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CYBER-INTERNATIONAL LAW ARTICLES & ESSAYS
Where on Earth does Cyber-Arbitration Occur?: International Review of Arbitral Awards Rendered Online
Tiffany J. Lanier, Esq.

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2000 PHILLIP C. JESSUP INTERNATIONAL LAW Moot Court Competition

Memorial for Applicant
University of Alabama

Memorial for Respondent
International Islamic University

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I. INTRODUCTION

As international commerce continues to increase in online volume, so will disputes arising out of that online commerce. Since arbitration, over litigation in a national court, is the preferred method to resolve international commercial disputes, online arbitration could be an alternative dispute resolution norm in the near future. National courts simply might not have the ability, the capacity, or the authority to effectively resolve the potentially numerous disputes that could arise.

Arbitration has become a legitimate dispute resolution method virtually everywhere in the world with varying degrees of scope and application. For
example, the World Intellectual Property Organization (WIPO) has recently recommended online arbitration to resolve domain name disputes. However, before online arbitration can be readily accepted, it must be determined which basic rules will govern matters of proper administration, choice of law, jurisdiction, enforcement, and review.

International arbitration law and national law can provide guidance in determining the necessary basic rules. The national law of the country where the arbitration takes place generally provides the rules for conducting the arbitration. However, because online arbitration has only a virtual presence, a question arises as to where, or in what country, the online arbitration has taken place. Typically, the parties will either determine the place via contract, or an arbitral tribunal will determine the place of an online arbitration.

The topic of this paper is limited to problems arising out of judicial review of online arbitral awards. Judicial review is an important aspect of all arbitrations. The losing party of the arbitration invokes judicial review. In an online arbitration, the country where the arbitration takes place could affect the judicial review of an arbitral award, because national law determines the scope of judicial review. Problems arise because different countries follow different models of judicial review. Sometimes peculiarities can develop when local rules are applied to international arbitration. The scope of this paper is to determine whether the national courts of the arbitration situs have the authority to review the arbitral award, and if that authority is established, the effect the country's national law might have on the award's review.

II. ONLINE ARBITRATION SITUS: WHY IS IT SO IMPORTANT?

The situs of the arbitration is the locale where the arbitration has taken place, or its legal seat. The importance of the place of the arbitration can not be overestimated. The role of the arbitral situs is vital in supporting international commercial arbitration. Parties will likely agree to an arbitral situs in the arbitration clause of the relevant commerce contract. However, if the parties fail to agree to the arbitration situs, then the arbitral tribunal may fix the location. The arbitration situs determines the mandatory procedural rules that will have to be adhered to while conducting the arbitration.

6. DERAINS & SCHWARTZ, supra note 4, at 200.
7. REISMAN, supra note 5, at 156.
the arbitration may literally determine the outcome of the case. The laws of the arbitration situs will also determine the likelihood and extent of the national court’s involvement in conducting the arbitration through judicial assistance and/or judicial interference. If the country’s national law deems the place of the award to be the place where the award was signed, then the arbitration situs may or may not be determined as the place of the award. Overlooking these considerations when determining the arbitration situs could be critical.

III. GOVERNING ONLINE ARBITRATION: WHO WILL BE RESPONSIBLE?

Two general theories exist regarding regulating commerce on the Internet. One theory suggests that since laws that govern international commerce already exists, those laws should be applied to online commerce, thereby treating the Internet merely as a new medium. A second theory suggests that basic regulations should be developed to deal with the particularities and uniqueness of the Internet.

The most optimal solution may evolve by combining existing international law while drafting flexible new laws to supplement, adapt, or clarify the existing laws. This combination may produce the least-restrictive regulation necessary while providing parties with some certainty as to rules, procedures, and possible outcomes. Perhaps a similar combination can be applied to create some certainty as to which laws to apply to online arbitration. The adversarial participation in the arbitration process is more meaningful when the decision-maker is bound by a set of procedural rules.

International law can be used to help resolve online commerce conflicts. International law binds all nations and arises through tradition, practice, and treaty. Two subsets of international law are public and private international law. Public international law addresses issues of state recognition, treaties, and war. Private international law is concerned exclusively with private disputes among individuals and/or corporations. Private international law is also referred to as conflicts of law. When the law of more than one jurisdiction can apply, conflicts rules determine whether a court should apply the laws of its own jurisdiction or the law of another jurisdiction.

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8. London was selected as the arbitration situs in the arbitration clause in an ICC arbitration between Finish and Australian corporations. Because of the situs, the arbitrator applied the United Kingdom Statute of Limitations Act that effectively barred the claim.
9. TANIGUCHI, supra note 2, at 33.
10. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 48 (3d ed. 1999).
11. Id.
13. JANIS, supra note 10, at 234-35.
Both substantive and procedural laws also regulate arbitration. Often, the arbitral tribunal has the power to determine which substantive and procedural laws to apply.\(^\text{15}\) Substantive law governs a contractual arbitration agreement between parties. The substantive law determines the validity, scope, and effect of the arbitration clause.\(^\text{16}\) It is widely believed that an arbitrator must apply the rules of substantive law rather than decide a case by his sense of justice, unless the parties otherwise agree.\(^\text{17}\)

Typically, parties agree on which procedural law will apply in the arbitration agreement. Procedural law governs arbitral procedures such as the appointment and challenge of arbitrators, pleadings, discovery, hearings, and the form of the final award.\(^\text{18}\) If the parties contractually agree to an arbitration location, then the parties' choice will be upheld. The choice of law is imperative when the contract does not specify what to do in a particular situation. The parties are also likely to agree, or they may only have one choice, as to which arbitral tribunal they will be submitted. One arbitral tribunal may be more suitable for a particular online transaction than another. There are currently six arbitral tribunals to which an arbitration can submit: International Chamber of Commerce (ICC), American Arbitration Association (AAA), LCIA Arbitration International (LCIA), International Center for the Settlement of Investment Disputes (ICSID), Stockholm Chamber of Commerce (SCC), and the United Nations Conference on International Trade Law (UNCITRAL). For example, Article 14(2) of the ICC Rules of Arbitration provides that the Arbitral Tribunal may, after consultation with the parties, conduct the hearings and meetings in any location it considers appropriate unless otherwise agreed to by the parties.\(^\text{19}\) Once the parties have either agreed to the situs in their arbitration clause, or the arbitral tribunal has chosen the situs with the parties' consent, the diverse physical locations of all the parties involved should not matter.

IV. TRADITIONAL ARBITRATION VS. ONLINE ARBITRATION

The following examples show a significant difference between traditional notions of arbitration and at least one emerging online arbitration approach. Traditional arbitration procedure provides the model for WIPO's proposed

\(^{15}\) Tricia A. Hoefling, Note & Comment, The (Draft) WIPO Arbitration Rules for Administrative Challenge Panel Procedures Concerning Internet Domain Names, 8 AM REV. INT'L ARB. 173, 178 (1997).

\(^{16}\) Ronald Bernstein et al., Handbook of Arbitration Practice (Derek Wood ed., 3d ed. 1998).

\(^{17}\) Taniguchi, supra note 2, at 32.


\(^{19}\) Derains & Schwartz, supra note 4, at 205.
online arbitration. However, certain unique features of WIPO’s online procedure may cause it to not be considered an arbitration for purposes of review.

WIPO defines this online procedure as an administrative procedure. It is questionable whether the administrative procedure will qualify as an arbitration for review purposes, because WIPO recommends that the parties retain the right to initiate litigation in a national court even after the arbitrator renders a decision. WIPO further suggests that a party who disagrees with an arbitrator’s determination is free to seek review from a national court. Therefore, the arbitrator’s determination will not be binding precedent under national judicial systems.\(^2\) Assuming competent jurisdiction, a national court’s decision that is contrary to an arbitrator’s determination will override the arbitral determination.\(^2\)

However, most countries’ statutory arbitration rules will uphold an arbitrator’s determination as binding, which is not subject to review except for a finding of fraud or arbitrator misconduct. For instance, the United States Federal Arbitration Act limits a court’s review to four instances: 1) if an award was procured by fraudulent means; 2) if there is evidence of corruption among the arbitrators; 3) if there is any misconduct by the arbitrators; or 4) if the arbitrators have exceeded their powers.\(^2\) A party’s dissatisfaction with the outcome does not trigger any of the four factors specified in the United States statutory arbitration law.

Another reason the WIPO procedure may not be considered arbitration for purposes of review is because, typically, submitting to arbitration is a voluntary choice. WIPO’s proposal requires a domain name applicant to automatically submit to the online tribunal’s jurisdiction when they accept the terms of their registration agreement.\(^3\) However, the submission will not preclude a complainant from filing a claim in a relevant national court.\(^4\) The registration agreement also requires the applicant to submit to the online procedure if a third party feels his intellectual property rights have been infringed. The validity and enforceability of such a mandatory procedure may be questioned in certain jurisdictions because courts view adhesive contracts suspiciously.\(^5\) The mandatory nature of the submission also raises questions particularly for purposes of consumer protection laws, due process considerations, and the fact

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20. WIPO FINAL REPORT, supra note 3, ¶ 196(ii).
21. Id. ¶ 196(v).
23. WIPO FINAL REPORT, supra note 3, ¶ 110.
24. Id. ¶ 196.
25. An adhesion contract is a standardized contract offered exclusively on a “take it or leave it” basis without giving the consumer the opportunity to bargain. See e.g., Carnival Cruise Lines Inc. v. Shute, 499 U.S. 585, 592-93 (1991).
that submission purports to create rights for a third party who is not even privy to the registration agreement.

V. CYBER-ARBITRATION LOCATION

Typical parties involved in an online arbitration may include the complainant, the defendant, up to three arbitrators, and the arbitral institution. Online arbitration could address the possibility that all the parties could be located in six or more geographical locations. Up to six national courts could have relevant jurisdiction for purposes of review.

The Lex Loci Server theory would suggest that the place of the arbitration can be determined by the geographical location of the computer server through which the arbitration is taking place. If the parties previously stipulated to the place of the arbitration, then the situs will generally be fixed as the parties' wish. However, if the parties did not agree to the arbitration location, then the arbitral tribunal can fix the situs to wherever it deems appropriate.

VI. ARBITRATION POLICY PERSPECTIVES

The role of the arbitral seat can be seen from two different policy perspectives. Essentially both policy perspectives pose the question to the extent that arbitral awards should be subject to the jurisdiction of judges of the arbitration's situs. First, it is necessary to consider the country's policies where the arbitral award is rendered. The arbitral situs' perspective is relevant regarding grounds for review. The national courts of the arbitral seat must first be concerned with whether it has the power to review the award. A determination then must be made as to whether the situs court has the power to correct errors of law on the merits of the dispute, or if the court should limit itself to a due process review. For instance, in Hiscox v. Outhwaite, the House of Lords determined that the place of the award is where the award was signed. Although the entire proceedings in that case were conducted in London, the place of the award was determined to be Paris, the location where the award was signed.

Next, it is necessary to consider the policies of the country asked to enforce the award. If an award is annulled where it was rendered, then the enforcement forum will be concerned if, and under what circumstances, the

27. Id. (discussing the ICC Rules of Arbitration, art. 14(3) of 1984).
28. REISMAN, supra note 5, at 1098.
award will be enforceable in a different country where the losing party owns assets. An enforcement forum may always impose its own standards for review as long as those standards are consistent with treaty obligations. It is less clear, however, whether the enforcement forum should always, or ever, recognize an arbitral award annulment by the courts of the arbitration’s situs.

VII. JUDICIAL REVIEW OF ARBITRAL AWARDS

Typically, judicial review of awards falls into one of two categories. One model is a full review on the merits, which seeks to maximize the legal certainty concerning the merits of the dispute. The second model is a limited review for conformity to basic procedural fairness, including arbitrator fraud and abuse of authority. The limited review for procedural fairness is an attempt to insure an arbitration’s integrity, while minimizing judicial meddling with the substantive results. Keeping judicial review within acceptable limits is not an easy practice. There is no bright line test distinguishing between the arbitrator who exceeds his authority and one who merely makes a mistake and renders a bad award. In some cases, the arbitrator may even be justified in disregarding the parties’ choice of law in favor of the mandatory norms of the arbitral situs. However, from the winning party’s perspective, review only adds delay and expense. It also compromises the privacy that the parties expected from the arbitration. However, some measure of court review on the award’s merits is necessary out of respect for the losing party’s interests.

Belgium’s new philosophy of non-review reflects a third model of judicial review. Non-review is an extremely limited model and has been scrutinized by some scholars as a legal fiction because it is hard to qualify as a review policy. Under Belgian law, when both parties to the arbitration are non-Belgian, annulment of an arbitral award by the Belgian courts is excluded all together. This amendment was first introduced into the Belgian Senate in 1981. Belgium is an important center for international arbitration because of its ideal location and the multiple language skills of its nationals. By excluding annulment of arbitral decisions “with which Belgium has nothing to do,” the attractiveness of Belgium as a place of arbitration is enhanced. Parties are not even allowed to agree that Belgian courts have jurisdiction to annul arbitrations in Belgium. The arbitral situs will not set aside an award for any reason,

30. Reisman, supra note 5, at 1101.
31. Id. at 1100.
32. Id.
33. Id. at 1103.
34. Id. at 1100.
including fraud by an arbitrator, or an abuse of his authority. In effect, the amendment concentrates judicial control over the international arbitration process on the enforcement court.

VIII. DELOCALIZATION

Delocalizing international arbitration is a recent trend that decreases the role of the national court at the place of the arbitration while increasing the role of the losing party's national courts. Delocalization tends to promote the parties' wishes without necessarily violating the vital interest of the arbitration situs. However, following the trend of delocalized arbitration too far can also pose problems. The judge at the arbitral seat should possess a clearly defined power to correct fraud, arbitrator excess of authority, and infringement of due process. If not, the losing party may have to defend an unfair award anywhere in the world where he owns assets. A legal system that supports this model supports arbitration within its borders without providing the minimum safeguards of basic justice. An entity that never signed the arbitration agreement will not have the chance to litigate the arbitrator's jurisdiction when the award is rendered. In addition, there would not be an opportunity to review choice of law or arbitral errors.

Imagine if the parties agreed on English law to govern the contract and UNCITRAL rules to govern the arbitral procedure. The arbitrator could apply French law and AAA rules without the losing party challenging these defects until after the award is later presented for enforcement.

When the losing claimant is victim to procedural irregularities, the results of arbitral autonomy are dramatically unfair. If the courts where the award is rendered denies the losing claimant the opportunity to set the award aside, then the losing claimant has no enforcement forum in which to test the defective award. This is simple because there is nothing to enforce. The goals of arbitration, such as speed and finality, are misguided if it is at the expense of the losing party's expected procedural fairness.

Award annulment is the legal principle when a court in the originating country deems that although a document purports to be an arbitral award under the country's arbitration laws, the arbitral award has no legal force. The party

36. Reisman, supra note 5, at 1100.
38. Reisman, supra note 5, at 1100.
39. Id. at 1101.
40. Id. at 1100.
41. Id. at 1102.
who has lost the arbitration institutes annulment. In most countries, attempts to have international arbitral awards set aside have not been successful. Almost all national arbitration laws provide for annulment of awards in one way or another. While some countries provide a single action for the annulment of awards, other countries have more complex procedural frameworks. Annulment in these countries is provided through arbitration law and case law.

There are some countries that will allow an arbitral award to be annulled on different grounds. The grounds can be divided broadly into the following categories. First, an award can be annulled for lack of a valid arbitration agreement. Second, an award can be annulled for violating due process principles. Third, an award can be annulled if an arbitrator is found to have violated his scope of authority. Fourth, annulment may occur if the rules for appointing arbitrators or governing the arbitral proceedings are not followed. Fifth, a lack of signatures could create a formal invalidity of an award. Finally, an award can be annulled for a violation of public policy that does not favor arbitration.

In a majority of countries, it is a basic principle that a court cannot review the merits of an arbitral award. WIPO's proposed online arbitration procedure provides that arbitrators' awards can be re-litigated in a court of competent jurisdiction. WIPO's Final Report has recommended that the registrant-applicant submit to the court's jurisdiction in the country of the applicant's domicile and the country of the registrar without prejudice to other potentially applicable jurisdictions.

IX. JURISDICTION

Jurisdiction is the power of a court to exercise control over subject matter and parties. Generally, the court that has the jurisdiction to review an award is the court in the country of the awards' origin. In other words, it is the court in the country under whose arbitration law the arbitration was conducted and award made. In a vast majority of cases, it is the country of the arbitration situs. An action seeking annulment has a cross-border effect. However, this

42. JAN VAN DEN BERG, supra note 37, at 133-135.
43. Id. at 135.
44. Id.
45. Id.
46. Id.
47. JAN VAN DEN BERG, supra note 37, at 135.
48. Id.
49. WIPO FINAL REPORT, supra note 3, ¶ 143.
50. Id. ¶ 147.
51. BLACK'S LAW DICTIONARY 766 (5th ed. 1979).
52. JAN VAN DEN BERG, supra note 37, at 136.
may need to be reassessed in view of recent developments in legislation and case law in Belgium, France, Sweden and Switzerland, where annulment is no longer sacrosanct. In the originating country, an action for an award rendered via international arbitration is excluded by law in Belgium, and may be excluded by agreement in Switzerland and Sweden.

X. SWISS ANALYSIS

In 1969, the Swiss Federal Government approved an intercantonal agreement unifying the laws on arbitration known as the Concordat. The Swiss government introduced a specific federal act for international arbitration. The parties to an international arbitration in Switzerland may exclude the possibility of annulment by agreement before the Swiss courts.

The agreement is subject to two conditions. First, none of the parties may have their domicile, habitual residence, or business establishment in Switzerland. Second, the exclusion must result from an express statement in the arbitration agreement, or in a subsequent written agreement. It is now believed that excluding annulment will have a limited use because parties are more concerned with certainty, versus speed and economy, at least where significant interests are at stake. In the Swiss International Arbitration Act, the highest Swiss court, the Tribunal Federal, is the sole competent authority for entertaining actions of annulment of arbitral awards rendered in international arbitrations taking place in Switzerland. If it is the losing party's intention to try and delay his award obligation, the availability of only one instance of recourse may make the losing party think twice about delay. It also appears that Sweden will allow exclusion by agreement of annulment of an arbitral award rendered in an international arbitration held in Sweden. The Swedish Supreme Court decided that if the parties have no contact with Sweden, and reside in different countries, then the parties must agree, prior to any arising dispute, to limit their right to challenge the award in a Swedish court on the account of formal deficiencies.

Would an award annulled in the court of origin be given effect by a foreign court before which enforcement of the award was sought? This consideration

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53. Id. at 133.
54. This formal requirement means that an indirect exclusion, such as an exclusion set forth in arbitration rules, lacks sufficiency. See Marc Blessing, *The New International Arbitration Law in Switzerland*, 5 J. INT'L ARB. 9, 75 (1988); ANDREAS BUCHER & PIERRE-YVES TSCHANZ, *INTERNATIONAL ARBITRATION IN SWITZERLAND* 145 (1989).
would only arise under awards not governed by the New York Convention. If the New York Convention applies, annulment of the award of the court in the country of origin constitutes a ground for refusal of enforcement pursuant to Article V(1)(e) of the Convention.\textsuperscript{57} However, the New York Convention enables a party to rely on more favorable domestic law concerning the enforcement of foreign arbitral awards.\textsuperscript{58} Some countries, such as France, have domestic law on enforcement of foreign arbitral awards, which appear more favorable than under the New York Convention rules.

\textbf{XI. THE FRENCH VIEW}

France is one of the few countries to apply two separate statutes for arbitrations. One statute was enacted in 1980, which applied to domestic arbitration. The other statute was enacted in 1981, and applied to international arbitration.\textsuperscript{59} Title VI of the 1981 Decree relates to the recognition and enforcement of, and the recourse against arbitral awards that were rendered abroad or through international arbitration. Contrary to Article V(1)(e), the French statute does not include a ground for refusal of enforcing an annulment of an award by a court in a country of origin. Therefore, under French law, an award which was rendered in international arbitration and which was annulled abroad under the basis of local law, is not contrary to French arbitration policy.

French courts do not give effect to an annulment by a court in the origin country because, under the French view of international arbitration, an arbitration award is not incorporated in the legal order of the country where it is merely located geographically.\textsuperscript{60} Only French law defines the incorporation of the arbitral award into the French legal order. The French, who follow a unilateral approach, are not concerned with the incorporation of an award in a foreign legal order. This is the case even if the latter is the place where the award has been made.\textsuperscript{61}

Whether the arbitral award is incorporated into another legal system does not matter. The rationale is that just because an arbitral award is acceptable to a French judge, the award should not be refused force and effect just because a foreign judge has different ideas of acceptability. In France, the notion of an award's nationality does not exist. There are awards rendered abroad or awards

\textsuperscript{57} JAN VAN DEN BERG, \textit{supra} note 37, at 147.

\textsuperscript{58} Id.


\textsuperscript{61} JAN VAN DEN BERG, \textit{supra} note 37, at 151.
rendered in France relating to international matters. There is no such thing as an English, French, or Italian award.

XII. AWARD ENFORCEMENT

Enforcement is distinguished from annulment. Enforcement of an award occurs when the prevailing party seeks judicial assistance in forcing the losing party to honor the award. The situs of the arbitration may have an effect in judicial proceedings after an arbitration. Judicial enforcement of arbitral awards must necessarily accommodate two competing policy interests. For international commercial transaction purposes, the most important interest is limiting the courts' review of the merits of the dispute and the arbitrators' decision, thereby giving effect to the parties' choice of arbitration.

The other competing interest is the courts correcting genuine abuses by arbitrators, and enforcing any relevant mandatory jurisdictional rules. Party confidence in the enforceability of the arbitral award without judicial review of the merits is what makes international arbitration such an attractive alternative to domestic litigation on the first place. Countries that have assumed the last of the New York Convention view arbitration as the abandonment of the right to litigation. However, the online arbitration system proposed by WIPO recommends that a party who submits to arbitration will not give up their access to court litigation.62

Enforcement of an award can only take place after a court has given permission to execute the award by public force. Awards are appointed by private individuals that hire the parties, and not by judges of the State. However, the procedure and the extent of control exercised by the courts over awards in enforcement proceedings differ from one country to the next.63 In most countries, an enforcement made in the country where it is sought consists of relatively short summary proceedings. Here, control exercised by the courts over the arbitral award is very limited. The principle international standard for enforcing arbitral agreements and awards is primarily regulated by the New York Convention.64 The New York Convention provides more exclusive control on the grounds of refusal for enforcement. If enforcement is refused in the country of origin, the arbitral award, in theory, is still capable of enforcement in a foreign country under the New York Convention. The New York Convention does not list refusal of award enforcement in the origin country as a ground for refusal. However, in practice, a refusal of enforcement

63. Jan van den Berg, supra note 37, at 138.
in the country of origin may constitute pervasive authority in a foreign country where enforcement is thought.\textsuperscript{65}

Articles III and IV of the New York Convention set forth the rules regarding enforceability under the Treaty. Each of the member states agree to recognize arbitral awards as binding and to enforce them according to the rules of procedure where the award is relied upon. Article VI imposes a further limitation on permissible domestic procedures, by prescribing a straightforward method of obtaining enforcement. The party seeking enforcement need only supply the requested court with a duly authenticated original award, or certified copy, along with the original, or a certified copy, of the arbitration agreement pursuant to which the award was rendered. This rule of minimum formality and abbreviated procedure is exactly the method that needs to be implemented in online arbitration procedures. Thus, a similar need of balancing certainty and flexibility in international arbitration can be applied to online arbitration.

In \textit{Scherk v. Alberto-Culver Co.}, the United States Supreme Court found the underlying purpose in American adoption and implementation of the New York Convention was threefold. The first purpose was encouraging the recognition of, and enforcement of, commercial arbitration agreements in international contracts. The second purpose was to unify the standards by which arbitration agreements are observed. The third purpose was to ensure that arbitral awards are enforced in the signatory countries.\textsuperscript{66}

Pro-arbitration is a well-established federal policy in favor of enforcing both arbitral clauses and awards in the international context. However, the \textit{Scherk} Court also pointed out that arbitration obviates certain dangers peculiar to the choice of forum for resolution of international business disputes. These dangers include a forum’s hostility towards one parties’ interest, and a forum’s lack of familiarity with the law to be applied or the subject matter of the agreement.

A few European countries, such as France, the Netherlands, and Switzerland have, as a matter of public policy, accorded greater enforceability to foreign awards, as compared to domestic awards.\textsuperscript{67} American case law and the European statutory law take an increasingly internationalist approach, restricting the extent to which arbitral authority is subject to the mandatory rules otherwise applicable to domestic arbitrations.

\textsuperscript{65} JAN \textsc{VAN DEN BERG}, supra note 37, at 139.
XIII. CONCLUSION

In most cases, the parties will agree to the situs of a cyber-arbitration in a contract. However, agreeing to a situs without knowing the particular national law of the country agreed to can have serious effects. When the parties do not select a forum and the arbitral tribunal selects one for them, the same problems may arise. The situs of the arbitration will determine whether the local courts will help or hinder the arbitration process. The arbitration situs will also determine local mandatory procedures to be followed. While online arbitration may be a helpful alternative dispute resolution in a relatively short number of years, much work is left to be done to create new, or amend the old rules regulating arbitration.
E-COMMERCE AND INTERNATIONAL POLITICAL ECONOMICS: THE LEGAL AND POLITICAL RAMIFICATIONS OF THE INTERNET ON WORLD ECONOMIES

Chelsea P. Ferrette

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I. INTRODUCTION

In the nearly 300 years since the industrial revolution,¹ the advancement of technology has always aided international business.² However, unlike the first industrial revolution that took more than 100 years to cause a massive effect on society,³ the Internet revolution has occurred almost instantaneously.⁴ Today, more than 100 million people worldwide use the Internet to do everything from research to purchasing products online.⁵

One of the many progenies derived from the use of the Internet⁶ in everyday life is the development of electronic commerce, or e-commerce. Unlike the evolution of the telephone for doing business, the Internet allows businesses to have more access to more customers in a shorter amount of time.

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2. See id. (stating that the invention of the steam engine coupled with the invention of electricity meant that companies had the freedom to be located anywhere).
3. Id. (noting that it took fifty years after the invention of electricity to create a power station to store electrical power and another fifty years before electricity became commonplace in businesses and households).
4. In terms of technological revolutions fifty-four years seems like a blink of an eye. In 1946, the Electronic Numerical Integrator and Computer (ENIAC) was invented. See id. At that time, ENIAC took up a 1,500 square feet of space and could perform only non-graphical calculus computations. See id. By 1971, Intel, the company famous for its Pentium Processors, was able to reproduce a chip which was four times more powerful than ENIAC and able to conduct 400 million instructions per second.
5. Id.
6. A few of the Internet progenies include digitized telecommunications, online banking, and online securities trading.
Globally, the speed of these transactions allows income generated from e-commerce transactions to be very lucrative for the e-commerce merchant. Currently, no country has taxed the income generated from e-commerce but many countries are considering that prospect.

E-commerce, although a relatively new unit of analysis, lends itself to distinctive issues. This paper advocates three theories regarding international e-commerce. First, an absolute bar on global taxation on the Internet will lead to market efficiency. Second, the burden of regulating consumer privacy during international e-commerce transactions should be placed on the consumer. Finally, each nation should take a nationalistic approach to the issue of whether a digital divide exists.

This comment first defines the concept of e-commerce, discussing its development in the international market. The comment next examines the legal questions raised in the use of the Internet to facilitate business. Legally speaking, in order to promote efficiency in the world market this comment recommends two things: 1) no taxation on international e-commerce income and 2) that the international buyer should be more responsible in their Internet business transactions. Additionally, this comment analyzes the political issue of the “digital divide” and how international nation states have addressed these issues. This comment advocates that increase competition in the global market will lead to increased market access and a narrowing of the digital divide. Finally, this comment describes the business models that have formulated due to the use of the Internet and then it focuses on one company, Yahoo!, to see how it has handled the legal and political ramifications of the Internet in its global business.

II. E-COMMERCE IN THE INTERNATIONAL MARKET

The term “e-commerce” has only been in existence since about 1994. Economist and capital market analysts use the term loosely to describe anything from the amount of sales generated by an online bookstore to explanations regarding the fluctuations in the global market. What they fail to do is clearly define the term “e-commerce.” E-commerce is simply the use of the Internet to conduct business transactions locally, nationally, or internationally. The rise of e-commerce is based on the revolution of the Internet and its technology. The development of the Internet has evolved from a tool of communication to one of economic utilization. The Internet facilitates electronic business transactions both nationally and internationally by permitting businesses to

have easy access to large consumer bases at lower costs. The use of the Internet to conduct business is not without problems. Internationally, there exist some concerns as to who should govern the flow of e-commerce income. Yet, the current debate does not look like it will be resolved any time soon.

A. The Development of the Internet

The modern structure of the Internet developed from a United States Army experiment more than thirty years ago. Today, the Internet exists in no physical or tangible realm. Instead, it is a "giant network which interconnects innumerable smaller groups of linked computer networks." This network is referred to as the World Wide Web (www). The current capabilities of the Internet for business transactions are enormous. The Internet has the ability

8. See, e.g., 47 U.S.C. § 230(e)(1) (Supp. 1998). ("The term 'Internet' means the international network of both Federal and non-Federal interoperable switched data networks."). The term "Internet" derived from the terms "interconnection" and "network." See GLEE HARRAH CADY & PAT MCGREGOR, MASTERING THE INTERNET 5 (2d ed. 1996). The term initially meant "the network formed by the cooperative interconnection of computing networks." See id. In the development of the Internet other terms were frequently used. William Gibson, in his science fiction novel Neuromancer, invented the term "cyberspace." See WILLIAM GIBSON, NEUROMANCER 51 (1985). Cyberspace is derived from the term "cybernation," which is equally derived from the term "cybernetics," or the study of automatic control systems of communications, by means of a computer. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 319 (9th ed. 1987). See also CADY & MCGREGOR, supra note 8 at 835. Gibson wrote that cyberspace was "[a] consensual hallucination experienced daily by billions of legitimate operators, in every nation... A graphic representation of data abstracted from the banks of every computer in the human system." See GIBSON, supra note 8 at 51. Bill Gates attributes the term "Information Superhighway" to then-senator Al Gore, Jr. See BILL GATES, THE ROAD AHEAD 5 (1995). At the time, Senator Gore was advocating the creation of a National Research and Education Network. See id.


10. See Corinne Bronfman et al., The SEC's Market 2000 Report, 19 J. CORP. L. 523, 524 (1994) (flouting the premise that with the advance of technology, markets have lost the necessity of belonging to physical entities).


to disseminate information to a large number of people quickly and with minimum costs.\textsuperscript{13} Because of the inexpensive nature of the Internet, the start-up cost to a company desiring to have a place on the Internet is minimal.\textsuperscript{14}

The Internet, unlike other forms of communication, has the ability to allow persons to interactively communicate with one another.\textsuperscript{15} Consumers access the World Wide Web by either an Internet Service Provider (ISPs)\textsuperscript{16} or Internet Content Providers (ICPs).\textsuperscript{17} ISPs and ICPs should not be confused with Internet portals. Internet portals are website interfaces that attract people to utilize the site.\textsuperscript{18} Similar to television stations, the portals do not in and of themselves sell anything. Instead, the portals entice consumers to hyperlink to other sites that may provide advice or sell consumers various products.\textsuperscript{19}

In addition to direct communication, anonymous communication is also available on the Internet, permitting consumers and purchasers to conduct transactions in private.\textsuperscript{20} The flexibility, the low cost of maintaining a website, the ability to quickly disseminate information, and the instantaneous communication to a large population of consumers, makes the Internet an ideal environment for business transactions.

B. \textit{E-commerce: The Internet as a Tool for Conducting Business Transactions}

In its early inception, the Internet was used mainly as a tool for people to communicate with one another through e-mail or in chat rooms. Early utilization of the Internet for business focused mainly on direct business to consumer transactions. This model allowed businesses to by-pass retail and

\begin{itemize}
\item \textsuperscript{13} See David M. Cielusniak, Note, \textit{You Cannot Fight What you Cannot See: Securities Regulation on the Internet}, 22 FORDHAM INT'L L. J. 612, 615-616 (1998) (advancing that currently there exists three methods in which to disseminate information over the Internet: the use of websites, electronic bulletin boards, and e-mail).
\item \textsuperscript{14} See Thomas D. Donlan, Editorial, \textit{Regulatory Milestone: SEC Chairman Levitt treads lightly on the markets}, BARRON'S, Oct. 18, 1999, at 58 ("American investors can trade practically anything with practically anyone on earth, at practically any time of the day. They can do it more cheaply than ever before, and they can deal with an amazingly diverse array of brokers, advisers and mutual-fund managers.").
\item \textsuperscript{15} See Securities Activity on the Internet: \textit{Report of the Internet Task Force to the Technical Committee}, 1128 PRACTISING LAW INST. 533, 546 (Sept. 19, 1998) [hereinafter \textit{Report of the Internet Task Force}] (implying that the graphic, audio, and instant written communication capabilities of the Internet acts as a benefit to security investors).
\item \textsuperscript{16} For example, Mindspring.com is an Internet service provider that provides its subscribers with e-mail addresses and paid access to the Internet.
\item \textsuperscript{17} See, e.g., http://www.eSinglemoms.com. Content providers do as their name suggests; provide a vast amount of information on a particular topic or various topics.
\item \textsuperscript{18} Interview with Jon Brod, V.P. of Marketing, iwon.com, Irvington, NY (Nov. 9, 1999).
\item \textsuperscript{19} \textit{Id.} See also http://www.iwon.com.
\item \textsuperscript{20} See \textit{Report of the Internet Task Force}, supra note 15, at 548 (voicing concern that anonymity of securities trading can also trigger fraudulent practices).
\end{itemize}
wholesale merchants by selling directly to their customers. Profitability depended on key elements. Some problems included brand marketing, both in the website name recognition and marketing the product, creating or carving out a market share, and producing or providing a similar service or product already in the market. Some businesses, realizing the risk of surviving in the Internet environments, have moved away from consumer based transactions to the business to business (B2B) model.

B2B e-commerce is the use of the Internet by one business to market his product to another business. Traditional brick and mortar companies have enhanced their participation in B2B marketing by creating B2B keiretsus, purchase groups for Internet product suppliers. Businesses participating in B2B transactions make money in numerous ways from taking a percentage of each sale to renting space on their website.

The efficiency of B2B transactions work by automating the intermediaries, such as taking human purchase order processors, out of the supply side of the supply-demand equation. The theoretical result of B2B transactions on the consumer side of the equation is lower prices, better services, and more choices. Yet, some market specialists believe that B2B is just another passing trend in the capital market.

21. Shannon Henry, For Venture Capital, a Wide-Open Door, WASH. POST, Apr. 5, 2000, at G13 (acknowledging the difficulty of raising money to support develop a brand around a consumer company). "Trying to have a technical advantage is better than building a brand." See supra note 15, at 548 (quoting Karl Khoury, principal with the venture capital firm Columbia Capital).

22. See id. at G13 (describing how the market for Internet business targeted toward consumers, i.e. B2C, is in low demand because certain brands such as Amazon, eBay, or Etoys have already established themselves in the American consumer lexicon of web businesses).


25. See id. at G21 (illustrating how the automotive companies have combined forces to create an online marketplace for buying auto parts). In Japan, a keiretsu is the business model of various businesses combining their individual efforts to support each business economically. See id.

26. See id. at G16 (mentioning that companies conducting B2B transactions may command a market worth between $1 to $8 trillion by 2004).

27. See id. (quoting Shikhar Ghosh, co-founder and chairman of Open Market, Inc., and CEO of iBelong Inc.). Jim Fox, co-founder of EqualFooting.com, Inc., an online market for small construction companies, states that the age of traveling salesmen may soon evaporate. See id. at G21.

28. Id. at G1. (explaining that in theory that is how it is supposed to work, in reality current speculations of the possibility of B2B transactions seem a bit premature). See generally LARRY DOWNES & CHUNKA MUI, UNLEASHING THE KILLER APP: DIGITAL STRATEGIES FOR MARKETPLACE DOMINANCE (1998) (supporting the premise that the evolution of the B2B marketplace will increase the expectations of consumers of lower prices and more purchasing choices).

29. Henry, supra note 21, at G13 (quoting Jack Biddle of Novak Biddle Venture Partners as saying that "a year from not they won't be talking about... B2B on Wall Street.").
Beyond simple B2B transactions are business to business to consumer (B2B2C) deals. B2B2C is a new market for venture capital investments. B2B2C centers on businesses that provide services or products, either software or hardware, to their business clients, who then sell the products or services to their customers.

C. Development of International E-commerce

E-commerce or electronic commerce is the practice of conducting commercial transactions, based on the processing and transmission of digitalized data over electronic networks. The Organization of Economic Cooperation and Development (OECD) created a working definition of, and guidelines for, e-commerce. The Organization of Economic Cooperation and Development (OECD) created a working definition of, and guidelines for, e-commerce.

The various uses of the Internet by business entities include the ability to advertise, generate, or otherwise perform regular business functions. According to OECD, e-commerce transactions can be used for both business to business and direct consumer marketing. Through the use of the Internet, either business transaction is considered e-commerce.

OECD has developed specific guidelines for international e-commerce. They expound eight central principles of e-commerce. First, the guidelines call for fair business dealings, advertising, and marketing practices in e-commerce transactions. Second, the guidelines propose that companies conducting e-commerce transactions give consumers sufficient information necessary to make an informed decision in their online purchases. Third, the guidelines ask that companies establish a clear procedure for the confirmation of purchase and sale orders online. Fourth, the guidelines recommend that websites are secured for consumer protection. Fifth, the OECD guidelines suggest that the companies have in place a way to conduct timely and affordable dispute resolutions. Sixth, the guidelines propose that customers are given protection.

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31. See Henry, supra note 21, at G13 (recognizing that business to consumer transactions are decreasing and business to business transactions, both interstructure and infrastructure deals, tend to be more profitable).
32. Id. (defining the concept of B2B2C).
34. See id. (noting the breadth of the definition of e-commerce).
36. Fox, supra note 33, at 161 (acknowledging that both organizations and individuals are the target markets of electronic retailers).
37. Sufficient information includes, but is not limited to, general disclosures about conducting business transactions online, the warranties regarding the quality of the goods being sold by the company, and the terms and conditions of the sale.
of their privacy of information provided to the company. Seventh, the guidelines call for companies to conduct both consumer and business education. Finally, the guidelines suggest that governments internationally should cooperate to implement these guidelines.\(^{38}\)

Since OECD is not a global governing body, the guidelines developed by OECD are not binding regulations on any country.\(^{39}\) The guidelines act merely as suggestions as to what would be considered fair business practices in international e-commerce transactions. Yet, the guidelines serve two central purposes. The guidelines act as a regulatory scheme, which governments may model in their creation and implementation of consumer protection laws regarding e-commerce and for private companies to emulate in their development of self-regulatory practices. Furthermore, the guidelines assist private companies in their goal of educating consumers about business practices on the Internet.\(^{40}\) However, since OECD lacks the jurisdictional predicate to enforce these guidelines they are merely ideals of the organization.

Jurisdictional questions arise when discussing international use of e-commerce.\(^{41}\) Response to such questions, as the amount of sales generated over the Internet, has gotten the attention of the World Trade Organization (WTO) regarding possible regulation of e-commerce.\(^{42}\) The WTO asserts that electronic commerce transactions fall within the scope of authority of the WTO/GATT.\(^{43}\) The WTO divides e-commerce transactions into three distinctive stages.\(^{44}\) The first stage of e-commerce is what the WTO defines as the searching stage, where the market producers and market consumers first interact with each other with the purpose of gathering information from one another. Once a transaction has been agreed upon, the second stage, ordering and payment of the desired product, takes place. Finally, the last stage is the delivery of the goods or contracted services.\(^{45}\)

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39. The OECD is an intergovernmental organization of 29 nation states established to promote global economic growth, trade and development. See OECD Guidelines, supra note 35.

40. See id. (stating that the guidelines should be used as blueprints for both international governments and private companies).

41. John Burgess, As Internet Commerce Goes Global, Countries Weigh New Barriers, WASH. POST, Nov. 7, 1999, at H01 (asking the question which country has the power to regulate when a company's headquarters are in country A, with a website hosted in country B, shipping products from country C, to a buyer in country D).

42. See id.

43. Fox, supra note 33, at 161 (noting that the WTO asserts jurisdiction over electronic commerce transactions).

44. Id. (discussing the three WTO categories of e-commerce).

Other organizations have tried to provide similar guidelines to the political and legal issues of e-commerce. The International Chamber of Commerce (ICC) issued a set of principles for ensuring and certifying digital messages.46 In December 1996, the United National Commission on International Trade Law (UNCITRAL) formulated the model law on international e-commerce, which established a global legal principle addressing the issue.47 Specifically, in the United States, the National Conference of Commissioners on Uniform State Laws (NCCUSSL) have worked for several years to propose amendments to the United States' Uniform Commercial Code to incorporate language regarding e-commerce transactions.48

III. LEGAL QUESTIONS AND PROPOSED SOLUTIONS REGARDING INTERNATIONAL E-COMMERCE

A. Legal Issues Concerning International E-commerce

There exist a plethora of legal issues concerning e-commerce.49 The two that this paper will focus on are taxation of e-commerce and consumer privacy.

1. International Taxation of E-commerce Income

The emergence of the Internet and e-commerce has generated millions in revenue for the online merchant.50 National and local governments have debated on how to harness e-commerce's success into the government's coffers of taxable revenue.51 Yet, taxation of the Internet can be difficult when international corporate taxation is based on geographical location.52


49. See Fox, supra note 33, at 161 (listing eight issues ranging from contract formation and execution to content regulation).

50. See id. (predicting optimistically that by the year 2003 e-commerce transactions may reach 5% of all global sales or $3.2 trillion U.S. dollars).


52. Schaefer, supra note 23, at 134 (evaluating the difficulty of taxing the Internet economy and declaring that predicated tax rules are necessary to examine taxation of global e-commerce income). See also infra Section III.A.1. (advocating that global taxation acts as a hindrance to economic progress on the Internet).
Two methods of taxing the international e-commerce income are source-based taxation and residence-based taxation. Source-based taxation, or taxation by source country, dictates that "a country may impose a tax on a non-resident company if that company derived [its] income within the country's borders."\(^{53}\) Source-based taxation can only be applied to companies with a permanent establishment in the source country. The establishment requirements are derived from OECD Model Income Tax Treaty, which states that a company should have economic ties with the source country to cause a legal establishment.

On the other hand, residence taxation states that the resident country of the corporation has the authority to impose taxes.\(^{54}\) The difficulty of applying these two methods to e-commerce transactions is that companies solely operating on the Internet have no physical residence. Additionally, developing countries, under the residence-based taxation method, would be excluded from taxing some corporations "squatting" in its territory.\(^{55}\)

2. Global Privacy of Consumer Information

Another legal dilemma facing e-commerce is the protection of consumers' privacy when conducting an online transaction. Consumer International conducted a global e-commerce shopping survey, which concluded that despite the rise in the use of the Internet to buy products, consumers' confidence in the entire process is low.\(^{56}\) Some believe that consumer confidence in e-commerce is crucial for the success of global e-commerce.\(^{57}\) However, the responsibility for consumer protection tends to fall on the e-commerce corporations and not on the individual consumer.\(^{58}\)

\(^{53}\) Schaefer, supra note 23, at 125.

\(^{54}\) See id. at 124 (providing background information regarding taxation under the OECD Model Income Tax Treaty).

\(^{55}\) See id. at 135 (arguing that developing countries benefit best under a source-based taxation model).

\(^{56}\) See International Chamber of Commerce, How e-business can secure vital consumer confidence, at http://www.iccwbo.org/home/news_archives/how_e-business_can_secure_vital_consumer.asp (Sept. 20, 1999) (acknowledging that 11% of the time, when an item was purchased online it was never delivered).

\(^{57}\) See id. (citing Louise Sylvan, chief executive of the Australian Consumers' Association).

\(^{58}\) See id. (articulating UK's Advertising Standards Authority personnel, Caroline Crawford's views that self regulation by the e-commerce companies would establish consumer protection guidelines without national government intervention).
B. A Legal Foot to Stand on Regarding International E-commerce

1. There is No [Cyber] Space for Taxation of International E-commerce Income

The question of taxation of e-commerce transaction is nation state specific. Currently, members of the United States Congress have expressed their desire to place a moratorium on new state and local Internet sales and services tax.\(^{59}\) The United State's position is that unregulated e-commerce will benefit both rich and poor nations alike.\(^{60}\) However, within the United States, the NCCUSSL has proposed uniform laws that the individual states may agree to adopt regarding the regulation of Internet software licenses.\(^{61}\)

The legal and tax consequences of doing business across borders are intensified when the domicile of the business is unknown.\(^{62}\) Yet, some have advocated that taxation of global e-commerce transactions would provide beneficial revenues for individual national governments. Some members of OECD advocate taxing e-commerce.\(^{63}\)

In Argentina, a law has been passed to place tariffs on all intellectual property entering the country on discs or by electronic transmission.\(^{64}\) Argentina has yet to test the law. U.S. companies, along with the European Union, are in the midst of negotiating a self-regulatory scheme where the companies agree to certain e-commerce etiquette.\(^{65}\) The U.S. government advocates a non-taxing e-commerce policy.\(^{66}\) Instead, the administration favors a permanent moratorium on international e-commerce tariffs.\(^{67}\) Some scholars predict that collection of any taxes for the purchase and download of strictly online intellectual property will be difficult.\(^{68}\) Currently, no country imposes tariffs on e-commerce.

\(^{59}\) See LITAN & NISKANEN, supra note 51, at 26 (explaining that Senator Ron Wyden (D-OR) and Representative Chris Cox (D-CA) sponsored legislature which would place a freeze on state and local laws which are designed to place a tax on e-commerce transactions).

\(^{60}\) Burgess, supra note 41; See also Patrick Thibodeau, Trade group readies international E-commerce guidelines, NETWORK WORLD FUSION (Oct. 18, 1999).

\(^{61}\) See UCC Article 2B, supra note 48.

\(^{62}\) This problem is more acute in the case of purely web-based companies which have no real physical presence, except on the Internet.

\(^{63}\) Thibodeau, supra note 60.

\(^{64}\) Burgess, supra note 41. This law includes computer software and hardware and MP3 music files. Id.

\(^{65}\) See id. (stating that the U.S. would like to extend the temporary moratorium on tariffs on cross-border electronic transmissions agreed to by WTO members last year).

\(^{66}\) See id. (quoting Deputy U.S. Trade Representative Susan G. Esserman requesting that no barriers to Internet-based trade be established).


\(^{68}\) Alan Reynolds, The Coming of E-Commerce Boom, AM. OUTLOOK, Spring 1999, at p. 34.
2. Globus Caveat Emptor

The theory of "let the buyer beware" arises in terms of global e-commerce marketing and the privacy rights of consumers. The Organization of Economic and Cooperation and Development (OECD) plans to release a set of consumer protection guidelines to aid American companies doing business abroad. The guidelines establish business standards for selling products over the Internet.

In September, Consumers International conducted a diagnostic of more than 700 international e-commerce websites, with thirty-five percent in Australia. The results indicated that most international e-commerce websites lacked legal language stating the controlling law on the Internet contract or any privacy policy.

The solution to the problem of consumer protection in global e-commerce transactions begins with the consumer. Forcing e-commerce businesses to act with more self-regulation presumes that companies have been in compliance with generally accepted business standards. However, self-regulating companies are few. Consumers should have a grain of skepticism when conducting certain transactions online. There is a correlation between consumer confidence and the success of global e-commerce. However, this link is not damaged if the consumer exercises his or her best judgment.

C. The Legal Laissez Faire Approach to International E-commerce

1. Absolute Bar on Global E-Tax Promotes Market Efficiency

An absolute bar to international taxation of the e-commerce income promotes market efficiency by preventing legislative waste. Information rich nations tend to regulate e-commerce more than information poor countries. The legislation, thus far, tends to address fair dealings in international e-commerce transactions and consumer privacy on the web. However, some countries have resisted the urge to draft laws regarding the taxation of international e-commerce. Taxation of international e-commerce would slow down the amount of commerce on the Internet. Taxation would increase the start-up costs for international e-commerce businesses. Thus, the amount of revenue generated would actually decrease because a tax would be levied on the income.

69. Thibodeau, supra note 60.
70. See id.
72. See infra Part IV (discussing the difference between information rich versus information poor).
73. See infra Part II.B.1 (discussing the United States government desire to place a moratorium on international taxation of the e-commerce).
Non-taxation of international e-commerce has a downside. The disadvantage to developing countries is that they will be unable to benefit from the increasing revenue that the international e-commerce generates. Yet, such a disadvantage is outweighed by the advantage of promoting international e-commerce.

2. Consumer Skepticism is Needed for an Efficient International E-commerce Marketplace

The theory of globus caveat emptor, or international buyer beware, works in two ways. First, it creates a duty on the international e-commerce seller to act fairly and truthfully in its dealings. Second, it shifts the responsibility of consumer protection in international purchases from the seller to the consumer since the enforcement of breaches of international consumer privacy is difficult since no specific global governing body exists.

IV. INTERNATIONAL E-COMMERCE POLITICAL CONCERNS & PROPOSALS

A. Political Issue Concerning International E-commerce

1. International Impact of the Digital Divide

a. What is the Digital Divide?

The digital divide is the term used to describe the division between those persons, within a given nation, who have access to and/or knowledge of the intellectual property characteristics of the Internet. Globally, the digital divide is not based on race or ethnic division, which exists in the United States. Nor is the digital divide a solely economic issue to be resolved among nation states. There are, however, two common characteristics that dictate the degree to which a digital divide exists within a country.

