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SYRACUSE UNIVERSITY COLLEGE OF LAW

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U.S. INCOME TAXATION OF FOREIGN PARTIES: A PRIMER

By Professor Ernest R. Larkins*

Over the last five years for which data are available, the number of foreign corporations showing net income on Form 1120F, U.S. Income Tax Return of a Foreign Corporation, has increased 36.5 percent.[1] In addition, the number of individuals granted temporary stays in the United States as non-immigrants has steadily increased from 9.5 million in 1985 to 24.8 million in 1996, an average annual increase of 9.1 percent.[2] These increases evidence growing opportunities to serve international clients and suggest that tax professionals must have a fundamental working knowledge of the way the U.S. tax system treats foreign parties.[3] This article analyzes the basic provisions for tax professionals who wish to obtain such knowledge and highlights tax planning opportunities.

Foreign Parties Defined

U.S. citizens and resident aliens are subject to U.S. taxation on their worldwide taxable incomes. In contrast, the Internal Revenue Code taxes nonresident aliens only on income that is effectively connected with a U.S. trade or business and U.S. source income.[4] Thus, the correct determination of an individual's tax classification is an imperative first step in the calculation of U.S. tax liability.

In a similar manner, corporations are taxable in the United States based on their characterization. Domestic corporations are subject to U.S. tax on a worldwide basis. Foreign corporations, like nonresident aliens, are taxable only on income that is effectively connected with a U.S. trade or business and U.S. source income.

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* Professor Ernest R. Larkins is the E. Harold Stokes/KPMG Peat Marwick Professor of Accounting at Georgia State University.

1. IRS Statistics of Income—1994 and 1989. Corporation Income Tax Returns–1997 and 1992.

2. U.S. Department of Justice, Immigration and Naturalization Service, 1996 Statistical Yearbook of the Immigration and Naturalization Service, Chart L, 110 (1996).

3. This article uses the term "foreign parties" to refer to both nonresident aliens and foreign corporations.

4. For a detailed discussion of the source rules, *see* Ernest R. Larkins, *Source of Income Rules: The Debits and Credits of International Taxation*, U.S. Taxation of International Operations 6111 (1997).

Nonresident Aliens

A nonresident alien is an individual who neither resides in the United States nor has U.S. citizenship. While the citizenship of a person is often easy to determine, resolving the question of residency for an individual without U.S. citizenship can be rather involved. Generally, U.S. residency occurs when one meets either a lawful permanent residence test or a substantial presence test under I.R.C. § 7701(b)(1).

Treas. Reg. § 301.7701(b)-1(b)(1) treats persons as lawful permanent residents when the U.S. government grants them the legal right to reside permanently in the United States as immigrants. The U.S. Immigration and Naturalization Service issues a card that evidences this right. Though cards issued today are white, they were green at one time. Hence, the lawful permanent residence test is sometimes called the "green card" test.[5] Once individuals secure the right to reside permanently in the United States, they are considered U.S. residents or resident aliens (rather than nonresident aliens). They continue to qualify as U.S. residents until they abandon such status or their rights as U.S. residents are rescinded.

Even when alien individuals are not residents under U.S. immigration law, they still may be residents under U.S. tax law. The substantial presence test is generally satisfied when an alien individual is physically present in the United States during at least 31 days during the current year and 183 "weighted days" over a three-year period.[6] In testing whether the 183-day threshold is reached, I.R.C. § 7701(b)(3) counts each day of U.S. presence during the current year as a whole day. Every day of U.S. presence in the preceding year is counted as one-third of a day, and days of U.S. presence in the second preceding year are weighted by one-sixth. Consider a foreign national who is present in the United States during 140 days in 1999, 90 days in 1998, and 120 days in 1997. This individual meets the substantial presence test during 1999 since her weighted days total 190 (i.e., 140 + 30 + 20). Thus, she is a U.S. resident (or resident alien) in 1999 rather than a nonresident alien.

Individuals close to the 183-day threshold may be able to extend or shorten their U.S. stays depending on whether they desire U.S. residency status. Documentation of U.S. visits and their durations is important.

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5. In 1996, nearly 916,000 alien individuals became U.S. immigrants, an increase of 195,000 over 1995 totals. U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1996), at 11.

6. *See, e.g.*, I.R.C. § 7701(a)(9). *See generally*, P.L.R. 9012023 in which the United States generally includes the 50 states, the District of Columbia, and U.S. territorial waters. Thus, an alien individual physically present in a U.S. possession (e.g., Guam or Puerto Rico) is not present in the United States.

Alien individuals can use airline receipts, passport stamps, and personal logs to support assertions of their status under U.S. law.

When either the lawful permanent residence or substantial presence test is met, an individual generally becomes a U.S. resident on the first day of U.S. presence.[7] Three special elections allow persons who are becoming U.S. residents to accelerate their starting residency dates in some situations: (1) the first-year election permits one who arrives in the United States too late during the year to meet the substantial presence test to become a U.S. resident for at least part of the arrival year, (2) the nonresident election allows a nonresident alien married to a U.S. person to become a U.S. resident for the entire year, and (3) the new resident election permits an individual who becomes a U.S. resident for part of the current year to elect U.S. residency status for the entire year.[8]

Using one of these elections to shift the residency starting date assists one in timing income and deduction items so that worldwide income tax is minimized. For example, a deferred bonus from the home country generally should be received before the residency starting date to avoid potential double taxation. However, if the home country exempts bonuses received after the starting date and the U.S. effective tax rate is below that of the home country, the alien individual might shift his or her residency starting date so that the bonus is received as a U.S. resident.

Special rules often preclude certain individuals from becoming U.S. residents even though they meet the substantial presence test. Full-time diplomats and other foreign government-related personnel generally are considered nonresident aliens even though their U.S. stay may be protracted. Teachers, students, and trainees who are temporarily in the United States are usually nonresidents also. The U.S. presence of students is generally temporary if the stay does not extend beyond five calendar years. Teachers and trainees are considered temporarily in the United States for at least two calendar years. Since the special treatment extended to teachers, students, and trainees is partially based on the type of visa held, the strategic application for the right type of U.S. visa can have favorable income tax implications. Of course, some visas may be more difficult to obtain from U.S. immigration authorities than others, depending on an individual's circumstances. Finally, other foreign persons with closer connections to their home country, individuals that regularly commute to work from Mexico or Canada, aliens who must prolong their U.S. stays because of medical conditions that developed

7. I.R.C. § 7701(b)(2)(A)(iii); Treas. Reg. § 301.7701(b)-4(a).
8. I.R.C. §§ 7701(b)(4), 6013(g), (h).

while present in the United States, and certain professional athletes temporarily in the United States to compete in a charitable sporting event can avoid U.S. residency status.[9]

Notwithstanding the rules discussed above, U.S. income tax treaties can affect an individual's residency status in some circumstances. In particular, an alien individual is a "dual resident" if he is a U.S. resident under the above rules and, under local law, also a resident of his or her home country with which the United States has a treaty. Dual residents must apply a series of tie-breaker rules to determine their country of residence under the treaty. For example, the U.S. Model Treaty indicates that one should determine residency, if possible, on the basis of his permanent home.[10] When he has a permanent home available in both countries, his residency depends on his center of vital interests (i.e. the country to which his personal and economic relations are closer). If no permanent home exists or the center of vital interests is not clear, an individual resides in the country of his habitual abode. When he has such an abode in both or neither countries, the U.S. Model Treaty uses citizenship as the determining factor. The competent authorities in the treaty countries (e.g., the IRS) determine the residency status of individuals who are citizens of both or neither countries.

Foreign Corporations

Under I.R.C. § 7701(a)(5), a domestic corporation is created under the laws of the United States or one of its states. In contrast, a foreign corporation is organized abroad. Thus, the sole determinant of corporate character under U.S. law is the location where articles of incorporation or similar papers are filed.

Incorporated entities created under the laws of a foreign country or U.S. possession (e.g., Guam) are foreign corporations. A corporation organized abroad is a foreign corporation even if most or all of its employees, assets, or business activities are located in the United States. Unlike the tax laws in many countries, the place from which a corporation is controlled and its "seat of effective management" are irrelevant in determining whether the entity is a domestic or foreign corporation.

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9. I.R.C. § 7701(b)(5), (7). To qualify under these special rules, alien individuals generally must timely file Form 8843, Statement for Exempt Individuals and Individuals with Medical Conditions, or Form 8840, Closer Connection Exception Statement for Aliens. For a more detailed discussion of U.S. residency, *see* Ernest R. Larkins, *Individual Tax Planning: Resident vs. Nonresident May Be Critical*, 7 J. INT'L TAX'N 410 (1996); Ernest R. Larkins, *Resident vs. Nonresident: Tax Planning Includes Elections, Timing*, 8 J. INT'L TAX'N 172 (1997).

10. Convention for the Avoidance of Double Taxation, Sept. 20, 1996, U.S.-____, 1 TAX TREATIES (CCH) ¶214 (1998), at art. 4(2) [hereinafter U.S. Model Treaty].

Like the choice some alien individuals have between U.S. residency or non-residency, an entity's initial decision of whether to organize as a domestic or foreign corporation is an important one. As discussed in more detail later, the United States exempts some income of foreign corporations from taxation and taxes other income items at varying rates.

Trade or Business Requirement

Unless a treaty provides otherwise, income of a foreign party that is effectively connected with a U.S. trade or business (ECI) is subject to U.S. taxation at regular rates. ECI cannot generally exist under I.R.C. § 864(c)(1)(B) unless the foreign party is engaged in a U.S. trade or business. In other words, the existence of a trade or business is a prerequisite to a finding of ECI. The first line of defense for foreign parties that do not wish to be taxed on ECI is to establish the lack of a U.S. trade or business.

Though the Internal Revenue Code and Treasury Regulations use the phrase "trade or business" ubiquitously, neither defines it. Moreover, Rev. Proc. 98-7, 1998-1 I.R.B. 222, §4.01(3), indicates that the IRS ordinarily will not rule on whether a party is engaged in a U.S. trade or business nor whether income is effectively connected with a U.S. trade or business. Prior judicial and administrative rulings provide the most relevant guidance on trade-or-business-type questions.

Generally, a trade or business is any considerable, continuous, and regular activity engaged in for profit.[11] Rev. Rul. 73-522, 1973-2 C.B. 226, normally characterizes minimal, sporadic, or irregular transactions as investment, rather than business, activities. I.R.C. § 875 treats a foreign party as engaged in a U.S. trade or business if the partnership of which the foreign party is a member is so engaged. *United States v. Balanovski,* treats partnerships as carrying on business when one or more of their partners are conducting business on the partnership's behalf.[12] For example, the ABC partnership is organized in Brazil, and each of its three partners are Brazilian citizens and residents. Partner A conducts business in the United States on behalf of the partnership. As a result, the partnership is considered to be engaged in a U.S. trade or

11. *See, e.g.*, Commissioner v. Groetzinger, 480 U.S. 23, 35 (1987); European Naval Stores, Co., S.A. v. Commissioner 11 T.C. 127, 133 (1948); Lewenhaupt v. Commissioner, 20 T.C. 151, 163 (1953), *aff'd per curiam*, 221 F.2d 227, 227 (9th Cir. 1955).

12. United States v. Balanovski, 236 F.2d 298 (2nd Cir. 1956).

business, as are partners B and C. A similar rule applies to the beneficiaries of estates and trusts.[13]

Beyond this general definition, certain specific activities have been held to constitute trades or businesses. For example, a foreign party that regularly sells goods into the United States through a dependent or exclusive, independent agent is conducting a U.S. trade or business.[14] Similarly, an agent that regularly exercises broad powers to manage a foreign party's U.S. real estate investments (beyond mere ownership or collection of rent) causes the principal to be engaged in a U.S. trade or business.[15]

Rev. Rul. 56-165, 1956-1 C.B. 849 treats a foreign enterprise as engaged in a U.S. trade or business when it sends an employee or other dependent agent to the United States to sell goods and conclude contracts. Employees that do not have the power to conclude contracts but who must send solicited orders to the home office for approval is one arrangement that can avoid trade or business status. However, if marketing representatives or employees are technically precluded from concluding contracts but the home office approves virtually all orders through no more than a "rubber stamp" procedure, the IRS will likely view the activity as a trade or business; the fact that the representative cannot conclude contracts must be more than a formality.

In contrast to the situations above, direct sales into (or purchases from) the United States are not considered a trade or business if the foreign seller (or purchaser) has no office, employee, or agent in the United States or if sales are made through a nonexclusive, independent agent with multiple principals.[16] Also, technical services performed in the United States incident to the sale of goods are not, by themselves, a trade or business. Absent other activities, the mere creation of a corporation, collection of passive income (e.g., in relation to a net lease), ownership of realty or corporate stock, investigation of business opportunities, or distribution of earnings do not constitute a trade or business.[17]

Higgins v. Commissioner confirms that mere investment activities on one's own account, even if actively and continuously engaged in, are

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13. I.R.C. § 875; *see, e.g.*, Di Portanova v. United States, 690 F.2d 169 (Ct. Cl. 1982).

14. Handfield v. Commissioner, 23 T.C. 633 (1955); Rev. Rul. 70-424, 1970-2 C.B. 150.

15. Lewenhaupt v. Commissioner, 20 T.C. at 163, *aff'd per curiam*, 221 F.2d 227 (9th Cir. 1955); Rev. Rul. 73-522, 1973-2 C.B. 226.

16. Amalgamated Dental, Co., Ltd. v. Commissioner, 6 T.C. 1009, 1018 (1946); Tech.Adv.Mem. 81-47-001 (Jan. 3, 1979).

17. G.C.M. 18835 (1937), 1937-2 C.B. 141; Neill v. Commissioner, 46 B.T.A. 197 (1942); McCoach v. Minehill & Schuylkill Haven R.R. Co., 228 U.S. 295 (1913); U.S. v. Balanovski, 131 F.Supp. 898 (S.D.N.Y. 1955); Abegg v. Commissioner, 50 T.C. 145 (1968), *aff'd on other grounds*, 429 F.2d 1209 (2nd Cir., 1970).

not considered a trade or business.[18] Thus, a foreign investor that trades commodities (of the type normally listed on organized exchanges), stocks, and securities in the United States on its own behalf or through an independent agent is generally not carrying on a U.S. trade or business. However, I.R.C. § 864(b)(2) indicates that a trade or business does exist if the investor is a dealer in such stocks and securities or, in the case of trading through an independent agent, the investor has a U.S. office or other fixed place of business at any time during the taxable year through which trading is directed.

Occasional or single, isolated transactions generally do not lead to a finding of trade or business activities.[19] However, the IRS and the courts have held that a single event (often involving substantial personal service income) can be a trade or business. For example, a prize fighter's engagement in one or more boxing matches has been held to be the conduct of trade or business activities.[20] Rev. Rul. 67-321, 1967-2 C.B. 470 held that a French company that contracts to perform a floor show or night club revue in a U.S. hotel over a ten-week period is engaged in a U.S. trade or business. Similarly, the purse winnings of a horse entered in only one race within the United States may be taxable since the IRS has ruled that a single race is a U.S. business activity.[21] On the other hand, *Continental Trading, Inc. v. Commissioner* held that numerous but "isolated and noncontinuous" sales transactions do not constitute a trade or business when motivated for tax avoidance, rather than profit-making, reasons.[22]

The rendition of personal services is generally considered carrying on a trade or business. However, a nonresident alien performing de minimis services in the United States, whether as an employee or independent contractor, is not engaged in a U.S. trade or business when the three conditions of I.R.C. § 864(b)(1) are met. First, the compensation cannot be more than $3,000 for the U.S. services. Second, the U.S. presence during the taxable year cannot exceed 90 days. Third, the services must be rendered for either a foreign party not engaged in a U.S. trade or business or a foreign office or place of business of a U.S. party.

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18. Higgins v. Commissioner, 312 U.S. 212 (1941).

19. Pasquel, 12 T.C.M. 1431 (1954); European Naval Stores, Co., S.A. v. Commissioner, 11 T.C. 127 (1948).

20. Rev. Rul. 70-543, 1970-2 C.B. 172; Johansson v. United States, 336 F.2d 809 (5th Cir., 1964).

21. Rev. Rul. 58-63, 1958-1 C.B. 624; Rev. Rul. 70-543, 1970-2 C.B. 172.

22. Continental Trading, Inc. v. Commissioner, 265 F.2d 40 (9th Cir. 1959).

Effectively Connected Income

Once the existence of a U.S. trade or business is established, the next question is whether any income is effectively connected with it.[23] Under I.R.C. § 864(c)(1)(B), foreign parties do not have ECI unless they are engaged in a U.S. trade or business during the taxable year. Six exceptions to this general rule exist in which the tax law treats income as ECI despite the absence of a trade or business or despite the lack of relationship between the income and a trade or business.

- I.R.C. §§ 871(d) and 882(d) allow foreign parties to treat any income from investment realty, including gains from sale or exchange, as ECI. Any such election continues in effect for all subsequent years unless revoked with IRS consent.
- Under I.R.C. § 882(e), interest on U.S. obligations that a possession corporation receives is ECI if the corporation is carrying on a banking business. The effect of this provision is twofold: (1) it allows possession banks to offset interest income from U.S. sources with business expenses, such as interest expense they pay to depositors, and (2) it removes a major disincentive for possession banks to invest their capital into the U.S. economy, namely a 30 percent tax on gross interest income.
- I.R.C. § 897 treats gain from the sale, exchange, or other disposition of a U.S. real property interest as ECI. A U.S. real property interest includes direct holdings in U.S. realty and certain indirect holdings through domestic corporations (as discussed later).
- When a foreign party receives deferred compensation during a year when no U.S. trade or business is conducted, I.R.C. § 864(c)(6) taxes it as ECI if attributable to a prior year when the foreign party did engage in a U.S. trade or business. For example, assume a foreign corporation carries on a U.S. retail business in 19x1 and makes an installment sale. Before the end of 19x1, the corporation closes the retail establishment and ceases to conduct any U.S. trade or business. When the installment obligation is collected in 19x2 or a later year, the deferred profit from the 19x1 sale is taxed as ECI.
- Under I.R.C. § 864(c)(7), a foreign party that ceases to use an asset in its U.S. trade or business and disposes of the asset within ten years of such cessation is taxable on any resulting gain as ECI, even if the foreign party is no longer engaged in a U.S. trade or business.

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23. *See, e.g.*, Alan B. Stevenson, *Is the Connection Effective? Through the Maze of Section 864*, 5 Nw. J. Int'l L. & Bus. 213 (1983); Harvey P. Dale, *Effectively Connected Income*, 42 Tax L. Rev. 689 (1987); and Christine Bouvier, *Foreign Corps. in U.S. Must Be Wary of Effectively Connected Income*, 2 J. Int'l Tax'n 287 (1992).

• When a foreign party does engage in a U.S. trade or business, I.R.C. § 864(c)(3) treats all U.S. source income that the tax law does not explicitly tax or exempt as ECI. This limited "force of attraction" rule assures that income the United States intends to tax is not inadvertently overlooked. In effect, U.S. source income (other than investment income and capital gains) is attracted to the foreign party's U.S. trade or business and taxed the same as business profits or ECI. To illustrate, Treas. Reg. § 1.864-4(b) assumes a foreign manufacturer with a U.S. selling branch. If the home office occasionally sells its manufactured products directly to U.S. customers without involving the U.S. branch and title to the sales pass in the United States, such profit is treated as ECI even though the U.S. branch played no role in generating the income. Note that the simple way to avoid ECI in this case is to pass title on the sale outside the United States; foreign source income is not subject to this force of attraction rule.

When nonresident aliens performing services in the United States meet the three de minimis conditions discussed earlier, they are not engaged in a U.S. trade or business; thus, their compensation is not ECI. In addition, the satisfaction of these three conditions assures that the compensation is treated as foreign source income under I.R.C. § 861(a)(3).[24] Since the compensation is foreign source income that is not ECI, it is exempt from U.S. taxation. The rules found in U.S. income tax treaties generally are more lenient than these statutory provisions. Thus, personal service income not exempt under the de minimis test may, nonetheless, be exempt under treaty.[25]

U.S. Source ECI

Once the existence of a U.S. trade or business is established, whether a given income item is taxable as ECI is often clear. For example, the net profit from sales a foreign corporation earns from a sales branch or retail outlet in the United States is ECI. However, types of

24. For a specific application, *see* Rev. Rul. 64-184, 1964-1 C.B. 323. Rev. Rul. 69-479, 1969-2 C.B. 149, indicates that any personal service income above the $3,000 threshold causes all of the income to be from U.S. sources, not just the excess portion. A similar interpretation presumably would hold for exceeding the 90-day threshold.

25. For example, Article 15(2) of the U.S. Model Treaty, *supra*, note 10, exempts the income from employee services that a nonresident alien renders in the United States if: (1) the recipient's U.S. presence does not exceed 183 days in any 12-month consecutive period that begins or ends in the taxable year, (2) the employer paying the compensation to the nonresident alien (or the employer on whose behalf the compensation is paid) is not a U.S. resident, and (3) a permanent establishment or fixed base that the employer maintains in the United States does not ultimately bear the expense of the compensation.

income that traditionally have been classified as investment or passive in nature are ECI in some cases; it depends on the income's source.

The manner in which ECI is determined differs for U.S. and foreign source income. U.S. source income that satisfies either the asset use test or business activities test of I.R.C. § 864(c)(2) is ECI. Under both tests, one must give due regard to how the U.S. trade or business accounts for the item in question.

The asset use test treats U.S. source income as ECI if the income is derived from assets currently used or held for current use in the U.S. trade or business. This test applies primarily to passive income such as interest and dividends. Treas. Reg. § 1.864-4(c)(2)(i) indicates that interest from a temporary investment of idle working capital in U.S. Treasury bills is ECI since it is held to meet the *present* needs of the business. In contrast, the income from a long-term investment of excess funds in U.S. Treasury bills with the expectation of using the accumulations for the *future* expansion of product lines or to meet *future* business contingencies is not ECI.

The business activities test concludes that income from U.S. sources is ECI whenever the activities of a U.S. trade or business are a material factor in realizing the income. This test applies to income that, though generally passive, arises directly from business activities. Treas. Reg. § 1.864-4(c)(3)(i) indicates that interest income of a financing business, premiums of an insurance company, royalties of a business that primarily licenses intangibles, dividends and interest of a dealer in stocks and securities, and fees of a service business are ECI under the business activities test.

Foreign Source ECI

Prior to 1966, foreign parties often used the United States as a tax haven for sales activities. The United States, at that time, did not tax foreign source income. Thus, a foreign party might establish a U.S. sales office through which it could sell to third countries. The home country did not tax the profit on such sales because, for example, it was derived from foreign sources. The United States did not tax the profit as long as title passed abroad. The third country did not tax the profit because the seller had no permanent establishment there. Thus, the profit on these sales often escaped income tax altogether.

Under current U.S. law, foreign parties are not taxed on most foreign source income. However, to prevent abuses such as those described above, foreign source income is considered ECI when the three conditions in I.R.C. § 864(c)(4) and (5) are met. First, the foreign party (or the

party's dependent agent) must have a U.S. office or fixed place of business. Second, the office must be a material factor in the production of the foreign source income and must be regularly used in business activities that produce the type of income in question. Third, the foreign source income must be one of the following: (1) royalties from the use of intangible property abroad or (2) dividends or interest derived in the active conduct of either a U.S. banking or finance business or a corporation whose principal business is trading stocks and securities for its own account.

I.R.C. § 864(c)(4)(B)(iii) indicates that foreign source income a foreign party earns through the material effort of a U.S. office is ECI. However, the interaction of this provision with the source of income rules assures that foreign source ECI will never result. In particular, sales of personalty (including inventory) through a U.S. office generally result in U.S. source income, which is ECI through the business activities test.[26] On the other hand, if a foreign office materially participates in the sale and the property is sold for consumption abroad, the income is from foreign sources and is not ECI.[27] In effect, when a foreign party sells inventory through a U.S. office, the profit must be either U.S. source ECI or foreign source income that is not ECI; it cannot be foreign source ECI.

Ordinary Income Taxation

I.R.C. §§ 872(a) and 882(b) grant the United States jurisdiction to tax foreign parties on two broad categories of income: (1) ECI and (2) U.S. source income that is not ECI, which is primarily investment-type income. Other income of foreign parties is exempt from U.S. taxation. For example, the foreign source income of a nonresident alien is not taxable in the United States unless it is ECI.

When no treaty is in force, I.R.C. §§ 871(b) and 882(a) tax the ECI of foreign parties at the regular rates applicable to U.S. parties. Whether the ECI is from U.S. or foreign sources does not matter. I.R.C. § 1231 gain on the sale or exchange of business assets is considered ECI the same as income from business operations.

If an income tax treaty exists, taxation of ECI depends on whether the foreign party has a U.S. permanent establishment. Article 7(1) of the U.S. Model Treaty exempts a foreign party's ECI from U.S. taxation unless the ECI is attributable to a permanent establishment that the foreign party has in the United States. Similarly, the "commercial traveler"

26. I.R.C. §§ 864(c)(2), 865(e)(2).
27. I.R.C. §§ 864(c)(4)(B)(iii), 865(e)(2)(B).

article in U.S. income tax treaties can exempt nonresident aliens' income from dependent personal services that otherwise might be taxable as ECI.[28] Among other things, treaty exemption usually depends on the length of stay in the host country. Article 15 of the U.S. Model Treaty and many other treaties allow stays of no more than 183 days.

I.R.C. §§ 871(a)(1) and 881(a) generally tax U.S. source income that is not effectively connected at 30 percent. The 30 percent rate is withheld at the time of the transaction and is applied to gross income; no deductions are allowed. I.R.C. §§ 1441 and 1442 usually designate the last U.S. party to control the income payment as the withholding agent.[29] For example, a U.S. corporation declares a $1,000 dividend. A foreign party residing in a country that has no income tax treaty with the United States owns all of the U.S. corporation's stock. The U.S. corporation should pay $700 to the foreign party and remit $300 in withheld taxes to the U.S. Treasury. Failure to withhold and remit the correct amount of tax can cause the withholding agent to be liable for the tax.[30]

Most U.S. source income taxable at 30 percent is investment income. I.R.C. §§ 871(a)(1)(A) and 881(a)(1) include dividends, interest, rent, royalties, and annuities in this list. Dividends include only gross income received out of a corporation's earnings and profits.[31] Any original issue discount that is accrued on an obligation's sale date is treated the same as interest per I.R.C. §§ 871(a)(1)(C)(ii) and 881(a)(3). Rental income is subject to the 30 percent withholding tax only if the rental activity is not treated as a trade or business. *Commissioner v. Wodehouse* clarifies that royalties from non-business activities are subject to withholding whether received periodically or as a lump-sum amount.[32] Only the income portion of annuities are taxable; any annuity amount received that is, in essence, a return of capital is not taxed. Similarly, Rev. Rul. 64-51, 1964-1 C.B. 322 provides that the income due when a

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28. *See, e.g.*, Lym H. Lowell, et al., *Tax Issues in the Provision of Inbound Services*, 9 J. INT'L TAX'N 36 (1998).

29. I.R.C. §§ 1441, 1442. Under some circumstances, a foreign party is the payor and, thus, the withholding agent. *See, e.g.*, Rev. Rul. 80-362, 1980-2 C.B. 208, in which a nonresident alien licensed the rights to use a patent within the United States to a Netherlands corporation. The royalty the corporation paid was subject to withholding as U.S. source income.

30. I.R.C. §§ 1461, 1463, 6672.

31. Rev. Rul. 72-87, 1972-1 C.B. 274, clarifies that corporate distributions in excess of earnings and profits are nontaxable returns of capital to the extent of the distributee's tax basis in the stock and capital gain to the extent of any additional amounts received. Since the U.S. corporate distributor may not know what portion of a distribution is from earnings and profits when the distribution is made, it must withhold at 30 percent or a lower treaty rate on the entire distribution. If it is determined later that part of the distribution was not made out of earnings and profits, the foreign distributee will be entitled to a refund.

32. Commissioner v. Wodehouse, 337 U.S. 369 (1949)

life insurance policy matures or from surrendering a life insurance policy is subject to the withholding tax.

U.S. income tax treaties often reduce the tax rate on U.S. source investment income below 30 percent. Interest and royalties are exempt in many treaties and are taxable at 5 to 15 percent in most others. Similarly, treaties normally tax dividends at 5 to 15 percent. The lower 5 percent withholding rate is generally reserved for corporate recipients that own a specified minimum stock percentage of the distributor. For example, Articles 10 through 12 of the U.S. Model Treaty exempt most interest and royalty income from host country taxation and require 15 percent withholding on dividends. However, dividends paid to corporations that own at least 10 percent of the distributor's voting stock are subject to a withholding tax of only 5 percent.

Some types of U.S. source income other than investment returns are subject to a 30 percent withholding tax. For example, amounts received as prizes, awards, gambling winnings (unreduced by gambling losses), and alimony are taxable.[33] I.R.C. §§ 871(a)(1)(B) and 881(a)(2) tax gain on the disposal of timber, coal, and domestic iron ore if the seller retains an economic interest. Similarly, I.R.C. §§ 871(a)(1)(D) and 881(a)(4) tax gain from the sale or exchange of intangibles to the extent the payments are contingent on future productivity, use, or disposition. Treaties may exempt these gains and income items from host country taxation.

Under I.R.C. § 871(a)(3), 85 percent of U.S. Social Security benefits are taxable at 30 percent. However, some treaties exempt such benefits from host country taxation. Assume that under the U.S.-France totalization agreement, a French national and resident is entitled to a $1,000 monthly benefit from the United States. The U.S. Social Security Administration should withhold a tax of $255 each month (i.e., $1,000 x 85% x 30%). Article 18(1)(b) of the U.S.-France income tax treaty does not exempt the income.[34] Now assume that the individual is a national and resident of Germany instead and that the $1,000 benefit is received pursuant to the U.S.-Germany totalization agreement. Under Article 19(2) of the U.S.-Germany income tax treaty, the Social Security benefit received is exempt from U.S. taxation.[35]

Under Treas. Reg. § 1.1441-4(b)(1), compensation from rendering independent personal services (i.e., as a non-employee) may be subject

33. Barba v. United States, 2 Cl.Ct. 674 (Cl. Ct. 1983); Howkins v. Commissioner, 49 T.C. 689 (1968); Rev. Rul. 58-479, 1958-2 C.B. 60.

34. Convention for the Avoidance of Double Taxation, Aug. 31, 1994, U.S.-Fr., S. TREATY DOC. No. 103-32 (1994).

35. Convention for the Avoidance of Double Taxation, Aug. 29, 1989, U.S.-F.R.G, 1 TAX TREATIES (CCH) ¶3249 (1998).

to 30 percent withholding.[36] For example, assume a self-employed, nonresident alien attorney receives $50,000 for his advice regarding an international reorganization. If the services are rendered in the United States and unless a smaller percentage is negotiated with the IRS, the income is subject to 30 percent withholding.[37] Unlike the withholding on investment income, Rev. Rul. 70-543, 1970-2 C.B. 172, clarifies that the 30 percent withheld is an estimated prepayment of the tax liability; the actual tax due might be more or less than the amount withheld. U.S. treaties might provide for a different treatment. Article 14 of the U.S. Model Treaty exempts independent services income from host country taxation unless the recipient has a fixed place of business in the host country that is regularly available to him (e.g., an office) and the income is attributable to such place. Thus, if the attorney in the above example had no fixed place of business in the United States available to him, any treaty between his home country and the United States likely would exempt the $50,000 from U.S. taxation.

The two-by-two matrix in Figure 1 summarizes the ordinary income provisions discussed above.

FIGURE 1: U.S. INCOME TAXATION OF FOREIGN PARTIES' ORDINARY INCOME[38]

		Effectively Connected Income: Yes	Effectively Connected Income: No
Source of the Income	U.S.	Regular U.S. Tax Rates	30% Withholding Tax on Gross
	Foreign	Regular U.S. Tax Rates	Exempt from U.S. Taxation

36. *See, e.g.*, Rev. Rul. 70-543, 1970-2 C.B. 173.

37. *See also* Rev. Rul. 58-479, 1958-2 C.B. 60, in which commissions that a marine supplier paid to a tramp steamer's foreign shipmaster was subject to U.S. withholding tax.

38. U.S. income tax treaties often exempt effectively connected income. Examples include the treaty articles dealing with business profits not attributable to a permanent establishment and dependent personal service income from short stays in the host country. For non-effectively connected income, U.S. income tax treaties often exempt U.S. source investment income or tax it at rates below 30%

Capital Gain Taxation

Capital gain of foreign parties that is ECI is subject to U.S. regular rates, the same as I.R.C. § 1231 gain.[39] The tax treatment of capital gain that is not ECI depends on the source of the gain and the type of taxpayer. For the remainder of this section, capital gain is assumed not to be ECI.

Foreign source capital gain of foreign parties is exempt from U.S. taxation. In addition, foreign corporations are not taxable on U.S. source capital gain.[40] As a practical matter, most capital gain of foreign corporations is foreign sourced. However, U.S. source capital gain can result in some situations, such as when a foreign corporation sells an intangible asset for a contingent price based on future productivity or use within the United States.[41] If such capital gain is not ECI, it is exempt from U.S. tax.

Under I.R.C. § 871(a)(2), a nonresident alien is taxable on U.S. source capital gain only if her presence in the United States is at least 183 days during the taxable year. Recall that an alien individual whose U.S. presence during the taxable year totals 183 days or more is generally a resident under the substantial presence test rather than a nonresident. At first glance, it might appear as though this provision has no application. Nonetheless, foreign government-related persons, teachers, students, trainees, commuters from contiguous countries, and other alien individuals can continue their status as nonresident aliens despite their substantial U.S. presence (as mentioned earlier). When nonresident aliens in one of these special categories have 183 days of U.S. presence, the Internal Revenue Code imposes a 30 percent withholding tax to the difference between capital gains and capital losses for the taxable year. The 50 percent exclusion on capital gains from the sale of certain small business stock under I.R.C. § 1202 is not allowed. Also, no I.R.C. § 1212 capital loss carryovers are allowed to reduce current capital gains.

Several U.S. income tax treaties exempt nonresident aliens from the withholding tax that the Code otherwise imposes on U.S. source capital gains. For example, Article 13(5) of the U.S.-Ireland treaty exempts from host country taxation the capital gains on the disposition of many

39. Arkansas Best Corp. v. Commisioner, 485 U.S. 212 (1988) clarified that a capital asset can be held in connection with a trade or business and that the motivation in acquiring the asset is irrelevant in its classification.

40. I.R.C. § 871(a)(2) imposes a withholding tax on the U.S. source capital gains of nonresident aliens. However, no parallel provision exists to impose a similar tax on foreign corporations; the statute's silence is equivalent to exemption.

41. I.R.C. §§ 861(a)(4), 865(d)(1)(B).

types of "movable" properties.[42] Article 13(6) of the U.S.-Sweden treaty allows only the home country to tax capital gain from disposing of most investment assets other than real estate.[43]

The three-by-two matrix in Figure 2 summarizes the provisions applicable to U.S. source capital gains.

FIGURE 2: TAXATION OF FOREIGN PARTIES' U.S. SOURCE CAPITAL GAINS[44]

	Effectively Connected Income: Yes	Effectively Connected Income: No
Nonresident Alien Present in U.S. < 183 days	Regular U.S. Tax Rates	Exempt from U.S. Taxation
Nonresident Alien Present in U.S. ≥ 183 days	Regular U.S. Tax Rates	30% Withholding on Tax Gains
Foreign Corporation	Regular U.S. Tax Rates	Exempt from U.S. Taxation

REAL ESTATE TAXATION

The management of U.S. real estate is generally considered to be the conduct of a U.S. trade or business. *Fackler v. Commissioner* held that, even when substantial time is not required, paying expenses (e.g., utilities and insurance), making arrangements for necessary repairs, and approving new tenants often is sufficient to qualify the activity as a trade or business.[45] Rev. Rul. 73-552, 1973-2 C.B. 226, clarifies that activities beyond merely collecting rent and paying expenses incidental to the col-

42. Convention for the Avoidance of Double Taxation, July 28, 1997, U.S.-Ir., S. TREATY DOC. No. 105-31 (1997).

43. Convention for the Avoidance of Double Taxation, Sept. 1, 1994, U.S.-Swed., S. TREATY DOC. No. 103-29 (1994).

44. The 30% withholding tax applies to the difference between U.S. source capital gains and capital losses allocable to such gains. The Section 1202 exclusion of half the gain from the sale or exchange of small business stock is not allowed. Neither are carryover losses permitted under Section 1212. U.S. income tax treaties often exempt U.S. source capital gains.

45. Fackler v. Commissioner, 133 F.2d 509 (6th Cir. 1943).

lection effort generally result in trade or business status as long as the general conditions of continuity, regularity, and considerableness are met. As discussed earlier, the rental income from business activity, whether directly conducted or carried out through an agent, is taxable at regular U.S. rates since it is ECI. Rental expenses are deductible against rental income only to the extent permitted under U.S. law. Thus, the I.R.C. § 469 passive activity rules can preclude deductions otherwise allowed in computing ECI.

Gross income from investment real estate (other than gain from disposition, which is discussed later) is generally taxable at 30 percent or a lower treaty rate with no deductions for expenses related to the investment. The disallowance of depreciation, interest, and other real estate-related expenses can cause a foreign party to pay a very high effective tax rate. Further, the U.S. tenant in a "net lease" arrangement may pay certain expenses directly to the obligee in lieu of additional rental income (e.g., property taxes paid to the state taxing agency). If the foreign landlord is not engaged in a U.S. trade or business, Rev. Rul. 73-552, 1973-2 C.B. 226, clarifies that the substitute rental payment is subject to withholding the same as rental income actually received.

To alleviate the potential inequity or hardship of taxing investment real estate on a gross basis, foreign parties are allowed to elect net basis taxation under I.R.C. §§ 871(d) and 882(d). Once elected, net basis taxation applies to all U.S. investment realty that the taxpayer holds and generally remains in effect for all subsequent years. However, the election is available only if the foreign party derives some income from the property during the taxable year. Failure to generate income at any time during the year causes the deduction for real estate expenses to be lost. Neither can the expenses be capitalized and added to the real estate's basis according to Rev. Rul. 91-7, 1991-1 C.B. 110. As a practical matter, the taxpayer should arrange to earn at least a nominal amount of income from the property to preserve its deductions.

Rev. Rul. 92-74, 1992-2 C.B. 156, holds that any net loss resulting from the election can be used to offset ECI from other business activities and, if some portion of the loss remains, to generate a net operating loss to carryover to other taxable years. If elected, all income from all U.S. real properties must be treated as ECI. Unless revoked with IRS consent, any election remains in effect for all subsequent years. U.S. income tax treaties often allow a similar election.[46]

Prior to 1980, foreign parties could easily dispose of investment real estate held in the United States with no U.S. tax consequences. For

46. *See, e.g., supra,* note 10, at art. 6(5).

example, nonresident aliens avoided tax if their presence within the United States totaled less than 183 days during the taxable year. Foreign corporations escaped U.S. taxation simply because the Internal Revenue Code did not impose a tax on capital gain unless it was ECI (as discussed previously). Amid growing reports that foreigners were amassing vast holdings of U.S. farmland because of the favorable investment climate, Congress enacted the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA).[47]

Under I.R.C. § 897(a)(1), FIRPTA treats a foreign party's gain from the disposition of a U.S. real property interest (USRPI) as ECI, which is taxable at regular U.S. rates, even if the party engages in no U.S. trade or business. The U.S. buyer must withhold income tax on the foreign party's gain. Since the buyer in most cases does not know the seller's adjusted basis in the USRPI, I.R.C. § 1445(a) adopts an alternative withholding method to estimate the required withholding. Unless the seller establishes that a smaller amount should be withheld, the buyer must withholding a tax equal to ten percent of the seller's amount realized (rather than the seller's gain). In contrast to most other withholding procedures, the withheld amount is a mere estimate of the tax liability; any additional tax owed or refund due must be settled on the U.S. tax return for the year. For example, Juan (a nonresident alien) owns U.S. real estate that he bought for $820,000 two years ago. Juan sells the real estate to David (a U.S. citizen) for $1 million, which results in $180,000 gain. Generally, David must withhold $100,000 income tax on the sale so that Juan receives only $900,000. When Juan files his U.S. tax return, he should be entitled to a refund of the excess withholding (assuming no other taxable income). If Juan's effective U.S. tax rate is 21 percent, his actual tax liability from the sale is $37,800 (i.e., 21 percent of $180,000), and he is entitled to a refund of $62,200 (i.e., $100,000 withheld less $37,800).

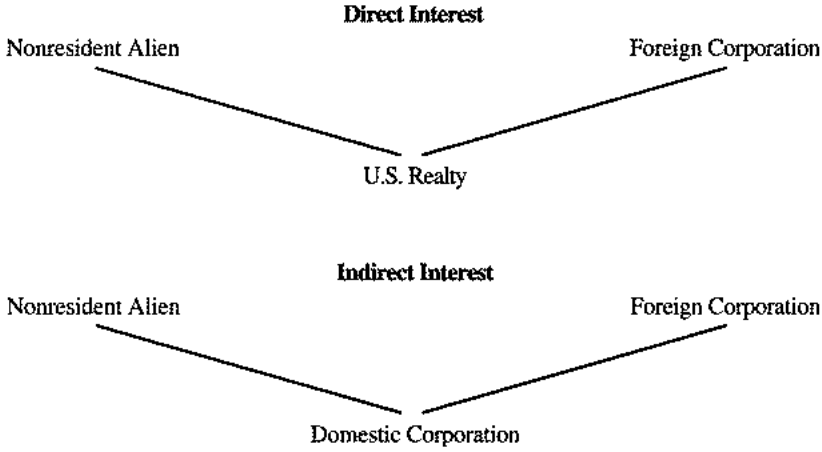
When a loss results from the disposition of a USRPI, it is deductible only to the extent the taxpayer has ECI; that is, it is not deductible against the foreign party's U.S. source investment income. If the loss is from the sale or exchange of a capital asset, Rev. Rul. 92-74, 1992-2 C.B. 156, indicates that the deductibility of the loss is further limited to a foreign corporation's capital gains and a nonresident alien's capital

47. For a more detailed discussion of the pre-1980 environment, see U.S. DEPARTMENT OF THE TREASURY, TAXATION OF FOREIGN INVESTMENT IN U.S. REAL ESTATE (1979); William H. Newton III, *Structuring Foreign Investment in United States Real Estate*, 50 U. MIAMI. L. REV. 517 (1996); Yoseph M. Edrey, *Taxation of International Activity: FDAP, ECI and the Dual Capacity of an Employee as a Taxpayer*, 15 VA. TAX. REV. 653 (1996); and Irwin O. Segal, et.al., *Foreign Investment in U.S. Real Estate: No Perfect Structure*, 9 J. INT'L TAX'N 22 (1998).

gains plus $3,000. In addition, a FIRPTA loss that constitutes a passive activity loss is deductible only to the extent of the taxpayer's passive activity gain. When a nonresident alien incurs a FIRPTA loss, I.R.C. § 897(b) permits a deduction only if the disposed real estate is (1) used in a for-profit activity or (2) damaged or lost through a casualty or theft. Thus, FIRPTA losses must clear several hurdles before their deductibility is allowed.

