calf, and then allowing her to die of starvation and exposure over the next winter).

198. Goff, supra note 9.
women by third parties is criminalized under Chinese law, such sales are not illegal when the transactions are completed by the women or their families.\textsuperscript{199} These marriages are still illegal, and thus unregistered, but neither the women and their families, nor the bridegrooms, face criminal repercussions.\textsuperscript{200}

\textbf{H. Effect of Non-Registration}

The social and economic implications of the OCP for children are far-reaching.\textsuperscript{201} Those children born “out-of-plan” have no legal identity in China.\textsuperscript{202} In the 1950s, the government created the household registration system, which “provide[s] a record of births, deaths, marriages, and changes in the household composition.”\textsuperscript{203} Unauthorized children cannot be registered as legal residents, and are thus unable to obtain official documentation of their existence, including birth certificates and passports.\textsuperscript{204} Some regions of China allow couples to register unauthorized children for a fee of anywhere from $600 to $2,400 per child.\textsuperscript{205} But as a department head at the State Family Planning Commission said, “There are two types of people for whom fees are ineffective: the richest, who just pay them and don’t care, and the poorest, who can’t pay them and don’t care.”\textsuperscript{206}

This deprivation of benefits to unauthorized children is also a case of conflicting legal enforcement.\textsuperscript{207} For example, the 1994 Maternal and Infant Health Care Law (MIHCL) promises that the state will “provide essential conditions and material assistance to the development of undertakings for maternal and in-

\begin{itemize}
\item \textsuperscript{199} Spahn, supra note 7, at 278–79.
\item \textsuperscript{200} Id. (noting that unregistered marriages are unlawful even if both parties freely consent to the union).
\item \textsuperscript{201} Unfair Burdens, supra note 13.
\item \textsuperscript{202} Report on CEDAW, supra note 12, at 89.
\item \textsuperscript{203} Zhang, supra note 72, at 565.
\item \textsuperscript{204} Unfair Burdens, supra note 13. See also Xicheng, supra note 96 (noting that “black children” are unable to obtain passports).
\item \textsuperscript{205} Elizabeth Rosenthal, Rural Flouting of One-Child Policy, supra note 69 (observing that fees vary widely by region).
\item \textsuperscript{206} Id. See also Report to CEDAW, supra note 12, at 89–90 (A slogan on a wall in rural Hubei Province encapsulates the discrimination suffered by poor families and their unauthorized children: “The family wealth of those having children out-of-plan should all be lost. The families of those having children out-of-plan should be broken up and dispersed.”).
\item \textsuperscript{207} Li, supra note 18, at 171.
\end{itemize}
fant health care.\footnote{ maternal and infant health care law art. 2, english version, at http://www.isinolaw.com.} Yet the law is not enforced because its provisions conflict with the penalties imposed by the OCP, a higher priority for the government.\footnote{Li, supra note 18, at 171.} The Marriage Law (revised) also aims to protect children by requiring that they all enjoy the same rights, including those of education and support, but it mitigates those rights by providing that other laws concerning illegal acts in the marriage and family shall prevail over the Marriage Law.\footnote{Marriage Law (revised), supra note 33, arts. 25, 49.} Accordingly, the provisions of the Family Planning Law prevail, including its policy of punishing parents for having unauthorized children by withholding their registration.\footnote{See Li, supra note 18, at 171.}