The first characteristic that indicates the degree of a digital divide existing in a country is the amount of intellectual property the country controls. The term "info rich" is the degree of intellectual property that currently exists in the nation state or is under the state’s control, either by regulation or other means. If the means to create intellectual property exist in a country, the country can be deemed information rich even if it presently do not have a large amount of

74. See Richard G. Barnes, Government concerned by growing digital divide, THE PHILADELPHIA TRIB., Aug. 7, 1998, at 5A (noting FCC Chairman, William Kennard, classifying the digital divide as a racial divide where Black and Hispanic Americans are more likely not to have a computer in their homes).

75. See, e.g., William E. Kennard, Information POWER: William E. Kennard, FCC Chairman, Shares With Us The Importance Of The ‘Information Age, SACRAMENTO OBSERVER, Sept. 9, 1998, at S30 (noting that Chairman Kennard was giving this speech before the NAACP regarding the lack of African American representation in the technology field).
intellectual property under its direct control. "The means for existence" can be illustrated through legislative or governmental intent to become info rich. In addition, info rich countries try to legislate e-commerce.\footnote{76} In contrast, info poor nations lack the necessary technological infrastructure and necessary resources to become a technology property owner. Furthermore, info poor countries systematically lack the means to establish an intellectual property foothold. Although the current market trend and technological advances create a division between info rich and info poor states, as the Internet and its progeny, e-commerce, become more global in nature the chasm which exists will narrow.

The second common characteristic of the existence of a digital divide within a nation is the number of people in the country who have the requisite technological knowledge (T knowledge) to know how to utilize the intellectual property (T knowledge rich v. T knowledge poor). T knowledge rich countries tend to have more people that are obtaining or have an advanced knowledge of intellectual technology. In comparison, T knowledge poor countries lack the requisite number of people who are technologically inclined to fill the increasing number of intellectual property jobs available in the given nations. These highly skilled workers are missing in T knowledge poor nations because there either exists a limited number of people with that knowledge or the populace as a whole lack people with such sophisticated knowledge. Similar to the factor of intellectual property, there is a direct correlation between the number of persons with intellectual knowledge and the degree of the existence of a digital divide.

b. \textit{Four International Models of the Digital Divide}

Four international models of the existence of a digital divide develops from the characteristics of ownership and control of intellectual property and technological knowledge. The first model is countries that are info rich, T knowledge rich. India best illustrates this model type. Economics and inherent classism are the strongest basis for the digital divide in India.

India has a large population of persons who are familiar with intellectual technology and e-commerce.\footnote{77} Currently, India has the largest population of intellectual manpower, outside of Silicon Valley.\footnote{78} Yet, despite India's high T...
knowledge quotient, the country still has difficulty demystifying the Internet and intellectual technology for the general India populace. \(^79\) In a country of more than one billion, the role of the Indian government is not only to harness its T knowledge, but also to convince the Indian population that the Internet and e-commerce is something to embrace. \(^80\) A second issue facing the Indian government is the need to regulate international e-commerce. Although India can be described as info rich, T knowledge rich, the country does not have any current legislation regarding e-commerce. \(^81\) The Indian legislature expects to have a proposed e-commerce bill by the summer of 2000.

Singapore’s approach to international e-commerce can be described as info rich, T knowledge poor. \(^82\) Singapore’s digital divide does not stem from a lack of technological development but from the lack of knowledgeable persons to implement their plans. Singapore currently has legislation on e-commerce. \(^83\) However, the country lacks the necessary manpower to execute its intellectual technology initiatives.

On March 30, 2000, Singapore and India announced a plan to enter into a joint partnership to harness both countries’ intellectual technology know how and man power. \(^84\) According to Yeo Cheow Tong, Singapore’s Minister for Communications, Singapore recognizes that India dominates the East-Asian technological community with large populations of intellectual talent. \(^85\) Thus, part of the purpose of the joint task force is to “tap into the vast pool of talents that India has.” \(^86\) In addition, Singapore Prime Minister Goh Chok Tong has stated that due to the lack of local talent within its country, Singapore needs foreign talent to implement its intellectual property plans. The Singaporean

\(^79\) See id. (acknowledging that if India does not convince its more than one billion population that the Internet is something to embrace, then the Internet will not become an asset but a liability widening the digital divide).

\(^80\) See id. (declaring that there is a view persistent in India that the Internet and its progeny are limited to elite groups of English speakers in the upper class of society).

\(^81\) Id. (citing India’s Minister for Communications and Parliamentary Affairs, Pramod Mahajan, as stating that India is in the process of formulating legislation regarding e-commerce). Information rich nations tend to have some form of e-commerce in process or it is already a part of their laws. See Robert MacMillian, Senate Democrats Unite on Electronic Signatures, NEWSBYTESNEWS NETWORK, Mar. 30, 2000 (articulating the United States Senate’s bill entitled The Millennium Digital Commerce Act, which is proposed to establish federal guidelines regarding the creation of binding electronic contracts and electronic signing of documents).

\(^82\) Singapore, India Join Forces in Information Technology, supra note 77 (quoting Singapore’s Minister for Communications, Yeo Cheow Tong, desire to turn Singapore into the Eastern Silicon Valley).

\(^83\) Id. (discussing India’s desires to implement e-commerce legislature similar to Singapore’s legislation).

\(^84\) Id. (describing India and Singapore’s plans to create a joint information technology task force).

\(^85\) See id.

\(^86\) Id. (quoting Yeo).
government believes that their national digital divide can be resolved through international infusion of more people with intellectual technical knowledge.

The third model of an international digital divide, info poor, T knowledge poor, is demonstrated by the governmental practices within New Zealand. New Zealand’s approach to increasing technological ownership is by cost benefit analysis. New Zealand’s Minister of Information Technology, Paul Swain, stated, in his briefing papers to the government, that “New Zealand is not doing enough, fast enough, to reap the full benefits of electronic commerce . . .” This is due in part to New Zealand’s technology focus. Unlike information rich countries, like India, who focus on instantaneously acquiring intellectual property and people, New Zealand’s mentality relates the country’s lack of technological progress with the lack of understanding of the issue. The New Zealand government policy ignores major e-commerce issues, such as consumer privacy and taxation, and instead focuses on increasingly practical and market research on the feasibility of e-commerce. By focusing solely on whether e-commerce is feasible, the New Zealand government gets further and further from becoming either info rich or T knowledge rich.

Finally, the model of info poor, T knowledge rich is difficult to find an example of in the global context. The model in and of itself begs the question, how can a country that does not own intellectual property have a populace which has extensive technological knowledge. Although this model type may not currently exist, it does not preclude the possibility of such an example in the future.

B. The International Politics of E-commerce

E-commerce for one, E-commerce for all: closing the gap on the international digital divide. A nationalistic approach to the international digital divide is the best approach to alleviating the problem. A nationalistic approach looks to the government or world organizations to intervene in international electronic economy. By intervening, the government and/or the agency assert their authority over the e-commerce market to ensure that technologically disenfranchised groups have access to the electronic market. In addition, a

87. See, e.g., Eric R. Biel, The Impact of Technological Change on Developing Countries, 25 CAN.-U.S. L.J. 257, 264 (1999) (analyzing the negative impact new technologies will have in developing countries, i.e., widening the digital divide).

88. See Rob O’Neill, Government Gets Proactive with E-commerce, INDEP. BUS. WEEKLY, Mar. 29, 2000, at 20 (maintaining that New Zealand’s Minister of Information Technology, Paul Swain has recently laid out in a report the legal impediments to e-commerce development in New Zealand).

89. See id. “Progress is hampered by the lack of adequate research and statistics on local e-commerce.” Id.

90. See id. (confusing the current legal issues of e-commerce, taxation, and consumer privacy with lesser important issues such as statistics on local e-commerce).
nationalist approach calls for an increased intellectual ownership by national
government. Such an approach promotes strategies toward narrowing the
international digital divide.

C. Political Analysis

1. How Does Increased Competition Resolve the Problem of Lack of
   Intellectual Ownership Due to the Digital Divide?

   Increased competition in the global e-commerce market resolves the
dilemma of the lack of intellectual ownership by certain Internet disenfran-
chised groups by allowing market forces to dictate a solution. Although the
Internet has provided a forum to create new market forces on the economy,
economic law still prevails. Microeconomic theory may be used to explain
e-commerce. The three basic assumptions of microeconomics are: (1) no
barriers exist for a company to enter and exit the market; (2) no business
dominates and thus has the ability to manipulate market prices; and (3)
companies will operate at a loss in the short run. Any company desiring to
conduct business online needs a business plan and little to no money to begin.
Companies conducting business on the Internet are so fluid that e-commerce
ideas are easily duplicated and thus creating competition. Amazon.com is a
prime Internet example of the sacrifice of short-term loses for long-term
profits.

   Political economy is defined as the parallel existence and mutual
interactions between the state and the market. A pure capitalistic market
exists when the state is absent from the equation and the market is left on its
own to establish the prices of commodities due to market forces. On the other
hand, a pure socialistic market exists when the market is non-existent and it is
the job of the state to provide the commodities to society.

   One assumption is that in order to increase national wealth, there must be
free and unrestricted exchange among individuals in both the domestic and

91. Jacob M. Schlesinger, If E-Commerce Helps Kill Inflation, Why Did Prices Just Spike?, WALL
    ST. J., Oct. 18, 1999 at A1, (quoting University of California at Berkeley economist Hal Varian as saying
    "technology changes but economic laws do not.").
93. Id.
94. Id.
95. Id.
96. Id.
97. C. ROE GODDARD, JOHN T. PASSÉ-SMITH, AND JOHN G. CONKLIN, INTERNATIONAL POLITICAL
98. Id. (capitalism).
99. Id. (socialism).
international economies. Some scholars have argued that pure market theories may be put to the test with the emergence of e-commerce and its effects on the market. However, that argument may be hindered by the fact that the Internet does not provide perfect competition at all times. The Internet also allows industry leaders to obfuscate certain websites so that only industry experts can have access to discounted prices, while simultaneously hosting a high-end priced website that is easier to comprehend.

2. A Nationalistic Approach to the International Digital Divide

On the other hand, applying a nationalistic model can lessen the issue of the international digital divide. Unlike free market competition, a nationalistic approach to international e-commerce urges foreign governments to intervene in the electronic economy. The theory being that without government intervention, info poor/knowledge poor countries, like New Zealand, will be unable to industrialize their technology and thus widen the international digital divide.

A nationalistic approach toward combating the international digital divide can also occur at the international agency level. The WTO’s assertion that international e-commerce is inherently within its authority gives rise to theory that the WTO can use its power to narrow the digital divide. Info rich/knowledge rich countries should urge the World Trade Organization to intervene in the global economy generated by e-commerce in order to encourage the use of the Internet in business but also to level the playing field. Without the WTOs intervention, some countries will be unable to benefit from the advent of e-commerce in the global market and thus fail to become players in the new global market.

V. THE INVENTION OF INVENTION

The United States is the world leader in e-commerce. Although e-commerce only accounts for 1% of the retail economy in America, it has been

100. Id. at 26.
101. Schlesinger, supra note 91 (acknowledging the theories of MIT economists Erik Brynjolfsson and Michael Smith).
102. See id. (giving the example of travel agencies and their ability not to create a price war through lower airfares accessible on the Internet).
103. See infra Part V.A.1 (describing China’s nationalistic e-commerce model).
104. See infra Part II.C (expressing that the WTO believes it has authority over international e-commerce under the WTO/GATT).
105. Burgess, supra note 41.
106. Schlesinger, supra note 91.
a force in lowering prices online as well as off-line.\textsuperscript{107} E-commerce creates the same efficiency of service on an international scale as it does on a domestic one.\textsuperscript{108} Before the ease of access to the Internet, commerce was dominated by vertical economic links that interconnected manufacturers, wholesalers and retailers causing consumer prices to be linked with "middle-man" syndrome. The emergence of the Internet has converted vertical economics to horizontal economics where all upstream suppliers are on the same level, thus giving consumers easier access to the best price for a product.\textsuperscript{109} This translates into lower prices for the average consumer due to decrease in inventory stockpiling by the seller.\textsuperscript{110}

A. The Internet Creates New Models of Doing Business

Many U.S. merchants have specifically targeted foreign buyers.\textsuperscript{111} The Internet has been the greatest benefit to the individual consumer as well as merchants.\textsuperscript{112} The consumer can buy over the Internet, without the purchase of a plane ticket, using only a mouse and a credit card.\textsuperscript{113} Single interactions by consumers become great ripples in the e-commerce supply chain.\textsuperscript{114} Thus, companies are advised to be more flexible to the consumer-centric market of the Internet.\textsuperscript{115}

1. Nationalistic E-commerce Model - China’s Plan

On April 6-8, 2000, China held its 4th China International E-Commerce Summit. The purpose of the summit was to bring together the top information technology specialist from China and around the world to discuss how to

\begin{itemize}
\item \textsuperscript{107} Id. (finding that although car buyers may not buy a car over the web, a majority will use the web to determine what is an ideal price for a car in their local area).
\item \textsuperscript{108} Burgess, supra note 41 (expounding the premise that the use of the Internet can shorten response time between purchasers and merchants, decrease the need to store piles of inventory, and increase the diversity of goods offered).
\item \textsuperscript{109} Michael Casey, \textit{Power of the Internet Ensures Supply and Demand Will Never Be the Same}, WALL ST. J., Oct. 18, 1999, at A43M (stating that horizontal economic structures allow purchasers to give a greater access to sellers).
\item \textsuperscript{110} See id. (stating that the Internet has brought about an age of efficient consumer response and continuous replenishment of inventory).
\item \textsuperscript{111} Burgess, supra note 41 (contending that U.S. merchants have established web pages specifically for foreign buyers).
\item \textsuperscript{112} See id. (noting that many international consumers comparison shop over the Internet for quotations on prices of a particular item in the next state or country).
\item \textsuperscript{113} See id. (describing the use of downloadable MP3 music files as a means of selling records world wide).
\item \textsuperscript{114} Casey, supra note 109.
\item \textsuperscript{115} See id.
develop the Internet and e-commerce in China. As of the end of 1999, from a total population of 1.3 billion people, 4.5 million are Internet users. The number is estimated to increase to 9.4 million users by 2002. China's Minister of Information Industry currently has five goals for China's e-commerce development.

First, China would like guidance in the overall planning of e-commerce development. China's governmental intervention could be looked at in two ways. The Chinese government's assistance could stem from the government's desire to aid in the furtherance of e-commerce in China. Yet, on the other hand, such interference from an intolerant government, such as China, could result in the Chinese government censoring the content of certain websites.

Second, the Chinese government would like to emphasize the function of enterprises in e-commerce development. On November 15, 1999, the Chinese agreed to permit foreign investors to own up to 49 percent of telecommunications industries, including Internet services. China's major concerns regarding development of an e-commerce market are its inadequate electronic infrastructure, diminutive credit card base, lack of communications among government departments and difficult to communicate with inland provinces. Yet, the agreement has been a catalyst for China's membership into the WTO. Furthermore, China's move to deregulate the telecommunications industry has opened the way for local Chinese companies to emerge as e-commerce providers.

Third, the Chinese government seeks to have standardized guidelines for any e-commerce development project. The Chinese government's major concern is exposure of inappropriate content to children. But the government, aside from the telecommunication ban from foreign investment, has not indicated the degree of its control of the Internet.

118. See id.
120. See id.
123. White, supra note 121.
124. See id.
125. See id.
Fourth, E-commerce websites within China must obey Chinese regulations on security and national law. Similar to other countries in the world, in China it is a criminal offense to misuse the Internet for criminal benefit.

Finally, cooperation between the Chinese government and international e-commerce business will be intensified.

2. Intrabusiness Model - IKEA

Ikea, the Swedish based home furnishing store, launched an international e-commerce website which will advertise and sell twenty to thirty percent of its current merchandise.\(^{127}\) Ikea, through its advertising agency, developed a series of microsites, which are targeted to certain life situations.\(^{128}\) Similar to old-fashioned mail order catalogs, the new website systems would be an electronic mail order service for its stores around the world.\(^{129}\)

3. Interbusiness Model

The advantage of the Internet to the consumer is the ability to gain information on multiple sellers of any given product. In addition, the Internet allows consumers to have access to the same items online if the local seller charges too much.\(^{130}\) However, the majority of e-commerce sales are from business to business transactions.\(^{131}\) Businesses that specialize in computers or Internet components use the Internet to make products designed specifically for the customer.\(^{132}\) Likewise, other industries that are supply and demand driven have been through the global use of the Internet. Purchasers for companies dependent upon chemical products, industrial parts and commodities, or steel and biological raw material are no longer stagnated by the geographical location of their supplier.\(^{133}\)


\(^{128}\) *Ikea to Offer a Fresh Start*, supra note 127.


\(^{130}\) Schlesinger, supra note 91; citing economist Ethan Harris' statement that "the Internet eliminates local monopoly power." Id.

\(^{131}\) Reynolds, supra note 68, at 33.

\(^{132}\) Dell Computers began as a company which sold computers over the Internet, specifically to those specifications requested by the customers. The advantage of such an approach ensures that they are "built to order" for the customers specific needs.

\(^{133}\) Casey, supra note 109 (featuring two companies, FreeMarket Inc. and VerticalNet Inc., which provide an auction based system to allow industry buyers better access to suppliers worldwide).
B. The Global Reach - Yahoo! A Case Study

In September 1999, Yahoo!, a leading Internet portal, launched Yahoo! China (http://www.yahoo.com.cn). The twentieth system in Yahoo!'s global network, Yahoo! China provides a localized web guide to financial, news and regional information, as well as e-mail and instant messaging. The Yahoo! service utilizes both simplified Chinese characters and traditional Chinese script. Similar to the original Yahoo! portal, Yahoo! China, as a search engine and ICP, organizes information under various easy to access categories with banner advertisements.

Yahoo! China did not enter the Chinese electronic business community on its own. Instead it created a joint venture with Beijing Founder Electronics Co., Ltd., a subsidiary of Founder (Hong Kong) Limited and a leading information technology company in China. Founder Limited is the world's largest research based for China's electronic publishing systems. The initial purpose of the joint venture was to establish a venture company that will provide online advertising in mainland China and develop Internet technology and applications. The implicit goal of the joint venture was to circumvent the Chinese government's ban on foreign investment in China's Internet industry.

Prior to and after Yahoo! China launched its website, Wu Jichuan, China's Minister of Information Industry (MII), had forbidden partnerships similar to Yahoo! China. The Chinese government's focused on the ban on foreign investment in its telecommunication industry. China's ban is based on the notion that foreign investment would corrupt China's telecommunication industry. Thus in China, the Internet, as a branch of telecommunication, must also have a ban against foreign investment. Yet, Yahoo! China received a tacit consent from the Chinese government for their endeavor. The tacit consent was not explicit but was implied by the government's lack of action in blocking the service.

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135. White, supra note 121.
137. Id.
138. Id.
139. Id.
141. Id.
142. Id.
143. Id.; see Chinese Internet Off Limits to Foreigners, ASIA INTELLIGENCE WIRE, Sept. 28, 1999 (saying Yahoo! China was launched four days later).
144. Chinese Internet Off Limits to Foreigners, supra note 143.
145. Id.
146. Yahoo! Evades ban on Net Deals, supra note 140.
consent could be due to the fact that in China there exists no one department that governs the Internet. The overall confusion regarding the telecommunication policy of the Chinese government has allowed other companies to defy the ban.

Recently, on March 30, 2000, the FTC announced that it was investigating Yahoo!’s consumer information gathering to determine whether it complied with consumer protection laws. Yahoo acknowledged the FTC’s concerns. Yet, Yahoo believes the FTC’s inquiry is due in part to a non-profit health care foundation’s allegations that some of Yahoo’s medical related websites were sharing information about their users. According to California Healthcare Foundation, Yahoo’s host sites failed to meet consumer privacy guidelines by not requiring across the board standards for all online business relationships as to the disclosure of consumer information.

This scenario raises the issue as to how far must an e-commerce website provider go to ensure the protection of a customer’s privacy. Furthermore, when is the consumer no longer a consumer of the original e-commerce company, at online business relationship level 1 or level 100?

VI. CONCLUSION

The lack of global taxation on international e-commerce income promotes efficiency in the market. Although some countries may benefit from source-based taxation of e-commerce income, overall taxation acts as an impediment to international e-commerce. Companies conducting international business over the Internet should be aware of their responsibility of fair dealings to their customers. However, the burden of consumer protection regarding international e-commerce should lie with the consumer. The customer is the one who has the ultimate control over whether their personal information is disseminated over the Internet. Therefore, the customer should take measures to protect themselves. Finally, the international digital divide created by the emergence of the Internet and e-commerce is a national specific phenomenon. One broad sweeping solution can not resolve the problem world wide. Each nation state needs to access their degree of intellectual ownership coupled with their amount of intellectual knowledge in order to create solution to e-commerce.

147. Id.
150. Id. (discussing that the FTC quickly responded to California Healthcare Foundation’s allegations against Yahoo by asking related healthcare sites if CHF’s statements were true).
151. Id.
UNDP'S NATIONAL EXECUTION MODALITY: ON THE ROAD TO TURNING THE MANAGEMENT OF DEVELOPMENT PROGRAMMES OVER TO PROGRAMME GOVERNMENTS

Francis M. Ssekandi and Peri Lynne Johnson*

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I. INTRODUCTION

The United Nations Development Programme (UNDP) is the cornerstone of the United Nations efforts in the field of international development cooperation and operates as the central funding and catalytic mechanism of the United Nations development system. From its origins in the Expanded Programme of Technical Assistance and Special Fund to the present, UNDP has continually adapted itself to the changing needs of programme countries and the evolving nature of international development.

Developing cooperation in the 60s and early 70s was largely perceived as technical assistance: the transfer of skills, technology and knowledge from the advanced and rich countries to the poor countries of the third world. In keeping with the times, UNDP used Specialized Agencies,¹ such as FAO and UNESCO,

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¹ Organizations brought into relationship with the United Nations under Article 63 of the Charter.
largely staffed by people from developed countries to provide technical assistance.

It is widely accepted today that a more cooperative approach to the provision of development assistance is necessary,\(^2\) one where there is partnership among people and active participation by those in the programme country in the design and implementation of development programmes and projects.\(^3\) In UNDP, the main instrument to convey this approach to the provision of development assistance is known as national execution.

This paper documents UNDP's transition from the traditional model of providing development assistance referred to above, which used Specialized Agencies as UNDP's technical and managerial agents, known as the tripartite relationship among UNDP, the Specialized Agencies and programme country governments, or agency execution, to national execution, where governments assume overall responsibility for such management.

In order to understand UNDP and the significance of this transition, Section One describes UNDP's origins in the Expanded Programme of Technical Assistance and the Special Fund as well as the subsequent merger of these two programmes to form UNDP. Section Two traces the institutionalization of national execution in UNDP as the norm for the provision of development assistance. Finally, Section Three gives an overview of the promises and challenges of national execution.

II. SECTION ONE

A. The Expanded Programme of Technical Assistance

The Expanded Programme of Technical Assistance was approved by the General Assembly in its resolution 304 (IV) of 16 November 1949, on recommendation of the Economic and Social Council, with the primary objective of helping under-developed countries to "strengthen their national economies through the development of their industries and agriculture, with a view to promoting their economic and political independence in the spirit of the Charter of the United Nations, and to ensure the attainment of higher levels of economic and social welfare for their entire populations."

It was the first attempt by the United Nations to provide technical assistance on a large scale.\(^4\) An analysis of the principles on which the Expanded Programme was based and

\(^3\) Id. at 191-92.
\(^5\) MAHYAR NASBAT, NATIONAL INTERESTS AND BUREAUCRACY VERSUS DEVELOPMENT AID 1 (1978).
the manner in which it functioned can help to understand UNDP today—and the significance of the shift to national execution.

The origins of the Expanded Programme can be traced to an earlier General Assembly resolution, resolution 200 (III), of 4 December 1948, in which the General Assembly considered that "the promotion of conditions of economic and social progress and development [was] one of the principal objectives of the Charter of the United Nations" and that the lack of "expert personnel" and "technical organization" were among the factors impeding the economic development of underdeveloped countries. The General Assembly considered further that the United Nations could extend "efficacious and timely help" and requested the Secretary-General to arrange the following:

a. international teams of experts to advise Governments on their economic development programmes;

b. facilities for the training of experts from under-developed countries through fellowships for study;

c. facilities for the training of local technicians within the under-developed countries themselves; and

d. facilities to assist Governments obtain technical personnel, equipment and supplies.

The General Assembly requested the Secretary-General to report at each session on measures taken to implement the resolution and to formulate recommendations.

In resolution 180 (VIII) of 4 March 1949, ECOSOC requested the Secretary-General, taking into account, inter alia, General Assembly resolution 200 (III) and the Secretary-General's first report in response thereto, to prepare a report in consultation with the executive heads of the interested specialized agencies setting forth:

1. A comprehensive plan for an expanded cooperative programme of technical assistance for economic development through the United Nations and its specialized agencies, paying due attention to questions of a social nature which directly condition economic development;

2. Methods of financing such a programme including special budgets; and

7. Id. ¶ 2, 3 (a)-(d).
8. Id. ¶ 6.
3. Ways of coordinating the planning and execution of the programme.  

In response to ECOSOC's request, the Secretary-General consulted with the executive heads of the International Labour Organization (ILO), the Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the International Civil Aviation Organization (ICAO), the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF) and the International Refugee Organization (IRO); input was also received from a number of Member Governments and the Organization of American States. The Secretary-General's Report in response to ECOSOC resolution 180 provided an overview of the objectives and nature of the programme, the fields of work, forms of technical assistance, organization, finance, and included detailed proposals by the above-referenced organizations, except the IMF and IRO which prepared statements instead along with the International Trade Organization (ITO).

In June 1949, the Secretary-General proposed that "ECOSOC give consideration to the expansion of the scope of the technical assistance programme." Notably, the Secretary-General proposed comprehensive missions, advisory services by experts, training, seminars and publications, for a total increase in the 1950 budget for such activities to United States $676,000 from United States $307,750 appropriated for such purposes in 1949.

The Secretary-General's March and June 1949 Reports provided the basis for ECOSOC Resolution 222 (IX), which set out the Observations and Guiding Principles of the Expanded Programme.

The Observations and Guiding Principles of the Expanded Programme contained in Annex I of ECOSOC resolution 222 (IX) were recommended by ECOSOC to serve as guides to the United Nations and the specialized agencies participating in the Expanded Programme (hereinafter collectively "Participating Organizations") and addressed the following areas: General Principles, Standards of Work and Personnel, Participation of Requesting...
Governments, Coordination of Effort, Concentration and Economy, and Selection of Projects.

ECOSOC resolution 222 (IX) also set out the administrative and governing structure for the Expanded Programme. The Programme was governed by both a Technical Assistance Board (TAB) and a Technical Assistance Committee (TAC), both of which were to be guided by the Observations and Guiding Principles of the Expanded Programme.

The TAB consisted of the executive heads of the Participating Organizations chaired by the Secretary-General or his representative, and included the United Nations, ILO, FAO, UNESCO, ICAO, and WHO. The TAB provided a forum through which the Participating Organizations could come together and share information on new requests for assistance and ongoing activities. Each Participating Organization was required to present annual reports to the TAB on its proposed programme for the next year and the TAB was to make recommendations concerning the proposals and the overall programme to ECOSOC through the TAC. The Secretary-General was authorized to designate the Executive Secretary of the TAB, in consultation with the Participating Organizations, whose responsibility was to service the TAB.


15. Governments were to facilitate the activities requested from the Participating Organizations; and undertake sustained efforts required for economic development, including "progressive assumption of financial responsibility for the administration of projects initiated at their request under international auspices." Id. at Annex 1 ¶ 1, 5.

16. Id. at 7 ¶ 7.

17. Although not Participating Organizations, the IRBD, IMF, and IRO regularly attended and participated in the meetings of the TAB and pledged the fullest cooperation for the promotion of the objectives of the Programme. Report of the TAB, E/1742, at ¶ 7 (July 4, 1950). In addition, the International Telecommunications Union (ITU) and the World Meteorological Organization (WMO) became Participating Organizations on August 30, 1951 by ECOSOC resolution 400 (XIII), and the International Atomic Energy Association (IAEA) on October 23, 1958, by ECOSOC resolution 704 (XXVI) of the same date.

18. Id. at 5 ¶ 3-4.
The TAC was proposed as a standing committee of ECOSOC, consisting of the members of ECOSOC. The terms of reference for the TAC were as follows: to critically examine activities undertaken by the Programme and the results achieved; to examine each year's programme; to interpret ECOSOC resolution 222 (IX) in the event of conflicts; to receive reports from the TAB; and to review the working relationships between the Participating Organizations. At the first meeting of the TAB, a draft basic Agreement was prepared to be used in negotiating with the recipient countries regarding the provision of the technical assistance. The Agreement was based on the Observations and Guiding Principles contained in ECOSOC resolution 222 (IX), Annex I, and the experience of a number of international organizations. The agreement set out the basic terms and conditions under which the Participating Agencies would provide technical assistance to the recipient countries and addressed issues relating to the type of assistance to be provided, administrative and financial arrangements and the privileges and immunities to be accorded to the Participating Agencies and their personnel. The clauses in this early agreement are similar to those still being used today in UNDP's standard basic assistance agreement (SBAA).

As has been shown, the Expanded Programme was truly a joint initiative of the United Nations and the Specialized Agencies. The Specialized Agencies were deeply involved in establishing the principles upon which technical assistance would be provided to Governments under the Expanded Programme. From the earliest efforts of the United Nations in the field of development cooperation, the Specialized Agencies assumed the role of providing and managing such assistance.

B. The Special Fund

The Special Fund was established following a number of years of study by special committees of the General Assembly and ECOSOC on ways of enhancing urgent assistance to developing countries, as complementary to the work already done by the United Nations, the specialized agencies and the Expanded Programme. The purpose was to "advance the process of technical,
economic and social development of the less developed countries, and, in particular, [...to] facilitate new capital investments of all types - private and public, national and international - by creating conditions which would make such investments either feasible or more effective."

By its resolution 1219 (XII), and on the basis of the reports prepared by the Ad hoc Committee on the Question of the Establishment of a Special United Nations Fund for Economic Development, the General Assembly established the basic conditions for the establishment of the Special Fund and the terms of reference of a Preparatory Committee, composed of representatives of sixteen Governments and appointed by the General Assembly. 25

The Special Fund was intended to establish a new administrative and operational machinery to spearhead the enlargement of the scope of technical assistance available from the United Nations and the Specialized Agencies, to include such activities as "intensive surveys of water, mineral and potential power resources, the establishment-including staffing and equipping-of training institutes in public administration, statistics and technology, and agricultural and industrial research and productivity centres." 26

The establishment of the Special Fund was accomplished in October 1958, by General Assembly resolution 1240 (XIII), entitled "Establishment of the Special Fund." The resolution was adopted on the recommendation of ECOSOC, which by its resolution 692 (XXVI) if 31 July 1958 had set out the basic principles and structure of the Fund, following review of the recommendations of the Preparatory Committee. 27

The realization of the Special Fund was a unique accomplishment of the United Nations in the field of development. Many of the institutions until that time, such as UNICEF, had been by and large inherited from the League of Nations and so this was one of the new structures under the Charter of the United Nations. The Fund was provided a separate inter-governmental governing body, known as the Governing Council. 28 The Council was to exercise inter-governmental control of the policies and operations of the Fund, with final authority for the approval of the projects and programmes recommended by the Managing Director. It was to provide "general policy guidance on the administration and operations of the Special Fund." The management of the Fund was to be entrusted to a Management Director appointed by the Secretary-General after consultation with the Governing

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25. G.A. Res. 1219 (XII) was adopted on December 14, 1957.
26. Id. ¶¶ 1-2.
27. See Id. ¶ 2.
28. The Governing Council was transformed into the Executive Board in 1994 as a result of General Assembly resolution 48/162 dated December 20, 1993.
Council and subject to confirmation by the General Assembly. The Management Director was to be advised by a Consultative Board consisting of the Secretary-General of the United Nations, the Executive Chairman of the Technical Assistance Board and the President of the International Bank for Reconstruction and Development or their designated representatives.  

Immediately following the Governing Council’s second session in May of 1959, action was taken towards establishing the legal framework of Special Fund projects. The Governing Council prepared standard agreements designed to govern the relations between the Special Fund on the one hand, and the recipient governments and executing agencies on the other. These agreements were similar to those used by the Expanded Programme and embodied the conditions under which the Fund would provide each government with assistance. The Agreement specified the nature of participation of the government in the execution of projects, its counterpart contribution (provision of materials, equipment, supplies, etc.) as well as the provision of local facilities. The Agreement also dealt with the provision of privileges and immunities to be accorded to the Special Fund and the executing agencies, their property, funds and assets, and their personnel.

The Standard Agreement with the Specialized Agencies, the UN or the IAEA when acting as Executing Agency, known as the Executing Agency Agreement, specified the respective responsibilities for the execution of projects and outlined the financial and reporting arrangements. Pursuant to this agreement, the role of the Specialized Agencies under the Special Fund remained much the same as in the Expanded Programme. The Managing Director of the Fund was to rely on the assistance of the Specialized Agencies

29. The Consultative Board would seem to be the precursor of the modern day Management Committee established by the UNDP Executive Board for UNOPS.


when evaluating project requests and to use the services available within the Expanded Programme, moreover such Agencies along with the UN and IAEA were responsible for the execution of the projects.

In addition to the two aforementioned sets of agreements which constituted the basic legal framework for co-operation, a Plan of Operation was signed by the three parties concerned, for each individual project. A typical Plan of Operation, as a tripartite agreement between the Government, the Special Fund and the Executing Agency concerned, contained a description of the project, a detailed work plan for its execution including particulars concerning experts, fellowships and equipment to be provided, a timetable showing sequence of operation, and a detailed budget of the costs to be borne by the government and the Special Fund. Today, the Plan of Operation is known as the programme support or project document.

The other salient features of the Fund were that projects were to be undertaken only at the request of a Government or group of Governments (as with the Expanded Programme); the execution of projects was to be carried out by the United Nations, by the Specialized Agencies and the IAEA; and the Managing Director was authorized to contract services of “other agencies, private firms or individual experts” where the services of the executing agencies were “wholly or partly unavailable or inadequate.”

C. The Consolidation of the Expanded Programme of Technical Assistance and the Special Fund into the United Nations Development Programme

UNDP was established by General Assembly resolution 2029(XX) of 22 November 1965 by merging the Expanded Programme of Technical Assistance and the Special Fund, on the understanding that the special characteristics and operations of the two programmes, as well as two separate funds, were to be maintained and that contributions would be pledged to the two programmes separately. The justifications for the merger were to, inter alia, streamline the activities of the two programmes and provide a “more solid basis for the future growth and evolution” of UN assistance programmes.

A single inter-governmental committee of thirty-seven members known as the Governing Council of UNDP was established to perform the functions previously exercised by the Governing Council of the Special Fund and the TAC, including the consideration and approval of projects and programmes and allocation of funds. In addition, the Governing Council was to provide general policy guidance and direction for the United Nations Development Programme.

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36. Id. at pmbl.
as a whole, as well as for the United Nations regular programmes of technical assistance.\footnote{37}

In place of the TAB of the Expanded Programme and the Consultative Board of the Special Fund, an advisory committee known as the Inter-Agency Consultative Board of UNDP was established. The Board was to meet under the chairmanship of the Administrator or Co-Administrator and was to include the Secretary-General of the United Nations and the executive heads of the specialized agencies and of the International Atomic Energy Agency or their representatives. The Board was to be consulted on all significant aspects of the United Nations Development Programme, in particular, on the programmes and projects submitted by governments prior to their submission to the Governing Council, the selection of agencies for the execution of specific projects, and the appointment of the Resident Representative.\footnote{38}

In 1969, a few years following the consolidation of the Expanded Programme and the Special Fund, the United Nations commissioned a Study on the Capacity of the United Nations Development System.\footnote{39} The purpose of the Study was to assess the capacity of the United Nations system to effectively use UNDP's resources and its capacity to handle a programme double the operations at that time.\footnote{40} The Study critiqued the problems experienced in the UN development system, in quantitative and qualitative terms, and made recommendations for the future.

With respect to the qualitative aspects of UN development programmes relevant to the present paper, the Study pointed out that a donor bias existed whereby initiative came from specialized agencies and not from the country itself, that there was a failure to recognize the need for a comprehensive approach to development problems and insufficient emphasis on training.\footnote{41} The Study further noted that development projects resulted from the "salesmanship" of specialized agencies rather than the priority needs of recipient governments, that specialized agencies had heavy operational burdens which resulted in delays in programme delivery as well as a decline in quality.\footnote{42} Included in the Study's recommendations to address the problems was the need to broaden the concept of development to take into account the changing political, economic and social conditions, noting that international development is made up of individual national goals and reaffirming the country approach to

\footnotesize{\begin{itemize}
\item \footnote{37} Id. \textsection 4.
\item \footnote{38} Id. \textsection 6.
\item \footnote{40} Id. \textsection 1.
\item \footnote{41} Id. \textsection 21.
\item \footnote{42} Id. \textsection 23 (a)-(b).
\end{itemize}}
development. With respect to the specialized agencies, the Study recommended that, in cases where specialized agencies were over-burdened, projects should be contracted outside the system, noting that the legislative authority already existed, whereby the Administrator could specify that an Agency subcontract on his behalf when assigning a project to it for execution.

Following the recommendations contained in the Study, the General Assembly adopted resolution 2688(XXV) of 11 December 1970, which sets out UNDP’s methods of operation, excluding the subsequent changes relating, inter alia, to national execution discussed below. In accordance with this resolution, distinctions between the Technical Assistance and Special Fund components have been eliminated. UNDP was to operate under the “United Nations Development Co-Operation Cycle, which included the following phases: country programme formulation, project formulation, appraisal and approval, implementation, evaluation and follow-up.” The Cycle also included periodic reviews.

Pursuant to resolution 2688, country programming, the first phase of the Cycle, is based on individual national development plans, or where they do not exist, on national development priorities or objectives. The Government of the country concerned retains the exclusive responsibility for formulating its national development plan. The total resources available for programming is divided between country programming on the one hand and inter-country programming (consisting of sub-regional, regional, interregional, and global projects) on the other.

The implementation of UNDP assistance is overseen by the Governing Council and the Administrator. The Governing Council is empowered to approve projects submitted by programmes for consideration. However, the Governing Council while retaining this authority, delegates to the Administrator

43. Id. ¶ 34.
44. G.A. Res. 2029, supra note 39, at 20.
45. Other significant changes since the Consensus relate to the introduction of the programming approach which seeks to integrate projects into a coordinated programme or programmes within the country The Program Approach, U.N. Doc.E/1993/73, Annex III; U.N. Doc. E/1995/98, ¶ 69 and the shift from the use of the Indicative Planning Figure (IPF) for the allocation of programme resources which was essentially guaranteed funding for the country programme to TRAC resources which is based on the premise that governments get only a percentage of designated funding and that the remainder is contingent upon minimum performance indicators (cite).
46. See G.A. Res. 2029, supra note 39.
48. Id. ¶ 1.
49. Id. ¶¶ 4-5.
50. Id. ¶ 24. Recent developments in the area of the country program, country cooperation framework, program cycle, and program resources can be found.
for three years the authority to approve projects within country programmes.\textsuperscript{51} The Governing Council has over-all responsibility for ensuring that the resources of the Programme are employed with maximum efficiency and effectiveness in assisting the development of the developing countries.\textsuperscript{52} In particular, the Council's responsibilities includes: considering and approving country programmes, approving certain projects included in the programmes, exercising operational control (including periodic reviews of the country programmes), and making broad allocations of resources and control their use.\textsuperscript{53}

In addition to the responsibilities delegated to him by the Governing Council, the Administrator is fully responsible and accountable to the Governing Council for all phases and aspects of the implementation of the Programme.\textsuperscript{54} The application of the twin principle of the Administrator's full accountability for the Programme and the decentralization to the country level envisaged in General Assembly resolution 2688 required modifications in the existing structures and procedures of the Programme. At the headquarters level, regional bureaus were established to provide a direct link between the Administrator and the resident representative in all matters concerning field activities.\textsuperscript{55} In addition, in order to analyze the main trends in the evolution of the Programme, a small long-term planning staff was established at the headquarters level under the direction of a senior official.\textsuperscript{56} In addition, at the country level, the resident representative was re-designated resident director.\textsuperscript{57} There was the maximum possible delegation of authority to the resident director; he was to have full over-all responsibility for the programme in the country concerned.\textsuperscript{58}

Thus, under General Assembly resolution 2688, the role of the specialized agencies in the provision of development assistance is preserved. The resolution stipulates that the role of such Agencies is to be that of partners and their advice available to the Administrator in the implementation of all projects, whether executed by them or not.\textsuperscript{59} The resolution further stipulates that such Agencies shall have first consideration as executing agents for the implementation of the programme assistance.\textsuperscript{60}

\textsuperscript{51} Id. \textit{\$} 20.
\textsuperscript{52} G.A. Res. 2688, \textit{supra} note 50, at 35.
\textsuperscript{53} Id. \textit{\$} 36.
\textsuperscript{54} Id. \textit{\$} 37.
\textsuperscript{55} Id. \textit{\$} 57.
\textsuperscript{56} Id. \textit{\$} 58.
\textsuperscript{57} G.A. Res. 2688, \textit{supra} note 50, at 62.
\textsuperscript{58} Id. \textit{\$} 63.
\textsuperscript{59} Id. \textit{\$} 38.
\textsuperscript{60} Id. \textit{\$\$} 39-40.
Following the consolidation of UNDP, the Administrator commenced preparation of a new standard agreement with a view to reflecting the "unitary concept" of UNDP and to incorporating certain provisions from the project documents in order to simplify negotiations with the recipient countries on such project documents.61 Today, over 130 governments have signed the new basic agreement, referred to as the SBAA. It continues to be the basic agreement between UNDP and programme country governments that sets out the terms and conditions of UNDP’s support to such countries.

III. SECTION TWO

A. The Transition to Government Execution

Throughout the period up to 1974, development theory, policy and practice remained largely unchanged. The persistence of under-development was explained by the lack of technical skills, shortage of managerial capacity and dearth of capital.62 The injection of technical assistance and capital from more advanced countries was the logical solution.

However, by the Second United Nations Development Decade developing countries expressed the desire for a new international economic order, in part a manifestation of the declining validity of the traditional approach to development. The General Assembly adopted the International Strategy for the Decade on October 24, 1970, wherein the General Assembly confirmed that the ultimate objective of development must be to bring about sustained improvement in the well-being of the individual and bestow benefits on all.63 By 1974, the General Assembly had proclaimed a “New International Economic Order,” declaring that the greatest achievement during the last decades had been the independence from colonial domination and that the present international economic order was in direct conflict with developments in international political and economic relations.64 The General Assembly further declared that changes in the international economy necessitated full and equal participation of developing countries in all decisions concerning the international community.65

These dramatic changes in the international economic order forced UNDP to consider new dimensions in technical cooperation. UNDP recognized that the increased emphasis placed on self-reliance by developing countries required

62. Harrod/Dumas Growth Model.
65. Id. ¶ 1-3.
a re-thinking of the automatic dependence on external inputs in technical assistance. It is against this backdrop that UNDP declared for the first time that governments and institutions in recipient countries should be increasingly entrusted with the responsibility for executing UNDP projects. This view was supported by a group of experts selected by the Secretary-General, at the request of the General Assembly in resolution 3343 (XXIX) of December 17, 1974, to recommend proposals on structural changes within the United Nations system to ensure that it is fully capable of dealing with problems of international economic cooperation in a comprehensive manner. In this respect, the experts recommended that responsibility for execution of projects need not be automatically assigned to specialized agencies but that it could be entrusted to, inter alia, "the recipient Government itself; institutions in the recipient country; appropriate consultants, universities, contracting agencies or firms, etc., institutions of other developed or developing countries."  

Consistent with UNDP's consideration of new dimensions in technical cooperation, and the recommendations of the group of experts convened by the General Assembly, in June and November 1975, the Governing Council and the General Assembly decided that "Governments and institutions" in programme countries should be increasingly entrusted with the "responsibility for executing projects" assisted by UNDP. The decision by the Governing Council and the General Assembly constituted the first major legal step towards government execution and represents a significant progression from General Assembly resolution 2688 which gave first consideration for the execution of projects to organizations of the United Nations system.

Shortly after the adoption of resolution 3405 by the General Assembly, the UNDP Administrator issued guidelines on the execution of UNDP-assisted projects by governments and institutions of developing countries. In the
introduction to the guidelines, the Administrator explained that government execution would constitute "an important aspect of the move towards decentralization, and a means of economizing on overheads, enhancing the capabilities of local expertise and institutions, and thereby promoting self-reliance." The Administrator further explained that government execution would strengthen the "indispensable role" of governments in their development, diversify the supply base for UNDP and facilitate the delivery of an expanding programme. In accordance with the guidelines, governments were to nominate themselves or other national agencies, organizations or institutions as the “Government Executing Agency” with full responsibility for the preparation, implementation and follow-up of a project assisted by UNDP. Thus, the new partnership with governments under this modality was to be that of a bipartite relationship between UNDP and the government.

Upon request of a government to execute a project, UNDP would carry out an assessment of the government’s capacity to determine whether the proposed government executing agency had sufficient managerial and technical capability to fulfill its obligations as executing agency. In order to assess capacity, Governments were requested to provide information on:

(a) the experience of the institution in executing similar projects, whether financed from domestic or external sources;
(b) the depth of technical experience and know-how of the institution and its access to, and links with, national and international sources of expertise and know-how;
(c) the ability of the institution to exercise adequate managerial and administrative supervision over the project; and
(d) the internal budgetary, accounting and audit arrangements of the institution... [as well as] a copy of the financial rules and regulations of the institution.

When UNDP determined that the government executing agency had sufficient capacity to execute the project, under the government execution guidelines, that entity would be responsible for carrying out the project as it would if it were a government project. Thus, the government executing agency would be responsible for the engagement of international and national project staff, who were responsible to the Government; the procurement, transport and installation of equipment under the rules and procedures of the government;

72. Id. at 1.
73. Id.
74. Id. at 3.
75. Id. at 2.
76. Guidelines, supra note 71.
awarding of sub-contracts, which would be entered into directly between the
government and sub-contractor; and placement of fellows in training
institutions and carrying out other training activities.77

Although government execution was largely a bilateral arrangement
between UNDP and the government, provision was made for the involvement
of specialized agencies and other agencies of the UN system in all stages of the
project cycle. However, the involvement of such agencies was subject to the
specific request of the government and their role under government-executed
projects was limited to providing technical and substantive backstopping and
not the direct delivery of inputs, such as procurement.78

Following the issuance of the guidelines for execution of projects by
governments and institutions, on July 2, 1976, the Governing Council began to
restrict the Administrator's use of government execution by only authorizing
him to initiate government execution projects on a "carefully selected basis
pending submission of a detailed report to the Council . . . on the criteria,
evaluation and administrative procedures and changes in the financial rules
necessary for the implementation of that new dimension on a regular basis."79
Thus, although the guidelines on government execution were issued in May of
1976 to field offices and participating/executing agencies, just two months
following their issuance, the Governing Council in its decision 76/57 appeared
to slow down the move towards government execution.

In 1978, the Joint Inspection Unit (JIU) prepared a report on the Role of
Experts in Development Cooperation.80 The 1978 Report included an
assessment of the government execution modality. In particular, the Report
noted that implementation problems arise in projects when there is a "failure to
recognize government responsibility at the project identification and
formulation stages."81 The inspectors found that Governments which were not
involved at the early stages of project formulation felt that the project activities
did not relate to what they actually wanted and, consequently, expressed little
sense of commitment towards the project.82 The JIU recommended a "fresh

77. Id. ¶ 23.
78. Id. ¶ 49-51.
JIU/REP/78/3 (1978). [hereinafter Experts]. In accordance with the Statute of the Joint Inspection Unit
(JIU), approved by the General Assembly in resolution 31/192 of 22 December 1976, the JIU consists of not
more than 11 inspectors chosen among members of national supervision or inspection bodies who serve in
their personal capacity. The JIU is charged with the responsibility of investigating all matters bearing on the
efficiency of the services and proper use of funds, including evaluation of programmes and activities. The
inspectors may propose reforms or make recommendations which are contained in reports drawn up under
their signature.
81. Id. ¶ 44.
82. Id.
"approach" to government execution where each new project supported by UNDP would be under "full government management." Under the JIU proposal, although the government management authority would be exercised over all aspects of project implementation, the government could seek the cooperation of one or more of the agencies of the United Nations system in any aspect of project preparation or implementation, such as recruitment and procurement of international project components.