As depicted in Figure 3, USRPIs take one of two forms—direct ownership of U.S. real estate and indirect ownership. Under I.R.C. § 897(c)(1)(A)(ii), the indirect ownership involves an interest in a domestic corporation that is a U.S. real property holding company. I.R.C. § 897(c)(2) states that a U.S. real property holding company exists if at least 50 percent of the domestic corporation's assets (measured by fair market value) are direct and indirect interests in U.S. realty. For example, a domestic corporation that owns U.S. investment realty valued at $11, foreign realty valued at $6, and other business assets worth $3 is a U.S. real property holding company (i.e., $11 is at least 50 percent of $20). Thus, any foreign party that sells stock in this domestic corporation is taxable on any resulting gain at regular U.S. rates.

FIGURE 3: U.S. REAL PROPERTY INTERESTS: ECI ON DISPOSITION[48]



Treas. Reg. § 1.897-2(b)(2) specifies an alternative test for U.S. real property holding company status based on book value (rather than fair market value). The alternative test is administratively easier to monitor, but the threshold is only 25 percent (rather than 50 percent). In the prior example, assume that the book values of the U.S. realty, foreign

48. At least 50 percent of the assets' fair market value or 25 percent of the assets' book value is attributable to direct or indirect interests in U.S. realty.

realty, and business assets are $2, $6, and $2, respectively. Under the book value test, the domestic corporation is not a U.S. real property holding company (i.e., $2 is less than 25 percent of $10). Assuming this alternative test is used, any gain that results when the foreign party in this example sells the domestic corporation's stock is not subject to FIRPTA.

Branch Profit Taxation

The U.S. branch of a foreign corporation is taxed at regular rates on its ECI. The U.S. subsidiary of a foreign corporation is similarly taxed on its ECI. In addition, the dividends that the U.S. subsidiary pays to its foreign parent company are subject to U.S. taxation at 30 percent or a lower treaty rate (as discussed earlier). Absent an equivalent tax on profits that a branch remits to its foreign office, the branch form of operation is treated more favorably than a subsidiary doing business in the United States.

To assure parity between subsidiaries and branch operations, I.R.C. § 884 imposes a branch profits tax on foreign corporations with U.S. business operations. Since branch remittances may be difficult to measure or monitor, the tax is based on a "dividend equivalent amount." To determine this base, the foreign corporation's annual earnings and profits from ECI are increased (decreased) for reductions (increases) in U.S. net equity. In other words, reinvestments (withdrawals) of net equity into (from) U.S. operations reduces (increases) the dividend equivalent amount. Like dividends, the tax rate is 30 percent unless an income tax treaty specifies a lower rate.

For example, assume a foreign corporation has ECI of $100 during the current taxable year and pays a U.S. tax of $34. The earnings and profits from ECI are $66 (i.e., $100 - $34). Also assume that the foreign corporation's U.S. net equity is $700 at the beginning of the year and $650 at year end. Thus, the reduction in net equity suggests that the U.S. operations remitted not only the $66 in earnings and profits but $50 that previously was part of the U.S. operation's equity or capital. Thus, the dividend equivalent amount is $116 (i.e., $66 + $50). Unless a U.S. income tax treaty reduces the branch profit tax, it will be approximately $35 (i.e., $116 x 30 percent).

Interest that the U.S. branch pays is generally considered to be from U.S. sources. Thus, "branch interest" paid to the home office or any other foreign party is subject to U.S. taxation if not exempted, for example, as portfolio interest (which is discussed later). If the foreign corporation apportions interest expense to the ECI of its U.S. business

activities, I.R.C. § 884(f) imposes the branch interest tax to the excess of such apportioned deductions over interest the branch pays to a foreign party.[49]

Tax Liability Calculation

The manner in which foreign parties determine their U.S. tax liabilities differs most notably from the procedures of U.S. parties in the types of income subject to taxation. U.S. parties are taxed on their worldwide incomes. In contrast, foreign parties are only taxed on: (1) ECI and (2) U.S. source income that is not ECI. Additionally, foreign parties can exclude specially-designated income items, are restricted in their deductions and credits, and may face more progressive effective tax rates than comparably-situated U.S. taxpayers.

Gross Income Exclusions

Foreign parties generally are entitled to exclude the same items of income as U.S. parties. To increase the flow of foreign capital to the United States, the Internal Revenue Code also excludes portfolio interest and interest from certain deposits. Other exclusions are allowed to facilitate international commerce, to enhance cultural ties with other countries, and for administrative reasons. In addition to exclusions that the Code grants, U.S. income tax treaties often exclude certain items from host country taxation.

Under I.R.C. §§ 871(h) and 881(c), portfolio interest includes U.S. source interest income (or original issue discount) paid pursuant to the terms in qualified debt obligations issued to foreign parties, as long as it is not ECI. Portfolio interest does not include interest income that a U.S. person beneficially receives. That is, the ultimate beneficiary must be a foreign party; otherwise, the policy objective to attract foreign capital is not achieved. Portfolio interest also does not include interest income of a ten-percent owner. For example, interest income that a foreign party receives from a corporation in which the foreign party owns 10 percent or more of the voting power cannot be excluded as portfolio interest. Similarly, when the debtor is a partnership in which the foreign recipient owns at least 10 percent of either capital or profits, the interest income is not portfolio interest.

The exclusion for portfolio interest is allowed on certain obligations that foreign parties hold. In addition, I.R.C. §§ 871(i)(2)(A) and

49. For background discussion, see Fred Feingold and Mark E. Berg, *Whither the Branches?* 44 Tax. L. Rev. 205 (1989).

881(d) attract foreign capital through excluding interest income derived from deposits with banks, savings institutions, and insurance companies. Like portfolio interest, this exclusion is allowed only if the interest income is not ECI. U.S. income tax treaties often exempt these types of interest income also.

Dividends that a foreign party receives from a domestic corporation are generally taxable at 30 percent or a lower treaty rate. However, I.R.C. §§ 871(i)(2)(B) and 881(d) exclude some or all of the dividends when 80 percent or more of the corporation's gross income for the preceding three taxable years is derived from the conduct of an active foreign business. The percentage of dividends excluded is equal to the ratio of the corporation's foreign source gross income to total gross income over the same three-year testing period. For example, assume that a foreign party receives $100 of dividends from a domestic corporation in 19x4. During 19x1 through 19x3, the domestic corporation conducted a foreign business from which it derived 87 percent of its gross income. Three percent of the domestic corporation's gross income was from foreign investment activities and ten percent was from U.S. sources. In this case, the foreign party can exclude $90 of the dividends; only $10 is taxable.

The United States allows the income of foreign parties from the international operation of ships or aircraft to transport people or cargo to be excluded. Income from the full or bareboat rental of ships or aircraft is excluded also. However, the exclusion is available only to residents of countries that provide an equivalent exemption to U.S. parties engaged in international transportation activities.[50] The reciprocal exemption often is formalized in an international transportation agreement between the two countries or in a U.S. income tax treaty.

I.R.C. § 872(b)(3) permits nonresident aliens participating in certain exchange or training programs in the United States to exclude the compensation their foreign employers pay them. For this purpose, a foreign employer is either a foreign party or the foreign office of a U.S. party. The exclusion applies only for nonresident aliens who are temporarily in the United States as nonimmigrants. Generally, the individuals who qualify are students, teachers, or trainees.

Income that nonresident aliens derive from certain gambling activities is excluded from U.S. taxation under I.R.C. § 871(j). Winnings from

50. I.R.C. §§ 872(b)(1), (2), (5), 883(a)(1), (2), (4). U.S. source gross transportation income that cannot be excluded and that is not ECI may be subject to a four percent excise tax under I.R.C. § 887. For more information, *see* Ernest R. Larkins, *Locating a Transportation Company Offshore May Still Be the Best Route*, 3 J. INT'L TAX'N 218 (1992).

blackjack, baccarat, craps, roulette, and big-six wheel are exempt. Presumably, this exclusion exists because collection of the tax on these types of gambling income is administratively infeasible.

Deductions and Credits

If a foreign party fails to file a "true and accurate" return in the United States, I.R.C. § 874(a) or 882(c)(2) disallows all deductions and credits. Absent a showing of good cause, a return that is not timely filed fails the true-and-accurate standard. U.S. returns of nonresident aliens filed 16 months late are deemed not to be timely filed. Similarly, foreign corporations that file their U.S. returns 18 months late may lose deductions and credits. Some foreign parties that believe they have no ECI may nonetheless choose to file a "protective return" to preserve future deductions and credits in the event the IRS determines that they do, in fact, have ECI.[51]

Assuming a true and accurate return is filed, foreign parties are entitled to deductions and credits only against ECI.[52] No deductions are permitted against U.S. source investment income and other amounts of gross income taxable at 30 percent or a lower treaty rate. Business and un-reimbursed employee expenses are generally deductible to the extent related to ECI. If otherwise allowed, the expenses of moving to the United States are deductible, but the expenses incurred when returning to the home country are not.

Most deductions are determined through allocation and apportionment procedures. Expenses are allocated to classes of gross income according to their degree of relatedness to the classes. Then, the allocated expenses are apportioned between ECI and non-ECI income according to some factual relationship. Special allocation and apportionment rules apply to interest expense, research and development costs, stewardship expenses, legal and accounting fees, income taxes, and certain losses. As noted above, only those expenses apportioned to ECI are deductible.

I.R.C. § 63(c)(6)(B) precludes nonresident aliens from claiming the standard deduction; thus, they must itemize. Several personal-type expenses that U.S. individuals can deduct are disallowed since the expenses are not allocable to ECI. Among these items are interest on residential mortgages, personal property taxes, and medical expenses. Nonetheless, if they otherwise quality, I.R.C. § 873(b) allows nonresi-

51. Treas. Reg. §§ 1.874-1(b), 1.882-4(a).

52. I.R.C. §§ 873(a), 882(c)(1), 906(a). Also, the instructions to Form 1040NR, U.S. Nonresident Alien Income Tax Return, allow nonresident aliens to deduct expenses incurred to (1) produce non-business income and (2) determine tax liability.

dent aliens to deduct some items in full without apportionment: charitable contributions to qualified U.S. organizations, casualty losses on U.S. property, and one personal exemption. Nonresident aliens residing in some locations can claim additional personal or dependency exemptions. For example, I.R.C. § 151(b)(3) grants residents of Canada, Mexico, and American Samoa exemptions for their dependents and, if they have no U.S. source income, their spouses. Residents of Japan and South Korea can claim some pro rata portion of dependency exemptions for their spouses and children who live with them at some time during the taxable year.[53]

Tax Rate Schedules

The same tax rate schedules that U.S. parties use apply to the ECI of foreign parties. However, nonresident aliens are ineligible to file in certain ways. I.R.C. § 6013(a)(1) generally requires married nonresident aliens to file separate U.S. returns from their spouses, the worst possible filing status (i.e., the most progressive tax rates). Married nonresident aliens can file a joint return only if they make either the nonresident or new resident election.

The nonresident election in I.R.C. § 6013(g) allows an individual who is otherwise a nonresident alien during the taxable year to be treated as a U.S. resident for the entire year and, thus, to file jointly. To be eligible, the person must be married to a U.S. citizen or resident at year end, and both spouses must join in the election. Once made, the election remains in effect until either spouse revokes it, one of the spouses dies, the spouses legally separate, or the IRS unilaterally terminates the election for failure to maintain or supply tax-related information. Each married couple can make this election only once during their lifetimes.

The new resident election in I.R.C. § 6013(h) allows an individual with dual status during the taxable year (i.e., nonresident alien on the first day and resident alien on the last day) to be treated as a U.S. resident for the entire year. This provision allows an individual who becomes a U.S. resident during the year to file a joint return. As with the nonresident election, the nonresident alien must be married to a U.S. person to be eligible, both spouses must join in making the election, and the spouses can never join in making this election again.

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53. Convention for the Avoidance of Double Taxation, Mar. 8, 1971, U.S.-Japan, 23 U.S.T. 967, T.I.A.S. No. 7365, art. 4(5), *reprinted in* 1 TAX TREATIES (CCH) ¶5203 (1998); Convention for the Avoidance of Double Taxation, June 4, 1976, U.S.-Korea, 30 U.S.T. 5253, T.I.A.S. No. 9506, art 4(7), *reprinted in* 1 TAX TREATIES (CCH) ¶5403 (1998).

Both the nonresident and new resident elections grant joint filing benefits to nonresident aliens who qualify. In addition to the preferential tax rate structure, joint filers have higher adjusted gross income thresholds for phasing out itemized deductions and personal and dependency exemptions under I.R.C. §§ 68(b)(1) and 151(d)(3), respectively. Further, joint filers are entitled to larger exemptions for alternative minimum tax purposes per I.R.C. § 55(d)(1), larger exclusions for gain from sale of small business investment company stock under I.R.C. § 1202(b)(3), and several other tax benefits.

When neither election discussed above is made, unmarried nonresident aliens must file as single individuals. I.R.C. § 2(b)(3)(A) does not permit nonresident aliens to file as head of households. Also, filing as a surviving spouse is allowed only if the deceased spouse was a U.S. citizen or resident and the surviving spouse resides in Canada, Mexico, Japan, Korea, American Samoa, or the Northern Mariana Islands.[54]

Conclusion

Increasingly, tax professionals must have some awareness of the special issues that arise for foreign clients. The U.S. tax liability of foreign parties depends on special residency elections, whether a U.S. trade or business is conducted, whether income is effectively connected with a U.S. trade or business, and net basis elections for real estate income. In addition, foreign parties exclude some income items, such as portfolio interest and capital gains from selling investment assets, on which U.S. parties are taxed. Income tax treaties often grant benefits beyond those the Internal Revenue Code provides. For example, treaties generally exclude ECI when no permanent establishment exists and tax U.S. source investment income at rates below the 30 percent statutory rate. Finally, to preserve tax deductions and credits and avoid statutory penalties, foreign parties should be careful to file true and accurate returns on a timely basis.

54. I.R.C. § 2(a)(2)(B); Treas. Reg. § 1.2-2(a)(4). *See also* Treasury Department, U.S. Tax Guide for Aliens, Pub. 519 (1997) 20.

THE SPS AGREEMENT OF THE WORLD TRADE ORGANIZATION AND INTERNATIONAL ORGANIZATIONS: THE ROLES OF THE CODEX ALIMENTARIUS COMMISSION, THE INTERNATIONAL PLANT PROTECTION CONVENTION, AND THE INTERNATIONAL OFFICE OF EPIZOOTICS*

By Terence P. Stewart & David S. Johanson*****

The proper functioning of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) of the World Trade Organization (WTO) depends in part upon three international organizations, the Codex Alimentarius Commission (Codex), the International Plant Protection Convention (IPPC), and the International Office of Epizootics (OIE). The SPS Agreement states that the sanitary and phytosanitary (SPS) standards of these organizations are the benchmark international standards for WTO members, and recent WTO decisions demonstrate the importance of international standards in the settlement of WTO disputes involving SPS measures. The Codex, IPPC, and OIE also provide valuable services that benefit the WTO, such as advising developing countries on technical matters concerning SPS issues.

This article describes the roles of these international organizations in the SPS Agreement. It also examines how the new responsibilities given to the Codex, IPPC, and OIE in the SPS Agreement might change these international bodies.

I. INTRODUCTION.

The Agreement on the Application of Sanitary and Phytosanitary Measures[1] (SPS Agreement) of the World Trade Organization (WTO), which emerged out of the eight years of negotiations of the Uruguay Round, has the potential to liberalize greatly agricultural trade. One ob-

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** Managing Partner, Stewart and Stewart, Washington D.C. B.A., College of the Holy Cross; M.B.A., Harvard University, J.D.; Georgetown University.

*** Associate Attorney, Stewart and Stewart, Washington D.C. B.A., Stanford University; M.Phil., Cambridge University; J.D., University of Texas.

1. Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS URUGUAY ROUND, vol. 31 [hereinafter SPS Agreement].

jective of the drafters of the SPS Agreement was to harmonize the sanitary and phytosanitary (SPS) measures[2] of the members of the WTO. To achieve this goal, the SPS Agreement encourages WTO members when creating or maintaining SPS measures to rely upon the SPS standards established by three international organizations: the Codex Alimentarius Commission (Codex), the International Plant Protection Convention (IPPC), and the International Office of Epizootics (OIE).[3] These organizations address, respectively, issues concerning human, plant, and animal life and health.

These three organizations are recognized by the world's food and agricultural communities as the premier international bodies for the establishment of SPS standards and for the coordination of information concerning SPS issues.[4] The standards they set are voted upon by the delegates of each member country to these organizations; these delegates are generally scientists employed by their respective national governments. While the participation of their numerous members has ensured that these organizations have never been immune to politics, the Codex, IPPC, and OIE are scientific bodies whose decisions have traditionally not been the subject of great political concern. The standards they promulgate are advisory and thus not legally binding, so their standards rarely receive significant attention outside of scientific circles.[5]

The Codex, IPPC, and OIE were created well prior to the adoption of the Uruguay Round Agreements, and they are now adjusting to the new role in the international trading system that was established for them through the SPS Agreement. The reliance on these three organizations within the SPS Agreement has already brought changes to these international bodies. As shown by the first three, and presently only,

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2. Sanitary measures concern human and animal health. Phytosanitary measures apply to plants. The SPS Agreement provides a definition of *sanitary or phytosanitary measure* at Annex 1A.

3. As the International Office of Epizootics is based in Paris, it is most often referred to by the acronym "OIE"; this organization's title in French is the "Office International des Epizooties."

4. The acceptance of these organizations as the leading international bodies in their fields is demonstrated by their prominence in the SPS Agreement. Further, the U.S. Department of Agriculture noted that the General Agreement on Tariffs and Trade (GATT) "officially recognized the Office of International Epizootics (OIE) as the forum for global standards in animal health, Codex Alimentarius (Codex) for food safety standards, and the International Plant Protection Convention (IPPC) for plant health standards." U.S. DEPARTMENT OF AGRICULTURE, ANIMAL AND PLANT HEALTH INSPECTION SERVICE (APHIS) TRADE SUPPORT TEAM, NAFTA AND GATT IMPLICATIONS FOR U.S. AGRICULTURE 4 (November 2, 1995).

5. World Trade Organization, *Report of the Panel: EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada*, WT/DS48/R/CAN (Aug. 18, 1997), at ¶ 8.62 [hereinafter Beef Hormone - Canada Panel]; World Trade Organization, *Report of the Panel: EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States*, WT/DS26/R/USA (Aug. 18, 1997), at ¶ 8.59 [hereinafter Beef Hormone - U.S. Panel].

WTO disputes resolved under the SPS Agreement, the European Communities (EC)-beef hormone dispute,[6] the Australian-salmon dispute,[7] and the Japan – agricultural products dispute,[8] the adjudication of major international trade conflicts can now turn at least in part upon the standards of the Codex, IPPC, and OIE. Even if these standards remain solely advisory, the stakes for WTO members in international SPS standards have become higher, and the potential exists for an increased politicization of the Codex, IPPC, and OIE processes when new standards are being set. Questions have also arisen within these organizations as to their structural capabilities to fulfill their new roles.

This article examines the provisions of the SPS Agreement that relate to the Codex, IPPC, and OIE. It describes the importance of the international standards of these organizations in the outcome of disputes involving SPS measures resolved through the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) of the WTO.[9] The article then discusses the Codex, IPPC, and OIE themselves, how they have changed since the implementation of the SPS Agreement, and how they might change in the future.

II. The SPS Agreement.

References to the Codex, IPPC, and OIE are made directly and indirectly in various articles located throughout the SPS Agreement. These three bodies are the only international organizations mentioned by name in the SPS Agreement. Accordingly, whenever the SPS Agreement refers to the "relevant" or "appropriate" international organizations, it is presumably referring to the Codex, IPPC, and OIE among possibly others.[10]

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6. World Trade Organization, *Report of the Appellate Body: EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (Jan. 16, 1998) [hereinafter Beef Hormone - Appellate Report]; *See* Beef Hormone – Canada Panel, *supra* note 5; *see also*, Beef Hormone – U.S. Panel, *supra* note 5.

7. World Trade Organization, *Report of the Panel: Australia - Measures Affecting Importation of Salmon*, WT/DS18/R (Jun. 12, 1998) [hereinafter Australia – Salmon Panel]; World Trade Organization, *Report of the Appellate Body: Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, AB-1998-5 (Oct. 20, 1998) [hereinafter Australia – Salmon Appellate Report].

8. World Trade Organization, *Report of the Panel: Japan – Measures Affecting Agricultural Products*, WT/DS76/R (Oct. 27, 1998) [hereinafter Japan – Agricultural Products].

9. Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 114 (1994) [hereinafter Dispute Settlement Understanding].

10. Although the Codex, IPPC, and OIE are the only international organizations listed in the SPS Agreement, other international bodies concerned with SPS issues are affiliated with the WTO. The following, along with the Codex, IPPC, and OIE have regular observer status at the

A. *Harmonization.*

The Codex, IPPC, and OIE are designated to play a major role in the harmonization process of SPS measures envisioned in the SPS Agreement. Article 3.1 obligates members to base their SPS measures on international standards, guidelines, and recommendations "where they exist." The SPS Agreement at Annex A specifically defines "international standards, guidelines or recommendations" as the standards, guidelines, or recommendations established by the Codex, IPPC, or OIE.

However, Article 3.3 permits members to maintain higher standards than the international norm as established by international standards, guidelines, and recommendations if a member's measures are based upon science or if such measures are the "consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with paragraphs 1 through 8 of Article 5." Article 5 requires WTO members to base their SPS measures upon risk assessments.

In regard to disputes arising under the SPS Agreement, Article 3.2 provides perhaps the most important provision pertaining to the roles of the Codex, IPPC, and OIE. It states that SPS measures of WTO members that are in conformity with international standards, guidelines, or recommendations shall be "presumed to be consistent with the relevant provisions of this Agreement." Therefore, in an SPS dispute adjudicated through the WTO's dispute settlement process, if a member adopts measures that are identical or similar to the standards promulgated by the Codex, IPPC, or OIE, the member's measures will presumably be found consistent with its obligations under the SPS Agreement.

Article 3.4 states that WTO members must participate "within the limits of their resources" in the relevant international bodies, and "in particular" the Codex, IPPC, and OIE. Accordingly, members are expected to promote the development of standards within these international organizations. Under Article 3.5, the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee) will monitor international harmonization activities and will coordinate this effort with the "relevant international organizations," which presumably include the Codex, IPPC, and OIE.

WTO: the World Health Organization (WHO), the Food and Agriculture Organization (FAO) of the United Nations, the United Nations Conference on Trade and Development (UNCTAD), the International Trade Centre (ITC), and the International Standards Organization (ISO). World Trade Organization, *The Committee* (visited Aug. 11, 1998) <http://www.wto.org/eol/e/wto03/wto3_36.html>.

B. *Risk Assessment.*

Article 5 of the SPS Agreement, which requires risk assessments for the establishment and maintenance of SPS measures, creates a role for the Codex, IPPC, and OIE. Article 5.1 states that in developing risk assessments for SPS measures, members must take into consideration the risk assessment processes developed by the "relevant international organizations," which can be assumed to include the Codex, IPPC, and OIE. If scientific evidence is lacking concerning an SPS measure, Article 5.7 provides that members are permitted to adopt provisional measures based upon available information, such as that developed by the "relevant international organizations." Under Article 5.8, in situations where a member believes that a measure of another member does not conform with the "relevant international standards, guidelines or recommendations," and the measure either interferes with or has the potential to interfere with that country's exports, that member can request that the other member provide it with explanations for the measure, and the other member will be obligated to respond.

C. *Differing Regional Conditions.*

Article 6 requires WTO members to recognize that pests and diseases occur in distinct regions and do not necessarily inflict all areas of a country. For example, a member would most likely violate its WTO obligations if it prevented imports of all fruit from the United States due to the presence of the Mediterranean fruit fly in only one state, Hawaii.[11] According to Article 6.1, members should take into consideration the guidelines of the "relevant international organizations" in determining pest- and disease-free areas.

D. *Provisions Related to Developing Countries.*

The SPS Agreement at Article 9.1 obligates members to agree to provide technical assistance to developing countries to help them adjust to the requirements of the SPS Agreement; members may contribute this assistance through the "appropriate international organizations." Under Article 10.4, members should encourage developing countries to take part in the "relevant international organizations."

The Codex, IPPC, and OIE have traditionally provided technical assistance to developing countries to help them address SPS threats, so these international organizations are well prepared to fulfill these provi-

11. U.S. Department of Agriculture, APHIS, Plant Protection and Quarantine, *The Mediterranean Fruit Fly* (visited Aug. 11, 1998) <http://www.aphis.usda.gov/oa/pubs/fsmedfly.html>.

sions of the SPS Agreement.[12] However, with increased technical assistance demands being made upon them since the end of the Uruguay Round, the Codex, IPPC, and OIE might in the future find it difficult to respond to these requests.[13]

E. Dispute Settlement.

Article 11.3 states that the SPS Agreement does not impair the rights of members to utilize the dispute settlement procedures of other international organizations. For example, two members of both the WTO and IPPC could choose to settle a dispute through either the Dispute Settlement Understanding (DSU) of the WTO or through the non-binding and seldom used dispute settlement mechanism of the IPPC. Under Article 11.2 of the SPS Agreement, dispute settlement panels should in disputes involving technical or scientific issues consult with experts in the relevant fields. In doing so, a panel may create a technical experts group or consult with the "relevant international organizations."

The DSU, which is a separate instrument from the SPS Agreement, restates in Article 13 the provisions of the SPS Agreement that dispute settlement panels can obtain information from experts in the relevant fields. Article 13.2 of the DSU goes on to provide that "a panel may request an advisory report in writing from an expert review group." Appendix 4 of the DSU elaborates upon the establishment and functions of expert review groups.

The panels in the EC-beef hormone, the Australia-salmon, and the Japan-agricultural products disputes declined to form expert review groups.[14] The beef hormone panels expressed concerns that expert review groups would have to find consensus on certain matters, which would complicate the groups' processes.[15] Instead of forming expert groups, the EC-beef hormone, Australia-salmon, and Japan-agricultural products panels sought scientific information from individual experts.[16]

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12. FOOD AND AGRICULTURAL ORGANIZATION (FAO) OF THE UNITED NATIONS, FAO TECHNICAL ASSISTANCE AND THE URUGUAY ROUND AGREEMENTS 6 (1997); International Office of Epizootics, (visited Dec. 15, 1997) <http://www.oie.org/press/a_960911.htm>.

13. FOOD AND AGRICULTURAL ORGANIZATION (FAO) OF THE UNITED NATIONS, FAO TECHNICAL ASSISTANCE AND THE URUGUAY ROUND AGREEMENTS 6 (1997).

14. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.7; *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.7; *see* Australia – Salmon Panel, *supra* note 7, at ¶ 6.3; *see also* Japan - Agricultural Products, *supra* note 8, at ¶ 6.2.

15. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.7; *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.7.

16. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.7; *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.7; *see* Australia – Salmon Panel, *supra* note 7, at ¶ 6.3, 6.4; *see also* Japan - Agricultural Products, *supra* note 8, at ¶ 6.2.

The WTO Appellate Body in the beef hormone appellate decision upheld the ability of panels to request opinions of individual scientists rather than form expert review groups.[17] Further, in the beef hormone disputes, the Codex provided the panels with names of possible nominees to serve as experts, and a scientist from the Secretariat of the Codex became an expert for the panel.[18] The panels in the Australia-salmon and Japan-agricultural products disputes asked the advice of the OIE and IPPC, respectively, when selecting experts.[19] Whether or not future panels establish expert review groups, the Codex, IPPC, and OIE will likely be substantially involved in providing scientific assistance to panels.

F. The SPS Committee.

The functioning of the SPS Committee, which is established in Article 12, relies heavily upon the Codex, IPPC, and OIE. Article 12.2 states that the SPS Committee is required to encourage WTO members to base their measures upon international standards, guidelines, or recommendations. The SPS Committee under Article 12.3 should discuss scientific and technical matters with international SPS organizations, and in particular the Codex, IPPC, and OIE, with the aim of obtaining the best scientific information. Article 12.6 provides that the SPS Committee may also ask these organizations to examine matters concerning certain SPS standards.

Article 12.4 requires the SPS Committee to establish a procedure to follow the progress of international harmonization efforts and the utilization of international standards, guidelines, and recommendations. The SPS Committee is expected to work with the "relevant international organizations" to develop a list of international standards, guidelines, and recommendations that affect international trade. Members should indicate which of these standards they require for the importation of products. If a member does not use an international standard, guideline, or recommendation, the member should explain why its policies vary from the international standard. When a member ceases using an international standard, guideline, or recommendation, it should either explain its action to the Secretariat of the WTO and to the "relevant international organizations" or through the procedures elaborated in Annex B of the SPS Agreement, which concerns transparency.

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17. *See* Beef Hormone - Appellate Report, *supra* note 6, at ¶ 149.

18. *See* Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 6.6, 6.10.

19. *See* Australia – Salmon Panel, *supra* note 7, at ¶ 6.2; *see also* Japan-Agricultural Products, *supra* note 8, at ¶ 6.2.

The SPS Committee is in the process of monitoring the international harmonization of SPS measures, and it implemented a provisional procedure for this purpose at its meeting in October 1997.[20] The SPS Committee plans to review the success of this provisional procedure eighteen months after the procedure's adoption.

G. Transparency.

Annex B of the SPS Agreement states that if a member's proposed SPS measure deviates from an international standard, guideline, or recommendation, or if no such international standard exists, and if the measure has a major impact on trade, the member must notify other countries of this proposed measure "at an early stage." If requested, the member must explain to other members how the proposed measure varies from international standards, guidelines, or recommendations.

III. International Standards and WTO Dispute Settlement Decisions.

At present, three disputes involving SPS measures have been resolved through the DSU of the WTO. The existence of international SPS standards played a role, directly or indirectly, in each of these disputes. As demonstrated by the EC-beef hormone panel and appellate body decisions, the Australia-salmon panel and appellate body decisions, and the panel decision in the Japan-agricultural products dispute, now that major international trade disputes can be influenced on the basis of international standards, the members of the WTO have incentives to see that the new standards of the Codex, IPPC, and OIE conform with current or possible future national SPS measures.

A. The Beef Hormone Dispute.

In 1988, the European Communities prohibited the use of growth promoting hormones in beef production, and an import ban on hormone treated meat was implemented in 1989.[21] The United States and Canada claimed that the use of hormones for growth promotion purposes in beef cattle was safe and posed no threat to human health. They contended that the European Communities' policy was scientifically unfounded and

20. World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Procedure to Monitor the Process of International Harmonization*, G/SPS/11 (Oct. 22, 1997).

21. U.S. Trade Representative, *1996 National Trade Estimate Report on Foreign Trade Barriers (1996)*, at 98.

was designed to protect EC beef producers from competition.[22] The European Communities countered by stating that beef hormones might threaten human health and claimed that science supported its policy.

1. The WTO Panel Decisions.

WTO-based consultations regarding the beef hormone controversy were held in 1996 between the European Communities and Canada, and the European Communities and the United States, but these talks did not result in mutually satisfactory solutions for the parties, and WTO dispute settlement panels were subsequently formed.[23] The two panels released their final reports on August 18, 1997.

Included among their arguments before the panels, the United States and Canada contended that the European Communities' prohibition on the importation of hormone-treated beef violated the European Communities' obligations under Article 3.1 of the SPS Agreement as the European Communities failed to base its measure upon international standards.[24] The Codex maintains standards for five of the six hormones under dispute.[25] According to the Codex, these five hormones, when used according to sound veterinary practices for purposes of growth promotion in beef cattle, do not pose risks to human health.[26] The panels determined that the European Communities' measures varied from the international standards of the Codex and thus were not in conformity with Article 3.1.[27]

Article 3.3 makes it clear that a WTO member is not required to base its SPS measures upon international standards. Article 3.3 provides that a member may maintain higher standards than the international norm, but only if such measures are based upon science or if they operate "as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5." Article 5 requires that members base their measures upon risk assessments.

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22. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.242; *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.239.

23. *See* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 1.3.

24. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶¶ 8.46, 8.47; *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 8.43, 8.44.

25. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶¶ 8.61, 8.62; *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 8.58, 8.59.

26. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶¶ 8.63, 8.73; *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 8.60, 8.70.

27. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶ 9.1; *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 9.1.

The European Communities claimed that risk assessments supported its position.[28] The panels determined, however, that the European Communities failed to demonstrate that its measures were indeed based upon risk assessments as required in Article 3.3.[29] Therefore, the panels held that the European Communities' policy on beef hormones contravened the European Communities' obligations under the SPS Agreement.

2. The WTO Appellate Body Decision.

The European Communities appealed the findings of the panels, and the WTO Appellate Body released its report on January 16, 1998. While the Appellate Body's decision rejected a number of arguments put forward by the panels, it affirmed the panels' conclusions that the European Communities' beef hormone policy violated Article 3.3 as it was not based upon a risk assessment.[30] In its report, the Appellate Body emphasized that voluntary standards of international organizations such as the Codex are not transformed into mandatory standards for WTO members.[31] Rather, members are permitted under Article 3.3 to maintain SPS measures that are higher than the international norm (*i.e.*, higher than the standards of the relevant international organizations), but such measures must be based upon risk assessments as described in Article 5.[32]

B. The Australia-Salmon Dispute.

On October 5, 1995, Canada requested WTO-based consultations with Australia regarding Australia's ban on the importation of fresh, chilled, and frozen salmon from Canada.[33] Australia contended that its prohibition of such imports, which became operative in 1975,[34] was necessary to protect Australian fish from up to 24 diseases that could enter the country through imported salmon from Canada.[35] The establishment of these diseases could have damaging economic and biological consequences for Australia's fisheries.[36]

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28. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶¶ 8.111, 8.112, 8.114, 8.152; *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 8.108, 8.109, 8.111, 8.149.
29. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶¶ 8.158, 8.261, 9.1, 8.82; *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 8.156, 8.261, 9.1, 8.79.
30. *See* Beef Hormone - Appellate Report, *supra* note 6, at ¶¶ 208, 209.
31. *Id.* at ¶ 165.
32. *Id.* at ¶ 177.
33. *See* Australia - Salmon Panel, *supra* note 7, at ¶ 1.1.
34. *See* Australia - Salmon Panel, *supra* note 7, at ¶¶ 2.14, 2.15.
35. *See* Australia - Salmon Panel, *supra* note 7, at ¶¶ 4.34, 4.35.
36. *See* Australia - Salmon Panel, *supra* note 7, at ¶ 4.35.

1. The WTO Panel Decision.

A WTO panel was formed on April 10, 1997.[37] Canada claimed that Australia's policy was not founded upon science and was a disguised restriction to international trade.[38] Canada also contended that Australia violated Article 3.1 of the SPS Agreement as the disputed measure was not based upon an international standard of the relevant international organization, the OIE, and the measure did not meet the requirements of Article 3.3 of the SPS Agreement.[39] Article 3.3 permits WTO members to maintain standards that are higher than international standards, but only if they are based upon science or are a "consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate" and are based upon risk assessments.

Australia countered that it did not claim that its measure on salmon imports was based upon OIE standards.[40] After all, OIE standards did not exist for all of the 24 diseases from which Australia was seeking protection, and the OIE had no guidelines for salmon as a specific product.[41] Australia contended that the lack of OIE guidelines for all of the 24 diseases meant in effect that no appropriate OIE guideline existed upon which Australia could base its measure.[42]

The panel's report, which was released on June 12, 1998, did not address Canada's claims concerning Australia's failure to base its measure upon OIE standards. Rather, the panel found that Australia was in violation of the SPS Agreement as it (1) did not base its salmon import regulation upon a risk assessment (in violation of Article 5.1 and thus by extension Article 2.2, which requires that SPS measures be based upon scientific principles); (2) was applying arbitrary or unjustifiable distinctions in the levels of SPS protection for measures for different situations, *i.e.*, was applying more restrictive measures to imports of salmon than to imports of ornamental live fish although the latter posed higher risks,[43] which resulted in a disguised restriction on international trade (in violation of Articles 5.5 and 2.3); and (3) was maintaining an SPS measure

37. *See* Australia - Salmon Panel, *supra* note 7, at ¶ 1.4.

38. *See* Australia - Salmon Panel, *supra* note 7, at ¶¶ 4.52 and 4.209.

39. *See* Australia - Salmon Panel, *supra* note 7, at ¶ 3.2.

40. *See* Australia - Salmon Panel, *supra* note 7, at ¶ 8.45.

41. *See* Australia - Salmon Panel, *supra* note 7, at ¶ 8.46. Of the 24 diseases from which Australia contended it sought protection, two were included on the OIE's list of "Notifiable Diseases" and four were on the OIE's "Other Diseases" list. *See also* Australia - Salmon Panel, *supra* note 7, at ¶ 2.24.

42. *See* Australia - Salmon Panel, *supra* note 7, at ¶ 4.104. The panel stated that lack of OIE guidelines for *all* of the 24 diseases did not make irrelevant the existence of OIE guidelines for *some* of the diseases. *See also* Australia - Salmon Panel, *supra* note 7, at ¶ 8.46.

43. *See* Australia – Salmon Panel, *supra* note 7, at ¶¶ 8.137 and 8.160.

that was more trade-restrictive than necessary to reach Australia's appropriate level of SPS protection (in violation of Article 5.6).[44] As the panel found that Australia was violating these provisions, the panel stated that it "[saw] no need to further examine Canada's other claims under . . . Article 3."[45]

While the Australia-salmon panel decision did not turn directly upon an international standard, the OIE's guidelines figured prominently in the arguments of both Canada and Australia. In addition, the panelists looked to the OIE for guidance when addressing other issues, such as whether Australia presented the panelists with a risk assessment.[46]

2. The WTO Appellate Body Decision.

Australia announced on July 22, 1998, that it would appeal the panel's decision,[47] and the Appellate Body of the WTO released its report on the salmon dispute on October 20, 1998. While the Appellate Body struck down some of the findings contained in the panel's report, the Appellate Body upheld the panel's decision that Australia's policy regarding the importation of salmon violated that country's obligations under the SPS Agreement. Namely, the Appellate Body, like the panel, found that Australia's policy as applied to ocean-caught salmon contravened Australia's obligations under Article 5.1 as the relevant measure was not based upon a risk assessment, and therefore, Australia's policy also violated Article 2.2, which requires that SPS measures be based upon scientific evidence.[48] The Appellate Body upheld the panel's finding that Australia, by maintaining unjustifiable distinctions in levels of SPS protection in different situations, was imposing a disguised restriction on international trade in violation of Articles 5.5 and 2.3.[49] The Appellate Body reversed the panel's finding that Australia's measure as applied to ocean-caught salmon was more trade restrictive than necessary, and thus in violation of Article 5.6, as the panel premised its finding upon the wrong SPS measure; *i.e.*, the panel addressed Australia's heat treatment for salmon as opposed to Australia's ban on the importation of salmon.[50] Further, due to a lack of adequate facts in the record,

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44. *See* Australia - Salmon Panel, *supra* note 7, at ¶¶ 9.1, 8.52.

45. *See* Australia - Salmon Panel, *supra* note 7, at ¶ 8.184.

46. *See* Australia - Salmon Panel, *supra* note 7, at ¶¶ 8.70, 8.71, 8.78, and 8.80.

47. *See* World Trade Organization, *Overview of the State-of-play of WTO Disputes*, at 5 (visited Aug. 25, 1998) <http://www.wto.org/wto/dispute/bulletin.htm>.

48. *See* Australia - Salmon Appellate Report, *supra* note 7, at 123-24

49. *See* Australia - Salmon Appellate Report, *supra* note 7, at 85-86, 93, and 124.

50. *See* Australia - Salmon Appellate Report, *supra* note 7, at 124.

the Appellate Body was unable to determine whether Australia's import prohibition was inconsistent with Article 5.6.[51]

The Appellate Body limited its examination to the findings of the panel, and as the measures of the OIE did not play a prominent role in the panel's decision, the Appellate Body did not examine issues directly related to the OIE. However, as with the panel, the Appellate Body looked to the OIE's guidelines when determining whether Australia's measure was based upon a risk assessment.[52]

C. The Japan – Agricultural Products WTO Panel Report.

The panel's decision in the Japan-agricultural products dispute did not rely directly upon the international standards, guidelines, or recommendations of the Codex, OIE, or IPPC, and none of these organizations were named in the findings or conclusions of the panel. However, the IPPC's risk assessment guidelines were discussed in the factual section of the panel report, in the arguments of the parties, and in the panel's consultation with its scientific experts.

1. Background of Dispute.

On April 7, 1997, the United States requested consultations with Japan regarding Japan's approval process for the importation of certain agricultural products.[53] The United States alleged that Japan prohibited the importation of individual varieties of some agricultural products until each variety had been tested for the required quarantine treatment.[54] For example, instead of requiring that apples imported from the United States meet Japan's quarantine requirements concerning a certain plant pest, the codling moth, Japan mandated that testing be conducted on each *variety* of apple before different varieties could be imported.[55] Thus, even though Japan had approved the importation of certain "red delicious" apples as the United States had proven that apples of this variety could be effectively treated for the codling moth, the United States was unable to export other varieties, such as "Fujis" or "Braeburns."[56] The United States claimed that it took from two to four years to conducts the necessary tests, these tests were expensive, and that Japan's policy adversely impacted U.S. agricultural exports and vio-

51. *See* Australia - Salmon Appellate Report, *supra* note 7, at 124.
52. *See* Australia - Salmon Appellate Report, *supra* note 7, at 74.
53. *See* Japan – Agricultural Products, *supra* note 8, at ¶¶ 1.1, 4.23.
54. *See* Japan – Agricultural Products, *supra* note 8, at ¶ 1.2.
55. *See* Japan – Agricultural Products, *supra* note 8, at ¶¶ 1.2, 4.23.
56. *See* Japan – Agricultural Products, *supra* note 8, at Table 2, p. 15.

lated Japan's obligations under the SPS Agreement.[57] Japan claimed that its policies were consistent with the requirements of the SPS Agreement.[58]

2. Findings of the Panel.

The panel determined that Japan's policy contravened that country's obligations under the SPS Agreement as Japan's measure, as applied to applies, cherries, nectarines, and walnuts, was not based upon scientific evidence, in violation of Article 2.2, and was more trade restrictive than necessary in violation of Article 5.6.[59] In addition, as Japan's measure was not published, the panel held that Japan was in violation of Article 7 and Annex B.1, both of which concern transparency.[60] According to press reports, Japan intends to appeal the findings of the panel.[61]

3. The IPPC and the Panel Report.

The United States contended that Japan had failed to base its policy upon risk assessments and that Japan was thus in violation of Article 5.1.[62] Japan claimed, however, that it had conducted such assessments under the procedures set forth in the risk assessment guidelines of the IPPC.[63] The panel provided a detailed description of the IPPC's guidelines,[64] and these guidelines figured prominently in the arguments of both the United States and Japan concerning the issue of risk assessments.[65] In the end, the panel decided not to address the issue of whether Japan's policy was based upon risk assessments as required in Article 5.1 as the panel had already found that Japan was in violation of Article 2.2 as its measure was not based upon scientific evidence.[66]

IV. The Codex Alimentarius Commission.

Of the standards established by the three international organizations named in the SPS Agreement, those of the Codex have perhaps the greatest potential to lead to conflicts among WTO members.