Registration cards are required for claiming state subsidies, health care and admission to day care.\footnote{Unfair Burdens, supra note 13.} Therefore, unregistered children, referred to as “hei haizi” or “black children,” do not qualify for government subsidies, which include education, health care, pension and many forms of employment.\footnote{Xicheng, supra note 96. See also Abrams, supra note 69 (A 15-year-old girl was recently granted asylum in the U.S. because as an unauthorized child she was denied access to education and her family had been extensively fined merely because of her existence.); Noonan, supra note 50.} Without a residence card, these children become part of the floating migrant population, doomed to work at low-paying jobs that are often outside the protection of China’s labor laws.\footnote{See, e.g., Kristof & WUDUNN, supra note 117, at 214–16 (showing that women without residence permits are often forced to work in jobs where labor standards are low or where they are subject to pernicious forms of sexual harassment and molestation).} Moreover, the government often uses registration benefits as a stick to enforce provisions of the OCP.\footnote{Gellman, supra note 48, at 1081.} For example, in Fujian province, women who refuse to use IUDs lose grain rations and medical benefits for their first child, regardless of whether the child’s birth was authorized.\footnote{Weisskopf, Abortion Policy, supra note 52.}

The floating population is rising in China, with conservative estimates placing this migrant population at approximately 150
million people.\textsuperscript{217} This migrant population, attributed to the emergence of China’s new market economy and an influx of rural laborers to urban commercial centers, has led to an erosion of the household registration system.\textsuperscript{218} Members of the floating population are not entitled to the benefits of the state, even if they are registered since Chinese citizens can only receive their state subsidies in their place of household registration.\textsuperscript{219} The floating population makes a sizeable contribution to the number of unregistered children, accounting for nearly one in eight births above the OCP quota.\textsuperscript{220}

While the birth rate is fairly low in urban areas, with most residents adhering to the OCP, in rural areas there is a growing number of unauthorized children.\textsuperscript{221} Census figures are notoriously poor at accounting for unregistered children, primarily because their parents hide them,\textsuperscript{222} but unannounced spot checks by the State Statistics Bureau have discovered undercounts of up to 40 percent in some rural villages.\textsuperscript{223} For example, Guangdong’s Tanba township failed to report more than 2,000 births; almost 80 percent of women in Xin village had three or more children.\textsuperscript{224} In rural areas, the number of children born third or later is often as high as 10.2 percent, compared to just one-tenth of one percent in cities like Beijing. Almost all of these children are illegal, and will remain unregistered and un-

\begin{footnotesize}
\item[217] Kane & Choi, supra note 91. But see Rosenthal, Rural Flouting of One-Child Policy, supra note 69 (Susan Greenhalgh, professor at University of California at Irvine, said, “My sense is that nobody knows the actual population of the People’s Republic of China . . . . [a]nd that makes it impossible to engage in the economic and social planning that China needs to do.”).
\item[218] Zhang, supra note 72, at 565.
\item[219] See generally Mosher, supra note 4. See also Kane & Choi, supra note 91 (noting that migrants earn cash wages, are seldom eligible for state services, and do not draw attention to themselves by trying to obtain temporary registration, the result being a decline in the reliability of population statistics).
\item[220] Zhang, supra note 72, at 566.
\item[221] Rosenthal, Rural Flouting of One-Child Policy, supra note 69.
\item[222] Unfair Burdens, supra note 13 (noting that unregistered children are overwhelmingly female, as parents hide them in order to try for the coveted son). See also Rosenthal, Rural Flouting of One-Child Policy, supra note 69 (commenting that after 20 years of the OCP, hiding children from the state has become second nature in many parts of China).
\item[223] Rosenthal, Rural Flouting of One-Child Policy, supra note 69.
\item[224] Id.
\end{footnotesize}
educated. Sadly, the very factors that perpetuate the abduction and trafficking of women are perpetuated by the state’s failure to register its illegal children. Poverty and lack of education often make women vulnerable to trafficking, yet their children must suffer the same fate because they have no legal identity.

IV. RELEVANT LAWS AND TREATIES

A. Marriage Law

Under the traditional Confucian hierarchical structure, a marriage was preeminently a contract and “usually the result of an agreement between two families, not two individuals.” Divorce proceedings, usually initiated by the husband, came about in much the same way. Women had no choice in their marriage or divorce, and lacked economic independence. Neither Chinese law nor Chinese culture provided any protection for women until the advent of Communism.