In preparing the Report, the JIU sent questionnaires to governments, UNDP resident representatives and agencies to elicit views on the applicability and feasibility of government execution. An analysis of the responses showed that 4/5 of the 72 responding governments felt that government execution was appropriate for use in their countries, with half giving it a high priority ranking. Resident Representatives and Agencies took a more conservative position than governments in assessing the suitability of government execution. The JIU further found that many governments had gained experience in recruitment and procurement through implementation of their own development programmes and established systematized procedures and machinery for these purposes. The JIU concluded, as follows:

Government project management is an essential step in the direction of self-reliant development, and it is equally imperative in order to clear up the existing uncertainty as to where the management authority for UNDP-assisted projects really lies. The present system not only divides responsibility and authority — thus contradicting one of the fundamental principles of good management by setting up dual chains of command — but it does so in a way which places actual decision-making powers in large measure beyond the reach of national authorities, who are nevertheless most vitally concerned. By the same token, the present system partly diverts the Agencies of the United Nations system from their proper preoccupation with the transmission of technical knowledge and skills, by involving them in numerous management and administrative tasks which should not be their primary concern. For all these reasons, the present system contributes to difficulties in project identification, planning and implementation in which there is insufficient government participation, and hence leads to large, if as yet unquantified, wastage in the use of both national and international resources. By accepting government management as standard procedures for the UNDP

83. Id. ¶ 45.
84. Id.
85. Experts, supra note 80.
86. Id. at 48.
87. Id. at 52.
programme, an energetic start can be made towards rectifying this situation and reducing the inefficiencies and diseconomies which characterize it.\(^8\)

The response of UNDP and the UN Agencies to the JIU Report was one of caution. In joint comments prepared by UNDP and the UN Agencies, they indicated that the proposals made by the JIU required the “most careful assessment” by the Council.\(^9\)

Following the JIU report, new guidelines on government execution were issued on January 18, 1979.\(^10\) The major difference in the 1979 procedures as compared to the 1976 procedures is the prominence of the role of the UN agencies. The 1976 procedures indicated that under government execution UNDP and the government would essentially have a bilateral relationship, with UN agencies providing technical support at the specific request of the government. In the 1979 procedures, however, the close association of the UN agencies with UNDP using the government execution modality is affirmed, as follows:

\[
\text{[Government execution] calls for constant awareness on the part of UNDP and Agencies of Governments’ primary responsibility for all management aspects of projects, and careful judgement in each case of how to derive the greatest benefit from the technical experience and knowledge available with the organizations of the United Nations system. The interdependence of UNDP and the Agencies in their support of countries’ development efforts and UNDP’s reliance on Agencies’ technical judgement in the planning and implementation of projects and in the assessment of their results call for constant and close cooperation in all aspects of government execution.}\(^9\)
\]

Consistent with the maintenance of the role of the UN agencies under government execution, the 1979 procedures introduced the term “Cooperating Agency” whereby a UN agency could participate in project execution along with the Government agency concerned, to assist the government in the utilization of UNDP-financed inputs.\(^9\) In addition, in Annex 1 to the procedures, government execution is defined as an “arrangement whereby

\(^{88}\) Id. § 54.


\(^{90}\) U.N. GAOR, U.N. Doc. UNDP/Prog/64; UNDP/Prog/HQTRS/116; UNDP/Prog/Field/101 (1974).

\(^{91}\) Id. § 2.

\(^{92}\) Id. § 43.
UNDP entrusts to a government the responsibility for the mobilization of UNDP-financed inputs and their effective application, in combination with the government's own and other available resources, towards the project's objectives.'93 In accordance with the 1979 procedures, governments were invited to designate one central authority to represent the government in dealing with UNDP, however, the central authority did not have to be the same entity actually carrying out project activities.94

In his report to the Governing Council in DP/558 of March 12, 1981, the Administrator proposed a reversal of the cautious and selective approach to implementing government execution previously adopted by the Governing Council. While the debate on the Report reflected a range of views, with some member states fully endorsing the approach and others arguing for a continuation of the cautious approach, the Governing Council requested, in its decision 81/21, that the Administrator give "full consideration" to implementation of UNDP assistance by the host governments and that the Administrator, along with representatives of the UN agencies, should review and analyze in greater detail the reasons for the lack of progress in implementing government execution.95

In response to decision 81/21, the Administrator submitted a report to the Governing Council wherein he stated that the experience with government execution had generally been positive, with a "slow but steady" progress in its use.96 Findings contained in the report indicated that most governments felt that, through government execution, they were closer to realizing self-reliance in their development efforts. Others felt that through assuming full responsibility in project design and implementation, the projects would be more likely to "respond to specific requirements determined by local norms, values and conditions."97 However, the Report also noted that some governments preferred the traditional modality of providing assistance through the use of the UN agencies.98 The Report concluded that while many governments saw the concept of government execution in a favourable light, they did not see immediate large-scale implementation of government execution.99

93. Id. Annex 1 ¶ 7.
94. Id. Annex 1 ¶ 9.
98. Id. ¶ 17.
99. Id. ¶¶ 20-21.
In April of 1987, the Administrator again reviewed the impact of
government execution. In his report to the Governing Council, the
Administrator noted that since its inception, government execution had grown
in importance and complexity. By the end of 1986, some 600 projects had been
executed by governments for a total of US $150 million. The Asia and
Pacific region utilized the government execution modality more than any other
region, with China executing the highest number (40) of projects. At the end
of 1986, the four sectors with the largest number of government executed
projects were general development issues, policy and planning; agriculture,
forestry and fisheries; natural resources; and industry.

With respect to the impact of government execution, the Administrator
indicated that an evaluation exercise was underway to make detailed
assessments of the successes and failures of government execution. The
Administrator further explained that preliminary replies from Resident
Representatives indicated that a high proportion of the government executed
projects appeared successful. However, the Administrator pointed out that
some problems had been experienced with government execution, including
low rates of delivery. The reasons for the low delivery were being
investigated but it appeared that it was related to delays in recruiting experts
and slow reporting. In addition, the Administrator indicated that cost-
effectiveness was to be measured by the evaluation exercise underway. It was
noted in this respect that the UNDP field offices and headquarters had
expended considerable resources in supporting government execution, largely
in the area of administrative and financial/accounting support. The reason for
this was not the inability of governments to carry out administrative, financial
and accounting procedures but was due to the difficulty in getting governments
to comply with extraneous administrative and accounting procedures for
projects which were considered relatively small in relation to governmental
budgets. The Administrator concluded that the general assessment of
government execution was that much progress had been made. The detailed

101. Id. ¶ 45.
102. Id. ¶ 46-47.
103. Id. ¶ 48.
104. Id. ¶ 52.
105. For example, in 1981, the total programme delivery rate was 77.6%, but only 61.6% for
government executed projects; in 1985, the total programme delivery rate was 69.1%, but only 50.1% for
government executed projects. Administrator, supra note 100, at ¶ 57.
106. Id. ¶ 58.
107. Id. ¶ 63, 68.
108. Id. ¶ 79.
evaluation was submitted to the Governing Council on 4 March 1988.\(^{109}\) The response of the Governing Council was positive, with the Council, in its decision 88/18, encouraging Governments to “continue the expansion of government execution.”\(^{110}\)

By 1989, it was felt by UNDP that a new agreement was needed with governments entrusted with the execution of UNDP projects. The SBAA was prepared on the basis of the tripartite approach, whereby UNDP executing agencies would carry out the project activities. As such, the SBAA did not envision execution by governments. Thus, in order to set out the legal framework of government execution, the roles and responsibilities of the parties, and to address certain problems that had arisen in the past with respect to government execution relating, \textit{inter alia}, to the lack of a central coordinating authority representing the government and to the increased involvement of field offices in carrying out project activities on behalf of governments, a new Government Execution Agreement was prepared.\(^{111}\)

Pursuant to that agreement, a central governmental authority would be charged to coordinate the projects executed by the Government and to select the entity to carry out the actual execution of the project. In cases where the Government could not perform the full range of activities, provision was made for a UNDP Executing Agency to act as a cooperating agency to assist the Government in carrying out project activities. Finally, the agreement charged the Government to be accountable to the Administrator for the proper utilization of the project funds and implementation of project activities. Thus, the Governments were to submit audited financial reports and accurate technical progress reports. Unfortunately, for reasons that are not entirely clear, this agreement was never used by UNDP. The government execution arrangements continued to be carried out under the SBAA, with modest adjustments to the project document to address some of the new financial and administrative details required under government execution.\(^{112}\)


\(^{111}\) Memorandum from Mr. Francis Ssekandi, Deputy Director, General Legal Division, to Mr. Douglas Stafford, Deputy Assistant Administrator, Bureau for Finance and Administration, UNDP, dated October 26, 1989.

\(^{112}\) There may have been concern that governments would not sign the new agreement and that it would be easier to continue using the SBAA, with the modifications on the project document. In this respect, three annexes were developed to attach to the project documents to address the new financial and administrative arrangements under government execution. \textit{See, e.g.,} UNDP PPM, Section 3490 et al on Government Execution.
B. National Execution

By 1990, the term “government execution” was replaced with “national execution” to better reflect the variety of ways in which projects are implemented. At the same time, UNDP began referring to national execution as the “ultimate modality” for activities supported by UNDP. UNDP defined national execution, as follows:

National execution is a cooperative operational arrangement whereby the Government assumes responsibility for the effective management of all aspects of its UNDP-financed technical assistance projects and programmes as requested by it and agreed to by the United Nations Development Programme (UNDP). National execution recognizes the wide range of technical support possibilities, and encourages implementation arrangements that draw upon outside technical expertise and in particular, the specialized agencies of the United Nations. Under national execution, Governments are responsible for the conduct of all project and programme activities including those implemented by the specialized agencies of the United Nations, the Office of Personnel Services (OPS) of UNDP, or other organizations or institutions on their behalf. Governments are accountable to the Administrator of UNDP for ensuring the most appropriate implementation arrangements, the quality of technical cooperation funded by UNDP and its judicious financial management.

With respect to the role of the specialized agencies in national execution, UNDP saw the effective use and association of the specialized agencies as a major challenge. In this respect, the Administrator pointed out in its report to the Governing Council that the specialized agencies had been used only to a very limited extent in national execution. One reason for this trend suggested by the Administrator is the appearance of new implementation agents on the international development scene — non governmental organizations, private sector firms and national institutions. Notwithstanding the limited involvement of specialized agencies and the appearance of new actors in the

114. Id. ¶ 3.
115. Id. ¶ 8. The Governing Council of UNDP took note of the Administrator’s report containing the proposed definition of national execution (Governing Council decision 90/21 ¶ 1 (1990).
117. Id. ¶ 37.
development area, the Administrator concluded that there is still a "significant continuing role for United Nations specialized agencies." 118

At the request of the Governing Council, UNDP issued guidelines for field offices on national execution in 1992, which defined key terminology such as execution and implementation and the roles of the Government, specialized agencies and UNDP in national execution. However, in 1993, the General Assembly, in resolution 47/199, while affirming that national execution should be the "norm for programmes and projects supported by the UN system, taking into account the needs and capacities of recipient countries," again requested that the United Nations development system agree on a common interpretation of national execution. Thus, the Consultative Committee on Programme and Operational Questions (CCPOQ), under the authority of the Secretary-General, agreed that national execution is a "cooperative operational arrangement entailing, inter alia, overall responsibility for the formulation and management of programmes and projects by the recipient country, as well as the recipient country's assumption of accountability for them." 119 The CCPOQ also agreed on the objectives and guiding principles for national execution, including, inter alia, the recognition of the central role, ownership, direction and control of the Government, and the enhancement of capacity building, self-reliance and sustainability. 120

Thus, by 1993, after almost 20 years since the first legislation on government execution, the General Assembly had endorsed national execution as the norm for the provision of development assistance by the United Nations development system, with UNDP at the center of that system. Through this progression to national execution, UNDP attempted to adapt itself to respond to the needs of programme country governments and their desire to be in charge of their national development programmes. UNDP's willingness to make national execution the norm was a recognition of the fact that empowerment of and control by national governments was the only way to lead to real impact and results.

IV. SECTION THREE

A. Initial Assessment of National Execution

In 1995, a team of experts carried out an independent evaluation of national execution, publishing an abridged and edited by UNDP under the title

118. Id.
120. Id.
"National Execution: Promise and Challenges." The evaluation is based on a field study of 11 countries, Chile, China, Burkina Faso, Egypt, Ethiopia, Malawi, Nicaragua, Peru, Sri Lanka, Thailand and Zimbabwe.

The study noted that 75% of all UNDP projects were carried out through national execution. The evaluators found that national execution had both positive and negative attributes. On the positive side, national execution 1) improved and expanded the sense of ownership of programmes; 2) increased self-reliance; 3) contributed to capacity building; and 4) increased cost-effectiveness. On the negative side, national execution has led to 1) delays in implementation due to the participatory nature of the modality; and 2) weak public sector institutions have necessitated short-term compromises such as national execution support units and parallel salary scales which jeopardize the long-term objective of institutional capacity building. In this respect, the study noted that in Latin America, national execution was used to bypass normal government institutions to ensure that programme activities are completed on time and to ensure that the funds are properly utilized.

The study was inconclusive on the cost-effectiveness of national execution. An analysis of project budgets showed a modest decline in the number of work months assigned to international personnel, with a large increase in work months delivered by national personnel. However, evidence did not show that greater use of national personnel affected performance, either positively or negatively. Moreover, a full analysis of cost-effectiveness would have to take into account costs related to the increased workload of UNDP country offices.

The study was inconclusive on whether national execution led to increased sustainability of programmes and projects. The evaluators noted that national execution should lead to increased sustainability because the programmes are more fully integrated into national structures, the greater use of national personnel reduces technical discontinuity at the completion of projects, and the sense of ownership enhances the possibility that governments will continue supporting project activities in the future.

The evaluators noted that the tripartite relationship among UNDP, governments and specialized agencies no longer applies in its traditional form as governments increasingly assume functions relating to ownership, oversight, execution and implementation while the role of the specialized agencies is to provide technical support. Thus, the evaluators recommended the adoption of

121. The team consisted of the following experts: Mr. Fuat Andic, Richard Huntington, and Ralf Maurer with support from Mr. Abdenour Benbouali.
123. Id. at 24.
124. Id. at 25.
125. Id. at 27-28.
a new conceptual framework for national execution with more clearly defined roles for UNDP, Government, and Specialized Agencies. The new model suggested by the evaluators envisages UNDP and Government as partners who would select a management team which would normally be a national entity but could be a specialized agency if agreed by the partners that using such an agency was the optimal way to proceed.\textsuperscript{126}

In addition to the 1995 evaluation, national execution has been regularly reviewed internally by the Board of Auditors. Recommendations of the Board of Auditors on the 1994-95 biennium included that UNDP should re-emphasize the need to assess the Government’s capacity to undertake national execution; the objectives of national execution should be clearly defined to provide closer link to UNDP’s aims; and that UNDP should issue new guidance on national execution to reflect all relevant legislation.\textsuperscript{127}

In order to address some of the issues raised in the 1995 evaluation of national execution and periodic comments of the Board of Auditors, UNDP revised the procedures for national execution which were finalized following guidance from the UNDP Executive Board in 1998. The procedures define national execution, consistent with the definition used by the CCPOQ in 1993, as a “cooperative operational arrangement entailing, among other things, overall responsibility and assumption of accountability of the formulation and management by the programme country of UNDP supported programmes and projects.” The key principles of national execution are the use of government rules and procedures where they are consistent with internationally recognized practices, government accountability for effective use of UNDP resources and adherence to UNDP rules and regulations when the UNDP country office provides services.

The procedures stipulate that national execution is based on an expression of government’s interest and willingness to assume management responsibilities for the programme or project as well as national capacities. The procedures set out key considerations for execution to guide country offices in determining where national capacities need to be strengthened. Such considerations fall within the areas of technical, managerial, administrative and financial capacity of the national entity.

The procedures describe the roles of the various actors in nationally-executed programmes and projects. The Government Coordinating Authority, the focal point for all communications with UNDP, assumes ultimate responsibility for the overall management of the programme or project on behalf of the Government. The Government Coordinating Authority in

\textsuperscript{126} Id. at 9.

consultation with UNDP designates the national entity which will serve as the executing agent primarily responsible for the planning and overall management of programme and project activities, reporting, accounting, monitoring and evaluation, and audit. The executing agent can be a Ministry, a department within a ministry; any other national entity, such as a central bank, a university, regional and local authorities and municipalities. The implementing agent, which provides services or carries out activities under the supervision of the executing agent, including procurement activities, can be the executing agent itself, another government entity, a United Nations executing agency (i.e. a specialized agency or other UN entities authorized to execute projects) or an outside entity such as an NGO, a private company, a consulting firm or a university. In addition to acting in the capacity of an implementing agent, the procedures specify that UN agencies can provide support to policy and programme development (policy for the formulation of strategies and programmes, advisory services and sectoral advice, technical assistance needs assessment, sectoral or multi-disciplinary studies) as well as technical support at all stages of the programme or project cycle (formulation and appraisal, technical support and monitoring of activities during implementation, evaluation).

The procedures provide that in addition to the assistance that UNDP normally provides to UNDP-supported programmes and projects, the UNDP country office may provide further support to the executing and implementing agents including assistance with UNDP reporting requirements and making direct payments.

One of the most important sections of the new procedures deals with the provision of support services, including recruitment of personnel, facilitation of training activities, procurement of goods and services, by the country office. UNDP sought confirmation of its mandate from the Executive Board to provide such services, which some delegations argued were tantamount to direct execution, outside UNDP’s mandate. In a hotly debated session of the Executive Board in January 1998, the Executive Board reaffirmed UNDP’s mandate to provide support services under the following conditions, which are reflected in the national execution procedures: the services can only be provided at the request of the Government and for activities within the country cooperation framework; the services must be in support of the implementation of activities described in the annex to the programme support or project document; the support must be provided based on a capacity assessment and be accompanied by capacity building measures including an exit strategy to ensure that long-term capacity building objectives are not jeopardized; and the nature of the support will take into account services which can be provided by other
UN agencies. In order to placate those delegations which were concerned that country office support services were in fact direct execution, namely Germany, France, Belgium, Switzerland (only an observer), the Executive Board also specified that direct execution activities of UNDP should be limited to countries in special circumstances and apply only when it is "essential to safeguard the full responsibility and accountability of the Administrator for the effective programme and project delivery."

The procedures also stipulate that the costs of providing such services by the country office must be detailed in the annex to the programme support or project document and recovered by UNDP.

In addition to direct country office support, the procedures describe support services provided by management support units, which carry out administrative work such as procurement, payment, contracting as well as reporting, programme management training and capacity building activities. The procedures stipulate that such units can only be supported or funded by UNDP when UNDP has assessed sustainability, cost-effectiveness, and capacity building. Clear responsibilities must be assigned to the unit and described in the programme support or project document. The support provided by such units is supposed to be temporary, clearly defined and accompanied by capacity building measures. The unit is supposed to function within a government structure and under government supervision. Finally, UNDP cannot employ or remunerate civil servants working within such a unit and such units cannot be established with the UNDP country office.

The procedures also give detailed guidance on monitoring and evaluation, financial management and reporting and audit requirements.

With respect to the legal framework for national execution, UNDP has not pursued the conclusion of the government execution agreement prepared in 1989. Instead, the national execution procedures provide for the conclusion of a letter agreement with governments to address the support services provided by UNDP field offices. The agreement extends the privileges and immunities accorded to UNDP under the SBAA to the support services provided by UNDP field offices under national execution. Thus, the SBAA continues to set out the basic conditions of UNDP's support to programme country governments. Under that overall agreement, the details concerning national execution are reflected in annexes to the project documents and in the letter agreements on support services provided by the UNDP field offices.

129. Id. ¶ 8(g).
B. The Future Direction of UNDP and National Execution

After 23 years, national execution is now legally and actually the preferred modality for the execution of UNDP programmes and projects. During the 23 years leading up to the 1998 national execution procedures, the tension between giving responsibility to the Governments and taking such responsibility away from specialized agencies is evident. Clearly, the donors and member states of such agencies have been aware of the impact that national execution would have on the involvement of such agencies in UNDP programmes and projects—that the role of specialized agencies would be marginalized and their use in such programmes and projects reduced.

What has also become clear in the transition to national execution is that as the role of the specialized agencies has become less significant, the role of the UNDP country office has become more prominent. With the 1998 decision of the UNDP Executive Board, the country office role in providing support services has been reaffirmed. These activities, which include procurement and recruitment, are activities formally provided by specialized agencies. Under national execution, these activities should in principle be carried out by the national entities responsible for the programmes and projects. Thus, the role of the country office in national execution will have to be monitored carefully to ensure that governments are empowered to manage and carry out all aspects of the programmes and projects, including the procurement and recruitment activities. The true challenge to UNDP, if it is sincerely committed to the capacity building of national institutions and the development of programme countries is not to allow national execution to become in effect direct execution by the UNDP country office. There is already evidence of UNDP country offices assuming far too large a role in national execution, notably in Latin America. Thus, the international community, donor and programme countries will have to watch and see if UNDP stays true to its mandate, in the hope that UNDP will meet one of its biggest challenges of the twenty-first century.
COMPARATIVE DYNAMICS OF PRIVATE SECTOR INFLUENCE ON DOMESTIC TRADE POLICY AND PROPENSITY FOR ENHANCED INTERNATIONAL COOPERATION

Robert Bejesky*

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The framework of the international trading system is essentially a struggle between: 1) international cooperation substantiated by the dominant economic premises of comparative advantage, which the adherence to which begets more acceptance of freer international trade, and 2) collective group responses to economic impacts of trade within the restraints of respective political institutions of a country. The extent to which interest aggregation or collective groups permeate government trade policy depends on the type of government and the political ideology of representatives and elites in power. At the nexus of international and domestic trade levels, these interests have varying levels of influence on trade policy.

I. INTRODUCTION

This article considers the dynamics of domestic politics, private sector interests, and government institutions as they relate to international trade policy within the context of the GATT/WTO. The context of GATT/WTO applies when tariff bindings are established on import classifications in reduction

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schedules, in negotiations at round discussions and yearly meetings, when domestic government institutions sanction tariff levels or other issues agreed upon at the international level, and when trading partners negotiate to resolve disputes. While all of these situations are important and their dynamics will be conspicuous when reading this article, it is the latter scenario into which this work seeks to ultimately culminate. The argument established assumes that the dominant theory of comparative advantage and international trade cooperation restrains government policy-making because of the existence of long-term commitments to freer trade and on-going mutual economic interests. However, the ways domestic interests are represented to governments, and the ways domestic interests influence government positions on trade issues, depend on the functioning of domestic politics and institutions. Thus, strategic interactions between governments on trade issues can be perceived as a two-level game: domestic politics influence states' actions at the international level, and vice versa.

The argument presented is also based on comparative government. Institutional variations of private sector-government relations will engender different levels of representation from domestic protectionist interests. Institutional variants among statist, corporatist, and pluralist governments will be employed to depict dissimilar levels of private sector influence on government. While the theoretical underpinnings of these three types of states might lead one to rationally presume that one form of government would be more amenable to free trade than others, the dynamics of collective action and relative dependence on international trade threaten the accuracy of any obvious conclusion.

1. Once agreed upon this initial setting of tariffs is, for countries holding WTO membership or those given MFN status, a multilateral international obligation that has some degree of future binding effect on economic, private sector, and government changes on that country unless an exception is later raised.

2. Trade round negotiations ordinarily tackle diverse issues in a deep fashion and each country inevitably brings domestic political and economic concerns to the negotiating rounds. Similarly, yearly meetings also discuss issues of cooperation but the meetings are limited in duration. One needs to only consider the 1999 Seattle meeting to illustrate collective domestic dissent to the WTO since issues on the discussion agenda were suspended.

3. For example, in the United States, Congress approves international trade agreements and tariff levels on goods.

4. See also Robert D. Putnam, Diplomacy and Domestic Politics: The Logic of Two Level Games, 42 INT'L ORG. 427-60 (Summer 1988) (discussing general international relations as a two level game); ARYE L. HILLMAN & PETER MOSER, Trade Liberalization as Politically Optimal Exchange of Market Access, in THE NEW TRANSATLANTIC ECONOMY (1995) (discussing trade theory as a two level game).

The paper is structured as follows. Section II presents the legal framework and ideology driving the international trade system. It presents the policies and rules supporting higher aggregate economic growth through comparative advantage, as structured in the General Agreement on Tariff and Trade (GATT)\textsuperscript{6}/World Trade Organization (WTO) framework. Within this dominant structure for trade, Section III claims that the system of government could make a state more susceptible to domestic positions that undermine higher levels of trade cooperation. Section IV explains that collective action dynamics in the private sector are the primary consideration driving more extreme government positions on tariff binding levels or when a trade dispute erupts that requires negotiation. Section V utilizes the framework established in the aforementioned sections and applies it to theoretical trade negotiations in a two-level game model.

II. IDEOLOGICAL AND INTERNATIONAL RESTRAINTS

Comparative advantage is the dominant economic axiom that underlies and lends credence to increased cooperation in trade. It says that efficiencies in the specialization of production, based on current efficiencies in a country’s resource endowments, will provide the highest global aggregate economic prosperity.\textsuperscript{7} If higher aggregate prosperity is a global goal and there is a reasonable presumption of spill-over benefit, a benefit that would not exist but for reliance on the benefits of mutual trade relations to domestic economies, cooperation in the international system should logically occasion governments to pro-actively reduce tariff and non-tariff barriers that skew economic efficiencies.\textsuperscript{8} While support for comparative advantage and propensity to reduce trade barriers have dominated international economic relations for decades, they have not always been universally accepted. Domestic institutions and influences on policy-makers, as well as policy-makers’ interpretations of the future viability and competitiveness of local economic actors, frequently impugn upon the suppositions on which the doctrine depends. Most countries have traversed through protectionist shifts based on economic circumstances and political shifts. Others have embarked on revolutionary change and


\textsuperscript{8} Joseph M. Grieco, Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism, 42(3) INT’L ORG. 485, 495 (1988). This assumes there is a desire for mutual cooperation so that states can achieve the highest aggregate gains, rather than adhering to a realist or relative gains premise which assumes that states will only cooperate in international relations when perceived gains derived from consummating an agreement will outweigh gains provided to the other party.
implemented new ideals about the best means of achieving economic prosperity.

For instance, changing global and domestic economic conditions induce governments to restrict trade. An apropos example is the circumstance prior to the Great Depression when many countries inordinately restricted imports to protect domestic markets.\textsuperscript{9} Conditions were placed on trade to stimulate domestic industry and attain revenue to fund new socioeconomic obligations that were being undertaken by governments. This resulted in trade dwindling to a fraction of previous levels.\textsuperscript{10} Governments began to regulate economies more, closed doors on open-market principles, and in some cases roused elites to unveil a "statist form"\textsuperscript{11} whereby government supervision and management of the economy, markets, and the private sector became customary.\textsuperscript{12} Despite this and other historical periods of protectionism, there has been a reconfirmation of the economic superiority of comparative advantage since World War II. Barriers to trade have dwindled in the aggregate as a result of international cooperation.\textsuperscript{13} With this shift in economic ideology and the existence of international agreements supporting freer trade, increasing cooperation has survived even dramatic international economic shocks and domestic political turnovers.\textsuperscript{14}

Even since the Bretton Woods Agreements shortly after World War II (marking the emergence of modern-day trade liberalization) influential examples of closed door policies were important in the countries in which they arose, and also served as examples for many other countries. This was the case in many Latin American countries that shifted economic policies from one extreme to the other during given periods of economic torment.

The Soviet Union and China, of course, provided the precedential illustrations. Both countries until the 1980s operated on principles of planned economic development. Under planned economic development, opening trade doors to the international system would undermine the agenda of the central government because the government had contrived all production necessary for

\textsuperscript{9} Thomas Ferguson, From Normalcy to New Deal: Industrial Structure, Party Competition, and American Public Policy in the Great Depression, 38(1) INT'L ORG. 41, 42 (1984).

\textsuperscript{10} Id.

\textsuperscript{11} Statism is discussed comparatively infra in section: III. Government Structure & Ideology of Administration.

\textsuperscript{12} These characteristics are all factors which undermine comparative advantage.


\textsuperscript{14} International covenants can restrain government actions and establish parameters for trade policies because the legality of international agreements survives replaced administrations and binds a state to previously ratified agreements.
society in multiple year plans. Under such a system, permitting imports to freely flow into the country could spawn instability in domestic production by engendering reliance upon, or a demand for, foreign products. The government had already projected what society needed and wanted. In the alternative, authorizing goods to depart from the country as exports because they might fetch higher prices on international markets could eventuate domestic deficits in these goods and halt production for internally projected requirements.

Outside of these circumstances, where large scale agendas to close doors to rectify poor economic conditions caused long-lasting revolutionary shifts in countries, the international trade system since World War II has gradually become more liberalized and freer. However, short-term intermittent political shifts within countries based on political turnover have also been an important consideration in international trade.

In the context of trade, domestic political turnover occurs when differing ideologies and economic programs have been enacted by political shifts in a country’s government. Such shifts result in the enactment of new policies that are either more or less open to trade than were the previous policies. However, the decision of a current administration to ratify a trade agreement to reduce trade barriers should bind a successor government, even if that subsequent administration is ideologically more protectionist. This means that without a complete withdrawal from the international trade system, the degree of policy change by a more protectionist regime will be restrained because of the regime’s desire to attain the benefits of future international trade. International bindings are never completely resolute, but a protectionist government’s full purview of policy-making is somewhat harnessed by obligations made to the international community. Even though protectionist governments may maneuver within treaty obligations, for exceptional circumstances, or stretch international obligations, the global result has been an increasingly institutionalized international framework supporting trade liberalization.

The GATT/WTO is the global international regime/rule structure. Its rules and principles incorporate the dominant economic ideology of comparative advantage by supporting less restricted trade. Although this ideology and framework is accepted, it is not conclusively followed because countries do introduce barriers to trade in order to protect domestic industries. This is

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15. To not permit some leniency could impede more countries from joining international regimes or cause more pervasive denouncements of international agreements and regimes, which can undermine the credibility of international law and attenuate the likelihood of future cooperation. The Reservations to the Genocide Convention Case, 1951 I.C.J. 15, 31, available at 1951 WL 3.

16. This is often the case when domestic firms are less efficient than foreign counterparts. Herein, “efficiency” can be described as a per unit cost and will generally vary based on the evolution of an economy because higher costs are expected when producing goods in countries with a higher standard of living, since wages are higher.
often how disputes arise. Therefore, countries that have previously made binding obligations among themselves to attain reciprocal rights with trading partners, or that have assented to the general framework of the GATT/WTO, have to some degree undermined the functioning of or violated that international framework. In other cases, such countries have strayed too far from the rules and policies to which they said they would adhere. The GATT’s general mission has always been to reduce trade barriers and eliminate discrimination against contracting parties that have Most Favored Nation status. However, specific GATT rules tend to undermine an unwavering adherence to its general policies. These rules are needed to provide an international outlet for domestic economic needs and to protect the agreement’s overall integrity by tempering its flexibility. These outlets might include setting a tariff binding higher than was originally agreed upon to protect domestic industries, utilizing safeguards and adjustments assistance authorized in Article XIX of the GATT 1947, and providing industries with various forms of subsidies and tax credits to maintain competitive advantages.

For purposes of this article, GATT/WTO provisions will only be considered from their policy position of supporting freer trade or undermining freer trade. The paramount concern herein is to generally highlight domestic actions that stray outside the international trade framework. In other words, the analysis examines state actions that depart from its previously undertaken obligations because of domestic influences. The domestic influence that undermines this general policy can emerge from two primary variables: 1) an institutional governing structure that might be, by its nature, more amenable to protectionism, and 2) collective groups that place varying levels of pressure on policy-makers to modify a trade policy position.

Both of these influences can shift a trade posture from what may be most economically optimal globally, within general policies and rules of the

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17. The GATT Preamble states that its purpose is for contracting parties “to enter into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.” GATT 1947, supra note 6, at pmbl.

18. Article I of GATT requires that like products of a contracting party be accorded treatment no less favorable than those of other contracting parties.

19. The Harmonized Tariff Schedule provides categorizations for imports that have assessed duties by domestic government institutions. The tariff level on products are generally expected to decrease over time, but a country’s choice to set some tariffs high may be perceived as protectionist for certain domestic industries.

20. This includes establishing higher tariffs and/or quotas on imports when there are “increased imports causing or threatening to cause serious injury to an identified United States industry.” TRADE ACT OF 1974 § 201 (1974).

21. While subsidies are for the most part restricted by the GATT/WTO, they will only become issues when there is a significant change in market share of a product that can be tied to the subsidies.
GATT/WTO, to a short-term policy that might be perceived as serving the interests of representatives in power or domestic interest group structures. This varying level of influence, based on institutional dissimilarities across countries in private-public sector relations, and collective private sector actions, are discussed in the succeeding two sections.

III. GOVERNMENT STRUCTURE AND IDEOLOGY OF ADMINISTRATION

A. Government Structure

Even though dominant economic ideology and international institutionalization support free trade and cooperation, the private sector can influence trade policy at the domestic level based on statist, corporatist, and pluralist government classifications. The private sector's influence on government trade policy affects the vacillation of policy preferences. It also affects the extent to which the rule framework of liberalizing trade is adhered to by individual countries (including during abrupt shifts via change of political ideology in government), and the dynamics of international trade negotiations.

In a statist government, public and private sector interests are unified. Government interference in the economy is perceived as normal and beneficial. However, the more a government is involved in the economy, the more the country is perceived as straying from free market principles. The country is perceived to be distorting the economically optimal results ordinarily consistent with premises supported by comparative advantage and prescribed and accepted by the international trading system. This may be the case even though statist governments often exist in countries that are resource dependent and not economically dominant. These governments must act within the framework of international trade cooperation, because they cannot control the system. On the other hand, because government and private sector interests are unified, the government's desires, the calculation of potential economic


24. This is a common characteristic for small developing countries where the government tries to manage the economy to achieve national goals. Joan M. Nelson, The Political Economy of Stabilization: Commitment, Capacity, and Public Response, 12(10) World Dev. 983, 988 (1984). A very high degree of cooperation between business and government is found in Japan, Taiwan, South Korea, Singapore, and Malaysia. By contrast, in the United States, a pluralist system (discussed infra), the only sector in which there are close government-business relations is the defense industry because of national security concerns. James Kitfield, The New Partnership, Nat'l J. 1840-44 (1994).

benefits, and policy preferences should be somewhat restrained by the legal framework of international trade and the cognizance of the need for long-term international cooperation. Thus, sporadic domestic collective interests that might otherwise influence government policy-making are unlikely to arise in statist governments. Those interests are already represented by the intimate nexus between the private sector and government, even though the government's institutional framework rejects market mechanisms and private sector freedoms.

In a corporatist government structure, public policymakers and private interests inhabit the same social and economic agenda. There is still a formal and independent private sector apart from the government. Corporatism is known for its national social partnership between government, business, and labor. A concentrated system of licensed interest coalitions regularly bargains with government, seeking policy positions that appease societal and collective groups in a way that is in the best interest of society. There is less government involvement in the economy than in a statist system. However, government influence on the private sector is still a natural extension of authority. Formal institutions may join the central government with the private sector. Mediating institutions may also provide for periodic negotiations and compromise. A line of demarcation can be drawn between the public (or government's) role and the role of private sectors (unlike in statist governments), even though the government will favor particular industries or firms based on perceived societal need.

In pluralist government systems, government activities and private sector activities have clearly defined roles. Government has regulatory authority in the economy, but should not unreasonably interfere with the functioning and rights of the private sector. Individual private sector actors operate within the framework of market forces. Individually or collectively, they sporadically advocate trade policy interests to government and representatives through political forces. These unstructured and non-aggregated private sector forces


27. PETER J. KATZENSTEIN, SMALL STATES IN WORLD MARKETS: INDUSTRIAL POLICY IN EUROPE 22-30 (1985).


29. This is analogous to a “reactive state” apparatus whereby the public sector’s obligation is to solely provide a supporting framework within which citizens pursue their own chosen goals. DAMASKA, supra note 23, at 73. Thus, actors in the private sector compete amongst themselves for a larger share of the societal pie and government plays little role in favoring one party over another. The belief is that this competition will lead to efficient markets through competition.
have the potential to dramatically influence government trade policy. Such influence will arise when the composition of resource endowments and collective advocacy mechanisms is favorable.\textsuperscript{30} Thus, despite the pluralist system's institutional propensity to keep government out of efficient markets, the government may taken together be even more prone to be protectionist in pluralist than statist systems. Statist systems lack strong private sectors and often do not treat market mechanisms as sacrosanct. The pluralist government may also be more protectionist than a corporatist system government. In a corporatist government, national collective entities represent private sector interests. Both corporatist and statist governments, however, tend to pro-actively plan for the economy.

If one conceives of the individual roles of government and the private sector, with the government's defined obligation being to provide for the public good and the private sector's role to stimulate the economy, the following visual depicts the intimate private sector-government nexus that exists in a statist government. Pacification of extreme private sector-government positions through interest negotiations occurs at the national level in a corporatist government. Collective action groups from the private sector directly influence government policy-makers in a pluralist government.

Based on the three forms of government, one would rationally presume that a statist government, because its institutional form normally permits the government to significantly influence markets and the economy, would have attributes most apt to disrupt cooperative trade arrangements or distort global economic production efficiencies. However, even if this was the expectation given the institutional characterization, the political ideology of the current government in power may not be entirely consistent with such institutional

\textsuperscript{30} See discussion \textit{infra} in Section: IV. Collective Action Groups & Political Influence on Trade Policy.
expectations. This is ordinarily the case with trade dependent countries or when levels of economic development are especially amenable to export dependent interests.

B. Ideology of the Current Government on Trade Issues

While each of these three government constructs of government-private sector relations may comprise an institutional and historical propensity for freer trade or protectionism, the ideology of the government or representatives in power can cause a drift in either direction. For instance, while there is a more natural institutional framework for the operation of market forces in pluralist systems than in corporatist or statist systems, administration changes and economic development adduce policy vacillation over time in all types of governance structures. This was the case with Republican-Democrat policy shifts in the United States.

Trade policy is established by elected representatives in democracies because it can impact the public interest and is a form of taxation. This means that the ideology of those in power should to some extent represent the will or position of the populace and result in temporal shifts in trade policy based on the composition of the economy. For instance, in the United States, up until World War I, firms were labor-intensive, but shifted after World War I because domestic capital-intensive organizations began to dominate world markets.31 Concomitantly, during this time and up until 1950, the percentage of Republicans in Congress voting for trade liberalization was very low, while Democrats nearly unanimously favored trade liberalization.32 Since 1950, the percentage of Republicans and Democrats favoring trade liberalization equalized,33 likely because higher levels of exports from capital-intensive and highly competitive United States firms formed a unified national interest.34 Certainly, there is always some degree of amalgamation between popular-based or electoral public choice and private sector influences (that provide funding to support a campaign) on politicians' trade policy positions.35 The balance of these will be dependent on the government's particular electoral institutional framework.36 Recently, however, it is even more difficult to argue that United

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31. Ferguson, supra note 9, at 55-56.
32. The percentage of Republicans favoring trade liberalization was between 0% and 20% from 1913 to 1940 and began to climb thereafter. Democrats favoring trade liberalization hovered around 90% from 1913 to 1962. Michael A. Bailey et. al., The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade, 49 WORLD POLITICS 309, 312 (1997).
33. Id at 312.
34. Id at 334.
36. Id at 105.
States trade policy is being driven by the will or desires of the populace\textsuperscript{37} or clearly defined partisan influences, but instead by factors such as: the level of national income,\textsuperscript{38} segmentation and position of major industries in the world economy, and migration of old firms into new production methods and the emergence of new and more modern industries.\textsuperscript{39}

Placing generalizations regarding political predisposition aside for a moment, even diametrically opposed partisan positions may agree on trade policy as blindly following strict assumptions about comparative advantage and free market principles without utilizing government intervention to promote exports and restrict imports in the short-run. This may not always be in the best interest of the country, because it may be necessary to protect an infant industry from foreign competition that has a first-mover advantage,\textsuperscript{40} or to raise national

\textsuperscript{37} On the other hand, at some level, one can claim that the aggregate of voter preferences will have some relation to a country's aggregate position on trade issues and tariff levels. However, the alternative is to claim that it is the sum total and degree of protectionist interests (in the private sector) that influence politicians to hold a particular position on trade. This paper segregates the latter as the independent variable for analysis. While this is an issue that can be tested empirically, measuring cause and effect relations between constituent positions and political positions will be problematic. Logic would posit that there are numerous problems today with claiming that political constituency influences directly drive representative positions or can be utilized as a predictive indicator for expected trade policy positions in democracies. First, it is difficult to segregate voters into their rational choice positions because they may not be concerned with only one factor of production, or simply "free trade." ROBERT E. BALDWIN, The Political Economy of Protectionism, in IMPORT COMPE TRN AND RESPONSE 268 (J.N. BHAGWATI & T.N. SRINIVASAN eds., 1982).

Voters may be concerned with two or more factors of production, or free trade on some items and protection on others. This results in cross-cutting tariff preferences. WOLFGANG MAYER, Endogenous Tariff Formation, 74(5) AMER. ECON. REV. 970, 983 (1984). Second, even if voters are acting in their rational self-interest and are more apt to vote for a candidate that will best support the economic interests of the voter. \textit{Id.} at 974. Voter interests are often too diverse (outside of favoring protectionist policies if the candidate is directly affiliated with labor or freer trade policies if he/she is more affiliated with capital) to register any changes in tariff policy. \textit{Id.} at 983. Third, to assume voters primarily impact trade preferences suggests that contributions received or a pecuniary interest endowed from interest groups to politicians are not directly translatable into political support, but are made to increase constituent support. When a trade position becomes an election issue in national elections, a politician's position is framed not as industry specific, but as a general position somewhere between the dichotomous classification of free trade and protectionism. This leads to the obvious problem of aggregating individual interests into general policy positions. On the other hand, while constituents are also consumers, they have little ability to influence the political process through campaign contributions. ARYEL HILMAN & HEINRICH W. URSPRUNG, Domestic Politics, Foreign Interests, and International Trade Policy, 78(4) AMER. ECON. REV. 729, 732 (1988), available at http://www.jstor.org/fcgi-bin/jstor/viewitem.fcg/00028282/ di9500295p0008d/0?currentRes. This is due to diffuse interests, the difficulty for consumers to identify economic interests from imperceptible benefits and costs involved in international trade, and the dynamics of the political process.

\textsuperscript{38} Ferguson, \textit{supra} note 9, at 56.

\textsuperscript{39} \textit{Id.} at 57.

\textsuperscript{40} Pankaj Ghemawat, Sustainable Advantage, 64 HARV. BUS. REV. 53 (1986). "First mover advantage" is a business term suggesting that a firm that enters a market first has the ability to attain a larger share of the market because of quick action even though other viable competitors may exist and could garner more market share if action were taken more promptly by these competitors. \textit{Id.}
income by promoting the profitability of firms in imperfect markets.\textsuperscript{41} A
government may strategically use trade policy to obtain a larger share of
domestic and/or international markets and profits for its multinational
companies. This is because doing so could be expected to stimulate the
domestic economy and increase the tax base. Such a decision must be made
while considering international interdependencies, because enacting trade
policies that favor nationally-based interests can reverberate with trading
partners when a noticeably higher tariff level in one industry or non-tariff
protectionist measure is employed to safeguard domestic interests or when a
government utilizes subsidies to promote exports. This could legitimately be
met with a higher reciprocal tariff level on other important industries.

As a caveat, because this analysis is concerned with domestic interactions
between government and the private sector, it downplays the dynamic nature
of comparative interactions among other government institutions. For instance,
separation of powers between the executive branch and legislature can
influence how and where interest groups spend time and resources to influence
trade policy.\textsuperscript{42} Strategic advocacy and planning by interest groups can probe
the dynamics of inter-branch relations to determine how they can best influence
policy-making. And perhaps, if the current legislature supports trade
liberalization, it could leave a lasting mark on trade policy long after its tenure
ends by changing trade policy or rules so that a later executive and legislature,
if more protectionist, could be restrained from making abrupt changes in the
trade framework since its purview of action might be corralled by the
previously established rules.\textsuperscript{43} Because of the added complexity, applicability
almost solely to governments with strict separation of powers,\textsuperscript{44} and frequent
policy-preference shifts in the short-term via electoral cycles, government
policy-preferences will be treated herein as a unified position at the
international level. This means that the private sector influences a "government
position" rather than the position of the executive or the legislature. This is


\textsuperscript{42} Specifically, when the executive branch opens negotiations with the expectation of
consummating an agreement with a foreign government over trade, the greater the degree of authority that
the legislature has over agenda setting, amending agreements, ratifying proposals, calling referendums, and
deploying side payments, the more that there is a relative shift in power to the legislature \textit{vis-a-vis} the
executive. HELEN MILNER, \textIT{INTERESTS, INSTITUTIONS AND INFORMATION: DOMESTIC POLITICS AND
INTERNATIONAL RELATIONS} 101-12 (1997).

\textsuperscript{43} Bailey, \textit{supra} note 32, at 326.

\textsuperscript{44} Government systems with strict separations of powers are most characteristic of presidential
systems that legally and practically have a strong balance of power between the president and legislature, as
distinguished from parliamentary systems where elected representatives choose a prime minister as the
executive and retains substantial control over that position (i.e., limiting what is perceived as a separation of
powers between the policy-making branches of government). Thus, the United States may be one of only a
few countries in the world that has such a system.
because the positions of these two institutions may differ based on political affiliation or constituency allegiances.

While differing political positions, sometimes based on party affiliations, can provide a predisposition toward a particular trade policy, private sector collective interests can impact government trade policy in a way that deviates from predispositions. For instance, a recognizable problem occurs in pluralist governments because representatives may neither represent the will of the populace, nor act in a way to protect the long-term viability of the domestic economy. Instead, they act primarily to further their own self-interested re-election concerns by accommodating interest groups.\textsuperscript{45} Such actions, even though they result in lower aggregate wealth for the populace in the end, are inherent in democracies.\textsuperscript{46} Regional constituency interests can form representatives' trade policy preferences.

To summarize the article to this point, within the institutional variations of statism, corporatism, and pluralism, government interactions with the private sector differ and dissimilarly influence a government's short and long-term position on trade issues. While there is an international ideological and institutionalized propensity to favor policy-positions consistent with the theory of comparative advantage and liberalizing trade, there are short-term benefits of protectionism and transition costs for government on long-term efficient uses of resources. Specifically, the short-term trade position of government will depend on: 1) the degree to which government is sequestered from pressure groups representing the private sector, 2) the economic power of the state, 3) international relations with trading partners and present government dedication to freer trade, and 4) an assessment of the degree of domestic economic harm from given imports. The interaction of these variables will be considered in the successive two sections.

IV. COLLECTIVE ACTION GROUPS AND POLITICAL INFLUENCE ON TRADE POLICY

Interest groups can dynamically influence trade policy, particularly in the context of setting tariff bindings. Interest groups express political support for candidates and party platforms\textsuperscript{47} through campaign contributions,\textsuperscript{48} in an


\textsuperscript{46} Bailey, supra note 32, at 328.

\textsuperscript{47} An election between two parties generally consists of a party that represents a more protectionist position and one that advocates more liberalized trade. The two parties commit to their respective policies to garner support in the populace to get elected. Stephen P. Magee et al., Black Hole Tariffs and Endogenous Policy Theory: Political Economy in General Equilibrium (1989). However, as mentioned, the degree to which this acts as an essential issue in the mind of voters is questionable.

\textsuperscript{48} This is the case with political action committees in the United States (PAC contributions).
amount likely correlated to the extent that tariff preferences are provided. These preferences appear in annually "choosing a vector of trade taxes and subsidies on the various import and export goods." However, the domestic political influence from these collective action dynamics of interest groups will differ among pluralist, corporatist, and statist governments.

The duty assessed on import classifications of goods will affect domestic factors of production in industries. A computer manufacturer will want to attain imported component parts to assemble its product at a lower cost (i.e. lower tariffs on components), but would not want low tariffs on the import of competing foreign computers. Consumers or other domestic users would desire lower tariffs on imported computers to make them less expensive for purchase. The result across all sectors and regions in a country is a competition for resources where the implementation of one tariff policy will have a rippling effect across other sectors of society, granting a larger income share to protected industries than would ordinarily result without the tariffs.

The winners in this game of competing interests are those groups that can best get their position heard and acted upon by politicians. Tariff policy positions will favor industry groups that are best organized and have more resources to influence policy-making bodies. Thus, the general presumption


49. The more that it is perceived that a politician, group of politicians and/or party grants preferences to an interest group, the more that it will contribute to those political actors.


51. A macroeconomic example of the conflicting interests that industrialized countries have faced is the inter-play between generalized interests of agriculture, industry, and consumer preferences. If tariffs on agriculture are high to protect domestically grown foodstuffs from imports, domestic agriculture interests will be appeased, but this high tariff will have a negative impact on consumers (assuming no government subsidization) who will be paying more for food products as well as on industry which will eventually need to increase labor wages based on a higher cost of living. If tariffs on imports that compete with industry are high, industry will be delighted because profitability will be higher and domestic labor will be pleased because protectionism protects labor, while agriculture interests will be distressed because profitability will be lower due to more import competition. Cheryl Schonhardt-Bailey, Specific Factors, Capital Markets, Portfolio Diversification, and Free Trade: Domestic Determinants of the Repeal of Corn Laws, in 43(4) WORLD POLITICS 545-69 (1991).


55. More specifically, one could also posit that organization and collective action are most effective with fewer individuals sharing in gains that will be produced by attaining a particular tariff policy. With too many individuals, there will be "free riders" that will not participate in the action because divided gains from a changed tariff policy will be smaller than the effort that must be exerted to attain the policy by any one member. Thus, the optimal time for concerted action or when self-interest will propel action the most is when
and simplified theoretical framework for purposes of this paper is that relatively more concentrated (and perhaps "scarce") factor endowments will be a unifying collective force attaining more trade protection. However, much explication and many caveats should be added.

As has been previously described, manufacturing firms in the United States in the post war period sought either free trade or protectionism. This has also been the case in foreign countries based on the level of that country's production efficiencies in internationally competing goods. Firms without foreign operations confronting competition from imports would advocate protectionism, while multinational firms and export-dominant corporations would advocate freer trade. A simplified dichotomization of what is really a complicated world of cross-cutting interests, is that firms with a strong position vis-à-vis international competition will advocate for an open economy world with little government intervention to hinder free markets. Firms that have a weak position vis-à-vis foreign rivals will request government protection. Competing interests across these two categorizations can and do exist. For instance, if a government has dedicated itself via international agreement to lowering tariffs in the long-run, there may be an aggregate or threshold level of protection that can be provided by the government before it loses trade policy credibility with trading partners. In that case, affected industries will struggle amongst themselves for tariff levels and/or quota protection from specific import items.