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57. *See* Japan – Agricultural Products, *supra* note 8, at ¶¶ 1.2, 4.23.
58. *See* Japan – Agricultural Products, *supra* note 8, at ¶ 3.3.
59. *See* Japan – Agricultural Products, *supra* note 8, at ¶ 9.1.
60. *See* Japan – Agricultural Products, *supra* note 8, at ¶ 9.1.
61. Doug Carder, *Ruling may open market*, THE PACKER, Nov. 2, 1998, at 1A, col. 2.
62. *See* Japan – Agricultural Products, *supra* note 8, at ¶ 3.1.
63. *See* Japan – Agricultural Products, *supra* note 8, at ¶ 4.144.
64. *See* Japan – Agricultural Products, *supra* note 8, at ¶¶ 2.29-2.33.
65. *See* Japan – Agricultural Products, *supra* note 8, at ¶¶ 4.143-4.169.
66. *See* Japan – Agricultural Products, *supra* note 8, at ¶ 8.63.

A. Background on the Codex.

The Codex establishes standards relating to human health, and its standards can concern additives, contaminants, and veterinary drug and pesticide residues in foods.[67] The Codex was founded in 1962 by the Food and Agricultural Organization (FAO) of the United Nations and the World Health Organization (WHO).[68] It currently has 162 member countries and is based in Rome.[69] The stated goal of the Codex is "to guide and promote the elaboration and establishment of definitions and requirements for foods, to assist in their harmonization and, in doing so, to facilitate international trade."[70]

Most of the work of the Codex is conducted through its various committees, which consist of delegates from its member states. Examples of these committees are the Committee on Food Additives and Contaminants and the Committee on Processed Fruits and Vegetables.[71] Standards of the Codex are established through a lengthy eight step process that provides members with the opportunity to comment on the proposed standards.[72] Throughout the Codex's history, most of its standards have been adopted by consensus.[73] The Codex's standards, guidelines, and principles fill 28 volumes, and the Codex has established 3200 maximum residue levels for pesticides alone since 1962.[74]

B. Recent Controversial Codex Decisions.

As the standards established by the Codex relate to human health, they have caused more concerns for the populations of members of the WTO than have the standards of the IPPC and OIE, which deal respectively with plant and animal health. Controversy increasingly surrounds

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67. *See generally* Codex Alimentarius Commission, *Report of the 21st Session, List of Standards and Related Texts Adopted by the 21st Session of the Codex Alimentarius Commission*, ALINORM 95/37 (July 8, 1995) [hereinafter Codex 21st Report].

68. U.S. Department of Agriculture, Food Safety and Inspection Service, U.S. Codex Office, *Codex Home Page*, (visited Dec. 18, 1997) <http://www.usda.gov/fsis/codex/index.htm>.

69. Codex Alimentarius Commission, *Latest News*, (visited Aug. 4, 1998) <http://www.fao.org/WAICENT/FAOINFO/ECONOMIC/ESN/codex/lnews.htm>.

70. *See* Codex Alimentarius Commission, *This is Codex Alimentarius* 2 (2d ed.).

71. *See* Codex Alimentarius Commission, *Report of the 22nd Session, Appendix V: Confirmation of Chairmanship of Codex Committees*, ALINORM 97/37 (June 28, 1997) [hereinafter Codex 22nd Report].

72. Codex Alimentarius Commission, *Procedures for the Elaboration of Codex Standards and Related Texts (The Codex "Step Procedure")*, (visited Aug. 11, 1998) <http://www.fao.org/waicent/faoinfo/economic/esn/codex/proced1.htm.>

73. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.69, *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.66.

74. *Supra* note 70, at 2.

the establishment of certain Codex standards, and the adoption of Codex standards through consensus can no longer be assumed.

1. Beef Hormones.

The first indication of such controversy following the conclusion of the Uruguay Round occurred with the non-consensus approval of maximum residue levels for five growth promoting hormones, which would become the focus of the beef hormone disputes at the WTO, at the Twenty-First Session of the Codex in July 1995, just seven months after the implementation of the SPS Agreement. At the request of the United States, a secret vote was held on these standards, and they were approved with 33 delegates favoring their adoption, 29 opposing them, and 7 delegates abstaining from the vote.[75]

Following the vote, the Observer of the European Communities stated that the secret vote was unfortunate as it deviated from the Codex's goal to operate transparently.[76] The Observer also said that the vote brought into question the validity of the Codex's standards and that the European Communities might reconsider its participation in this body.[77] The delegations of the Netherlands, Sweden, Finland, Spain, and the United Kingdom dissociated themselves from parts or all of these remarks.[78]

The European Communities would later argue before the WTO panels in the beef hormone disputes that the failure of the Codex to adopt the beef hormone maximum residue levels through consensus demonstrated the very controversy of using these standards.[79] The European Communities also stated that Codex members were accustomed to adopting non-binding measures and were unaware that these standards for beef hormones would in effect become mandatory for the member states of the European Communities through the operation of the SPS Agreement and the DSU.[80] The panels held, however, that nothing in the SPS Agreement requires that votes on the measures of the relevant

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75. *See Codex 21st Report*, *supra* note 67, at ¶ 45.

76. *Id.* at ¶ 46.

77. *Id.*

78. *Id.*

79. Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.69, *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.66.

80. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.71, *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.68. The Appellate Body in the beef hormone dispute held that the voluntary standards of the relevant international organizations have not become mandatory standards for WTO members through the operation of the SPS Agreement. Members may maintain SPS measures that are higher than international standards if these measures are based upon risk assessments. *See* Beef Hormone - Appellate Report, *supra* note 6, at ¶¶ 165, 177.

international organizations be by consensus, so the European Communities' argument was irrelevant.[81]

2. Twenty-Second Session of the Codex.

The Twenty-Second Session of the Codex was held in Geneva in June 1997 and provided further examples of disagreements over the adoption of new standards. The release of the interim panel reports in the beef hormone disputes only one month before this session most likely influenced the decisions that were made there.[82]

a. Bovine Somatotropin.

Bovine somatotropin (BST) is injected into dairy cows and increases their milk production.[83] Its use is common in some major dairy producing countries, such as the United States.[84] At the Twenty-Second Session of the Codex, a vote was held on a draft standard for maximum residue levels for BST. In the debates preceding the vote, the Codex was divided into two groups: those who sought to adopt the draft standard at Step 8 of the Codex's standard-setting process and those who favored postponing consideration of its adoption pending the reevaluation of scientific information.[85]

The delegations that favored adopting the BST standard contended that thorough scientific evaluations of BST had already been conducted by the Joint FAO/WHO Expert Committee on Food Additives and Contaminants (JECFA) and the Committee on Residues of Veterinary Drugs in Foods (CCRVDF), no new scientific evidence had been presented at the Codex meeting, and therefore a reevaluation was not needed.[86] These delegations contended that the adoption of the draft standard would logically follow the conclusions of the JECFA and CCRVDF while also liberalizing trade by preventing the adoption of unfounded trade barriers.[87]

Those delegations opposing the adoption of the standard, as well as an observer from a non-governmental organization, Consumers Interna-

81. *See* Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.72, *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.69. The Appellate Body did not address the issue of non-consensus decisions by the relevant international organizations in its report for the beef hormone dispute.

82. *See* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 1.10.

83. H. Allen Tucker, Michigan State University, Department of Animal Science, *Safety of Bovine Somatotropin (bST)*, at 1, (visited Aug. 11, 1998) <http://www.canr.msu.edu/dept/ans/mdrx224.html>.

84. *Id.*

85. *See Codex 22nd Report*, *supra* note 71.

86. *Id.*

87. *Id.*

tional, claimed that new evidence demonstrated that the administration of BST can increase the likelihood of viral and bacterial infections and mastisis in cattle, which could lead to the further usage of antibiotics in dairy cattle.[88] Delegations also argued that factors besides science should be taken into consideration, and the delegation of the Netherlands, representing the views of the European Communities' member countries, as well as the observer from Consumers International, claimed that consumers were opposed to the use of BST.[89]

Upon a motion of the Netherlands, a vote was held to postpone the consideration of the adoption of the proposed BST maximum residue level pending the reevaluation of the scientific information and an examination of other factors, most likely including consumer preferences.[90] This resolution passed with 38 members voting for it, 21 delegations against it, and 13 countries abstaining.[91] The member states of the European Communities, as well as most countries seeking admission to the European Communities, voted in favor of the resolution while the United States, Canada, Australia, and New Zealand were among the countries opposing its adoption.[92]

b. Natural Mineral Waters.

Discussions on a draft standard for natural mineral waters at the Twenty-Second Session of the Codex were also controversial and resulted in a close vote. As reported out of the Codex Committee on Natural Mineral Waters in October 1996, this draft standard did not permit microbial treatments of natural mineral water.[93] Instead, the draft standard comported with the traditional means of producing natural mineral waters in Europe, a process which protects the purity of water by bottling it at its source.[94] Some delegations supporting the adoption of the standard stated that they would not oppose the creation of another standard for bottled waters besides "natural mineral waters."[95] Countries opposing the adoption of the draft natural mineral water standard, such as Japan, expressed concerns about an international standard that would prohibit the use of microbial treatments as certain conditions, presumably including water quality, vary throughout the world.[96]

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*

Perhaps recognizing the influence of the European Communities over countries seeking admission to it, Japan requested that secret ballots be used when a roll call vote was proposed for this draft standard, but Japan's proposal was rejected by a show of hands.[97] In the actual vote on the adoption of the proposed standard, some 33 countries voted for the resolution while 31 voted against it, and 10 delegations abstained.[98] The member states of the European Communities and most other European countries voted in favor of the draft standard.[99]

Following the vote, the delegates of 16 countries expressed their reservations about this new standard.[100] The United States issued a statement denouncing it as a possible threat to public health and a non-tariff trade barrier as it imposes restrictive requirements on the bottling of water.[101] The vote on natural mineral waters also caused several delegations to reiterate that the Codex should attempt to reach major decisions through consensus.[102]

After the adoption of the standard for natural mineral waters, the Codex assigned the Committee on Natural Mineral Waters with the task of developing a draft standard for packaged water other than natural mineral waters.[103]

C. Future Codex Standards.

It is likely that non-consensus decisions will become more common in the standard-setting process of the Codex.[104] With the heightened importance of Codex standards, the circle of those who follow this body closely has grown beyond scientists and select government officials and now includes others, most notably environmentalists and consumer advocates. The Codex is in the process of formulating draft standards on genetically modified organisms (GMOs), and GMOs will almost cer-

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* While the panels in the beef hormone disputes found no requirement for standards to be consensually agreed upon, a future WTO panel may or may not be asked to consider the consistency of standards decided by simple majority voting in these non-WTO entities with Articles IX and X of the Agreement Establishing the World Trade Organization.

103. *See Codex 22nd Report, supra* note 71.

104. Further examples of non-consensus decisions of this international body might be provided at the next Codex session. The Twenty-Third Session of the Codex will begin in Rome on June 28, 1999. *Source:* Codex Alimentarius Commission, *Timetable of Codex Sessions 1998-1999*, (visited Aug. 4, 1998) <http://www.fao.org/WAICENT/FAOINFO/ECONOMIC/ESN/codex/timetab.htm>.

tainly become one of the next areas of controversy in the Codex.[105] Proponents and opponents of foods obtained through biotechnology are likely examining how they might be able to attain their goals through the Codex process.

V. The International Plant Protection Convention.

While the Codex has experienced controversy surrounding the adoption of some of its standards since the implementation of the SPS Agreement, the IPPC is undergoing a major structural change to prepare it for its new responsibilities in the world's trading system as a result of the SPS Agreement.

A. Background on the IPPC.

The IPPC came into force in 1952, and some 105 countries were contracting parties to it as of November 1997.[106] According to Article I of the IPPC, the purpose of this organization is to secure "common and effective action to prevent the spread and introduction of pests of plants and plant products and to promote measures for their control."[107] The IPPC was amended in 1979, and the amended text became operative in 1991.[108]

A Secretariat was established for the IPPC in 1989 by the FAO Conference, but the Secretariat did not begin functioning until 1993 during the Uruguay Round.[109] The purpose of the Secretariat is to coordinate international efforts concerning plant quarantine issues, to compile information concerning plant pest outbreaks, and to provide technical assistance to members on phytosanitary issues.[110] Like the Codex, the

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105. *See Codex 22nd Report*, *supra* note 71. *See also* U.S Department of Agriculture, Food Safety and Inspection Service, U.S. Codex Office, *Draft United States Comments, Proposed Draft Recommendations on the Labeling of Foods Obtained through Biotechnology*, (visited Dec. 18, 1997) <http://www.usda.gov/fsis/codex/biotech.htm>.

106. Food and Agricultural Organization of the United Nations, Conference, 29th Session, *Revision of the International Plant Protection Convention*, C 97/17 at 1 (Nov. 18, 1997).

107. With a minor exception, a comma between "plant products" and "and to promote," the purpose of the IPPC as proposed in the 1997 text is identical to the one found in the 1979 text.

108. Food and Agricultural Organization of the United Nations, *Secretariat of the International Plant Protection Convention*, (visited Aug. 11, 1998) <http://www.fao.org/ag/agp/agpp/pq/secretar.htm>.

109. *Id.*

110. Food and Agricultural Organization of the United Nations, *FAO technical assistance and the Uruguay Round Agreements* 14-15 (1997); Food and Agricultural Organization of the United Nations, *Activities* (visited Aug. 11, 1998) <http://www.fao.org/ag/agp/agpp/pq/Activit.htm>.

IPPC Secretariat is located in Rome and operates under the aegis of the FAO.[111]

Another major function of the IPPC Secretariat is to coordinate the implementation of the IPPC through its nine regional organizations.[112] These organizations are the Asia and Pacific Plant Protection Commission, the Caribbean Plant Protection Commission, the Comite Regional de Sanidad Vegetal para el Cono Sur, the European and Mediterranean Plant Protection Organization, the Inter-African Phytosanitary Council, the Junta del Acuerdo de Cartagena, the North American Plant Protection Organization, the Organismo Internacional Regional de Sanidad Agropecuaria, and the Pacific Plant Protection Organization.[113] Some of the regional organizations of the IPPC have traditionally been more active in establishing international phytosanitary standards, albeit regional ones, than the IPPC Secretariat itself.[114]

B. Revision of the IPPC.

Of the three international organizations named in the SPS Agreement, the IPPC is currently the least prepared to fulfill the role envisioned by the WTO. Recognizing this, the FAO Conference decided in 1995 to amend the IPPC to adapt it to the new responsibilities anticipated for it in the SPS Agreement.[115] In 1996, an Expert Consultation proposed a revised draft of the IPPC, which was distributed to contracting parties for comments.[116] After a review by members of the IPPC, a proposed revised convention was presented to the IPPC Conference in Rome in November 1997.[117] The revised IPPC will go into ef-

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111. Food and Agricultural Organization of the United Nations, *Secretariat of the International Plant Protection Convention,* (visited Aug. 11, 1998) <http://www.fao.org/ag/agp/agpp/pq/secretar.htm>.

112. Food and Agricultural Organization of the United Nations, *Regional Cooperation,* (visited Aug. 11, 1998) <http://www.fao.org/ag/agp/agpp/pq/RegCoop.htm>.

113. *Id.*

114. For example, the North American Plant Protection Organization, which was founded in 1976 and is comprised of plant quarantine officials of Mexico, Canada, and the United States, has traditionally been active in creating non-binding phytosanitary standards, such as risk assessment and export certification standards. Comments of Jean Hollebone, Executive Committee Member for Canada to the North American Plant Protection Organization (NAPPO), North American Plant Protection Organization: *Abstracts of the 21st Annual Meeting and Colloquium on Quarantine Security*, Bulletin No. 15, at 3 (Oct. 24, 1997); *See also* NAPPO, *NAPPO – The North American Plant Protection Organization: Its Purpose, Goals, Projects, and Policies*, (visited Aug. 11, 1998) <http://www.nappo.org/brochure_E.htm>.

115. *See Revision of the International Plant Protection Convention, supra* note 106, at 1.

116. Food and Agricultural Organization of the United Nations, *News and Events*, (visited Aug. 11, 1998) <http://www.fao.org/ag/agp/agpp/pq/News.htm>.

117. *See generally Revision of the International Plant Protection Convention, supra* note 106, at 1.

fect after two-thirds of the IPPC's contracting parties approve it.[118] Amendments that are deemed to create new obligations for members will go into force for each contracting party upon acceptance of such amendments.[119]

The most significant change proposed in the amendments is the creation a new standard-setting focus for the IPPC.[120] The IPPC itself does not contain provisions relating to the establishment of standards. Instead, an ad hoc standard-setting process, which is viewed by many as unsatisfactory, was developed in 1993 for the IPPC and was approved by the FAO Conference.[121] Consequently, unlike the Codex and the OIE, the IPPC does not have an extensive history of establishing new standards. The revisions will provide the IPPC with the structure and the capability to become a major standard-setting organization like the Codex and the OIE.

The amendments propose other notable changes to the IPPC. While the provisions of the current IPPC do not mention a Secretariat, the suggested revisions do.[122] The proposed revisions also codify within the IPPC some of the principles of the SPS Agreement, such as the use of risk assessments, pest free areas, and harmonization.[123] Both the current and proposed amended conventions contain non-binding dispute settlement mechanisms.[124]

With its new standard-setting focus, the decisions of the IPPC could possibly become more controversial as has occurred with some Codex decisions. Indeed, the Secretariat of the IPPC expressed concerns during the IPPC revision process that trade matters were possibly being viewed as more important than plant health issues.[125] However, block voting within the revised IPPC might be less effective than within the Codex. Under Article X.5 of the proposed revised IPPC, if consensus cannot be reached on a matter that comes before the IPPC's Commission on Phytosanitary Measures, decisions will be made by a two-thirds majority, not by a simple majority.[126]

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118. *See Revision of the International Plant Protection Convention, supra* note 106, at 2.

119. *Id.*

120. *Id.* at 12.

121. *Id.* at 1, 3.

122. *Id.* at 14.

123. *Id.* at 6.

124. *Id.* at 14.

125. World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 8-9 October 1996: Note by the Secretariat*, at 10, G/SPS/R/6 (Nov. 14, 1996).

126. *See Revision of the International Plant Protection Convention, supra* note 106, at 13.

VI. The International Office of Epizootics.

Unlike the Codex and IPPC, the OIE has not experienced major changes in either its standard-setting process or its structure since the implementation of the SPS Agreement in 1995.

A. Background on the OIE.

The OIE coordinates studies of animal diseases, informs governments of animal diseases, and assists in the harmonization of regulations involving the trade of animals and animal products.[127] It was created in 1924 and is based in Paris.[128] As of May 1998, some 151 countries were members of this organization.[129] The OIE differs from the Codex and IPPC in that it does not operate under the auspices of the FAO of the United Nations.

The International Committee of the OIE meets at a minimum once a year.[130] This committee, which is comprised of all delegates, approves new standards of the OIE.[131] The OIE has five regional commissions that encourage cooperation on animal health issues in their respective geographical areas.[132]

The OIE is the oldest veterinary association in the world and is similar to the Codex in that it too has a long history of establishing advisory international standards.[133] OIE standards are found in the OIE's *Code*, which lists standards for international trade, and *Manual*, which provides the standard diagnostic procedures for animal diseases as well as vaccine standards related to international trade.[134] The Fish Diseases Commission of the OIE issues a separate *Code* and *Manual* pertaining to aquatic life.[135]

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127. International Office of Epizootics, *The OIE: The World Organization for Animal Health* (visited Aug. 11, 1998) <http://www.oie.int/overview/a_oie.htm>.

128. *Id.*

129. *Id.*

130. International Office of Epizootics, *Structure of the OIE* (visited Aug. 11, 1998) <http://www.oie.int/overview/a_struc.htm>.

131. *Id.*

132. *Id.*

133. U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Organizational and Professional Development, International Services - Trade Support Team (1997).

134. International Office of Epizootics, *International Standards* (visited Aug. 11, 1998) <http://www.oie.int/Norms/A_norms.htm>.

135. *Id.*

B. The OIE Since Implementation of the SPS Agreement.

The OIE has undergone relatively few changes since the implementation of the SPS Agreement in 1995. Unlike the Codex, the OIE has not to date experienced significant controversy when creating standards. This lack of controversy can be attributed in part to the nature of the risks which the OIE addresses; the establishment of standards for animals and animal products does not evoke the same concerns for most people as do the standards of the Codex, which relate to human health.[136] And in contrast to the IPPC, the OIE prior to the Uruguay Round Agreements was well suited to establish new standards, so the OIE was not in need of revision.

Perhaps the most significant action of the OIE since 1995 has been the formalization of the relationship of the WTO and the OIE through an exchange of letters.[137] These letters state in part that the OIE and WTO agree to consult regularly on matters of mutual interest; to be invited to and to participate in relevant meetings held by one another; to exchange information on a regular basis; and to assist in providing technical assistance to developing countries.[138] The agreement proposed in these letters was approved by the OIE's International Committee in May 1997[139] and by the General Council of the WTO in October 1997.[140]

C. The OIE and Impending Disputes.

While the profile of the OIE is possibly lower than those of the Codex and IPPC when considering changes to these organizations since the implementation of the SPS Agreement, the function of the OIE in the WTO system was demonstrated in the Australia-salmon dispute. The prominence of this international organization in resolving trade disputes will most likely increase in the near future. Bovine spongiform en-

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136. Although the OIE monitors and establishes standards for animal health, its standards can also indirectly impact humans. For example, the OIE monitors for bovine spongiform encephalopathy (BSE) as this disease is carried by cattle. At the same time, however, the OIE's regulations concerning BSE also affect humans as its regulations apply to cattle products, which are ultimately consumed by humans.

137. World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 29-30 May 1996: Note by Secretariat*, at 2-3, G/SPS/R/5 (July 9, 1996).

138. *See* World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Draft Agreement Between the World Trade Organization and the Office International des Epizooties*, G/SPS/W/61 (May 22, 1996).

139. World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Decisions Relevant to the SPS Agreement Taken by the OIE International Committee at the 65th General Session*, at 1, G/SPS/GEN/24 (July 9, 1997).

140. World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Report (1997) of the Committee on Sanitary and Phytosanitary Measures*, at 1, G/L/197 (Oct. 27,1997).

cephalopathy (BSE), also known as "mad cow disease,"[141] has significantly impacted the international trade of live cattle and beef products, and this disease could lead to conflicts involving the WTO.

One such dispute that could result in WTO challenges concerns the European Communities' proposal to ban the use of "specified risk materials" (SRMs) that might pose risks regarding transmissible spongiform encephalopathies.[142] The European Communities has based its proposal in part upon OIE standards which state that certain materials, such as bovine brains and spinal cords originating from countries with cases of BSE, should not be traded internationally.[143] Such a ban by the European Communities could restrict billions of dollars worth of U.S. pharmaceutical exports to Europe as many pharmaceutical products are encased in gelatin capsules composed partly of SRMs.[144] U.S. officials have claimed that the European Communities' prohibition of such products from the United States is not scientifically justified, and thus violates the European Communities' obligations under the SPS Agreement, as the United States regularly monitors for BSE according to OIE guidelines.[145] The future of the European Communities' proposed ban is in doubt due to questions of EC member states regarding the risks of BSE in SRM products.[146] As a result of concerns of EC member states, as well as those of the United States, the European Communities has delayed the implementation of its SRM proposal, and a decision on the proposal might be made in 1999.[147] The OIE is in the process of examining such risks, and any new EC policy on SRMs would likely reflect the OIE's opinion.[148]

European countries might take issue with the U.S. policy of restricting the importation of live cattle, meat, and meat products from European countries where BSE might be present, yet has not been detected.[149] The United States implemented such a policy in 1998 as it contended that some European states either have less restrictive import

141. International Office of Epizootics, *65th Annual General Session of the International Committee of the Office International des Epizooties* (May 30, 1997).

142. *Barshefsky Letter on SRM Ban*, INSIDE U.S. TRADE, Sep. 19, 1997.

143. *European Commission Decision on Animal Products*, INSIDE U.S. TRADE, August 15, 1997.

144. *Barshefsky Letter on SRM Ban*, INSIDE U.S. TRADE, Sep. 19, 1997.

145. *Id.*

146. *Unanimous EU Council Vote Means End to SRM Ban in Short Term*, INSIDE U.S. TRADE, Apr. 3, 1998.

147. *EU Likely to Delay SRM Ban Again to Continue Preparing New Regime*, INSIDE U.S. TRADE, Nov. 6, 1998.

148. *Id.*

149. *See* Restrictions on the Importation of Ruminants, Meat and Meat Products From Ruminants, and Certain Other Ruminant Products, 63 Fed. Reg. 406 (1998).

laws than the United States or fail to monitor adequately for this disease. OIE standards concerning BSE could potentially become an issue in such a dispute.

VII. Conclusion.

The SPS Agreement of the WTO has expanded the visibility of the Codex, IPPC, and OIE in the international trading system. The SPS Agreement encourages WTO members to base their SPS measures upon the standards of these organizations. The Codex and OIE are currently well situated to perform the roles provided for them in the SPS Agreement. Although the IPPC in its present form is capable of fulfilling the responsibilities given to it in the SPS Agreement, the IPPC's proposed revisions, if approved, would facilitate the IPPC's ability to support the WTO system.

As demonstrated by the EC-beef hormone, Australia-salmon, and Japan-agricultural products decisions of the WTO, the settlement of major international trade disputes can turn at least in part upon the standards of the Codex, IPPC, and OIE as these organizations' standards are viewed as international benchmark standards under the SPS Agreement. With the heightened importance of international standards, the standard-setting process of the Codex has become more controversial, and consensus on its new standards can no longer be assumed. The establishment of standards by the IPPC and OIE in the future might also become more political, and possibly less scientific, as an indirect result of the SPS Agreement. Such a trend might ultimately damage the credibility of the Codex, IPPC, and OIE.

It is unclear how great a role the specific trade agendas of member countries, as opposed to scientific evidence, might affect the development of future standards. All three organizations have lengthy approval processes for new standards, which should prevent the adoption of numerous scientifically questionable standards. In addition, although delegates to these organizations are government officials, they are scientists as well, and their professional integrity as well as the goodwill that has developed among them when working together might also limit the potential of the Codex, IPPC, and OIE to create standards that are scientifically unsound.

Although the possible increased politicization of the standard-setting processes of these organizations is regrettable, it is perhaps inevitable. Under the SPS Agreement, the outcome of international trade disputes can be influenced by the conformity of a WTO member's SPS measures with international standards. Therefore, one can expect that

many governments, to the extent they can, will try to protect their current or possible future SPS measures. This will likely lead to less consensus within the Codex, IPPC, and OIE than existed during the time prior to the implementation of the SPS Agreement. If lack of consensus becomes the norm, the harmonization objective will likely be harmed. Such a development may lead to increased calls for consensus standard-setting within the three entities.

SADDAM HUSSEIN AS HOSTES HUMANI GENERIS? SHOULD THE U.S. INTERVENE?

By Professor Edieth Y. Wu, J.D., LL.M.*

INTRODUCTION

This article discusses several jurisdictional principles which may assist the United States in its efforts to acquire jurisdiction in certain situations that are declared, by the United States, egregious enough to warrant intervention. The United States has long used the "effects doctrine"[1] to assert extraterritorial jurisdiction. This article concentrates on developing and employing the Hostes Humani Generis Theory,[2] and its past and possible future use. The central focus is to determine whether the possibility exists that the United States may use the theory in an effort to acquire physical jurisdiction over Saddam Hussein.

A survey, though not comprehensive, of U.S. activity and approach to justice under the auspices of the Hostes Humani Generis Theory or parallel theories and the tools used to effect its edicts is also developed.[3] The lack of proper fora to pursue international disputes, the need for and efforts to develop a supranational tribunal,[4] and international reaction, lack of support and defiance to this activity,[5] are also critiqued. Finally, a conclusion is drawn that highlights U.S. aggressive use of the Hostes Humani Generis Theory in the extraterritorial context and the continued overt lack of support from the international community. Several suggestions are detailed to curb continued use of the United States' extraterritorial jurisdiction under the theory of Hostes Humani Generis or other parallel approaches[6]

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* Attorney Edieth Y. Wu is a member of the Texas Bar. Attorney Wu teaches at Thurgood Marshall School of Law, Texas Southern University. The author wishes to thank God, her sisters, Suzanne Crockett and Mary Salazar, TMSL Librarians, Anga Spearman, her research assistant Jackie Fleming, and the TMSL faculty and staff.

1. The "effects" doctrine allows the U.S. to assume extraterritorial jurisdiction to regulate U.S. commerce. *See* American Banana Co. v. United Fruit Co., 213 U.S. 347, 354-55 (1909), explaining that the "intended effects test is a legitimate basis of jurisdiction when defendant's conduct abroad is intended to result in substantial, direct, and foreseeable effects on U.S. domestic or foreign commerce). *See* United States v. Aluminum Co. of America, 148 F.2d 416, 416 (2d Cir. 1945) *(Alcoa)* (explaining that the intended effects test is a legitimate basis of jurisdiction to regulate economic conduct abroad when the defendant intends market effects inside U.S.).

2. *See infra* notes 7-39 and accompanying text, *passim*.

3. *See infra* notes 30-148 and accompanying text.

4. *See infra* notes 149-202 and accompanying text.

5. *See infra* notes 203-263 and accompanying text.

6. *See infra* notes 263-276 and accompanying text.

THE HOSTES HUMANI GENERIS THEORY

Hostes Humani Generis[7] ("HHG") is defined as an "enem[y] of the human race." The phrase Hostes Humani Generis refers to a theory prominent in the late 18th and early 19th century law of nations. Its essence was that certain acts specified as universally reprehensible would make the perpetrator liable to capture and trial wherever he went. The principal, though by no means the only, application of Hostes Humani Generis was to pirates.[8] Piracy was included not simply because it usually occurred on the high seas, and outside the territorial jurisdiction of any sovereign, but because of its internationally recognized nature as a heinous threat to the common safety. The doctrine was not limited to pirates exclusively, however, because it applied also to land-based offenders whose culpable acts earned them recognition as enemies of civilization everywhere.[9] "Pirates were merely a type, albeit a pervasive one, of universal offender."[10] "Although the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundation of their common safety. Thus pirates are sent to the gibbet by the first into whose hands they fall"[11] The United States has long invoked the practice of assuming jurisdiction over piracy on the high seas, that is out of the jurisdiction of any particular state. The United States tried one such pirate for piratical acts upon the high seas against persons who were subjects of Spain.[12] The U.S. position was, and still is, not to allow such actors to evade justice. Today, this position extends far beyond piratical acts.

Early in its history, the United States also tried to influence international law – law of nations – when it attempted to abolish the slave trade and, thus, declared the act piracy.[13] A Spanish ship was seized by an American revenue cutter and coerced into an U.S. port and ultimately

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7. BLACKS LAW DICTIONARY 664 (5th ed. 1979).

8. Jeffrey M. Blum and Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala* 22 HARV. INT'L L. J. 53 (1981) *citing* United States v. Klintock, 18 U.S. (5 Wheat) 144 (1820).

9. *Id., quoting* E. DE VATTEL, THE LAW OF NATIONS, 232-233 (5th ed. 1849).

10. *Id.*

11. *Id.* at fn. 36, *quoting* E. DE VATTEL, THE LAW OF NATIONS 232-233 (5th ed. 1849).

12. United States v. Palmer, 16 U.S. 610, 611 (1818) (Established that the U.S. has jurisdiction when the act, murder or robbery, would be punishable in the U.S.).

13. Slave Trade Act, ch. 22, 2 Stat. 426 § 7 (1807).

into a U.S. court.[14] Although the United States was also engaged in slavery at this time,[15] it nevertheless resisted claims for restitution upon the ground that the persons in question were not by law (U.S. law) to be considered slaves, but free. The United States asserted that U.S. laws were proper and not the laws of Spain. The United States argued that its national policy dictated this result.[16] "The acts of Congress provide that, however brought here [slaves to America], they shall be set free, and sent back to their native land."[17] The United States also asserted that it would assume jurisdiction over such instances where pirates were brought before its courts regardless of how the pirates were brought to U.S. shores, and further that the action constituted a pledge to all nations engaged in the slave trade activity that the United States was committed, even if jurisdiction was not clear, to asserting its long arm jurisdiction.[18] This pledge continues because the United States extends jurisdiction extraterritorially by using its articulation of what actions "effect" the United States.[19]

The United States went as far as it could, nationally, to abolish the slave trade. Articulations of what the law should be and U.S. vigor in this area was highly criticized,[20] and some of the sentiments about double standards still ring true today, a façade of "false legalism."[21]

"The common denominator of Hostes Humani Generis seems to have been the magnitude of the threat posed by the acts, coupled with the universality of condemnation of the acts. The effect of the doctrine was to hold individuals liable, both civilly and criminally, for violations. When wrongdoers violated the law of nations their liability followed them everywhere. It was unimportant whether their acts had any connection with the forum state, as all nations had a duty to enforce international law. There was no doubt that United States courts, for example, were competent to try foreign nationals who committed acts of universal

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14. *The Antelope*, 23 U.S. 66, 106 (1825).

15. U.S. CONST. amend. XIII (The U.S. did not emancipate the slaves until 1865).

16. *The Antelope*, 23 U.S. at 71.

17. *Id* at 71.

18. *Id.* at 72. *See* Slave Trade Act, *supra* note 13, at § 7 (made no distinction as to the national character of ships even if found outside U.S. waters the ship was automatically forfeited).

19. *See supra* note 1.

20. *Id.* at 86. ("For more than twenty years this traffic was protected by your constitution, exempted from the whole force of your legislative power, its fruits yet lay at the foundation of that compact. The principle, by which you continue to enjoy them, is protected by that constitution, forms a basis of your representatives, is infused into your laws, and mingles itself with all the sources of authority. Relieve yourself of these absurdities, before you assume the right of sitting in judgment on the morality of other nations. But this you can not do").

21. Yamashita v. Styler, 327 U.S. 1, 30 (1946).

culpability outside the United States."[22] Even though the doctrine declined in use when nations adopted the notion that international law only applied to nations' conduct,[23] the United States has maintained and pursued the notion that U.S. courts not only have the power to, ordinarily, but also the obligation to decide "cases and controversies."[24] Additionally, the U.S. Congress has the power to define and punish. . .offenses against the Laws of Nations.[25] Therefore, the U.S. continues to extend jurisdiction, in a myriad of circumstances, when it determines that an act poses threats, which should be construed as "universally culpable"; thus, U.S. courts have the obligation to decide the issue even if the acts occurred outside the United States.

The universality principle[26] is very similar to the Hostes Humani Generis Theory. According to the universality principle, "a state may exercise jurisdiction with respect to certain specific universally condemned crimes, principally piracy, wherever and by whomever committed, without regard to the connection of the conduct with that state."[27] In some instances the crime is so universally condemned that the perpetrator is an enemy of all people; therefore, the nation with custody can try and punish him.[28] The problems with classifying an individual or administration as "HHG" are the lack of an adequate definition and international acceptance of what constitutes an "enemy" and ambiguity as to when the behavior warrants applying the label or, ultimately, pursuing jurisdiction.

Acts of aggression are rapidly coming into focus in the international area. By the standard of contemporary international law, terrorists are [also] known as *Hostes Humani Generis*, common enemies of humankind.[29] The United States has included torture[30] as an activity that violates universally accepted norms of international law of human rights, regardless of the nationality of the torturer, and, thus whenever an al-

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22. *Supra* note 8, at 61.

23. *Id.*

24. U.S. CONST. art. III, § 2, cl. 1.

25. *Id.* at. art. I, § 8, cl. 10.

26. S. HOUSTON LAY AND HOWARD J. TAUBENFELD, THE LAW RELATING TO THE ACTIVITIES OF MAN IN SPACE (1970) (Discussing traditionally accepted forms of jurisdiction, universality, territoriality, protective, etc.).

27. *Id.*

28. Matter of Extradition of Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985).

29. Louis Rene Beres, *Assassination of Terrorists May Be Law-Enforcing – A Brief According to International Law* (visited June 29, 1998) <http://www.freeman.io.com/m_online/nov97/beres2.htm>.

30. United Nations Declaration on The Protection of All Persons From Being Subjected to Torture, General Assembly Resolution 3452, U.N. GAOR Supp. No. 34, 91 U.N. Doc. A/1034 (1975).

leged torturer is found and served with process by an alien who is in the United States, U.S. federal courts have jurisdiction.[31]

Accordingly, citizens of Paraguay were allowed to sue a Paraguayan citizen in U.S. courts for wrongfully causing the death of their son, allegedly by the use of torture. The plaintiffs claimed that this act was done in retaliation for the father's political views.[32] The U.S. court assumed jurisdiction even after the defendant's Paraguayan counsel vehemently averred that Paraguayan law provided a full and adequate civil remedy for the alleged wrong.[33]

U.S. courts also have jurisdiction to try aliens for conspiracy to smuggle drugs into the United States.[34] The Courts have interpreted this to mean that the defendant does not have to ever have been in the United States For example, an alien was charged with conspiracy to import drugs into the United States and the Court assumed jurisdiction over the matter.[35]

Terrorism has been defined as the substitute application of violence or threatened violence intended to sow panic in a society to weaken or even overthrow the incumbents and to bring about political change.[36] It shades into 'guerrilla warfare.'[37] "In its long history terrorism has appeared in many guises; today society faces not one terrorism but many terrorisms."[38] These types of activities are recognized as crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions of political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the coun-

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31. Alien Tort Statute, 28 U.S.C.A. § 1350 (1948) (The statute allows aliens to sue in U.S. courts for torts, including torture, committed in other sovereigns' territories).

32. Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980).

33. *Id.* at 877.

34. 21 U.S.C. § 960 (1981).

35. Marin v United States, 352 F.2d 174 (5th Cir. 1965). *See* Rocha v. United States, 288 F.2d 545, *cert. den.* 366 U.S. 948 (U.S. court used the protection principle to assert jurisdiction over a crime committed by an alien while abroad a ship. Highlighted extraterritorial effects of U.S. law).

36. Walter Laquer, *Postmodern Terrorism*, FOREIGN AFF., Sept.-Oct. 1996, at 25 (Discussing modern examples of terrorist activity).

37. Tom Wells, *Why We Would Do Well to Ape Mao's Guerrilla Tactics*, MARKETING, April 17, 1997, at 18 (The word 'guerrilla' derives from the Spanish term for 'little soldier' – usually uses fire and maneuver tactics to harry the enemy. According to Mao Zedong, among other things, it "oppose[s] fixed battle lines and positional warfare and favour[s] fluid battle lines and mobile warfare.").

38. *See supra* note 36 at 25.

try where perpetrated.[39] The United States defines what types of behavior must be prosecuted and proceeds accordingly; these definitions are analogous to "HHG."

A great deal of controversy regarding the long arm of U.S. jurisdiction arose as a result of the court martial, by U.S. military court, of General Yamashita,[40] after the cessation of the war. Here the United States construed an ambiguity—whether the charge against the petitioner stated a recognized violation of the law of war and whether the U.S. court was the proper forum—in the light most favorable to the United States. Therefore, after concluding in the affirmative, the United States used this construction, and rushed to prosecute Yamashita after his writ of habeas corpus was denied.[41] The court was not only criticized for denying Yamashita his due process rights but was also criticized that popular passion or frenzy of the moment influenced its decision. Yamashita was the leader of an army that had been totally destroyed by the United States. Many casualties and violent acts of war took place. He voluntarily surrendered. At that point he was entitled to all the proper procedures of a fair trial and to be free from charges of legally unrecognized crimes that would serve only to permit his accusers to satisfy their desires of revenge. The trial was also held in an area where the United States had complete control; he was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence, and summarily sentenced to be hanged.[42]

In Yamashita's situation, the United States seemingly viewed the alleged atrocities as acts against humanity; therefore, Yamashita was an "enemy to mankind." Justice Murphy warned the Court that "the high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implication of the procedure sanctioned [by the Court] today. But even more significant will be the hatred and ill-will growing out of. . .this unprecedented procedure."[43] That warning continues to have merit today.

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39. *See* Charter of the International Military Tribunal, Aug. 8, 1945, 59 at. 1546, 1547, 82 U.N.T.S. 279. The United Nations General Assembly in a resolution proposed by the U.S. unanimously affirmed the principles of international law recognized in the Nuremberg Charter and Judgment. U.N GAOR, 95 at 188, UN Doc. A/64/Add.1 (1946).

40. Yamashita v. Styler, 327 U.S. 1 (1946) (Commanding General of the Imperial Japanese Army and Military Governor of the Philippines was tried and convicted for a violation of the law of war; he was classified as an enemy belligerent for failing to prevent certain acts; he was not charged with any acts).

41. *Id.* at 26, 30-31.

42. *Id.* at 27-28.

43. *Id.* at 28 (Justice Murphy dissenting).

Further, in an effort to bolster and justify its case for extraterritorially expanding its reach, the U.S. Government and the media often use terms to vilify the offender.[44] For example, President Bush referred to Noriega, Panama's head of state, as a "drug trafficker" who should get a fair trial. Dan Rather, on the CBS Evening News, called the General "scum" and "a thug." Peter Jennings on ABC's World News Tonight called Noriega an "odious creature."[45] Noriega was later prosecuted in U.S. court for his activities.[46] Saddam is perhaps the closest analogy to Noriega. For example, Saddam, the central focus of this article, has been called a menace, among other things.[47] Saddam has been compared to Hitler and also called a war lover.[48] "Like a vampire, the war lover feeds on the blood of the living.[49] President Bush even said that Saddam was "worse than Hitler."[50]

Yugoslavia's President Slobadan Milosevic was referred to as "an international pariah."[51] The classifying continues: Iran, Libya, North Korea, Cuba, and especially Iraq are often referred to as "The World's Six Rogue States."[52] Iran and Iraq are not only considered rogues but also "Pariah States."[53] Washington has also classified Iran "as one of the chief threats to global security."[54]

When Saddam threatened to burn Israel, the U.S. publicly called Iraq's human rights practices "abysmal."[55] As a result of this aggression, "some [U.S.] officials wanted to do more [than threaten] and proposed putting Iraq back on the terrorist list."[56] Americans are openly

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44. PAT M. HOLT, SECRET INTELLIGENCE AND PUBLIC POLICY – A DILEMMA OF DEMOCRACY 172 (The media is important because, "In simplest terms the government wants the news presented in a way that reflects credit on the government. To this end the government tries mightily to influence, if it cannot control, what flows through the channel that the media provide between the government and the public, because this is what shapes public attitude toward government. In the fashionable phrase of the 1990s, the government seeks to put a spin on the news. The media view these efforts as directed toward distortion and concealment, they consequently believe it is their job, even their responsibility, to disclose these efforts.).