Although the 1950 Marriage Law never became well known, it introduced the concept of marriage as an individual choice, a contract that must be entered into “without any interference or obstruction from third parties.” Even though it essentially outlawed child marriages and forced marriages, arranged marriages were still common. By contrast, the 1980 Marriage Law was highly publicized even though the differences between the two laws were slight. While the 1980 law affirmed the right of free choice in marriage, it also included rules on inheri-
tance, family planning, adoption and support obligations of extended family. Nevertheless, the law remained silent as to invalid marriages, failing to establish a system of regulation for invalid and revocable marriages.

The revised Marriage Law, which became effective in 2001, differed significantly from the 1980 Marriage Law in that it established rules regarding invalid and revocable marriages. According to Article 8, a marriage is not established until it has been registered. Under China’s Marriage Law, there are several ways to make a marriage invalid. For example, the exactation of monies, i.e., bride price, would nullify the marriage, as would failure to register it. Moreover, women trafficked in violation of Chinese law, or those who are forced into marriage, may request revocation of their unions, essentially invalidating them. Because the marriages would be invalid, none of these couples would be eligible for birth permits, and thus all of these children would be unregistered.

While Article 10 provides circumstances in which a marriage is invalid, Article 11 allows a party to request revocation of the marriage when it is based upon intimidation. Article 12 complicates matters, however. Although an invalid or revoked marriage is completely invalid, parents of children born to these invalid unions have the same responsibilities to their children as do parents in valid marriages. In actuality, however, parents of children born to invalid unions have greater responsibilities because although Article 25 states that “[c]hildren born

235. Han, supra note 105, at 799.
237. MARRIAGE LAW (REVISED), supra note 33, art. 8.
238. Id. art. 12.
239. Feng, supra note 236, at 349 (noting that de facto marriages are invalid).
240. MARRIAGE LAW (REVISED), supra note 33, art. 11.
242. MARRIAGE LAW (REVISED), supra note 33, art. 10 (stating that marriages shall be invalid for bigamy, prohibited relative relationships, where a party is unfit because of disease, and where either party is younger than the legal marriage age).
243. Id. art. 11 (intimidated parties must request revocation within one year of marriage registration or within one year of gaining their personal freedom).
244. Id. art. 12.
out of wedlock shall enjoy the same rights as children born in wedlock,” it also provides that the parents shall bear all of the child’s living and educational expenses. Because the state typically assumes the burden of health and education expenses, the Marriage Law places both the parents and the children of invalid marriages at a distinct disadvantage.

Another dilemma not entirely solved by the revised Marriage Law is the validity of de facto marriages. A de facto marriage is one that meets the formal requirements of the Marriage Law and is not otherwise invalid, but has not been registered. The general rule is that de facto marriages are not legally binding. Discussions surrounding revisions to the Marriage Law, however, imply that de facto marriages are revocable, but not invalid. Therefore, if the cohabiting couple obtains a marriage certificate prior to revocation, the union will be valid.

In rural areas, de facto marriages may include sixty to seventy percent of total marriages, with parties lacking either the intent or the monetary means to register their union. This lack of registration has serious consequences for family planning; parties to an unregistered marriage cannot obtain birth permits and, thus, any children of these unions are illegal and unregistered.

B. Family Planning Law

The Family Planning Law, which essentially codifies the OCP, only became effective in December of 2001. Prior to its promulgation, implementation of the OCP was spelled out by government directives and carried out by local officials. Some commentators see the new law as a landmark in China’s implementation of the OCP because it demonstrates the government’s recognition of the implicit gender problems created by the OCP and is the first national attempt to address gender is-

245. Id. art. 25.
246. Feng, supra note 236, at 348–49.
247. Id. at 349.
248. Id.
249. Id. at 346.
250. Id. at 347.
251. See generally FAMILY PLANNING LAW, supra note 36.
252. See Li, supra note 18, at 152.
sues on family planning. For example, Article 22 prohibits discrimination and abandonment of female babies and their mothers while Article 35 prohibits sex selection and use of ultrasound technology for anything other than medical purposes.