Within this competition among industries, the diversification of that industry will partially determine the potential for aggregation or political power of collective influence groups. If an industry is highly segmented, that industry may take longer to aggregate a common position and/or have a less

58. Milner & Yoffie, supra note 7, at 239.
59. Ferguson, supra note 9, at 53.
60. Kazuharu, supra note 53, at 348.
intense influence on government when responding to trade concerns. The more specific that a product or factor of production can become to a smaller or more closely knit group of economic actors, the more likely that an interest benefiting that group will get enacted, ceteris paribus. In advanced economies, factors may become more inter-sectorally mobile and thus domestic policy may be less emphatic on tariff level changes. This is because of counteracting interests across sectors, even though several lobbies in a country could pursue a common goal.

This private sector competition to sway trade policy preferences and the extent of influence of these collective action dynamics will be most conspicuous in pluralist systems because of a more direct private sector impact on representatives. Collective action winners in the pluralist system should be more apt to attain amenable tariff bindings or perhaps receive non-tariff barrier assistance. In statist and corporatist governments, labor and capital cooperate on trade policy to fashion a more moderate position that should be based on long-term economic projections and viability of competitive industries, and less on collective action dynamics. This does not mean that when comparing all three forms of government, higher tariffs would be less ardently favored on factors annexed to less identifiable and less aggregated interests or on industries that are not as important to the domestic economy in statist and corporatist systems. It means that the institutional variable of government interference in the market is more dominant in statist and corporatist governments, while the private sector influence is more dominant in pluralist systems.

This is the case since all three forms of government can have less diversified economies and central industries. Those dominant industries will control trade policy on specific goods and have elevated support in government. The premise is most clear, however, in developing countries where industrialization has recently emerged and policy-making deference is given to particular industrialized sectors before agricultural interests. Here, there may be less lobbying by groups in developing countries to influence politicians to decrease trade barriers in prime foreign markets on agricultural products as this might beget a stronger export industry for agricultural products and eventually push up the price of agricultural goods domestically. This is because agricultural exports could fetch higher prices in international markets and drain domestic supply. This could precipitate domestic societal distress and although

it is globally a less optimal position, it is one which would appease the increasingly commanding position of industry in a developing country.

Using the two polarity classification of market segmentation and the number of firms in an industry (indicating a general propensity for efficacy to attain policy-change), one can also consider an example where an industry may have numerous members with more homogenized interest (low market segmentation) and an industry with a handful of firms with greater diversity of interest (high market segmentation). In this example, the factors work against each other. Despite a large number of actors, thirty firms could unite collectively for an economic interest and advocate for and attain amenable government trade policies. Conversely, a three firm industry may not be able to unite because of competitive agendas or the low unity of factor interests.65 (See Figure 2).

Even with the complexity of existent crosscutting interests, the importance of private sector influences on trade policy is rather straightforward. If collective action dynamics can emerge in a country based on attributes of the economy and industry, that emerging interest should be most influential on

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65. Others have said that in particular instances, such as with the financial community in Britain, "the more dispersed the institutions, the more likely were they to be driven to formal organization." Moran, supra note 28, at 386.
government and lead to more extreme tariff bindings in a pluralist system because of the direct interest that can be placed on government. If politicians choose trade policy preferences on tariff bindings unilaterally, without considering international implications and relations, high tariffs or other protectionist measures could violate the international trade framework. If a trading partner recognizes economic losses to its industries based on a suspected breach of another country's international trade obligations, a trade dispute may arise. For example, when subsidization, dumping, or discrimination is alleged, the allegations could be matched with countervailing or antidumping duties. It is the dynamics of this domestic variable that will be applied to the model in the next section. Section V describes the influence of the private sector on international negotiations between governments and nexus between the domestic and international levels when a trade dispute erupts.

V. INTERNATIONAL COOPERATION

Many scholars recognize inter-linkages between domestic politics and international relations. Many have even suggested that “the main purpose of all strategies of foreign economic policy is to make domestic policies compatible with the international political economy.” It is also assumed that long-term protectionism is not the optimal strategy for any country and that a government may protect certain industries. Such protection may be desirable to safeguard a national economic policy, even if doing so undermines international commitments, or to appease interest groups that are advocating preferential treatment over other private sector entities and thus influencing social and economic policy. While the last section explained this theme in relation to tariff bindings, this section offers a theoretical model of private

66. GATT 1947, supra note 6, at art. XVI.
67. Id. at art. VI.
68. This may include discrimination vis-à-vis other foreign competitors (GATT 1947, art. I), or discrimination vis-a-vis domestic goods GATT 1947, art. III).
69. GATT 1947, supra note 6, at art. VI. In United States law, see 19 USC § 1671.
70. Id. at art. VI. In United States law, see 19 USC § 1673.
sector influence when a dispute has arisen. This section will discuss how the private sector influences trade negotiations when a dispute involves both the variables previously discussed—the three forms of government, the importance of the affected industry to its economy, the ability of the interest coalition to influence the government’s position—and the bargaining power of the disputing governments.

A typical scenario that can give rise to a trade dispute and negotiation is a claim of foreign protectionism. The higher the level of protection by a country, the more likely an affected company will seek government assistance, because its market share could drop relative to the level of protection and elasticity of demand for the foreign product. Thus, pressure is placed on the exporting country authorities to complain to the importing country government. For instance, if tariffs are lower domestically than in a protected foreign market, a multinational industry may complain to its home government that such a tariff results in lost market share because competitive imports are less expensive, and/or because the domestic industry’s foreign market share is lower because the industry’s product is more expensive in the foreign market. The multinational industry could also claim some other form of an alleged breach based on an internationally agreed-upon tariff binding or similar non-tariff-based promise by the foreign country to make concessions. Possible steps for the government could include raising tariffs domestically for that industry or claiming a competitive exception. Or, if the government wants to dissent, it could enter into negotiations with the foreign government claiming a violation of GATT/WTO rules.

Three caveats extending the analysis from an initial general policy position of a state on trade to the circumstance which require negotiations to resolve a trade dispute. First, power-based bargaining positions in the negotiations are recognized, whereas it has been articulated that when a dispute is brought

75. While many have suggested the importance of other concerns such as social and political conflicts in determining tariff levels, which is often claimed to be represented in voting behavior, this article simplifies the analysis by placing primary emphasis on interest groups. KATZENSTEIN, supra note 72, at 333-36.

76. Supra.
77. Supra.
78. This could include numerous claims under provisions of the GATT/WTO framework, such as: Articles I, III, V, X, XI, and XIII, to name a few.
79. Of course, if domestic tariffs are lower, but the belief is that international or domestic market share has not been affected, private sector complaints should not be forthcoming.
80. For example, the “Escape Clause” of Article XIX of the GATT/WTO.
81. Throughout the GATT/WTO agreements are provisions requiring negotiations before a dispute can be brought before a WTO dispute settlement body.
before a more institutionalized body, as would be the case with a WTO dispute settlement panel, influences on the dispute based on power differentials between parties to a dispute are said to be diminished. Thus, the following analyses are based on efforts to resolve trade disputes via negotiations, with the analysis stopping short of submitting a complaint to a formal body, such as the WTO, to resolve the dispute. Thus, power-based relations will play some role in the analysis herein, albeit admittedly an arguable one because both expectations of being haled into a forum that would diminish power-based relations if negotiations fail and an institutionally sanctioned remedial right to apply countervailing duties might in themselves serve as a catalyst that relatively nullifies the influence of those assumptions even in the negotiation stage.

Second, there will be a different degree of influence between the private sector and the executive during the negotiations. As described, initial penetrability will primarily be based on the government type classification. But political allegiance by the interested collective group or industry in the dispute to the political affiliation of the representative and the importance of the result to the economy will increase the level of influence. It is also possible that inter-government institutional relations would designate or reserve a political check on the negotiating authority. This would be the case if a legislature, in representing an interest of the private sector, is able to place political pressure on the executive branch, which fields the trade negotiating team.

Lastly, during trade dispute negotiations, both countries will have a perceived acceptable range of positions. The parameters representing acceptable agreements, as defined by the domestic influence on negotiations and policy positions of the respective executive on the good in dispute, can be described as a "win-set." A large win-set, often when government positions

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84. The private sector influence was noted in establishing the initial government position for (or the degree of protection) a given product classification or industry type in section: "IV. Collective Action Groups & Political Influence on Trade Policy." Private sector influence on government positions may be the attribute that caused the trade dispute in the first place. For instance, consider the process for assessing countervailing duties on imports in the United States, a pluralist country, when government subsidies are alleged. The International Trade Administration (ITA) is a division of the Commerce Department, which is part of the executive branch but can also be influenced by Congress. Arun Venkataraman, Binational Panels and Multilateral Negotiations: A Two Track Approach to Limiting Contingent Protection, 23 COLUM. J. TRANSNAT'L L. 533, 553 (1999). The ITA makes a determination of whether foreign goods had been sold at less than fair market value in the United States, a pluralist country, when government subsidies are alleged. The ITA makes a determination of whether foreign goods had been sold at less than fair market value in the United States, which, it has found in 97% of the companies the agency investigates Id. at 555. It has also been said that foreign producers lack faith in the objectivity of United States domestic courts when they review Commerce Department findings. Id. at 560. If this is true, an already overly biased and protectionist position is brought by the United States Trade Representative (also a politically susceptible department as part of the executive) into trade dispute negotiations.
85. See generally Putnam, supra note 4, at 435. Note that Putnam uses other domestic government influences, such as the legislature, on a general international negotiating position (i.e., not necessarily trade), rather than the private sector.
are not far apart and/or are more flexible, makes an international agreement more likely. The stronger the private sector influence on government and the greater the gravity of economic harm at issue, the more that governments will be restrained, making a smaller win-set.

In the following graphical representations, the governments' initial international negotiating position without any domestic influences would be based on the: 1) assessment of the economic importance of the industry to the economy, as balanced against the 2) current governments' dedication to freer trade. However, when there is a stronger private sector that is able to have its position penetrate government negotiations, the influence from the domestic level on the government's international negotiating position will be dependent on: 1) the respective industry aggregation of interest (based on the collective action principles previously discussed), and 2) the type of government structure.

The first example depicts a pluralist government that is economically more powerful than a rival statist government that complains of the pluralist government's use of protection in a critical industry with strong interest representation in the private sector:

![Graphical Representation]

**Figure 3**

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86. Putnam, supra note 4, at 437.

87. The assumption here is that only domestic industries influence their respective governments, but interest groups or coalitions of lobbies need not necessarily be solely of domestic origin. Foreign groups can influence politicians in a trading country to enact voluntary export restraints, Hillman & Ursprung, supra note 37, at 729, or lessen tariff bindings on imports. T. Schelling, The Strategy of Conflict 209-10 (1960). Globalization of business illustrates a dynamic process whereby the private sector has cross-cutting interests that affect trade policy, which makes a simplified domestic analysis seemingly unrealistic.

88. On rare occasion, it is also possible that the populace can influence government trade policy in highly publicized or media-driven disputes, as has intermittently been the case with Japanese car imports.
The relative power of a country, generally based on the size of the economy, can render an important role in bargaining at the international level and the degree to which a trading partner will grant position flexibility with its negotiating counterpart. Without the WTO/GATT rule framework, negotiations between the dominant pluralist government and the weaker statist government should favor the pluralist government. This is because weaker rule frameworks often provide fewer and less objective guiding principles to the negotiating parties and increases the degree to which leverage principles of power play. Thus, if the dominant pluralist government is being accused of protectionism by the statist government, negotiators of the pluralist government will be partially restrained by a dominant ideological framework of freer trade in the international system, thus relatively off-setting power differentials. While the impact may be marginal for less important cases (i.e. giving the dominant state more concessions), for very important circumstances or when there are accumulated victories for the dominant state on results that seem inconsistent with international cooperation, a backlash from other trading states may eventually occur.\footnote{While policy-makers generally have an incentive to "cheat" on international economic agreements if it is in their own best self-interest or in the interest of their country, a more dominant country should be more able to get away with defecting without being penalized. However, the likelihood of defecting can be reduced by those states that expect to cooperate again in the future. ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).} The international trade framework should partially restrain even more dominant states that might have engaged in protectionist measures.

The more pluralistic the government, the more influence the private sector should be able to place on government trade policy, and the more that trade positions or negotiations should reflect private sector interests and collective action dynamics than on independent government economic or public policy assessments cloistered apart from private sector influences. In the given example, the dominant pluralist country is apt to elevate economic distortions by taking a position farther from the optimal freer trade position and protect the industry with a self-interested but globally sub-optimal negotiating policy position. This is because the powerful pressure group has an extreme protectionist position, moving the pluralist government’s position away from enhanced cooperation with the statist government on the issue to a location that makes a mutually acceptable agreement unlikely.\footnote{J.M. Finger et al., The Political Economy of Administered Protection, 72(3) AMER. ECON. REV. 452, 464 (1982), available at http://www.jstor.org/fcgi-bin/jstor/viewitem.fcgi/00028282/dig50028/95pool3/f0?currentres.} In this scenario, when there is no over-lap in the win-set, requesting the assistance of a third-party dispute settlement institution, such as the WTO, is likely.

Domestic actors outside of government should have little influence on the statist government’s trade position, conferring it a unified international and
domestic disposition toward the dispute. For instance, if the pluralist government were instead a statist government, the result of negotiations between two statist governments should provide a larger win-set that is influenced primarily by the relative power of the states, by what the negotiators perceive to be in the best public interest of their respective countries, by each country's dedication to international economic cooperation, by future expectations about trade with this party, and by independent calculations of the economic impact of an agreement. Regardless of these considerations, there would only be one level of consideration during the negotiations for which the governments should be concerned—unlike the domestic influence when a pluralist government is involved.

In the example as originally given, because the private sector influence is so substantial and the industry is important to the economy, the dominant pluralist government should make it even less flexible and improbable for the win-set between the countries to overlap. The probable result is that the weaker statist government would grudgingly make more concessions than it would ordinarily make than if the power disparity did not exist. Similarly, because the statist government regularly interferes in the domestic economy and the private and public sectors are often perceived as relatively unified, appeasing an interest outside of government is not of as significant importance as in a pluralist system. Thus, the government can and will make economic adjustments domestically through the regular course of policy-making. In fact, as is often the case in statist governments, economic adjustments will be made by a counteracting domestic subsidization to the impacted industry, especially if it is a moderately important industry to the country.

Taking a minor twist on the previous example, if there is a weak industry representation, or if many overlapping product interests exist, and it is a less critical industry to the domestic economy in the dominant pluralist country, a mutually acceptable agreement is more apt to be concluded because less is at stake for the pluralist government. Therefore, the government's negotiating position is more flexible. (See Figure 4 on next page).

With a weaker interest representation and less important industry, the dominant pluralist government is likely to be more flexible in negotiations. Its range of acceptable results will be larger and a mutually acceptable agreement more likely. Also, when there is an overlapping win-set as depicted, it is less likely that the dispute would be referred to a formal dispute settlement forum. In the obverse, one might also conclude

that this result is transpiring because there is a counter-balancing effect engendered by weakening the domestic influence and strengthening the importance of the ideological preferences or future expectations about pluralist government's reliance on mutual cooperation. The only variables that have changed are the domestic private sector interest and the importance of that interest to the economy. Thus, the pluralist government's negotiating executive might be said to be more sequestered from domestic private sector influences as well as those of a larger scale in the economy.

In changing the scenario again, if a weaker statist government enacted a protectionist measure on a product of a less important industry to its economy against a stronger corporatist government with an economically important export product, a depiction follows. (See Figure 5 on next page).

Because statist governments normally have at least a pseudo-control over the domestic economy, it might have a natural institutionally based propensity to be more hostile to opening markets that could undermine its economic plans and programs. While this is theoretically palatable, statist governments have also been known to drastically modify trade policy positions. This is particularly true if the country is less democratic in nature, as disappointing experiences may urge leaders to enact extreme protectionist positions, or even rapidly open markets when assimilating the successes of similarly situated countries. This is unlike the situation in consolidated democracies since revolutionary or abrupt change is often quelled by negotiated positions. The

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92. The Asian Tigers are often cited as models of statist governments that opened their doors to freer trade and reaped economic success.
assumption in this example is that the statist government is situated in a protectionist position on this good, despite that the industry is less important to its economy (which may in itself be somewhat philosophical and less pragmatic). Thus, while the corporatist government's position will be influenced by its private sector (but less so then in a similarly situated pluralist government), elites in the statist government will be more apt to make trade policy based on ideology, feasibility and need for cooperating on this good and expectations about future cooperation, and acceptability of possible change within domestic economic programs.

Many corporatist governments have been identified as being very successful at flexibly adapting to open market principles through sagacious long-term horizons. This is because they have tended to accept open-market principles and adhered best to the ever-increasingly freer trade system because domestic interest group structures have been pacified with joint policy-setting between government and the private sector. In the aforementioned example,

93. KATZENSTEIN, supra note 27, at 205.

94. The Western European countries are the best example of corporatist structures. This institutional structure of government was employed to react to the catastrophic economic changes of the 1930s and 1940s by enhanced domestic cooperation between the private sector and government. Business, unions, and government realized that limiting domestic quarrels were necessary so to better cooperate and adapt to changing economic conditions in the world within the system of freer trade because the European states were dependent on international trade and were not powerful enough to control the system. id. at 30-38.

95. Probably one of the best examples of this close corporatist relationship between government and business can be found in the European consortium Airbus, a relationship which resulted in a trade dispute in the early 1990s with the United States claiming subsidization when Airbus significantly increased global market share. Artemis March, The Future of the U.S. Aircraft Industry, TECH. REV. 26-36 (1990).
the corporatist government has a moderately freer ideological position on trade. Further, this particular good is an important export product. Private sector pressure is diluted because the corporatist government’s general policy melds with the government’s long-term economic programs, making a mutually acceptable trade negotiating result with the statist government more likely. On the other hand, because the industry product is not as important to the statist government, its original protectionist position will be more flexible toward accepting an agreement with the stronger corporatist state. This is especially true when the product is an important export product to the corporatist state.

For a final hypothetical scenario, consider a dominant corporatist state with a critical industry to its economy, and a much weaker pluralist government that has a minimal interest representation on the good at issue with a less important export industry to its economy. The corporatist government has enacted protectionist measures on the import of the pluralist country’s good:

The weaker pluralist government will likely make extensive concessions because of the negligible domestic interest influence on the international bargaining position and the less important export industry to its economy. In fact, given this scenario, the pluralist country would be unlikely to even complain about the dominant corporatist’s protectionist measure, unless other goods have been debated and disputes have been on-going between the two countries, such that the current dispute is just more fuel for a recurring fire.

96. This “long-term” program does not have the rigidity of a statist government.
As is evident when considering these conjectural examples, within all three government constructs, the states’ positions in negotiations will be dependent on a dedication to freer trade, private sector influence on the states’ position, and also the necessity of relying on trade to support their economies. Two governments that are more dedicated to freer trade and rely more on trade as a percentage of gross domestic product (GDP) will be more prone to conclude dispute negotiations in a more mutually satisfactory manner because of the fear of reciprocal sanctions. The extent to which a government will be flexible is influenced by the private sector and the severity of harm to the domestic economy. The more severe the need to protect the domestic economy, the more likely that a government will submit to protecting its domestic economy and risk deeper trade cooperation.

VI. CONCLUSION

This paper has described the dynamics of private sector-government relations in statist, corporatist, and pluralist governments within the context of domestic influences on international trade policy preferences. While it is clear that the international trading system, as framed in the GATT/WTO, has structured restraints within which states will act, leaders/politicians have positions and personal ideological and self-interested preferences on trade issues that are influenced by the private sector and the domestic economy.

Statist governments have unification between the private and public sectors on economic issues and a propensity to interfere more with market mechanisms than other government forms. These aspects facially undermine the GATT/WTO trade system and its premises regarding comparative advantage because they are endemic institutional government attributes that could tend to favor protectionism. However, this is not always the case because of the oftentimes dependency on external resources and ideological shifts in statist governments. The other extreme, pluralist governments tend to refrain from enacting domestic economic regulations that undermines market mechanisms. However, these governments are also often more susceptible to protecting industry and sectors of the economy at the behest of private sector lobbying, with the degree of protection correlated with power bases and collective action dynamics. Lastly, corporatist systems, in having a pseudo-unification between the private and public sectors (but still having a defined private sector), have been said to have more stable, foresighted, and planned trade policy preferences, generally of a liberalized nature. This is attributable

98. See generally KATZENSTEIN, supra note 27.
to the aggregation of interests and negotiations between major economic actors at the national level that would otherwise contend amongst themselves for trade and tariff preferences. A policy supporting freer trade is generally incorporated into these domestic level negotiations.

The government forms and subsequent influences by the private sector precipitate complexities for national representatives negotiating over trade disputes. When a trade dispute arises, nationally-oriented representatives will have a policy position dependent on ideology, the states’ relative dedication to the international system of free trade and cooperation (often to the extent that it has been “locked in” to international agreements by previous governments), and the importance of the industry to the domestic economy. The collective action influence from the private sector on the states’ trade policy positions should be influenced most in pluralist systems, depicting when domestic politics have the most prominent impact on international economic relations. The impact will be greater when the interest group aggregation is stronger. Corporatist systems would be expected on average to have less extreme positions being asserted by the private sector at the domestic level because of aggregated collective bargaining at an earlier period. Therefore, the negotiators’ position is more flexible and more apt to result in a mutually acceptable agreement. A statist government would be expected to witness very little private sector influence on international negotiations because the private sector position is conceptually unified in the government’s long-term economic strategy for the country. Thus, the position of these economic production entities in the economy should be the same as the government’s position.

With all of these dynamics, obvious conclusions or generalizations cannot be drawn about the position of particular governments on trade issues for the future. The likely trend seems to be that the international trade framework (and other international law economic agreements) will continue to pressure domestic government institutions to more fully support market and trade liberalization principles. Government interests may be privatized, especially to the extent that intricate relations between government and internationally competitive production entities may be under constant scrutiny of subsidization claims by trading partners. This would make countries with statist tendencies gradually have more domestic private sector influence on government trade agreements, such as the North American Free Trade Agreement and the Uruguay round of the General Agreement on Tariff and Trade. Grossman & Helpman, supra note 50, at 675.

100. While this is the trend—removing government from production and subsidization of private sector production so that market competition consistent with the international trade system will be fostered—even in countries that have not previously played an intricate role in their economies, they have over time become more deeply involved in regulating their economies. Lairson & Skidmore, supra note 82, at 6.
policies because there would be a loss of control over a portion of the economy. Those influences may still exist but be derived now, at least legally, from outside the government, and within a trade framework that is continually becoming more liberalized by agreements that establish precedence and bind future governments from straying too far from previously agreed upon principles. As has been described throughout this paper, this does not mean that any particular type of state should necessarily be more prone to favor freer trade or protectionism, but that government institutions that have had a natural prejudice to support freer trade could be influenced more by ad hoc and sporadically arising protectionist positions from the private sector (as is more common in pluralist governments). Given a dispute might result in a similar trade position that would have existed even without any institutional conversion but with less government dominance or encompassing economic planning over that trade policy.
Like many economies in transition, the Republic of Armenia is in the process of adopting market-oriented policies and laws. The current tax law\(^1\) in Armenia was passed by the National Assembly on April 14, 1997 and was signed by the President on May 12, 1997. The transition rules were quite simple. Upon taking effect, the prior law, which was passed on April 19, 1992, became void.\(^2\)

I. GENERAL PROVISIONS

The tax procedures in Armenia come from three different sources: 1) tax legislation and other laws on different types of taxes,\(^3\) 2) government decrees,\(^4\) and 3) legislative norms that are adopted by the Tax Inspectorate or other State administrative bodies.\(^5\) Thus, there are some similarities and differences between the sources of tax rules in Armenia versus those in the United States and other western democracies.

In the United States, the legislative branch passes tax legislation. The same is true in Armenia. However, in Armenia there are also government decrees, which are not a source of tax law in the United States. The advantage of having

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1. See Generally Tax Code, 1997 (Arm.) (All references are to the English language version of the Republic of the Armenia tax law, passed in the National Assembly on April 14, 1997).
3. Id. at art. 2, sec. a.
4. Id. at sec. b.
5. Id. at sec. c.
government decrees as part of the legal process is that it allows for faster changes in the law. If something needs to be fixed, it can be fixed quickly, without the need to first gather the necessary number of votes from the legislature. The problem with allowing government decrees to have the force of law is that there is no legislative input. If those who have the authority to issue such decrees are incompetent or evil, a great deal of damage may be done. Such decrees can be used to reward friends or punish enemies. One of the strengths of the legal system in the United States is the separation of powers. The legislative branch passes the laws and the executive branch enforces them. This separation of powers doctrine acts as a safeguard against government abuse. The Armenian tax system, or legal system in general, does not have this safeguard built into the system to the same extent, although there are three separate branches of government.

The third source of tax regulations, legislative norms, might be compared to Internal Revenue Code Regulations that are written by the United States Treasury Department and to Revenue Rulings and Revenue Procedures, which are written by the Internal Revenue Service in the United States. In Armenia, these legislative norms have the force of law. In the United States, Internal Revenue Code Regulations have the force of law, although occasionally a regulation is declared to be invalid for one reason or another. Internal Revenue Service publications like Revenue Rulings and Revenue Procedures do not have the force of law, but taxpayers who ignore them do so at their peril.

The problem with this source of law is that it is generated by the very people who are in charge of collecting the tax. Thus, there may be a tendency to interpret the law, or to make new law, that benefits the tax collector at the expense of the taxpaying public. One of the main strengths of the Separation of Powers Doctrine is that it provides a legal structure to prevent this potential abuse of power.

The Separation of Powers Doctrine has been substantially eroded in the United States, especially since the 1930s, when a number of administrative agencies were created in the executive branch. These agencies have grown in size and power to such an extent that the judges who would hear cases on the violation of the Separation of Powers Doctrine are afraid to declare some administrative agency unconstitutional for fear that their ruling would be used

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6. The Separation of Powers Doctrine had its origins in the political writings of the seventeenth and eighteenth centuries. The United States was the first country to adopt it as part of its constitutional structure. The Separation of Powers Doctrine is constructed around the belief that a government that has its power divided among the executive, legislative and judicial branches has less ability to abuse power than a government that has these powers centralized in a single branch. The legislative branch makes the laws, the executive branch enforces the laws, and the judicial branch interprets the laws. A system of checks and balances is thus established to minimize the amount of abuse that might otherwise take place.
as precedent to eventually hold that all such administrative agencies that exercise legislative and judicial power are unconstitutional.\textsuperscript{7}

The Armenian tax law states that taxes are compulsory payments, collected for state and public welfare. They are to be collected from legal and physical persons and from enterprises.\textsuperscript{8} Those who are philosophically inclined might question the meaning of state welfare and public welfare, and whether they might be appropriate or true recipients of tax revenues.

The philosophical problem with collecting tax revenues for state welfare is that the state is supposed to represent the people, but state welfare, if such a thing exists, runs contrary to the interests of the taxpaying public. It is in the state’s interest to expand its power and scope, whereas it is in the interest of individuals to keep the state small enough that it is not able to do much damage to the individuals within its borders or without. There is a built-in and irreconcilable conflict between state interests and individuals interests. At least that is true once the state grows beyond the minimal state.\textsuperscript{9}

Collecting taxes for the public welfare is a benign enough goal. The problem is that many states collect taxes for reasons that actually harm public welfare rather than enhance it. An ideal tax, if there is one, has the sole aim of collecting revenue. The problem is that many taxes are created to further social engineering goals rather than revenue collection goals. The graduated income tax, for example, exists mostly to reduce income inequality, which is social engineering at its worst. Karl Marx advocated a graduated income tax in his Communist Manifesto as a means of destroying the free enterprise system, which he disparagingly referred to as capitalism.

Economists have made a number of utilitarian arguments against the graduated income tax.\textsuperscript{10} It destroys incentives of the most productive people. It retards economic growth by reducing the amount of capital available for investment and job creation.\textsuperscript{11}

\textsuperscript{7} In the United States, a number of administrative agencies exercise both legislative and judicial power although they are in the executive branch. For example, the Internal Revenue Service, which is a subdivision of the Treasury Department, which is in the executive branch, issues pronouncements such as Revenue Rulings and Revenue Procedures, which have the force of law for all practical purposes, since a taxpayer who ignores them does so at his peril. The Treasury Department writes the regulations that expand, clarify, and sometimes alter the tax laws that the legislative branch has passed. The Internal Revenue Service also has its own court, the Tax Court, which hears and decides thousands of tax cases. It is an administrative court that is in the executive branch.

\textsuperscript{8} Tax Code, 1997, art. 3 (Arm.).

\textsuperscript{9} For more on the concept of a minimal state from the philosophical perspective, see generally ROBERT NOZICK, ANARCHY, STATE AND UTOPIA, BASIC BOOK, INC. (1974).


\textsuperscript{11} KEITH MARSDEN, LINKS BETWEEN TAXES AND ECONOMIC GROWTH: SOME EMPIRICAL EVIDENCE (World Bank Staff Working Paper No. 605, 1983).
There is also the fairness argument. There are basically only two views of government. Either the government is the servant and the people are the masters, or the government is the master and the people are the servants. The graduated income tax is based on the view that the government is the master. As Karl Marx said, "From each according to his abilities; to each according to his needs." If government were viewed as the servant, the view might be, "From each according to the benefits received."

Unfortunately, the tax laws of Armenia tend to be of the Marxist variety. The enterprise profit tax, for example, varies between 15% and 25%, which, although lower than the rates in most countries, is, nevertheless, graduated. The profit tax on gambling games and lotteries, although not graduated, is set at a confiscatory 70%. Individual income taxes are assessed at three rates, 15%, 25% and 30%.

The Armenian tax system engages in other forms of social engineering in addition to attempting to reduce income inequality. The excise tax law for example punishes those who sell or consume caviar, alcohol and tobacco products while rewarding those who make coats from sheep fur for employees and the army.

The value-added tax (VAT) is assessed at a single rate, although there are exemptions for certain socially desirable activities and products. Exports are subsidized by a zero tax rate.

One concept imbedded in the Armenian tax code that might be adopted by the United States is the provision relating to when tax law changes should be made. The Armenian tax law states that changes in tax rates, the introduction or termination of a tax may generally take place only at the beginning of a fiscal year. That would eliminate the need to allocate by days or to deal with the complexities that result when the rules are changed during the year, as is so often done in the United States.

12. GEORGE SELDES, THE GREAT THOUGHTS 274 (1985). The original wording was "Jeder nach seinen Fähigkeiten, jedem nach seinen Bedürfnissen." Id. Louis Blanc, the French socialist, said basically the same thing in 1848.
13. As are those of the United States and every other country that has graduated tax rates.
15. Id. at sec. 2 (Law on Enterprise Profit Tax).
16. Id. at art. 18 (Personal Income Tax).
17. Id. at art. 5 (Excise Tax), (signed into law by the President on June 24, 1997). The tax rate on caviar is 200%. Id. On tobacco products it is 100%. Id. On alcohol, the rate varies between 50% and 125%. Id. The rate on coats made of sheep fur for employees or the army is zero percent.
18. Id. at art. 9 (Law on Value Added Tax) (signed into law by the President on June 16, 1997).
20. Id. at art. 16.
21. Id. at art. 8.
The Armenian tax credit is quite simple. Taxes paid by taxpayers in Armenia shall be reduced by the amount of tax collected from the taxpayer outside Armenia.\(^\text{22}\) This rule is much less complicated than the United States rule. It avoids the possibility of double-taxation.

Armenia assesses six kinds of taxes,\(^\text{23}\) the enterprise profit tax,\(^\text{24}\) the personal income tax,\(^\text{25}\) the excise tax,\(^\text{26}\) the Value Added Tax,\(^\text{27}\) the property tax\(^\text{28}\) and the land tax.

**II. RIGHTS AND RESPONSIBILITIES OF TAXPAYERS; CONTROL OVER TAX PAYMENTS**

A taxpayer has the following rights:

a. be introduced to the results of checking his activity,\(^\text{29}\)
b. submit to Tax Inspection explanatory notes on tax accounting, and payment,\(^\text{30}\)
c. appeal against activities of Tax Inspectorate, as in accordance with the legislation,\(^\text{31}\)
d. apply for obtaining tax privileges, as defined by the legislation.\(^\text{32}\)

A taxpayer has the following responsibilities:

a. to account income, and to submit statement of accounts,\(^\text{33}\)
b. to account amounts of taxes to be paid, and pay them, unless envisaged otherwise by the legislation,\(^\text{34}\)
c. to submit to Tax Inspection tax reports, and other documents, as envisaged by the legislation.\(^\text{35}\)

\(^{22}\) Id. at art. 11.

\(^{23}\) Id. at art. 12.

\(^{24}\) See generally Law on Enterprise Profit Tax, 1997 (Arm.) (enacted by the National Assembly on Sept. 30, 1997 and signed by the President on Nov. 27, 1997).

\(^{25}\) See generally Law on Personal Income Tax, 1997 (Arm.) (adopted by the National Assembly on Dec. 27, 1997 and signed by the President on Dec. 30, 1997).

\(^{26}\) See generally Law on Excise Tax, 1997 (Arm.) (signed by the President on June 24, 1997).

\(^{27}\) See generally Law on Value Added Tax, 1997 (Arm.) (enacted by the National Assembly on May 14, 1997 and signed by the President on June 16, 1997).

\(^{28}\) Tax Code, 1997 (Arm.).

\(^{29}\) Id. at art. 14, sec. a.

\(^{30}\) Id. at sec. b.

\(^{31}\) Id. at sec. c.

\(^{32}\) Id. at sec. d.

\(^{33}\) Tax Code, 1997, art. 15, sec. a (Arm.).

\(^{34}\) Id. at sec. b.

\(^{35}\) Id. at sec. c.
d. to pay in due time taxes, and tax advances, if envisaged by the legislation,\textsuperscript{36}

e. provide necessary conditions for checks, conducted by the Tax Inspectorate,\textsuperscript{37}

f. submit documents, verifying his fights for tax privileges,\textsuperscript{38}

g. to make corrections in the accounts, if errors are found during the checks conducted by Tax Inspectorate.\textsuperscript{39}

Taxpayers have a month to register for a taxpayer identification number after receiving a taxpayer’s license.\textsuperscript{40} Tax liability is terminated upon death,\textsuperscript{41} which is different from the treatment in the United States, where the deceased taxpayer’s estate assumes responsibility for paying the tax. If a legal person or enterprise is restructured, the outstanding tax liabilities are assumed by the successor.\textsuperscript{42}

The restructuring provision is an interesting one because it does not go into any further detail about what constitutes a restructuring. If the restructuring is by transfer of shares, it is easy to identify the old and new owners. But what if the restructuring is by the sale of assets, where the old and new owners are not quite identical? Who is liable for tax in such a case? The law is unclear.

If outstanding tax liabilities have been discovered after the liquidation of a legal person, the court may assign them to the major owners or members of management if these liabilities arose within one year of liquidation as a result of mistakes made by these persons.\textsuperscript{43} Thus, there is a one-year statute of limitations in which to pierce the corporate veil.

Which major owners or managers would be liable is not stated. Would a bookkeeper be liable, or would the bookkeeper’s boss be liable? Would the president of the enterprise be liable if it was the bookkeeper who made the mistake without the president’s knowledge? If the president told the bookkeeper to calculate the amount of tax liability incorrectly, would the bookkeeper be liable? Would it be joint and several liability with the right of contribution?

Questions might also arise about what constitutes a mistake. Is an underestimate of tax liability a mistake, or is it merely an underestimate? What

\textsuperscript{36} Id. at sec. d.

\textsuperscript{37} Id. at sec. e.

\textsuperscript{38} Tax Code, 1997, art. 15, sec. f (Arm.).

\textsuperscript{39} Id. at sec. g.

\textsuperscript{40} Id. at art. 15.

\textsuperscript{41} Id. at art. 16.

\textsuperscript{42} Id.

\textsuperscript{43} Tax Code, 1997, art. 16 (Arm.).
if a mistake is discovered that, upon correction, would result in a tax refund? Who is entitled to receive the refund?

A number of questions arise because the tax law does not cover these points. Carefully worded language in the corporate charter might spell out who is entitled to a tax refund in the event of liquidation, but it is unlikely that those who draft corporate charters would think to include such a provision.

Information obtained illegally during the course of a tax inspection may not be used to collect taxes.\textsuperscript{44} Thus, the tax inspector is not able to benefit by breaking the law, which reduces the incentive for doing so.

Information may not serve as the basis for accounting and collecting taxes unless the taxpayer has become familiar with it.\textsuperscript{45} This provision provides a measure of basic fairness and allows the taxpayer to introduce information to challenge the veracity of the information that is otherwise used to assess and collect taxes.

Legal persons, enterprises without the status of a legal person, entrepreneurs, and state and local government bodies shall provide the Tax Inspectorate with information on the activities associated with the taxpayers, and the income paid to physical persons and taxes collected from the income, in accordance with procedures defined by legislation.\textsuperscript{46}

### III. Responsibility for the Violation of Tax Legislation

Taxpayers, and their management in the case of enterprises, institutions and other organizations, are responsible for the correct tax accounting and timely payment unless otherwise envisaged by legislation.\textsuperscript{47} Taxpayers who do not submit the accounting documents, or who submit documents that do not comply with the requirements, shall have the Tax Inspectorate perform its own accounting, based on the following:\textsuperscript{48}

\begin{itemize}
  \item[a.] Taxpayer’s assets taxed turnover
  \item[b.] Expenses on the production and turnover
  \item[c.] Inventory results
  \item[d.] Information obtained from third persons
  \item[e.] Prices and costs used by other persons in similar cases
  \item[f.] Other norms set by the government
\end{itemize}

\textsuperscript{44} Id. at art. 18.
\textsuperscript{45} Id. at art. 19.
\textsuperscript{46} Id. at art. 20.
\textsuperscript{47} Id. at art. 22.
\textsuperscript{48} Tax Code, 1997, art. 22 (Arm.).
There are penalties for delay in payment. If there is a 90 day delay in paying, a fine equal to 0.1% of the total amount is assessed. If payment is delayed by more than 90 days, the fine is 0.3% of the total amount of tax due. For taxpayers who understand the time value of money, this provision encourages them to delay payment and invest the proceeds in some kind of income generating account.

A fine is imposed if an accounting statement is submitted more than two months late. The fine is equal to 5% of the total amount due for each 15 days of delay, not to exceed the total amount due.

A fine equal to 10% of the outstanding tax liability is assessed if the taxpayer either did not carry out an accounting or if the accounting was done improperly. This penalty might be exceedingly harsh in some cases. For example, take the case of a taxpayer who completed 99% of the accounting properly but made a mistake on some minor item. According to the wording of this penalty provision, the taxpayer is assessed a 10% fine on the entire amount of the tax liability, when in fact the mistake that was made might have been quite minor. What if the mistake was in the government's favor? Apparently, the taxpayer would still be assessed a 10% penalty, which seems grossly unfair.

If an item is not included on a tax declaration, or is partially concealed, meaning not properly accounted for, the taxpayer is liable for the full amount of tax plus a 50% penalty. If the taxed object is missing or partially concealed a second time, the penalty rises to 100%. There is nothing in this tax law that mentions prison as a possible penalty for concealment of tax liability.

49. Id. at art. 23
50. Id.
51. Id. at art. 24.
52. Id.
53. Tax Code, 1997, art. 25 (Arm.).
54. Joan Caplin, 6 Mistakes Even the Tax Pros Make, MONEY, Mar. 1998, at 104-106. If a similar penalty provision were enacted into the United States tax code, it is likely that every taxpayer that is audited would have to pay the penalty. In November 1997, for the eighth time since 1987, MONEY magazine conducted a survey of practitioners to see how accurately they were able to prepare tax returns. In the survey that was published in the March, 1998 issue, all 46 tax preparers who completed the survey made at least one mistake. For the seventh time in the history of the MONEY magazine survey, no two tax preparers came up with the same tax liability. Participants in the survey consisted of 31 certified public accountants, 12 enrolled agents and three other individuals who prepare tax returns for a living.
55. Tax Code, 1997, art. 27 (Arm.).
56. THE ETHICS OF TAX EVASION 306-314 (Robert W. McGee, ed. 1998); It might be mentioned that tax evasion is widespread in Eastern Europe and the CIS countries. The main reasons for the widespread evasion are the belief that the government is corrupt and therefore not entitled to any tax revenue, and the absence of an infrastructure that lends itself to the easy reporting of taxable income or its collection. For a discussion of tax evasion in Russia; see VLADIMIR V. VAGUINE, THE "SHADOW ECONOMY" AND TAX EVASION IN RUSSIA, for a discussion of tax evasion in Bulgaria, see GUEORGUI SMATRAKALEV, WALKING
However, that does not mean that tax evaders cannot go to prison because there is another section in the law that states that other types of penalties and fines might be imposed if other provisions of the tax laws are violated.\textsuperscript{57}

If the product of entrepreneurial activity, including goods and services to be delivered or sold, is not registered in accordance with procedures set forth by the government, the fine shall be equal to the total cost of production.\textsuperscript{58} If the goods or services are sold at a price that exceeds the registered price, the fine is equal to the difference between the registered price and the actual price.\textsuperscript{59} However, neither of these fines shall be collected if the violation occurs during a period in which the taxpayer provides an accounting declaration.\textsuperscript{60}

Such a provision is totally missing from the United States tax code. In the United States there is generally no need to report prices to the government. Setting prices is seen as an activity that is none of the government's business. It is strange that a government that is trying to convert to a market system would retain such a provision.

Taxpayers are to pay the taxes and fines within ten days after receiving notification from the Tax Inspectorate.\textsuperscript{61} Failure to do so may result in seizure of the taxpayer's property.\textsuperscript{62} The Tax Inspectorate may apply to the court for seizure.

This procedure seems harsh and subject to potential abuse. What if the Tax Inspectorate notification states a tax figure that is grossly overstated? What recourse does a taxpayer have other than paying whatever the Tax Inspectorate thinks is due? What if the amount due is a few dollars? Does the Tax Inspectorate have the right to seize all the taxpayer's property?

In the United States, the policy is much different. The Internal Revenue Service first notifies the taxpayer of the alleged deficiency. The taxpayer has 30 days to respond. A series of 30 day and 90 day letters then go back and forth. If various levels of administrative review do not resolve the issue, the taxpayer can petition the Tax Court to hear the case, or can pay the tax and sue for a refund in either the Claims Court or the appropriate federal District Court.

\begin{footnotes}
\item[57] Tax Code, 1997, art. 32 (Arm.).
\item[58] Id. at art. 28.
\item[59] Id.
\item[60] Id.
\item[61] Id. at art. 29.
\item[62] Tax Code, 1997, art. 30 (Arm.).
\end{footnotes}
Although there are possibilities for abuse in the United States tax system, the due process afforded most taxpayers minimized the potential for abuse.\textsuperscript{63} This level of due process is absent from the Armenian tax system.

Evidence of this lack of due process may be seen in the provision that allows the Tax Inspectorate to collect even before taxes are due. There is a provision in the tax law that permits the Tax Inspectorate to collect taxes before the regular due time if there is evidence that a taxpayer with outstanding tax liabilities is destroying the objects of income or concealing income, thus making it impossible to collect taxes. The Tax Inspectorate may require the submission of accounting statements, declarations or other documents before they would ordinarily be due.\textsuperscript{64}

Such a rule violates due process and may lead to abuse. There really are no safeguards to prevent the Tax Inspectorate from targeting anyone it wishes, merely to solicit a bribe. From conversations the author has had with numerous Armenians, tax inspectors have a reputation for soliciting bribes. Based on the opinions of the average Armenian, it could be concluded that the average tax inspector would accept a bribe. Some people become tax inspectors for that very reason, since the pay is low and the opportunity for making extra income is great.

\section*{IV. Getting a Refund}

If a taxpayer is entitled to a tax refund, the amount of the refund will be netted with other tax obligations and refunded to him within 30 days after receiving the application from the taxpayer.\textsuperscript{65} There is a special procedure for refunding excess VAT and excise taxes.\textsuperscript{66}

If an employer does not withhold taxes for employees, the amount of tax due may be collected from the employer.\textsuperscript{67} The exact language of the English language translation reads as follows:

\begin{quote}
If an employer does not collect (keep) taxes from the employee in due time, the amounts shall be collected from the employer after discovery, for a period not exceeding the last three months, and the remaining tax obligations shall be covered by the employer.\textsuperscript{68}
\end{quote}

\textsuperscript{63.} GEORGE HANSON, TO HARASS OUR PEOPLE: THE IRS AND GOVERNMENT ABUSE OF POWER (A Positive Publications Book, 1984). Although the system in the United States goes a long way toward eliminating abuse by tax authorities, it has not been able to eliminate abuses. See also, DAVID BURNHAM, A LAW UNTO ITSELF: POWER, POLITICS AND THE IRS (Random House, Inc., 1989).

\textsuperscript{64.} Tax Code, 1997, art. 31 (Arm.).

\textsuperscript{65.} Id. at art. 33.

\textsuperscript{66.} Id.

\textsuperscript{67.} Id. at art. 34.

\textsuperscript{68.} Id.
If the employer withholds too much from the employee's wages, the excess shall be returned within 30 days after discovery, for the period of the previous three years. 69

Taxpayers who incur a loss as the result of the Tax Inspectorate's violations shall be reimbursed in accordance with legal procedure. 70 This provision is much better than the provision in the United States tax code. In the United States, the IRS can unjustly confiscate a taxpayer's house and sell it for ten cents on the dollar. If it later turns out that the house was wrongly confiscated and sold, the taxpayer is only entitled to the ten cents the IRS collected, not the market value of the house. Worse yet, the taxpayer might have to sue the IRS to get even that. In one case, a taxpayer who was entitled to such a refund had to agree not to sue the IRS as a condition of having the property returned, even after the court said that the taxpayer was entitled to a refund. 71

V. OTHER PROVISIONS

Taxpayers may appeal activities of the Tax Inspectorate officers to the senior body within the Tax Inspectorate within 30 days. 72 A decision regarding the appeal shall be made within thirty days thereafter. Appeals against these decisions may be appealed to a higher body or to the court within one month after receiving notification. 73 The taxpayer and/or his representative may be present during the examination of the appeal. 74 An appeal against the activities of the Tax Inspection officers does not suspend further collection of taxes. However, the tax body that examines the appeal may suspend tax collection until a decision is made. 75

The provisions of an international agreement take precedence over the provisions of the tax law for those international agreements that were entered into after the current law was passed. 76 The previous procedures will be effective for international agreements signed before the current tax law took effect. 77

69. Tax Code, 1997, art. 34 (Arm.).
70. Id. at art. 35.
72. Tax Code, art. 36 (Arm.).
73. Id.
74. Id.
75. Id. at art. 37.
76. Id. at arts. 38, 44.
77. Tax Code, 1997, art. 44 (Arm.).
VI. CONCLUDING COMMENTS

For one who is familiar with the United States tax code, one is struck by the relative simplicity of the Armenian tax law. The Armenian tax law has little or no complexity compared to the mammoth United States tax law, which has evolved over more than eight decades. On the other hand, there is not nearly as much guidance, which leaves room for interpretation. But the United States tax code also leaves a lot of room for much interpretation. The Armenian tax system has some provisions that could lead to abuse and there are inadequate safeguards to prevent abuse. The United States tax system has safeguards, but IRS officials have often ignored those safeguards and have abused the law on numerous occasions. Such abuses have led Congress to pass several Taxpayers’ Bill of Rights legislation. So even if the Armenian legislature amended the tax law to include safeguards, just having them on the books might not be sufficient to prevent abuses. But it might help.

Armenian tax rates are lower than those in most other countries. Thus, Armenia is at a competitive advantage, all other things being equal. All other things are not equal, of course. After the breakup of the Soviet Union there remains a bit of an anti-capitalistic mentality, which impedes investment and economic growth. This mentality is present in all countries to a certain extent. However, it is more prevalent in former Soviet countries, especially those that became part on the Soviet Union in the early days, as Armenia did. Fortunately, Armenia does not seem to be infected by this anti-capitalistic virus to the same extent as most other countries of Eastern Europe and the CIS that I have visited. One hesitates to say that Armenians have entrepreneurship in their blood without empirical evidence and scientific studies of genes to back up the statement, but it seems to be true. After the 1915 Diaspora brought on by the Turkish genocide, Armenians fled to the Middle East, Europe, North America and elsewhere. Many of them became quite successful in business.

There is also rampant corruption. As mentioned previously, tax officials, the police and the army are known for taking bribes. Corruption deters some foreign investment but not all foreign investors refuse to invest in countries that are corrupt. Some investors probably prefer such an environment.

Foreign investors hesitate to invest in a company that does not issue financial statements that they can place confidence in. Armenia has gone a long way toward eliminating that competitive disadvantage by the partial adoption of International Accounting Standards. It adopted 15 International Accounting

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78. U.S CONST. amend. XVI.
Standards toward the end of 1998 and has plans to adopt most or all of the rest of them within the next two years. Some officials in the Tax Inspectorate resent that they were not consulted before the adoption process was in the final stages. The Armenian accounting system is fine just the way it is. Some of the people who were involved in the adoption of International Accounting Standards in Armenia are concerned that tax inspectors will punish Armenian companies once they convert their internal accounting records and procedures to comply with International Accounting Standards. The tax inspectors do not have any training in International Accounting Standards, they do not understand them; and what they do not understand they will not approve. The accountants who work in the private sector also are not familiar with the International Accounting Standards, for the most part. How the accounting community of a whole country can get up to speed on International Accounting Standards in a short period of time will be quite a feat. But they are trying, as are the accountants in a number of CIS republics.
I. INTRODUCTION

In 1999, worldwide financial losses to business software piracy were estimated at $12 billion. Although worldwide piracy rates dropped between 1994 and 1999, possibly due to increased availability of legal software and increased government cooperation in enforcing penalties, business software...
piracy remains a pressing issue in Asia. While North America and Western Europe, at 30% each, accounted for the largest percentages of money lost to business software piracy in 1999, Asia and Pacific Rim countries followed close behind at 23%.