45. Richard Fricker, *Dealing With The Maximum Leader*, J.A.B.A. Apr. 1990, at 54, 56 .

46. Noriega v. United States, 118 S.Ct. 1389, 140 L.Ed.2d 648 (1998).

47. Steven J. Thomma, *U.S. Finding Its Roar Lack Bite in Recent Foreign Upheavals*, HOUSTON CHRON., May 22, 1998, at 36 A.

48. JOHN E. STOESSINGER, WHY NATIONS GO TO WAR 182 (6th ed. 1993).

49. *Id.* at 182.

50. J.F.O. McAllister, *The Lessons of Iraq*, TIME, Nov. 1992, at 57.

51. *Kosovo's Cauldron Bubbles On*, THE ECONOMIST, June 20-26, 1998, at 57.

52. Lawrence F. Korb, *Our Overstuffed Armed Forces*, FOREIGN AFF., Nov.-Dec. 1995, at 22, 25. .

53. Jeffrey E. Garten, *Business and Foreign Policy*, FOREIGN AFF., MAY-JUNE 1997, at 67.

54. Graham E. Fuller and Ian O. Lesser, *Persian Gulf Myths*, FOREIGN AFF., Mar.-June 1997, at 47.

55. *See* McAllister, *supra* note 50, at 57.

56. *See* McAllister *supra* note 50, at 58

discussing the possibility of not only threatening to treat Saddam as "an enemy to mankind" (Hostes Humani Generis) and in the traditional sense bring him to justice but are also discussing assassination. In certain circumstances political assassination is a moral act. If the attempt on Hitler's life in July 1944 had succeeded, the world would have been spared oceans of blood and tears. And if Saddam Hussein had been removed before 1990, two wars might have been averted. Hitler was Nazi Germany, and *Saddam still is Iraq today*. As long as he survives in power, civilization is in danger.[57] "The Iraqi leader isn't going away. That means assassination may be Clinton's best option."[58] "Relaxing the moral norm against it [assassination] is a regrettable but justifiable price to pay when confronted with someone like Saddam who is unique in his capacity to inflict evil on his own people and the rest of the world. It's one of the extremely rare circumstances where killing can be a *humanitarian* act that saves far more lives than it risks."[59] Former CIA director, Robert Gates, said that assassination is a "non-option [only] because Saddam is so elusive and well protected."[60] A targeted air strike against the homes or bunkers where Saddam is most likely to be found has also been strongly suggested.[61] "If we can kill Saddam we should."[62] The United States is also concerned about other activities that are against "humanity," and often takes measures to suppress them.

Terrorism and tyranny are often grouped together. Terrorist acts around the world are of great interest and concern to the United States. This is not only because the U.S. economic, ideological, military, technological, and cultural primacy are overwhelming,[63] but also because the United States often intervenes with threats and other methods to effectuate compliance to combat many international problems that are actually crimes against humanity: terrorism, tyrants, human rights violations, and its general concern about deterring aggression, especially in the area of controlling weapons of mass destruction. The United States, therefore, "need[s] to check the capabilities of terrorist groups and states that support terrorism."[64] The United States must pre-empt this activity by denying them funds, arms or safe havens and deal with it forcefully to

57. JOHN G. STOESSINGER, WHY NATIONS GO TO WAR 205 (6th ed. 1993).
58. George Stephanopoulos, *We Should Kill Saddam*, NEWSWEEK, Dec. 1, 1997, at 34.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. Samuel Huntington, *The Erosion of American National Interest*, FOREIGN AFF., Sept.-Oct. 1997, at 42.
64. R. JAMES WOOLSEY, THE FUTURE OF INTELLIGENCE ON THE GLOBAL FRONTIER 3 (1993).

protect itself, its allies, and friends.[65] "Terrorism can be permitted to have no role to play whatever on our new global frontier. None."[66]

Tyranny is the exercise of power beyond right, nobody can have a right to: and this is making use of the power any one has in his hands, not for the good of those who are under it, but for his own private, separate advantage.[67]

Wherever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he had under his command to compass that upon the subject which the law allows not, ceases in that to be a Magistrate, and acting without authority may be opposed, as any other man who by force invades the right of another.[68]

Some of Saddam's conduct may border on tyranny – by jeopardizing the international community, he has transgressed many.

The U.S. zeal to influence democracy, suppress tyrants, and create open markets is evinced by its assistance to ease Ferdinand Marcos of the Philippines into exile[69]; the backing of the contra guerrillas in Nicaragua,[70]and the assistance to Cambodia in 1993 with its first free, fair, and comprehensive elections.[71] Also, "in July 1994 the United States successfully persuaded the UN Security Council to authorize all necessary means" to remove the coup leaders [from Haiti] and restore Aristide to the Presidency. This was a landmark: for the first time the United Nations had called for international action to restore a democratically elected leader.[72] Of course, this was due to U.S. influence and persuasion, but most of all it was due to the United States' dogged commitment to implement its version of democracy, the rule of law, and to continue its efforts to secure harmony and world peace by aggressively pursuing terrorists and tyrants wherever they are found The use of Weapons of Mass Destruction[73] (WMD) is also an area of grave concern for the United States. Sovereigns as well as fringe groups are potential dangers. The United States is committed to disarming any group or nation possessing weapons of mass destruction – as the threat to use weap-

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65. *Id.*

66. *Id.*

67. JOHN LOCKE, TREATISE CONCERNING CIVIL GOVERNMENT 71 (Josian Tucker ed., 1967).

68. *Id.*.

69. Strobe Talbott, *Democracy And The National Interest*, FOREIGN AFF., Nov.-Dec. 1996, at 53.

70. *Id.*

71. *Id.*

72. *Id.*

73. Weapons of Mass Destruction (WMD) include but are not limited to nuclear, biological, and chemical. *See* Betts *infra* note 74.

ons of mass destruction heightens, the U.S. will doubtless take more preemptive defense measures that will target potential groups and breading grounds, whether inside the United States or in Iran or Iraq.[74] When conflicts threaten U.S. interest, or when they are fueled by nations or factions that seek to obtain weapons of mass destruction, or that employ terrorist tactics, then we must understand and be prepared to deal with them.[75] "Today there are twenty-five countries – many hostile to our interests – that are developing nuclear, biological, and chemical weapons. More than two-dozen countries alone have research programs underway on chemical weapons, and Libya, Iran, and Iraq have stockpiled them."[76]

Many sources of contention exist not only with WMD but other aggressive acts. This activity may lead the United States to aggressively pursue Saddam under the Hostes Humani Generis Theory. Based on his wide range of activities, Saddam may become the example to the world if the U.S. decides to classify him and ultimately pursue him under the auspices of the "HHG" theory. Ultimately, this decision may be expedited if acts of aggression and terrorism are traced to sources that are aligned with Saddam.[77] For example, the U.S. adopted the Antiterrorism Act[78] to deter terrorism both nationally and internationally.[79]

A. United States' Approach to Justice

The U.S. has acted [often] as if the emergence anywhere in the hemisphere of a government it deems Marxist so threatens the sovereignty of this nation or its allies [or smaller more vulnerable nations] as

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74. Richard K. Betts, *The New Threat of Mass Destruction*, FOREIGN AFF., Jan.-Feb. 1998, at 26, 38.

75. *See* WOOLSEY, *supra* note 64, at 1-3.

76. *Id.*

77. *See also* Alan Cooperman, *Terror Strikes Again*, U.S. NEWS AND WORLD REPORT, Aug. 17-24, 1998, at 10 (Recent terrorist attacks on U.S. embassies prompt new fears and a vow, by the U.S., of retribution. Terrorist attacks on U.S. embassies in Kenya and Tanzania are suspected as having Arab connections. Today, a Saudi millionaire Osama Bin Ladin, is suspected of financing terror around the world. Brian Jenkins, a terrorism expert said "we deal with universes of like-minded fanatics from which emerge ad hoc conspiracies, or whose members provide the soldiers for a terrorist leader." The U.S. has attempted to apprehend Bin Laden but requesting help assistance from the Afghanistan people, but to no avail. Bin Laden issued a fatwa, religious ruling, "to kill the Americans and their allies.").

78. Antiterrorism And Effective Death Penalty Act, 104 Pub. No. 132, 10 Stat. 1214 (1996)

79. *Id* at § 702 (Acts of Terrorism Transcending National Boundaries – whoever, involving conduct transcending national boundaries . . .a) kills, kidnaps, maims, commits and assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the U.S. or b) creates a substantial risk of serious bodily injury to any other person by destroying within the U.S. or by attempting or conspiring to destroy or damage any structure, conveyance, or real or personal property . . ..Further, there is Extraterritorial Federal Jurisdiction).

to justify measures to abort or overthrow the offending regime.[80] Much of the time, this decision is a unilateral one.[81]

U.S. law has an aggressive extraterritorial reach in the area of trade, "as in attempts to penalize foreign companies for violating U.S. trade sanctions."[82] If a foreign suspect need to be brought to justice the United States has, at times, resorted to force. Using forcible means to bring international criminals to justice is not a novel one in international law, especially when dealing with situations where the offender is perceived as a threat to humankind (Hostes Humani Generis). Terrorists "are Hostes Humani Generis, common enemies to mankind"[83] "Men who are by profession poisons or incendiaries may be exterminated wherever they are caught, for they direct their disastrous attacks against all nations by destroying the foundation of common safety."[84]

For many years, the United States has routinely used speculative means, kidnapping or forcibly abducting, to bring defendants to justice. For example, Drug Enforcement Agents kidnapped a Mexican citizen who was suspected of killing an American special agent.[85] This act was committed even though the United States has an extradition treaty with Mexico.[86] These practices continue even after earlier warning "that illegal restraints are unauthorized and unjustified and unjustified by any foreign policy. . .and that commonly accepted judicial standards are to be recognized and enforced.[87]

Perhaps more vivid, the situation with former Panamanian leader Manuel Noriega epitomizes the United States' aggressive approach when it perceives that a nation or person is somehow threatening the United States' interpretation of how certain events should develop and the desired outcome. In December 1989, President Bush deployed military troops to Panama and proclaimed that "General Manuel Noriega had declared a state of war with the United States and publicly threatened the lives of Americans in Panama."[88] Even those who advo-

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80. Tom. J. Farer, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activist: Panama: Beyond The Charter Paradigm*, 84 AM. J. INT'L L. 503 (1990).

81. *Id.* at 508.

82. Charles Lane, *Changing Iran-Germany's New Ostpolitik*, FOREIGN AFF., Nov.-Dec. 1995, at 77.

83. *See* Beres *supra* note 29, at 2.

84. *Id., quoting* Nuremberg Tribunal 1945 (discussing the limited right to assassination).

85. United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992) (U.S. agents, with the help of Mexican nationals, forcibly abducted the doctor, and he was tried in U.S. court).

86. Treaty of Extradition, May 4, 1978, 31 U.S.T. 5059.

87. *Yamashita,* 327 U.S. at 30 (Murphy, J., dissenting).

88. Ved P. Nanda, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?: The Validity of United States Intervention in Panama Under International Law*, 84 AM. J.

cate the validity and viability [of humanitarian] intervention can justify only a limited and temporary unilateral necessity and proportionality in the use of force as required under customary international law. Additionally, such unilateral action is ultimately subject to community review. Thus, notwithstanding the lack of agreement on the proper interpretation of Article 51 of the UN Charter, while rescue operations of one's nationals might be considered permissible, the United States' invasion of Panama does not satisfy the minimum required standards.[89]

Even though the incidents are serious, the question remains – whether they warrant the launching of a full-scale invasion, of a size not seen since the Vietnam War? The conclusion is inescapable [to U.S. critics] that the Untied States has failed to provide sufficient evidence to prove that the "necessity prerequisite" was met.[90] Restoration of democracy, supposedly, was another reason the United States intervened in Panama. Noriega's strong-arm tactic to gain power, the roar of opposition by the Panamanian people, and ultimately Noriega's nullification of the U.S. supported election of an opposition party as Panama's President[91] were all critical cogs in the U.S. decision to use force. The United States interpreted Noriega's behavior as quite egregious; nevertheless, "no international legal instrument permits intervention to maintain or impose a democratic form of government in another state."[92] President Bush further justified intervention because the invasion was delayed until after Endara, the new President, was sworn in. Therefore, he believed that the invasion was legitimate because Endara, the puppet, immediately asked the United States for aid in restoring democracy to Panama.[93] And the United States acquiesced.

The use of force as a deterrent to certain behavior is not wise. "If democratic forces are well developed in the target state, they will likely prevail without foreign assistance; if they are underdeveloped or nonexistent, a period of foreign-dominated "tutelage" is likely to follow, which is contrary to the concept of self-determination."[94] Even though there was no direct threat that the Panama Canal was in jeopardy,[95] the United States proceeded to invade Panama. Although Noriega was

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INT'L L. 494 (1990) *quoting* Statement by The President (Dec 20, 1989) (Office of the Press Secretary, the White House).

89. *See* Nanda, *supra* note 88, at 495.

90. *See* Nanda, *supra* note 88, at 496.

91. *See* Nanda, *supra* note 88, at 498.

92. *See* Nanda, *supra* note 88, at 498.

93. *See* Fricker, *supra* note 45, at 54.

94. *Id., citing* Berry, *The Conflict Between United States Intervention And Promoting Democracy in the Third World*, 60 TEMPLE L.Q. 1015 (1987).

95. *Id.* at 501.

never, officially, declared as an Hostes Humani Generis, the evidenced established that he was treated as such. This action may open the door to pursue Saddam. Additionally, Noriega's indictment and subsequent arrest "reflects the long-standing U.S. practice of asserting extraterritorial legislative jurisdiction under the "effects" doctrine, or arguably under the "protective principle,"[96] or even more so the Hostes Humani Generis theory.

No State. . .has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.[97]

The United States often ignores this directive and also the international preference for multilateral intervention. This international preference stems from several factors: "multilateral efforts may provide a check on interventions by a single state to pursue its own ends (political, military, economic, etc.) rather than merely correcting the international outrage that may have justified the intervention. . .[and] to assure that the incident that justifies the intervention is indeed viewed by the international community as of sufficient magnitude to warrant intervention."[98] Multilateral support does not automatically mean that the desired results are met. But, the results are often counterproductive when a state acts unilaterally.

For example, after the United States intervened in Panama, its desired results were not realized.Supporters of Guillermo Endara, Panama's President, "are turning against him. Labor unrest is on the rise, and a feeling exist that the United States is replacing Noriega as the real power."[99] Nevertheless, the Noriega approach may also be used to pursue Saddam. The United States has pursued prosecution in situations that were not distinctly demarcated as falling within U.S. jurisdiction.

Perhaps the most notable commander detained by U.S. forces was Yamashita,[100]who was actually executed for war crimes committed during the Japanese occupation of the Philippines. Yamashita's case was heard before the United States Supreme Court on a writ of habeas corpus. The Court upheld the verdict and sentence, but not unani-

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96. *Id.*

97. Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361.

98. *See* Nanda, *supra* note 88, at 502.

99. Alima Guerrero, *Year-Old Democracy in Panama Insecure Despite U.S. Backing, The Commercial Appeal,* MEMPHIS ASSOC. PRESS, Dec. 20, 1990, at A4.

100. Yamashita v. Styler, 327 U.S. 1 (1947). *See supra* notes 40-43.

mously.[101] More recently, but in the same long-arm style, the United States government captured Fawaz Yunis,[102]a citizen of Lebanon, after he and several of his comrades hijacked a Royal Jordanian Airlines Aircraft in Beirut and attempted to have the plane flown to Tunis. This action further illustrates how the United States intervenes based on certain types of activity that it determines too egregious to escape adjudication. At the time he was apprehended, "Yunis was not, of course, the most important terrorist on the United States' wanted list"[103]; his acts were interpreted by the United States, not only as a threat to the United States but also as a threat to humanity (Hostes Humani Generis). U.S. interest in the flight was perhaps minimal because, of fifty-sixty passengers, only three were Americans, all of whom survived.[104] Here again, U.S. agents working in Cyprus obtained local help to lure Yunis from Lebanon to Cyprus where, in route in international waters, DEA and FBI agents arrested him.[105] Considering the extremely low number of Americans on the flight, was the United States, out of its obligation to "try cases and controversies,"[106] left with no alternative but to pursue Yunis? An increase in these types of incidents, leads one to ask "whether or not it is correct that some of the constraints of the U.S. Constitution can shed like an overcoat when officers of the United States pass the frontiers of the Republic. . .[and] whether the Constitution prohibits action abroad by U.S. officers to seize suspects and bring them by force to the United States for prosecution"?[107]

Right or wrong, these questions, doubtless, have an affirmative answer. To illustrate, in *United States v. Alvarez-Machain,*[108] the Supreme Court exercised its traditional power of treaty interpretation to adjudicate the abduction of a Mexican national by executive authority for the purpose of criminal prosecution in the United States.[109] Parties enlisted by the DEA, forcibly abducted Alvarez-Machain from his medical of-

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101. *See* Fricker, *supra* note 45, at 56.

102. United States v. Yunis, 681 F.Supp. 909 (D.D.C. 1988).

103. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution And International Law, Continued*, 84 AM. J. INT'L L. 444, (1990) (discussing U.S. tactics and other instances of capturing terrorist and other perceived criminals).

104. *Id.*

105. *Id.*

106. *See supra* note 24.

107. *See* Lowenfeld, *supra* note 103, at 460 (explaining developments in Ker v. Illinois, 119 U.S. 436 (1886), where defendant was forcibly arrested in Peru, prior to demands on that government to surrender the suspect).

108. United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992).

109. David Ring, Notes and Comments, *United States v. Alvarez-Machain: Literalism, Expediency And The "New World Order,"* 15 WHITTIER L. REV. 495 (1994) (discussing the Court's decision and whether its integrity was compromised and the Court's lawless exercise of power).

fice in Guadalajara and transported him by private plane to El Paso, where DEA officials were waiting to take him into custody.[110] The circumstances surrounding the abduction are very similar to the U.S. activity in *Yunis*, clandestine and extremely contrary to the norms of international law. To some Americans, Saddam's activities are more egregious than than the acts of Alvarez-Machain or Yunis. Therefore, the United States may argue that his activities are imminent threats to the American people and their allies.

The Second and Ninth Circuits have recognized such an exception to the Ker-Frisbie Rule that a defendant himself is not suppressible as a fruit of an unlawful arrest.[111] These courts reasoned that if the governmental conduct is so beyond the scope of the law as to shock the conscience, then the court would lack jurisdiction over these defendants.[112] *Alvarez-Machain* was neither an isolated occurrence nor is the evolving United States policy regarding extradition treaties directed exclusively to Mexico. The United States has clearly departed from the common understanding of civilized nations as to the function and scope of extradition treaties. In effect, the Executive Branch seeks the right to disavow treaty obligations on an ad hoc basis – the Government has tired of the niceties of extradition. This position does not derive from any rule of law, but from the vagaries of assumed exigency.[113] This same type of exception based on exigency may also soon be applied to Saddam in order to assume jurisdiction over him.

This same approach is also becoming more apparent in all aspects of acquiring jurisdiction over international suspects. If certain exigent circumstances exist, in a Hostes Humani Generis situation, for instance, then the United States may also forgo the niceties of multilateral cooperation and unilaterally pursue that particular defendant. "By kidnapping Alvarez-Machain, the United States Government provided Mexico with a small reminder of the arrogant and unbridled exercise of American power."[114] This show of strength was not only a reminder to Mexico but also a reminder to the entire world, and perhaps ominously to Saddam, that the United States is a major power. And more importantly, that it

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110. *See* Ring, *supra* note 109, at 497.

111. *See* Nanda, *supra* note 88.

112. *See* Ring, *supra* note 109, at 497 *citing* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 65-66 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975); United States v. Lovato, 520 F.2d 1270, 1271 (9th Cir. 1975) *(per curiam), cert. denied*, 423 U.S. 985 (1975), United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

113. *See* Ring, *supra* note 109, at 416.

114. *See* Ring, *supra* note 109, at 530.

has the power to carry out its edicts because ultimately "the foundation of jurisdiction is physical power,"[115] and that it always will be.

Without a doubt, "[i]t should not be mistaken that the use of abductions as a means of attaining jurisdiction over a criminal defendant is a dangerous dance that should be conducted only in light of the most careful reflection and planning. Abducting an unsuspecting criminal to stand trial in the United States violates all notions of decency and fair play inherent in the American judicial process."[116] Such abductions usually will violate some inner sense of justice and many people may automatically assume that principles of comity suggest that the United States will condone the abduction of Americans to stand trial in foreign courts.[117] This cannot be acceptable to the United States because of its long history of protecting its nationals, and its general suspicion about justice abroad[118]

Until a global peace can somehow be worked out among all the nations of the world, we will constantly have a world divided.[119] This division, apparently, does not bother the United States because it finds justification in its activities, and the United States doubtless would never actually acquiesce to the abduction of Americans. Thus, "kidnapping by authority of the United States of America. . .[should] shock the conscience of the nation. . .the distinctions between kidnapping with or without torture are understood to be unconvincing, in fact and in law; and that the United States would look at the uneven practice of other states not as a justification for indecent action, but as a challenge to develop – by example and by treaty – a rule worthy to be called international law."[120]

The United States has often resorted to covert activity to apprehend U.S. declared "wanted defendants." Unilateral activity to apprehend persons indicted for war crimes (PIFWC)[121] has also been added to the list of recent U.S. activity. For example, "a U.S. special operations task force has been conducting one of the broadest covert operations since

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115. McDonald v. Mabee, 243 U.S. 90, 91 (1917) (J. Holmes).

116. Arthur Shin, Note And Comment, *On The Borders of Law Enforcement—The Use of Extraterritorial Abductions As A Means of Attaining Jurisdiction Over The International Criminal*, 17 WHITTIER L. REV. 327, 397 (1995) *citing* ETHAN A. NADELMAN, COPS ACROSS BORDERS, THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 426-36 (PA State Univ. Press 1993).

117. *See* Shin, *supra* note 116, at 392.

118. *See infra* note 234.

119. *Id.*

120. *See* Lowenfeld, *supra* note 103, at 493

121. Richard J. Newman, *Hunting War Criminals*, U.S. NEWS AND WORLD REP., July 6, 1998 at 45.

the Vietnam War, gathering intelligence on PIFWCs and helping to seize them in a series of raids."[122] The US-dominated task force continue to track PIFWCs and gather information on other wanted individuals, such as Radovan Karadjic, the former Bosnian Serb President, was charged with the responsibility for the murder of thousands, was recently tracked.[123]

The United States probably has the ability, militarily, to carry out its threats against offending nations or, as defined by the United States, "liberty opponents."[124] This is true because the United States spends at least three times what others spend on national defense.[125] "America's global ability to offer threats or protection will [probably] remain unique for years."[126] If not through military might then through economic might, sanctions. The United States has engaged in kidnapping, abduction, prosecuting criminals, and threats of military force. Saddam Hussein has had a number of sanctions as well as military force aimed in his direction.

On January 12, 1991, the U.S. Congress passed a resolution to allow war, if necessary, between the U.S. against Saddam. In Operation Desert Storm, 250,000 troops were sent to Kuwait in an attempt to actually curb Saddam's aggression against Kuwait.[127] Even though this war was not quite a unilateral engagement but more of a coalition of UN forces,[128] the United States took a very active role in the strategic planning and also implored the Israelis and committed thousands of American troops to the cause.[129] In the United States, the war was seen as an American war. After the cease-fire, President Bush exclaimed, "By God we've kicked the Vietnam syndrome once and for all."[130] This zeal to pursue its objectives has been employed in several ways.

B. Tools Used by the U.S. to Carry Out Its Edicts

To bring about unilateral compliance, the United States often resorts to threats of sanctions or actual sanctions or threats of military force or actual military force. "The U.S. has slapped economic sanc-

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122. *Id. See also* STEPHEN E. AMBROSE, RISE TO GLOBALISM – AMERICAN FOREIGN POLICY SINCE 1938 140-147 (5th ed. 1988) (discussing U.S. financial and military involvement in the Vietnam).

123. *Id.*

124. Huntington, supra note 63, at 42

125. Korb, *supra* note 52, at 23.

126. Michael Elliott, *America Is Back*, NEWSWEEK, Oct. 9, 1995, at 44.

127. JOHN G. STOESSINGER, WHY NATIONS GO TO WAR 197-98 (6th ed. 1993).

128. *Id.*

129. *Id.* at 199-200.

130. *Id.* at 202.

tions on other countries about 120 times in the past 80 years."[131] Sanctions "offer a way of doing something short of actually using military force, about troublesome issues from human-rights . . .to drift-net fishing on the high seas."[132]

The United States also uses "Most Favored Nation"[133] status to manipulate "liberty opponents" into conforming to U.S. expectations. "MFN" treatment is an obligation to treat that state, its nationals or goods, no less favorably than any other state, its nationals or goods."[134]

The United States has tried to impose its own cold war mentality and habits onto the international scene by using bluffs and counter-bluffs,[135] to gain advantages. To bring about compliance, the United States often deploys its military as a show of force to the offender. The U.S. Sixth Fleet was deployed during the late 60's to the Mediterranean after Israel seized the Golan Heights, Jordan, the West Bank, and Jerusalem.[136] Also, during the Cuban missile crisis, the United States put forth a strong showing of its military might.[137] In 1962, Washington was convinced that the Soviet Union was placing or about to place nuclear-capable missiles in Cuba.[138] As a result, Congress passed a resolution that the United States was going "to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States."[139] The CIA stepped up reconnaissance of the island and began a special daily report on activities in Cuba.[140] This action was done even though no missiles were actually found in Cuba.[141]

In the 1980's, the United States supported, with military aid, the so-called "freedom fighters" or "contras" during the conflict in El Salvador. The United States justified the support because, according to U.S. standards, the U.S. intended to prevent a brutal military takeover of the

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131. Thomas Omestad, *Addicted To Sanctions*, U.S. NEWS AND WORLD REP., June 15, 1998, at 30.

132. *Id.*

133. *See* General Agreement on Tariffs And Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 (signatories are automatically given MFN status).

134. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 801(1) (1987).

135. STEPHEN E. AMBROSE, RISE TO GLOBALISM – AMERICAN FOREIGN POLICY SINCE 1938 267 (5th rev. ed. 1988).

136. *Id.* at 223.

137. Pat M. Holt, Secret Intelligence And Public Policy – A Dilemma of Democracy 1, 100 (CQ Press 1995).

138. *Id.*

139. *Id., citing* Pub. L. No. 87-733, 76 Stat. 697, Oct. 3, 1962.

140. *See* Holt, *supra* note 137, at 100.

141. *Id.*

country by a totalitarian minority.[142] This is the only conclusion the United States could have drawn because action had to be taken against "liberty's opponent."Pursuing "liberty's opponents" by restoring democracy is a major aspect of U.S. policy. As far as sanctions against Iraq are concerned "it now appears that, for at least as long as Saddam is in power, the people of Iraq may never get parole from the economic sanctions,"[143] imposed on them by the United States. Saddam's aggressive acts may lend credibility to U.S. arguments articulating reasons why Saddam should be classified as Hostes Humani Generis.[144] At present, "the administration strongly believes that Saddam must be kept in his cage with strict economic sanctions, and that he must be militarily whacked when he acts up."[145]

To carry out its edicts, the United States frequently uses sanctions. Since 1993, the United States has imposed unilateral sanctions or threatened legislation that would allow it to do so, sixty times on thirty-five countries that represent over forty percent of the world's population."[146] Unfortunately for the United States,

> The policy of unilateral U.S. sanctions against Iran [and Iraq] has been ineffectual, and the attempt to coerce others into following America's lead has been a mistake. Extraterritorial bullying has generated needless friction between the United States and its chief allies and threatened the international free trade order that America has promoted for so many decades. To repair the damages and avoid further self-inflicted wounds, the United States should sit down with the Europeans, the Japanese, and its Gulf allies and hash out what each other's interests are, what policies make sense in trying to protect those interests, and how policy disagreements should be handled. Only such high-level consultation can yield multilateral policies toward Iran [and other nations that are classified by the U.S. as "liberty's opponents"] that stand a good chance of achieving their goals and being sustainable over the long term.[147]

More recently, after the bombing of U.S. embassies in Africa, "dozens of American cruise missiles struck targets in Afghanistan and the Sudan." According to President Clinton, this was an act of self-defense

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142. *Id.* at 330-31.

143. *Who's in Charge Here?* NEWSWEEK, Dec 1997, at 30-31.

144. *See* Lewis, *infra* note 256 (Iraq stated that it would not cooperate with UN Inspectors seeking to check its weapons of mass destruction.)

145. *Who's in Charge Here?* NEWSWEEK, Dec. 1, 1997, at 30-31.

146. Charles William Maynes, *The Perils of (and for) An Imperial America*, FOREIGN POL'Y, Summer 1998, at 36, 44.

147. Zbigniew Brzezinski, et al., *Differentiated Containment: Policies Toward Iran and Iraq*, FOREIGN AFF., May-June, 1997, at 20, 28.

against imminent terrorist plots and of retribution for the bombing. "Let our action today send this message loud and clear," Mr. Clinton said, "There are no expendable American targets. There will be no sanctuary for terrorist."[148]

Many of the arguments concerning U.S. activity may be justifiable and should carry great weight in an international dialogue concerning the multilateral or even better the supranational approach to solving international disputes. The U.S. has not only acted unilaterally on many occasions, but also has the attitude that it *must* protect humanity. Nevertheless, terrorist attacks against Americans can only exacerbate the issue, and most people will agree that the United States has a duty to protect its nationals. Does the lack of a supranational forum justify this unilateral activity?

Lack of Proper International For a to Pursue International Disputes

The exposure of the individual to direct prosecution for the commission of war crimes under international law is now well established by the various trials held principally after the Second World War.[149] Nevertheless, no permanent international court exists to address certain types of activity. As a result, "the question has been raised from time to time in the ensuing years as to whether a permanent international criminal court should be established with jurisdiction to try not only war crimes but such other criminal [and civil] acts as international law may identify?"[150] International sentiment and need mandate establishment of such a tribunal. Especially in light of the United States perceived aggression in prosecuting international criminals.[151] And also, the situation that may exist in the very near future is that the U.S. will be forced, by Saddam's actions, to pursue Saddam under the "HHG" theory.

Prior to the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), international disputes were usually solved through the arbitration process.

The process of arbitration was carried forward, in the nineteenth century, from the arbitral commissions established under the Jay Treaty of 1794 through a series of British-American Claims Commissions, dealing with claims arising out of the War of Independence, the War of

148. James Bennet, *U.S. Cruise Missiles*, N. Y. Times, Aug. 21, 1998, at A1.

149. Elihu Lauterpacht, Aspects of the Administration of International Justice 73 (1991).

150. *Id.*

151. *See supra* notes 45, 85, 100, and 102.

1812 and the Civil War; by numerous bilateral arbitrations dealing with boundary disputes and territorial claims; by a string of ad hoc arbitrations on other matters, including claims arising out of the treatment of aliens; by a number of other commissions adjudicating groups of claims between the United States on the one hand and, on the other, respectively Britain, Mexico, Peru, Spain, France and also between Britain. . .Peru, Venezuela, and so on.[152]

A. International Court of Justice

The International Court of Justice ("ICJ"), established by the United Nations charter, is the principal judicial organ of the United Nations. Each member of the UN undertakes to comply with the decisions of the ICJ in any case to which it is a party. International adjudication in the 1990's is basically a consensual type of process. For example, "the ICJ has no jurisdiction unless the parties have specifically agreed thereto either through treaty or by accepting the Optional Clause in appropriate terms. A state party to a dispute with another state may submit that dispute to the International Court of Justice for adjudication and the Court has jurisdiction over that dispute, if the parties: a) have, by a special agreement (compromis) or otherwise, agreed to bring and dispute before the Court; or b) are bound by an agreement providing for the submission to the Court of a category of disputes that includes the disputes in question; or c) have made declarations under Article 36(2) of the Statute of the Court accepting the jurisdiction of the Court generally or in respect of a category of legal disputes that includes the dispute in question.[153]

Every other tribunal, whether specially created or institutional, is likewise dependent upon the consent of the parties.[154] For example, the United States excepted to the Court's jurisdiction in *Iran v. United States.*[155] Twelve years earlier, the United States also attempted to re-

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152. *See* LAUTERPACHT, *supra* note 149, at 14.

153. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ? 903, 362 (1987) *See* ICJ, art. 93, 94 *et. seq.* (The U.S. accepted the ICJ's jurisdiction but excluded several areas: a. disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence of, which may e concluded in the future; b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America, and c. disputes arising under a multilateral treaty, unless 1) all parties to the treaty affected by the decision are also parties to the case before the Court, or 2) the United States of America specially agrees to jurisdiction.)

154. *Id.* at 23.

155. The Aerial Incident of 3 July 1998 (Iran v. U.S.), 1996 I.C.J. 9, (the case was later settled between the parties).

move itself from the ICJ's jurisdiction in a dispute with Nicaragua.[156] Nicaragua complained of U.S. involvement in its war. These are only a few examples of the drawbacks the Court faces.

There is no effective forum available to prosecute criminals, internationally.[157] Political rifts between nations make prosecuting criminals in the international setting almost impossible.[158] "What may violate the laws of the United States may not necessarily violate the laws of another nation, such that the other nation would likely object to prosecuting its own nationals in the interests of foreign comity."[159] These objections "will be compounded, however, when it comes to securing agreements on the type of court that is to be established in particular on its composition and procedure, as well as on the types of punishment that it will be able to inflict in the event of conviction."[160] In desiring to establish such a court, many questions are brought to the forefront: "what will the establishment of such a jurisdiction achieve; will it make the world a more law-abiding place; will it significantly add to the existing system of national enforcement of the criminal"?[161] Even if these questions can not be answered with a simple "yes," the international community must attempt to establish such a forum and the U.S. must commit to it. Humanity deserves it – especially in light of possibly using the Hostes Humani Generis Theory unilaterally and especially if the United States intends to adopt the theory and make it an integral part of its jurisdictional law, another expansion of its extraterritorial jurisdiction. In other words, if the United States makes it part of its national law, analogous to the "effects doctrine" or the Alien Tort Act, other concerns about its unilateral activity are bond to surface.

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156. Nicaragua v. United States, Preliminary I.C.J. Ruling on Nicaraguan Request, May 10, 1984, DEP'T ST. BULL., June. 1994, at 78-80.

157. This was and still may be true, prior to the establishment of the very recent International Criminal Court (ICC). *See* Rome Statute – International Criminal Court, adopted by the UN Diplomatic Conf. Plenipotentiaries, 17 July 1998. A/CONF.183/9 (This Court is untested; its members may mirror the UN membership, and the Statute is open for signatures until 12/31/2000 (Art 125); thus, this paper neither projects the possible future effectiveness of the Court nor does it suggest that the Court is the proper forum to solve international disputes – it has no jurisdiction over civil matters. UN Secretary-General (Annan stated that "it is my fervent hope that by then a large majority of United Nations Member States will have signed and ratified it, so that the Court will have unquestioned authority and the widest possible jurisdiction." www.un.org/icc/pressrel/lrom23.htm. Even though the Court has jurisdiction over the following crimes: a) The crime of genocide; b) crimes against humanity; c) War crimes; and d) The crime of aggression (Art. 5); limitations exists; its jurisdiction has limits. *See infra* note 276.

158. Shin, *supra* note 116, at 388.

159. *Id.*

160. *See* LAUTERPACHT, *supra* note 149, at 74.

161. *Id.* at 74-75.

B. United Nations

The United Nations is another organization, though not a court, which was originally created to help nation-states facilitate the peaceful resolution of international disputes.[162] Its purpose is to 1) maintain international peace and security, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law; 2) to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people, and to take other appropriate measures to strengthen universal peace; and, 3) to be a center for harmonizing the actions of nations in the attainment of these common ends.[163]

The current argument is that its members should cede "absolute and exclusive sovereignty" and give the U.N. additional authority.[164] Unfortunately, the UN is not all-inclusive and a broad assortment of new actors (nations) are appearing on the world scene.[165] The UN was designed to be both the world organization and the organization of its member states, responding both to global concerns and to the needs of member states and their people. As if in training for precisely this moment, the UN has in its fifty years gained enormous experience in contending with the problems that both trends have spawned.[166]

Even though the UN has and continues to play a key role in international issues, its scope and effectiveness are extremely limited. The UN is not equipped to fully operate as a supranational organization because, "regional arrangements, non-governmental organizations, parliamentarians, transnational business, academic and policy research institutions, the media - all are taking on greater global roles. Their collective impact on world events now surpasses that of traditional international structures. As civil strife and social disarray undermine the authority of the state, these networks of new actors also erode it."[167]

The UN has spent nearly four years negotiating the development of a permanent international criminal court to try war crimes, genocide, and

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162. Jessie Helms, *Saving The U.N.*, FOREIGN AFF., Sept.-Oct. 1996, at 86, 89.

163. *Supra* note 157.

164. *See* Helms, *supra* note 162, at 3

165. Boutros Boutros-Ghali, *Global Leadership After The Cold War*, FOREIGN AFF., Sept.-Oct. 1996, at 86, 89.

166. *Id.* at 87

167. *Id.* at 89.

crimes against humanity,[168] (or "HHG" types). Even though backers of a strong court support jurisdiction over internal as well as external conflicts, others are concerned about the extent of the court's jurisdiction, which crimes to include, and the court's relationship with the UN Security Council.[169] Possible questions arise relating directly to the United Nation's ability to contain Saddam Hussein: Should not the United Nations be empowered now, however, to take action against a war lover who murders his own people? Saddam's atrocities had major global repercussions: a flood tide of refugees, an obsession with nuclear weapons, and ecological terrorism on an unprecedented scale. Has the time not come at last for the United Nations to weigh the sacred principles of national sovereignty against untold human suffering?"[170]

At this point, the UN cannot handle the demands of the growing international community. Nevertheless, "[c]ivilization must defend itself against the war lover [Saddam]. This is a formidable task since it may be impossible to recognize and repeal the Saddam's of the world, in an effort to repel absolute evil when it first appears."[171] Nevertheless, the United States continues to take a hard stand on aggressive activity that tend to affect the United States and world peace. The United States cannot continue to serve in this role – an international tribunal with arbitration, adjudication, and enforcement powers is needed.

C. The World Trade Organizaton

The World Trade Organization[172] "shall provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments. . ..[it] shall provide the forum of negotiating among its members concerning multilateral trade relations. . .[and] a forum for further negotiations among its members concerning multilateral trade relations." The WTO also administers rules and procedures governing the settle-

168. *The U.N. and War Crimes – How Strong A Court*, THE ECONOMIST, June 13, 1998, at 46.

169. *Id.*

170. STROESSINGER, *supra* note 127, at 206.

171. *Id.*

172. World Trade Organization (hereinafter WTO),General Agreement on Tariffs And Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15, 1994, 33 I.L.M. 1125, 1140 (1994), *available in* 1994 WL 761491 (G.A.T.T.). *See* Uruguay Round Agreements Act, Pub. L. No 103-465, 108 Stat. 4809 (1994) (The major focus of the WTO is trade. According to the Ministerial Decisions and Declarations of 4/15/94, the Ministers "affirmed[ed] that the establishment of the WTO ushers in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral *trading* system for the benefit and welfare of their people."

ment of disputes; administer trade policy review mechanism. Even with the existence of the WTO, foreign leaders question the United States' withdrawal of support for the multilateral trading system.[173]

The United States has been accused of not embracing the WTO by its action to avoid bringing its trade disputes to the body. The accusers further assert that the U.S. is trying to solve its problems through bilateral agreements at best or unilateral fiat at worst.[174] This attitude is probably due to U.S. belief that many of the trade barriers with Japan [and others], lack of antitrust protection, collusion between suppliers and manufacturers, and suffocating regulations are not yet within the WTO's competence.[175] It has been suggested that: 1) we cannot rely on one source to ensure compliance in international matters and disputes, considering that U.S. intelligence agencies affect trends in the global economy and the economic policies of key nations more effectively than the World Trade Organization;[176] and, 2) countries "use their intelligence services for industrial espionage against American companies, providing the information they steal to their own industrial firms as they seek unfair advantage. . .[and] by various devices, they exert extraordinary pressure, financial and otherwise, to help their own firms win contracts away from American businesses – contracts that they cannot otherwise obtain in fair competition."[177] It has also been questioned whether the World Trade Organization's lack of efficiency lead to unilateral activity because of violations of the rules of the games in international trade.

Many feel that this "substitution of the law of the jungle for established international rules. . .encourages unbridled mercantilism, protectionism, and heightened political tension between countries, weakening global trade."[178] The WTO's view is to achieve greater coherence in global economic policy making;[179] even if all the criticism is true, the unfortunate aspects of the WTO is that many years are required to de-

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173. Jeffrey E. Garten, *Is America Abandoning Multilateral Trading?* FOREIGN AFF., NOV.-Dec. 1995, at 50.

174. *See* Garten *supra* note 173. *See* Ann Swardson, *U.S. Turtle Law in Conflict With World Trade Group*, HOUS. CHRON., Aug. 24, 1998, at 6D (In the five years since the United States supported the creation of the World Trade Organization to resolve international trade disputes, the long-standing question always has been: Will the U.S. comply if a big decision goes against it? The question arose in 1996, when the European Union filed a complaint with the Geneva-based trade regulatory body over the Helms-Burton Act, which prohibits other countries from doing certain kinds of business with Cuba. The U.S. said openly that it would not change the law even if the trade body overruled it.

175. *See* Garten, *supra* note 173.

176. *See* Woolsey, *supra* note 75, at 4

177. *Id.*

178. *Id.* at 50.

179. WTO art. III, § 5.

velop adequate laws on such barriers. Not only are the new organization's hands full with traditional problems, but many of the problems are deeply rooted in the history, culture, and institutions of their societies, and the wide variations among countries make multilateral liberalization extremely difficult.[180]

D. War Crimes Tribunal for the Former Yugoslavia

The War Crimes Tribunal was established under Chapter VII of the Charter of the United Nations.[181] The Tribunal was established for the sole purpose of prosecuting persons responsible for violating international and humanitarian laws in Yugoslavia after 1991. This Tribunal was borne out of great international concern for reports of mass killings, massive and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing," especially in Bosnia and Herzegovina. Like the United States in many of its decisions, the UN determined that the situation was a threat to international peace and security.

Even though the international community supports the Tribunal, out of 74 indictments only a few are in custody or have actually been tried. Of theses five or so in custody, none are top political or military leaders who gave key orders for the rapes, torture, executions, etc.[182] The Tribunal for the Former Yugoslavia has encountered great difficulties because of its lack of police power, ability to effectuate arrests, inability to properly investigate, and the lack of enforcement mechanisms.[183] Its inability to properly investigate led to the withdrawal of charges against four Bosnian Croat suspects who were on its official "wanted" list. The decision was taken from "lack of evidence."[184]

Another serious drawback for the Yugoslavian Tribunal, according to Louise Arbour, Chief Prosecutor, is that, "Bosnia and particularly Croatia had been unwilling to assist[185] the Tribunal in arresting and providing information about suspects wanted for war crimes. In many

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180. *See* Garten, *supra* note 173, at 55.