Nevertheless, the Family Planning Law does not change the essential elements of the OCP, namely a commitment to birth quotas and local implementation. Moreover, much of the law is focused on the socioeconomic justifications for implementation of the OCP, not specific enforcement measures for it. Most important, however, China’s adoption of the Family Planning Law signifies China’s continued commitment to the OCP. China’s previous failure to adopt a national law was seen as a convenient way to divert international criticism. The law’s adoption, according to a panel member involved in its drafting, demonstrates that family planning is now widely accepted.

V. LEGAL RAMIFICATIONS AND SUGGESTIONS FOR THE FUTURE

A. Legal Ramifications

While the provisions of the Family Planning Law take precedence over the Marriage Law, both laws require societal respect for the rule of law and a sound legal infrastructure to ensure enforcement and protection of promised legal rights. Yet, the primary problem with implementation of the OCP has been the state’s failure to adequately protect women and children. These problems have not been alleviated since the adoption of the Family Planning Law. In fact, the unintended consequences of the OCP—gender discrimination, a woman shortage, and trafficking—may be exacerbated by strict enforcement of either the Family Planning Law or the Marriage Law.

254. FAMILY PLANNING LAW, supra note 36, arts. 22, 35.
255. See id. arts. 6, 7, 9, 12, 18.
256. See id. arts. 1, 2, 24, 25.
257. Hui, supra note 30, at 200.
258. Id.
259. MARRIAGE LAW (REVISED), supra note 33, art. 49.
260. Hui, supra note 30, at 204.
261. See generally Report on CEDAW, supra note 12.
Strict enforcement of the Family Planning Law could include stricter sanctions and increase the number of sex-selective abortions. On the other hand, strict enforcement of the Marriage Law could have serious consequences for China’s next generation. Not only will unplanned births or unregistered children be unable to reap the benefits of the state, but children theoretically falling within the OCP guidelines would be unregistered because of their parents’ invalid marriages. Moreover, strict enforcement of the Marriage Law could force victims of trafficking to remain with their buyers because by revoking their marriages, these trafficked women would be forcing their children to be unregistered.

B. Possible Solutions

While enforcement of the OCP has created a wide range of social, cultural and gender-related problems, China’s recent adoption of the Family Planning Law reflects its long-term commitment to the policy. Although the most effective solution would be a relaxation of the policy, that does not seem likely considering China’s population problem and the shortage of relatively speedy, economical solutions. While some commentators argue that public family planning education would eventually effectuate China’s population goals, the reality is that it would not do so quickly enough to forestall the economic consequences of a baby boom in China.

Instead, China should focus on a reconstruction of its Marriage Law and amendments to its Family Planning Law. The largest hidden problem with the OCP is its effect on future generations, an effect that China could feel economically. By failing to register a large number of its children because of their unauthorized status, China is dooming them to an inferior existence. To begin, China could amend its Marriage Law so that children born out of wedlock and to invalid marriage arrangements, including de facto marriages, would not be unauthorized. In order for this change to be effective, however, China would also need to amend its Family Planning Law and prohibit the withholding of registration as a punishment for children

262. Unfair Burdens, supra note 13.
263. See generally Hui, supra note 30.
264. Zhang, supra note 72, at 593.
born out-of-plan. Moreover, China should give its Marriage Law equal weight and forbear valuing family planning over the rights and obligations of parents to their children. Finally, in order for China to demonstrate its commitment to human rights and gender equality, it must develop a comprehensive legal structure for enforcement of its prohibitions against trafficking and coercive family planning techniques. Without true enforcement of these prohibitions, as well as a crackdown on local corruption, China will be unable to garner popular support for the OCP or respect for the rule of law.

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