As China seeks accession to the World Trade Organization (hereinafter "WTO"), its software anti-piracy enforcement efforts will be scrutinized and may be found lacking. If China accedes to the WTO, it will be required to comply with the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) standards for intellectual property protection. United States non-governmental organizations (hereinafter "NGOs"), such as the Business Software Alliance (BSA) and the International Intellectual Property Alliance (IIPA), are willing to help China reduce its rate of software piracy. These organizations have experience working in the United States and other countries to educate software users, encourage software piracy reporting, assist law enforcement agencies, gather market information, and recommend software anti-piracy strategies to businesses and governments. However, China's political, legal, and social structures present special challenges to these NGOs.

This Note will first discuss transnational software trade in China with an emphasis on United States concerns over the piracy of its software products. Second, it will examine China's current software anti-piracy initiatives. Third, it will outline TRIPS requirements and discuss how China's current software anti-piracy initiatives fall short of TRIPS's standards. Fourth, this Comment will introduce two NGOs, the IIPA and the BSA, explain their software anti-piracy capabilities, and examine their current activities in China. Finally, it will identify problems NGOs may encounter as they seek to help China comply with TRIPS and make recommendations for future NGO software anti-piracy activities in China.

II. TRANSNATIONAL SOFTWARE TRADE IN CHINA

Software is a booming business in countries across the globe, and China is no exception. A November 1998 study reports that China's software industry is growing by 28% per year and projects a total economic impact of $6.2 billion by 2001. As the software industry grows, so grow its associated problems. In

3. Id.
4. Id.
a recent worldwide study, China, with a 91% rate of software piracy, was second only to Vietnam (at 98%) in its utilization of pirated business software. Business software piracy takes several forms: downloading software from the Internet, making multiple copies of a program when a license has been bought for only one user, creating or copying compact disc read-only memory (hereinafter “CD-ROMs”), or loading software without license onto new computers before sale. Because pirates can instantly redistribute their spoils worldwide via the Internet, and because purchasers of pilfered software have an attractive choice of media, software piracy is not merely a local problem but a national and transnational concern.

For China, national protection of intellectual property is both an internal and an external issue: first, China must protect its own software developers’ work from piracy by others (a problem beyond the scope of this Comment), and second, China must protect the intellectual property of its transnational trading partners. With a WTO membership on the horizon, China is focused on the second tier of the problem: reassuring the international community of its concern for other nations’ intellectual property, including software copyrights.

Historically, China’s failure to provide adequate copyright protection to other nations’ software products discouraged transnational software trade, especially with the United States. The United States Trade Representative’s Office (USTR) has for years kept China on its watch list, although in the wake

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6. “Rate of software piracy” refers to the percentage of software applications in use that were not purchased at retail, but pirated (copied) from a private source and redistributed through various means without license from the original author. BUSINESS SOFTWARE ALLIANCE, CONTRIBUTIONS OF THE PACKAGED SOFTWARE INDUSTRY TO THE GLOBAL ECONOMY 13-14 (1999) [hereinafter CONTRIBUTIONS OF THE PACKAGED SOFTWARE INDUSTRY].

7. Id. at 13.

8. “Software Piracy is the use or reproduction of a software product without the express consent of its author.” Id.

9. Id.


12. “Countries listed on the [USTR’s] Priority Watch List, Watch List, and Special Mention list are subject to increased bilateral scrutiny but are not subject to immediate trade sanctions . . . Priority
of recent trade agreements the USTR demoted China from a high-scrutiny status\(^\text{13}\) to one of continued monitoring.\(^\text{14}\) The United States voted in May 2000 to grant permanent normal trade relations (hereinafter “PNTR”) status to China.\(^\text{15}\) This optimistic development, however, pales in comparison to China’s piracy-related trade losses, which were measured in 1998 at $808.4 million for commercial software applications alone.\(^\text{16}\)

Over the last twenty years, China has tried to become the friendliest child on the transnational software trading playground. Recent trade agreements ostensibly reflect deep concern for protecting other nations’ intellectual property. During trade negotiations with the United States between 1980 and 1995, China designed new copyright laws as a concession to the United States’ concern over intellectual property protection.\(^\text{17}\) The Sino-German Accord signed this summer emphasized intellectual property protection and “technology cooperation.”\(^\text{18}\) A May 2000 trade agreement with the European Union

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13. “Section 301 of the Trade Act of 1974 is the principal United States statute for addressing foreign unfair practices affecting United States’ exports of goods or services. Section 301 may be used to enforce United States rights under international trade agreements . . . .” Press Release, Office of the U.S. Trade Representative, Monitoring and Enforcing Trade Laws and Agreements (2000) (on file with author). The WTO has held that Section 301 activities are in compliance with WTO member guidelines. Press Release, Office of the U.S. Trade Representative, WTO Adopts Panel Findings Upholding Section 301 (Jan. 27, 2000) (on file with author).

14. The USTR ended its Special 301 investigation of China in February 1995 when the United States and China entered into a bilateral trade agreement. The investigation had been initiated in May 1994.


emphasized access and ownership in mobile telecommunication markets. China has also made international treaty commitments to intellectual property protection. In 1980, China joined the World Intellectual Property Organization (hereinafter “WIPO”), an agency of the United Nations system. In 1985, China became a member of the Paris Convention for the Protection of Industrial Property, which provides for reciprocal intellectual property protection among the states of its Union. In 1992, China became a party to the Berne Convention, which establishes copyright protection guidelines for its member countries.

China has, at least on paper, backed its international commitments with national action. It has launched internal software anti-piracy initiatives designed to reduce the rate of software piracy in China. These initiatives will form the backbone of China’s TRIPS compliance strategy should China accede to the WTO.

III. CHINA’S SOFTWARE ANTI-PIRACY INITIATIVES

China’s internal anti-piracy initiatives include creating laws against software piracy, establishing courts to deal with intellectual property rights violations, and establishing government offices to coordinate law enforcement.

First, as a result of United States trade pressure and China’s desire for WTO membership, China has made significant changes in the “substantive aspect of copyright enforcement in China,” i.e. its copyright laws. Copyright laws are held by “international consensus” to be an appropriate, albeit not ideal, means of software protection. The United States has been a driving force in

26. See Jorda, supra note 11, at 337 (noting an “international consensus” in favor of copyright protection for software, but advocating sui generis protection).
China’s copyright law development, successfully urging through trade pressure that China enact “modern” intellectual property legislation. Second, China has created an intellectual property court system. The intellectual property courts, which have been in place since 1993, were specifically created to deal with copyright, patent, and trademark litigation. Finally, China has created government offices and agencies to enforce software anti-piracy measures. The IIPA reports that in 1999, two government offices emerged as leaders in China’s fight to enforce its copyright laws.

China’s State Intellectual Property Office (hereinafter “SIPO”) was established in 1998 to monitor and centralize intellectual property protection enforcement. China has also created the Office of National Antipiracy and Pornography (hereinafter “NAPP”), which the IIPA reports has “assumed control over coordinating all copyright enforcement throughout China.”

IV. THE CHALLENGE OF TRIPS

China’s desire for WTO membership is viewed as the solution to its ongoing software piracy problem. The prevailing attitude is that China would not dare endanger its quest for WTO-member status, or its status if achieved. If it accedes to the WTO, China will be obligated to comply with the

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28. See, e.g., Declet, supra note 11, at 70.
33. See General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1150-51 [hereinafter WTO Agreement]. Although a signatory to the WTO Agreement, China is not yet a member of the WTO. Article XI ¶ 1 of the WTO Agreement only incorporates the European Communities nations and nations that were signatories to the 1947 GATT. Id. China, not in either of these classes, must comply with a Schedule of Specific Commitments. If it complies, it will be designated an original WTO member. Id.
34. "The financial promise of WTO membership and the tremendous volume of Chinese exports to the United States have become too important to the future of the Chinese economy for Beijing to risk the consequences of non-compliance." Jenckes, supra note 17, at 571. Declet agrees, saying WTO membership is the "long-term solution" to China's software piracy problem. See Declet, supra note 11, at 76.
35. Some WTO member obligations, including TRIPS obligations, were scheduled for implementation over a period of time beginning April 14, 1994 (the date of the Uruguay Round's Final Act). Countries acceding to the WTO after April 14, 1994 must also meet these obligations. Further, the standards
intellectual property protection standards set out in the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights.\textsuperscript{35}

On its face, TRIPS does not overburden China. TRIPS allows members to implement existing laws in pursuit of TRIPS-defined objectives, and it does not require members to create special legal channels for intellectual property enforcement.\textsuperscript{37} The substance of the Berne Convention, of which China is already a member, serves as the basis for TRIPS guidelines,\textsuperscript{38} and the Berne Convention requirements are incorporated into the current WTO standards for intellectual property protection.\textsuperscript{39}

However, TRIPS is more than a legislative drafting checklist. TRIPS also provides for compliance monitoring, identifies information that WTO members are required to disclose upon request, sets forth guidelines for enforcing TRIPS, and creates a body charged with overseeing member compliance.\textsuperscript{40} These provisions are the ones that might cause trouble for a WTO-member China, because they do more than set legal standards. They require actual deterrence of intellectual property infringement and disclosure of results to the WTO.

First, TRIPS specifies that members "provide for" criminal penalties, fines, and imprisonment that will deter "willful . . . copyright piracy on a commercial scale."\textsuperscript{41} TRIPS specifically states that "remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent [to piracy and counterfeiting]."\textsuperscript{42} Although TRIPS does not set forth any standard or formula for measuring whether a nation is providing sufficient deterrents, this language certainly implies that TRIPS is outcome-based. Common sense applicable to existing WTO members will be applied equally to the new country when it accedes, i.e., a latecomer to the WTO must, at the time of its accession, compare favorably to countries that have been working on their implementations for years. \textit{See} WTO Agreement, \textit{supra} note 33, at 1151.

\textsuperscript{36} The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is Annex Ic to the Agreement Establishing the World Trade Organization, which is embodied in the Uruguay Round GATT concluded in Marrakesh on April 15, 1994.

\textsuperscript{37} "This Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general." Agreement on Trade-Related Aspects of Intellectual Property Rights, General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1214 [hereinafter TRIPS Agreement].

\textsuperscript{38} Cheng, \textit{supra} note 25, at 1946.

\textsuperscript{39} World Intellectual Property Organization, \textit{International Protection of Copyright and Neighboring Rights}, \textit{at} http://www.wipo.int/eng/general/copyrght/bern.htm (last visited July 31, 2000). The WIPO's online information about the Berne Convention notes that all members of the WTO are also bound to the terms of the Convention, with some exceptions for parties that are not signatories to the Convention.

\textsuperscript{40} \textit{See generally} TRIPS Agreement, \textit{supra} note 37, at 1213-20 (setting out general member obligations to enforce TRIPS).

\textsuperscript{41} \textit{Id.} at 1220.

\textsuperscript{42} \textit{Id.}
indicates that the "sufficiency" of a penalty could vary from nation to nation, so the most simple way to determine whether piracy is reduced is an empirical one: find a way to measure a nation's rate of software piracy and monitor the nation for a decline in that rate. Therefore, it is reasonable to infer that WTO members are expected to comply with TRIPS by finding ways to reduce their measurable rates of software piracy.

Second, TRIPS created The Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter "Council for TRIPS"), which reports to the General Council of the WTO. The Council for TRIPS monitors TRIPS member compliance and works in cooperation with WIPO to carry out duties assigned to it by TRIPS members. TRIPS charges the Council for TRIPS with reporting and evaluating TRIPS-related complaints.

Finally, TRIPS requires WTO members to publicize TRIPS-related laws, judicial decisions, government administrative rulings, and agreements among domestic government agencies to their fellow members. It also specifically requires members to provide their legislative, judicial, and administrative information to the Council for TRIPS upon request. Presumably these provisions not only encourage transparent cooperation among member countries, but also allow the Council for TRIPS to evaluate whether each member country is complying with its TRIPS obligations.

Disputes arising under TRIPS are governed by the GATT. The GATT's dispute resolution procedures provide for three levels of response to a complaint against a member: first, to "secure the withdrawal of the measures" that conflict with a WTO member agreement; second, to provide compensation to a member claiming injury, and finally, "as a last resort," to suspend "concessions or obligations . . . on a discriminatory basis" in favor of the complaining member. In plain language, trade sanctions may be authorized against a WTO member that fails to comply with TRIPS provisions.

At first glance, China appears to be ready for WTO membership. Technically, TRIPS requires only that member countries have "enforcement

43. See generally WTO Agreement, supra note 33, at 1146 (creating the Council for TRIPS and defining its reporting relationship to the General Council of the WTO).
44. TRIPS Agreement, supra note 37, at 1223.
45. Id. at 1221.
46. Id.
47. Id.
48. Presumably, such disputes include allegations of member failures to comply with TRIPS guidelines; TRIPS makes no other specific provision for penalizing member non-compliance.
49. The TRIPS Agreement refers the reader to "Articles XXII and XXIII of GATT 1994 as elaborated and applied by the [accompanying] Dispute Settlement Understanding." TRIPS Agreement, supra note 37, at 1223.
50. Compensation is an interim remedy until the offending measure may be withdrawn. Id. at 1227.
51. Id.
procedures... available” to protect intellectual property and to “constitute a
deterrent to further infringements.”52 China’s laws, courts, and government
offices ostensibly meet this requirement. However, TRIPS also requires that
WTO members effect measurable drops in their rates of software piracy. Thus,
China’s TRIPS compliance troubles will arise not from a dearth of laws, but
from an apparent inability to apply them.

V. CHINA’S ENFORCEMENT PROBLEM

If China is obligated to comply with TRIPS’s standards for intellectual
property protection, it will have to improve its legislation and its law enforce-
ment. China’s legislative drafting efforts, its law enforcement systems, and its
government agencies have all been criticized for failing to meet the latest
international standards.

First, China’s existing laws and proposed amendments have garnered
criticism. Arguably, China’s existing laws do not adequately protect other
nations’ intellectual property rights.53 The IIPA notes that even the latest
revisions to Chinese legislation, while possibly TRIPS-compliant as drafted,
will probably not meet TRIPS requirements as applied.54 The USTR agrees,
noting in a discussion of China’s 1999 trade law reforms, “the vague wording
of many Chinese laws and regulations often leads to conflicts with other laws
or broader trade and investment policies, and makes compliance difficult.”55
Also, as one commentator succinctly observes, merely establishing copyright
laws does not “automatically lead to their enforcement.”56

China’s present law enforcement is also inadequate. China’s intellectual
property courts report only spotty success in resolving copyright infringement
cases. The court system has been criticized for inadequately training its judges
and allowing itself to be used as a tool of the Communist Party.57 Chinese
courts have also been accused of slow claims handling time and a burdensome
requirement that the complaining party produce evidence before a court will
decide whether to hear a case.58 One writer observes that it is “not a cost-

52. Id. at 1213-14.
53. For additional discussion of whether China’s existing copyright laws adequately protect
software, see Declet, supra note 11, at 70.
54. International Intellectual Property Alliance, People’s Republic of China, at
Republic of China] (providing excerpts from the EPA’s 1999 Special 301 Recommendations to the USTR).
55. 2000 NATIONAL TRADE ESTIMATE REPORT, supra note 31, at 42.
56. Endeshaw, supra note 27, at 314.
57. Declet, supra note 11, at 71-72.
58. Jenckes, supra note 17, at 556.
effective investment” to bring suit in China.59 Although China has created government offices and departments to execute its new intellectual property protection policies, the international community and the United States are suspicious about whether these departments are able to, or wish to, perform their intended tasks. The USTR observes that, “[w]hile [establishing SIPO] is a positive step, SIPO has yet to establish that it can manage its responsibilities effectively.”60 In 2000, the United States Department of State reported that “[a]lthough China has revised its laws to provide criminal penalties for intellectual property violations, the United States remains concerned that penalties imposed by Chinese courts do not act as a deterrent.”61 The IIPA concurred, reporting that “actions by [government agencies] are too sporadic and the administrative fines are simply too low to deter piracy.”62

VI. THE INTERNATIONAL RESPONSE

In short, China’s efforts do not appear to impress the United States or the international community as a whole. Even in the wake of this summer’s trade accords that anticipate WTO backing from trading partners,63 China is being asked to tighten its existing intellectual property protection practices. In a March 2000 report, the United States Department of State affirms that it intends to continue Section 30664 monitoring to ensure that China is complying with its existing United States trade agreements.65 In July of 2000, European Union officials called for better cooperation between China’s government and law enforcement branches, presenting China with a list of 400 Chinese companies suspected of infringing on European Union member software copyrights.66

Though trading partners disapprove of China’s status quo, China does not seem to be getting the international help it needs to correct its anti-piracy

59. Id. at 569. Although Jenckes is discussing difficulties encountered by American businesses, the expense of proceeding in a Chinese court may be reasonably inferred to apply to other international plaintiffs.
60. 2000 NATIONAL TRADE ESTIMATE REPORT, supra note 31, at 50.
63. Agence France Presse, EU Calls on China to Reign In Rampant Copyright Theft, INSIDE CHINA TODAY, July 26, 2000, at http://www.insidechina.com/investorinsight/business.php3?id=182651 (last visited July 26, 2000) [hereinafter EU Calls On China]. See also Agence France Presse, supra note 18; EU-China Agree Trade Deal, supra note 19.
64. Section 306 is a trade status of continued monitoring. See IIPA LAUDS USTR’S CONTINUING PRESSURE, supra note 14.
65. 1999 COUNTRY REPORT, supra note 61, at sec. 8.
66. EU Calls on China, supra note 63.
enforcement problems. In its 1995 trade agreement with China, the United States made only vague promises of "technical assistance."\textsuperscript{67} Although the European Union signed an intellectual property enforcement assistance agreement with China and opened a patent office in Beijing last year,\textsuperscript{68} it still claimed that Chinese companies were infringing on its copyrights.

Nor is the WIPO providing focused assistance to China. Article 4(1) of the 1995 agreement between the WIPO and the WTO promises that "[t]he WTO Secretariat shall make available to Member States of the WIPO which are developing countries and are not WTO Members the same technical cooperation relating to the TRIPS Agreement as it makes available to developing country WTO Members."\textsuperscript{69} However, China is not identified by the WIPO as a Least Developed Country (hereinafter "LDC"), and therefore presumably not a candidate for the specialized WIPO anti-piracy enforcement programs referenced in Article 4(1).\textsuperscript{70}

VII. THE POSSE COMES TO TOWN: UNITED STATES NON-GOVERNMENTAL ORGANIZATIONS

Given China's existing anti-piracy enforcement problems, other nations' failure to actively help China solve those problems, and China's ineligibility for the WIPO's LDC assistance, China will have to seek other allies in its war on software piracy if it accedes to the WTO. NGOs, experienced in anti-piracy lobbying and enforcement, can help China comply with the provisions of TRIPS. Two NGOs have taken a dedicated interest in China: the International Intellectual Property Alliance and the Business Software Alliance.

A. The International Intellectual Property Alliance

Formed in 1984, the IIPA is an umbrella organization for seven private trade associations, "each representing a significant segment of the United States copyright community."\textsuperscript{71} The IIPA works worldwide with governments and

\begin{itemize}
\item \textsuperscript{67} Endeshaw, supra note 27, at 328. Endeshaw also notes that the United States made no "substantial concessions" to China in this agreement, and that it is unclear whether the agreement is designed to assist China or merely protect the United States trade interests. \textit{Id.}
\item \textsuperscript{68} Eubusiness, \textit{EU-China Intellectual Property Rights Cooperation Programme}, at http://www.eubusiness.com/cgi-bin/item.cgi?id=9951&d=101&dateformat=%o-%B (last modified June 30, 1999).
\item \textsuperscript{70} See generally World Intellectual Property Organization, \textit{Establishment of the Least Developed Countries Unit}, at http://www.wipo.org/eng/ldc/index.htm (last modified July 30, 2000) (identifying Least Developed Countries (LDCs) and outlining WIPO's intent to help the governments and industries in these countries create and maintain intellectual property protection systems).
\item \textsuperscript{71} International Intellectual Property Alliance, \textit{International Intellectual Property Alliance 1}, at
\end{itemize}
private industries to deter copyright infringement in music recording and publishing, written publishing, computer software, computer gaming, videos, and motion pictures. In the United States, the IIPA reports to House and Senate subcommittees on member activities in China. The IIPA also makes recommendations to the USTR during the USTR's annual Super 301 trade review process and generates reports for the USTR's Special 301 trade review. Internationally, the IIPA participated in TRIPS development for the WTO. The IIPA is also a non-governmental organization participating in WIPO, and it participates in "regional initiatives," notably the Asia-Pacific Economic Cooperation. The IIPA actively monitors China's software piracy problem, and in February 2000 it wrote in support of United States congressional approval for permanent normal trade relations between the United States and China.

While the IIPA gathers information, participates in international discussion, and reports on activities in China, one of its member organizations, the BSA, works at the local level in China to effect change.

B. The Business Software Alliance

The BSA, a member of IIPA, is a software industry trade organization with ten "worldwide members," all of which are software companies incorporated or headquartered in the United States. The BSA Policy Council includes


72. Id. at 2-3.
74. See, e.g., USTR AGAIN NAMES CHINA AS A PRIORITY FOREIGN COUNTRY, supra note 12.
76. Id.
77. Id.
80. Business Software Alliance, Business Software Alliance, at http://www.bsa.org/tour/members/index.html (last visited Aug. 7, 2000) [hereinafter Business Software Alliance]. The BSA's membership list, provided in the BSA's online brochure, lists the following companies as "worldwide members": Adobe Systems, Inc. (www.adobe.com); Autodesk, Inc. (www.autodesk.com); Bentley Systems, Inc. (www.bentley.com); Corel (www.corel.com); Lotus Development Corporation (www.lotus.com); Microsoft Corporation (www.microsoft.com); Network Associates (www.nai.com); Novell, Inc. (www.novell.com); Symantec Corporation (www.symantec.com); and Visio (www.visio.com). The investor relations and legal information on each of these companies' websites reveals that, although many have transnational presence and transnational business partners, all of them are United States-based corporations or business entities and/or traded on United States stock exchanges.
all ten worldwide members, plus seven additional members, all of which are also incorporated or headquartered in the United States.81

Like the IIPA, the BSA participates in domestic and transnational policy discussions. It encourages legislative software protection efforts by promulgating its Cyber Champion awards in the United States.82 Recently, United States Trade Representative Charlene Barshefsky received the award for her efforts to promote intellectual property protection agendas in China–United States trade matters.83 BSA representatives testify before United States legislative bodies,84 and in 1999 the BSA spent over $1 million on domestic lobbying activities.85 The BSA was also active in WIPO’s treaty organization86 and maintains an ongoing presence in WIPO’s regional initiatives.87

The BSA exists to stop software piracy. It employs a variety of tactics in the United States and in other countries to encourage piracy reporting and to enforce software anti-piracy laws. In the United States, the BSA brings suit against private companies and even government offices.88 One source reports that “the [BSA] investigates an average of 500 cases a year [in the United States] and has collected more than $10 million in penalties.”89

On its website, www.bsa.org, the BSA provides reading material, educational material, and downloadable freeware90 to help United States

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81. The seven Policy Council members who are not also BSA “worldwide members” are Attachmate (www.attachmate.com); Apple Computer (www.apple.com); Compaq Computer Corporation (www.compaq.com); IBM Corporation (www.ibm.com); Intel Corporation (www.intel.com); Intuit Corporation (www.intuit.com); and Sybase, Inc. (www.sybase.com). Business Software Alliance, supra note 80.
83. Id. Although Rund does not specifically cite the Special 301 review process, the BSA publicly endorsed Barshefsky’s decision to place China and other countries on the USTR Priority Watch and Watch lists. See Press Release, BUSINESS SOFTWARE ALLIANCE, STATEMENT FROM BSA PRESIDENT & CEO ROBERT HOLLEYMAN SUPPORTING USTR’S EMPHASIS ON TRIPS COMPLIANCE IN ANNUAL SPECIAL 301 DESIGNATION ANNOUNCEMENT (May 1, 2000) (on file with author).
89. Software Piracy Probe Nets Florida Firms, MIAMI DAILY BUS. REV., June 27, 2000, at 3.
90. “Freeware,” often distributed over the Internet, does not require users to pay a license fee to the developer as long as the freeware is used in the manner specified by the developer.
companies track software licenses and conduct internal licensing audits. The BSA also provides transnational Internet resources. Its websites offer corporate educational materials and model corporate policies for the United States and United Kingdom. Further, the BSA maintains a worldwide network of websites in member countries' native languages, offering e-mail piracy reporting forms, toll-free telephone numbers for software piracy reporting hotlines, and links to online BSA reports and resources.

The BSA does not confine itself to the virtual world; it also works directly with law enforcement agencies worldwide to conduct undercover sting operations and raids on commercial software piracy operations. In 1997, BSA member Microsoft and the BSA conducted 51 raids on software pirates in Singapore, resulting in several jail sentences. In 1998, the BSA filed over 750 lawsuits in Latin America on behalf of Microsoft. In 1999, the BSA reported successful coordination with the Danish National Computer Crime Unit to break a European software counterfeiting ring.

The BSA's current activities in China include filing lawsuits, conducting government and industry cooperative programs, and monitoring China's software market and piracy activity. In 1995, the BSA announced its first in-court legal victory when a Chinese court found in favor of BSA members Autodesk, Microsoft, and Novell against China's Juren Computer Company. The court held that Juren had illegally distributed BSA members' software. As part of the 1995 United States-China trade agreement, the BSA was allowed to establish offices in China to help implement a "title verification system" that identifies original compact disc and laser disc products. The BSA also works with the provincial offices of China's official Administration for Industry and Commerce (hereinafter "AIC"). and this work has given rise to software licensing audits by the AIC and a letter-writing campaign to educate corporate

92. Id.
93. Business Software Alliance, supra note 80.
95. Jim Oliphant, Booty and the Counterfeiting Beast - Microsoft Has Set Up a Unique Unit of Undercover Operatives and Specially Trained Investigators in Fort Lauderdale Devoted to Thwarting Software Piracy in South Florida and Latin America, PALM BEACH DAILY BUS. REV., Oct. 1, 1999, at 12.
end-users about software piracy. In addition, the BSA offers computer hardware and technical assistance to Chinese law enforcement agencies.

The BSA also coordinates efforts with the private sector. PricewaterhouseCoopers, working for the BSA, recently conducted a study of 100 Chinese software-related companies to evaluate the Chinese software industry. In June of 2000, the BSA signed an agreement with Hong Kong Internet service provider Asia Online to crack down on software piracy via the Internet. Finally, the BSA monitors China and strives to increase its presence and promote its image there. Although the BSA only reports two affiliated companies in Asia, it publicly supports Chinese anti-piracy initiatives through its Internet outlets. In 1999, the BSA openly announced that it "stands ready" to support the Chinese government in software anti-piracy efforts.

VIII. CAN NGOs FILL CHINA'S ENFORCEMENT GAPS?

United States non-governmental organizations are present and active in China, but if China accedes to the WTO, it will need to correct its software anti-piracy enforcement problems to comply with the outcome-based TRIPS provisions. At that point, NGO presence will only be relevant if those NGOs are helping China comply with TRIPS.

China will have to fight on multiple fronts to comply with TRIPS. It must improve its laws, effectively promulgate them, and consistently enforce them. It must also show meaningful cooperation among its governmental branches and private industries. It must reduce its measurable rate of software piracy enough to convince the WTO that it is creating the intellectual property infringement deterrents TRIPS requires. The international community, as a whole, has not offered much internal law enforcement help to China. NGOs are equipped to

100. Id.
102. See CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY, supra note 5, at 20.
105. The BSA maintains a special website for its activities in the "Asia Region" at http://www.bsa.org/asiap/ and another for Hong Kong at http://www.bsa.org/hongkong/.
fill some of these anti-piracy law enforcement gaps, but all NGO activity will rely on China's cooperation in deed as well as in word.

A. Drafting Laws

China's 1990 "two-tiered" copyright laws are inadequate because they provide more protection to other nations' intellectual property than they provide for Chinese intellectual property. TRIPS requires that each member provide to other nations a level of protection no less favorable than the protection the country provides to its own people. The IIPA believes that TRIPS requires equal protection for nationals and non-nationals; it was allowed to review proposed amendments to the "two-tiered" laws in 1999. It reported that the amendments were still inadequate, and that as of 2000 the Chinese government neither enacted the amendments nor provided a progress report to the IIPA.

NGOs can help with legislative drafting. As discussed above, both the IIPA and the BSA have experience lobbying in, reporting to, and testifying before the United States government, governments in other countries, and the WIPO. WIPO and the Council for TRIPS already have a formal cooperative relationship, and the IIPA is a WIPO participant. Therefore, the IIPA has access to the latest international trends in intellectual property enforcement and could provide specific information to help Chinese legislators tighten the gaps between existing law and TRIPS-compliant law.

NGOs must note, however, that a Chinese commitment to drafting new laws does not guarantee that those laws are appropriate for the problems and the people affected by them. The legislative drafting urged by the United States during trade negotiations and the values that NGOs bring to China's policymaking efforts may be in fundamental conflict with the social and legal structures formed by China's communist and imperial history. The political developments that led to China's current copyright laws reflect a blend of

107. See People's Republic of China, supra note 54 (noting that China's latest laws provide more protection for "foreign rightholders" than for Chinese software developers).
108. TRIPS Agreement, supra note 37, at 1198-99.
110. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT, supra note 16, at 34.
111. TRIPS Agreement, supra note 37, at 1223.
112. See, e.g., People's Republic of China, supra note 54. The section entitled "New Draft Copyright Law" contains a point-by-point IIPA analysis of potential TRIPS and Berne convention shortcomings in China's new laws. Id.
113. Endeshaw, supra note 27, at 308. Endeshaw observes that when a less-developed country enacts "borrowed legislation" that is ill-suited to its current industrial development status, there is little incentive to "work earnestly towards implementation" of the new laws. Id.
Marxism, Maoism, and Confucianism. The BSA, however, is capitalistic to the point of jingoism. For example, the BSA urges in an online Special Focus report, "Let American ingenuity and creativity thrive. Deregulation, competition and entrepreneurship will foster our success. Regulation, government interference and managed competition will dash prospects and stunt progress." These two sets of values stand in direct conflict. In a historical perspective, individual intellectual property ownership is a new concept for China, and China's expressed willingness to change its law does not necessarily evince a cultural shift.

If NGOs intend to help China with its legislative drafting, they will have to convince the Chinese government that the values embodied in TRIPS are appropriate for China's government and people. Despite the valid policy question of whether leading economic powers should impose their legal and social values upon other countries, the fact remains that the WTO's present standards are not compatible with China's social values. China's ongoing failure to enforce its existing copyright laws with respect to United States software developers gives rise to a sneaking suspicion that China has adopted a "say anything" policy in the last two decades. If China is cheerfully re-drafting its laws to secure desirable trade relationships but has no true interest in enforcing them; the best NGO efforts in the legislative drafting arena will be irrelevant to TRIPS-mandated outcomes.

B. Promulgating Laws

Once China drafts adequate laws, they must be promulgated, and the people affected must be educated about their benefits. This is where NGOs will shine. The BSA already has excellent channels for Internet information dissemination. Via the Internet, the BSA promotes its software piracy reporting

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114. See generally Jenckes, supra note 17, at 552-55 (providing a concise overview of historical developments in Chinese legal ideology).
117. The sociological impact of China's new trade policies is well beyond the scope of this Comment, but sources observe that these new international economic relationships will drive massive political reforms in China. See, e.g., Jason Kindopp, Trade with China Promotes Political Reform - Period, CHINA ONLINE, at http://www.chinaonline.com/commentary_analysis/wtocom/currentnews/secure/c00072441.asp (last modified July 26, 2000). The USTR agrees, observing that "[b]y encouraging structural reform and the rule of law, [China's] accession to the WTO will . . . support China's own domestic reform process." 2000 NATIONAL TRADE ESTIMATE REPORT, supra note 31, at 41.
118. The WTO's intellectual property protection standards have been criticized for reflecting the values and enforcement capabilities of nations, primarily the United States, with mature technology industries. For a detailed analysis, see Endeshaw, supra note 27, at 304-05.
hotlines, provides real-time piracy reporting forms, posts model policies for corporations, and offers reports and educational materials for end users. These BSA educational tools are already in place in the United States and should not be difficult to implement in China. The BSA merely needs to create Internet sites for Chinese use and translate and customize its information for the local market. Although Internet-based initiatives rely on technological infrastructure, China is gradually improving its Internet access capabilities. For example, this summer the United States hardware giant Intel announced a co-operative effort with a major China telecom company to provide Internet hosting in south China.\(^{119}\)

End-user education programs are not difficult to design or implement, but they will be challenged by the cultural gap discussed above. If consumers believe there is nothing really wrong with using pirated software, they are unlikely to curtail or report software piracy. For example, in response to a 1998 industry study, only 50% of Chinese software-related businesses responded that they believed software piracy "hampers the healthy development of [the] software industry."\(^{120}\) In the same study, 51% of the responding businesses reported that they take no action to identify or control piracy by competitors or counterfeiting organizations.\(^{121}\) If the concern over piracy is so low within the software industry itself, it is reasonable to infer that non-software companies in China, potential end-users of pirated business software, are similarly apathetic. This does not bode well for NGO educational efforts.

Again, NGOs face the task of changing China's cultural norms before they can implement a meaningful end-user anti-piracy education plan. Within the software industry, NGOs might have some success. Of the Chinese companies surveyed in 1998 that responded to a question about whether consumer education could help reduce piracy, 25% believed that it would.\(^{122}\) Although this number is rather low, it indicates that China's software industry, at least, is aware of potential benefits from end-user education. The NGOs' best strategy in China would be an educational program to convince Chinese corporate end-users, both inside and outside the software industry, that they must actively protect intellectual property to attract and maintain transnational trade.

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120. 'CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY, supra note 5, at 25 (presenting chart, "Software Piracy Impedes Market Development and Reduces Benefits").
121. Id. at 25.
122. Id. at 39.
C. Promoting Legal Action

Even good laws and an educated populace do not ensure that the laws will be applied. Sixty-six percent of Chinese software companies responding to a 1998 BSA-sponsored survey agreed that "limited risk for high profitability" is the primary reason that software is pirated in China.\textsuperscript{123} Provided this is true, increasing piracy's risk or lowering its profitability should reduce the rate of software piracy in China.

NGOs could do in China what they have done in other countries: bring suit on behalf of interested software developers. The BSA's 1998 study of China's software industry speculates that Chinese software companies believe that current legal penalties do not deter piracy, and that legal action is too difficult or expensive to pursue.\textsuperscript{124} NGOs and their members do not necessarily share this doubt and could lead by example in China, filing suit in Chinese courts for copyright infringement with respect to NGO members. The BSA has the financial resources to undertake high-profile litigation because its United States activities help finance transnational software anti-piracy efforts.\textsuperscript{125}

If NGOs pepper China's courts with United States copyright infringement suits, they will probably improve Chinese pirates' awareness of piracy risk.\textsuperscript{126} Securing fines and damages on behalf of NGO member companies will also lower pirates' profitability. However, these actions will also raise the question of whether NGOs are truly interested in helping China enforce its software anti-piracy laws and thereby comply with TRIPS, or merely interested in protecting NGO members' interests. Even in the United States, the BSA and its founding member Microsoft have been criticized for being too quick to act against alleged infringers.\textsuperscript{127} Further, the BSA has garnered criticism in its own country for being a mouthpiece for its member Microsoft Corporation's policy decisions.\textsuperscript{128}

Thus, NGOs have a difficult balancing test in China: they must support NGO members' interests while maintaining the image of a helping-hand organization. This might be difficult. In 1999, a United States company's piracy case against a Chinese corporation was dismissed; a report from the IIPA

\textsuperscript{123.} Id. at 36 (presenting chart, "Reasons for Production and Sale of Pirated Software").

\textsuperscript{124.} Id. at 26.

\textsuperscript{125.} Oliphant, supra note 95.

\textsuperscript{126.} Of course, this assertion presumes that Chinese media report and disseminate the litigation outcomes.

\textsuperscript{127.} Oliphant, supra note 95.

implies the dismissal was due to "antiforeign sentiments" in the Chinese court system.\textsuperscript{129} NGOs would have to conduct careful public relations campaigns to effectively raise piracy risk awareness. As discussed below, such an effort could require governmental cooperation that China is not ready to provide.

D. \textit{Securing Government Cooperation}

NGOs can provide critical market information to China’s government. As discussed above, the IIPA and the BSA both have experience conducting industry surveys, creating reports and recommendations for legislators, testifying before domestic and international policymakers, and assessing software anti-piracy enforcement efforts.

However, NGOs cannot act in a vacuum. They need Chinese government cooperation and reliable sources for industry information, and at present both appear limited. The BSA has reported success in reducing software piracy rates in other Asian countries because “[Korean and Taiwanese] governments took the problem seriously and acted.”\textsuperscript{130} In China, however, the IIPA reports difficulty getting information from government sources about whether China’s commitments to enforcement are working.\textsuperscript{131} Some evidence indicates China does not even want enforcement help; for example, the IIPA reported in 1998 that local Chinese law enforcement agencies turned down an offer of donated computer hardware (designated for law enforcement activity) without any explanation.\textsuperscript{132}

The BSA’s studies rely on information provided by the CCID-MIC, the “R&D arm” of the China’s Ministry of Industrial Information.\textsuperscript{133} This is government-disseminated information, not market information. Market information is difficult to obtain. For example, the IIPA’s 1999 Special 301 report notes that information about China’s CD factories, requested by foreign market researchers, was withheld with the claim that those data were “national confidential documents.”\textsuperscript{134} A 1999 report from the United States Department of State summarizes another problem:

\footnotesize

\begin{itemize}
\item \textsuperscript{129} \textit{INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT}, \textit{supra} note 16, at 33.
\item \textsuperscript{131} \textit{INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT}, \textit{supra} note 16, at 26.
\item \textsuperscript{132} \textit{China}, \textit{supra} note 101.
\item \textsuperscript{133} \textit{CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY}, \textit{supra} note 5, at 42-43.
\item \textsuperscript{134} \textit{INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT}, \textit{supra} note 16, at 32.
\end{itemize}
[Chinese regulations] require all foreign companies conducting market surveys in China to go through an annual registration process . . . [they] stipulate that all survey activities undertaken by foreign institutions, or domestic agencies employed by foreigners, must first be approved . . . Finished survey results must also be cleared with the approving agency. The regulations . . . will be expensive and time consuming to comply with . . . [and] have the potential to limit the freedom of legitimate firms to conduct market research. In addition, the potential for compromise of confidential business information is substantial.\textsuperscript{135}

NGOs might not have direct influence over Chinese government offices, but they can continue work with WIPO and the Council for TRIPS to effect enforcement through trade pressure. NGO representatives can also work on a personal, local level to provide knowledge, experience, and advice to the Chinese agencies responsible for investigating piracy allegations.

\textbf{E. Encouraging Industry Participation}

China’s business community seems willing to cooperate with NGOs. A 1998 press release from the BSA was optimistic about the cooperative efforts between the BSA’s survey designer and private industry in China.\textsuperscript{136} Private industry could do much to further NGO educational efforts. Chinese companies could commit to eschewing pirated software in their own businesses, disseminate information about piracy and its risks in the workplace; create and enforce corporate policies against software piracy, and conduct self-audits to be sure that the software they are using is legal.

Unfortunately, these glowing proposals could be premature when over half of China’s surveyed software companies have reported that the primary reason software is pirated in China is because consumers do not have the income to purchase legal software.\textsuperscript{137} If legal software is simply not available, it is not realistic to expect Chinese companies to abandon any pirated software they are profitably using. Nor is it realistic to believe those companies will invite NGOs to enter their offices and conduct software licensing audits. NGOs will have to either offer these companies licensing amnesty or increase the companies’ access to legal software that performs like the pirated software.

\begin{flushleft}
\textsuperscript{135} 1999 COUNTRY REPORT, supra note 61, at Section 6.
\textsuperscript{137} CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY, supra note 5, at 28.
\end{flushleft}
IX. CONCLUSION

China’s existing problems with software anti-piracy enforcement will probably not keep China out of the WTO. China is already attempting to conform to a Schedule of Specific Commitments in keeping with its participation in the GATT.\(^\text{138}\) Although the IIPA reports some ongoing problems with China’s legislative drafting,\(^\text{139}\) TRIPS itself does not pose a major barrier to China’s accession. Despite IIPA’s report to the contrary,\(^\text{140}\) at least one commentator believes that China’s laws already generally comply with TRIPS standards.\(^\text{141}\)

If China accedes to WTO membership, its challenge will be improving its intellectual property rights enforcement, then maintaining that enforcement at the “actual deterrent” level required by TRIPS. If China fails to do so, it could be the subject of trade sanctions with respect to other WTO members.

NGOs can help China draft its laws and promulgate them. They can promote China’s existing legal system and legal remedies, advise Chinese policymakers and government agencies, and work with private industry to ensure a commitment to preventing end-user software piracy. Although NGOs cannot fix all of China’s enforcement woes, they certainly can help.

However, NGOs must do more than provide publicity or fill a law enforcement gap. They must fill a cultural gap as well. To do their jobs effectively, NGOs need cooperative commitments from the Chinese government. They also need cooperative commitments from China’s business software end-users and the Chinese software industry. China has sought little hands-on law enforcement help from its international neighbors, and it does not seem to be doing so now. If China joins the WTO, only time will tell whether Chinese policymakers’ desire for transnational software trade is strong enough for them to embrace TRIPS’s value system and welcome NGO participation in its fight against software piracy.

\(^{138}\) See WTO Agreement, supra note 33, at 1150-51.

\(^{139}\) People’s Republic of China, supra note 54.

\(^{140}\) Id.

\(^{141}\) Cheng, supra note 25, at 2006.
ALTERNATIVE DISPUTE RESOLUTION IN CYBERSPACE: THERE IS MORE ON THE LINE, THAN JUST GETTING "ONLINE"

Rachel I. Turner

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I. INTRODUCTION

The potential plaintiff is in Dallas, the potential defendant in Tiruporur, and the mediator in Hong Kong? They never leave their home cities. They never meet face to face. Yet they are mutual parties in an online dispute resolution process. Cyberspace is putting all new meaning to Alternative Dispute Resolution. Alternative Dispute Resolution (ADR) plays an essential function in the role of settlement and resolution processes. In addition, ADR's role in the international business arena is expanding and developing rapidly. However, the past few years have taken ADR further than ever. "1999 was a year in which a variety of Internet entrepreneurs decided that there were commercial opportunities in online dispute resolution," and thereby created an all new dimension to ADR. The use of online dispute resolution has already proven itself effective in the battle over domain names. Several domain name disputes have been settled utilizing online processes. As ADR services

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1. I'll See You Out Of Court As ADR Grows Globally, So Do Disputes About It, 10 CORP. LEGAL TIMES, Feb. 2000, at 17 [hereinafter I'll See You Out Of Court].


3. Business This Week 1 (Cybersquatting): New Online arbitration service has domain name cases filed, IRISH TIMES, Feb. 25, 2000, at 60; See also The WIPO Dispute Settlement Process, WIPO MAG., Feb. 2000.

4. Id.
become more popular online, questions on jurisdiction, privacy, uniformity, and enforcement must be resolved.

The United States government defines the Internet as "[t]he international computer network of both Federal and non-Federal interoperable packet switched data networks." This definition makes the Internet sound like something out of a science fiction movie. In reality, this network connects cultures, people, laws, businesses, and inevitably creates an entirely new global legal arena. Are we, as legal professionals, ready to be thrust into this arena? Encompassing such a potentially broad range of legal issues and conflicts necessitates moderation and management in online ADR to safeguard the already recognized benefits of more traditional approaches. This international step must be taken gracefully so it will not disrupt the positive international business relationships that already exist. Proper training, cultural sensitivity, established guidelines, and a governing mechanism must be established before the spread of ADR to the Internet jeopardizes the preexisting success of ADR in the global marketplace.

Part one of this article will discuss and define ADR generally. Part two will examine the use of ADR internationally. Part three will demonstrate, using Hong Kong and India as examples, the differences in ideology and practice of ADR. The fourth section will focus on the role ADR has played, and will potentially play in the future, on the Internet. Part five will examine some of the problems faced by the Internet expansion of ADR. Finally, part six will conclude with a forecast of the future role the Internet will have on ADR.

II. THE ROLE OF ADR IN THE DISPUTE RESOLUTION PROCESS

ADR serves as a mechanism for opposing parties to find solutions without resorting to litigation. ADR generally refers to "any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, Mediation, factfinding, minitrials, Arbitration, and use of ombuds." The most common forms, and the forms addressed in this paper, are Arbitration and Mediation. Both serve substantially different roles in dispute resolution processes. Arbitration is a procedure in which a dispute is:

[S]ubmitted, by agreement of the parties, to an arbitrator or to a tribunal of several arbitrators who give a decision on the dispute that is binding on the parties. In contrast to a Mediation, once the parties have freely agreed to submit a dispute to Arbitration, a party cannot

unilaterally withdraw from the Arbitration. Mediation (also known as conciliation) is a procedure in which a neutral intermediary, the mediator, endeavors, at the request of the parties to a dispute, to assist them in reaching a mutually satisfactory settlement of the dispute. The mediator does not have any power to impose a settlement on the parties. Mediation is also voluntary in the sense that either party may, if it so chooses, abandon the Mediation at any stage prior to the signing of an agreed settlement.8

As this paper will display Arbitration plays the leading role in the international realm.

III. THE USE OF ADR INTERNATIONALLY?

International business is not a new phenomenon; neither are international disputes. Modern technology is only making both more commonplace. In the world of international business disputes, Arbitration is the resolution tool of choice.9 Estimates indicate ninety percent of international contracts include an Arbitration clause.10 The role of Arbitration on an international scale is comparative to the role litigation plays in the "litigation happy" United States. Arbitration is by far, the international king of ADR.11 International Arbitration, is Arbitration that concerns international transactions, as well as Arbitration between different entities from different countries involving issues that extend further than domestic law.12

The presence and broad use of Arbitration internationally begs the question, "Why not Mediation?" The United States seems to be fighting the Mediation battle alone. Although there is pressure to establish and update Mediation rules at the International Chamber of Commerce, (ICC) the pressure is coming solely from the United States. In the United States, there are organizations and educational services that teach, practice, and embrace Mediation techniques.13 This is not necessarily indicative of the international

10. Id. at 73.
12. I'll See You Out of Court, supra note 1, at 18.
13. Ole Amundsen, ADR 101: Finding a Course that Suits Your Needs, at http://www.conflict-resolution.net/articles/index.cfm?doc=training.cfm&title (last visited Sept. 14, 2000). "A wide variety of training programs are available, which can accommodate a range of time constraints and cost concerns. Basic programs that introduce participants to various techniques in ADR are available through universities, private consultants, and state offices of dispute resolution." Id.
perception of Mediation. "Since the demand is only coming from the United States, the ICC is not taking [it] as seriously as it needs to" the international role of Mediation. Mediation is perceived as an American product, and its domestic popularity has not diminished. The American Arbitration Association reports an increase in the use and interest of Mediation in the United States. Under different names, Mediation has been used in other countries. However, resistance to using Mediation has been fed by the perception that the United States pushes its use internationally. Countries are not comfortable utilizing a system they are unfamiliar with, nor are they willing to use a system they see being pushed solely by the United States. Fifteen years ago, in Europe, Mediation and other ADR attempts were met with animosity. Only recently has Mediation made its way on the international agenda of ADR. Lately, there have been numerous ADR organizations formed. The involvement of European legislatures resembles the behavior that preempted the use of Mediation in the United States. This propensity indicates Mediation may be at an early stage of development in the international marketplace.

This is not to say there is no current international support for Mediation. The London Court of International Arbitration (LCIA) is adopting rules to assure that there are qualified mediators available. "That's the cornerstone of the problem. You can't have Arbitration panels migrate to Mediation. Many of them are not trained in Mediation, they have a different outlook, they are more decision-making oriented than facilitative and evaluative oriented." Although this preparation indicates a concern for the future of Mediation, today the method of choice for resolving international disputes is unquestionably Arbitration.

Cost effectiveness and speed have been the emphasis in the recent international rule changes to national arbitral laws. These changes have further defined the popularity of Arbitration over Mediation. Several noted reasons for Arbitration's international supremacy include; its enforceability through treaty obligations, its ability to provide a neutral forum, its ability to

16. I’ll See You Out Of Court, supra note 1, at 18.
17. Id.
18. Id. at 22.
19. Id. at 18.
20. Id. at 17.
21. I’ll See You Out Of Court, supra note 1, at 17.
22. Bishop, supra note 11, at sec. 32.
23. Id.
allow experts in the field of the dispute to be the decision makers, and it’s becoming faster, and cheaper.24

While these characteristics feed recent excitement and expansion of international Arbitration, there is fear that as American ideals, driven by litigation desires, become more influential, these characteristics may be threatened.25 There are plenty of American attorneys who are trying to turn Arbitration into litigation.26 The United States needs to take a cautious role not to push Arbitration internationally, and jeopardize an international backlash. Lack of enthusiasm for Mediation, driven by fear of American persuasion, should serve as an example to our leaders that aggressiveness may lead to international resistance in the use of Arbitration as well.