181. U.N. SCOR 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

182. Theodor Meron, *Answering For War Crimes – Lessons From The Balkans*, 76 FOREIGN AFF. 2, 3 (1997).

183. *Id.* at 8.

184. *War Crimes Tribunal Withdraws Charges Against Four*, AGENCE FRANCE-PRESS, Dec. 19, 1997, *available in* 1997 WL 13457719.

185. *Belgrade Kept Rejecting Surrender of War Crimes Suspects*, AGENCE FR-PRESS, Feb. 13, 1998, *available in* 1998 WL 2221757, Yugoslav Authorities Rejected a Call by The Chief UN War Crimes Prosecutor to Extradite War Crimes Suspects For Trial in The Hague.

cases, governments that are supposed to cooperate with the Tribunal have instead taken the side of the accused."[186]

Nevertheless, "we must not give up in despair."[187] A concerted effort by the major powers and the developing powers is the only way to combat the growing problem of resolving international conflict, civil, criminal, or humanitarian issues.

E. The Need for and Efforts to Develop a Supranational Tribunal with Judicial and Enforcement Capability

Several countries have recently shown their strength by detonating nuclear weapons.[188] Some of the U.S. bravado may come because of past accomplishments. Remember that, "the United States defeated Nazism, contained the Soviet empire, and lifted Europe and Japan from the ashes. . .."[189]

As globalization increases, the need to revitalize international law and promote its progressive expansion has taken on even greater urgency. Ideology and power politics have in recent decades dealt serious blows to international law. As more and more problems of order and justice are experienced transnationally, the international community must recognize that the pursuit of more effective international law and legal institutions is one of the most compelling challenges it faces.[190]

To that end, even though the ICJ, UN, WTO, and the War Crimes Tribunal for the Former Yugoslavia are not equipped to arbitrate complex international issues. The international community is actively discussing the possibility of some type of international world court. In March more than 100 countries' delegates met at the UN in New York. Their task was to draft a treaty designed to establish a court. The court would have jurisdiction over war crimes, genocide, and crimes against humanity.[191] Crimes against humanity should at least encompass Hostes Humani Generis types. Most countries seem to favor such a court, which would have judicial and enforcement powers. Nevertheless, legitimate concerns are inevitable when 180 countries come together to reach an agreement. Four of the five permanent members of the UN Security Council, notably the United States and France, are reluctant to give the

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186. *War Crimes Prosecutor Calls Yugoslav Nations Uncooperative*, DOW JONES INT'L NEWS SERV., May 24, 1998.

187. *Id.*

188. *See infra* notes 209-211.

189. Joshua Muravchik, *Affording Foreign Policy-The Problem is not Wallet, But Will*, FOREIGN AFF. Mar.-Apr.1996, at 8.

190. *See* Boutros, *supra* note 165, at 89.

191. *International, All Gum, No Teeth?* THE ECONOMIST, Mar. 14, 1998, at 50.

court the powers and independence that its advocates insist it needs to have the needed credibility. American negotiators wanted the court to investigate only cases referred to it by the Security Council.[192] This generated some fear that the court would become "a political tool of the great powers."[193] This result would neither address the concerns of the emerging countries nor would it address the needs of the "great powers" and the international community as a whole. The March meeting was one of the precursors to the newly established International Criminal Court.[194]

Hostes Humani Generis types are probably implicitly included in the crimes against humanity language, which has been included as one of the crimes that should be under the court's jurisdiction. The international community strongly agrees that those indicted for war crimes in the former Yugoslavia should be brought to justice.[195] Most of the activities are directly against humanity insofar as they actually threaten the international community's balance.

Continued international dialogue is a great sign that nations are interested in a multinational solution to the growing problems of globalization, which unfortunately brings about an increase in international disputes. Thus, continued unilateral interference always breeds a lack of trust and thwarts needed dialogue and action in this critical area. The U.S. Information Agency polled Croats, to inquire as to the most pressing issue facing their country. Croats, Muslims, and Serbs alike consistently ranked bringing war criminals to justice near the very bottom. Only about six percent of any faction member thought it was important.[196] "It would seem that the whole business is much more important to Washington."[197]

These responses are instructive because they allow the United States and others to reflect on the impact that multilateral decisions have on consensus building. Even when nations come together to map out solutions to international problems, difficulties exist. Therefore, the United States should always make legitimate attempts to gain international support when it has to make decisions that may have broad range implications. This is especially true when prosecuting international

192. *Id.*

193. *Id.*

194. *See supra* note 157. *See also* Establishment of an International Criminal Court, G.A. Res. 51/207, Dec. 17, 1996, *available in* 36 I.L.M. 510 (1997) (deciding that a diplomatic conference of plenipotentiaries shall be held in 1998 with a view to finalizing and adopting a convention on the establishment of Int'l. Crim. Court).

195. Charles G. Boyd, *Making Bosnia Work*, FOREIGN AFF., Jan.-Feb 1998, at 42, 49.

196. *Id.*

197. *Id.* at 51.

criminals with questionable contacts within the United States, and when the decisions to pursue the issues are employed without assistance from the criminal's home country. The ICC should restrict U.S. aggression in this complicated area, but a diplomatic approach is necessary to solve the continuing problem that emerging nations and nations that, in the past, have exhibited aggressive behavior are often left outside the United Nations' umbrella.

In the area of trade and open markets, the question has been asked whether "it would . . .make sense to create a small, international group of wise men that would present recommendations to the group of seven ("G7") and the WTO on the next steps to strengthen the multilateral trading system"?[198] Even if the question were expanded to include *all* disputes affecting the international community, especially criminal prosecution, the entity would require nearly unbridled powers coupled with the authority to enforce. Its job would be to interpret the law and to say what the law is.[199] This same concept would have to be extended to a supranational judicial entity, which would have a duty to interpret and enforce. Many thought the "New World Order," where international institutions, led by the United Nations, would bring about peace with active support from the world's major powers where centralized rule-making authority, a hierarchy of institutions, and universal membership are all required.[200] "That world order is a chimera. The United Nations cannot function effectively independent of the major powers that compose it, nor will those nations cede their power and sovereignty to an international institution. Efforts to expand supranational authority, whether by the UN secretary-general's office, the European Commission, or the World Trade Organization (WTO), have consistently produced a backlash among member states."[201]

If the WTO is ineffective as a trade regulatory body, can it manage a supranational tribunal? Nevertheless, if harmony is truly wanted, the major and minor powers must enter into serious dialogue and assess existing organizations to determine if either can work as a catalyst to develop an "inclusive" world tribunal not a tribunal to merely mirror the UN. This tribunal must not only have a commitment from the international community, but must also include emerging, and perhaps aggres-

198. *Id.*

199. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) (the U.S. Supreme Court established, early in U.S. judicial history, emphatically that it was the province and the duty of the judicial department to say what the law is).

200. Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 183.

201. *See* Garten, *supra* note 53, at 61.

sive nations, as well. Only when this happens, can an organization dedicated to justice and world harmony achieve success in this very static international community.

IV. International Defiance and Lack of Support for Past U.S. Aggression and Intervention

The U.S. has accepted the role of international peacekeeper, but not without adverse reactions. The legal traditions of most civil law countries, as well as some common law countries, regard the non-extradition of their citizens as an important principle deeply ingrained in their legal tradition. They justify the principle because they view the state's role as an obligation to protect its citizens and maintain a lack of confidence in the fairness of foreign judicial proceedings, the many disadvantages defendants have when they try to defend themselves in a foreign court.[202]

Specifically, India believed the United States has, in the past, unfairly singled it out from Pakistan and Israel, two other key Nuclear Nonproliferation Treaty non-signatory states.[203] Throughout the 80's, at the height of Pakistan's nuclear weapons project, the United States pursued a policy of strategic alliance and military largess without which Pakistan's success in developing nuclear weapons would have been highly unlikely.[204] Thus, India recently ignored United States' wishes and set off three underground nuclear explosions. Ignoring loud protests and threats of economic sanctions, it set off two more two days later.[205]Les Gelb, President of the Council on Foreign Relations, said that India knew that the global reactions would be based on the accepted premise that powerful weapons should be strictly controlled.[206] When nations are "willing to pay a high price for their national honor," says Gelb, "it is almost impossible to prevent them doing so." "*There are places, we now know, where Washington's writ does not run.*"[207] The United States could get no countries besides Canada and Japan to agree to impose economic sanctions on India.[208]

Even though Saddam may be in imminent danger of the United States labeling him, officially, as Hostes Humani Generis, and possibly

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202. *See* Shin, *supra* note 116, at 439.

203. Deepa Ollapally and Raja Ramanna, *U.S.-India Tensions Misconceptions on Nuclear Proliferation*, Foreign Aff., Jan.-Feb. 1995, at 13.

204. *Id.* at 16.

205. Steven Thomma, *U.S. Finding Its Roar Lacks Bite in Recent Foreign Upheavals*, Hous.Chron., May 15, 1995, at 36A.

206. Michael Elliot, *Out of Pandora's Box*, Newsweek, June 8, 1998, at 21.

207. *Id.* (*emphasis added*).

208. *See* Thomma, *supra* note 205, at 36A.

taking aggressive action to physically contain him, he nevertheless closed off presidential palaces to United Nations weapons inspectors last October. The United States threatened military action, but it never won broad support from allies or even Middle East countries that might be threatened by Iraq.[209] More recently, "Iraq sa[id] it would hold up oil sales if the UN did not approve a new oil-for-food program due to start on June 4th."[210] American allies have sanctions fatigue and, therefore, rarely back U.S. penalties anymore.[211] The United States may determine that another unilateral act, even if within another sovereign, may be the only way to stop Saddam.[212]

Sanctions are credited with actually hampering Saddam's efforts to develop nuclear, chemical, and biological weapons; nevertheless, to be effective, sanctions must have broad international support, and they must target specific vulnerabilities.[213] This support is becoming more and more difficult for the United States to obtain. This difficulty, warranted or not, has been expressed by other nations advocating lifting sanctions against Iraq. Specifically, "Baghdad looks forward with growing confidence to a crucial Security Council meeting next October, when Russia, France, and China are expected to continue their push for easing sanctions imposed on Iraq."[214] One positive sign, perhaps, is that the United States withdrew one of its aircraft carriers from the Iraqi region, which had been there since the face-off with Saddam last November. The U.S. owned land-based warplanes have also been reduced to about two-hundred.[215] With U.S. forces thinning out, Saddam may think that he can defy UN inspectors and not risk military retaliation.[216] During the early stages of the Iraq crisis, nations overtly supported Iraq. After the total U.S. embargo against Iraq, French Foreign Minister Alain Juppe stated that "we do not believe in unilateral embargoes."[217] The United States' continued aggressive involvement in Iraqi matters is continually met with criticism. On February 4, 1998, Russian Federation President, Bo-

209. *See* Thomma, *supra* note 205, at 36A. .

210. *Iraq And The U.N. Chronology of a Crisis*, THE HERALD, June 16, 1998, at 2.

211. Thomas Omestad, *Addicted To Sanctions*, U.S. NEWS AND WORLD REP., June 15, 1998, at 30.

212. *See* supra *notes* 85-93.

213. *Id.*

214. Joseph Contreras and Russell Watson, *Saddam's Old Tricks*, NEWSWEEK, June 15, 1998, at 35.

215. *Id.*

216. *Id.*

217. Russell Watson, Karen Breslau, and John Barry, *So Who Needs Allies?* NEWSWEEK, May 15, 1995, at 36.

ris Yeltsin, stated that "Bill Clinton's actions in the [UN Arms Inspections] crisis could lead to world war."[218]

Hostility toward U.S. actions has been expressed on many fronts, not only is the middle easterners complaining but also other countries as well, including allies. Early on, some Panamanians accepted U.S. actions against Noriega, a one-time ally, as rough but benign justice to deal with a stubborn despot, and protection for democracy and U.S. interests in Panama.[219] "The combined cost paid by the Panamanian people for their liberation is increasingly viewed in Panama City as unacceptable."[220]

The U.S. Congress has also been far from enthusiastic about U.S. behavior in the area of extraterritorial arrests and abductions, even though media headlines bombard Americans everyday about the "War on Drugs" and the "War on Terrorism."[221] For example, Congress adopted an amendment to the Foreign Assistance Act,[222] which prohibits U.S. officers or employees from engaging in direct arrests in any foreign country.[223]

The United States' view is that "refusing to exercise jurisdiction is far more drastic a step than excluding evidence produced by the illegal arrest; it completely deprives the state of the opportunity to present its case. This view reflects the notion that due process is limited to the guarantee of a fair trial, but that interstate or international abductions are not misconduct sufficiently egregious to justify releasing the defendant.[224] This interpretation supports the U.S. position to exercise jurisdiction, even in attenuated circumstances where contacts are minimal.

After Dr. Alvarez-Machain's abduction, an uproar took place in the governments of Central and South America.[225] The governments of many Central and South American nations called for the expulsion of American ambassadors. After the Supreme Court's decision in the case, Mexico suspended the right of U.S. agents to conduct business in Mex-

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218. *Iraq And the U.N. Chronology of A Crisis*, THE HERALD, June 16, 1998, at 2.

219. Tim Coone, *U.S. Invasion Brings Panama Slim Dividends*, FINANCIAL TIMES (London), Dec. 20, 1990, at 6.

220. *Id.*

221. *See* Lowenfeld, *supra* note 103, at 477. *See also* Richard J. Newman, *America Fights Back*, U.S. NEWS & WORLD REP., Aug. 31 1998, at 38 (discussing the impact after two U.S. embassies in Africa were bombed, the resulting U.S. action, Operation Infinite Reach – amounting to one of the most decisive attacks against suspected terrorists in years).

222. Foreign Assistance Act, 22 U.S.C. § 2291(c) (1961).

223. *See* Lowenfeld, *supra* note 103, at 477(discussing. 481c, the amendment to the FAA of 1961).

224. *See* Lowenfeld, *supra* note 103, at 468, *citing* case comment, United States v. Toscanino, 88 HARVARD L. REV. 813, 816 (1975).

225. *See supra* notes 85-87 and accompanying text.

ico.[226] This inconsistent U.S. policy is definitely a source of contention. Both U.S. intervention, by using its courts, and its reaction to certain international activity are inconsistent. "The Gulf rulers. . .are acutely aware of the American double standard that lets Israel defy the UN and arm itself with nuclear weapons, but is ready to bomb Iraq for hanging on to drums of anthrax or nerve gas."[227]

Even though some of the gulf countries look for trade with Iraq, they will do almost nothing to weaken relations with the United States.[228] Even so, that reality does not necessarily conclude the matter. In the last ten years, the United States and Europe have paid scant regard to the Subcontinent. The Balkans, Russia and China have loomed much larger in the councils of the rich. This disregard was probably a mistake, considering that India and Pakistan are not just proud nations, but ones with intense rivalry and well known nuclear programs.[229] India's recent defiance in detonating a nuclear weapon[230] is an example of the extent that smaller, perhaps mostly non-aggressive, nations may go to either protect themselves or try to receive recognition as legitimate components of the international community. India's defiance shows that India and the rest should not have been treated this way.[231] The major task is to undo that error. If the world's major powers commit to including smaller nations in the development of entities that touch and concern them, it can be done. The people in this region are not stupid; they do not want a nuclear war – they want a measure of respect to their legitimate concerns about security and international disputes. They deserve and should receive consideration.[232]

The United States' inconsistent policy, especially with China, is further evinced by the various approaches that its agencies have adopted, which leads to very mixed messages. The Office of the U.S. Trade Representative threatens sanctions over market access and intellectual property rights, the Department of Commerce zealously increases investments in China; while the Department of State thrashes China for

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226. *See* Shin, *supra* note 116, at 391, *quoting* Kristin B. Weissman, Comment, *Extraterritorial Abductions: The Endangerment of Future Peace*, 27 U.C. DAVIS L. REV. 488-89 (1994).

227. *As Iraq's Clock Ticks On*, THE ECONOMIST, Feb 7, 1998, at 47. *See* Frank McCoy, *A World of Opinions About U.S. Strikes*, U.S. NEWS & WORLD REP., Aug. 31, 1998, at 52, (After the U.S. bombed Afghanistan, a common theme in the Islamic world "was that the attack violated the sovereignty of Sudan and Afghanistan – and demonstrated Washington's willingness to kill innocent civilians).

228. *Id.*

229. *See* Elliot, *supra* note 126, at 21.

230. *See supra* note 205.

231. *See* Elliot, *supra* note 126, at 21.

232. *Id.*

human rights violations and nuclear proliferation, and the Department of Defense works hard to develop military-to-military ties. The Chinese continue to search, in vain, for an underlying rationale to explain these chameleon type shifts and conflicting efforts.[233] Even though China contends that the U.S. policy is not clear, this contention has not totally stayed off harsh threats and sometimes sanctions. Even in the face of U.S. threats, China fails to adhere to U.S. demands. Specially, it "rebuff[ed] American demands on human rights,[234] but nevertheless it garnered support. "In almost every instance the G-7 countries have not supported American's threats and has made Washington's claim that it is acting on behalf of widely accepted international norms ring[s] hollow."[235] Clinton's May 1994 decision not to link China's most favored nation trade status renewal to human rights demands reversed months of espousing the opposite view,[236] and highlights U.S. inconsistency.

Not only has this inconsistency alienated China but the view that Chinese political leaders are unfit, and the suspected desire to exclude China from the WTO have also fostered resentment toward the United States.[237] The U.S. approach to China is, supposedly, predicated on the conviction that continued economic and cultural engagement is the best way to induce democratization.[238]

The need to obtain international support in the area of intervention under the Hostes Humani Generis Theory is critical. The Hostes Humani Generis Theory or other similar tools that are used to expand jurisdiction extraterritorially will not gain acceptance when employed unilaterally. President Clinton's plea to U.S. partners for assistance in Bosnia was succinctly articulated and is instructive if the United States plans to adopt its concept of what constitutes behavior that is egregious enough to label one, even a head of State, an Hostes Humani Generis. Clinton stated that "if peace is achieved NATO must help secure it. . .America must take part. Only NATO-proven, strong, effective. . .can give the Bosnian people the. . .space they need to begin to reconcile and rebuild. NATO [is] the anchor of America's and Europe's

233. Kenneth Lieberthal, *A New China Strategy*, FOREIGN AFF., Nov.-Dec. 1995, at 35.

234. Huntington, *supra* note 63, at 42.

235. *See* Lieberthal, *supra* note 233, at 35.

236. *See* Lieberthal, *supra* note 233, at 44.

237. *See* Lieberthal, *supra* note 233, at 42, 45.

238. Strobe Talbott, *Democracy And the National Interest*, FOREIGN AFF., Nov.-Dec. 1996, at 57.

common security."[239] These statements in reality, perhaps unconsciously, exclude many nations.

Nevertheless, this same passionate plea for assistance from U.S. allies should also be employed to develop an international tribunal to oversee international disputes. The President also said that "our values, interests and security are at stake."[240] This is true because aggressive acts jeopardize U.S. security. Fringe groups, international terrorist, and legitimate nations are, justified or not, impelled to take action when they perceived that the United States has acted outside the scope of its jurisdiction by invading sovereigns.[241] Internationally, countries and especially the European countries are very frustrated about the United States' approach to justice because the resounding view is that "it is hypocritical of the United States to condemn Germany and others for trading with Iran while America itself eagerly trades with China."[242] Even China experiences this hypocrisy because the U.S. policy with China is extremely inconsistent.

The Arab nations were incensed by U.S. actions against Iraq. Islamic fundamentalist movements universally supported Iraq rather than the Western-backed Kuwaitis and Saudis. Even the Ayatollah Ali Khamenei put Iran-Iraq differences on the back burner and called for a holy war against the West[243]: "The struggle against American aggression, greed, plans and policies will be counted as jihad, and anybody who is killed on that path is a martyr." "This is a war," King Hussein of Jordan argued, against all Arabs and Muslims and not against Iraq alone."[244] Muslims also articulated the West's double standard. Where civilizations clash, a double standard inevitably exists, and people apply one standard to their kindred-countries and a different one to others.[245] Lack of support for the U.S. attack on Iraq after good faith talks had failed was also articulated by Jimmy Carter, former U.S. President, when he said that "there were never any good faith talks, as a matter of fact, and we attacked Iraq without them."[246]

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239. President Clinton, *Why Bosnia Matters to America*, NEWSWEEK, Nov. 13, 1995, at 55.

240. *Id.*

241. *See* Frank McCoy, *A World of Opinions About U.S. Strikes*, U.S. NEWS & WORLD REP., Aug. 31, 1998, at 52 (quoting reactions the U.S. bombing of Sudan and Afghanistan).

242. Charles Lane, *Germany's New Ostpolitik*, FOREIGN AFF., Nov.-Dec. 1995, at 77, 78.

243. Samuel Huntington, *The Clash of Civilizations?* FOREIGN AFF., Summer 1993, at 35, 36.

244. *Id.*

245. *Id.* at 36.

246. Douglas Brinkley, *Jimmy Carter's Modest Quest For Global Peace*, FOREIGN AFF., Nov.-Dec. 1995, at 90.

"The British House of Lords recently rebuked the U.S. Supreme Court for its decision to uphold the kidnapping of a Mexican doctor by U.S. officials determined to bring him to trial in the U.S."[247] Also, in 1994, the tiny country of Singapore defied intense American pressure and caned an American teenager for violating the laws of Singapore.[248] The United States tried to convince the Singaporean government to have leniency on the individual. This is a strange reaction to another sovereign's jurisdiction in light of U.S. abduction and other intervention practices. Poland had defied American request not to proceed in buying arms from Iran. Jordan has resisted American pressure to break off commercial links with Iraq.[249]

Iran, like Iraq, has also been bombarded with U.S. sanctions. Iran defied the U.S. supported UN arms embargo and supplied men and weapons to Bosnia.[250] These sanctions "have not appreciably worsened any of the ills [in Iran] whatever their adverse effects, they have not been strong enough to induce a noticeable change in Tehran's behavior."[251] The International Court of Justice, last December, voted fourteen-to-two to reject Washington's plea for dismissal and to hear Tehran's case against the United States for deliberate destruction of three Iranian offshore platforms in the Persian Gulf in 1987."[252]

U.S. restraint is the first step in developing a national, and ultimately an international, policy that can be embraced by the international community. "American foreign policy is becoming a foreign policy of particularism increasingly devoted to the promotion abroad of highly specific commercial and ethnic interests."[253] Thus, the alternative to particularism is not promulgation of a "grand design," "coherent strategy," for a "foreign policy vision." It is a policy of restraint and reconstitution aimed at limiting the diversion of American resources to the service of particularistic sub-national, transnational, and non-national interests. The national interest is national restraint and that appears to be the only national interest the American people are willing to support at this time in their history. Hence, instead of formulating unrealistic schemes for grand endeavors abroad, the foreign policy elite might well devote their energies to designing plans for lowering American involve-

247. Anne-Marie Slaughter, *The Real World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 18.

248. *See* Huntington, *supra* note 243, at 42.

249. *Id* at 43.

250. Huntington, *supra* note 250, at 48.

251. Jahangir Amuzegar, *Adjusting to Sanctions*, FOREIGN AFF., May-June 1997, at 33.

252. *Id.* at 35.

253. *See* Huntington, *supra* note 250, at 48.

ment in the world in ways that will safeguard future national [and international] interest[254]

The pique of other nations with America's preemptive arrogance results from U.S. demands to have its way in one international form after another; its actions to imperiously impose trade sanctions that violate international understanding, to presumptuously demand national legal protection for its citizens, diplomats, and soldiers who are subject to criminal prosecution, while insisting other states forego that right; and to unilaterally dictate its view on UN reforms or the selection of a new secretary general. The United States has been able to get away with these tactics; the patience of others is shortening. The difficulty the United States had in rounding up support, even from its allies, in the recent confrontation with Iraq and Saddam Hussein evinces this pique.[255]

Fortunately, the United States' demands on Iraq continue to have some credence. "After a defiant out-burst from Baghdad. . .the Security Council voted unanimously to renew economic sanctions against Iraq, and the U.S. Representative to the UN warned that the sanctions may never be lifted." Specifically, United States Ambassador to the United Nations, Bill Richardson, said, "[s]anctions may stay on in perpetuity."[256] Iraq stated that it would not cooperate with UN inspectors seeking to eliminate its weapons of mass destruction until the Security Council starts lifting the trade embargo.[257] Additionally, prior to the last event Russia, France, and China had joined to convince the Security Council to ease restrictions on Iraq.[258] This appeal will continue to be unpersuasive, as to the U.S. vote, after recent test conducted at the U.S. army lab on warhead fragments excavated in Iraq in March found traces of poison VX gas.[259]

Nevertheless, to garner international support, we must consider

The most inadequately examined issue in American politics [which] is precisely whether or not post-Cold War conditions offer us a chance to change the rules of the international game [?]

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254. *Id.* at 48.

255. Charles William Maynes, *The Perils of (And For) An Imperial America*, 36 FOREIGN POL'Y 44 (1998).

256. Paul Lewis, *UN Council Renews Sanctions After Iraq Expresses Defiance*, N.Y. TIMES, Aug. 24, 1998, at A8.

257. *Id.*

258. Bruce B. Auster, *Proofs of Iraq's VX Gas Warheads*, U.S. NEWS & WORLD REP., July 6, 1998, at 50.

259. *Id.*

Certainly, there is no hope of changing the rules of the game if we ourselves pursue a policy of world hegemony. Such a policy, whether formally announced or increasingly evident, will drive others to resist our control, at first unsuccessfully but ultimately with effect. A policy of world hegemony in other words, will guarantee that in time America will become outnumbered and overpowered. If that happens, we will once and for all have lost the present opportunity to attempt to change the rules of the game among the great powers.[260]

There are those, the United States included, who believe a semblance of international justice can be achieved only where there is a balance among relative equals. In this environment, national arrogance must be tempered, national aspirations limited, and attempts at hegemony, either benevolent or malevolent, checked. A more evenly balanced world, they assume, with the United States cut down a peg or two [or three or four] would be freer, fairer, and safer.[261] Iraq has voiced a desire to reconcile; even though, the United States is adamant about not easing the economic pressure. "Many high-ranking American officials keep speaking about Iraq as being a threat to American interests and to the region. We would like to assure these officials, and through them the American people, that Iraq is eager to live in peace with its neighbors and the world. But Iraq will not submit to intimidation, bullying and coercion. Peace will come only through dialogue based on mutual respect for the principles of independence, sovereignty and the observance of international law."[262]

V. Conclusion

"In facing the ongoing reintegration of international relations, the United States Government has spoken of a 'New World Order,' premised on respect for international law."[263] Comparative Law[264] is helpful in the understanding of foreign peoples; it thereby assists in the

260. *See* Maynes, *supra* note 255, at 46.

261. Robert Kagan, *The Benevolent Empire*, Foreign Pol'y, Summer 1998, at 24, 30.

262. Nizar Hamdoon, *A Black Cat in a Dark Room*, N.Y. Times , Aug. 20, 1998, at A23, (Hamdoon is Iraq's permanent Representative to the United Nations). *But see, infra* note 231. After the U.S. bombed Sudan and Afghanistan, the Chinese Foreign Minister condemned U.S. action, saying "that the embassy bombing should have been dealt with through international law. Also, Jia Qingguo, a politics professor at Beijing University, complained about what he sees as a double standard. "The United States uses military force overseas and international opinion is soft. But China uses military force domestically, and people criticize it for being too tough," he said. America, he added, acts on the principle of "an eye for an eye, a tooth for a tooth."

263. *See* Ring, *supra* note 109, at 530

264. Rene David and John E.C. Brierley, Major Legal Systems in The World Today 8 (3d ed. 1985).

creation of a healthy context for the development of international relations.[265] "Global changes have undoubtedly complicated the conceiving and conducting of U.S. foreign policy."[266] Nevertheless, as a nation we must recognize that "there are new players, new capabilities, and new alignments – but, as yet, no new rules."[267] Predictability is absolutely mandatory if allies are going to count on us or if foes are to think before challenging American interests. Policymakers need bearings by which to judge international events. Without them, policy is apt to be steered by popular emotions, daily headlines or, increasingly, the latest televised image. But what is the solution if an all-embracing doctrine is not available and particularism is unwise? The answer lies in a foreign policy that is clear about ends – American's purposes, priorities, relationships, and approach to the world. Thankfully, the potential for fashioning and applying such a structure does exist.[268]

A new aspect of foreign relations is arguably emerging from a discrete forum of imperialism based on the extraterritorial application of the U.S. law.[269] Ultimately, "[a]s the global order rapidly evolves, the United States must redefine its role in the international community."[270] "The role suggested by. . .recent decisions. . .belittles American ideals of justice and respect for the rule of law. For the sake of those ideals, for the sake of judicial integrity, and for the sake of international law [and relations], it is imperative that the administration of the United States find no further need to call upon the courts to validate lawless Government actions on foreign soil."[271] "Champions of a global rule of law have most frequently envisioned one rule for all, a unified legal system topped by a world court."[272] Until this happens, the United States should endeavor to use restraint and avoid backlash from the international community. "In the areas of free trade, the 'grand bargain' has been suggested. WTO members should consolidate their regional arrangements into a global commitment: the high-income mature econo-

265. *Id.*

266. Richard N. Haas, *Paradigm Lost-From Containment to Confusion,* FOREIGN AFF., Jan.-Feb. 1995, at 43.

267. *Id* at 43.

268. *Id.* at 45.

269. *See* Ring, *supra* note 109, at 530, *citing* V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 AM. J. INT'L L. 257 (1980).

270. *Id.* at 535.

271. *Id.* at 535.

272. *See* Anne-Marie Slaughter, *supra* note 247, at 189.

mies of North America and Western Europe would merge in a real partnership with the rapidly growing, lower-income countries."[273]

This "grand bargain" approach should also be used to continue to develop and strengthen an International Tribunal, e.g., the ICC, because conflicts often involve complex and sensitive issues that are not clearly within the congnizance of a particular sovereign or court. The concern that "regional arrangements could develop into hostile blocs"[274] is very similar to hostility against the United States for extending jurisdiction or intervening in attenuated circumstances.[275] To ease these legitimate concerns a truly international tribunal or "unified legal system" with judicial, arbitral, and enforcement capabilities is imperative to a global community.[276] This is especially true because the United States has taken on the role of the World's helper in a wide range of situations, which affect nations' domestic as well as international policies. President Clinton recently articulated this and said that "We [the U.S.] will help all people of all faiths in all parts of the world who want to live free from fear and violence. We will persist and we will prevail."[277] Saddam probably should heed this warning, especially in light of the recent bombings of U.S. embassies and the U.S. strikes in Sudan and Afghanistan as a result of the aggression.

273. C. Fred Bergstein, *Globalizing Free Trade*, FOREIGN AFF., May-June 1996, at 105, 110.

274. *Id.* at 120.

275. Frank McCoy, *A World of Opinions About U.S. Strikes*, U.S. NEWS & WORLD REP., Aug. 31, 1998, at 52, (After the U.S. bombed Afghanistan and Sudan, a common theme in the Islamic world was "that the attacks violated the nations' sovereignty – and demonstrated Washington's willingness to kill innocent civilians.

276. The newly established ICC's jurisdiction extends to persons, but "persons" refers to nationals of signatories. Rome Statute of the International Criminal Court, Art. I. See Art.12, Preconditions to The Exercise of Jurisdiction (A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Art. 5. . .).; Jurisdiction Ratione Temporis, Art. 11 (showing limitations to the Court's jurisdiction, which also may lead the U.S. to act unilaterally if the Court refuses to expand its jurisdiction).

277. President William J. Clinton, National Address (Aug. 20, 1998).

BOOK REVIEWS

RICHARD HAAS, *The Reluctant Sheriff: The United States After the Cold War,* New York, Council on Foreign Relations (1997)

Henry H. Perritt, Jr.*

Dr. Haas sums up his basic approach in terms of law: "I propose that the United States adopt a foreign policy based on the notion of regulation." That theme is one of several things that makes this an important book. The theme and the title go right to the heart of the challenge for US foreign policy in the post cold war world. As important, they do it in a way that is easy to understand, thereby enhancing the possibility that larger segments of the American public will rise to the challenge. This is not a heavy treatise built on a foundation of jargon, making it accessible only to specialists in international relations or international law. Instead, it is brisk, direct, and makes effective use of the regulation, sheriff, and posse metaphors to frame the important questions.

Appropriate political structures, in Dr. Haas' view, are necessary for an effective American foreign policy and for a peaceful world. Political structures represent a kind of "regulation" in the international arena. The cold war provided a bi-polar political structure that offered a place for almost all nation states and provided a compass for American foreign policy. The end of the cold war left nearly 200 nation states adrift and made American foreign policy directionless. The absence of a political framework for small or less powerful countries increases the risk of anarchy. The absence of a coherent foreign policy erodes the basis for the necessary political support for any kind of international engagement by the United States.

The "Reluctant Sheriff" explains that all of the post cold war empirical evidence suggests that the United States must exercise leadership. In order for this to happen, there must be an intellectual framework within the United States from which coherent foreign policy directions can be extracted, and there must be a reasonable political consensus supporting international engagement by the US.

Coherence in either the intellectual framework or in actual foreign policy requires simple and understandable goals. Dr. Haas suggests sta-

* Henry H. Perritt, Jr. is Dean of the Chicago-Kent College of Law at the Illinois Institute of Technology.

bility as the central goal of a post cold war American foreign policy. Pursuit of this goal will, on occasion, justify US intervention, which sometimes will take the form of military intervention. When this is appropriate, the United States will act in the role of a sheriff.

The posse metaphor signifies that while the United States is the preeminent military power, it is not sufficiently powerful to act effectively alone. It needs participation by other states to support any military intervention. Thus, the United States as sheriff can act effectively only by persuading others to join its "posse". The implications of Dr. Haas' second central goal - free trade - are less clear. Whether major threats to free trade would justify military intervention is doubtful. Presumably the means used to promote free trade would range up to, but not beyond, economic sanctions. There also, the US could play the role of sheriff but could not act effectively alone and must enlist others in its posse.

Dr. Haas erroneously distinguishes sheriffs from police officers, asserting that police officers, but not sheriffs, need explicit legal authority to perform their law enforcement functions. On the contrary, the duty of a sheriff in Anglo-American law traditionally was to execute writs (specific orders in specific cases) issued by courts. A sheriff acting without such judicial authority would be no different from an ordinary citizen in his legal capacity and would be subject to civil liability for conversion of property, trespass, battery, and false imprisonment.

In one respect, that is a meer lawyer's quibble over a metaphor. The metaphor provides firm support for Dr. Haas' essential point, which relates to the role of the posse and the sheriff's relationship with it. In the wild west, the sheriff's legal authority from a writ issued by a court, typically an arrest warrant, did him little good as a practical matter. In order to effectuate his authority, he needed sufficient physical force to overcome the resistance of the subject of the writ. The posse provided that coercive supplement to the sheriff. As a theoretical matter, all citizens were obligated to obey the sheriff's command to join a posse. In fact, however, whether the sheriff could form a posse was a political matter, and depended on persuasion and collective interest rather than the law.

This is the exactly the relationship between international law and peace enforcement in the post cold war world. In theory, and under international law, the US role as organizer and leader of peace enforcement efforts depends on legal authority - a UN Security Council resolution, or the privilege of self defense under customary international law and article 51 of the UN charter. But the existence of these sources of legal authority are hardly sufficient; they do little more than the arrest

warrant did for the sheriff in the wild west. What really matters is the political practicability of organizing a posse, and that depends on collective self-interest and on persuasion at the political level.

But to stop there understates the role of international law, just like Dr. Haas' book understates the role of the writ for the wild west sheriff. The sheriff in the wild west faced a law suit and damages if he acted and organized a posse without a writ. But that was not the important point. What is important about the antecedent of the metaphor is that the sheriff would not be able to organize a posse as a political matter without a writ. He had no legitimacy without a writ. A posse, whether or not organized by the sheriff, was a lynch mob unless there was a writ authorizing its formation and activity. Lynch mobs of course formed from time to time, but the sheriff had stronger rhetorical leverage and thus was more persuasive when he could say to potential posse members, "Do your duty. We must enforce law and order" rather than saying, "Join my lynch mob." Similarly, in the post cold war international arena unilateral action occurs, and to be sure, it is not subject to the obrobrium attached to the term "lynch mob". Nevertheless, sources of legitimacy found in international law play a major role in the rhetoric leading up to the modern form of a posse. The United States had a stronger moral position and thus could be more persuasive in Desert Storm because it had Security Council resolutions. Similarly, in Bosnia, the US organized NATO IFOR was more practicable because there was a source of legitimacy both in peace keeping UN Security Council resolutions and in the privilege of self-defense because the signatories of the Dayton Accords - Bosnia, Serbia, and Croatia had requested NATO assistance, thereby triggering the privilege of self-defense under Article 52 and customary international law. The intellectual challenge for students of international law and international relations, and the policy challenge is to work out the relationship between the US role as sheriff and the appropriate metaphor for the writ in the post cold war world. As Dr. Haas points out, the mechanisms for obtaining international writs - the UN Security Council process especially - is convoluted. Its performance in Bosnia was disgraceful.

But there maybe a richer array of choices than Dr. Haas suggests. There may be intermediate possibilities between waiting for a UN Security Council resolution sufficiently explicit to represent a writ authorizing military action, and unilateral action by the United States without any basis of authority in international law. One obvious possibility is commitments by regional authorities. More needs to be done to understand why NATO succeeded where the UN failed in Bosnia Even if regional possibilities for issuing post cold war writs can be worked out,

that source of authority must be reconciled with the UN Security Council's authority under Article 53. Controversy has swelled for years around the issue whether Security Council authority is necessary for regional action (most people think not) and whether the absence of post action authority negates the legitimacy of continued regional action.

The need for legitimacy is just as great with respect to the posse engaged in application of economic sanctions as with one engaged in military intervention. The recent uproar over application of Helms Burton *to punish* those violating US economic sanctions against Cuba and Iran are examples. The rest of the world does not consider extra territorial application of US law to be legitimate in the absence of some kind of imprimatur under international law (and maybe even with such an imprimatur).

1997-1998 SURVEY OF INTERNATIONAL LAW IN THE SECOND CIRCUIT*

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* This survey reviews significant case law from the United States Court of Appeals for the Second Circuit, the Federal District Courts in New York, and the New York Court of Appeals decided from Aug. 1, 1997 through Aug. 1, 1998. Only those cases which overturned old law and/or broke new ground were included in this survey. Consequently, cases that simply reaffirmed previous decisions were not reported.

I. Foreign Sovereign Immunity Act

A. Elliott v. British Tourist Authority, 986 F.Supp. 189 (S.D.N.Y. 1997); Although the Foreign Sovereign Immunity Act ("FSIA") mandates that a wholly-owned, funded and directed tourism promoting agency of a foreign government is to be presumed immune from the jurisdiction of United States, the agency's hiring of American citizens to work in the United States requires it to abide by the Age Discrimination in Employment Act ("ADEA") with regard to such employees and brings it within the FSIA's commercial exception, which may overcome such presumption of immunity.

In *Elliott v. British Tourist Authority*, the District Court for the Southern District of New York held that although the Foreign Sovereign Immunity Act ("FSIA")[1] mandates that a wholly-owned, funded and directed tourism promoting agency of a foreign government is to be presumed immune from the jurisdiction of United States, the agency's hiring of American citizens to work in the United States requires it to abide by the Age Discrimination in Employment Act ("ADEA")[2] with regard to such employees and brings it within the FSIA's commercial exception, which may overcome such presumption of immunity.[3]

The plaintiff, a New York resident formerly employed by the British Tourist Authority ("BTA") in its New York office, claimed that he was wrongfully terminated because of his age in violation of the ADEA.[4] In response, the BTA moved to dismiss, arguing that as an agency of a foreign state, it is entitled to immunity from jurisdiction of United States courts, in accordance with the provisions of the FSIA.[5]

In reaching its decision, the court employed a two step analysis. First, it had to determine if the provisions of the ADEA applied to an agency or instrumentality of a foreign state that employs United States citizens on United States soil.[6] If the ADEA applied, the court then had to ascertain if the BTA was immune from the jurisdiction of American courts under the FSIA.[7]

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1. Foreign Sovereign Immunity Act of 1976, Pub. L. No. 94-583, 90 Stat. 2898 (1976), *codified at* 28 U.S.C. §§ 1330(a), 1441(d), 1602-1611.

2. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967), *codified at* 29 U.S.C. §§ 621-634.

3. Elliott v. British Tourist Auth., 986 F.Supp. 189 (S.D.N.Y. 1997).

4. *Id.* at 191.

5. *Id.* at 190.

6. *Id.* at 191.

7. *Id.*

In determining whether the provisions of the ADEA apply to an agency of a foreign state that employs United States citizens on United States soil, the court first examined ADEA § 623(h)(2), which specifies the ADEA's applicability to such circumstances.[8] It also looked to how courts in other circuits have ruled on issues raised by § 623(h)(2)[9], paying particular attention to the legislative purpose behind the 1984 amendments to the ADEA that added § 623(h)(2).[10] The court chose to interpret the ADEA provision of non-applicability to foreign employers as referring only to their employment of American citizens *overseas*, and surmised that in adopting the ADEA, Congress never intended to subject American citizens working in the United States to foreign employment law.[11] Hence, by hiring United States citizens to work in its New York office, the BTA subjected itself to the provisions of the ADEA, to the extent permitted by the FSIA.[12]

Next, the court considered the merit of the BTA's claim of immunity as an agency of a foreign state. The FSIA provides immunity for "an agency or instrumentality of a foreign state" if three conditions are met: (i) it is a separate legal person, corporate or otherwise, (ii) it is an organ of a foreign state or political subdivision thereof, and (iii) it is not a citizen of a state of the United States.[13] Plaintiff contended that under 28 U.S.C. §1332(c)[14], the BTA failed to meet the third condition mentioned above, and was in fact a citizen of the State of New York subject to the jurisdiction of the federal courts.[15] Examining the facts, the court concluded that "the BTA (i) was established by the British Government Development of Tourism Act of 1969, (ii) is not incorporated in New York and (iii) its principal place of business is London, England. Therefore, under the three-part test of § 1603(b), the BTA is an agency or instrumentality of a foreign state and is thereby presumed immune from

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8. *Id.* The court concluded that the BTA is a "foreign person" under the ADEA. ADEA, 29 U.S.C. § 623(h)(2) (stating "the prohibitions of this section shall not apply when the employer is a foreign person not controlled by an American employer").

9. Elliott, 986 F.Supp. at 191. *See* EEOC v. Kloster Cruise Ltd., 888 F.Supp. 147, 148 (S.D.Fla. 1995) (stating that § 623(h)(2) was intended to apply only to overseas operations of a "foreign person", not to the operations of a "foreign person" within the United States), Helm v. South African Airways, No. 84 Civ. 5404 (MJL), 1987 WL 13195 (June 25, 1987) (concluding that nothing in the ADEA indicates that section was meant to exclude United States citizens working for a "foreign person" within the United States from ADEA coverage).