International Arbitration is supported and allowed by national laws.27 Companies either agree via contract that Arbitration will be the means used to solve potential disputes, or, there is an agreement to arbitrate after a dispute arises. Primarily, Arbitration is prescribed by contractual agreement.28 Five key elements of an Arbitration clause include: 1) a choice of law clause; 2) the venue; 3) the language to be used in the proceedings; 4) the number of arbitrators; and 5) the method of appointing arbitrators.29 Arbitration is used successfully throughout the global marketplace. It is imperative the development and expansion of this process happen globally. To force American ideals through a global network will only threaten the historic success of ADR. "International cooperation is necessary to conduct harmonious trade and business relations, now being increasingly conducted in cyberspace."30

IV. THE ABSENCE OF GLOBAL CONSISTENCY IN THE USE OF ADR

Successful network expansion of ADR techniques compels thorough understanding of the role ADR currently plays internationally. With recognition of the various perspectives and practices of ADR, a globally amicable system is more likely. An understanding of the domestic role Arbitration plays in countries like Hong Kong and India illustrates the ideological differences this international step must consider. The following information does not intend to summarize the entire practice of ADR in either

24. Id.
25. Id.
26. I'll See You Out Of Court, supra note 1, at 22.
27. Hill, supra, note 15.
28. Id.
29. I'll See You Out Of Court, supra note 1, at 17.
place. Each would require, at minimum, a separate article. However, the
glimpse provided serves to exemplify the differences that currently exist
globally.

Hong Kong demonstrates enthusiasm in the increased use of Arbitration.\textsuperscript{31} The Hong Kong International Arbitration Center (HKIAC) serves to help
consumers in both domestic and international affairs.\textsuperscript{32} The center provides
services in negotiation, conciliation, Mediation, Arbitration, and litigation.\textsuperscript{33} HKIAC incorporates the United Nations Commission on International Trade
Law (UNCITRAL)\textsuperscript{34} model law for international cases. The Laws of Hong
Kong govern the domestic situations.\textsuperscript{35} The strength of the system is that it
combines “[m]aximum of independence from the court system, with a strong
regime of court support in areas where this is required.”\textsuperscript{36} In Hong Kong,
Negotiation is the most common form of dispute resolution.\textsuperscript{37} Hong Kong is
currently attempting to expand the use of ADR to less typical areas. Currently,
a pilot program is being tested to see if ADR can be used to solve divorce
disputes.\textsuperscript{38} This attempt serves to reduce the caseload of the court systems.\textsuperscript{39} Hong Kong exemplifies the progressiveness of ADR. In Hong Kong, there is
statutory law\textsuperscript{40} that governs, one organization that assists clients, and an
established ideology that ADR is very distinct from the court system.

India illustrates the newly recognized ability of ADR to empower the poor.
In India, there is the general perception that the laws are tools to help the rich.\textsuperscript{41} Certainly with the increased association of ADR and technology, this
perception will need to be addressed. Similar to the concept in Hong Kong,
India attempts to separate ADR approaches from the court system.\textsuperscript{42} India also

\begin{itemize}
\item \textsuperscript{31} David W. Rivkin, \textit{Arbitration In P. R. China And Hong Kong}, DisP. RESOL. J. (Sept. 1994)
(reviewing \textsc{Neil Kaplan, Jill Spruce, \& Michael J. Moser, Hong Kong and China Arbitration: Cases and Materials} (1994)).
\item \textsuperscript{32} Hong Kong International Arbitration Centre, \textit{HKIAC Guide For The Appointment of an
\item \textsuperscript{33} Id.
\item \textsuperscript{34} In June 1985, the United Nations Commission on International Trade Law (UNCITRAL)
International Arbitration Rules Of The American Arbitration Association And The UNCITRAL Model Law:
\item \textsuperscript{35} HKIAC, supra note 32.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} \textit{Hong Kong: ADR Developments}, WORLD ARB. \& MEDIATION REP., June 1999, at 159.
\item \textsuperscript{39} Id. at 159.
\item \textsuperscript{40} For the relevant laws, see the Arbitration Ordinance Chapter 341, of the Laws Of Hong Kong.
\item \textsuperscript{41} D.K. Sanpath, \textit{The View from India: Credibility is the Problem Reaching the Powerless with
conflict.org/vol74/credibility.html.
\item \textsuperscript{42} Id.
\end{itemize}
incorporates the UNCITRAL model for international ADR and relies on Indian law for domestic situations. Although there has been contract law and ADR practiced historically in India, only in the past twenty years has it been able to shed its pro-court bias. The recent opening of the Tiruporur Mediation Center attempts to change the perception that resolution always favors the wealthy. The center emphasizes "[f]air play, justice, and give and take." It also utilizes local villagers in the operation of the center. Here, Mediation is the mechanism most utilized. Mediation has made great strides domestically to alleviate the powerlessness felt by the poor in India. People once feeling powerless, now feel powerful. India’s ADR practices are delicately emerging to include a population of people who other wise feel left out. The technological future of ADR must be cautious not to reaffirm the traditional fears of the poor, in India and around the world, that this is a system for the wealthy.

The state of ADR in Hong Kong and India exemplifies the concept that the world is not necessarily on the same page. The use and recognition of ADR techniques is far from globally consistent. ADR’s multi-faceted role needs to be realized before a safe path for its future can be determined. Although the spread of ADR to the Internet offers exciting changes, its growth must promote the perception that this tool is not only for the wealthy. Likewise, the recognized success of ADR should encourage its expansion. The progression needs to be made with the knowledge of the differences that exist.

While the focus of this paper is on the international impact of this new technology, cultural sensitivity to the different domestic ADR practices is essential. The exchange of information internationally directly effects international relations. Internet expansion has resulted in the common use of “global communication.” With an awareness of the different uses of ADR,


45. Id.

46. Id.


48. Id. at 11. The author defines “Global Communication” as the “[i]ntersection of disciplines that studies the transborder communication of values, attitudes, opinions, information, and data by individuals, groups, people, institutions, governments, and information technologies, as well as the resulting controversial issues arising from the structure of institutions responsible for promoting or inhibiting such messages among and between nations and cultures.” Id.
the current Internet expansion will not jeopardize the existing international relations.

V. ADR ON THE INTERNET

It is logical that online ADR began with disputes arising out of Internet regulation. It is also not surprising that the "litigation-loving" United States was the origin of this new trend.49 As of May 1, 2000, there have been 531 cybersquatting cases filed with the World Intellectual Property Organization (WIPO).50 United States Senator Spencer Abraham introduced the Anti-cybersquatting Consumer Protection Act, establishing misdemeanor penalties for first time cybersquatting offenders, and Class E felony penalties for repeat cybersquatting offenders.51 Today, Cybersquatting is a crime.52

The Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit organization that controls domain name management.54 As part of the options for resolving cybersquatting disputes, they offer opposing parties the ability to solve these disputes online.55 There are a few providers recognized by ICANN to solve these domain name disputes.56 One of the largest providers of online settlement processes for cybersquatting, is WIPO's global online Arbitration system.57 "The Arbitration service, which enables companies to avoid costly lawsuits, aims to tackle obvious cases of people

52. "A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person- (i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and (ii) registers, traffics in, or uses a domain name that- (I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark; (I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark; (I) in the case of a mark that is distinctive at the time of registration of the domain name, is a trademark, work, or name protected . . . ." Steven R. Borgman, The New Federal Cybersquatting Laws, 8 TEX. INTELL. PROP. L. J. 265, 268 (2000).
55. Id.
57. Brown, supra note 51.
registering domain names in which they have no rights or legitimate interests . . . " The caseload has doubled in less than a month. The director of WIPO’S Arbitration and Mediation center interprets these statistics to "[r]eflect the market’s growing confidence in the procedure and it’s efficient and balanced handling . . . " Although, the execution of this program started out focusing on a narrow range of disputes, it has triggered a whole new phenomenon in online dispute resolution.

The phrase ‘Online ADR’ generally refers to the “application of dispute resolution skills and resources over a network." This definition goes far beyond settling domain name disputes. New trends in ADR on the Internet imply that we are just beginning to see the impact of this technology on the world of ADR. Cybersettle is part of the new genre of online options to settle all types of disputes. Although Cybersettle’s online service is new, it utilizes very simple traditional strategies:

Typically an insurance carrier representative will enter three confidential settlement offers through Cybersettle’s secure website, Cyberdocket.com. The claimants’ attorney is then contacted by claims facilitators from Cybersettle and invited to participate in the online resolution of the case. If the claimant’s attorney agrees, he submits three demands, one for each three rounds, via a secure input at the same website. If the offer and demand are within... 30 percent of the original demand, the case settles immediately for the average of the two amounts. If there is no settlement after three rounds, neither side is prejudiced because all the figures are held in strict confidence.

This technique has been used in traditional negotiations, designated as blind bidding, but now it’s being done over a network, rather than a conference table. Cybersettle has been party to over 400 resolutions. More than twenty

58. Business This Week 1, supra note 3, at 60; The WIPO Dispute Settlement Process, WIPO MAG., Feb. 2000.
59. Id.
60. Id.
61. Katsh, supra note 2, at 6.
63. Id.
64. Id. at 10.
65. "Blind Bidding" refers to the process of both parties putting down on paper what they would accept as a settlement, giving the paper to the clerk, and splitting the difference in the numbers were within a given range. Kate Marquess, Point, Click-Settle Quick! Online Negotiations Hailed for Efficiency, But Some Prefer Face to Face, 86 APR. A.B.A. J. 82 (2000).
66. Scott Brede, CyberSettle-An Electronic Messiah Whose Time May Not Yet Have Come Before
insurance carriers have used the service.\textsuperscript{67} One of the keys to the success of online services like Cybersettle, is that it does not allow ego and personality to interfere with settlement, as they do in face to face negotiations.\textsuperscript{68}

Cybersettle is not alone. There are several existing websites where disputes can be settled over the Internet.\textsuperscript{69} Furthermore, domain name disputes and insurance claims are not the only disputes being resolved. Another United States based service, clickNsettle.com,\textsuperscript{70} currently offers Arbitration service for contracts, personal injury, commercial liability, medical malpractice, and employment practices.\textsuperscript{71} London Resolve\textsuperscript{72} a similar service out of the United Kingdom, specializes in online resolution of defective software and other computer crime cases.\textsuperscript{73} NovaForum.com\textsuperscript{74} a Toronto, Canada based operation, has contracted arbitrators from around the world, and guarantees online disputes will be settled within seventy-two hours.\textsuperscript{75} The Toronto group sees their service as essential in bolstering consumer confidence in the online market.\textsuperscript{76} "Burchetta, Goetz, and Roy Israel, CEO of National Arbitration and Mediation (NAM) Corp., contend their services can help settle any dispute as long as the question is "How much?"\textsuperscript{77} The question of 'how much' is inherent in the majority of, if not all, disputes. The confidence in these online systems

\textit{Settling Claims in Cyberspace, Says One Wag, Lawyers Should First Learn How to Use the Internet, 25 THE CONN. L. TRIB., June 7, 1999, at 7.}

\textsuperscript{67} Id. at 5.

\textsuperscript{68} Id.

\textsuperscript{69} Some of the other providers of similar services include: clickNsettle.com; eResolution.com; Settlementnow.com; and Online Ombuds Office, WIPO Arbitration and Mediation Center, Resolution Forum Inc., i-courthouse, Keylaw.com.

\textsuperscript{70} Why clickNSettle.com?, at http://www.clicknsettle.com/why_cns.cfm (last visited Sept. 14, 2000). “[C]lickNsettle.com offers a wide range of innovative dispute resolution products designed to meet the changing needs of businesses and individuals worldwide. From complete solutions for insurance companies, corporations, law-firms and e-commerce providers to highly customized individual programs, clickNsettle.com has the experience, services and technology . . . clickNsettle.com enables you to settle any dispute, anywhere in the world.” Id.

\textsuperscript{71} Stones, supra note 49, at 2.

\textsuperscript{72} Conflict Resolution, at http://www.londonresolve.com/Conflict.htm (last visited Sept. 8, 2000). Provides, "[o]n-line and in-person process and expert alternative dispute resolution and consulting services that include: Negotiation, Settlement Negotiation, Mediation/ Conciliation, Meeting Facilitation, Co- mediation, Conciliation, Settlement Conference . . . ."

\textsuperscript{73} Id.

\textsuperscript{74} NovaForum.com, The Right Platform to Power Online Dispute Resolution Services, at http://www.novaforum.com/methods.stm (last visited Sept. 10, 2000). This service “[c]ombines online collaboration tools, video, live chat, text and transcript capabilities with full case management, fact assessment, analysis, and weighted issue/interest variables.” Id.


\textsuperscript{76} Id.

\textsuperscript{77} Marquess, supra note 65, at 82.
indicates online Arbitration and Mediation services may redefine the world of ADR.

The most blatant benefit of using cyberspace as a venue, is that distance between parties becomes irrelevant. This characteristic clearly leads to the conclusion that online Mediation will be especially critical in the world of international Arbitration. The biggest expense in disputes that cross international borders is travel time. Conducting these encounters online eliminates those expenses. Without time or travel concerns, online dispute resolution can bring experts from all over the globe together. "It could also resolve cross-border litigation. Instigating legal action in another jurisdiction is so complex and expensive that many cases never reach that stage."

Cybersquatting is an international problem. Estimates suggest disputes of generic domain names could escalate into the tens of thousands. Disputes arising from Internet activity will certainly add to the assortment of international legal issues. "It should also be noted that national registrars are moving to the adoption of complaint management procedures with regard to domain names, which means that in the near future we can expect disputes over national identity domains." The solutions to the domain name disputes illustrate the ability to utilize this technology to solve international disputes. Already, parties to WIPO’s dispute resolution service come from all over the globe. "Given the global nature of e-commerce and the small dollar value of most consumer transactions, trying to settle disputes in court is probably not a practical option for most consumers and businesses... ADR can provide this option." The global marketplace is becoming more and more intertwined through technological advances. ADR has proven effective and popular in the global marketplace. The Internet has provided a neutral, nearby venue for resolving long distance disputes. The combination of technology and long standing ADR techniques offers new opportunities to develop and control business relationships regardless of distance.

VI. HURDLES FACED BY ONLINE EXPANSION OF ARBITRATION

Only time will tell what, if anything, stands in the way of online ADR becoming as popular as traditional settlement options. However, even at the early stage it is in now, there are already hurdles that need to be overcome.

79. Id.
81. Id. at 4-5.
82. eResolution Online Arbitration System Targets Cybersquatters, supra note 54.
83. Id.
This technology requires trained experts, of which there is an apparent shortage.\(^8^5\) Additionally, if this expansion is going to be successful, there has to be willing consumers. Currently, the consumer base is hesitant to jump online to solve disputes.\(^8^6\) The potential of online expansion to destroy and cheapen the legal profession needs to be understood.\(^8^7\) The high potential for fraud must be addressed.\(^8^8\) Jurisdiction and choice of law in cyberspace, remain the subject of much intellectual debate.\(^8^9\) Questions of Internet privacy and consumer confidentiality must also be answered. This section of the article could not possibly discuss all the problems online ADR faces, they are unknown. The next few paragraphs will discuss the most prevalent problems that will likely test our abilities to carry out online ADR successfully. This article will consider the lack of trained individuals, then consumer confidentiality and privacy concerns.

Technology is not going to sit idle while the legal profession waits to get comfortable with modern changes. Historically the legal profession as a whole is reluctant to technological advances. In the United States, the birthplace of online ADR, the fear is that our legal professionals are not prepared for the new role the Internet will play in their occupation. "Lawyers who don’t or can’t see that e-law represents the future may be quickly left behind."\(^9^0\) The majority of people who use the Internet are not very sophisticated users.\(^9^1\) There are still many people who are not even connected to the Internet.\(^9^2\) Overall, the general public is fearful of conducting such consequential matters online.\(^9^3\) Moreover, many attorneys have never ventured into cyberspace.\(^9^4\) "Even some of the biggest promoters of ADR think the young industry isn’t ready to make the

86. Stones, *supra* note 49.
87. Hellwege, *supra* note 85, at 16. "[T]he new technology could degrade the profession. Several sites are full of slick content that cheapens what we as lawyers do." *Id.*
88. *Id.* "[T]he Internet offers increased opportunities for consumers to become unsuspecting victims of fraud. The potential for fraud is magnified considerably when you’re using joethelawyer.com." *Id* at 15.
92. *Id.*
move to the Internet." The services being provided online do not replace the roles of the trained professional. The goal of the online expansion, is not to replace lawyers; it is to adjust the role of lawyers in light of the available technology. Ensuring these systems operate successfully, at a professional level, requires professionals that fully comprehend and are comfortable using the systems.

Although there is little consensus as to the best strategies and techniques for online ADR, there is little doubt that the need for those who understand the process of dispute resolution, and are comfortable with the machines being employed, is a necessity. To assure quality service is being provided, professionals must be properly trained. Not only in the technological workings of the systems, but in their advisory positions. Both mediators and arbitrators must understand, and be trained in, their respective roles. There is a lack of experienced arbitrators willing to preside online. Although online services are being offered today, there is no way to assure a qualified representative and not a 'computer geek' is on the other end of the terminal.

A classic advantage to ADR is confidentiality, leaving the secrets of the parties private, in case trial is inevitable. The expansion of ADR to the Internet compounds the concern of confidentiality in ADR, with the concern of privacy of Internet use. In the United States, for example, statutory law mandates that "[a] neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided to the neutral." Who has access to the information once it has been electronically transferred? The concern over Internet privacy increases with our use and dependence on the world of cyberspace. As the information on the Internet becomes more personal and consequential, the trouble over who may access the information grows.

Currently, the strongest existing safeguard to Internet privacy is a public key encryption. Although it's not comforting to Internet users, as you

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95. Id.
97. Katsh, supra note 2, at 6.
98. Id.
100. Id.
101. ADR and Technology, Special Supplement ADR, 2000, CPR's Online Seminar, 18 ALTHCL 129 [hereinafter ADR and Technology]. "Obviously one traditional lure of ADR from some parties standpoint is to preserve confidentiality." Id.
103. "Encryption allows an individual using cryptographic algorithm and a key, to turn a message into gibberish. Once the message is sent to the intended recipient, the gibberish is decoded and becomes
browse, every electronic move you make, may be being watched, tracked, and recorded. The Federal Trade Commission suggests four necessary elements to assuring privacy online. They propose; commercial operators should provide notice to their customers about how their personal information is used, offer the consumer a choice on whether their information is used, secure the information that is gathered, and allow the consumer access to their information to encourage accuracy. Adopting an international model incorporating these elements will give the consumer more control. With increased control and increased confidence in the online process, perhaps more consumers will utilize the procedure. Moreover, with these additional safeguards, concern of who is watching our cyberspace activity will diminish.

While securing the information disclosed with encryption techniques, there is still the concern over whether the traditional confidentiality found in ADR will remain a feature in cyberspace. International arbitration is a highly competitive business. Use of ADR techniques is consensual by the parties. Different commercial providers of ADR services utilize different rules. "In June 1985, the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on International Commercial Arbitration . . . . The Model Law represents a modern procedural framework which is liberal in its provisions and de-localized, without neglecting fundamental requirements of procedural justice or due process. Under the UNCITRAL Arbitration Rules, confidentiality is granted by article 25 and article 32. Article 25 asserts that hearings shall be held in camera unless the parties agree otherwise, and article 32 provides that the award may be made public only with the consent of both parties.

Considering the lack of uniformity in international ADR, there is inherently lack of uniformity in online ADR. In order to assure the consumer is protected by the traditional concept of confidentiality in an ADR proceeding, in cyberspace, commercial providers must make their rules unambiguous to users. Furthermore, the old saying "buyer beware," applies full force. Online consumers must understand that Internet activity is vulnerable to fraud and
privacy invasion. Consumers must also understand the rules of the ADR procedures that are being offered by a particular provider. This is not to suggest there is no governing body of law that applies to the Internet, or that there is no protection if laws are violated in cyberspace. "All existing national laws apply to cyberspace, in theory; the difficulty is knowing how to apply or interpret them."\(^{112}\)

VII. CONCLUSION: FORECAST ON "CYBER-SETTLING"

"ADR took a long time to take root in the legal profession, and online ADR is one of those things we're going to have to do very slowly and let people get comfortable with."\(^{113}\) There are mixed predictions on what role the Internet will have on ADR, but there is no denying the Internet will have an impact on ADR and the legal profession in general. Supply and demand will dictate the growth of this new commercial phenomenon. Consumers that currently use ADR generally look for speed, effectiveness, expert knowledge, and cost in the dispute resolution mechanisms they employ.\(^{114}\)

Certainly, the idea of conducting Mediations and Arbitrations in cyberspace would have sounded delusional to our legal predecessors. However, online ADR may become more expansive than ever imagined. The idea of an entire online courthouse was made a reality over a year ago:\(^{115}\)

I-Courthouse provides jury trials for the Internet community. The firm provides a service to individuals and businesses interested in having their disputes evaluated or decided online by a jury of their peers. The service is also marketed to attorney's who wish to conduct mock trials to gauge their strengths and weaknesses of their case before trial.\(^{116}\)

In this system, everything takes place online. The use of audio, video, graphic, and other digital media allows for evidence exhibits. There is a jury selection process, and of course verdicts and verdict summaries.\(^{117}\) The ingenuity clearly exists to expand online options. The question is: Will it work?

After all the exciting options this new technological step offers, there seems to be two major setbacks. The predominant criticism is that the
technology will detract from the human aspect needed in ADR, and as a result, the application is limited to more impersonal situations. "Once you start the practice of law in the virtual setting, a degree of personal touch disappears to become nothing more than cookbook law . . . ." Of course, there is additional criticism and obstacles, but the majority of the negative commentary concentrates on this theme. Perhaps this is a real concern, or perhaps this concern is the reaction of professionals unwilling to venture into the new world of jurisprudence that cyberspace encourages.

The forecast for the future of online ADR is certain. It is not the future; it is now. The future is the expansion of its use, and the adaptability of its services. It is only a matter of time until there is comfort in conducting ADR online and the services that provide online ADR take off. As the richness and adaptability of online communications continues to flourish, online opportunities for ADR will too. There is still a severe need to improve the software that operates these systems. "But it's early and technology will certainly change as rapidly as e-commerce itself."

In conclusion, it seems we are on the brink of an online revolution. The technology already marginally exists to conduct online ADR. There is software that allows it to operate. There are willing participants, willing clients, and more and more disputes with every business and Internet transaction. Test programs and pioneers in the industry demonstrate money making potential and success. It is very inviting to jump in and get started, but there is a lot more on the line than just getting "online". This technological advance will undoubtedly affect international business relationships. The integrity of the global legal profession also hinges on how seriously we consider each move. It is far more important to be patient and ensure proper training, international education, consumer protection guidelines, and some international order of information than to jeopardize failure.

118. Hefwege, supra note 85, at 16.
119. Brede, supra note 66, at 5.
120. ADR and Technology, supra note 101.
121. Gibbons, supra note 56, at 6.
122. Id.
JURISDICTION AND THE INTERNET: THE "REAL WORLD" MEETS CYBERSPACE

Michael Gilden*

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I. INTRODUCTION

In a world where global communications are increasingly dependent on the Internet,1 traditional geographic and territorial borders are disappearing, leaving in their wake important and unanswered questions. Cyberspace is different from the "real world" because it is boundary-less. This lack of defined, territorial borders has necessitated exploration into new areas of law that is developing to regulate this technological arena. International Jurisdiction is one of the most important areas of the law. It requires new ways of thinking to develop ideas on adapting and regulating cyberspace. Many of these new ideas are similar, yet different from traditional forms of legal thought.

Amongst the emerging issues evolving in the new field of cyberlaw, none is more important and difficult to define than Jurisdiction.2 Traditionally, territorial borders separating countries into distinct entities marked which laws would be used to resolve a conflict. Every country in the world with an organized legal system has its own variation of Civil Procedure. The question

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1. IDC estimates that the number of Internet users worldwide will grow from approximately 97 million at the end of 1998, to approximately 320 million by the end of 2002. This reflects a compound annual growth rate of 34.8%. The rapid growth in popularity of the Internet is due in large part to increasing computer and modem penetration; development of the Wide World Web; the introduction of easy-to-use navigational tools; and utilities and the growth in the number of informational, entertainment, and commercial applications available on the Internet, at http://www.idc.com (last visited Oct. 27, 2000).

2. In July of 1999, an Internet Law and Policy Forum took place in Montreal, Canada. One of the major topics of the conference was "Jurisdiction: Building Confidence in a Borderless Medium". Many experts in the field of law and technology made presentations on the subject. Several of these experts are cited throughout this article.
of where jurisdiction lies in order to solve a conflict and why it should lie there is essential to Civil Procedure. Jurisdictional problems come to the forefront of a conflict when a legal dispute occurs in a world without borders. The Internet provides an "information superhighway" that is accessible any place in the world where a person has access to a telephone wire. If a legal conflict occurs resulting from information or content found on the Internet, where will the conflict be resolved and whose law applies? There are several competing theories that have developed to address this difficult question. This article will illustrate the traditional concepts for solving international conflicts over Jurisdiction. It will then present several theories on how to confront these conflicts when they occur in Cyberspace. Analysis of the best methods for confronting the issue of global jurisdiction in cyberspace will follow, leading to a conclusion.

II. WHAT IS THE INTERNET?

In order to understand the problems that the Internet presents to traditional notions of International Jurisdiction, one must have basic knowledge of the Internet. One must know what the Internet is and where it came from. The Internet is a product of the United States Department of Defense Advanced Research Projects Agency (ARPANET). While it is highly doubtful that the developers of ARPANET had the modern evolution of the Internet in mind at the time of its creation, there was the idea of using the network for education. Today, education is only one of the endless applications of the Internet. An infinite stream of information on subjects ranging from Astronauts to Zebras can be located with the click of a computer mouse.

The modern Internet is a huge network that spans the globe. The basic make-up consists of local computer networks that are connected to regional networks that come together to form national and international systems. These systems form "webs" that are connected to each other, essentially creating an "information superhighway" commonly known as the Internet. Communications on the Internet are in a machine language called Internet

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3. According to NUA Ltd., An Internet Survey site, through various measurements and surveys, have estimated the number of users online to be 359.98 million worldwide. The following is a breakdown of the numbers by region. Africa, 3.11 million; Asia/Pacific, 89.43 million; Europe, 94.22 million; Middle East, 2.40 million; Canada & USA, 157.24 million; Latin America, 13.4 million, at http://www.nua.ie/surveys/how_many_online/index.html (last visited Oct. 27, 2000).
5. Id.
Protocols.\textsuperscript{7} This language is transmitted over the Internet in packets of data that are broken up and sent through the network at whatever pace the connection can capacitate. The address of the final destination identifies these data packets. Each packet travels over different routes depending on available capacity and speed from computer to computer until it reaches its intended destination.\textsuperscript{8} Once they reach their destination, these packets of data come together to form the requested page.

The route that the final product takes may travel through various states of the United States as well as through various countries of the world. The network design is to move information as quickly as possible along the system and does not recognize any defined territorial borders. Because of this objective, it is likely that information will travel through several different jurisdictions before it reaches its final destination.

There is no real way to monitor the information that passes over the Internet. Additionally, there are no realistically feasible ways for countries to block Internet transmissions. Internet protocols do not recognize geographic location.\textsuperscript{9} This lack of ability to control and screen information transmitted on the Internet leads to legal problems. Without a specific authority to oversee these problems, the question becomes, how can legal conflicts be resolved. Who has jurisdiction to decide and solve these problems?

\textbf{III. TRADITIONAL JURISDICTIONAL ISSUES}

In order to file a lawsuit in the United States, the court hearing the case must have jurisdiction over the subject matter of the issue and over the defendant(s). Subject matter jurisdiction in federal cases depends on the diversity of citizenship between the parties. It also depends on whether a specific issue of federal law arises.\textsuperscript{10} The more complex issue is whether the court can assert personal jurisdiction over the defendant. For a court to have personal jurisdiction over a person, the court must conclude that the person has "minimum contacts" within the forum state, so as not to offend traditional notions of due process.\textsuperscript{11} A defendant must purposely avail himself or herself within the forum state by being present in the state, doing business within the state, or maintaining certain activities within the state. The defendant must

\begin{itemize}
\item \textsuperscript{7} \textit{Id.}
\item \textsuperscript{8} \textit{Id.}
\item \textsuperscript{9} \textit{Id.}
\item \textsuperscript{10} \textsc{Fed. R. Civ. P.} \S\ 1331.
\item \textsuperscript{11} \textit{International Shoe Co.} v. \textit{Washington}, 326 U.S. 310, 316 (1945). The Due Process Clause of the 14th Amendment permits the courts to exercise personal jurisdiction over persons with sufficient minimum contacts. \textit{Id.}
\end{itemize}
have had sufficient, continuous contacts within the forum.\textsuperscript{12} Therefore, non-residents of one state are still subject to the jurisdiction of the court in that state if the court finds that they maintained the necessary minimum contacts required for asserting personal jurisdiction.

A significant problem arises when actions filed are a result of conflicts arising in cyberspace. The Internet flows freely and is available in every state and every country. This creates a direct challenge to the minimum contact rule. Courts are examining what constitutes minimum contact with respect to Internet issues. It may not be enough to say that a person has established minimum contacts in a forum just because another person was able to gain access to a website within the forum. If this were true, every state in the United States and every country around the world with similar minimum contact standards would be able to claim personal jurisdiction over anyone with a website. Legal scholars propose that well defined standards be established when determining personal jurisdiction based on cases dealing with conflicts originating in cyberspace.

United States' Courts are making efforts to clarify the question of jurisdiction for cases arising from conflicts originating on the Internet. One factor for determining whether minimum contacts exist in a forum is by deciding if a particular website is passive or active.\textsuperscript{13} \textit{Weber v. Jolly Hotels} used a test based on this issue. The defendant in that case was an Italian hotel that advertised on the Internet. The plaintiff booked a room in the hotel through a licensed travel agent in New Jersey. The plaintiff's injury occurred while in the hotel in Italy. The issue presented in the case was whether a corporation's advertisement on the Internet was enough to support general jurisdiction. The \textit{Weber} Court held that advertising on the Internet, without further solicitation, could not support jurisdiction in this case. The Court asserted that the nature and quality of contacts is key when determining whether personal jurisdiction can be asserted in Internet cases.\textsuperscript{14} A determining factor is whether a defendant's website simply places information on the Internet, or whether the website facilitates a means for soliciting and conducting business. The Court reasoned that without deciding the characteristic nature of the website, a defendant could be open to legal action anywhere that the website is accessible.\textsuperscript{15} This departs from the well-established precedent that a person needs to be 1) present in or 2) purposely availing oneself of the forum state that is attempting to establish personal jurisdiction in order for there to be minimum contacts.

\begin{footnotesize}
\textsuperscript{12} Id. at 317-19.
\textsuperscript{14} Id. at 330-31.
\textsuperscript{15} Id. at 333.
\end{footnotesize}
While it may be a valid assertion that the nature and quality of contacts is a significant factor in determining whether personal jurisdiction can be asserted in Internet cases, this is not as simple as it seems. Many websites are established with the purpose of providing information and not for advertising or for the solicitation of business. However, this does not mean that they are not actively making contacts within a forum. A leading case in this area is *Zippo Manufacturing Company v. Zippo Dot Com.*\(^{16}\) Although this is a case involving United States jurisdictions; it should be persuasive with respect to how international law may want to address jurisdictional issues. *Zippo* involves trademark infringement on the Internet. Trademark infringement is a problem that will have a significant impact on the international community. For example, a French company could be using a trademark to do business on the World Wide Web as a United States company conducting business with the same or similar trademark. Anyone doing business with these companies may experience confusion from the similarities of the trademarks and consequently, conflicts could arise. Trademarks used by a French Corporation in France will no longer have an effect on a United States Corporation using the same or similar trademark. The effortless ability to access the Internet has made the world smaller, thus facilitating the need to protect companies and individuals intellectual property rights.

The *Zippo* Court addressed trademark infringement on the Internet in the United States when the Zippo Manufacturing Company, a cigarette lighter manufacturers domiciled in Pennsylvania, brought suit against a California Internet news service company, Zippo Dot Com, for trademark infringement. Zippo Dot Com’s website advertised its service and had an electronic application used to subscribe to their service. They had contracts with Internet providers in Pennsylvania and had subscription agreements with 3000 residents of Pennsylvania. The Court held that jurisdiction in Pennsylvania was proper because Zippo Dot Com had purposely availed itself of the law and economy of Pennsylvania.\(^{17}\) The Court, specifying that this was a distinctive situation because it was an Internet case, applied the *International Shoe*\(^{18}\) minimum contacts analysis. The court in *Zippo* established a "sliding scale" which measures the degree of interactivity of the website.\(^{19}\) The Court broke the scale down into three levels. The first is a passive website. A passive website is a site that merely distributes information.\(^{20}\) The second level is an

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17. *Id.* at 1126.
18. *International Shoe,* 414 U.S. at 316. In *International Shoe,* the court defined for the first time what contacts a defendant would have to establish in a particular forum so as to have "minimum contacts" within the meaning of the law. *Id.*
20. *Id.* at 1124.
intermediate website. Intermediate websites are able to exchange information between the host and the user. The third level is an active website. An active website enables the host to conduct business over the Internet. The Court defines conducting business over the Internet as entering into a contract over the Internet and/or knowingly and continuously engaging in the transmission of computer files over the Internet.

In order to satisfy due process requirements, a defendant, acting as a reasonable person, would have to anticipate being haled into court in the forum that the activity that is conducted. The Zippo Court in fact did believe that Zippo Dot Com should have foreseen jurisdiction in Pennsylvania. According to the Court, the level of activity was sufficient to subject the defendant to the laws of that forum.

The test established in Zippo is a model from which to base new international laws on jurisdictional conflicts arising on the Internet. While the laws of various countries may differ with respect to jurisdiction based on "real world" conflict, compromises are necessary when it comes to the Internet. Everyone conducting activity on the Internet should be guaranteed due process of law. The type of conflict that is causing the dispute will often determine the solution, but in many circumstances, the ruling described in Zippo can provide a basic test to use as guidance. If a company or individual transmits information over the Internet, and a conflict occurs, one should examine the nature of the information. In addition, an analysis must be conducted to determine whether the website is passive, active, or intermediate. Finally, a determination as to whether a reasonable person could anticipate being haled into court in that forum is determined. With respect to cases of international conflict, if a person should have anticipated that the information they were disseminating over the Internet would possibly cause a problem, they should foresee judgment in the forum where the conflict occurs. It is entirely feasible that an American using a website to post information or conduct business may have to face suit in Argentina. This would be true if it is determined that a reasonable person conducting that activity should have foreseen that problems could occur in Argentina. Naturally, these situations are determinable on a case-by-case basis, but this is a starting point for handling the complicated litigation that will arise over international jurisdiction conflicts.

IV. INTERNET JURISDICTIONAL ISSUES

There are an infinite number of Internet issues that will give rise to conflicts over jurisdiction. Consequently, varieties of scholars have commented

21. Id.
22. Id.
on the conflicts that have arisen and could arise with respect to jurisdictional issues on the Internet.

Hypothetically, international jurisdiction problems could arise involving hate speech on the Internet. The First Amendment of the United States Constitution protects pro Nazi material on the Internet. This information, originating in the United States, is accessible in Germany. However, German law restricts the proliferation of Nazi material and information in Germany. This raises the question of the German government’s ability to have jurisdiction over the person who places such information on the World Wide Web. Should the German government have personal jurisdiction over the creator of the website created and domiciled in the United States?

Applying the interactivity test set forth by the Zippo Court to the aforementioned hypothetical is challenging. However, if the international legal community starts to analyze these issues in the same manner, specific tests can evolve based on the facts of each individual conflict.

In analyzing whether the German government should have jurisdiction in this situation, the first issue addressed is to determine the website’s level of activity. This is an issue not easily answered and is a strong argument for creating legislation to deal with conflicts of this nature.

If the website is passive and only distributes information, it would be inconsistent with due process for the Germany to have personal jurisdiction over the defendant in Germany. The website would not be purposely availed to any forum in particular. The German government may argue that the laws of its country are different from most others when it comes to this type of information. Germany may argue that those who established the website should have known that the website is accessible in Germany and therefore should have expected being haled into court in Germany.

If the level of activity of the Nazi material website is deemed intermediate or active, different conclusions result regarding the jurisdictional question. If the nature of the website is to actively exchange information between users and the host, then purposeful availment to the benefits of the forum occur.

If it is determined that business is being conducted over the website, it may be concluded that minimum contacts are being maintained within the forum. In these cases, the German government would have a strong argument that jurisdiction should lie in Germany. The border-less nature of the Internet is evident to those that participate in the medium. If the website is actively conducting business in a forum, the hosts should expect to be subject to jurisdiction in that forum.

Another issue that could present itself on the Internet involves professional licensing.\textsuperscript{25} For instance, if a doctor in England offers medical advice over a website, does the United States government have jurisdiction to say that the doctor is practicing medicine in the United States without the proper license?

If the medical website is passive, it is only distributing information. The website should clearly disclaim that the content is for informational purposes only, not to offer medical advice or diagnosis. This being the situation, it would be unlikely that personal jurisdiction in the United States would be consistent with due process.

If the website features an exchange of information between the user and host and this information is in the form of medical advice, an intermediate level of activity will exist. In this case, the totality of the circumstances should be examined to determine the nature of the information exchanged and if the defendant should have anticipated being haled into court if problems arose over the exchange of the aforementioned information. In a situation such as this, whether medicine is being practiced without a license will be have to be determined based on the kind of information being exchanged. Heightened scrutiny is required on a case-by-case basis for intermediate level websites. Whether those responsible for offering information should have to answer suit in foreign jurisdictions will depend on the specific nature of the information exchanged.

For personal jurisdiction to be consistent within the forum, a website must be actively conducting business. If a doctor in England is offering medical advice, or attempting to dispense medications in exchange for payment, in the United States there is a strong likelihood that the doctor is practicing medicine without a license. In these cases, personal jurisdiction lies within a United States forum. Again, the level of activity of the website lends to determining a good starting point for deciding issues of international jurisdiction for Internet conflicts.

It is important to realize that the \textit{Zippo} test is only a starting point for answering the question of international jurisdiction on the Internet. Different variations of Civil Procedure exist from country to country. Certain perspectives in the United States regarding enforcing jurisdiction are fundamentally different from other countries. For example, Japanese Civil Procedure states that the general grounds for jurisdiction depend on the domicile of the defendant.\textsuperscript{26} Therefore, the plaintiff can sue the defendant in

\textsuperscript{25} Id.

the defendant's domicile. The United States Supreme Court has ruled that a foreign plaintiff can sue a defendant in the United States domicile of the defendant only in cases where it is not precluded by forum non-conveniens. The differences between the United States and Japan are indicative of the variations that exist between countries throughout the world.

One manner in which we could resolve the variations that exist in civil procedure laws between countries is to form a treaty standardizing laws in cyberspace. However, the constitutional systems of participating countries in a treaty will still create an imbalance in the harmonization of a standard rule system. University of Tokyo Professor Kazunori Ishiguro illustrates this conflict. He notes that in the United States a treaty has the same rank in terms of judicial importance as a federal law. The rank of international law is lower than that of federal law, but higher than state law. In Germany, international law is considered above federal law, but a treaty is generally treated the same as federal law. According to the Japanese Constitution, international law and treaties take precedence over national law. These fundamental differences among countries will be an impediment to harmonizing the international law dictating jurisdiction on the Internet.

V. DIFFERING VIEWS ON THE INTERNET JURISDICTIONAL PROBLEM

There are several different theories on the number of problems that jurisdictional issues will cause in cyberspace. There are also several theories as to what the solutions to those problems should be. Professor Henry H. Perritt, Jr. illustrates in his article three examples of conflicting hypotheses on the Internet Jurisdiction issue. Jack Goldsmith of the University of Chicago offers the first hypothesis. David R. Johnson and David G. Post present contradicting views on the issue. Peter Swire offers a compromised view of the first two.

Jack Goldsmith of the University of Chicago has set forth one prominent theory. He asserts that the "hype" created by Internet jurisdictional issues are just that, "hype." He is of the opinion that well-established theories of

29. Id.
30. Id.
31. Id.
32. Id.
33. Perritt, supra note 24.
34. Chairman of Counsel Connect and Co-Director of the Cyberspace Law Institute.
35. Visiting Associate Professor of Law, Georgetown University Law Center and Co-Director of the Cyberspace Law Institute.
international law that have been in place for many years will provide the answers to any questions raised in cyberspace, the same as they do with traditional jurisdictional conflicts.

It is likely that the issue of Internet Jurisdiction will cause a great deal of over-excitement as new cases arise at a rapid pace in the near future. This would seem to be natural when a new medium is expanding as quickly as the Internet. However, to say that new laws and dramatic variations on current doctrine are not necessary to deal with the legal complications resulting from the Internet is overly optimistic. Jurisdiction in the real world depends on clear territorial divisions between nations. Once these divisions disappear, as they disappear on the Internet, new regulations must be enacted. Traditional law is important and not to be discarded. Current rules will be the basis for the ever-expanding set of regulations that will need to be established and used to deal with conflict resulting from disputes in cyberspace.

David R. Johnson and David G. Post suggest a theory that contradicts Goldsmiths. They assert that a whole new area of law needs to arise to deal with the rising issues of jurisdiction on the Internet. Their article provides an example of how the United States government could traditionally not impose United States trademark law on a Brazilian business operating in Brazil. Post and Johnson explain that this is impossible because it would require that the United States be able to assert physical control over those that run the business in Brazil. This would be in direct contradiction to the Brazilian government’s right to be the only governing body to have such control over its citizens. This control comes from physical territorial borders, and as previously illustrated, physical borders do not exist in cyberspace. Governments have responded to the lack of physical borders by attempting to regulate the flow of electronic information as it crosses their borders. This is a difficult undertaking that most likely is impossible and impractical. Johnson and Post conclude that the World Wide Web has created a new arena where new rules must evolve. They assert that this area should be distinct from current doctrine and new regulations need to develop based on the special characteristics of cyberspace.

The inherent border-less nature of the Internet will necessitate an evolution in jurisdictional doctrine in order to regulate legal conflicts on the Internet. However, traditional international law provides the building blocks for future regulations. The concepts of minimum contacts within a forum and a defendant anticipating facing suit in a forum are good starting points for creating Jurisdiction rules in cyberspace. These concepts must be adapted to fit legal issues that arise on the Internet depending on the nature of the website.

38. Id. at 1374.
A third theory offers a compromising position to the aforementioned two. Peter Swire suggests that the size of the entity providing the Internet service will determine jurisdiction issues.\textsuperscript{39} Entities such as large multinational corporations will likely have significant physical presence in countries that have access to their Internet services or products. Therefore, traditional notions of jurisdiction apply. However, Swire suggests that new concepts and variations on traditional laws will need to be created for the smaller entities in countries that have access to Internet services or products.

This theory is provocative in that it concentrates on the "real world" concept of physical presence. While the size of the entity may have a connection to the issue of jurisdiction, the type of website that the entity maintains will give a better result.

Regardless of which theory best addresses the problem of Internet jurisdiction; using the test suggested by the Zippo Court is a logical starting point. All websites, whether they are active, passive, or intermediate are judged according to the Zippo test. This focuses attention on the website itself as opposed to the size of the entity behind the site. By focusing on the characteristics of the website, real world concepts, which do not appear in cyberspace, such as size and physical presence, will cease to exist.

VI. CONCLUSION

Jurisdiction in cyberspace is a very important area of the law. Current international law is not well equipped to handle all of the complex issues that will arise from conflicts based in cyberspace. However, the current law is a good basis from which to mold laws that will fit questions of jurisdiction on the Internet. United States courts have started to address the question of where jurisdiction should lie in cases arising from conflicts occurring on the Internet.

In addition to the courts concern with the potential problems arising in cyberspace, users of the Internet are policing each other. Websites now contain legal disclaimers that suggest what kind of information is contained on the site. The legal ramifications of accessing the webpage are clear and rules are set for using the information contained. This self-regulation by creators and hosts of websites is the best, first line of defense for preventing legal conflicts from occurring.

As the Internet continues to grow, the cyber-community as a whole should become more responsible for monitoring what is being proliferated over the system. Court should not be responsible for addressing every problem that arises in cyberspace. Most Internet users will not be able to afford defending

suits in multiple jurisdictions or complying with different regulations of the various jurisdictions through which they might electronically venture. In order to avoid these pitfalls, efforts must be made to continue; 1) creating uniform international laws pertaining to the Internet; 2) increase self-regulation by hosts and users; and 3) better educate law makers of how the Internet and World Wide Web function.

No other medium has created a global community as widespread and accessible as the Internet. Without physical boundaries to block the free flow of information, people have been able to come together and communicate around the world like never before. The Internet has made it possible for people of all levels of social and economic backgrounds to have a voice in a plethora of issues. Enacting and enforcing international laws and regulations will protect the interests of all of the entities communicating in cyberspace. This will be a complicated process, but one that is essential for the protection of a world advancing towards free flowing communication and cooperation.

40. Burk, supra note 6.
As we approach the end of the first year of the new millenium, we see a rapid growth in the enactment and evolution of legislation regarding the use and validity of digital signatures in countries throughout the world. Digital signature legislation has been established with the purpose of giving digital signatures the same validity and effect as handwritten signatures.\(^1\) Digital signatures are alluring to those involved in international e-commerce, because through their use, parties are able to significantly minimize the distance and physical obstacles associated with international transactions.\(^2\) Unlike other forms of electronic signatures, a digital signature is a secure communication, which can ensure that electronic documents signed by one party and sent electronically to another are done without a compromise of security.\(^3\) However, the differences in various laws create a problem for the use of digital signatures across national boundaries.\(^4\) "The development of international electronic commerce requires cross-border arrangements involving third countries; in order to ensure operability at a global level, agreements on multilateral rules
with third countries on mutual recognition of certification services could be beneficial." In order for the use of digital signatures to be a success in the international forum, several barriers must be tackled. This article will focus on three barriers: 1) the conflicting technical requirements of digital signatures; 2) the ability to limit potential liability of Certificate Authorities; and 3) the conflicting legal requirements regulating digital signatures and contracts.

The creation and verification of digital signatures is done through cryptography, with the use of mathematics, which transforms messages. Digital signatures generally require the use of two keys, a "private key" and a "public key." The signatory uses the "private key" exclusively in the creation of the digital signature, while the "public key," which can be widely known, is used by the party relying on the signature to verify the authenticity of the digital signature. The private key is the tool used by the signatory to encrypt the text of the document. Then, the recipient of the document uses the public key to decrypt and verify the authenticity of the document. The encrypting and decrypting of the document occurs through a mathematical relationship between the two keys, which makes it "computationally infeasible to deduce the private key solely from knowledge of the public key."

Another process used in the creation and verification of a digital signature is a hash function. "A hash function is an algorithm which creates a digital representation or 'fingerprint' in the form of a 'hash value' or 'hash result' of a standard length which is usually much smaller than the message but nevertheless substantially unique to it." This process creates a digest, which is a string of characters that maps the text. This ensures that if any portion of the original message is changed, the digest will also be changed. These keys

7. Id.
13. Lupton, supra note 2.
14. Id.
are issued by a trusted third party, generally referred to as a Certification Authority. Digital signatures can be described as the use of cryptography and a hash function to transform a message. Whoever is in possession of the initial message and the public key of the signer can accurately verify that the transformation was done through the use of the private key of the signer, and whether the original message has in any way been altered. A digital signature is not a handwritten signature electronically stored; it is a secure communication used to verify a signatory.

II. CONFLICTING TECHNICAL REQUIREMENTS OF DIGITAL SIGNATURES

Digital signature laws provide for different technological requirements in various areas of the world. Legislation has been enacted in several jurisdictions, which either recognizes or regulates the use of digital signatures. However, the approach taken regarding the legal and technical issues has been significantly different in each jurisdiction. While some countries focus on only the technical standards, others have touched on a wide variety of issues, including the establishment of a regulatory agency whose function is to oversee Certificate Authorities. Different jurisdictions have set up different requirements for a Certification Authority. For example, Singapore has a Controller of Certification Authorities whose responsibilities include licensing, certifying, monitoring, and overseeing certification. However, the Singapore law does not require that all Certification Authorities be licensed; it simply provides for a greater assumption of validity and limitation on liability. In contrast, a valid digital signature in Italy must be certified by a Certification Authority that has been accredited through the fulfillment of specific conditions set by the law. Additionally, the European Union encourages Certificate Authorities to include in their certificates the name, address, social-security

16. Lupton, supra note 2 (defining digital signatures and explaining the procedures associated with the issuance and usage of digital signatures).
17. Id.
18. Id.
19. Thomas, supra note 9, at 1026.
20. Id.
23. Id.
number, tax and credit information, and specific licenses and certifications. The European Union's goal is to have the Certificate Authorities offer a wider variety of services.

With so many different variations of requirements for Certification Authorities, it will be difficult to conduct international transactions through the use of digital signatures. In order to be successful across international borders, Certification Authorities will be required to fulfill the requirements set forth by every area in which it will conduct its business. For a Certification Authority to be successful internationally, it would quite possibly have to acquire licenses in several jurisdictions, a task that would prove to be expensive. The costly price of acquiring licenses in different jurisdictions would be shifted to the consumers of the Certificate Authority. This would discourage the use of digital signatures on the international level, and quite possibly stifle growth and progression. Due to the varying conditions of licensing, becoming licensed in different jurisdictions could be virtually impossible. Additionally, some laws regarding the requirements for Certification Authorities are unclear, making the task more difficult. A harmonization of the licensing requirements of Certification Authorities must come about in order to secure a future for international digital signatures.

III. THE ABILITY TO LIMIT LIABILITY OF CERTIFICATION AUTHORITIES

Anyone can download digital signature Software on the Internet and create a digital signature. For this reason, any message using a digital signature should be authenticated by a Certification Authority to minimize the occurrence of fraud. It is the duty of the Certification Authority to ensure the identity of the user, and verify that both the public key and private key used belong to that individual. The Certificate Authority will then issue a certificate, which gives the digital signature a presumption of validity. Upon issuance of a certificate, the Certificate Authority could possibly be held liable for negligence in performing its functions by providing certificates that contain false or misleading information, and breach of contract.