10. *Id.*

11. *Id.*

12. *Id.* at 192.

13. Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1603(a), (b).

14. 28 U.S.C. §1332(c) states in part: "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

15. Elliott, 986 F.Supp. at 192.

the jurisdiction of United States courts."[16] The court recognized, however, that the FSIA does not offer blanket immunity, and that it provides for a number of exceptions.[17]

Plaintiff argued that the defendant's activities placed it within the FSIA's "commercial exception," which overcomes the BTA's presumption of immunity and conferred upon American courts the necessary jurisdiction to hear the case.[18] The "commercial activity" exception provides that sovereign immunity will not apply where "the action is based upon a commercial activity carried on in the United States by the foreign state. . .."[19] In order to determine if the BTA's activities were commercial in nature, the court "examine[d] the nature, rather than the purpose, of the activity under scrutiny."[20] The court concluded that the FSIA mandates that there be a clear distinction between a state's governmental activities (*acts jure imperii*) and its commercial endeavors (*acts jure gestionis*), with only the latter offered immunity.[21] In order to determine which category the BTA's actions fit, the court delved into the FSIA's legislative history[22], and concluded that the hiring and firing of American citizens (as opposed to diplomatic staff and civil servants) is commercial in nature and not subject to immunity.[23] The court examined prior applications of the rule[24], and concluded that the BTA was not entitled to sovereign immunity. Given that the plaintiff's title was

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16. *Id.*

17. *Id.* at 193.

18. *Id.* Plaintiff argued that four exceptions to the FSIA apply to overcome the BTA's presumed immunity. As the court found that the defendant's activities are subject to the FSIA's commercial exception, it did not address the plaintiff's other arguments.

19. Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1605(a)(2).

20. Elliott, 986 F.Supp. at 193 (citing Segni v. Commercial Office of Spain, 835 F.2d 160 (7th Cir. 1987)).

21. *Id.* (citing Broadbent v. Organization of American States, 628 F.2d 27, 31 (D.C. Cir. 1980), *Segni*, 835 F.2d at 162).

22. *Id.* (citing H.R.Rep. No. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604,6615 (stating that "public or governmental, but not commercial in nature would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States. . .. Activities such as a foreign government's employment or engagement of laborers, clerical staff or public relations or marketing agents, . . would be among those included within the definition [of commercial activity].")).

23. *Id.*

24. *Id.* at 193-94. *See* Zveiter v. Brazilian Nat'l Superintendency of Merchant Marine, 833 F.Supp. 1089 (S.D.N.Y. 1993), (foreign state was not immune from a sexual harassment claim brought by a secretary who was a United States citizen employed by the defendant in the United States. Court held that employment of the secretary was not "peculiarly sovereign in nature", and therefore constituted commercial activity.), Segni, 835 F.2d at 165, (hiring of a marketing agent for Spanish wines constitutes commercial activity), Holden v. Canadian Consulate, 92 F.3d 918, 922 (9th Cir.1996), (hiring and firing of "Commercial Officer" primarily engaged in promotion and marketing constitutes commercial activity not subject to immunity.).

"Manager of Industry Relations," and taking into account the nature of the BTA's business, the court found that it fit squarely within the definition of a "marketing agent," which necessarily denotes a commercial activity on the part of the employer.[25]

Finally, the courts emphasized the need for "significant nexus between the commercial activity in this country upon which the exception was based, and a plaintiff's cause of action."[26] In other words, the plaintiff's cause of action must stem from the same activity that gave rise to the "commercial activity" exception from immunity. The court found a clear significant nexus between the commercial activity of employment and the plaintiff's claim of age discrimination.[27]

In determining that the plaintiff's ADEA claim applies to the foreign state, and that the plaintiff's argument of "commercial exception" under the FSIA successfully overcame the defendant's presumption of immunity, the court held that it has the necessary jurisdiction to hear the action. Accordingly, the defendant's motion to dismiss was denied.[28]

B. Rein. v. Socialist People's Libyan Arab Jamahiriya., 995 F.Supp. 325 (E.D.N.Y. 1998); An amendment to the Foreign Sovereign Immunity Act ("FSIA") creating an exception to the sovereign immunity rule for any state designated by the Executive Branch as a sponsor of terrorism was constitutional, rationally related to a legitimate government purpose, did not constitute an impermissible ex post facto law, and did not violate due process.

In *Rein v. Socialist People's Libyan Arab Jamahiriya*, the District Court for the Eastern District of New York held that an amendment to the Foreign Sovereign Immunity Act ("FSIA")[29] creating an exception to the sovereign immunity rule for any state designated by the Executive Branch as a sponsor of terrorism was constitutional, rationally related to a legitimate government purpose, did not constitute an impermissible *ex post facto* law, and did not violate due process.[30]

The plaintiffs, survivors and representatives of victims who died in the December 1988 crash of Pan Am Flight 103 over Lockerbie, Scot-

25. Elliott, 986 F.Supp. at 194.

26. *Id.* (citing NYSA-ILA Pension Trust Fund v. Garuda Indonesia, 7 F.3d 35, 38 (2nd Cir. 1993)).

27. *Id.*

28. *Id.*

29. Foreign Sovereign Immunity Act of 1976, Pub. L. No. 94538, 90 Stat. 2898 (1976), *codified at* 28 U.S.C. §§ 1330(a), 1441(d), 1602-1611.

30. Rein et al. v. Socialist People's Libyan Arab Jamahirya, 995 F.Supp. 325 (E.D.N.Y. 1998).

land, originally brought an action against Libya on the ground that Libya and its agents were responsible for the plane's destruction and the resulting loss of life.[31] On motion by Libya, the court dismissed the action for lack of subject matter jurisdiction under the FSIA.[32] After Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, which amended the FSIA[33], the plaintiffs commenced the present action.[34]

The defendant challenged the court's subject matter jurisdiction by questioning the constitutionality of the amended FSIA. It argued that since Congress (the Legislative Branch) enacted a law of the United States - i.e. the FSIA - which prescribed that the court's jurisdiction be determined in accordance with designations made by the Secretary of State (the Executive Branch), such law was unconstitutional.[35] In delegating to the Executive Branch the authority to decide which nations may be accorded sovereign immunity by courts, Congress acted in a constitutionally compliant manner.[36] The court pointed out that the FSIA provides for courts to decline to hear cases against nations not designated as terrorist states.[37] In other words, the defense of foreign sovereign immunity can be used as a bar to United States jurisdiction in the great majority of cases, but a United States court is allowed to establish jurisdiction when the nation concerned is designated by the Executive Branch as a sponsor of terrorism.[38] Yet, even in such cases, nothing would prevent the defendant from using the defense of foreign sovereign immunity to attempt to have the court relinquish its jurisdiction acquired by conventional means.[39] In response to Libya's claim that it is entitled

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31. *Id.* at 327-28.

32. *See* Smith v. Socialist People's Libyan Arab Jamahirya, 886 F.Supp. 306 (1995), aff'd, 101 F.3d 239 (2nd Cir. 1996), *cert. denied*, 117 S.Ct. 1569, 137 L.Ed.2d 714 (1997).

33. See 28 U.S.C. § 1605(a).

34. Rein, 995 F.Supp. at 328.

35. *Id.* Libya is referring specifically to the FSIA provision lifting immunity from U.S. jurisdiction to states designated as sponsors of terrorism by the United States State Department (28 U.S.C. § 2371).

36. *Id.* at 329.

37. *Id.* Section 1605(a)(7) of the FSIA mandating that "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage [or] hostage taking . . . except that the court shall decline to hear a claim under this paragraph (A) if the foreign state was not designated as a state sponsor of terrorism . . .." 28 U.S.C. § 1605(a)(7).

38. *Id.*

39. Rein, 995 F.Supp. at 328-29. *See* Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103, 106 (2nd Cir.), cert. denied, 385 U.S. 931, 87 S.Ct. 291, 17 L.Ed.2d 213 (1966), (stating that "in an action against a sovereign just as in any other suit, jurisdiction must be acquired either by service of process, or by defendant's appearance in court, or in rem by seizure and control of

to certain rights under international law,[40] (presumably among them a right of sovereign immunity) the court relied on *Argentine Republic v. Amerada Hess Shipping Corp.*, where the Supreme Court unequivocally established that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country. . .."[41] The court reiterated that Congress has the authority to remove the defense of foreign sovereign immunity for particular violations of *jus cogens*, as it has done in the 1996 amendment to the FSIA.[42]

The court then examined Libya's claim that the FSIA violates due process because Libya has already been designated as a state sponsoring terrorism, thereby lessening the plaintiff's burden of fully proving every element of the crime.[43] The court noted that the designation serves only to establish an exception to foreign sovereign immunity under the FSIA, and in no way affects the liability of foreign states against whom actions have been taken, nor does it diminish the plaintiffs' burden of proving that Libya was responsible for the acts alleged.[44] Therefore, the FSIA in no way alters judicial due process. This holding is instrumental to the court's rejection of Libya's next argument.

Libya's next position is that since the Executive Branch's designation of Libya as a state sponsor of terrorism violated Libya's fundamental right to a fair trial as guaranteed by the Due Process Clause, such designation should be subjected to strict scrutiny review by the court.[45] Since the court had already established that no "fundamental right is implicated by this classification," it opined that the appropriate test was whether the statute is rationally related to a legitimate governmental purpose.[46] In this case, the court found that the protection of U.S. nationals

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property. Only after such jurisdiction is acquired, does the sovereign immunity defense properly come into consideration. Instead of being a 'jurisdictional' matter in the same sense as acquiring jurisdiction over a person or property, sovereign immunity presents a ground for relinquishing the jurisdiction previously acquired.").

40. *Id.* at 328.

41. *Id.* at 329, (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 819 (1989)).

42. *Id.* (citing Smith, 101 F.3d at 242).

43. *Id.* at 330.

44. *Id.* (citing First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 620-21, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983).).

45. Rein, 995 F.Supp. at 330.

46. *Id.* at 330-31. *See*, e.g. Heller v. Doe, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

and air carriers qualified as a legitimate government purpose and, as such, no further review is warranted.[47]

The last relevant point addressed by the court was Libya's claim that the 1996 FSIA amendment is an impermissible *ex post facto* law. In rejecting this argument, the court stated that the *ex post facto* doctrine applies when there is a possibility of arbitrary penal sanctions working unfairly to deprive an individual of a liberty interest.[48] It is not applicable to the question of whether or not a state may be completely immune from a civil action, and the decision by the United States not to grant it sovereign immunity does not bring about criminal sanctions.[49] It did not apply to the case at bar, where the only thing established by the 1996 FSIA amendment was "whether a foreign state is amendable to civil suit in the courts of the United States."[50]

Concluding that the FSIA poses no constitutional or jurisdictional hurdles, the court consequently rejected the defendant's motion for dismissal.

II. Forum Non Conveniens

A. *Potomac Capital Investment Corp. v. Koninklijke Luchtvaapt Maatschapplj N.V. D/B/A KLM, No. 97 Civ. 8141(AJP)(RLC), 1998 WL 92416, at *1 (S.D.N.Y. March 4, 1998): under the forum non conveniens doctrine, discretion for a district court to decline jurisdiction is broad and the dismissal should be based on reasonable alternatives that would best serve the ends of justice and be of the most convenience to the parties. The lack of discovery in pretrial procedure, under a country's laws does not make that country an inadequate forum.*

In *Potomac v. KLM,* the United States District Court for the Southern District of New York held that a District Court has much discretion to dismiss a case on forum non conveniens ("FNC") grounds where dismissal would best serve the convenience of the parties and the ends of justice, and the private and public interest factors strongly favor another forum.[51] The plaintiff brought a negligence action against the defendant

47. *Id.* at 331 (court found that the 1996 amendment to the FSIA is a reasonable means of achieving the legitimate government purpose of protecting United States nationals, and it is a rational method of providing a forum for the victims to seek compensation for their injuries.).

48. *Id. See* Doe v. Pataki, 120 F.3d 1263, 1272 (2nd Cir.1997), cert. denied,—U.S. —, 118 S.Ct. 1066, 140 L.Ed.2d 126 (1998).

49. *Id.*

50. *Id.*

51. Potomac Captial Investment Corp. v. Koninklijke Luchtvaapt Maatschapplj N.V. D/b/a KLM, No. 97 Civ. 8141 (AJP)(RLC), 1998 WL 92416, at *1 (S.D.N.Y. March 4, 1998).

for wrongfully repairing an aircraft engine, which failed in a plaintiff owned Boeing 747 in route to Brazil.[52] The defendant moved to dismiss the claim on FNC grounds and the court granted the motion because the defendant satisfied the burden of showing that the private and public interest factors strongly tilt in favor of having the case litigated in an alternative forum.[53]

Koninklijke Luchtvaart Maatschaappij N.V. ("KLM") is a Dutch corporation headquartered in the Netherlands and registered as a foreign corporation in New York.[54] KLM owns an extensive aircraft and engine repair facility in the Netherlands and was contracted to do repairs on aircraft and engines operated by Atlas, a U.S. commercial cargo carrier, which leases aircraft and engines from Potomac Capital Investment Corporation ("Potomac").[55] An Atlas-Potomac Boeing 747, the engine having received repairs from KLM, was in flight from Dakar, Senegal to Veracopas, Brazil when the engine failed.[56] The engine was transported to Amsterdam where KLM examined it and determined that it was the replacement blade, which had caused the failure.[57] Potomac filed the negligence claim in New York but the defendant argued the Netherlands is an adequate alternative forum and the claim should be dismissed under the FNC doctrine.[58]

The FNC standard is a two-step analysis which, if met, gives a district court broad discretion to decline to exercise jurisdiction where "dismissal would best serve the convenience of the parties and the ends of justice."[59] The Second Circuit emphasized the importance and process of the two-step procedure. It explained that the court would first ask if there is an alternative forum with jurisdiction to hear the case; and, secondly, the court would determine which forum would be most convenient and would best serve the ends of justice.[60] The key for the court in determining the second part is to weigh a variety of private and public factors, including: (1) the ease of access to sources of proof; (2) the availability of witness; (3) the cost of obtaining witnesses; (4) the efficiency and expense of a trial; (5) enforceability of judgments; (6) court congestion; (7) imposing jury duty on forum citizens; (8) local interests;

52. *Id.* at *1.
53. *Id.* at *15.
54. *Id.* at *1.
55. Potomac, 1998 WL 92416, at *1.
56. *Id.* at *2.
57. *Id.*
58. *Id.* at *4.
59. Potomac, 1998 WL 92416, at *4, *quoting* Murray v. British Board. Corp., 81 F.3d 287, 290 (2d Cir. 1996).
60. Potomac, 1998 WL 92416, at *4.

and (9) the avoidance of unnecessary problems in the application of foreign law.[61] These are known as the "Gilbert factors."[62]

The court first looked to see if there was an alternative forum. Potomac did not claim that the Netherlands lacks jurisdiction and KLM went uncontested in its declaration that jurisdiction would be proper in the Netherlands' courts.[63] Dutch law also recognizes Potomac's tort claim and the statute of limitations is five years; thus not likely to create a statute of limitations issue.[64] The plaintiff argued that the forum is inadequate due to a lack of U.S.–style discovery.[65] But even if the discovery is more limited, it does not determine whether a forum is adequate or not.[66] The Court explained that litigants in foreign tribunals can seek discovery assistance under 28 U.S.C § 1782, which provides such assistance to foreign tribunals and to litigants before those tribunals.[67]

When weighing the Gilbert Factors, courts generally start with a presumption in favor of the plaintiff as to choice of forum, especially if the defendant resides in the forum.[68] The Private Interest factors favored the alternative forum in this case because Potomac is not a New York resident; therefore, its choice of forum received less deference that it would have if Potomac had been a resident of New York.[69] A foreign plaintiff is to receive less deference if the plaintiff is not a resident of the forum.[70] The Supreme Court has explained that because the main focus of any FNC inquiry is to ensure a convenient trial, deference is usually given to a plaintiff's choice, except where it is foreign to the forum and convenience leans to another forum.[71] The favored forum is the Netherlands because the engine is being stored in the Netherlands, all pertinent documents are available for review there, and 18 witnesses reside in the Netherlands.[72] Potomac could not and did not show any such relationship to New York, except for the possible shipping of the engine (the

61. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947).

62. Potomac, 1998 WL 92416, at *4.

63. *Id.*

64. *Id.*

65. *Id.* at *5.

66. Potomac, 1998 WL 92416, at *5. Doe v. Hyland Therapeutics Div., 807 F.Supp. 1117, 1124 (S.D.N.Y.1992), "the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate."

67. Potomac, 1998 WL 92416, at *5.

68. Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 46 (2d Cir.1996).

69. Potomac, 1998 WL 92416, at *7.

70. Murray, 81 F.3d 287, 290 (2d. Cir.1996).

71. Piper Aircraft Co. v. Reyno, 454 U.S. 235, at 255-56; 102 S.Ct. 252, at 265 (1981).

72. Potomac, 1998 WL 92416, at *7.

only form of evidence) to New York.[73] Common sense suggests that in FNC cases the litigation take place in the forum where a larger number of relevant witnesses are located.[74] The plaintiff tried to persuade the Court that KLM's involvement in prior litigation in New York was an effective reason for them to pull the defendant into a New York court. But, the Court reasoned that such a suggestion was as weak as one expressing they should sue in New York because one of the parties might have a main office in New York.[75]

KLM, the defendant, had the burden of showing that the Gilbert Factors "tilt strongly in favor of" the alternative forum.[76] In addition to the private factors favoring the Netherlands as an adequate alternative forum, so do the public interest factors. The court determined the Netherlands to be the most interested in this action because of the suit being against one of its major corporations, while New York had no interest whatsoever.[77] New York lacked interest, and even if there was an interest it would not be sufficient to justify the large commitment of judicial time and resources it would require if litigated in New York.[78] Court congestion and jury duty factors also favor the Netherlands as an alternative forum.[79]

The court declared that the choice of law public interest factor favors the Netherlands.[80] It determined that Potomac misapplied a case to its argument that United States maritime law is the applicable substantive law in the case.[81] The court corrected the plaintiff by stating that just because the engine failed over international waters does not mean that the tort necessarily has a maritime connection.[82] For there to be a "maritime" tort, the wrong must have occurred on navigable waters or

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73. *Id.* at *7-*8.

74. Potomac, 1998 WL 92416, at *7. Nippon Fire & Marine Ins. Co. v. M.V. EgascoStar, 899 F.Supp 164 (S.D.N.Y.1995), (holding that "when the greater number and more relevant witnesses are located in a foreign forum, common sense suggests that the litigation proceed in that forum.").

75. *Id.* at 169.

76. Peregrine, 89 F.3d 41, quoting R. Maganlal & Co. v. M.G. Chem. Co., 942 F.2d 164, 167 (2d. Cir.1991).

77. Potomac, 1998 WL 92416, at *10.

78. Piper, 454 U.S. 235, 261, 102 S.Ct 252, 268, 70 L.Ed2d 419 (1981).

79. Potomac, 1998 WL 92416, at *11.

80. *Id.* at *12.

81. *Id.*

82. *Id.*

must "bear a significant relationship to traditional maritime activity."[83] At this stage, the court decided it need not determine what law applies.[84]

Finally, the Court concluded that in balancing the private and public interest factors, the Netherlands' courts are the favored forum.[85] Despite the fact that this claim was brought in New York, the case has no relationship to New York.[86] Even after all of the non-New York, U.S. based witnesses were considered, the factors still favor the Netherlands forum.[87] KLM also met the burden of showing that the Netherlands is a more appropriate place for the trial.[88] The defendant's motion to dismiss on the basis of forum non conveniens was granted.[89]

B. Capital Currency Exchange, N.V., v. National Westminster Bank PLC, 1998 WL 634783 (2nd Cir. 1998); Antitrust suits brought under the Sherman Act are subject to dismissal under the forum non conveniens doctrine; if the forum is adequate and the Gilbert Factors show more convenience in trying the case in the foreign forum, then dismissal will generally be granted.

In *Capital v. National*, the Second Circuit held that suits brought under the Sherman Act are subject to dismissal under the forum non conveniens ("FNC") doctrine.[90] The Court also found that a district court judge does not abuse his or her discretion by dismissing a complaint on the grounds that there is another, more convenient forum. The Court affirmed the District Court's decision that the complaint be dismissed and that England is a more convenient forum.[91]

National Westminster Bank PLC ("NatWest UK") and Barclays Bank PLC ("Barclays UK") are English corporations that offer currency exchange and money transfer services to their customers.[92] Capital Currency Exchange, N.V. ("CCE") is a financial company organized under the laws of the Netherlands which has affiliates in New York and Britain.[93] CCE was doing business with Barclays UK but was eventually

83. Executive Jet Aviation v. City of Cleveland, 409 U.S. at 253, 268, 93 S.Ct. at 497, 504 (1972).
84. Potomac, 1998 WL 92416, at *14.
85. Potomac, 1998 WL 92416 (S.D.N.Y.), at *15.
86. *Id.*
87. *Id.*
88. *Id.*
89. Potomac, 1998 WL 92416 (S.D.N.Y.), at *15.
90. Capital Currency Exchange, N.V. v. National Westminster Bank PLC, 1998 WL 634783 (2nd Cir. (N.Y.)).
91. *Id.* at *8.
92. *Id.* at *1.
93. *Id.*

refused business. CCE then sought business with NatWest UK. Eventually, it too refused to extend banking services to CCE.[94]

The plaintiffs brought suit against the two British corporations and individuals involved with them in the United States District Court for the Southern District of New York under Sections 1 and 2 of the Sherman Act.[95] The plaintiffs alleged that it and its affiliates were wrongfully denied banking services.[96] The defendants moved to dismiss the complaint for failure to state a claim under the FNC doctrine.[97]

The plaintiffs argued that FNC cannot apply to antitrust suits.[98] The Court disagreed.[99] At common law, dismissal of suits had long been permitted where, although jurisdiction and venue are proper, there is another forum that is substantially more convenient; however, this was not true of Federal Courts until 1947.[100] Even after there began to be FNC dismissals in federal question cases, there were some not permitted under certain federal statutes, including the Sherman Act, until 1948.[101] The Court referred to the last overruling by the Supreme Court, pursuant to 15 U.S.C. §29, of a FNC case dismissal, brought under the Sherman Act.[102] The Court held that FNC could not be used to transfer an antitrust suit to a more convenient forum within the United States.[103] Shortly after the Supreme Court ruling, Congress passed 28 U.S.C. § 1404(a), which provides that "for the convenience of the parties and

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94. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *1.

95. 15 U.S.C. §§ 1&2.

96. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *1.

97. *Id.* at *1-*2.

98. *Id.* at *2.

99. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *2.

100. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13, 102 S.Ct. 252, 70 L.Ed. 2d 419 (1981); Dismissals on ground of forum non conveniens and transfers between federal courts are not equivalent, since statute allowing transfers was enacted to permit change of venue between federal courts, and although it was drafted in accordance with doctrine of forum non conveniens, it was intended to be a revision rather than codification of common law by giving district court more discretion to transfer than they had to dismiss on grounds of forum non conveniens; and Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); The doctrine of forum non conveniens presupposes at least two forums in which the defendant is amenable to process and furnishes criteria for a choice between them.

101. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *1-*2.

102. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 372-73, 47 S.Ct. 400, 71 L.Ed. 684 (1927); the court held that an action against foreign corporation for violation of Anti-Trust Act may be brought in district where defendant sold goods in interstate commerce through salesman, by service in another district where it resides, or is found transacting business.

103. *See* United States v. National City Lines Inc., 334 U.S. 573 (1948); The doctrine of forum non conveniens is not a principle of universal applicability and whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants, with a right of choice among them which is inconsistent with exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect.

witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[104] The Court pointed out that Section 1404(a) has supplanted the common law doctrine of FNC for transfers between U.S. district courts.[105] The Court explained that where the more convenient forum is not a U.S. district court, the common law doctrine of forum non conveniens governs.[106]

The Court moved to apply the two-step analysis of FNC to this case by determining (1) whether there is an adequate forum; and (2) which forum is favored by the public and private interests introduced by Gilbert.[107] The plaintiffs argued that England is not an adequate alternative forum because: (1) claims under the Sherman Act are not recognized; (2) it might not award damages, and/or treble damages, in an antitrust suit; and (3) plaintiff's common law causes of action might not be recognized.[108] The Court believed that under Articles 85 and 86 of the Treaty of Rome, which are similar to Sections 1 and 2 of the Sherman Act and which English courts are bound to enforce, the plaintiffs may litigate the subject matter of their Sherman Act claims in England.[109]

The Court challenged the claims made by the plaintiffs seeking recognition of money damages and common law claims. The Court pointed to an interlocutory appeal where the Law Lords of the House of Lords stated that damages are available for a violation of Article 86.[110] Although a final judgment was never entered in the case, and the decision was therefore considered dicta, the Court considered the case highly persuasive on the question of whether monetary damages would be available to plaintiffs in England.[111] As to the unavailability of treble damages, the Court stated that his does not render a forum inadequate.[112]

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104. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *3.

105. *Id.*

106. *Id.*

107. *Id.* at *5.

108. *Id.* at *8.

109. *Id.*

110. *See* Garden Cottage Foods Ltd. v. Milk Mktg. Bd. {1984} 1 AC 130, where the court recognized the possibility of damages under the Treat of Rome: "The 1958 Treaty of Rome, which established European Atomic Energy Community (Euratom), granted to that organization the powers necessary to conduct and regulate trade in source and special fissionable material (e.g. uranium and plutonium) among the member-states;" State Dept. No. 96-85 1996 WL 361511, *35 (Treaty); for a violation of a Wisconsin statute, "The Wisconsin Environmental Policy Act (WEPA) requires that all state agencies carefully examine the environmental consequences of all actions that constitute 'major actions significantly affecting the quality of the human environment.' Alternatives to environmentally significant actions must also be considered": 1995 WL 406030, *1 (Wis.P.S.C.).

111. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *8.

112. Piper, 454 U.S. 235, at 247.

The Court conceded that the plaintiffs might not be able to recover in England on some of their common law claims, but this does not render the forum inadequate and the essential subject matter of the dispute can still be addressed.[113]

The Court agreed with the District Court in weighing the Gilbert factors, that the public interests favor neither the New York nor England forums but that the private interests strongly favor England.[114] If there is an adequate alternative forum and the Gilbert factors favor that forum, the case should be dismissed under FNC so that convenience may be achieved and the ends of justice may be best served.[115] Therefore, the Court concluded that the District Court did not abuse its discretion by dismissing the complaint on the ground that England is a more convenient forum. The Court further ruled that suits brought under the Sherman Act are subject to dismissal under forum non conveniens doctrine.[116]

In conclusion, the court found that when a district court judge dismisses a claim brought under the Sherman Act, there is no abuse of discretion if it is based on the existence of a more convenient forum.[117] The Gilbert Factors must be the method of measurement, favoring the other forum.[118] In the transfer of civil actions to a more convenient forum, between U.S. district courts, 28 U.S.C. § 1404(a) governs, but where the more convenient forum is not a U.S. district court, the common law doctrine of forum non conveniens governs.[119] England was determined by the court to be the more convenient forum and, under the forum non conveniens doctrine, the claim was dismissed.[120]

113. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *9.
114. *Id.* at *9-*10.
115. *See* Gilbert, 330 U.S. 501, at 508; Peregrine Myanmar, 89 F.3d at 46.
116. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *11.
117. *Id.* at *8.
118. *See* Gilbert, 330 U.S. 501, at 508; Peregrine Myanmar, 89 F.3d at 46.
119. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *3.
120. *Id.* at *8.

III. Immigration and Nationality Act

*A. Karim v. Immigration and Naturalization Service, No. 95 Civ. 510, 1998 WL 60949, at *1 (N.Y.2d Cir. Feb. 13, 1998) (CSH); The Second Circuit has jurisdiction to review an adjustment of status decision when deportation proceedings have not commenced. The District Director of the Immigration and Naturalization Service's exercise of discretion in an adjustment of status case must be based on balanced reasoning and governing law.*

In *Karim v. INS*, the United States District Court for the Southern District of New York decided several issues: the Second Circuit does have jurisdiction to review an adjustment of status decision when deportation proceedings have not commenced; the district director of the Immigration and Naturalization Service's exercise of discretion in an adjustment of status case must be based on balanced reasoning; INA § 1182(a)(7)(A) does not exclude immigrants who qualify under Federal Regulations 8 C.F.R. § 245.4; INA § 1182(a)(7)(B) applies only to "nonimmigrants" as defined by § 1101 (a)(15); INA § 1182(a)(6)(C) excludes only immigrants who intend to mislead U.S. officials.[121]

On October 26, 1990, the Karim family entered the United States of America.[122]

They were refugees from Afghanistan who had been living in Pakistan.[123] The Karims used false Pakistani passports to board a plane destined for JFK Airport in New York.[124] Upon arrival, they immediately informed an Immigration and Naturalization Service ("INS") officer of their true identities as Afghan refugees.[125]

In June of 1991, the Karims filed an application for political asylum which was repeatedly adjourned.[126] In June 1993, when the Foster Nurses Agency filed an application for an immigrant petition on behalf of Mrs. Karim, who had obtained a nurse's license, the Karim family was allowed to apply for adjustment of status.[127] On December 18, 1996, the Karims were finally granted asylum, which allowed them to stay in the United States, but they were denied the status of permanent legal residents that they would achieve through adjustment.[128]

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121. Karim v. Immigration and Naturalization Service, No. 95 Civ. 510, 1998 WL 60949, at *1 (N.Y.2d Cir. Feb. 13, 1998) (CSH).
122. *Id.*
123. *Id.*
124. *Id.*
125. Karim, 1998 WL 60949, at *1.
126. *Id.*
127. *Id.*
128. *Id.* at *2.

The Karims filed their first amended complaint on September 5, 1995.[129] They argued that they could not be excluded for adjustment of status under § 1182(a)(6)(C) because they made no willful misrepresentation to a U.S. official; they could not be excluded under § 1182(a)(7)(B) because they never attempted to enter as nonimmigrants; and finally, they could not be excluded under § 1182(a)(7)(A) because although they did not have the proper papers when they attempted to enter in 1990, this could no longer be held against them in an adjustment of status proceeding.[130] The INS moved to dismiss the complaint setting forth two arguments. First, they argued that no statute specifically authorizes judicial review to adjustment of status decisions.[131] Adjustment of status is similar to a consulate's denial of a visa which has long been immune from judicial review.[132] Second, even if the court did have jurisdiction, the district director did not abuse his discretion and had solid statutory grounds to refuse to adjust the Karims' status.[133]

Since the Second Circuit had never addressed the specific jurisdictional question raised by this case, the court looked to similar issues decided in *Howell v. INS* and *Jaa v. United States INS*.[134] The court in *Howell* held that the district court lacked jurisdiction to review the district director's denial of Howell's application for adjustment of status once deportation proceedings commenced, because she failed to exhaust her administrative remedies.[135] This exhaustion requirement arose as a result of the administrative remedies available to Howell through deportation proceedings.[136] Howell had to pursue these remedies rather than seek review in the district court pursuant to 8 U.S.C. § 1329.[137] These administrative remedies were not available to the Karims, however, because deportation proceedings had not commenced against them.[138] Also, as long as the Karims had asylum, deportation proceedings would not be commenced against them.[139]

Section 1329 was amended recently to grant jurisdiction in the district courts to some matters "arising under" the subchapter, not to all

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129. *Id.*
130. *Id.*
131. Karim, 1998 WL 60949, at *2.
132. *Id.*
133. Karim, 1998 WL 60949, at *2. *See also*, Immigration and Nationality Act §§ 1182(a)(7)(A), 1182(a)(7)(B), and 1182(a)(6)(C) (1998).
134. Karim, 1998 WL 60949, at *2. *See* Howell v. INS, 72 F.3d 288 (2d Cir.1995); Jaa v. United States INS, 779 F.2d 569, 571 (9th Cir.1986).
135. Karim, 1998 WL 60949, at *3, *citing* Howell, 72 F.3d 288.
136. *Id.*
137. *Id.*
138. Karim, 1998 WL 60949, at *3.
139. *Id.*

actions brought by the U.S. that arose under its provisions.[140] Applying § 1329 as it read in 1995, *Howell* suggests that a denial of adjustment of status should be subject to judicial review; the court, primarily concerned with the exhaustion doctrine, left that question open.[141] The INS did not dispute that the Karims took every administrative step available to them.[142] Accordingly, the court was satisfied that it could follow the Ninth Circuit decision in *Jaa v. United States INS.*[143] There, it was held that a district court "has jurisdiction to review a denial of status adjustment" where proper administrative steps had been followed.[144]

The court then analyzed whether the district director abused his discretion in denying the Karims adjustment in status. The Second Circuit set the standard for determining whether there was an abuse of discretion in *Arango-Arandondo v. INS.*[145] The court need only decide whether or not the INS considered the appropriate factors and came to a rational decision.[146] In the Karims' case, the court found all of the evidence was not properly weighed by the district director.[147] The district director made no reference to any positive factors such as Mrs. Karim's nursing job, the family's clean record, or their desperate circumstances.[148] He focused solely on the Karims' means of entry into the United States involving the forged passports.[149] This did not represent the balanced reasoning that must support the exercise of discretion by an officer of the United States.[150] The court held that while not every factor needed to be explicitly mentioned, the failure of the district director

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140. *Id.* at *4.

141. Karim, 1998 WL 60949 at *4 (*citing* Howell, 72 F.3d 288).

142. Karim, 1998 WL 60949 at *4.

143. *Id.* at *3. *See* Jaa v. United States INS, 779 F.2d 569, 571 (9th Cir.1986).

144. Karim, 1998 WL 60949 at *3 (*citing* Jaa, 779 F.2d 569, 571). *See also* Chan v. Reno, 113 R.3d 1068, 1071 (9th Cir.1997) (concluding district court had jurisdiction to review denial of application for adjustment of status); Ijoma v. INS, 854 F.Supp. 612 (D.Neb.1993); Reid v. INS, 1993 WL 267278 (S.D.N.Y. Nov.7, 1993).

145. Karim, 1998 WL 60949 at *4. *See* Arango-Arandondo v. INS, 13 F.3d 610, 613 (2d Cir.1994).

146. Karim, 1998 WL 60949 at *4 (*citing* Arango-Arandondo, 13 F.3d 610, 613) (concluding no abuse of discretion occurred where INS carefully and thoughtfully weighed the evidence in Arango's favor. . .against the detrimental evidence; a court is not empowered to reweigh the evidence where the evidence had been carefully considered).

147. Karim, 1998 WL 60949, at *5.

148. *Id.* at *4.

149. *Id.* at *5.

150. *Id. See also* Zaluski v. INS, 37 F.3d 72 (2d Cir.1994); Arango-Arandondo v. INS, 13 F.3d 610, 613 (2d cir.1994).

to either mention a single positive factor or discuss any process of balancing or weighing indicated that he abused his discretion.[151]

The court then interpreted the statutory arguments made by the parties. The district director first claimed that the Karims were excludable under § 1182(a)(7)(A) because the Karims were not in possession of valid entry documents.[152] Title 8 of the Code of Federal Regulations relieves certain immigrants from the documentary obligation of § 1182(a)(7)(A).[153] The court explained that those applying for an adjustment of status are not seeking admission in the usual sense, but are parolees, asylees, or others who have traveled a different route to residence in the United States so they would not be required to possess the same documents.[154] Also, the court noted that the language of § 1182(a)(7)(A) differs from other provisions of that section in that it speaks in the present tense alone, rather than present and past tenses, referring to an immigrant "who is not in possession" of certain documents.[155] Other exclusion provisions used the present and the past tenses.[156] This change in language provides further evidence that a lack of documents was not intended to permanently exclude an alien.[157] Thus, the court found that the documentation requirements that originally prevented the Karims from being admitted would not preclude adjustment of their status.[158]

Secondly, the district director argued that the Karims were excludable under § 1182(a)(7)(B).[159] The court found this section inapplicable because it only refers to "nonimmigrants."[160] The Karims did not qualify as such since each member of the family qualified as an immigrant as

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151. Karim, 1998 WL 60949, at *5. *See also* Douglas v. INS, 28 F.3d 241, 244 (2d Cir.1994).

152. *Id.* at *6. Immigration and Nationality Act 8 U.S.C. § 1182 (a)(7)(A)(i)(I) (1998) (stating that any immigrant "who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document . . . is excludable.").

153. 8 C.F.R. § 245.4 (1998) (stating, "the documentary requirements for immigrants shall not apply to an applicant under this part").

154. Karim, 1998 WL 60949, at *6.

155. *Id. See* *6 n.8 (1998).

156. *Id.* Immigration and Nationality Act 8 U.S.C. § 1182(a)(6)(E) (1998) (referring to an alien "who at any time" engaged in immigrant smuggling); § 1182 (a)(6)(C) (1998) (referring to an alien who "seeks to procure (or has sought or procured)" documents by fraud); § 1182 (a)(1)(D) (1998) (referring to an alien who "is or has been" a member of a totalitarian party).

157. Karim, 1998 WL 60949, at *6.

158. Karim, 1998 WL 60949, at *6.

159. Immigration and Nationality Act 8 U.S.C. § 1182(a)(7)(B)(i)(II) (1998) (stating that any nonimmigrant who "is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission is excludable.").

160. Karim, 1998 WL 60949, at *6.

defined by 8 U.S.C. § 1101(a)(15) which included every alien except those within certain specific exceptions.[161] The INS abandoned this argument in their briefs before the court.[162]

Finally, the district director denied the Karims' adjustment of status claiming that they were excludable under § 1182 (a)(6)(C).[163] In the words of the director, the Karims "presented fraudulent documents in an attempt to gain entry into the United States."[164] However, the court relied on *Matter of D.L & A.M.* where the Board of Immigration Appeals ("BIA") held that an alien is excludable under § 1182(a)(6)(A) only if there is evidence that the alien intended to present fraudulent documents to an authorized official of the United States Government.[165] Similarly, in *Matter of Y.G.*, the BIA determined that even though the alien had used a false passport to arrive in the United States, because he "gave his real name, stated that the documents he possessed were not his own" and was otherwise forthright with the officials, no misrepresentation had occurred.[166] Likewise, the Karims did not use their fraudulent passports to gain admission to the United States. Rather, they revealed their true identities to the United States Official immediately upon their arrival in New York.[167]

In *Garcia v. INS*, the court held that exclusion under the misrepresentation provision requires "subjective intent" on the part of the alien, involving willful, deliberate behavior."[168] Although the Karims possessed fraudulent passports, the family's immediate renunciation of the passports at JFK airport was evidence of their honest intentions.[169] Thus, the court held that there was no attempt by the Karims to misrepresent themselves to a United States official.[170]

The district director denied the Karim family an adjustment of status. He believed the decision was within his discretion and not within the jurisdiction of the Second Circuit. However, the court held that the case was within their jurisdiction and that the district director did not

161. *Id.*

162. *Id.*

163. Immigration and Nationality Act 8 U.S.C. § 1182(a)(6(C)(i) (1998) (stating, "Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure a visa, other documentation, or entry into the United States or other benefit provided under this chapter is excludable.").

164. Karim, 1998 WL 60949, at *6.

165. *Id.* at *7. *See* Matter of D.L. & A.M., Int. Dec. # 3162 (BIA Oct. 16, 1991).

166. Karim, 1998 WL 60949, at *7. *See* Matter of Y.G., Int. Dec. # 3219 (BIA May 5, 1994).

167. Karim, 1998 WL 60949, at *7.

168. Karim, 1998 WL 60949, at *7. *See* Garcia v. INS, 31 F.3d 441, 443 (7th Cir.1994) (citing Suite v. INS, 594 F.2d 972, 973 (3d Cir.1979).).

169. Karim, 1998 WL 60949, at *7.

170. *Id.*

base his decision on balanced reasoning and governing law. As a result, the court found that the Karims were entitled to an adjustment of status.

IV. Quasi-In-Rem Jurisdiction and the Question of Due Process For Foreign Entities.

A. *Orient Overseas Container Line v. Kids International Corp., No. 96 Civ. 4699 (DLC), 1998 WL 531840 (S.D.N.Y. Aug 24, 1998); Under the due process standards of International Shoe Co. v. Washington, third-party defendants, China Export and Shanghai North, lacked sufficient minimum contacts with the forum as to permit the exercise of quasi-in-rem jurisdiction and allow a motion for attachment by third-party plaintiff Kids International Corp.*

In *Orient Overseas Container Line v. Kids International Corp.* the United States District Court for the Southern District of New York held that under the Constitutional due process requirements presented in *International Shoe Co. v. Washington,* third-party defendants, Frame International Ltd., China Export Bases Development Shanghai Corp. ("China Export") and Shanghai North Rex-Pu Industries Corp. ("Shanghai North"), lacked sufficient minimum contacts with the forum to permit the exercise of quasi-in-rem jurisdiction which resulted in the denial of a motion for attachment by third-party plaintiff Kids International Corp., ("Kids").[171] In April 1995, China Export and Shanghai North were awarded a judgment against Orient Overseas Container Lines ("Orient") blaming Orient for the improper release of goods without original bills of lading.[172] June 24, 1996, Orient commenced the present action seeking to force Kids to honor the parties' indemnity letters justifying the release of these goods.[173] Kids then sought attachment of the money judgment awarded in 1995 to China Export and Shanghai North.[174] Orient now opposes Kids motion stating that China Export and Shanghai North have insufficient contacts with the New York forum to establish personal jurisdiction and allow for attachment.[175]

In 1994, Kids, a New York clothing corporation, contracted to purchase apparel in the amount of $970 million from third-party defendant, Frame International, who was a joint venturer with third-party de-

171. Orient Overseas Container Line v. Kids International Corp., No. 96 CIV. 4699 (DLC), 1998 WL 531840, at *7 (S.D.N.Y. Aug 24, 1998).

172. *Id.* at *1.

173. *Id.*

174. *Id.* at *1.