26. Id.
27. Digital Signature, supra note 21.
28. Id.
29. Lupton, supra note 2.
30. Id.
31. Id.
32. Id.
33. Id.
The next barrier to the international progression of digital signatures is the ability of Certification Authorities to limit their liability. A Certification Authority is subject to strict liability for failure to follow issuance requirements and for losses caused by reliance on an inaccurate certificate under the European Union Directive. However, the European Union allows a Certification Authority to limit its liability. The European Union Directive allows Certification Authorities to limit their liability by indicating the beginning and end period of a valid certificate, limiting the scope and use of a certificate, and the value of transactions in which the certificate can be used.

Other areas, such as Singapore and Malaysia, require that a Certification Authority be licensed in order to place a limitation on its liability for the certificates it issues. The major problem with this requirement is whether being licensed or accredited should be a prerequisite for Certification Authorities to place a limit on their liability. While some jurisdictions require licensing and some do not, several jurisdictions have not addressed the issue of liability at all. Some assert that addressing the issue at this stage is premature, while others are simply opposed to the idea of a system based on strict liability, which permits Certification Authorities to state limitations on liability.

With so many conflicting views on how and when a Certificate Authority can limit its liability, difficulties will arise for Certificate Authorities and users of digital signatures. With these conflicting views and laws, Certificate Authorities will be hesitant to converge into the spectrum of cross-border transactions. For example, there could be instances in which one jurisdiction requires that a Certificate Authority complete a step that another jurisdiction prohibits. In an instance such as this, there is no easy solution to this problem, but only the creation of more complexities. The conflicting laws in the various jurisdictions would expose Certificate Authorities to possible unlimited liability. With the uncertainty of liability exposure, Certificate Authorities would be unable to determine how much liability they would accrue when they become involved in cross-border transactions.

34. Digital Signature, supra note 21.
35. Id.
36. Electronic Signatures, supra note 5, at 18.
37. Digital Signature, supra note 21.
38. Id.
39. Id.
IV. THE CONFLICTING LEGAL REQUIREMENTS RELATING TO DIGITAL SIGNATURES AND CONTRACTS

In almost every jurisdiction, legislatures are enacting laws regarding the use and regulation of digital signatures. The enactment of these laws will lead to confusion and complications in the use of digital signatures at the international level. Supporters of the enactment of international regulations for digital signatures assert that such regulations will provide certainty and guidance, thus promoting e-commerce and eliminating conflicting laws.\(^{41}\) In contrast, opponents argue that the enactment of such laws would bring about burdensome regulations that would inhibit e-commerce transactions.\(^{42}\)

The main purpose of digital signature legislation is to give equal legal effect to digital signatures as to handwritten signatures.\(^{43}\) The ability to bind parties to contracts and agreements online in much the same way as handwritten signatures is the greatest strength of the digital signature.\(^{44}\) The differences among the laws of different jurisdictions pose a problem for use and acceptance of the technology at the international level.\(^{45}\) Some jurisdictions have laws, either enacted or proposed, which require that the states be significantly involved in the regulation of digital signatures.\(^{46}\) Other jurisdictions have enacted more lenient, flexible standards.\(^{47}\) Although some jurisdictions may have similar laws enacted, the manner in which the courts interpret and apply those laws could be significantly inconsistent.\(^{48}\) Additionally, the absence of regulations in other jurisdictions also poses a problem. The jurisdiction of the courts and revenue, regulatory, and government authorities of a country are usually confined to the physical boundaries of that country.\(^{49}\) Currently, it is not clear when one country has the authority to assert jurisdiction over an Internet user located in another country.\(^{50}\) The use of digital signatures and the Internet dispel the idea that the jurisdiction of a country stops at the country’s borders because they allow people to interact with one another while in

\(^{41}\) Thomas, supra note 9, at 1044, relying on Ira H. Parker, Why Digital Signatures Matter, 1 ELEC. BANKING & COM. REP. Z (1997).

\(^{42}\) Id.

\(^{43}\) Supra note 1.


\(^{45}\) See id.

\(^{46}\) Thomas, supra note 9, at 1006, relying on Kimberly B. Kiefer, Developments Abroad May Influence U.S. Policy on Electronic Banking, 17 No. 4 BANKING POL’Y REP. 1, 8 (1998).

\(^{47}\) Id.

\(^{48}\) Id. at 1007.


\(^{50}\) Id.
different countries. This poses the question: how does one determine what laws guide international transactions over the Internet?

Generally, the location of a transaction, location of performance, and the location of an effect are used to determine what law applies to international transactions. However, these elements are virtually irrelevant because of the fact that physical location in e-commerce has minute importance. It is presently unclear exactly how to determine what laws the user will be subjected to when conducting transactions over the Internet through the use of digital signatures. For example, in Taiwan, the law provides that in the case of Internet transactions, the laws of the country in which the offer of a contract originated should govern the contract. However, it is not always clear when an offer is made, and who actually made the offer. Additionally, the law in Taiwan grants only limited recognition to acts of persons twenty-years and younger. This is different from the United States, in which the age of majority is eighteen-years of age. These differences create a problem for not only a Certification Authority, but also for anyone in an area outside of Taiwan, in which the age of majority is less than twenty-years old.

First, a Certification Authority would be required to know all of the laws of majority in every jurisdiction in which it wishes to conduct business. This is not only time consuming, but also quite costly. Second, suppose a citizen of the United States accepts an offer through the use of a digital signature from a nineteen-year-old in Taiwan. The law of Taiwan requires the nineteen-year-old to have a legal representative act for him or her, or else the contract is unenforceable. In this situation, where the offer originated in Taiwan, the law of Taiwan would be binding on the contract. Thus, the contract will be unenforceable and the Certificate Authority would not be liable because, in this situation, the Certificate Authority only issued a digital signature to the United States citizen, and would not be responsible for the inability of the nineteen-year old to fulfill the terms of the contract. Suppose that the legal representative of the nineteen-year old acquired a digital signature for the nineteen-year old, but did not act on behalf of him or her or approve the contract. The problem is that the digital signature was acquired from the Certificate Authority and issued by them rightfully to the legal representative. However, the minor used it without the approval of the representative. Who would be liable in this

51. Lui-Kwan, supra note 44, at 468.
53. Id.
55. Id. at 82.
56. Id.
instance? There is no clear answer to this question. It appears that to some extent, the Certificate Authority could be held liable. However, one way in which the Certificate Authority could limit its liability in this instance is to provide a limitation on the use of the digital signature. The limitation could contain a notice that the representative must first approve the use of the digital signature. This would put the other party on notice that the nineteen-year old is not able to act on his or her own.

These variations of laws in different jurisdictions will cause a reluctance to use digital signatures in the formation of contracts on an international level. One possible solution to this problem is through a choice of law clause in the agreement. If the parties can select the law that will govern their agreement, and be confident that the courts will uphold their choice, the transaction costs will decline. For example, if a Certificate Authority can include a choice of law provision stating that it will abide by the rules of the United States, this could eliminate the need to know the laws of all of the other jurisdictions in which its certificates will be used. Although a choice of law provision can be a tool to limit liability, this does not solve the Certificate Authority's problem of fulfilling all the requirements necessary to issue a valid certificate in the different jurisdictions.

Although one can acquire some protection by specifying which country's law will govern the contract, a country may still assume jurisdiction when the interests of a citizen or the country are affected. One instance is the mandatory rule of the Uniform Commercial Code (UCC), which states that the laws of the country in which an online merchant is established will regulate the online merchant. Some jurisdictions have rules that are mandatory and can not be contracted around through the use of a choice of law provision. In contrast, under European laws, those engaged in commercial transactions are allowed to agree to what laws will govern their contract. However, in Europe, choice of law clauses in consumer agreements are invalid and the law of the consumer's residence or the place of the transaction will govern these agreements. Although there is the possibility of using a choice of law clause, it is still necessary to have some grasp of the laws in the jurisdiction in which agreements are made. It is important to know if there are any laws or rules that cannot be circumvented through the use of choice of law provisions.

58. Steyn, supra note 49.
In the face of conflicting laws governing the use of digital signatures, the various jurisdictions should recognize and enforce the choice of law provisions of an electronic transaction. The only instance in which a government should be reluctant to, or refuse to not enforce such an agreement is to prevent abuses or to protect public policy. However, absent these instances, a choice of law provision designating that a particular state should govern the contract should be recognized and enforced.

It is clear that there is a need for international harmonization of the laws and rules that govern the use of digital signatures. However, the lack of consensus regarding the various elements of the rules and requirements of digital signatures will prove to be a significant obstacle in the creation of international standards. There are various suggestions for ways to go about creating uniform legislation for the use of digital signatures in cyberspace. The ideal digital signature legislation would encourage the development of electronic commerce by addressing the needs of companies, as well as protecting the privacy of consumers who engage in online transactions.

The United Nations has agreed that the uniform rules of digital signatures should deal with the issues of 1) the legal basis of the certification process; 2) applicability of the certification process; 3) how risks and liabilities should be allocated among users, providers and third parties; 4) use of registries for certification; and 5) incorporation.

With these issues in mind, the United Nations Commission on International Trade Law Working Group on Electronic Commerce (UNCITRAL) drafted the UNCITRAL Uniform Rules on Electronic Signatures. Although the work of UNCITRAL has proven to be extremely beneficial when drafting national digital signature legislation, governments are not obligated to follow UNCITRAL. The UNCITRAL rules could possibly evolve into the basis for international harmonization for the use of digital signatures. However, these rules, if enacted, would only be enforceable on its signatories. It is highly unlikely that all jurisdictions will be signatories to these rules. Because digital signature legislation is such a new area, it is possible that it may take some time and persuasion for countries to be comfortable enough to agree to the legislation set up by UNCITRAL.

62. Id. at 21.
63. Id.
64. Id.
65. Digital Signature, supra note 21.
66. LuiKwan, supra note 44, at 477.
68. See generally id.
69. Digital Signature, supra note 21.
Another approach to legislation is the “admiral” approach. The Internet can be analogized to the high seas: 'Just as the territory a ship traverses is not subject to any one state’s exclusive jurisdiction, so too the user in cyberspace traverses a sovereignless region that is not subject to any state’s exclusive jurisdiction.' Following this approach, the location of the physical jurisdiction of the access provider would decide choice of law on the Internet. Unfortunately, this is not helpful if the parties have different service providers. The physical jurisdiction in which the Certificate Authority is located could govern the contract. By following this approach, not only would the governing jurisdiction be clear, but the transaction costs could be reduced.

For example, suppose a citizen of the United States wanted to contract with a citizen of Italy. Both parties obtain a digital signature for this transaction from a Certificate Authority in European Union. There are clearly three different nations involved in this example. By using the “admiralty” approach, the jurisdiction of the Certificate Authority would govern the contract. There are several advantages to this way of deciding what jurisdiction will govern. First, the Certificate Authority would only be required to know the laws of the jurisdiction in which it is physically located. This eliminates the cost of the Certificate Authority to know the laws of every jurisdiction in which it has customers. By cutting the cost to the Certificate Authority, the costs to the consumer are also reduced. Second, the consumers will clearly know what jurisdiction will govern. This gives the consumer the option of finding a Certificate Authority in the jurisdiction in which they want the terms of the contract to govern. Last, the rules that govern the agreement can be easily ascertained. The Certificate Authority should be able to provide the users of its digital signatures with the terms, conditions, and prevalent law pertaining to their transaction. This provides an ease of acquiring information regarding the rules of the jurisdiction in which the Certificate Authority is located.

Unfortunately, this approach has its flaws. A problem would arise if the parties chose to use different Certificate Authorities located in different jurisdictions; there would be no clear way to determine jurisdiction. Additionally, it is likely that there will be some Certificate Authorities physically located in more than one jurisdiction. The Certificate Authority could have several physical locations, several principal places of business, and could be incorporated in different jurisdictions. Although this would not create a major problem

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72. Id.
73. Id.
74. See generally id.
for the Certificate Authority, it could cause some confusion for those consumers that utilized its digital signatures.

Perhaps the only solution to this dilemma is the enactment of a globally recognized scheme for digital signatures. Such a scheme could supplant conflicting rules and provide legislation for areas where none exist. Adequate clarity and guidance for the use of digital signatures is needed to promote growth in international e-commerce transactions. Ideal international legislation for digital signatures would provide uniform rules and encourage the development of e-commerce. Any legislation related to digital signatures must consider that barriers such as border patrols, customs, and oceans are almost eliminated through electronic commerce. The European Union has suggested that the legislation for digital signatures should have technology-neutral standards. In order to allow the movement of goods and services through e-commerce transactions, conflicting laws regarding digital signatures must be eliminated. The conflicting laws bring about uncertainty, risk, and an inability to comply with the rules, not to mention significant costs. The need to reduce these costs and provide a harmonization of the laws is what drives the crusade for uniform international laws.

Despite the conflicting laws, some critics argue that the establishment of uniform international rules regarding digital signatures would not be beneficial. These critics argue that it would only lead to unnecessary governmental regulations that would restrict the use of digital signatures. Further, the critics believe that the implementation of such regulations would only stifle the development and expansion of e-commerce, and that e-commerce should develop naturally. Additionally, they contend that legislation on digital signatures could possibly distort an infant industry, lock in business models that are harmful to consumers and hamper further e-commerce developments.

Critics to uniform digital signature legislation also address the issue of liability to Certificate Authorities and their consumers. They believe that prior to the implementation of additional legislation regarding liability, there must be

75. See generally Thomas, supra note 9, (discussing the need for a global regulatory scheme).
77. Id.
78. Lupton, supra note 2.
79. Id.
80. See id.
82. Id.
83. See Thomas, supra note 9, at 1007 (discussing the objections raised by those opposed to the enactment of a global legal framework for the use of digital signatures).
84. Id. at 1053.
85. Id.
an understanding of the risks and implications associated with the use of digital signatures. The critics go on to argue that currently, legislation shifts the risk to the users while protecting the Certification Authorities, which they feel harms not only the users, but will harm the developers eventually.

The main concern of the critics to uniform digital signature legislation appears to be the possibility of over regulation. This concern rests on the fact that at this point, policy makers lack knowledge about the technology and its possible uses because it is such a new area. Additionally, critics argue that the enactment of internationally recognized regulations will be difficult because there may be conflicts between the local and state laws, and the proposed international laws. While this is a strong argument, it could also be an argument in support of the enactment of international regulations, since there are so many different laws which often conflict with one another. This creates problems for both the Certificate Authority and their consumers. Another problem with international legislation is that it generally takes years to negotiate, draft, and pass. Although these arguments focus on some important points, it is clear that there is a need for international legislation of digital signatures.

V. Conclusion

Digital signatures can either prove to be the necessary tool required to help stimulate the growth of e-commerce, or it can be the beginning of the end of e-commerce. So far, it appears as if digital signatures are contributing to the growth and progression of e-commerce by providing a way in which parties can securely form contracts on the Internet. The new legislation, in most areas of the world, which gives digital signatures the same legal effect and recognition as traditional hand-written signatures is another contribution.

Unfortunately, with these great advances in technology comes the problems associated with the uncertainty of an area in which there is no legal authority. Consequently, different jurisdictions are approaching the issue in completely different ways. Laws enacted by the different jurisdictions are totally different from each other, creating much conflict. These conflicts have led to different views about what approach should be taken to resolve them. The conflicts surrounding digital signatures range from how to create a set of uniform laws to regulate and guide the use of digital signatures on the

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86. *Id.* at 1055.
87. *Id.*
89. *Id.*
90. *Id.*
international level, to the way in which Certificate Authorities should be allowed to limit their liability.

To resolve these conflicts, the issue becomes whether there should be an international global scheme regulating digital signatures. While there are those opposed to the enactment of international regulations, without it, more problems will arise. There is a need for standard rules regarding the administration and regulation of Certificate Authorities. Without standards rules for Certificate Authorities, the laws of the different jurisdictions will continue to clash, and cause the transaction costs of using digital signatures to rise. The conflicting laws not only create additional costs for the Certificate Authorities; but inevitably create additional cost for the consumers.

Additionally, there is the problem with the overall conflict regarding digital signatures. As previously mentioned, there are several laws in effect in different jurisdictions which lay the groundwork for digital signatures and e-commerce. However, these laws tend to conflict with one another. In order for a party to contract through the use of e-commerce, it is necessary to know the laws of the country and state in which the other party is located. Although the parties can provide for a choice of law clause in the contract, there are certain areas in which these clauses have no legal effect. Thus, a party can become subject to the laws of another country or state. These situations have the potential to discourage international use of digital signatures and e-commerce. While opponents of an international regulation of digital signatures propose that it will stifle the development and growth of e-commerce, it is obvious that uncertainty about what laws govern tremendously limits the expansion of e-commerce.

Clearly, the task of developing and enacting global legislation for digital signatures will take time. However, it is a task that should be undertaken in order to promote e-commerce's continued growth. The ease of contracting through the use of digital signatures could lead to a huge expansion in international trade. Thus, steps must be taken to ensure that consumers can be certain of their rights and the consequences of their actions when contracting internationally through e-commerce. Digital signature could be the tool used to promote the use of e-commerce and international trading to the next level. But in order for digital signatures to be a successful it must be is clear which laws govern these types of transactions. The obvious solution is the implementation of a universal set of general standards which establish the roles and

91. See generally id.
92. Id.
93. See generally Nimmer, supra note 40.
94. See generally Thomas, supra note 9 (discussing the arguments supporting and against a global scheme for digital signatures).
liabilities of a Certificate Authority, states clearly the terms and conditions of
the use of digital signatures, and the liability to consumers. Without an
international agreement laying the groundwork for digital signatures, the
various laws in different jurisdictions will further confusion and frustration
with this technology. If this continues, the progression of e-commerce and the
use of digital signatures will come to an abrupt halt.

One proposal is the continuation of the development of the UNCITRAL
Uniform Rules on Electronic Signature. This will allow the different
jurisdictions to help in the creation of a set of international uniform rules.
However, the rules must be drafted in a way that will influence the acceptance
of nations. Another proposal is to utilize the framework of rules established by
particular countries, such as the European Union Directive or the Electronic
Signatures in Global and National Commerce Act enacted in the United
States. Following this type of legal framework will provide a general set of
rules that will inform parties of their rights and responsibilities. At the same
time, it would still allow individual jurisdictions the ability to create and
maintain their own specific regulations for the progress and growth of e-
commerce. Either of these proposals will aid in clearing up the confusion
surrounding the use of digital signature internationally. More importantly, they
can provide the legal certainty that is desperately needed to further the growth
of e-commerce and encourage the use of digital signatures.

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96. See generally supra note 5; see also S. Res. 761, 106th Cong. (2000) (enacted). See generally
    Electronic Signatures, supra note 5.
2000 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF
JUSTICE AT THE PEACE PALACE,
THE HAGUE, THE NETHERLANDS

Case concerning the Vaccine Trials

STATE OF KURACA

Applicant

v.

REPUBLIC OF SENHAVA

Respondent

SPRING TERM 2000

MEMORIAL FOR THE APPLICANT

University of Alabama

Team Members:
J. Michael Allen, III, Elizabeth Bosquet,
Kristi L. Deason, and David R. Pruet
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STATEMENT OF JURISDICTION

The State of Kuraca and the Republic of Senhava have submitted their differences concerning the vaccine trials to the International Court of Justice for resolution through a Special Agreement, in accordance with Article 40(1) of the Statute of the International Court of Justice. Both States have accepted the jurisdiction of this Court pursuant to Article 36(2) of the Statute. The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and the Convention on the Elimination of All Forms of Discrimination Against Women also confer jurisdiction on this Court pursuant to Article 36(1) of the Statute of the International Court of Justice.

STATEMENT OF THE FACTS

The State of Kuraca is a large, industrialized country with a developed economy and an extensive higher education system. It is also a world leader in biotechnology. The Republic of Senhava is a small, developing country containing diverse ethnic and language groups, several of which live in total isolation. Kuraca and Senhava have always maintained normal trading relations with each other. However, their current relations are strained due to their disagreement over the Multivector Hepatic Viral Disease (“MHVD”) vaccine trials.

MHVD is a deadly and contagious disease that attacks the human liver, disrupts the digestive system, and ultimately leads to death within three years. MHVD can be transmitted through air, water, human bodily fluid, and several
kinds of flies and mosquitoes. MHVD was unknown to public health authorities until 1988, and in 1996, the World Health Organization ("WHO") declared MHVD a worldwide pandemic. A WHO Special Panel on MHVD found that clean water, sanitation, pest control, and avoiding unsafe sexual practices are the only reliable defenses against the disease, but it urged that a vaccine be developed to combat the disease.

Because a vaccine to prevent this deadly and pervasive disease is in demand, Megaceutical Corp. ("Megaceutical"), a multinational pharmaceutical company incorporated in Kuraca, began developing a potential MHVD vaccine. Megaceutical conducted research to find a vaccine, and it later conducted small-scale tests of various vaccine formulas in Senhava through its subsidiary, Megaceutical-Senhava, Ltd. ("M-S"). Though Megaceutical is not permitted to own more than forty-nine percent of M-S under Senhavan law, Megaceutical retains control over M-S through a shareholder agreement.

In the Phase I (toxicity) vaccine trial conducted by M-S, two of the thirty Senhavan test subjects developed a debilitating form of asthma. However, Megaceutical decided to continue the vaccine trials in large populations using a variation of the original vaccine, Vaccine 078c. M-S procured Senhava's permission to continue the vaccine trials, at the corporation's expense, in return for payment of an equivalent of Euros 2,000,000 to the Senhavan Health Ministry. In return, the Senhavan Health Ministry allowed the trials to target orphanages, prisons, maternal and child health clinics, and people in outer island villages. Also, the Senhavan National Police were to transport M-S personnel supervising the trials.

Megaceutical hired Dr. Maria Yukawa-Lopez to oversee the vaccine project. Dr. Yukawa-Lopez submitted the Biomedical Research Protocol ("Protocol" or "Research Protocol") to the Kuraca Capital University Biomedical Ethics Review Board ("Board") for its approval. Though the Protocol included an "informed consent" form ("Consent Form"), the Board concluded that the Senhavan test subjects were not adequately protected due to the vulnerability of the proposed study populations, the small likelihood that any voluntary consent would actually be fully informed, the use of placebos in areas where the disease is active, and the absence of a credible biomedical ethics review board in Senhava. The Board also warned that Kuracan Capital University physicians and faculty working on these proposed vaccine trials would risk losing their medical licenses if they proceeded to implement the Protocol.

The Kuracan Medical Product Regulation Agency ("Agency") hired George Smith, a citizen of Nemin, to provide on-site reporting and advisory services to M-S. Senhava agreed to permit George Smith to perform these services. Smith sent copies of the Research Protocol and Consent Form to the Agency, along with his recommendation that the vaccine trials be canceled.
After reviewing Smith’s recommendation, documents, and the Board’s opinion, the Agency warned Megaceutical to halt the vaccine trials on “humanitarian” grounds, according to an industry newsletter.

Citing these developments, Dr. Yukawa-Lopez resigned from the vaccine project. As a result of her resignation and the Agency's warning, Megaceutical terminated the project. Subsequently, Senhavan National Police arrested George Smith for giving the Kuracan Medical Product Regulation Agency the documents relating to the drug trials. Smith continues to be held without bail, without being formally charged, and without a trial date scheduled. Kuraca has demanded Smith be freed. On September 16, 1999, Senhava’s Ministry of Health declared a MHVD public health emergency and ordered M-S to continue the vaccine trials or face substantial fines and imprisonment of its officers. On September 22, after refusing to comply with Senhava’s orders to continue the vaccine trials, Senhava closed M-S’s offices and continues to levy a fine of $100,000 per day.

Kuraca maintains that it has jurisdiction to regulate its corporations and comply with its obligations under international law regarding human rights, while Senhava maintains that this is a Senhavan domestic health issue and thus outside of Kuraca’s prescriptive jurisdiction. Diplomatic intervention has failed to resolve this impasse. Kuraca now petitions this Court to resolve the dispute. Though Senhava objects to this Court’s jurisdiction, both parties have agreed to a jointly-prepared Compromise to expedite proceedings.

QUESTIONS PRESENTED

I. Whether the International Court of Justice Has Jurisdiction over this Dispute.

II. Whether Kuraca Has Jurisdiction under International Law to Apply Kuracan National Health Law 1006 to Megaceutical-senhava.

III. Whether Kuraca’s Laws and Regulations Protecting the Human Rights of People Involved in Medical Experimentation Comply with its Obligations under International Law.

IV. Whether Senhava Improperly Imprisoned George Smith for Performing His Duties for the Kuracan Medical Product Regulation Agency.

V. Whether Senhava Should Pay Compensation for Injuries Caused by its Breaches of International Law.

SUMMARY OF THE PLEADINGS

I. This Court has jurisdiction over this dispute based on three separate grounds: 1) the Compromise, 2) Kuraca and Senhava’s declarations accepting this Court’s jurisdiction, and 3) pre-existing treaties that confer jurisdiction on this Court. The dispute is international in scope because human rights would
be violated if the Research Protocol were implemented, and MVHD is a worldwide pandemic. Thus, Senhava is divested of any claim that this is a domestic issue. Further, Nemin is not a necessary party to this dispute, as its rights will not form the subject-matter of this Court’s judgment. In addition, the multilateral treaty reservation is inapplicable because this case involves treaties that codify existing customary international law.

II. Kuraca has jurisdiction under international law to apply the Kuracan National Health Law to M-S for five reasons. First, Kuraca has jurisdiction under the subjective territoriality principle because Megaceutical planned the vaccine trials. Second, Kuraca has jurisdiction under the universality principle to protect the human rights of the Research Protocol test subjects. Third, Kuraca has jurisdiction under the nationality principle because Megaceutical is a national of Kuraca. Fourth, the extraterritorial application of the Kuracan National Health Law is reasonable, in that a Kuracan corporation controls the vaccine trials, and the human rights that would be violated in these vaccine trials are of international concern. Fifth, the Vienna Convention on the Law of Treaties allows Kuraca to suspend the Treaty of Amity and Commerce and thus apply its health law to Senhava because Senhava breached the treaty first by closing M-S’s offices, threatening its officers, and fining the company.

III. International law prohibits the Research Protocol for three reasons. First, human rights treaties to which both Senhava and Kuraca are parties prohibit the Research Protocol because it endangers and exploits vulnerable Senhavans without their free and informed consent, thereby undermining the treaties’ guarantees of human dignity and integrity. Second, the Research Protocol specifically violates the Convention on Human Rights and Biomedicine (“CHRB”) because it does not ensure the free and informed consent of the targeted populations and because it does not provide for a Senhavan ethics review board. Third, the Research Protocol violates customary international law and customary international human rights law because it subjects the targeted Senhavans to medical experimentation without their free and informed consent, and it does not require an ethics review board.

IV. Kuraca has authority to object to the unlawful imprisonment of George Smith, a citizen of the Republic of Nemin, pursuant to Kuraca’s interest in Smith as its agent. Senhava violates Articles 9 and 10 of the Universal Declaration of Human Rights by arbitrarily arresting Smith and holding him without bail, without presenting formal charges, and without setting a trial date.

V. Customary international law dictates that Senhava should pay compensation for all damages resulting from its breaches of the Treaty of Amity and Commerce, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the Convention on the Rights of the Child. Further, Senhava should return the payment of
Euros 2,000,000 previously advanced by Megaceutical, pay for all damages resulting from the closing of M-S, and cease all conduct from which the breaches arise.

PLEADINGS AND AUTHORITIES

I. THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION OVER THIS DISPUTE

This Court has jurisdiction based on the declarations of Kuraca and Senhava accepting this Court's compulsory jurisdiction, the Compromise, and treaties which directly confer jurisdiction on this Court. Senhava asserts that this Court lacks jurisdiction because: 1) The dispute exclusively concerns matters which are essentially within the domestic jurisdiction of Senhava, as determined by Senhava; and 2) the Republic of Nemin is not a party to the case. However, norms of international law do not support Senhava's objections to this Court's jurisdiction, regardless of which basis for jurisdiction the objections are applied.

A. Senhava's Domestic Jurisdiction Objection does not Divest this Court of Jurisdiction

In an apparent attempt to reciprocally assert Kuraca's domestic jurisdiction reservation, Senhava urges that the issues in this case "are purely internal to Senhava" and attempts to take advantage of the subjective clause of Kuraca's reservation. However, whether Senhava asserts its domestic jurisdiction objection through the doctrine of reciprocity or through its own "reservations" to the Compromise, the objection is not supported by international law.

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5. See Comp. & 34.
1. The Dispute is International in Scope

The scope of the disagreement between Kuraca and Senhava is essentially international for two reasons: 1) The facts underlying this dispute are international in character; and 2) even if the dispute is domestic, Senhava's participation in multilateral treaties has elevated the dispute to an international realm. First, the facts have international implications. Because the WHO declared MHVD a worldwide pandemic, concerns about the disease transcend the borders of Senhava. The ease of MHVD's transmission demonstrates that the pandemic is not localized to Senhava and that it requires an international response. Moreover, this dispute ultimately turns on the international law of human rights. As questions of human rights in the medical experimentation context hold a significant position in international law, this case is properly characterized as essentially international in nature.

Second, to the extent that Megaceutical's vaccine trials may be domestic in nature, Senhava has elevated that domestic subject matter to an international level by its assent to treaties implicated by the trials. The "theory of relativity" accords international status to issues otherwise domestic when a country enters into an international agreement concerning those same issues. Because this Court must interpret treaties to which Senhava is a party or has signed, the dispute is plainly international.

2. Senhava should not be Permitted to Subjectively Determine whether this Dispute is Essentially Domestic in Nature

Senhava should not be permitted to determine this Court's jurisdiction because: 1) the subjective clause is invalid; and 2) Senhava waived its ability to rely on the subjective clause.

a. The Subjective Clause is Invalid

Senhava should not be able to assert the subjective clause, reciprocally or through its own reservation contained in the Compromise, because it is invalid. According to the Vienna Convention on the Law of Treaties ("Vienna

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7. See id. & 5.
8. See generally Francesco Franchioni, An International Bill of Rights: Why it Matters, How it Can Be Used, 32 TEX. INT'L L.J. 471, 481 (1997); see also discussion infra Part III.A.
10. See infra Part III.B.1.
the subjective clause is prohibited by the Statute of the International Court of Justice ("Statute") and therefore is void. The Statute requires that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by a decision of the Court."\textsuperscript{11} The United Nations Charter and the Statute support the above mandate by declaring that this Court "shall function in accordance with the . . . Statute."\textsuperscript{12} Accordingly, the reservation is void under the Vienna Convention, which clearly states that a state may formulate a reservation "unless the reservation is prohibited by the treaty."\textsuperscript{13} Furthermore, since the Vienna Convention codified customary international law regarding reservations,\textsuperscript{14} the clause is also invalid under customary international law.

The invalidity of the subjective clause of Kuraca's reservation does not invalidate Kuraca's entire declaration. The Vienna Convention permits an invalid clause to be separated from a treaty where: 1) The separation does not interfere with the application of the remainder of the treaty; 2) the voided clause was not an essential basis for the acceptance of the other parties to the treaty; and 3) the continued performance of the treaty would not be unjust.\textsuperscript{15} The elements are easily satisfied: 1) The declaration will function as if the invalid clause never existed; 2) as other states chose not to make the same reservation to their declarations, it may be inferred that no state would have based its acceptance on Kuraca's subjective clause; and 3) the continued utilization of the optional clause is not unjust, as the result is equally binding on all parties that have submitted declarations. However, even if Kuraca's declaration were deemed invalid, the Compromise\textsuperscript{16} and the treaties\textsuperscript{17} provide a second and a third basis for jurisdiction.

b. Senhava Waived the Ability to Assert the Subjective Clause

The Compromise acknowledges this Court's ability to determine its own jurisdiction in three instances.\textsuperscript{18} In agreeing to submit this dispute to this Court, Kuraca detrimentally relied on the Senhavan assertions that this Court had the ability to determine its own jurisdiction to the extent that Kuraca by-passed

\begin{itemize}
\item \textsuperscript{11} I.C.J. Statute, supra note 1, art. 36, para. 6 (emphasis added).
\item \textsuperscript{12} U.N. CHARTER art. 92; I.C.J. Statute, supra note 1, art. 1.
\item \textsuperscript{13} Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 19, 1155 U.N.T.S. 331, 336-37 [hereinafter Vienna Convention]. See also Certain Norwegian Loans 1957 I.C.J. at 43-49 (separate opinion of Judge Lauterpacht); Szafarz, supra note 2, at 54.
\item \textsuperscript{14} See James Crawford, The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court, 50 BRIT. Y.B. INT'L L. 63, 79 (1981).
\item \textsuperscript{15} Vienna Convention, supra note 13, art. 44, para. 3, 1155 U.N.T.S. at 343.
\item \textsuperscript{16} See supra note 2.
\item \textsuperscript{17} See supra note 3.
\item \textsuperscript{18} See Comp. preamble & art. 1.
\end{itemize}
alternative methods of dispute resolution, such as the arbitration provisions mandated by treaties implicated in this dispute. Accordingly, Senhava should be estopped from denying this Court the ability to determine its own jurisdiction.

3. If Senhava is Permitted to Determine the Character of this Dispute, then the Duty of Good Faith Prevents Senhava from Characterizing this Dispute as Essentially Domestic

The Vienna Convention and general principles of international law require treaties to be performed in good faith. Indeed, this Court explained that "[i]n the establishment of this [network of reservations] which constitutes the Optional-Clause system, the principle of good faith plays an important role." The decidedly international character of this dispute and the theory of relativity preclude a good faith characterization of this dispute as essentially domestic.

B. Nemin's Absence does not Divest this Court of Jurisdiction

Senhava’s argument that this Court lacks jurisdiction due to Nemin’s absence implicates two issues of international law: 1) the application of the necessary party doctrine and 2) the application of the multilateral treaty reservation, either reciprocally through Kuraca’s declaration or through the Compromise. Neither implication divests this Court of jurisdiction.

1. The Necessary Party Doctrine is not Applicable in this Case

The necessary party doctrine applies in cases where an absent state’s rights would “constitute the very subject matter of” this Court’s judgment. In other words, the doctrine applies when the absent state’s rights form the “basis” for the judgment, and not simply where the Court’s judgment “might well have implications” for the absent state’s rights.

19. See CAT, supra note 3, art. 3, para. 1, 1465 U.N.T.S. at 121; CEDAW, supra note 3, art. 29, para. 1, 1249 U.N.T.S. at 34.
20. See The Territorial Dispute (Libya/Chad), 1994 I.C.J. 6 (Feb. 3) (separate opinion of Judge Ajibola).
Nemin has two peripheral connections to this dispute: 1) its national, George Smith, has been unlawfully imprisoned by Senhava;\(^27\) and 2) Nemin is a party to several multilateral treaties to be interpreted by this Court.\(^28\) These insubstantial connections cannot form the basis for this Court's judgment. First, Nemin's rights vis-à-vis George Smith will remain unchanged since his nationality is not at issue here. While a judgment of this Court will indeed affect the rights of George Smith, the rights of Nemin are not implicated. Second, although Nemin is a party to several multilateral treaties that this Court must construe, Nemin's rights will not be affected because a decision of the Court "has no binding force except between the parties" to the case.\(^29\) Thus, Nemin's meager connections do not form the basis of the dispute.

2. The Multilateral Treaty Reservation is not Applicable in this Case

The multilateral treaty reservation protects states such as Kuraca from having the terms of a treaty construed with regard to itself, while other parties to the same treaty are able to assert the non-binding nature of any judgment of this Court as a defense for non-compliance with the Court's construction of a treaty.\(^30\) This Court has explained that there is no danger of prejudice to parties of a case or to absent parties when the Court merely construes customary international law codified in multilateral treaties.\(^31\) Thus, this reservation is inapplicable as the treaties at issue are codifications of customary international law.\(^32\)

II. KURACA HAS JURISDICTION UNDER INTERNATIONAL LAW TO APPLY KURACAN NATIONAL HEALTH LAW 1006 TO MEGACUTEICAL-SENHAVA

Despite the fact that Senhava bears the burden for proving that the extraterritorial application of the Kuracan National Health Law ("Health Law") is illegal,\(^33\) Kuraca advances three independent bases of jurisdiction for its extraterritorial application of the law: 1) the subjective territoriality principle, 2) the universality principle, and 3) the nationality principle. Kuraca's application of its law under these bases is reasonable. Furthermore, the Treaty

\(^{27}\) See Comp. & 25; Clar. & 9.
\(^{28}\) See Clar. & 8.
\(^{29}\) I.C.J. Statute, supra note 1, art. 59.
\(^{32}\) See infra Parts III.A., III.B.3.
on Amity and Commerce ("TAC") does not affect Kuraca's ability to assert jurisdiction over M-S.

A. Kuraca has Jurisdiction under the Subjective Territoriality Principle

According to the subjective territoriality principle, Kuraca has jurisdiction over infractions "commenced within the state, but completed or consummated abroad." The vaccine trials regulated by the Health Law fit squarely within this definition. While the trials were conducted in Senhava through M-S, planning and substantial research was no doubt done at the company's headquarters in Kuraca, where its principal laboratories and drug processing facilities are located. Indeed, Megaceutical initiated the idea for the MHVD vaccine project and hired Dr. Maria Yukawa-Lopez to head the project. Most importantly, Megaceutical controls all of its Senhavan satellite's "small scale" operations through a shareholder agreement. Megaceutical's orchestration of the vaccine trials is also analogous to previous applications of the subjective territoriality principle where states asserted jurisdiction based on the planning of, or even a single act of, a fraudulent transaction occurring within its territory.

B. Kuraca has Jurisdiction under the Universality Principle

The universality principle allows jurisdiction over foreign nationals "where the circumstances . . . justify the repression of some types of crime as a matter of international public policy." International human rights law has gained such stature that some scholars comment that "the principle of sovereignty is not necessarily a bar to intervention within another nation's domestic affairs regarding the protection of international human rights." Thus, this Court should permit Kuraca to apply its law extraterritorially under

34. IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303-04 (5TH ED. 1998); INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FIFTH CONFERENCE 139 (1972); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) [hereinafter RESTATEMENT].
35. See Comp. & 9.
36. See id. & 12.
37. Id. & 9.
38. See id. & 10.
40. See BROWNLEE, supra note 34, at 307.
41. William C. Plouffe, Sovereignty in the "New World Order": The Once and Future Position of the United States, A Merlinesque Task of Quasi-legal Definition, 4 TULSA J. COMP. & INT'L L. 49, 59-60 (footnote omitted) (1996); see also discussion supra Part I.A.1 and discussion infra Part III.A.
the universality principle in order to prevent further human rights abuses in Senhava.\footnote{42}

C. \textit{Kuraca has Jurisdiction under the Nationality Principle}

The nationality principle "is also generally recognized as a basis for jurisdiction over extra-territorial acts."\footnote{43} Thus, Kuraca should be able to apply its Health Law to M-S because it is a national of Kuraca.

1. General Principles of International Law Hold that a Subsidiary Corporation should be Treated as a National of the Country from which its Parent Corporation Controls it

The nationality of a parent corporation determines the nationality of a subsidiary corporation in many contexts, especially when the parent controls the affairs of the subsidiary. Numerous international agreements cite the controlling parent corporation's nationality as the determining factor,\footnote{44} and various courts have held it determinative of the subsidiary's nationality.\footnote{45} Furthermore, in an analogous situation, countless courts have based liability of a parent corporation on its control of a subsidiary.\footnote{46} Thus, given Senhava's concession that Megaceutical effectively controls M-S,\footnote{47} the subsidiary is a national of Kuraca.

\begin{itemize}
\item \footnote{42. See infra Part III.B.3.}
\item \footnote{43. See \textsc{Brownlie}, supra note 34, at 306.}
\item \footnote{47. See \textsc{Comp. }\textsc{10}, 31.}
\end{itemize}
While section 213 of the Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") seems to indicate that a corporation's nationality should be determined by its state of incorporation, this rule is not absolute. For example, the comments to section 213 explain that "[a] state cannot, by requiring a foreign enterprise to incorporate locally, compel the enterprise to surrender . . . protection by the state of its parent corporation." Accordingly, as M-S is required under Sehavan law to incorporate in Senhava, the Restatement is inapplicable.

2. Barcelona Traction is Inapplicable under the Facts of this Case

In Barcelona Traction, this Court held that a corporation's nationality should be determined by "the laws of which it is incorporated and in whose territory it has its registered office." However, the corporation in Barcelona Traction had free choice in selecting its country of incorporation, whereas, M-S was forced to incorporate in Senhava. But most importantly, the corporation in Barcelona Traction had a "close and permanent connection" with its state of incorporation, as opposed to the tenuous ties between M-S and Senhava.

D. Kuraca's Application of Kuracan National Health Law 1006 is Reasonable

The Restatement requires any assertion of jurisdiction be "reasonable" in addition to satisfying one of the traditional grounds for jurisdiction. The reasonableness of Kuraca's extraterritorial assertion of its Health Law is evident in that: 1) The drug testing has a strong link to Kuraca resulting from Megaceutical's control of the tests; 2) the nationality of the individual being regulated is Kuracan; and 3) human rights are a serious national concern within Kuraca, as well as on an international scale. This is true despite the

48. See Restatement, supra note 34, § 213.
49. Id. cmt. 3.
50. See Comp. ¶ 10.
52. See Barcelona Traction, 1970 I.C.J. at 42.
53. See Comp. ¶ 10.
55. See Restatement, supra note 34, § 403.
56. See Comp. ¶ 10, 31.
57. See supra Part II.C.
58. See Kuracan National Health Law, 1006 § 6(a)(1); see also discussion supra Parts I.A.1., II.B.
fact that the reasonableness standard is not binding on Kuraca, as it does not properly reflect international law.\textsuperscript{59}

E. \textit{The Treaty of Amity and Commerce does not Prevent Kuraca from Applying the National Health Law Extraterritorially}

Though the TAC states that Kuraca and Senhava submit “themselves to all laws and regulations applicable to them,”\textsuperscript{60} this does not preclude Kuraca’s extraterritorial application of its law due to Senhava’s prior material breach of the treaty. When the Health Law first affected M-S, the law conflicted with no Senhavan laws. Only in reaction to the Health Law did the Senhavan government begin treating M-S as if it was acting illegally. Indeed, Senhava attempted to force M-S to conduct drug trials via a government order, threatened its officers with substantial fines and imprisonment, and eventually shut the company down.\textsuperscript{61} This treatment constitutes material breach of the treaty in that Senhava did not permit M-S, a Kuracan national, to carry on trade “upon the same terms as Senhava’s nationals are permitted to” in Kuraca.\textsuperscript{62} It is reasonable to infer that Senhavan companies operating in Kuraca have been treated well based on the countries’ thirty-two year history of normal trading relations.\textsuperscript{63} Thus, the Vienna Convention permits Kuraca to suspend the treaty’s operation and apply its Health Law extraterritorially.\textsuperscript{64}

III. KURACA MUST APPLY NATIONAL HEALTH LAW 1006 REGARDING BIOMEDICAL RESEARCH ON HUMANS TO MEGACEUTICAL AND ITS SUBSIDIARY BECAUSE IT EMBODIES INTERNATIONAL LAW

A. \textit{Human Rights are a Matter of International Concern and are Governed by International Law}

International law protects human rights. Since at least the end of the Second World War, the international system has transformed from one which values state sovereignty above all else to one which recognizes that there are inviolable human rights involving the dignity and integrity of people that no state may violate.\textsuperscript{65} The United Nations Charter, a clear indicator of the


\textsuperscript{60} See Clar. ¶ 10.

\textsuperscript{61} See Comp. ¶ 30.

\textsuperscript{62} See Clar. ¶ 10.

\textsuperscript{63} See id. ¶ 2.

\textsuperscript{64} See Vienna Convention, supra note 13, art. 60, 1155 U.N.T.S. at 346.

international protection afforded to human rights, reaffirms in its preamble "faith in fundamental human rights [and] in the dignity and worth of the human person." Both Senhava and Kuraca are members of the United Nations ("U.N.") and are bound by the provisions of the Charter. Further, the U.N.'s Universal Declaration of Human Rights, which guarantees equality in dignity and rights, embodies customary international law. The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"), and the Convention on the Rights of the Child ("CRC"), key human rights treaties that guarantee human dignity and to which Senhava and Kuraca are parties, also embody customary international law.72

B. International Law Prohibits Conducting the MHVD Biomedical Research Protocol in Senhava

Because the Research Protocol violates multilateral human rights treaties, customary international law, and customary international human rights law, this Court should uphold Kuraca's rejection of the MVHD vaccine trials in Senhava.

1. Treaties to which Senhava and Kuraca are Parties Prohibit the Research Protocol

The CEDAW, the CAT and the CRC all guarantee human dignity and integrity. Advances in biomedics and life sciences may undermine these guarantees, thereby invoking the application of these human rights treaties when conducting human experimentation. The World Conference on Human Rights officially links medical ethics with human rights based on the ways in

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70. See CAT, supra note 3, 1465 U.N.T.S. 113.
72. See supra notes 67, 68.
73. See CEDAW, supra note 3, preamble, 1249 U.N.T.S. at 14; CAT, supra note 3, preamble, 1465 U.N.T.S. at 113; CRC, supra note 71, preamble, 1577 U.N.T.S. at 44.
which ethics and health sciences concern fundamental questions throughout the world with regard to all humans. The Research Protocol violates the guarantee of human dignity and integrity because it does not provide for free and informed consent, as it targets the most vulnerable populations of Senhava.

The Research Protocol also violates specific human rights protections ensured in the CEDAW, the CAT and the CRC. The CEDAW provides for the elimination of "all forms of discrimination and... promot[ing] equal rights for men and women." Because the Protocol targets women in maternal clinics, it violates the CEDAW by discriminatorily targeting women in health clinics to the dangerous Vaccine 078c. The CAT prohibits states from, among other things, treating people in cruel, inhuman or degrading ways. Subjecting disadvantaged populations to the random risk of suffering from debilitating asthma is degrading and inhuman- sacrificing their bodily integrity and human worth without first securing their free and informed consent. The introductory note to the CRC states that the CRC is intended to encompass the "protection of children... against medical experimentation." This language was not specifically included in the treaty-though clearly within the scope of it-because of the "last minute rush" in preparing the final version of the CRC. The Protocol violates the intent of the CRC because it specifically targets children in health clinics and orphans.


The Convention on Human Rights and Biomedicine ("CHRB") reiterates that human rights protect human dignity. Article 5 declares that "intervention in the health field may only be carried out after the person concerned has given free and informed consent to it." Article 16 requires the satisfaction of five conditions before research may be conducted on humans. One of these

76. *See infra* Part III.B.3.c.
80. *See id.*
81. *See Comp. § 15.
83. *Id.* art. 5, at 821 (emphasis added).
conditions restates Article 5, thereby emphasizing its importance. Another condition is approval of the research project by a "competent body after independent examination." The Research Protocol violates the voluntary, informed consent provisions of Articles 5 and 16, and it violates Article 16's requirement of a competent ethics review board. As discussed in Part III.B.3.c., the targeted research populations are also Senhava's most vulnerable, thereby undermining the possibility of any voluntary, informed consent. Further, Senhava has no ethics review board, much less a competent one, and Kuraca's ethics review board has banned the Research Protocol.

Senhava and Kuraca have signed the CHRB, and their ratifications are pending. Therefore, Article 18 of the Vienna Convention, to which Senhava and Kuraca are parties, obligates them to "refrain from acts which would defeat the object and purpose of a treaty" because they have "signed the treaty." Conducting research trials which directly violate specific provisions of the CHRB and which undermine its preamble's stated purpose of respecting human dignity would defeat the object and purpose of the CHRB.

3. The Research Protocol Violates Customary International Law and Customary International Human Rights Law because it does not Ensure Adequate Informed Consent and because it does not Provide for an Ethics Review Board

a. There is a Lower Threshold for Establishing Customary International Human Rights Law, as Opposed to Customary International Law

Generally, to prove the existence of a norm as customary international law, the norm must be 1) an identifiable state practice and 2) recognized as obligatory and legally binding. In North Sea Continental Shelf, this Court found that multilateral conventions may generate rules which crystallize customary international law after meeting certain conditions: 1) the rule must be of a "norm-creating character such as could be regarded as forming the basis of a general rule of law;" 2) there must be widespread participation in the Convention, particularly those states whose interests are specifically affected; and 3) there must be opinio juris reflected in near uniform State practice, though "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law."
In the realm of human rights, however, the standard for establishing customary international law is different. In *Military and Paramilitary Activities in and against Nicaragua*, this Court emphasized *opinio juris* as the crux of establishing law with regard to protecting humans. 90 Section 701 of the Restatement states that "the practice of states that is accepted as building customary international law of human rights includes some forms of conduct different from those that build customary international law generally"; 91 "it is not based on consent . . . it does not honor or accept dissent, and it binds particular states regardless of their objection." 92

b. Customary International Law and Customary International Human Rights Law Require Voluntary, Informed Consent and a Competent Ethics Review Board when Conducting Biomedical Research


Even if Senhava and Kuraca were not bound to further the object and purpose of the CHRB, 93 it has become part of customary international law because the provisions of informed consent and an ethics review board do not include any secondary obligations; in other words, they are internationally practiced without any additional conditions, thereby fulfilling *North Sea Continental Shelf*’s first requirement. 94 Second, there is widespread participation in the CHRB; twenty-four of the members of the Council of Europe have signed it, as well as Senhava and Kuraca. Finally, as discussed below, the CHRB reflects *opinio juris*, which independently elevates informed consent and the requirement of an ethics review board to the status of customary international human rights law.

The Explanatory Report to the CHRB states that one of the CHRB’s purposes is to "harmonize existing standards;" 95 it builds on human rights law that already exists. The CHRB further states that it is consistent with *International Covenant on Economic, Social and Cultural Rights* 96 and the CRC,

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91. RESTATEMENT, supra note 34, § 701 n.2.
92. Henkin, supra note 65, at 38.
93. See discussion supra Part III.B.2.
94. See *North Sea Continental Shelf*, 1969 I.C.J. at 41.
treaties which are currently in force and to which Senhava is a party. By
signing the CHRB, Senhava and Kuraca indicated their intent to be bound and
their belief that they should be bound by the CHRB’s provisions. As such, the
CHRB constitutes opinio juris.

ii. The Declaration of Helsinki and the Nuremberg Code are Customary
International Human Rights Law Requiring Informed Consent and an Ethics
Review Board

The Nuremberg Code and the World Medical Association Declaration
of Helsinki ("Declaration of Helsinki") reflect opinio juris. The Nuremberg
Code consists of ten principles, articulated in the final judgment of the trial of
Nazi doctors who were indicted for and convicted of crimes against humanity
committed during World War II. The first principle is: "The voluntary
consent of the human subject is absolutely essential." The Nuremberg Code
has been described as "[t]he most complete and authoritative statement of the
law of informed consent" and "part of international common law . . . [which]
may be applied in both civil and criminal cases.

The Declaration of Helsinki builds on the Nuremberg Code. In addition,
it implements the requirement of an ethics review board. Both are "widely
known international codes of ethics for the protection of human subjects."
International texts and legislation recognize the Declaration of Helsinki as
international law regarding human experimentation, and medical organizations

97. See CHRB, supra note 82, preamble, 36 I.L.M. at 821.
98. See NICARAGUA, 1986 I.C.J. at 98-108; RESTATEMENT, supra note 34, § 701 n.2; Hurst
Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, 25
GA. J. INT'L & COMP. L. 287, 318-20 (1995/1996); Henkin, supra note 65, at 36-38; THEODOR MERON,
99. See NICARAGUA, 1986 I.C.J. at 98-108; RESTATEMENT, supra note 34, § 701 n.2; Hurst
Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, 25
GA. J. INT'L & COMP. L. 287, 318-20 (1995/1996); Henkin, supra note 65, at 36-38; THEODOR MERON,
100. See NICARAGUA, 1986 I.C.J. at 98-108; RESTATEMENT, supra note 34, § 701 n.2; Hurst
Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, 25
GA. J. INT'L & COMP. L. 287, 318-20 (1995/1996); Henkin, supra note 65, at 36-38; THEODOR MERON,
101. See MICHAEL A. GRODIN, HISTORICAL ORIGINS OF THE NUREMBERG CODE, in THE
NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION 121, (GEORGE J. ANNAS &
MICHAEL A. GRODIN eds., 1992) [hereinafter NUREMBERG CODE].
103. GEORGE J. ANNAS ET AL., INFORMED CONSENT TO HUMAN EXPERIMENTATION 1 (1977);
104. See id. art. I.2.
105. See id. art. I.2.
106. See also 167-68 (1977); see also 4 ENCYCLOPEDIA OF BIOETHICS 1746-82 (Warren Reich ed.,
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107. See MICHAEL A. GRODIN, HISTORICAL ORIGINS OF THE NUREMBERG CODE, in THE
NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION 121, (GEORGE J. ANNAS &
MICHAEL A. GRODIN eds., 1992) [hereinafter NUREMBERG CODE].
109. See id. art. I.2.
accept it internationally. It has also been cited as constituting the basis of "universality in the field of ethical-moral standards in human experimentation."

The Nuremberg Code and the Declaration of Helsinki are modern clarifications of medical ethics followed worldwide, necessary because of advances in medicine heralded with new technology and the internationalization of disease caused by increased international travel. Indeed, the Nuremberg Code has its ethical roots in Percival's code of medical ethics, requiring researchers to be conscientious and responsible, and in Beaumont's code of medical ethics, requiring the same, as well as a statement of voluntary, informed consent. It builds on the Hippocratic oath, which obligates doctors to do no harm to their patients. More modern manifestations of the Nuremberg Code and the Declaration of Helsinki include the International Covenant on Civil and Political Rights, which requires voluntary consent, the Principles for Those in Research and Experimentation, which requires informed consent, the International Ethical Guidelines for Biomedical Research Involving Human Subjects, issued by the Council for International Organizations of Medical Sciences in collaboration with the WHO ("WHO/CIOMS Guidelines") and requiring informed consent as well as approval of an ethics review board, and many other international instruments.

107. See Sharon Perley et al., The Nuremberg Code: An International Overview, in NAZI DOCTORS, supra note 101, at 159 (citing M. Cheriff Bassiouni et al., An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation, 72 J. CRIM. L. & CRIMINOLOGY 1587, 1611 (1981)).

108. Id. at 160 (citing William Curran, Subject Consent Requirements in Clinical Research: An International Perspective for Industrial and Developing Countries, in HUMAN EXPERIMENTATION AND MEDICAL ETHICS (Zbigniew Bankowski & Norman Howard-Jones eds., 1982)).


114. See Kevin King, A Proposal for the Effective International Regulation of Biomedical Research Involving Human Subjects, 34 STAN. J. INT'L L. 163, 170-90.
c. **The Research Protocol does not Ensure Voluntary, Informed Consent, and it does not Provide an Ethics Review Board**

The WHO/CIOMS Guidelines define vulnerable populations as those having "a substantial incapacity to protect [their] own interests owing to such impediments as lack of capability to give informed consent, lack of alternative means of obtaining medical care or other expensive necessities, or being a junior or subordinate member of a hierarchical group." The Research Protocol targets the most vulnerable peoples of Senhava- prisoners, people in outer island villages, orphans, and women and children in health clinics. These are the people who have the least freedom of choice and who are most vulnerable to manipulation, particularly when M-S uses the Senhavan police to "provide transportation" to M-S personnel- truly undermining the possibility of free consent and constituting coercion and duress.

It is unlikely that prisoners would ever be able to give informed consent because often they have been confined in isolation for so long or to such an extent that they are not able to weigh options in a meaningful way, as free citizens are able to do. Further, because they are forcibly deprived of their freedom, they often experience a significant lack of self-esteem and diminished capacities for decision-making. Prisoners may "consent" to medical research to escape from the violent atmosphere of most prisons to a more regulated and protected environment provided through medical experimentation. They may simply stop caring about their own well-being- defeated and discouraged by prison life- and helplessly "consent" to medical experimentation. Further, if a cure is found for MHVD, with or without the use of prisoners, it is unlikely that they will be one of the groups to benefit from the use of any such vaccine, thereby increasing their exploitation.

People in outer island villages do not share the same basis of knowledge and education with populations residing in more developed areas; they are therefore unable to give informed consent. Traditionally, isolated populations- especially isolated populations in developing countries like Senhava- lack a scientific conception of disease and a comprehension of the technical details of

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116. See Comp. ¶ 15.
117. See id.
118. See Simon N. Verdun-Jones et al., Prisoners as Subjects of Biomedical Experimentation: Examining the Arguments For and Against a Total Ban, in RESEARCH ON HUMAN SUBJECTS 503, 506 (David N. Weisstub ed., 1998).
119. See id.
120. See id. at 521-22.
121. Id. at 522.
122. Id. at 523.
The peculiar qualities of remote, isolated villages make the Protocol’s “informed” Consent Form completely inadequate; indeed, it is a tool for exploitation.

Conducting the Research Protocol on orphans and women and children in health clinics exploits Senhavans who are in desperate situations and who are least able to freely decline taking part in trials that are sponsored, promoted and apparently required by the Senhavan government. The Consent Form’s provision allowing a legally responsible person to give consent for a minor is especially problematic with respect to orphans because Senhava may be the legally responsible authority that provides consent for such testing.

With respect to all of the vulnerable populations discussed above, there is a further problem involving the use of placebos. Assuming, arguendo, that the targeted groups could give informed consent, such consent would cease to be informed when they are given placebos because the Consent Form does not mention that placebos may be used. The groups have never consented to the possibility of ingesting placebos. Naturally, another immediate problem follows: If the targeted populations believe that they are being treated by a vaccine, then they may continue to engage in conduct which actually spreads the disease.

Finally, the Research Protocol does not provide for a biomedical ethics review board to evaluate the Protocol, thereby violating customary international law and customary international human rights law.

IV. SENHAVA MUST IMMEDIATELY RELEASE GEORGE SMITH BECAUSE HIS DETENTION VIOLATES INTERNATIONAL LAW

Because the Republic of Nemin, of which George Smith is a citizen, has declined to intervene in the case at bar or to otherwise participate in the proceedings, Kuraca has jurisdiction to demand the immediate release of Smith from detention in Senhava. If Kuraca did not assert his claims, Smith would be left without a remedy. Further, Smith’s status as an agent of the Kuracan Medical Product Regulation Agency creates a bond between Kuraca and Smith, thereby giving Kuraca an interest in asserting Smith’s rights.

124. See Comp. ¶ 15.
125. See Christian Mormont, Ethical Questions Pertaining to the Use of Placebos, in RESEARCH ON HUMAN SUBJECTS, supra note 118, at 541-42.
126. See Comp. ¶ 11.
127. See J. BRIEFLY, THE LAW OF NATIONS 276-87 (6th ed., 1963); see also Comp. ¶ 11.
Further, Senhava has violated Smith’s rights under international law. Article 10 of the Universal Declaration of Human Rights, which constitutes customary international law,\(^{128}\) states that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Senhavan authorities are holding Smith without bail; they have presented no formal charges against him; they have not scheduled a trial date.\(^{129}\) Senhavan authorities arrested Smith for performing duties that Senhava previously agreed he should perform.\(^{130}\) Therefore, his subsequent arrest for performing precisely these duties is also arbitrary, thereby violating Article 9 of the Universal Declaration of Human Rights.

V. SENHAVA SHOULD PAY COMPENSATION FOR INJURIES CAUSED BY ITS BREACHES OF INTERNATIONAL LAW

Customary international law dictates that Senhava should remedy its breaches\(^{131}\) of the TAC, the CEDAW, the CAT, the CRC, and customary international law.\(^{132}\) Thus, Senhava should pay compensation for injuries caused and cease all conduct that resulted in the breaches. Furthermore, a state may recover for injuries to its nationals, such as Megaceutical, M-S,\(^ {133}\) and the Kuracan shareholders of M-S.\(^ {134}\) Therefore, Senhava should compensate Kuraca for Megaceutical’s advance payment of Euros 2,000,000 and for all damages arising from M-S’s closing.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Kuraca respectfully requests this Honorable Court to assert jurisdiction over the subject matter of this case; find that Kuraca properly applied its National Health Law 1006 to M-S in compliance with international law; order the immediate release of George Smith; declare that Kuraca incurred no liability to Senhava in this matter; and order Senhava to rescind the order closing the offices of M-S and to return the advance payment of 2,000,000 Euros to the Senhavan Ministry of Health.

\(^{128}\) See discussion supra Part III.A.

\(^{129}\) See Comp. ¶ 25.

\(^{130}\) See id. ¶ 11.


\(^{132}\) Supra Part III.B.

\(^{133}\) Corfu Channel, 1949 I.C.J. at 44.

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**MISCELLANEOUS**


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STATE OF KURACA

Applicant

v.

REPUBLIC OF SENHAVA

Respondent

SPRING TERM 2000

MEMORIAL FOR THE RESPONDENT

International Islamic University

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The Governments of the State of Kuraca and the Republic of Senhava have recognized as compulsory ipso facto in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in accordance with Article 36, paragraph 2.

Senhava objects to this Court's jurisdiction on several grounds. It observes that Kuraca's declaration restricts this Court's jurisdiction by placing two reservations. Senhava, under the principle of reciprocity, relies on those reservations. Alternatively, Senhava contests the validity of Kuraca's declaration. Accordingly, Senhava requests that the Court decline jurisdiction.

Kuraca is a developed country with one of the world's leading biotechnology industries. It is also a foreign assistance donor country [Compromis, ¶ 1]. The Republic of Senhava is a developing country relying on agriculture, primary resources, foreign tourism, and foreign assistance for sustenance. She is an archipelagic state, thousands of miles from Kuraca, with a population of approximately three million people of diverse ethnic and language groups, several of whom live in almost total isolation [id., ¶ 2]. Of this number, over 20% are confirmed to be infected with the MHVD disease as compared to Kuraca's reported cases of a few hundred to date [id., ¶ 7].

The MHVD is a highly infectious and deadly disease [id., ¶ 4 & 5]. It had been declared a worldwide pandemic in as early as 1996 despite having its first symptoms reported only as late as 1988. Biomedical, public health and pharmaceutical organizations worldwide have tried to contain the disease but to no avail. A WHO panel reported in 1997 that the only guard against the disease is natural prevention. They urge scientists to develop a vaccine [id., ¶ 6].

Considering the pervasiveness of the disease, numerous biomedical and pharmaceutical companies in Kuraca have attempted to develop the vaccine, as it would be extraordinarily profitable. The two leading companies in the race for a vaccine are Megaceutical Corporation and K-Biomed Corp [id., ¶ 8].

Recently, Megaceutical Corporation has reported great progress in a vaccine project headed by Dr. Yukawa-Lopez of the Biomedical Faculty of Kuraca Capital University [id., ¶ 12]. Dr. Yukawa Lopez is a Kuracan national [cla., ¶ 1] and a world-leading expert on MHVD [comp., ¶ 12]. Kuraca Capital
University is a world-renowned private research institution [id., ¶ 12] but receives funds from the Kuracan Government [cla., ¶ 3].

Since 1998, several small-scale tests of various formulas have been conducted on Senhavans through Megaceutical-Senhava [Comp., ¶ 12], a subsidiary of Megaceutical Corporation incorporated and fully-operated in Senhava [comp., ¶ 9]. Phase I (toxicity) Investigational MHVD 078b research has been conducted with 93.33% success. In view of this, Magaceutical Corp. and Dr. Yukawa-Lopez had decided to accelerate research with a safer variant of 078c. Following this, Phase II (efficacy and dose-response ratio studies) and Phase III (clinical trials in large population) have been planned for proceeding as soon as practicable [id., ¶ 13].

Megaceutical announced that Phase II and Phase III trials would be conducted in Senhava by Megaceutical-Senhava, Ltd., for reasons of cost and availability of test subjects as well as in view of the prevalence of the disease in Senhava [id., ¶ 14].

In June, 1999, Megaceutical-Senhava Ltd. was granted permission by the Senhavan Government to conduct Phase II and Phase III of the trials of Investigational MHVD Vaccine 078c in orphanages, prisons, maternal and child health clinics and outer island villages. The trials are to be carried out at Megaceutical-Senhava's expense. Arrangements have been made for the Senhavan national police to provide transportation to Megaceutical-Senhava personnel supervising the vaccine trials, which were scheduled to commence in September 1999 [id., ¶ 15].

Neither Megaceutical Corporation nor its subsidiary sought Kuracan Government funding in the vaccine development project [id., ¶ 16].

Pursuant to the Kuracan National Health Law 1006, Dr. Yukawa-Lopez submitted a copy of the Megaceutical-Senhava research protocol to the Kuraca Capital University Biomedical Ethics Review Board, among whose seven members was Dr. Francis Zeaklin, the President of K-Biomed Corporation [id., ¶ 19]. Regrettably, The Board rejected the proposal notwithstanding the seriousness of the MHVD disease. It also warned that any physician who worked on it would face the risk of revocation of their medical licenses [id., ¶ 21].

Meanwhile, George Smith, the independent consultant who provided on-site reporting and advisory services to Kuraca with respect to Megaceutical-Senhava [id., ¶ 11], sent the proposed study protocol and consent form to the Kuracan Medical Product Regulation Agency recommending that the trials not be undertaken [id., ¶ 22].

Subsequently, the Administrator of the Kuracan Medical Product Regulation Agency directed the President of Megaceutical Corporation to stop the project or else drugs and biologics needed for the project will not be readily granted [id., ¶ 23].
Because of these developments, Dr. Yukawa-Lopez withdrew from the project and Megaceutical Corporation directed its subsidiary to terminate it. Thus on August 10, 1999, Megaceutical-Senhava notified the Senhavan Ministry of Health that it had halted work [id., ¶ 24].

Following this, the Senhavan National Police arrested George Smith for interfering in Senhavan public health measure by providing documents of the project to the Kuracan government [id., ¶ 25]. Immediately two days later Senhavan Ministry of Foreign Affairs sent a diplomatic note attempting to resolve Kuraca’s extraterritorial application of Kuracan health legislation. The actions of the Kuracan Administrator of the Medical Product Regulation Agency amounted to ‘a wealthy country’s self-indulgence’ and ‘cultural imperialism’. In the absence of diplomatic improvement, Senhava was prepared to proceed with the project without Kuraca’s consent [id., ¶ 26].

In reply, the Kuracan Ministry of Foreign Affairs demanded that George Smith be freed [id., ¶ 27].

Senhava made a reply explaining the domestic character of George Smith’s detention and the violation of Senhava’s sovereignty through the extraterritorial application of Kuracan health legislation. Kuraca’s procurement of the cessation of the project violated Senhava’s sovereign rights and international human rights law [id., ¶ 28].

The Kuracan Ministry of Foreign Affairs again cited a list of assertions and an accusation but offered no explanation to the matter [id., ¶ 29].

Having tried and failed diplomatic discussions, Senhava announced publicly its arrangement to proceed with the trials [id., ¶ 30]. However, Megaceutical Corp. continued to hinder the project through its control of Megaceutical-Senhava thereby forcing Senhava to shut down the office of Megaceutical-Senhava and levy substantial fine [id., ¶ 31]. Senhava’s Prime Minister again attempted diplomatic discussion with the Kuracan ambassador but to no avail [id., ¶ 32]. Consequently, each country recalled its ambassador and announced a break in diplomatic relations [id., ¶ 33].

In late October 1999, an ad hoc group of 12 Nobel Peace laureates proposed to both Kuraca and Senhava that the dispute be referred to the International Court of Justice [id., ¶ 33].

Hence, Kuraca filed the case before the International Court of Justice with the willing agreement and co-operation of Senhava, although Senhava maintains the view that the court does not have jurisdiction over the matter [id., ¶ 35].

Both Senhava and Kuraca have accepted the Court’s compulsory jurisdiction [id., ¶ 34].
QUESTIONS PRESENTED

1. Whether the Court’s jurisdiction is precluded when the consent of the parties was negated by Kuraca’s Declaration?
2. Whether Megaceutical’s action in not continuing with its contemplated vaccine work is justifiable under international law?
3. Whether Kuraca’s extraterritorial application of laws infringe international law?
4. Whether Kuraca has standing in the dispute concerning George Smith?
5. Whether Senhava is bound to afford reparation to Kuraca under the principles of state responsibility?

SUMMARY OF PLEADINGS

The existence of Kuraca’s declaration precludes this court from exercising its jurisdiction. Kuraca’s declaration of acceptance under Art. 36(2) of the ICJ Statute is invalid as it is contrary to the object of Art. 36(6). This Honorable Court therefore does not have before it a valid declaration of acceptance to take cognizance of the present dispute. Arguendo the declaration is valid, the reciprocity of Kuraca’s reservation precludes this Court’s jurisdiction. Senhava relies on Kuraca’s domestic reservation clause and the multilateral treaty reservation.

Megaceutical’s action in not continuing with its contemplated vaccine work has no justification under international law. There are no conventional international obligations or customary rules of international law binding on Senhava with regard to the dispute. Therefore, Senhava has the sovereign right to determine the level of protection given to human subjects in the vaccine trials. Even were the Convention on Human Rights and Biomedicine applicable, the conduct of the trial complies with its terms.

Kuraca’s extra-territorial application of laws infringes international law. Senhava has the right to prescribe jurisdiction over the MHVD vaccine program. Any extra-territorial effect of the Kuracan Health Law 1006 is a breach of customary international law, as such an exercise of jurisdiction is not founded on any valid basis for jurisdiction.

Kuraca has no standing in the dispute concerning George Smith. George Smith has not exhausted local remedies. The absence of a breach of an obligation owed by Senhava to Kuraca prevents Kuraca’s standing in this dispute. No international instruments or rules of customary international law exist which grant Kuraca standing in this dispute. The treatment of George Smith by Senhava is in any event warranted due to the significant concerns of national security and public order.

Kuraca is bound to afford reparation to Senhava under the principles of state responsibility. A breach of international obligation has been committed
by Kuraca and therefore it has a duty, under international law, to afford reparation. This Honorable Court must make a declaratory judgment in favour of Senhava. Kuraca has a duty to undo all the consequences of the wrongful act. Arguendo Senhava is not entitled to the above remedies, damages is the appropriate form of reparation.

PLEADINGS AND AUTHORITIES

I. THE EXISTENCE OF KURACA'S DECLARATION PRECLUDES THIS COURT FROM EXERCISING ITS COMPULSORY JURISDICTION

Senhava objects to the jurisdiction of the Court, firstly, on the ground that the Honorable Court does not have before it a valid declaration of acceptance of the compulsory jurisdiction of the Court, under Art. 36(2) of this Court's Statute, to take cognizance of the present application. Secondly, Kuraca's declaration is invocable reciprocally by Senhava by virtue of Art. 36(2). Thus, Senhava is entitled to exempt herself from the compulsory jurisdiction of the Court.

A. Kuraca's Declaration of Acceptance1 under Art. 36(2) of this Court's Statute2 is Invalid

States are allowed to enter reservations against this Court's jurisdiction in their declarations under Art. 36(2), but such reservations must conform to the 'object and purpose' of Art. 36.3 A reservation that attempts to emasculate the power of this Honorable Court to determine its own jurisdiction as conferred by Art. 36(6) is contrary to the object of the Article and therefore is invalid.4 Invalidity of the reservation invalidates the entire declaration it qualifies.5

5. Aegean Sea Continental Shelf (Gre. V. Turk.), 1978 ICJ 1, 33; Norwegian Loans, supra n. 3,
Kuraca’s declaration contains a reservation that purport to confer to Kuraca the capacity to determine the jurisdiction of the Court. The reservation breaches the letter of Art. 36(6) and as such, invalidates Kuraca’s entire declaration. Kuraca cannot thus invoke the Court’s authority, as it is without a valid declaration.

B. Arguendo, the Declaration is Valid, the Reciprocity of Kuraca’s Reservation Precludes this Court’s Jurisdiction

Kuraca’s automatic reservation precludes from this Court’s jurisdiction any dispute that is essentially within Kuraca’s domestic jurisdiction as determined by the Kuracan government. Alternatively, the Court has no jurisdiction, if the dispute arises under a multilateral treaty, unless all parties to the treaty affected by the decision are also parties to the case before the Court.

The reservation is invocable by Senhava through the well-established principle of reciprocity, as pointed out by this Court and its predecessor, and by various publicists. By allowing Senhava to rely on Kuraca’s reservation, this Court would uphold the principle of sovereign equality, whereby Senhava would not be subjected to a greater scope of judicial scrutiny than that to Kuraca.

1. The Court’s Jurisdiction is Precluded by Kuraca’s Domestic Reservation Clause

The protection of public health and the regulation of internal commerce is within the dominion of Senhava’s domestic jurisdiction. In making the determination that the present dispute is essentially within the domain of its

\[\text{at 43-4}; \text{R. Jennings, Recent Cases on Automatic Reservations To The Optional Clause, 7 ICLQ 349, 361 (1958); I. Hussain, supra n. 4; F. Wilcox, The United States Accepts Compulsory Jurisdiction, 40 AJIL 699 (1946); L. Preuss, The International Court of Justice, The Senate, And Matters of Domestic Jurisdiction, 40 AJIL 721 (1946); Ende, supra n. 3, at 1115; J. Crawford, The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court, BYBIL 63, 65 (1979).}\]

6. Crawford, id.
7. Statute, supra n. 2, art. 36(2); Norwegian Loans, supra n. 3; Leo Gross, Bulgaria Invokes the Connally Amendment, 56 AJIL 357 (1962); Ende, supra n. 3, at 1153, n. 45.
8. Anglo-Iranian Oil Co. (UK v. Iran), 1952 ICJ 93, 103; Interhandel, supra n. 3, at 23.
9. Phosphates in Morocco, 1938 PCIJ (ser. A/B) no. 74, 22; Electricity Company of Sofia, 1933 PCIJ (ser. A/B) no. 77, 81.
11. SS Lotus (Fr. V. Turk.) 1927, PCIJ (ser. A), No. 10.
domestic jurisdiction, Senhava has adhered to the policy of making the determination in good faith, although Senhava has no legal obligation to do so. Senhava has acted neither arbitrarily nor against the principle of genuine understanding. Stripping Senhava the right to control these matters would preempt its sovereign right to set its own policies and thus violate the principles of state sovereignty. Refusal of Nemin to intervene in the proceedings indicates a tacit recognition of the domestic nature of the dispute. As the determination was made in good faith, it should not be made subject to review by this Court. Senhava is entitled to exempt itself from the compulsory jurisdiction of the court. The present dispute determined by Senhava is essentially within the domain of its national jurisdiction. This Court therefore has no jurisdiction over the subject matter of the dispute.

2. Further, the Court's Jurisdiction is also Precluded by the Multilateral Treaty Reservation

The Court's jurisdiction only exists within the limits for which it has been accepted. The multilateral treaty reservation was designed to expressly limit the extent of the Court's jurisdiction and as such should be allowed to serve its purpose. Nemin, which is a party to all of the multilateral treaties and therefore potentially affected by this Court's decision, is not before the Court. The Court's jurisdiction is therefore precluded by the multilateral treaty reservation clause in Kuraca's declaration.


17. *Comp.*, ¶ 11.

18. *Norwegian Loans*, supra n.3, at 94-95 (dis. op. of Judge Read).


II. MEGACEUTICAL'S ACTION IN NOT CONTINUING WITH ITS CONTEMPLATED VACCINE WORK HAS NO JUSTIFICATION UNDER INTERNATIONAL LAW

A. There are no Conventional International Obligations Binding on Senhava Pertaining to the Vaccine Trials

The pacta tertiis rule protects non-parties to a treaty from having a treaty imposed on them. Senhava is not a party to the ICPR, therefore, Senhava is not bound by its terms. Kuraca may contend that Art. 7 is a 'generally accepted international law', but the provision is not applicable to this dispute since it is not the intention of the provision to exclude genuine medical experiments. Senhava's signature on the Convention on Human Rights and Biomedicine (CHRB) only obligates it to 'refrain from acts calculated to frustrate the objects of the treaty'. The Convention explicitly requires ratification for binding effect. Thus, Senhava's signature to it does not establish Senhava's consent to be bound by it. To bind Senhava without her consent would impose an illegal limitation upon Senhava's rights as a sovereign state.

B. There are no Customary Rules of International Law Binding on Senhava with Regard to this Dispute

1. There is no Consistent State Practice and Opinio Juris Pertaining to the Level of Protection for Human Subject

Since there is no conventional obligation binding on Senhava with regard to this dispute, this Court must look to customary international law to determine the existence of any international obligation. States may become bound by customary international law if there is evidence of both a common practice among states as well as state's conviction that this practice is rendered obligatory by the existence of law requiring it. According to actual practice of states regarding the protection given to human subjects, Kuraca cannot bear

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22. VCLT, art. 34, supra n. 3; Free Zones of Upper Savoy and the District of Gex (Switz. v. Fr.), 1932 PCIJ (ser. A/B), No 46; M. Shaw, International Law 652 (4th Ed. 1997).

23. Comp., § 3.


25. I. Brownlie, supra n. 16; 606-7 (3rd. Ed. 1979); see also VCLT, supra n. 3, at art. 18.


27. VCLT, supra n. 3, art. 18; I. Brownlie, supra n. 16, at 606.


29. Statute, supra n. 2, art. 38 para 1 (b); North Sea Continental Shelf, 1969 ICJ 41 (Feb. 20); Military and Paramilitary Activities in and against Nicaragua, supra n. 21.
its burden of demonstrating the existence of customary rules of international law in this area.30

Legal provisions are not frequently invoked as a source of protection for human subjects in medical experiments, it being widely accepted until today to be largely based on ethical codes of conduct. They are 'recommendations', acting as a 'guide', 31 their observance 'voluntary and not legally enforceable'.32 This factor poses a formidable obstacle to the transformation of the codes into rules of customary international law.33 This is because 'voluntary guidelines followed by compromises could not lead to the creation of customary international law as the [Codes] do not purport to be... law by... states'.34

Efforts at national and international levels in this field have remained restricted to a particular geographical area or incomplete because of their focus on a particular topic.35 Adoption of even the ethical codes of conduct is rare in developing countries.36 There is no legal framework in the United Kingdom that deals with medical research and experimentation. Instead, there are a number of non-binding guidelines formulated by a variety of bodies covering different aspects of this topic.37 Similar situation prevails in many other countries.38 There is also no legal framework for bio-medical research in Thailand, the first country in the world to launch a large-scale AIDS vaccine

30. Browulie, supra n. 16, 6-10.
trial, as well as many other countries where similar trial are currently being conducted.\(^3\n\)

2. There are no Provisions in the CHRB, which have Risen to the Level of Customary International Law\(^4\n\)

The Biomedicine Convention only recently entered force. Although time is not a bar to the absorption of a treaty into customary international law, a few months hardly allows time for extensive and virtually uniform state practice to develop.\(^4\n\) Thus, the provisions contained within CHRB are not binding customary international law.

C. Senhava has the Sovereign Right to Determine the Level of Protection Given to Human Subjects the Vaccine Trials

In the absence of international rules or principles governing the level of protection to be given to human subjects, it must follow that these standards are to be determined solely by reference to Senhava’s municipal laws and regulations, under the principle of state sovereignty.\(^4\n\)

D. Arguendo the CHRB is Applicable, the Conduct of the Vaccine Trials Complies with its Terms

Art. 26\(^4\n\) of CHRB provide that restriction may be placed on the exercise of the rights and protective provisions contained in the Convention. The protection of public health is specifically mentioned as a ground on which a limitation may validly be imposed.\(^4\n\) The seriousness of the MHVD disease in Senhava, as evidenced by the declaration of public health emergency by the Senhavan government,\(^4\n\) justifies the restrictions on the rights guaranteed under the Convention.


\(^{40}\) Vienna Convention, supra n. 3, at art. 38.

\(^{41}\) North Sea Continental Shelf, supra n. 29.

\(^{42}\) Lotus, supra n. 11.

\(^{43}\) Supra, n. 26.

\(^{44}\) Supra, para 1, n. 26.

\(^{45}\) Comp., ¶ 30.
The restrictions imposed did not go beyond what is necessary to achieve the purpose of the derogation. The human subject would have incurred minimal risk far outweighed by the potential benefits of the research to the international community.\textsuperscript{46} Consent as provided under Art. 5 was to be given expressly, specifically and documented.\textsuperscript{47} The human subjects would have been informed of the purpose, nature, consequences and the risks of the trials.\textsuperscript{48} The research project has already been approved by the authority responsible for overseeing medical practice in Senhava i.e. the Ministry of Health.\textsuperscript{49} Even were the CHRB applicable, the conduct of the vaccine trials would have complied with its terms.

III. KURACA’S EXTRATERRITORIAL APPLICATION OF LAWS INFRINGES INTERNATIONAL LAW

A. Senhava has the Right to Prescribe Jurisdiction over the MHVD Vaccine Programme

Senhava’s exertion of jurisdiction on Megaceutical-Senhava accords to the established principles of international law. Megaceutical-Senhava lies within the territorial jurisdiction of Senhava\textsuperscript{50} as it is located in Senhava and all of her operations are in Senhava.\textsuperscript{51} Furthermore, Megaceutical-Senhava, as a company incorporated in Senhava, acquires Senhavan nationality\textsuperscript{52} and thus lies within the national jurisdiction of Senhava.\textsuperscript{53} Although there is an absence of legislation regulating medical experiments in Senhava, it does not, of itself allow Kuraca to step in to apply its own laws extraterritorially to that activity.\textsuperscript{54} It is for Senhava to decide how far it wishes to legislate with regard to persons within its jurisdiction.\textsuperscript{55}

\begin{itemize}
  \item[46.] CHRB, art. 16 para. ii, supra n. 26; Comp. ¶ 6, 13.
  \item[47.] CHRB, art. 16 para. v, Id. n. 26; Comp., ¶ 20.
  \item[48.] CHRB, art. 5, id. n. 26; Comp., id.
  \item[49.] CHRB, art. 16 para. iii, supra n. 26; Comp. ¶ 15.
  \item[50.] Brownlie, supra n. 16; M. Shaw, supra n. 22; G. Schwartzzenberger & E. Brown, A Manual of International Law 72-78 (1976); Schooner Exchange v McFadden, 11 US (7 Cranch) 116, 136 (1812); A. Lowe, Public International Law And The Conflict Of Laws: The European Response To The United States Export Administration Regulations 33 ICLQ 517 (1984); Barcelona Traction, Light and Power Co. Ltd, 1970 ICJ 4 [hereinafter Barcelona Traction].
  \item[51.] Comp., ¶ 7.
  \item[52.] Barcelona Traction, supra n. 50.
\end{itemize}
B. **Extraterritorial Effects of Health Law 1006 is a Breach of Customary International Law**

Kuraca cannot justify her acts of interference in the domestic matter of Senhava by actions done within her state. Consequences flowing directly from the enforcement of Kuraca's law on Megaceutical Corporation are still considered as the extraterritorial application of the law. Furthermore, the direction from Megaceutical to Megaceutical-Senhava is invalid since it is not made in the best interest of the subsidiary. The order from Kuraca through Megaceutical is also nullified by the order of the Senhavan government, as Megaceutical-Senhava is obliged to obey the command of its sovereign.

1. Kuraca's Exercise of Jurisdiction over Megaceutical-Senhava through Megaceutical Corp. is a Breach of Customary International Law

The burden is on Kuraca to prove that international law permits the exercise of jurisdiction over foreign companies based on control. The United States' attempt to claim jurisdiction over foreign companies controlled by its nationals under the Export Administration Act and the Trading with the Enemy Act was met with severe criticism from states, municipal courts and publicists. Such exercise of jurisdiction is invalid under international law.

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2. Kuraca's Exercise of Jurisdiction is not Founded on any Valid Basis for Jurisdiction

In order for Kuraca's exercise of jurisdiction to be valid, it must be founded on at least one of the grounds of prescribing jurisdiction. However, Kuraca cannot exercise territorial jurisdiction over Megaceutical-Senhava as it is located and operates in Senhava. Secondly, the nationality principle is inapplicable as Megaceutical-Senhava is of Senhavan nationality. Thirdly, the MHVD vaccine programme will not affect any Kuracan nationals since the subjects of the experiments are all of Senhavan nationality. Hence, Kuraca cannot claim jurisdiction based on the passive personality. Furthermore, Kuraca cannot exercise jurisdiction based on the effects doctrine as the trials will not have any substantial effect on Kuraca. The protective principle is inapplicable as the conduct of the trials are not prejudicial to the security of Kuraca. Lastly, the MHVD vaccine trials are not a matter within the universal jurisdiction of all states because they do not constitute any breach of obligations owed erga omnes. Hence, Kuraca's exercise of extra-territorial jurisdiction is not founded on any of the universally accepted or even the more controversial basis of prescribing jurisdiction. It is, therefore, a clear breach of international law.


64. Barcelona Traction, supra n. 50; L. Brownlie, supra n. 16, at 380; Compagnie Europeene Des Petroles S. A. v Sensor Nederland B. V., supra n. 53; Sumitomo Inc. v Avagliano, supra n. 53.


66. Third Restatement, supra n. 63, § 402(c); M. Shaw, supra n. 22, at 484; L. Henkin, supra n. 63, at 241; U.S v Aluminium Co. of America, 148 F.2d 416 (1945); Timberlane Lumber Co. v Bank of America, 549 F.2d 597 (1976); Mannington Mills v Congoleum Corporation, 595 F.2d 1287 (1979).

67. W. Levi, supra n. 56, at 146; M. Shaw, supra n. 22, at 468; I Brownlie, supra n. 16, at 300; L. Henkin, supra n. 63, at 238; O. Schachtner, supra n. 63, at 254; Third Restatement, supra n. 63, § 402(3); Joyce v. DPP, [1946] AC 347.


3. Exercising Jurisdiction through Ownership or Control is against the Principle of Separate Legal Entity between Parent and Subsidiary Companies

As laid down in the *Barcelona Traction* case\(^{70}\) and various municipal decisions,\(^{71}\) Megaceutical-Senhava is an entity entirely separated from its parent company, Megaceutical Corporation. Asserting jurisdiction through ownership or control is a violation of this principle. The treatment of subsidiaries and parent company as one entity has been rejected by state practice,\(^{72}\) writings of publicists\(^{73}\) as well as decided cases.\(^{74}\) Furthermore, there is no evidence from the facts that Megaceutical has exercised any more than policy control to warrant the piercing of the corporate veil.\(^{75}\)

4. Kuraca’s Exercise of Jurisdiction would be Unreasonable

Arguendo Kuraca has a right to prescribe jurisdiction according to the principle of reasonableness or balance of interest, it should still not exercise as it is unreasonable for it to do so.\(^{76}\) The unreasonableness occur from the fact that:

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70. *Barcelona Traction*, supra n. 50.
74. *Sumitomo Inc. v Avagliano*, supra n. 53; *Sumitomo Shoji America Inc. v Avagliano* XXII ILM 629(1982); *Fruhauf case* ILM 476 (1966); *Compagnie Europeene Des Petroles S. A. v Sensor Nederland B. supra* n. 53; *Bank of Tokyo Ltd. v Karoon* [1981] AC 45; *Adams v Cape Industries PLC* Ch 433, 532-9 [1990].
a. The Experiments are within Senhava’s Essential Domestic Jurisdiction

International law prohibits Kuraca from exercising jurisdiction over a matter within another state’s essential domestic jurisdiction. Since the vaccine trials are within Senhava’s essential domestic jurisdiction, Kuraca could not exercise extraterritorial jurisdiction over it.

b. Kuraca’s Exercise of Jurisdiction would Force Megaceutical-Senhava to Act against the Laws and Policies of Senhava

Kuraca’s exercise of jurisdiction is unreasonable, as it would force Megaceutical-Senhava to violate the order of the Senhavan Government under the public health emergency legislation. Moreover, it forces Megaceutical-Senhava to act against the policy of the Senhavan government to find a cure for MHVD.

c. Kuraca has no Substantial Connection with the Experiments

Customary international law requires that Kuraca has substantial connection over the trials before it could exercise extraterritorial jurisdiction over the trials. Kuraca has to prove more than mere ordinary interest in the trials to establish substantial connection that justifies its interference in Senhava’s domestic matter. Kuraca has no such connection to justify its assertion of jurisdiction. The experiments are carried out by a Senhavan company on Senhavan subjects wholly within Senhava’s territory. Thus, Kuraca cannot exercise extraterritorial jurisdiction over it.


78. Brownlie, supra n. 16, at 310; Mann, supra n. 58; Third Restatement, § 414, Comment d, supra n. 63, at 272.

79. A. Lowe, supra n. 54, at 738. Societe Internationale v Rogers, 357 US 197 (1958); In Re Westinghouse Uranium Contracts Litigation 563, supra n. 76.

80. Brownlie, supra n. 16; Mann, id.; Third Restatement, supra n. 63 § 403(2)(a), supra n. 10; F. Mann, supra n. 58; Jennings, 121 Hag R 515 (1967, II).

d. Kuraca’s Claim to Jurisdiction Constitutes an Unreasonable Demand of Special Treatment on Kuracan Nationals

Under the Treaty of Amity and Commerce, Senhava is obliged to treat a Kuracan national upon the same terms and conditions as its own national. However, Kuraca’s claim to jurisdiction cannot be reconciled with claims of national treatment of Kuracan investment abroad. If Megaceutical-Senhava is to be subjected to the Kuraca health laws, then the foreign investors in the Megaceutical-Senhava are not being treated as favorably as nationals, whose companies, not being subjected to the Kuraca health laws, are not denied the permission to conduct the trials. Investors of other nationalities in Megaceutical-Senhava will object to the denial of business opportunities, as will Senhava, which is concerned about the effects of such constraints on Megaceutical-Senhava’s capacity to act as employer, tax payer and foreign currency earner. Kuraca’s claim to jurisdiction would have an adverse effect on investments by Kuracan company in Senhava.

Thus, considering all these factors, Kuraca exercise of jurisdiction over the trials would be unreasonable and therefore unlawful under customary international law.

IV. KURACA HAS NO STANDING IN THE DISPUTE CONCERNING GEORGE SMITH

A. George Smith has not Exhausted Local Remedies

It is an ‘important principle of customary international law’ that before international proceedings are instituted, the various remedies, ‘administrative, arbitral or judicial,’ provided by the local state should have been exhausted.

82. Comp., ¶ 3.
83. EC Aide Memoire on 14 March 1983, supra n. 60; A. Lowe, supra n. 50, at 528; Australian Note to the US Department of States, dated 23 May 1983.
84. A. Lowe, supra, n. 50.
85. EC Aide Memoire on 14 March 1983, supra n. 60; Australian Note to the US Department of States, dated 23 May 1983, supra n. 72.
88. ILC Draft Articles on State Responsibility, art. 22, ILC’s 1996 Report, GAOR, 51st Sess., Supp. 10, 125; Roberto Ago, Sixth Report on State Responsibility, 2 YBILC 1, 40-1 [1977]; Mavrommatis Palestine Concessions (Gr. V. UK), 1924 PCIJ (ser. A), No. 2, 12; Interhandel, supra n. 3; Ambatielos (Gre. V. UK) 12 RIAA 83 (1956); Heathrow Airport User Charges Arbitration 102 ILR 215, 277 et seq.; Rules Regarding International Claims (British Foreign and Commonwealth Office), rule VII, 37 ICLQ 1006 (1988); D. Harris, Cases and Materials on International Law 617 et seq. (5th ed. 1998); T. Meron, Human Rights
Such a provision also appears in all the international and regional human rights instruments. This is to enable the particular state to have an opportunity to redress the wrong that has occurred within its own legal order thereby reducing the number of international claims that can be brought. By not pre-empting the operation of their legal system, respect is thus accorded to the sovereignty and jurisdiction of the foreign state. Logically, reference to this Court must not proceed until the highest Senhavan court has ruled on the matter. Kuraca has not sought a remedy in Senhavan courts.

Neither of the two situations where the insistence on the exhaustion of local remedies is generally excepted; where such exhaustion would be unreasonably prolonged or where local remedies would be ineffective or unavailable, apply. There is no indication that the Senhavan courts would not give full regard to customary international principles in reviewing the needs of George Smith or that the courts would unreasonably prolong such review. If claims could be brought on behalf of individuals after they assert violation and before the state responsible had a chance to rectify it, it would tax the international system as well as proving vexatious. Consequently, the Honorable Court should hold the dispute concerning George Smith to be inadmissible for failure of Kuraca to prove that there are no effective remedies to which recourse can be had.

B. The Absence of a Breach of an Obligation Owed by Senhava to Kuraca Prevents Kuraca's Standing in this Dispute

A state must possess *jus standii* in order to present a dispute before this Honorable Court, in accordance with art. 37 of the Court's Statute. Generally,
this requires a state to have a legal interest in the dispute. A right to vindicate an act by another state must derive from either a treaty obligation, an interest capable of diplomatic protection, or an obligation *erga omnes*, none of which are applicable to the present case.

1. No International Instruments Exist which Grant Kuraca Standing

This Court has jurisdiction under art. 36 (1) of it's Statute in all cases referred to it by parties, regarding all matters specially provided for in the UN Charter or in treaties or conventions in force. However, no such treaty between Senhava and Kuraca exists. Although both are members of the UN, Senhava has not breached any obligations found in the Charter. Without a mutual instrument setting out Kuraca's legal interest in this dispute, Kuraca has no standing to art. 36(1).

2. No Rules of Customary International Law Exist which Grant Kuraca Standing in this Dispute

As Kuraca failed to obtain redress through international instruments, it must seek *jus standii* in more general customary international rules. Only an individual's state of nationality may offer diplomatic protection of that individual's interest. George Smith has not been conferred Kuracan nationality.

The only exception allowing a state to sue another state on behalf of persons who are nationals of neither requires the breach of *obligatio erga omnes*. This Court has never based the standing of an otherwise disinterested state on the enforcement of obligation *erga omnes*. Kuraca lacks the necessary standing, as it has no rights or interests of its own in this dispute that has been materially affected.


Furthermore, erga omnes obligation implies conduct far different from the facts of this dispute. None of the claims made by Kuraca suggests acts that rise to the level recognized by this Court in *Barcelona Traction* for example slavery, genocide, etc. Any expanded definition would discourage many states from accepting this Court’s compulsory jurisdiction and would be vulnerable to abuse by states capriciously seeking political advantage.

In the absence of an erga omnes obligation, there must be a close link connecting the state attempting to redress for the injury and the allegedly injured individual. Kuraca had no connection with George Smith, other than that he was employed in the Kuracan government regulatory process, much less one so great that he could be said to have a connection with Kuraca greater than that with Nemin.

The breadth of diplomatic protection must be limited to lessen the chance of its abuse and to strengthen the boundaries of consent, sovereignty, and standing defined by principles of customary international law. An obligation of some sort owed by Senhava must be found to encroach these principles.

C. Senhava’s Treatment of George Smith is Warranted due to Significant Concerns of National Security and Public Order

No obligation has been breached by Senhava in this dispute. Human rights documents contain justification for derogation in cases of national security and maintenance of public order. The threatened state has a sovereign right to take whatever measures in its territory necessary to ensure the safety of the community, whenever the safety, security or integrity of a state is threatened. The MHVD epidemic qualifies as an emergency, which if uncontrolled would threaten Senhava’s national security and public order.

The detention of George Smith has not been prolonged considering the circumstances. When learning that George Smith had been providing vaccine development documents to the Kuracan Government, Senhavan police detained him, informing him immediately of the reason for his arrest. Senhava’s continuous detention is justified, in light of the real danger that George Smith

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99. Id. 32; Graefarth, supra n. 96, at 56-7; Meron, supra n. 88, at 5-13; Simma & Alston, *The Sources of Human Rights: Custom, Jus Cogens, and General Principles* 12 Aust. YBIL 82, 103.


101. Nottebohm, Id., at 24-6; *Barcelona Traction*, supra n. 50, 42; Leigh, *Nationality and Diplomatic Protection* 20 ICLQ 453 (1971); Cordova, 2 YBILC 42 (1954-II); *Third Restatement*, supra n. 63.


103. UDHR, art. 29; EHR, arts. 15, 16, 17, 18; ACR, art. 27; ICPR, art. 4; ECR, art. 4.


105. Comp., ¶ 25.
might abscond, that he might repeat the offense for which he is detained and that he might attempt to suppress evidence prejudicial to him. No restriction was imposed on his right to have the legality of his detention tested before the Senhavan courts, a right that he has not availed himself to during his detention.

V. KURACA IS BOUND TO AFFORD REPARATION TO SENHAVA UNDER THE PRINCIPLES OF STATE RESPONSIBILITY

A. Under International Law, State Responsibility Stems from the Breach of an International Obligation

In order to establish that a State has committed an internationally wrongful act, the complaining state must show that the former has breached an international obligation and the breach is attributable to it.\(^{106}\) As established earlier, Kuraca violated international law by promulgating laws and regulations to operate extraterritorially, and by putting obstacles to the conduct of MHVD vaccine trials in Senhava. Under international law, the act of an organ of a State shall be considered as an act of that state, whether the organ belongs to the constituent, legislative, executive or judicial or other power. Therefore, the illegal act of ordering that the vaccine work be halted is attributable to Kuraca although the wrongful act was committed by Its Government official.\(^{107}\)

B. Kuraca has a Duty under International Law to Afford Reparation to Senhava

1. This Honorable Court Must Make a Declaratory Judgment in Favor of Senhava

It is trite law that declarations are a form of judicial remedy in international law.\(^{108}\) In this case, this Honorable Court should declare to the effect that Kuraca violated international law by promulgating laws and regulations to operate extraterritorially, violating Senhava's sovereign rights.

2. Kuraca has a Duty to Undo all the Consequences of the Wrongful Act

Since Kuraca has breached her international obligation, the appropriate form of reparation is the immediate cessation of such activities, restoration of

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107. Id., art. 5.
108. SS Lotus, supra n. 11; J. Arechaga, General Course in Public International Law, Hag R 217, 267 (1978, I); C. Gray, supra n. 98.
the *status quo ante*, and undoing of all the consequences of the wrongful act.\(^{109}\) Accordingly, Senhava requests that this Honorable Court order that Kuraca promptly remove all direct and indirect legal and governmental obstacle to the conduct of the MHVD vaccine trials as proposed in the research protocol that led to this controversy.

In the alternative, This Honorable Court should order that Kuraca remove obstacles to the development and trials of MHVD vaccine by Megaceutical-Senhava, Ltd., a Senhavan corporation.

3. Arguendo, Senhava is not Entitled to the Orders, that Damages is the Appropriate Form of Reparation

The appropriate form of reparation is damages to compensate Senhava for public health expenses reasonably incurred because of failure to conduct vaccine trials in Senhava, including a percentage of the cost of treating future victims of the epidemic.

CONCLUSION AND PRAYER FOR RELIEF

Senhava respectfully prays that this Honorable Court:

*DECLARE* that this Court has no jurisdiction over the subject-matter of the dispute;

*DECLARE* that Kuraca violated international law by promulgating law and regulations to operate extraterritorially;

*ORDER* that Kuraca promptly remove all direct and indirect Kuracan legal and governmental obstacles to the conduct of MHVD vaccine trials in Senhava.

In the alternative, *WARD* monetary damages to compensate Senhava for public health expenses reasonably incurred because of failure to conduct vaccine trials in Senhava, including a percentage of the cost of treating future victims of the MHVD epidemic.

Respectfully submitted,

Agents for Senhava

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