175. *Id.*

fendant, Yangzhou Elizabeth Garments Co., Ltd. ("Elizabeth").[176] Elizabeth subcontracted a portion of the manufacturing work to China Export.[177] When Elizabeth and China Export did not acquire necessary export quotas to effect shipment of the goods to Kids, Shanghai North became involved and was named the shipper on the remaining two bills.[178] Plaintiff Orient, a Hong Kong corporation, was selected to transport the clothing from China to the United States.[179]

Orient transported the goods to New York and upon arrival notified Kids that in order to release the goods under the shipment terms Kids needed to present Orient with original bills of lading.[180] Kids, unable to locate the original bills of lading, would only receive the clothing upon agreement to sign letters of indemnity holding Orient harmless to claims brought against Orient as a result of its release of the goods without the original bills of lading.[181] Kids never made payments on the clothing to any third party defendants, claiming the garments were defective.[182]

In April 1995, to secure payment goods, China Export and Shanghai North commenced an action in Shanghai Maritime Court against Orient for the improper release of goods without obtaining the bills of lading.[183] In 1996, Orient initiated the present action seeking an order requiring Kids to honor the parties' indemnity letters by way of intervention and injunction.[184]

Kids filed a Third Party Complaint demanding damages from third-party defendants and a Notice of Motion for an order of Attachment of the 1995 Shanghai Judgement pursuant to Supplemental Rule B(1) Fed. R. Civ. P. or 4(n)(2) Fed. R. Civ. P.[185]

The issue presented to the Southern District of New York was whether Kids may attach the Shanghai Judgement awarded against the Orient and establish quasi-in-rem jurisdiction in this Court over China Export and Shanghai North.[186] The court, in considering an attachment to attain quasi-in-rem jurisdiction, focused on two factors: (1) Whether the movant has satisfied the conditions for an order of attachment under the procedural rules; and, (2) whether the court's exercise of jurisdiction

176. *Id.*
177. Orient, 1998 WL 531840, at *1.
178. *Id.*
179. *Id.* at *2
180. *Id.*
181. *Id.*
182. *Id.*
183. Orient, 1998 WL 531840, at *2.
184. *Id.*
185. *Id.*
186. *Id.*

over the defendants, if attachment occurs, satisfies Constitutional standards of due process. The court found Kid's arguments failed the latter aspect of this test.[187]

Kids first argued that it may obtain a motion for attachment under Supplement Rule B(1) of the Federal Rules of Civil Procedure (Admiralty) which was easily rejected by the court.[188] The court concluded Kids could not apply Rule B(1) because they filed no claim in admiralty against China Export and Shanghai North which is required for an attachment under the rule.[189]

In determining the acceptance of attachment under Rule 4(n)(2) Fed. R. Civ. P., the court reasoned that Kids did satisfy all of the circumstances under Article 62 of the C.P.L.R.[190] Thus, Kids was entitled to an order of attachment against China Export and Shanghai North. The sole question that remained for the court was whether the use of the attachment, a procedure to establish jurisdiction over these entities, was consistent with prevailing Constitutional standards.

The standard needed to exercise quasi-in-rem jurisdiction and fulfill Constitutional due process requirements is established in *International Shoe Co. v. Washington*.[191] The Southern District Court considered whether minimum contacts existed as to be "fair and just" in forcing foreign corporations to defend an action in New York initiated by attachment.[192] It was decided Kids did not satisfy the burden of the minimum contacts test as set forth in *International Shoe*.[193]

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187. Intermeat v. American Poultry, 575 F.2d 1017, 1020 (2d.Cir.1978) (*holding*: Minimum contacts were satisfied when a non-resident defendant had "continuous involvement in the commerce of New York, had repeatedly consented to arbitration in New York, and purchased meat through New York importers.").

188. FED.R.CIV.P.SUPP.RULE B (1), ("The rule envisions that the [attachment]order will issue when the plaintiff makes a prima facie showing that he has a maritime claim against the defendant in the amount used for and the defendant is not present in the district.").

189. Orient, 1998 WL 531840, at *3.

190. *Id.* at *3 - *4, (The relevant provision of New York law to which the Rule points is found in Article 62 of the C.P.L.R., §6201, "[A]n order of attachment may be granted" when the defendant "is a foreign corporation not qualified to do business in the state.").

191. *Id.* at *5. *See* International Shoe v. Washington, 326 U.S. 310, 66 S.Ct. 154 (*holding*: "Due process requires that the defendant have certain minimum contacts with [the forum], such that the maintenance of the suit does not offend traditional notions of fair play and justice.") and Orient Overseas Container Line v. Kids International Corp., No. 96 Civ. 4699 (DLC), 1998 WL 531840 (S.D.N.Y. Aug 24,1998).

192. International Shoe v. Washington, 326 U.S. 310, 66 S.Ct. 154. *See*, APC Commodity Corp. v. Ram Dis Ticaret A.S., 965 F.Supp. 461, 465 (S.D.N.Y.1997) (*holding*: "The test is whether there are sufficient minimum contacts to make it fair and just that the foreign corporation be required to come to New York to defend the action that was begun by attachment.").

193. *Id.*

General jurisdiction could not be established due to lack of systematic contacts. It was stipulated that China Export and Shanghai North had no offices, employees, or bank accounts in New York nor did they solicit, transact, or have a license for business in New York.[194] Thus, the court reasoned that there was no systematic contacts and no jurisdictional presence in the district.[195] China Exports and Shanghai North had no direct contacts with New York to show continuous involvement in the commerce of New York.[196]

The court further considered that the only way China Export and Shanghai North could have minimum contacts with New York was by the contract they both had with Elizabeth and Frame.[197] Minimum contacts with the forum did not exist by virtue of their contacts with these entities that had minimum contacts.[198] Kids argued that minimum contacts was satisfied because China Export and Shanghai North knew the garments were destined for New York and intended to gain financially from the transaction in the forum.[199] This argument was rejected by the court.

Ultimately, the court held that Kids failed to fulfill the due process requirement to enable quasi-in-rem jurisdiction over the third-party defendants due to a lack of evidence of purposeful acts which would establish minimum contacts in New York.[200] The result eliminated a possibility of the appearance of China Export and Shanghai North before the New York forum.[201]

V. Warsaw Convention

A. *Shah v. Pan American World Services, Inc., 148 F.3d 84 (2nd Cir.(NY) June 15, 1998); A claim for fraudulent misrepresentation may be considered willful misconduct under the Warsaw Convention; the liability causation standard established by the Warsaw Convention is whether the damages would have occurred had the carrier performed as promised.*

In *Shah v. Pan American World Services, Inc.* the Second Circuit held that a claim for fraudulent misrepresentation may be considered

194. Orient, 1998 WL 531840, at *7.
195. *Id.*
196. Intermeat, 575 F.2d at 1018.
197. *Id.* at*6.
198. Orient, 1998 WL 531840, at *7.
199. *Id.*
200. *Id.*
201. *Id.*

willful misconduct under the Warsaw Convention ("Convention")[202], removing carrier liability limitations if found.[203] The Second Circuit also held that the causation standard established by the Convention is whether the damages would have occurred had the carrier performed as promised.[204]

Injured passengers and relatives of those killed during the hijacking of Pan Am Flight 73 in Karachi, Pakistan on September 5, 1986 filed suit in several United States district courts against Pan Am for damages.[205] In 1987 and 1988 the lawsuits were transferred to the Southern District of New York by the multi-district litigation panel for consolidated pre-trial proceedings under 28 U.S.C. § 1407. The court referred the consolidated case to itself in December, 1993.[206]

At trial the plaintiffs argued that Pan Am had engaged in willful misconduct by advertising it had contracted a security system for its international flights with Alert Management Systems, Inc.("Alert").[207] In April, 1994, the jury returned a special verdict determining that Pan Am did engage in willful misconduct in connection with Alert but the misconduct was not the proximate cause of the hijacking.[208] The district court entered a final judgement for damages within the limitations of the Convention.[209] On appeal, the Second Circuit determined that fraudulent misrepresentation can be considered willful misconduct in actions brought pursuant to the Convention.[210]

Article 17 of the Convention establishes liability for the death or wounding of passengers on board aircraft, subject to limitations established in Article 22.[211] However, Article 25 removes limitations for damages caused by willful misconduct,[212] which the court defined as actions taken with the knowledge injury or death would probably result

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202. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention") *concluded* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C.A. § 40105 (1997).

203. Shah. v Pan Am. World Serv., Inc., 148 F.3d 84, 92 (2nd Cir.(NY) June 15, 1998).

204. *Id.* at 95.

205. *Id.* at 88.

206. *Id.*

207. *Id.* (Only one set of the plaintiffs, the Singhs, allegedly relied on these representations in choosing Pan Am. Sadanand Singh brought suit individually and as executor of the estates of Kala, Samir, and Kalpana Singh. There were several additional plaintiffs to the appeal).

208. Shah, 148 F.3d at 88-89.

209. *Id.* at 89, 93.

210. *Id.* at 93.

211. Shah, 148 F.3d. at 92 *citing* Warsaw Convention *supra* note 1, at arts. 17, 22. (Liability limitations under Article 22 of the Warsaw Convention were modified by the Montreal Agreement, approved by the U.S. *See* Exec Order No. 23,680, 31 Fed.Reg. 7,302 (1966)).

212. Shah, 148 F.3d at 93 *citing* Warsaw Convention *supra* note 1, at art. 25(1).

or a "conscious or reckless disregard of . . . the consequence of its actions."[213] The court found the Convention did not require equal treatment for all passengers when only some were injured by a carrier's misconduct.[214]

The court then looked to the Convention to establish the proper causation standard for willful misconduct claims. Article 24 restricts damage actions under Article 17 to the conditions and limits of the convention itself.[215] Because there are no provisions suggesting causation to be determined otherwise, and as the Convention was intended to create a uniform standard,[216] the court held it is the law of the Convention itself which applies to the causation question and no other jurisdictional standard.[217]

The court examined three possible interpretations of the Convention language before establishing the proper standard. First, it rejected but-for causation as overly broad and insufficient.[218] This approach would allow a passenger lured on board by a misrepresentation of comfort and luxury then injured in a hijacking to file a claim because the false advertising caused them to board and suffer injury.[219]

The Singh plaintiffs urged a second interpretation, linking both reliance on misrepresentation and the relationship between injuries and the misrepresentation.[220] The court found that if the representations made had been carried out and injuries still would have occurred, the misrepresentations could not be said to have caused the injures.[221] Holding carriers liable for actions that would have occurred regardless of whether the representations were performed as advertised would be counter to one of the primary purposes of the Convention, limiting carrier liability.[222]

It was the third interpretation which the court adopted. To establish causation for willful misconduct under Article 25, plaintiffs must demonstrate a reasonable reliance on fraudulent misrepresentation as an

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213. Shah, 148 F.3d at 93 *citing* Pagnucco v. Pan American World Airways, Inc. (*In re* Air Disaster at Lockerbie, Scotland on Dec. 21, 1988), 37 F.3d 804, 812 (2nd Cir.(NY), September 12, 1994)("Lockerbie II").

214. *Id.*

215. Shah, 148 F.3d at 93 *citing* Warsaw Convention *supra* note 1, at art. 24.

216. Shah, 148 F.3d at 94 *citing* Rein v. Pan American World Airways Inc. (In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988), 928 F.2d 1267, 1270, 1280 (2nd Cir.(NY), March 22, 1991)("Lockerbie I").

217. Shah, 148 F.3*d* at 95.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

inducement to use the carrier and then show "the damages would not have occurred if the carrier had performed as promised."[223] Under this definition, the Article 22 liability cap is not removed in the instant case assuming that even if the Alert program delivered as promised, it would not have prevented the hijacking.[224]

Having determined the proper standard to apply, the Second Circuit then looked to see if this was the same one used in the jury instructions and special verdict.[225] The court found that while the form of the special verdict question on misconduct as a proximate cause of the hijacking could have been better worded, the district court's instructions clarified the question of causation with language consistent with the Convention definition and, therefore, the special verdict was not subject to reversal.[226] Given the definition established by the Convention and the lack of reversible error in the special verdict handed down at trial, the court concluded there were no grounds for a misrepresentation claim.[227]

The Singh plaintiffs also challenged the English translation of the Convention. They argued it establishes a different misconduct-causation relationship than the original French text does.[228] They believed a closer translation to the original text requires the damage need only 'arise out of,' not be 'caused by,' the incident. They further argued that under this seemingly lower threshold, the special verdict is not a bar to a fraudulent misrepresentation claim.[229] The court found that under actions arising from willful misconduct, the arising out of approach might be permissible."[230] But the court found it inappropriate to rule on this issue because the plaintiffs did not object to the jury instructions or the special verdict questions before the verdict was reached.[231]

In accordance with established law, the court found that all of the state law claims the Singh plaintiffs sought were within the scope of the Warsaw Convention and state law claims which fall within the scope of the Convention are preempted.[232]

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223. Shah, 148 F.3d at 95.
224. *Id.*
225. *Id.* at 96.
226. *Id.*
227. *Id.* at 96
228. *Id.* at 96-97.
229. Shah, 148 F.3d at 97.
230. *Id.*
231. *Id.*
232. Shah, 148 F.3d at 97, 98 *citing* Fishman v. Delta Airlines, Inc., 132 F.3d 138, 141 (2nd Cir.(NY), Jan. 05, 1998)(citing Lockerbie I, 928 F.2nd at 1273).

The court also rejected appeals related to the case's referral under 28 U.S.C. § 1407.[233]

233. *Id.* at 90 (The Supreme Court had recently ruled against self-referral of §1407 cases. *see* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,—*U.S.* —-, *118 S.Ct. 956, 140 L.Ed.2d 62 (1998).* The court held that this ruling did not apply retroactively).

NOTES

ECONOMIC ESPIONAGE: THE FRONT LINE OF A NEW WORLD ECONOMIC WAR[1]

The means by which enlightened rulers and sagacious generals moved and conquered others, that their achievements surpassed the masses, was advance knowledge. Advance knowledge cannot be gained from ghosts and spirits, inferred from phenomena, or projected from the measures of Heaven, but must be gained from men for it is the knowledge of the enemy's true situation.[2]

The spy of the future is less likely to resemble James Bond, whose chief assets were his fists, than the Line X engineer who lives quietly down the street and never does anything more violent than turn a page of a manual or flick on his microcomputer.[3]

I. INTRODUCTION

A. Background

With the end of the Cold War, although warfare per se has not declined, the threat of nuclear war is steadily declining. At the same time, this has led to an increase in the importance of economic competitiveness in nations' definitions of national security. Prior to the end of the Cold War, many international relationships were defined according to military alliances. These relationships are changing significantly due to a shifting international focus from a military to an economic outlook, and allies now see one another as competitors in the global economy.

Under this new arrangement, industrialized countries striving to maintain their standards of living, and developing nations eager to improve such standards, face enormous pressure to succeed. They will pursue any and all means which bear the potential to ensure their productivity and economic security. When economic objectives begin to play a more dominant role in defining national security, the interest in

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1. Journalist and business consultant Sam Perry suggests that "[e]conomic espionage is the front line of a new world economic war. It is a war that most companies from open, democratic nations are illprepared to fight." *See* Sam Perry, *Economic Espionage and Corporate Responsibility*, CJ INT'L, Mar.-Apr., 1995 <http://www.acsp.uic.edu/oicj/pubs/cji/110203.html>.

2. SUN TZU, ART OF WAR, *reprinted in* THE COMPLETE ART OF WAR, at 118 (Ralph D. Sawyer, trans., Westview Press 1996).

3. ALVIN TOFFLER, POWER SHIFT: KNOWLEDGE, WEALTH, AND VIOLENCE AT THE EDGE OF THE 21ST CENTURY 311 (1990).

economic espionage expands. The end result for today's society is that economic espionage is the front line of a new world economic war.

This note will examine the problems surrounding economic espionage at the international level. A brief history of the problem will be presented first. Section two will then describe the current problem of economic espionage. Section three will consider the specific effects of economic espionage has on individual countries—from the victims to the perpetrators to the innocent bystanders in the global economic espionage struggle. Section four will discuss relative international agreements, laws, and organizations, as well as the reasons for their ineffectiveness in curbing international economic espionage. Finally, section five will put forth and analyze possible solutions to the problem.

B. Defining Economic Espionage

Many of the world's intelligence units have attempted to define economic espionage. Simply put, economic espionage is the "outright theft of private information."[4] A different and somewhat more definitive description comes from the Canadian Security Intelligence Service ("CSIS"). According to CSIS, economic espionage is "illegal, clandestine, coercive or deceptive activity engaged in or facilitated by a foreign government designed to gain unauthorized access to economic intelligence, such as proprietary information or technology, for economic advantage."[5] Still another, and far more complex definition is contained in the United States' Economic Espionage Act,[6] one of the few forms of legislation enacted by any state to help suppress economic espionage. The Economic Espionage Act criminalizes[7] activity by anyone who:

intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly—(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret; (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret; (3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization; (4)

4. Peter Schweizer, *The Growth of Economic Espionage: America is Target Number One*, FOREIGN AFF., Jan.-Feb. 1996, at 9.

5. Canadian Security Intelligence Service, *Economic Security* (1996) <http://www.csis-scrs.gc.ca/eng/backgrnd/back6e.html>.

6. Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-1839 (1997).

7. Economic Espionage Act § 1831. Penalties for those convicted of this activity include fines up to $500,000, or imprisonment for up to fifteen years, or both.

attempts to commit any offense described in any of paragraphs (1) through (3); or (5) conspires with one or more other persons to commit any offense described in any of paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy. . ..[8]

American legislators have determined that the above activity constitutes economic espionage.

An important concept related to economic espionage is *economic intelligence*. CSIS explains that economic intelligence is "policy or commercially relevant economic information, including technological data, financial, proprietary commercial and government information, the acquisition of which by foreign interests could, either directly or indirectly, assist the relative productivity or competitive position of the economy of the collecting organization's country."[9] Those who conduct economic espionage specifically target this class of information.[10]

C. *A Brief History of Economic Espionage*

Espionage in the traditional sense is the way in which spies acquire an enemy's military secrets. A few famous incidents of espionage include England's use of spies to acquire military information in defeating the Spanish Armada in 1588; the Allies' use of spies during World War II in defeating the Axis powers; and the former Soviet Union's use of spies in stealing atomic bomb secrets from the United States and Great Britain.[11] Traditional espionage has transformed with the passing of the Cold War and the rise of international economic competition. Nations' economic and national security are closely connected and espionage activities are changing from military to economic foci.[12]

Although the end of the Cold War seemingly brings a surge of economic espionage activity, stealing the ideas of a business competitor is not a new game in the world market. Indeed, economic espionage is a practice that has existed for thousands of years. An early instance of economic espionage occurred over 1500 years ago and involved the secret of silk. A Chinese princess traveled abroad, wearing a flowered hat. She hid silkworms in the flowers and gave them to a man in India.

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8. *Id.*

9. Canadian Security Intelligence Service, *supra* note 5.

10. *Id.*

11. Edwin Fraumann, *Economic Espionage: Security Missions Redefined*, 57 PUB. ADMIN. REV. 303 (1997).

12. *Id.*

Thus, through economic espionage, the secret of silk escaped from China.[13]

In the eighteenth century, China again lost a secret because of economic espionage. After China had spent centuries of making high-quality porcelain through a process known only to its alchemists, the French Jesuit, Father d'Entrecolles, visited the royal porcelain factory in China, where he learned the secrets of porcelain production and described the process in writings he sent to France.[14]

The early twentieth century and the reality of world-wide conflict led to significant incidents of economic espionage, proving that economic and military intelligence were equally important.[15] Opposing sides in World War I searched for secret weapons, knowing that such weapons would be available in a foreign country's industrial sector.[16] Spies gained information on how to create weapons like poison gas.[17] As was already known, spying saved countries time and financial resources that they would have spent developing poison gas on their own. The spies stole the secret from the Germans, and shortly afterward many countries used poison gas against each other during warfare.[18]

In the present day, economic espionage continually thrives. A few publicized incidents in more recent history include the following. In Japan, the ministry for international trade and industry identifies foreign high-tech companies that are likely to produce significant products in the near future.[19] The ministry supplies crucial information to Japanese companies, leading them toward purchasing the foreign companies through front organizations, false flag operations, or by overt means.[20] In an unrelated incident, a firm in the United States lost a contract bid for international electronics. Shortly thereafter, it learned that a European intelligence agency somehow intercepted its pricing information. The European agency turned this critical data over to another company which eventually won the contract bid.[21] In still another incident, CSIS discovered that a handful of "flight attendants" on Air France were ac-

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13. JACQUES BERGIER, SECRET ARMIES: THE GROWTH OF CORPORATE AND INDUSTRIAL ESPIONAGE 3 (Harol J. Salemson trans., Bobbs-Merrill Co., Inc., 1975) (1969).

14. *Id.* at 4.

15. *Id.* at 31.

16. *Id.*

17. *Id.*

18. *Id.* at 32.

19. Thomas J. Jackamo, III, *From the Cold War to the New Multilateral World Order: The Evolution of Covert Operations and the Customary International Law of Non-Intervention*, 32 VA. J. INT'L L. 929, 945 (1992).

20. *Id.*

21. *Id.*

tually agents of the French intelligence service, strategically positioned to spy on companies' executives and gather their trade secrets.[22] These present-day examples, together with the afore-mentioned historical evidence, illustrate a crucial point: that economic espionage has been and continues to be on the rise.

II. Current Trends in Economic Espionage

A. *Participants in the Trade*

Countries involved. Counterintelligence agent George Lepine's description of global involvement in economic espionage is startling: "The question these days," he says, "isn't which country commits economic espionage, but which doesn't."[23] He and others estimate that two dozen countries regularly participate in economic espionage activities.[24] Among these are industrialized countries, including Japan, France, Russia, the United States, the United Kingdom, Germany, the Netherlands, Belgium, Israel, Taiwan, South Korea, and various Middle Eastern and Latin American countries.[25] According to a Canadian survey, the worst offenders are Asian governments, with western European governments following closely.[26] Other offenders can be found in various businesses throughout the United States, as indicated in a 1997 survey by The Futures Group. The survey revealed that in the United States, "[a] full 82 percent of companies with annual revenues of more than $10 billion now have an organized intelligence unit."[27] But economic espionage is not carried out exclusively by first world powers. "Countries that heretofore have not been considered intelligence threats account for much of the economic collection currently being investigated by. . .law enforcement communities."[28] In general, any nation that competes in the world market and has enough motivation to spy will engage in economic espionage.[29]

The significance surrounding the classes of parties involved in economic espionage is twofold. First, friendly and allied nations commit

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22. Anthony Boadle, *Canada Spy-Catcher Says High-Tech Firms Targeted*, The Reuter European Bus. Report, Apr. 13, 1994.

23. Ian McGugan, *The Spy Who Came in for the Gold*, Can. Bus., May 1, 1995, at 99.

24. *Id.*

25. Jackamo, *supra* note 19, at 944; Schweizer, *supra* note 4.

26. McGugan, *supra* note 23.

27. Katherine Hobson, *Corporate Intelligence Seen as a Necessity* (visited Sept. 30, 1998) <http://www.abcnews.com/sections/business/DailyNews/spy980924/index.html>. The Futures Group is a competitive intelligence consultant in the United States.

28. *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage* (July 1995) <http://www.nsi.org/Library/Espionage/indust.html>.

29. Canadian Security Intelligence Service, *supra* note 5.

espionage against one another. In the world of economic espionage, there are no true friendly relations, largely due to the fact that countries which engage in the activity are vying for a rung on the global market ladder.[30] As former French intelligence chief Pierre Marion points out, "[i]t is an elementary blunder to think we're allies. . .When it comes to business, it's war."[31] Second, developing nations are heavily involved in the trade, due to recent political developments, especially the decline of communism.[32] Formerly communist states must quickly catch up with the West, and economic espionage often provides an avenue to do just that. Without communism, intelligence agents from Eastern block countries are unemployed and available in the open market.[33] The involvement of Eastern block agents is threatening because their intelligence activities are not restricted by traditional notions of international business ethics.[34] Therefore, such agents may go to any lengths to acquire the information they seek.

Individuals involved. There is no specific person who qualifies as an intelligence gatherer. However, some of the more common international snoops include competitors, vendors, investigators, business intelligence consultants, the press, labor negotiators, and government agencies.[35] Some countries hire individuals, rather than large organizations or intelligence agencies, to do their spying for them.[36] Other countries hire teams of individuals to enter foreign companies and steal ideas.[37]

B. Targets

Realistically, no business is especially immune from economic espionage. Targets include two main forms: industry and proprietary business information.[38] Government and corporate financial and trade data are also stolen on a regular basis. Industries are probably the biggest targets of economic espionage. Among those regularly sought are bio-

30. Marc A. Moyer, *Section 301 of the Omnibus Trade and Competitiveness Act of 1988: A Formidable Weapon in the War Against Economic Espionage,* 15 Nw. J. Int'l L. & Bus. 178, 182 (1994); Jackamo, *supra* note 19, at 944.

31. Stanley Kober, *Why Spy? The Uses and Misuses of Intelligence,* USA Today, Mar. 1, 1998, at 10.

32. Moyer, *supra* note 30, at 183.

33. *Id.*

34. *Id.*

35. Kevin D. Murray, *Ten Spy-Busting Secrets* (visited Sept. 10, 1998) <http://www.tscm.com/murray.html>.

36. John J. Fialka, War by Other Means: Economic Espionage in America 18 (1997).

37. *Id.* at 29

38. *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, supra* note 28.

technology; aerospace; telecommunications, including information superhighway technology; computer software and hardware; advanced transportation and engine technology; oil and gas companies; advanced materials and coatings, including "stealth" technologies; energy research; defense and armaments technology; manufacturing processes; semiconductors; and critical technologies: manufacturing processes and technologies, aeronautics and surface transportation systems, and energy and environmental related technologies.[39]

The second targeted category is proprietary business information. Proprietary business information includes bid, contract, customer, and strategy information. What seems mundane and unimportant to companies can be very important to competitors—numerous amounts of stolen information consists of plant layouts, client lists and bids.[40]

C. *Reasons Why Countries Conduct Economic Espionage*

To Accelerate Modernization. The desire of states to possess the most modern industries and technologies possible is not an unreasonable one. Modernized states realize better overall economic development, self-sufficiency, and political autonomy than do undeveloped states.[41] In order to become more modernized, states with lesser-developed economies are tempted to import foreign technologies by whatever means are available, including economic espionage. Economic espionage appeals to these states because it saves them the time and financial resources they would have spent to develop the technologies on their own.[42]

Success Given in Economic Espionage. Nations also commit economic espionage because it is an area in which many of them are capable of success. Many countries already have the ability to carry out economic espionage because they the have sufficient funds and apparatus to do so. (Appendix) A United States Congressional intelligence committee report in 1994 stated that "reports obtained since 1990 indicate that economic espionage is becoming increasingly central to the operations of many of the world's intelligence services and is absorbing larger portions of their staffing and budget."[43] Additionally, many countries use their leftover Cold War spying apparatus, such as giant com-

39. Boadle, *supra* note 22; Moyer, *supra* note 30, at 184; *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, supra* note 28.

40. Boadle, *supra* note 22.

41. Robert Gilpin, The Political Economy of International Relations 112 (1987).

42. *Id.*

43. Fialka, *supra* note 36, at 5 (quoting *Report on U.S. Critical Technology Companies, Report to Congress on Foreign Acquisition of and Espionage Activities Against U.S. Critical Technology Companies,* 1994, p. 5).

puter databases, scanners for eavesdropping, spy satellites, and bugs and wiretaps, to conduct economic espionage activities.[44]

Keeps Agents Employed. Some intelligence agents commit economic espionage to fill voids left from the Cold War, especially those agents from Eastern block countries, where the need for secret services has lessened.[45] These agents need new reasons to continue their spy work, and the economic sector occupies their time where the military sector previously did so.[46]

Leads to More Effective Global Competition. Companies commit economic espionage to increase their chances for success in the world market.[47] Economic espionage helps nations to maintain economic and technological competitiveness[48] and to gain an edge on a competitor because it helps to provide technologically limited countries with the modern devices they need.[49]

Profitable Business. Peter Schweizer writes, "[t]hat so many states practice economic espionage is a testament to how profitable it is believed to be."[50] Some countries gain financial profit as well as technology from economic espionage. In Australia, for example, economic espionage is estimated to be worth $2 billion per year.[51] France acquired a $2 billion deal with India for airplanes because of the economic espionage activities of the Direction Generale de la Securite Exterieure.[52]

Quick and Cheap. Getting the means of production is often more important for some countries than acquiring the actual technology.[53] The manufacture of a particular product, ballbearings for example, may not be a secret, but the means by which it is done well takes years to develop.[54] Countries that steal this information are therefore able to cut down the amount of time it would take to develop effective manufactur-

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44. FIALKA, *supra* note 36, at 5.

45. McGugan, *supra* note 23.

46. Jackamo, *supra* note 19, at 938.

47. *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage*, *supra* note 28.

48. Jackamo, *supra* note 19, at 943.

49. *The Trade in Secrets*, THE BULLETIN, June 28, 1994 <http://www.dap.csiro.au/Interest/Secrets/secrets.html>.

50. Schweizer, *supra* note 4.

51. *The Trade in Secrets*, *supra* note 49.

52. Schweizer, *supra* note 4. The Direction Generale de la Securite Exterieure is the intelligence service of France.

53. Moyer, *supra* note 30, at 187.

54. *Id.*

ing processes on their own.[55] In sum, the supported philosophy is that it is quick and cheap to steal—crime pays.

Promotes National Security. "It has now been proven that economic strength of a nation is going to determine more than military power."[56] A nation's economic status makes up a large part of its national security.[57] This economic status is dependent upon a nation's ability to compete effectively in the world market. Because of this, economic competition "must be more carefully balanced with traditional military and intelligence concerns in determining policy to protect national security."[58]

D. Popular Methods

Virtually every traditional espionage method used during war is employed in today's business world. There are numerous ways in which countries carry out economic espionage, and many of these methods require little effort on the part of the perpetrators. Author Ira Winkler explains his approach to espionage: "I 'steal' most of my information by simply asking for it, looking on desktops, going up to computers that are left on all day, and digging through the trash. With few exceptions, all real-life James Bonds get their information exactly the same way."[59] The following are some of the most common methods of conducting economic espionage.

Planting "Moles" or Recruiting Agents. "Moles" are spies that are put into seemingly legitimate positions in a competitor's company.[60] Many intelligence gatherers rely on trusted workers within companies or organizations to provide them with proprietary and classified information.[61] A study by the American Society for Industrial Security ("ASIS") concluded that "trusted insiders pose the greatest risk" to the divulgence of trade secrets.[62] Lower-ranking employees, such as secretaries, computer operators, or maintenance workers, are regularly recruited because they often have desirable access to information and are

55. *Id.*

56. Steve Barth, *Spy vs. Spy,* World Trade, Aug. 1, 1998, at 34 (quoting John Schiman, special agent of the Federal Bureau of Investigation in Los Angeles).

57. *Id.* at 188-89.

58. *Id.*

59. Barth, *supra* note 56.

60. *Id.* at 180.

61. *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, supra* note 28.

62. Barth, *supra* note 56.

easily manipulated by intelligence agencies due to their lower pay and status within their respective companies.[63]

Surveillance, Clandestine Entry, and Bag Ops. Intelligence gatherers often break into their competitors' offices outright and steal the information they want. Many incident reports describe stolen laptop computers, disks, and confidential files. "One common method of stealing laptops at airports is for the thief's accomplice to get into line at the x-ray machine just in front of the victim. While the accomplice slowly empties his pockets of keys and loose change, the thief takes your laptops off the conveyor on the other side of the machine and spirits it away."[64] Additionally, hotel rooms and safes are regular targets.[65] Some spies bribe hotel operators to provide access to the hotel rooms, which is known as a "bag op." During bag ops, gatherers search unattended luggage and confiscate or photograph anything they think may be valuable to them.[66]

Technical Operations. Computer hacking and telecommunication interceptions are common, especially where systems are not fully protected against such intrusions.[67] Easy targets are cellular and cordless telephones.[68] Hacking and interceptions can provide much information to intelligence gatherers, including trade secrets and other forms of competitive information.[69] In one case, "it was suspected that a host government was intercepting telephone conversations between an executive abroad and his Canadian company headquarters. Canadian executives discussed detailed negotiation information including a specific minimum bid. This minimum bid was the immediate counter-offer put forward by the host company the following day."[70]

Student Placements. When students study abroad, some governments task them with acquiring economic and technical information about their host countries.[71] Common perpetrators are graduate students who serve professors as research assistants free of charge. In research

63. *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, supra* note 28.

64. Barth, *supra* note 56.

65. McGugan, *supra* note 23.

66. *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, supra* note 28.

67. *Economic Espionage: Information on Threat from U.S. Allies,* GAO/T-NSIAD-96-114 (Feb. 28, 1996) <http://www.fas.org/irp/gao/nsi96114.html>.

68. Murray, *supra* note 35.

69. *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, supra* note 28.

70. Canadian Security Intelligence Service, *supra* note 5.

71. *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, supra* note 28.

positions, the foreign graduate students gain access to the professor's research, learning technological applications which they can then relay to their home governments.[72]

Debriefing Travelers. Debriefing citizens after foreign travel is popular in some countries. Travelers are asked for any information acquired during their trips abroad. The debriefing sessions are considered offensive to some travelers, while others accept them as part of traveling abroad.[73]

Dumpster Diving. Also known as trash trawling, waste archaeology, and trashing, dumpster diving is the act of rummaging through a competitor's garbage to obtain information. Some believe it is the number one method of business and personal espionage.[74]

Bugging and Tapping. Business class seats on airlines, offices, hotel rooms, and restaurants are regularly bugged and tapped by spies. In a specific incident, a European airline bugged its entire business class section, while spies posed as flight attendants.[75]

Drop-by Spies. Some intelligence gatherers pose as technicians and repair persons in order to get to confidential information. Others volunteer for positions that get them close to sensitive information.[76] Some spies even pose as documentary camera crew members to gain access to places where secret information is kept.[77]

E. Harmful Effects

Costs to the World Economy. As long as countries continue to conduct economic espionage activities, there will be serious implications for the world economy. Many scholars and reporters attempt to estimate economic espionage's financial burdens to society. Such costs are difficult to determine, due to the fact that international industry is generally reluctant to discuss them. No company wants to admit it has suffered significant financial loss at the hands of foreign spies, especially when it depends on shareholder support that may discontinue if shareholders feel the company is faltering.[78] IBM, however, came forward and discussed its losses. In 1992, IBM vice-president Marshall Phelps told a United States Congressional committee that his company suffered billions of

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72. *Id.*
73. *Id.*
74. Murray, *supra* note 35.
75. Boadle, *supra* note 22.
76. *Economic Espionage: Information on Threat from U.S. Allies, supra* note 67.
77. *Id.*
78. Boadle, *supra* note 22.

dollars in losses due to theft of proprietary information.[79] This calculation supports the estimates of economists who claim that individual companies and firms lose billions of dollars annually through economic espionage.[80] For example, in its Intellectual Property Loss Survey Report from May 1998, ASIS estimated that American businesses may lose over $250 billion annually because of economic espionage.[81]

In spite of the difficulties of determining exact costs of economic espionage, two notions are clear: intelligence agencies spend billions of dollars each year in their espionage efforts, and counterintelligence agencies spend billions of dollars each year trying to thwart those efforts.[82]

In addition to direct financial loss, companies face other damages resulting from economic espionage: job loss and diminished or even lost contracts.[83]

Costs to Society in General. In an age where power stems from wealth, there is an ever-increasing fear that acquisition of economic information will lead to the breakdown of international security with economic foes of today becoming military foes of tomorrow. Society therefore lives in fear of economic espionage.

Economic espionage can destroy the incentive to innovate. No one wants to create new ideas if there is a strong likelihood that the ideas will be stolen, used, and sold by competitors. Not only will competitors take credit for ideas which belong to the original creators, but they will also profit from them financially, while the original creator will be left with nothing. This greatly discourages creativity.

F. Preventive Measures

One scholar points out that economic espionage "is an alive and growing art, and it's spawning a lot of protective measures."[84] Many countries respond to the threat of economic espionage in their own ways, by creating preventive measures, awareness and protection programs, and enacting laws. The following are recent examples of such action.

Canada. In January 1992, CSIS created its national Liaison/Awareness Program, which "seeks to develop an ongoing dialogue with organizations, both public and private, concerning the threat posed to

79. Canadian Security Intelligence Service, *supra* note 5.
80. *Id.*
81. Barth, *supra* note 56.
82. Richard Norton-Taylor, *Spooky Business*, THE GUARDIAN, Mar. 26, 1997.
83. FIALKA, *supra* note 36, at 6.
84. *The Trade in Secrets*, *supra* note 49.

Canadian interests by foreign government involvement in economic and defense-related espionage."[85] The program enables CSIS to collect and assess information that will promote its investigation of economic espionage activities against Canada. CSIS assesses the specific threats and advises the Canadian government accordingly.[86]

France. Recently, France developed INTELCO, a private intelligence company.[87] One of INTELCO's purposes is to teach business people how to safeguard their companies against espionage by foreign competitors.[88] The company is run by J. Pichot-Duclos, a former army general who oversaw France's military school for spies until 1992.[89]

Australia. Australia is in the process of changing its ASIO charter to allow investigations on the use of economic espionage in Australia. (ASIO is Australia's counter espionage agency.) If the charter is changed, non-military secrets will be protected in the same way as politically-motivated violence is protected.[90]

United States. In 1996, Congress passed the Economic Espionage Act, which proposes to deter theft of trade secrets by individuals and teams both within the United States and abroad. The Act purports to punish anyone who:

steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice or deception obtains a trade secret; without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret; receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization. . ..[91]

By December 1996, the United States was already prepared to fight one of its first cases under the new law, after two brothers, Patrick and Daniel Worthing, were arrested for misappropriating diskettes and other forms of confidential research information from the company for which they both worked.[92] Since the onset of this case, five other criminal actions have been brought under the Economic Espionage Act, resulting

85. Canadian Security Intelligence Service, *supra* note 5.
86. *Id.*
87. FIALKA, *supra* note 36, at 99.
88. *Id.*
89. *Id.*
90. *The Trade in Secrets, supra* note 49.
91. Economic Espionage Act of 1996, 18 U.S.C. §§ 1831(a), 1832(a).
92. R. Mark Halligan, *Reported Criminal Arrests Under the Economic Espionage Act of 1996* (visited Sept. 10, 1998) <http://www.execpc.com/~mhallign/indict.html>.

in two convictions.[93] Despite the presence of the Economic Espionage Act, however, it does not appear that it is being used to its full capacity. The few cases that have actually been brought to trial account for only a miniscule portion of the large number that are believed to exist.[94]

Multistate conferences. In recent years, some of the world's security organizations have held world-wide conferences to educate states on economic espionage and how to best protect themselves against it. In 1997, the National Computer Security Association ("NCSA") held such a conference in Brussels, Belgium.[95] Representatives from over thirty states participated in the "War by Other Means" conference that was geared toward protection of computer-related information.[96] The participants discussed and learned about such issues as open source intelligence and information strategy, information security basics, and information warfare and cyber-terrorism basics.[97] This was the NCSA's sixth conference on information warfare gathering, and it is helping to increase awareness of the "cyber battlefield" for economic espionage.[98]

Other Preventive Measures. Intelligence experts advise companies to protect their classified information carefully and effectively. Some of their suggestions include the following:

Appropriate classification, control and protection of sensitive documents;

Protection of computer databases and network links from unauthorized access;

Proper storage and disposal of sensitive documents;

Discussion of sensitive company matters in appropriate locations;

Realistic controls on employees' and visitors' access to sensitive facilities and materials;

Sensitivity and caution with the choice of medium used for business communications (i.e. cellular phones, open fax and phone lines);

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93. Gerald J. Mossinghoff, et al., *The Economic Espionage Act: A Prosecution Update*, 80 J. PAT. [& TRADEMARK] OFF. SOC'Y 360 (1998). *See* United States v. Hsu, 982 F.Supp. 1022 (E.D. Pa. 1997), *reversed by* United States v. Hsu, 155 F.3d 189 (3d Cir. 1998); United States v. Pin Yen Yang, Criminal No. 1:97MG0109 (N.D. Ohio 1997); United States v. Davis (MD Tenn. 1997); United States v. Trujillo-Cohen (CR-H-97-251, S.D. Tex. 1997); United States v. Campbell (MD Tenn. 1997).

94. *Id.* at 368.

95. Bill Pietrucha, *NCSA Plans Information Warfare Conference*, IAC (SM) INDUSTRY EXPRESS (SM); NEWSBYTES, Feb. 5, 1997.

96. *Id.*

97. *Id.*

98. *Id.*

Education and sensitization of all employees about the threat that economic espionage may pose to job security and the organization's economic well-being; and

Emphasis on sharing responsibility amongst all employees for adherence to effective security policies and practices.[99]

III. Existing Treaties, Agreements, and an International Organization Related to Economic Espionage

A. General Problems with the Law

Because of the threat of economic espionage, many countries make economic security a priority, enacting laws that purport to deter would-be intelligence gatherers.[100] Although laws in individual countries may help protect economic secrets of the country's nationals, such laws do not solve the problem of economic espionage internationally. Part of the trouble may stem from the history some states have of not respecting the intellectual property rights of other states. Historically, patent law in some nations *encouraged* economic espionage abroad. For example, one of the earliest patent laws, developed in France, gave "to whomsoever shall be the first to bring to France a foreign industry the same advantages as if he were inventor of it."[101] France has since amended its patent law to exclude such encouragement, but the fact that it once existed only supports the idea that when a nation's economy is threatened, ethics will not necessarily keep it from protecting itself in any way possible.

A main legal problem regarding international economic espionage is that there currently is no rule that "prevents western multinational corporations from committing corrupt practices overseas."[102] Although progress has been made to prohibit bribes by western multinational corporations in underdeveloped countries via the United States' Foreign Corrupt Practices Act, very few nations have enacted laws that criminalize the bribing of foreign officials.[103]

Another problem is that when such corrupt practices do occur, victimized states fail to adequately retaliate. For example, after United

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99. Canadian Security Intelligence Service, *supra* note 5.

100. Salem M. Katsh and Michael P. Dierks, *Globally, Trade Secrets are All Over the Map*, 7 No. 11 J. Proprietary Rts. 12 (1995). For example, Canada, China, Germany, Italy, Japan, Korea, Mexico, the United Kingdom, and the United States have adopted express statutory protection for trade secrets.

101. Bergier, *supra* note 13, at 13.

102. Alex Y. Seita, *Globalization and the Convergence of Values*, 30 Cornell Int'l L.J. 429, 486 (1997).

103. *Id.*

States officials learned of the existence of French spies in the French subsidiaries of Texas Instruments and IBM, the United States government simply sent a letter of diplomatic protest to France.[104] Similarly, the United States took little action against Israeli intelligence officers when they stole technological information from a defense contractor in Illinois, Recon Optical.[105] Until stronger reprimands are made by victims against violators and precedent is set to demonstrate that economic espionage such as this is intolerable, intelligence agents and others will continue to purchase and use stolen information, encouraging economic espionage's continuance.[106]

Furthermore, not all countries provide the same protection for intangible property rights, including trade secrets.[107] International intellectual property law does not help because it is quite weak, as will be discussed in further detail later in this report. At the present time, it does not provide much protection to countries that are regular victims of economic espionage.[108]

B. Treaties and International Agreements

The International Covenant on Economic, Social and Cultural Rights.[109] This agreement focuses in part on exploitation of Third World natural resources, but its coverage may be construed to reach other forms of economic wealth, including technology.[110] If the covenant is interpreted in this way, intellectual "innovation and expertise" would be considered among a state's natural resources, a subject matter which the agreement seeks to protect.[111]Therefore, economic espionage might be covered under this provision, but such a notion is questionable because the covenant refers more to overt ownership than covert theft of resources.[112]

Paris Convention. The Paris Convention for the Protection of Industrial Property, revised in 1967, is a multilateral treaty that provides

104. Schweizer, *supra* note 4.
105. *Id.*
106. *Id.*
107. Hoken S. Seki and Peter J. Toren, *EEA Violations Could Trigger Criminal Sanctions, Stiff Penalties are Intended to Deter Economic Espionage by Foreign Companies in the U.S.*, NAT'L L.J., Aug. 25, 1997, at B8.
108. Perry, *supra* note 1.
109. Dec. 16, 1966, 993 U.N.T.S. 3.
110. Jackamo, *supra* note 19, at 961.
111. *Id.*
112. *Id.*

the norms for international patents and trademarks.[113] It is the foremost industrial property law treaty and has extensive membership. Parties to the convention make up a union that protects industrial property. The significance of the union is that it consists of several administrative bodies that were created to ensure that the purposes of the convention would be fulfilled: the Assembly (the chief governing body under Article 13 of the Convention), the Executive Committee (a smaller body elected from the Assembly under Article 14), and the International Bureau of the World Intellectual Property Organization ("WIPO") (a body that performs the union's administrative tasks pursuant to Article 15).[114] The Convention sets forth uniform rules by which member states must abide with respect to industrial property rights.

Although the Convention purports to implement important industrial property laws, it is not effective against economic espionage, as evidenced by the present amount of economic espionage that takes place. Perhaps the reason why the Convention fails to help is because it does not specifically address economic espionage. Article 10 on unfair competition comes close where it states in subsection two that "any act of competition in contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition."[115] However, member states may hold the view that this does not prohibit economic espionage. It should be duly noted that several member states to the Convention engage in economic espionage on a regular basis today.

General Agreement on Tariffs and Trade ("GATT"). On April 15, 1994, an agreement resulted from the Uruguay Round of GATT, establishing the World Trade Organization ("WTO") and promulgating several trade-related agreements.[116] The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"), a product of the Uruguay Round, requires member countries to protect against acquisition, disclosure, or use of a party's trade secrets "in a manner contrary to honest commercial practices."[117] TRIPs specifically refers to "confidential information" rather than "trade secrets," but still emphasizes that such information has commercial value, is not in the public domain, and

113. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *reprinted in* INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 20-43 (Marshall A. Leaffer, ed., Bureau of National Affairs, Inc., 2d ed. 1997).

114. *Id.*

115. *Id.*

116. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994), *reprinted in* INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY, *supra* note 113 at 588-618.

117. *Id.*

is subject to "reasonable steps under the circumstances" to maintain its secrecy.[118] Relief offered to member states under the agreement includes injunctions and damages as well as provisional remedies to prevent infringement and to preserve evidence left behind by infringers.[119] Member states are also required to recognize third party liability.[120] Some countries already comply with TRIPs, but the purpose of the agreement is to *globally recognize* the importance of protecting trade secrets.[121] With this in mind, one of TRIPs' main goals is to foster consistency among nations.[122]

TRIPs' good intentions are not yet realized. The agreement so far has not been successful at curbing economic espionage. Perhaps this is due to the fact that TRIPs does not expressly forbid economic espionage. Furthermore, "the reality is that all parties knowingly tolerate substantial economic espionage activities because all sides believe that, on balance, they have more to gain by a world of information or unrestrained efforts to prevent 'hostile intelligence activities.'"[123]

C. United Nations Resolutions

Two United Nations Resolutions in particular relate to the problem of economic espionage, albeit indirectly. "Peaceful and Neighborly Relations Among States" is the title of Resolution 1236, which was passed in 1957.[124] It addresses the duty of non-intervention in other states' internal affairs, and calls upon states to settle their disputes in a peaceful manner.

A second resolution (Resolution 2131), passed in 1965 and entitled the "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty" (the "Declaration on Inadmissibility"), declares that "[n]o state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[125] The declaration condemns armed intervention as well as "all other forms of interference or attempted threats against the personality of the State or against its

118. Katsh and Dierks, *supra* note 100, at 15.

119. *Id.*

120. *Id.*

121. *Id.* (emphasis added).

122. *Id.*

123. *Relevant Intelligence in the Post-Cold War World* (visited Sept. 10, 1998) <http://www.venable.com/govern/fulltext.htm>.

124. G.A. Res. 1236, 12 U.N. GAOR, 12th Sess., Supp. No. 18, at 5, U.N. Doc. A/3805 (1957).

125. G.A. Res. 2131, 20 U.N. GAOR, 20th Sess. No. 14, at 11, U.N. Doc. A/6014 (1965).

political, *economic*, and cultural elements.. . ."[126] Arguably, however, this resolution was intended to deal more with economic sanctions than theft of private commercial secrets.

Because a state's economy is part of its internal affairs and economic espionage is an activity by which one state intervenes in another state's economic affairs, it could be construed that both resolutions indirectly condemn economic espionage. Each promotes non-intervention, and Resolution 2131 specifically condemns interference in a state's economic elements. However, these resolutions are ineffective in the war against economic espionage for the following reasons.

First, these and other United Nations resolutions on non-intervention lack the specificity to serve as guidelines that pinpoint permissible intervention.[127] Therefore, it is difficult to distinguish between what may and what may not be acceptable intelligence practices. Second, in reference to Resolution 2131, many states felt that the General Assembly merely expressed a political, rather than legal, view.[128] Third, states continually question the authority of General Assembly resolutions. Because these resolutions are persuasive and not binding materials, some states tend to ignore them.[129] The end result is that in spite of United Nations resolutions that are seemingly against it, economic espionage continues to exist.

D. An International Organization

World Intellectual Property Organization ("WIPO"). WIPO is the most important global intellectual property organization. Established by a convention at Stockholm in 1967, it administers international unions related to intellectual property, including the Paris Convention. Its main role is protecting the interests of intellectual property on a world-wide level.[130] In 1995, WIPO concluded an agreement with the World Trade Organization, establishing a cooperative relationship in which WIPO will provide WTO members and their nationals with copies of relevant laws and regulations in the same way that WIPO supplies its own members with such documents.[131]

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126. *Id.* (emphasis added).

127. Jackamo, *supra* note 19, at 964.

128. *Id.* at 963.

129. *Id.* at 970.

130. INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 561 (Marshall A. Leaffer ed., Bureau of National Affairs, Inc., 2d ed. 1997).

131. *Id.* at 577.

IV. Recommendations

"Any discussion about 'economic intelligence' must begin with an awareness that it is indeed a Brave New World for the Intelligence Community, one that must be entered with extraordinary sensitivity, as well as extensive public dialogue."[132] The sensitivity requirement exists because economic espionage is a sensitive subject area for many businesses. As was pointed out earlier in this report, businesses are reluctant to admit that they are victims of economic espionage. Additionally, this is a sensitive area because businesses instinctively try to keep their trade secrets from others, in order to prevent hard economic data from falling into the hands of both competitors and government representatives.[133] The public dialogue requirement exists because states must communicate nationally and internationally if they are to reach any agreements to help stop economic espionage.

What the preceding discussion of economic espionage shows is that there is a tremendous need for countries to create a global economic espionage agreement. Individual corporations and countries attempt to handle matters on their own, but it is difficult for them to counteract economic espionage, especially when foreign corporations and countries sanction and support such activity.[134] The fact that economic espionage continues to exist demonstrates that there is a need to set international business rules—both to promote fair economic competition and to balance competing values in a proper and formal way.[135]

There is presently much debate, both within nations and internationally, about the ways in which economic espionage should be controlled. The debate revolves around unilateral and multilateral action.[136] Industrialized countries are the leaders in implementing this action. They are now attempting to reach an agreement that would prohibit bribes and other corrupt practices in doing business abroad.[137] Corrupt business practices are illegal in all the industrialized countries.[138] Hence, the proposed agreement will simply extend that prohibition to activities abroad, potentially leading to higher ethical standards in developing countries where corruption runs rampant.[139]

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132. *Relevant Intelligence in the Post-Cold War World*, *supra* note 123.
133. *Id.*
134. Fialka, *supra* note 36, at 7.
135. Seita, *supra* note 102, at 484.
136. Moyer, *supra* note 30, at 179.
137. Seita, *supra* note 102, at 486-87.
138. *Id.*
139. *Id.*

Scholars and economists alike suggest many ways to battle economic espionage. The following is a compilation of popular suggestions. First, states must come to terms with what specifically constitutes the key elements of unjustifiable, unreasonable, or discriminatory conduct with respect to economic espionage, thereby defining the problem in explicit detail.[140] States must recognize what is and what is not economic espionage if they are to combat it.

Second, states must incorporate existing law, both national and international, that may apply to economic espionage, and propose new law where existing law fails to control economic espionage.[141]

Third, on the "supply side" of the economic espionage problem, states must make efforts to control their own exports and heighten individual corporate security.[142]

Fourth, on the "government side" of the economic espionage problem, states need to take advantage of existing governments and intelligence agencies of individual nations to curb economic espionage through law enforcement mechanisms.[143]

Fifth, states need to specify the roles that individual nations will play in identifying and countering the threats that economic espionage imposes on the industry of all nations, paying special attention to the manner in which such functions and roles are coordinated.[144]

Sixth, states must identify what constitutes the industrial threat, by discussing the threat to nations' industry of economic espionage and any trends in that threat, including: the number and identity of the governments conducting economic espionage; the industrial sectors and types of information and technology targeted by such espionage; and the methods used to conduct such espionage.[145]

Seventh, states need to work together toward an international criminal law solution, discussing the possibility of creating a coherent, modern body of international criminal law that deters and/or penalizes economic espionage.[146]

Finally, states might consider alternatives to banning economic espionage altogether. This might include the possibility of creating a

140. Moyer, *supra* note 30, at 179.

141. *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, supra* note 28.

142. Moyer, *supra* note 30, at 179.

143. *Id.*

144. *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, supra* note 28.

145. *Id.*

146. FIALKA, *supra* note 36, at 206.

United Nations or international economic intelligence service that works equally for all nations, leveling the field in which economic espionage is played. Perhaps an international economic intelligence agency could inspect and conduct surveillance globally, and share its findings with all nations. This might eliminate the current threats to global economic harmony.[147]

Overall, the importance of states working *together* to combat economic espionage cannot be stressed enough. This already occurs between some states, and others must follow such a lead. For example, some FBI agents in the United States regularly make contact with Scotland Yard or with the French police and work collectively in attempting to stop international criminals who are being investigated by both countries.[148] This kind of activity may open doors for creating relationships at a higher level, such as mutual legal assistance treaties for dealing with economic espionage crimes.[149] The United States Department of Justice already has such treaties, which provide procedures to share evidence and facilitate cooperative law enforcement with many countries throughout the world.[150] However, it does not presently have such treaties with any of the countries of Eastern Europe or the former Soviet Union, which began increasing their economic espionage activity with the end of the Cold War.[151]

V. Conclusion

Economic espionage will continue to be on the rise, unless nations make joint efforts to start dealing with the problem. Because of the dramatic changes to the world's military and economic divisions caused by the end of the Cold War, the probability that nations will continue to commit economic espionage against one another is great. Illicit gathering of competitor nations' economic information is what allows many nations to compete effectively in the world market. Those who take part in economic espionage will not be readily willing to stop, especially if it means losing any clout they have as members of the global economy. World leaders recognize that economic power is fundamental to national power. If nations persist to place their domestic priorities above international norms, the international economy will suffer as a result. For the world to achieve an even somewhat stable economy, individual govern-

147. Bergier, *supra* note 13, at 175.

148. Howard M. Shapiro, *The FBI in the 21st Century*, 28 Cornell Int'l L.J. 219, 224 (1995).

149. *Id.* at 227.

150. *Id.*

151. *Id.*

ments must be willing to put aside their short-term parochial interests and begin harmonizing business practices with one another.[152] It is vital that global leaders form an agreement on economic espionage. The world's economic future depends on it.

Karen Sepura

152. GILPIN, *supra* note 41, at 406.

APPENDIX

ECONOMIC ESPIONAGE ACROSS COUNTRIES:
LEVELS OF SOPHISTICATION

Tier 1	Tier 2	Tier 3
China	Colombia	Iraq
France	India	Libya
Germany	Russia	
Israel	South Korea	
Japan	Ukraine	
United States		

Tier 1: Through their technological and intelligence abilities, these countries eavesdrop electronically and perform computer intelligence gathering.

Tier 2: Although these countries have high-level intelligence gathering organizations, they do not have resources for computer and data intelligence gathering.

Tier 3: These countries' intelligence agencies will have high technology capabilities in the near future.

Source: Edwin Fraumann, *Economic Espionage: Security Missions Redefined,* 57 PUB. ADMIN. REV. 303 (1997), at 303.

A DYNASTY WEANED FROM BIOTECHNOLOGY: THE EMERGING FACE OF CHINA

INTRODUCTION

Although China has been slow to revolutionize its intellectual property laws by Western standards, the recent amendments made to this body of law combined with their expanding legal system have nonetheless allowed China to successfully participate in the multi-billion dollar industry of biomedicine. Through the use of joint ventures, the Chinese have lured approximately 1,500 foreign companies into the area of biomedical technology.[1] These companies will produce new biopharmaceuticals with an estimated market value of billions worldwide. Since China has invested in biotechnology for the last eight to ten years and has simultaneously renovated its intellectual property laws, the country has brilliantly enabled itself to wholly embrace an extremely profitable industry. This note will explore the likelihood of China's success in biotechnology and examine the potential difficulties that it may face.

I. BIOTECHNOLOGY DEFINED

Biotechnology is the application of scientific and engineering principles to the processing of materials by biological agents to provide goods and services.[2] More simply stated, biotechnology is the engineering and technology of the interaction between man and machines.[3] In the field of biomedicine, the biotechnology industry uses the genetically based characteristics in microorganisms and animals to create drugs and drug therapies.[4] These drugs may prevent, cure or in some way alleviate diseases. Biomedical research has produced drugs to treat cancer, hepatitis B, asthma, AIDS and numerous other afflictions.[5] As a result of these medical breakthroughs, there has been an increased need for culture and plant stock collections which can provide the basic source material for later genetic modification of existing organisms. The result of a genetic modification may be the discovery of a new cure or treatment for a disease.

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1. *Chinese/European Collaboration*, BIOTECHNOLOGY BUS. NEWS, June 3, 1994, at 14.
2. ALAN T. BULL ET. AL., BIOTECHNOLOGY: INTERNATIONAL TRENDS AND PERSPECTIVES 21 (1982).
3. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 190 (3d ed. 1992).
4. Akim F. Czmus, *Biotechnology Protection in Japan, the European Community, and the United States*, 8 TEMP. INT'L & COMP. L.J. 435 (1994).
5. *Id.* at 436.

Biotechnology has also been utilized to treat growing environmental and agricultural concerns. Several companies, for example, have used biotechnology to produce an insecticidal protein that is effective against certain harmful insect species.[6] In addition, many companies are genetically engineering animals and plants to either produce a high yield or to increase quality.[7] Due to the substantial benefits already incurred from this area, the world has come to rely on biotechnological research for advances in medicine, pharmacology, and food production.

II. The Development of Intellectual Property Protection for Biotechnology in China

In both China and the West, intellectual property law began not as effort to provide incentives to creators by establishing a system of compensation and protection for their work, but rather as an incentive not to publish heterodox materials.[8] In England, for example, the Crown limited the unauthorized copying of books due to their desire to provide printers with an incentive not to publish materials against the state interest.[9] Similarly, in Imperial China, restrictions on the unauthorized reproduction of certain books were for the maintenance of imperial legitimacy and power.[10] The seventeenth and eighteenth centuries in the West, however, brought the development of intellectual property law as we now know it; the supplying of authors and inventors with a property interest in their creations.[11] China, on the other hand, under Confucian ideology, established a disdain for commercial profit based on the belief that true scholars wrote for edification and moral renewal. In fact, there was a general attitude of tolerance, or indeed willingness, on the part of the great Chinese painters towards the forging of their own works for it demonstrated the quality of the work and the creator's degree of civility and understanding.[12] Thus, China's laws concerning intellectual property developed far differently from those of the Western states, appearing not to resemble Western laws again until centuries later in the early 1980's.

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6. *Ecogen Signs Chinese Collaboration*, Biotechnology Bus. News, June 4, 1993, at 17.

7. Czmus, *supra* note 4, at 436.

8. William P. Alford, Comment, *Don't Stop Thinking About Yesterday: Why There Was No Indigenous Counterparts to Intellectual Property Law in Imperial China*, 7 J. Chinese L. 3, 4 (1993)

9. *Id.* at 9.

10. *Id.* at 3.

11. *Id.* at 9.

12. Alford, *supra* note 8, at 17.

Accordingly, it was not until 1985 that China adopted its first patent law to facilitate trade and establish a legal framework for foreign exchange.[13] The law provided for the granting of patents in three areas: (1) inventions for a 15 year term; (2) utility models; and (3) designs for a 5 year term, renewable for an additional 3 years.[14] The 1985 Patent Law was intended to reassure foreigners involved in technology license agreements that industrial designs not yet publicly disclosed would have legal protection, and to promote the development of science and technology for the needs of modernization.[15] The drawback of the 1985 Patent Law was that it provided little protection to pharmaceutical and chemical companies and it did not recognize services.[16]

Then, in 1991, China revised the 1985 Patent Law. Although the amendments were somewhat helpful, foreign states felt that there was not adequate protection for their works in China. Therefore, on January 17, 1992, the United States and China signed a Memorandum of Understanding (hereinafter "MOU") to solve these problems. In compliance with MOU, China made another set of amendments to its patent law in 1993. Among the most substantial changes were the extension of the duration of patent protection and the enlargement of patent protection to new pharmaceutical and chemical inventions.[17] Although China did not permit the patenting of plant and animal varieties, it did permit patents on microbiological processes and their products.[18] This new law should encourage investment in biotechnology research and development in China and is expected to cause an increase in the importation of chemical and pharmaceutical products.[19] Thus, by drastically changing its intellectual property laws in a period of only eight years, China is clearly seeking to stimulate scientific and technical personnel to produce creations and to attract foreign firms.

A. Two Means of Patent Law Enforcement in China

The government of China has expended significant efforts to accommodate the increasing volume of patent litigation by creating a special intellectual property division of the People's Intermediate Court in

13. Hamideh Ramjerdi & Anthony D'Amato, *The Intellectual Property Rights Laws of the People's Republic of China*, 21 N.C. J.INT'L. & COM. REG. 169, 175 (1995).
14. *Id.* at 176.
15. *Id.* at 176.
16. *Id.* at 176.
17. *Id.* at 177.
18. Davis Hill &Judith Evans, Comment, *Chinese Patent Law: Recent Changes Align China More Closely With Modern International Practice*, 27 GEO. WASH. J. INT'L & ECON. 359, 364 (1993-1994).
19. *Id.* at 361.

Beijing.[20] Instead of soliciting judges from China's old cadre system, the government sought to staff the intellectual property courts with a new contingent of judges.[21] China has followed an identical procedure in the courts of several provinces, municipalities and economic zones.[22] The increased volume of lawsuits demonstrates a growing confidence in the ability of China to enforce its intellectual property laws. Since the culture has a predominant aversion to litigation,[23] China has also offered other means of dispute resolution. Plaintiffs may seek conciliation, mediation, arbitration or settlement through the Administrative Authorities for Patent Affairs.[24] Through this system, adversaries in a patent dispute may rely on government officials to resolve their disagreements.[25] The Authorities have a strong local presence and connections to other local agencies which help them to make settlements without proceeding to the courts. In addition, the Administrative Authorities have concurrent jurisdiction with the People's Courts over patent infringement actions and have the power to order monetary compensation or an injunction against the infringer.[26]

While this picture of China's ability to enforce its intellectual property laws appears very bright, it is important to remember that the entire concept of patentable intellectual property is relatively new to China. Many Chinese citizens and businesses are not aware of their right to protect intellectual property.[27] In addition, the judges who preside over intellectual property disputes are typically inexperienced law school graduates because no older class qualified to hear such a dispute exists.[28] Moreover, investigations and dispute settlements are costly, time-consuming and complicated, and there is a shortage of Chinese lawyers trained in intellectual property law.[29] China is also riddled with corruption, causing regulations to be interpreted inconsistently from one government agency or ministry to the next.[30] As evidence of this widespread corruption, the United States Trade Representative reported that the estimated losses due to Chinese intellectual property infringe-

20. *Id.* at 372.
21. *Id.* at 372.
22. *Id.* at 372.
23. *Id.* at 373.
24. *Id.* at 373.
25. *Id.* at 364.
26. *Id.* at 364.
27. Meredith A. Harper, *International Protection of Intellectual Property Rights in the 1990's: Will Trade Barriers and Pirating Practices in the Audiovisual Industry Continue*, 25 CAL. W. INT'L L. J. 153 (1994).
28. *Id.*
29. *Id.*
30. *Id.*

ments in 1993 alone were $50 million.[31] Thus, the legal system that appears effective on paper is often futile in reality, spreading alarm to foreign investors who are seeking intellectual property protection over their technology transfers. As a result, China initiated a nationwide campaign to publicize the system of intellectual property protection and to educate and train professionals in this field.[32] Therefore, while China is to be applauded for the enormous quantity of positive changes that it has made in intellectual property law in an extremely short period of time, it is unrealistic to expect China's new system to function smoothly at the outset.

III. The Status of International Intellectual Property Protection for Biotechnology and China's Role in the International Arena

In general, there are two prevalent views evident in the international conventions that address the subject of biotechnology. Private industry in developed countries, who typically produce superior biotech products, prefer the most expansive set of rights to protect their new technologies.[33] Developing countries, on the other hand, want private[34]industry in developed countries to surrender certain rights in consideration for the benefits to be realized under a universal patent system.[35] Furthermore, developing countries would like to receive the transfer of new biotechnologies without having to compensate the developed states.[36] Without the ability to receive free technology transfers, most developing countries could not afford to pay for the rights to costly biotech products. In addition, developing countries would also like to exclude living organisms from the scope of protectable subject matter for a significant percentage of genetic material used in bioengineering new plants and animals is native to their countries.[37]

The World Intellectual Property Organization (hereinafter WIPO) was created on July 14, 1967 as a specialized agency to the United Nations.[38] WIPO was constructed as an administrative body to oversee the

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31. *Id.* at 165

32. Hill and Evans, *supra* note 18, at 371.

33. David G. Scalise & Daniel Nugent, Comment, *International Intellectual Property Protections for Living Matter: Biotechnology, Multinational Conventions and the Exception for Agriculture*, 27 Case W. Res. J. Int'l L. 83, 105 (1995).

34. *Id.* at 105.

35. *Id.* at 107.

36. *Id.* at 111.

37. *Id.* at 107.

38. Convention Establishing the World Intellectual Property Organization, July 7, 1967, 828 U.N.T.S. 3.

Paris Union on the Protection of Industrial Property and to provide a forum to harmonize future intellectual property laws. Since 1967, WIPO has convened four diplomatic conferences to revise the law. WIPO primarily caters to developing states by including provisions that would require technology transfers to developing countries, authorize compulsory licensing of protected technology and other substantial limitations on the rights of patent holders. In the same vein, WIPO refuses to include new plant varieties within the scope of patent protection, which blocks adequate intellectual property protection in biotechnological advancements.[39] WIPO also excuses the obligation to compensate the inventor, which denies biotechnology companies the ability to receive a return for their investments in the research and development of new technologies.[40] As a result, the developed states of North America, Europe and Asia do not endorse WIPO's efforts.[41]

China, on the other hand, joined WIPO in 1983 to demonstrate its intention to meet international standards of intellectual property protection.[42] Furthermore, China's ratification of WIPO occurred at approximately the same time as the emergence of its new patent laws. These two dramatic developments, coupled with China's recent biotechnology activity, clearly support the idea that China has strategically planned for the emergence of a highly significant biotechnology industry.

A second multilateral treaty that concerns biotechnology is the Convention on Biological Diversity.[43] Formed in 1992, the Convention aimed to conserve biological diversity, maintain the sustainable use of biological components, and to promote the fair and equitable sharing of benefits arising out of genetic resources.[44] Despite the United States' refusal to adopt the treaty at that time, 162 other countries have agreed to its terms. While the Clinton Administration supported most of the treaty's goals, the U.S. nevertheless could not accept the idea of the "equitable share," which would force inventors to transfer their technologies to developing countries without compensation. The treaty also suggested that any income earned from the sales of technology be shared with the country that contributes the biological material.[45] The concept of shared income was borne out of an international concern that bi-

39. Scalise and Nugent, *supra* note 31, 107.
40. *Id.* at 107.
41. *Id.* at 107.
42. Laurence P. Harrington, Note, *Recent Amendments to China's Patent Law: The Emperor's New Clothes*, 17 B. C. Int'l & Comp. L. Rev. 337 (1994).
43. Convention on Biological Diversity, June 5, 1992, S. Treaty Doc. No. 20, 31 I.L.M. 818 (1993).
44. *Id.*
45. Scalise and Nugent, *supra* note 31, at 110.

otechnological and pharmaceutical corporations of developed states were using indigenous flora and fauna from developing countries to manufacture their discoveries.[46] The founders of the treaty had observed foreign companies exploit and profit from the resources of developing countries, who lacked the economic strength to buy the new technologies made from their own raw materials.[47]

On June 4, 1993, the Clinton Administration signed the treaty, but later submitted a letter of interpretation securing the U.S. position on technology transfers.[48] The letter announced that transfers of proprietary technology would occur only at the discretion of, and with the voluntary consent of the owner of the technology.[49] While the international community greatly resented the United States' unilateral renegotiation of the treaty, it is important to note that if the biotechnology industry perceives low economic returns on an investment due to an international convention, then little money will be invested in that area, thereby decreasing the possibility for the creation of new drugs or vaccines.

China signed the Convention on Biological Diversity on June 11, 1992.[50] While China would undoubtedly like to see the biotechnology industry expand, it also has a need to protect itself from foreign exploitation. Many of the new biopharmaceuticals are derived from plant and animal life native to the Chinese highlands.[51] Therefore, if China fails to procure protection from global treaties, foreign companies may completely exploit Chinese flora and fauna without supplying compensation to the Chinese. Besides relying on treaties for protection, China has initiated numerous joint ventures to circumvent the dilemma of attracting foreign research and investment in biomedicine without losing all of its rights to the final product.

The General Agreement on Tariffs and Trade (hereinafter GATT) was established in 1947. GATT has a division devoted exclusively to intellectual property issues, aptly entitled the agreement on Trade Related Intellectual Property Rights (hereinafter TRIPS).[52] TRIPS seeks to assist the developed countries in receiving adequate intellectual property protection for biotechnology. Since the United States loses an estimated $60 billion annually from patent violations by developing countries, it

46. *Id.* at 110.
47. *Id.* at 111.
48. *Id.* at 112.
49. *Id.* at 112.
50. Convention on Biological Diversity, *supra* note 43, at 1004.
51. *Biotechnology Profile: A New Industry Mushrooms*, HONG KONG INDUSTRIALIST, May 1, 1997.
52. General Agreement on Tariffs and Trade, Oct, 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

has become an avid supporter of TRIPS.[53] As a result of the U.S. endorsement, TRIPS has been widely embraced by developed states like Japan and the European Community, who have joined the United States in their desire for a universally accepted system of intellectual property protections.[54] In 1990, TRIPS proposed to authorize patents for living organisms and biological processes which would also encompass microorganisms, seeds, plants and animals.[55] The developing states, however, have opposed GATT's attempt to cover patent issues, and would rather see these disputes settled in WIPO.

In addition, the developing countries have made their support of TRIPS contingent upon the removal of microorganisms and microbiological processes for the production of plants and animals as patentable subject matter. These countries want to narrow the patentable area of biotechnology so that only living organisms and biological processes that are achieved by traditional breeding methods are protected.[56] Consequently, the developing states want biopharmaceuticals excluded from intellectual property protection, which is the area of biotech that has the greatest potential for commercial gain.

In the spring of 1996, the World Health Organization (hereinafter 'WHO') called for the clarification of whether or not TRIPS protected the patent rights of biotechnology processes and products.[57] While TRIPS has made the patenting of pharmaceuticals compulsory, the agreement does not specify whether biotech processes should be patented, such as the replication of a naturally existing gene for a human protein.[58] As a result, TRIPS may undergo changes in the next four years. In the meantime, WHO will be pressing for amendments to have TRIPS clarify its position on biotechnology.[59]

The development of China's patent law has enabled it to conform with the GATT agreement on TRIPS.[60] Since China is currently in the process of cultivating and expanding its biotechnology industry, China has not ascribed to the views of the other developing countries, who are against intellectual property protection for biopharmaceuticals. Rather,

53. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994).

54. Scalise and Nugent, *supra* note 31, at 114.

55. *Id.* at 114.

56. *Id.* at 115.

57. *WHO Wants Patent Confusion Cleared Up*, BIOTECHNOLOGY BUS. NEWS, Apr. 10, 1996, at 2.

58. *Id.*

59. *Id.*

60. Hill and Evans, *supra* note 18, at 359.

China has sought to prove that it is ready to comply with modern international practice in the enforcement of intellectual property protection.[61] In addition, China would not support the views of the developing countries, for such support would essentially block both the establishment of their biopharmaceutical industry and the profits that could be derived therein.

China has also become a member of the Patent Cooperation Treaty (hereinafter PCT) which was unanimously approved at the plenary session of the 20th General Assembly of the PCT in September 1992.[62] Since complying with the PCT, China is performing international patent searches and preliminary examinations.[63] China's participation in this treaty and its willingness to enter into international searches is yet another example of China's drive to compete in the global market of biotechnology.

Furthermore, China has shown support for the International Centre for Genetic Engineering and Biotechnology (hereinafter ICGEB) based in Geneva. The ICGEB was also established by the United Nations Industrial Development Organization in 1987 to create biotech discoveries in developing countries.[64] The ICGEB has recently signed a number of licensing agreements with industries in its member states to transfer technology that could lead to new products being manufactured by developing countries.[65]

As a result of China's participation in these international agreements regarding the intellectual property protection of biotechnology, China has begun to demonstrate to the international community that it has not only been willing to revamp its laws in favor of modern practice, but has also been willing to become an international figure in the industry. The massive reconstruction of Chinese law and the Chinese accession to global treaties should not be lightly discounted when one considers that China's former isolationist policies had dominated its foreign relations law for centuries. Thus, the dramatic shift in Chinese foreign policy and intellectual property law should secure China a successful position in the field of biotechnology, provided that China can continue to evolve its internal political system.

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61. *Id.* at 359.

62. Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 230.

63. Hill and Evans, *supra* note 18, at 359.

64. *New Push for Biotech Products in Developing Countries*, BIOTECHNOLOGY BUS. NEWS, Mar. 12, 1996, at 3.

65. *Id.*

IV. The Emergence of China's Biotechnology Industry

China has devoted a decade of governmental investment in its biomed/biotech industry with the hopes of attaining substantial capital dividends in its commercial applications. This year China announced plans to raise its biomedical industry level to that of Western standards by 2004.[66] In order to achieve this end, the Chinese Pharmaceutical Administration determined that it would focus future research on genetic and protein engineering.[67] Although many of China's domestically produced biomedical products are adaptations of existing foreign developed technology, China has recently created government programs designed to help research institutions commercialize their work.[68] Coupled with the funding for these research institutions, China has also striven to update its intellectual property protection in order to provide an environment suitable for the biomed/biotech industry. Over the last few years, China has attracted nearly 1,500 foreign funded biopharmaceutical enterprises amounting in a $4.1 billion capital investment.[69] Furthermore, seven national level research and development centers and laboratories have been established in Shanghai and six national engineering research centers are currently under construction there.[70] As a result of these new research and development centers, Shanghai has been labeled the most important "pharmaceutical valley" in China, aiming to generate $1.2 billion in industrial output by 2000.[71]

China has also developed extensive state programs to help implement their goal of making the biotechnology and pharmaceutical industries a priority for growth. The Chinese Academy of Sciences has provided $20 million for 40 research projects in biomedicine for the past five years.[72] The projects have aided in the development of hepatitis B vaccines, interleukin-2, interferon alpha, and other specialist products.[73] In addition, China's State Science and Technology Commission (hereinafter SSTC) is responsible for the analysis of science and technology's role in society and for general management and coordination among various ministries and agencies.[74] The SSTC comprises six programs

66. *Development of Biomedicine in China*, Marketletter, London, Sept. 8, 1997.

67. *Id.*

68. Andrew Beckman, *Biomed & Biotech New Business Opportunities in China* (PRC), Biomedical Market Newsl., Apr. 1, 1996.

69. Dan Gallagher, China Offering Biotech Firms Big Opportunities, San Diego Daily Transcript, June 17, 1997 at A1.

70. *China to Focus on Biotech*, Biotechnology Newswatch, Jan. 20, 1997.

71. *Biotech Gets Top Priority in Zhangjiang*, Biotechnology Newswatch, Nov. 4, 1996.

72. *Development of Biomedicine in China*, Marketletter, London, Sept. 8, 1997.

73. *Id.*

74. Beckman, *supra* note 68.

which support biomed/biotech development and commercialization. The first program is entitled China's Key Technologies R&D Program, which is organized in five-year time blocks.[75] By 1991, China had established 74 national key labs in higher education and research institutes. The following five-year plan (1991-1995) set goals in the biomed/biotech field to develop new biochemical reagents, and genetically engineered vaccines.[76]

The second program under the SSTC is entitled the "863" program because it was announced by Deng Xiao Ping in March 1986, listing biotech as one of seven targeted areas. This program channels most governmental funding for biotech in China, focusing primarily on the genetic engineering of animals and plants for high yield and quantity, the research and development of new medicines, vaccines and gene therapies, and protein engineering for food industries.[77]

In addition, China's National Center for Biotechnology Development administers a RMB 7.4 million annual budget for biotechnology under the SSTC.[78] Roughly 32% of that budget is devoted to pharmaceutical research, 8% for protein engineering research, 20% for commercialization, and 32% for agricultural research.[79] Foreign partnerships are also allowed to compete for funding in this program.

The SSTC's Torch program, established in 1988, aims to commercialize, industrialize, and globalize China's new technologies.[80] The biotech component of this program has focused on biopharmaceutical products for the creation of vaccines like hepatitis B, and anti tumor drugs.[81] The Torch program also provides contacts for foreign companies interested in joint ventures and offers incentives to investors in the 52 high tech zones that it has established across China.[82]

The Spark program was established in 1985 and has encouraged economic development in the rural areas of China through the application of science and technology.[83] Spark grants loan packages and has a development center under the SSTC which matches proposals with grants and loans.[84] Because this program focuses on biotech outside the field of medicine in areas like bioagriculture, grain production, animal

75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. Beckman, *supra* note 68.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*

husbandry, and storage technology,[85] it has been particularly important in meeting the nutritional needs of China's approximately 1.2 billion people.

China's last program under the SSTC is the National Natural Science Foundation (hereinafter NNSFC), which promotes basic research in all science and technology. In 1993, the NNSFC had a total budget of $28 million, 14% of which was devoted to clinical medical sciences.[86] The NNSFC also launched a national genome project as part of its contribution to international genome project in 1993.[87]

Under all six of these programs, researchers submit their own projects to compete for funds allocated toward designated fields. These researchers are also expected to find external funding to supplement the slight decrease in governmental funding. China eventually plans to make external sources, such as international foundations and private firms bear the majority of financial responsibility and severely decrease government financing.[88] While the absence of governmental financing may lessen the government's control in determining the types of research conducted, many private companies who bear the total fiscal cost without the benefit of total control will likely look elsewhere for business. Therefore, if China follows through with its plans to completely cut government funding for biotechnology, and yet maintain restrictions on the type of biotech to be produced, it may be driving away the very industry it sought to create. The author is not suggesting, however, that the biotechnology industry be entirely unregulated by the government. Rather, until the industry is fully developed, China is in need of a balance between governmental and private control.

In addition, China hosts 120 domestic biotech companies which commit only a small portion of funding to research.[89] Most of these companies rely on results published by the Chinese research community and foreign sources to produce the scientific portion of their products. Moreover, the Chinese government's attempts at transforming the economy into a market system have created special government financing programs for commercially viable products to work in cooperation with a biotech company.[90] Thus, the government may transform research institutions into private labs that do work only on the products contracted

85. *Id.*

86. *Id.*

87. *China Enters Genome Research*, BIOTECHNOLOGY BUS. NEWS, Sept. 24, 1993. A genome is the complete set of haploid chromosome in an organism.

88. Beckman, *supra* note 68.

89. *Id.*

90. *Id.*

for with the biotech companies. While this system may create immediate profits since it focuses only on commercially viable products, it may defeat the purpose of an applied research system. The special government financing may also relegate China to simply producing products already known to be profitable, which likely stem from a foreign source, instead of being at the center of the development process and originating these products.

A. Foreign Firm Involvement with China's Biotech Industry

In the early to mid 1990's, foreign firms began to envision enormous investment opportunities in China for the biotechnological production of drugs, food and chemicals. By 1994, analysts were predicting that the market for medical technology products in China would grow three to four times faster than industrialized countries.[91] The same numbers were again forecasted for the years 1997-1999.[92] In 1996, China's medical technology market grew 28%, making it the fastest growing market in the world.[93] As a result of this positive financial outlook, and despite fears regarding adequate intellectual property protection, the U.S., Europe and Japan have been competing vigorously for investment opportunities in China.[94]

The business device employed by foreign firms in China is almost exclusively a joint venture. The remainder of foreign-owned enterprises that choose not to pursue joint ventures in China, but still want a share of the Chinese market, will ordinarily attempt to launch their own products there. Many firms from the U.S., Europe and Japan have engaged in joint ventures and have decided to move their clinical trials, R&D, and manufacturing capacity overseas to avoid delays and to be near the markets where they first introduce their products.[95] Foreign companies feel that these business relationships can prove beneficial by lowering research expenses, facility and manpower costs, and absorbing more advanced Chinese technology.[96] A few private companies have contracted projects with Chinese institutions to take advantage of transgenic plant technology advances achieved with the aid of international cooperation.[97] In addition, foreign biomed/biotech firms often view China as an

91. *Asia Fastest Growing Market*, BIOCHEMICAL MARKET NEWSL. Jan. 1, 1994.
92. *Id.*
93. *Market Research Studies: Expert market Devises Improving 1997 Global Market*, BIOMEDICAL MARKET NEWSL., Apr. 30, 1997.
94. *Id.*
95. *Id.*
96. Beckman, *supra*, note 68.
97. *Id.*

inexpensive place to conduct laborious processes which do not involve the transfer of their newest technology.[98]

The transfer of mainly older technology reduces some of the foreign companies' fears over intellectual property protection. Furthermore, conducting research with Chinese partners can facilitate a firm's product entrance into the Chinese market since many of the partners have relationships with the Ministry of Health.[99] Similarly, complaints lodged with the local government from a joint venture are ordinarily acted upon with more vigor than those from purely foreign companies. Local favoritism to joint ventures occurs because the Chinese partner will typically have a relationship with various governmental agencies, whereas a foreign-owned enterprise likely has no ties to China at all.

While the business opportunities in Chinese biotechnology appear endless, many Westerners warn that foreign firms need to be careful because the political system is not fully developed in China. For example, one U.S. entrepreneur involved in the biomed/biotech industry was shocked to learn that one of his Chinese clients was forced to register with the police within 30 days if that person wanted to use the Internet or other online services.[100] Moreover, a company may have problems getting its hard currency out of China once it has been converted into local Renminbi.[101] Another concern regarding Chinese joint ventures is that since local manufacturers have not yet constructed high-tech machines capable of producing enzymes and similar biotech materials, this high cost equipment must be imported from the U.S. or Japan.[102] After considering importation, transportation and administration costs, coupled with the frustration incurred from cultural clashes, setting up a joint venture in China does not come without a price. However, establishing a joint venture in China can nonetheless be a very lucrative business. Balancing the total expenses against low labor costs, beneficial tax credits, and favorable regulatory practices generally results in increased profit margins.

1. Sample Biotech Joint Ventures in China

In 1993, Merck, a multinational pharmaceutical company that uses biotechnology, inaugurated a high-tech manufacturing plant in Beijing

98. *Id.*

99. *Id.*

100. David Anast, *Don't Throw our Chines Clients in Jail using the Interest is not a Crime*, BIOMEDICAL MARKET NEWSL., Feb. 1, 1996.

101. *New Company Aims to Bridge the Gap between East and West*, BIOTECHNOLOGY BUS. NEWS, June 3, 1994, at 13.

102. Beckman, *supra*, note 68.

to produce its hepatitis B vaccine.[103] The joint Sino-American project sought to initiate Chinese production of Merck's HB Vax II to enable the country to fight one of its largest public health threats.[104] The factory was built in collaboration with China's National Vaccine and Serum Institute under the Ministry of Public Health and is able to produce 20 million doses of anti-hepatitis vaccine.[105] Merck also established a second manufacturing plant in the southern city of Shenzhen in 1994.[106]

More recently, in 1996, the French genetic research company Genset established a joint venture in Beijing with the Chinese Academy of Medical Sciences and Tang Freres, a French trading firm that specializes in Chinese medical and pharmaceutical fields.[107] The objective of the joint venture is to collect DNA from related and unrelated individuals affected with common diseases, conduct gene discovery research on such DNA in collaboration with Genset, and eventually market products based on these discoveries in China.[108] Genset is engaged in the systematic and comprehensive analysis of the human genome to identify and patent genes. Genset then applies its genomics technology to both discover drugs for the treatment of diseases and to enter into strategic partnerships with pharmaceutical companies for the development and marketing of these drugs. Genset has targeted such ailments as prostate cancer, schizophrenia, osteoporosis, psoriasis, and hypertension. Upon the creation of this joint venture, Genset's president remarked, ". . .it provides us with access to highly-characterized samples representing a wide range of diseases from the largest population in the world. The immense resources of China in medical and clinical research are an ideal complement for Genset large-scale technology."[109] Therefore, by the creation of this joint venture, Genset clearly regards China as the proverbial 'field of dreams' in the futuristic realm of biotechnology.

Similarly, in 1997, Japan's Kirin Brewery Co. and China's Shanghai Kunpeng Investment Co. agreed to set up a joint venture in Shanghai to produce and market two drugs.[110] The first drug, Espo, will be used to treat renal anemia and the second drug, Gran, is a granulocyte colony stimulating factor. Kirin had previously been exporting the drugs to Beijing, Shanghai, and Guangzhou through its marketing base in Hong

103. *Merck opens hepatitis B plant*, BIOTECHNOLOGY BUS. NEWS, Oct. 21, 1993, at 9.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Genset and Chinese Academy to Enter Joint Venture for Genomics*, WORLDWIDE BIOTECH, Dec. 1, 1996.
108. *Id.*
109. *Id.*
110. *Kirin in Shanghai Venture*, BIOTECHNOLOGY NEWSWATCH, June 2, 1997, at 6.

Kong. Now, however, the joint venture also plans to construct a basic research laboratory and a drug manufacturing facility for herbal medicines by 2003.[111]

Thus, by establishing joint ventures in China, foreign firms are acknowledging that both the immense size of the Chinese market and the capability of the preexisting Chinese medical facilities have created favorable arenas in which to launch their biomed/biotech products. On the opposite side of the bargaining table, China has been able to absorb numerous quantities of foreign technology, insights onto foreign expertise, and has received billions in foreign investment by forming joint ventures. Furthermore, the profits generated by the biotech industry will help fuel the Chinese economy and thereby contribute to an increased standard of living.

2. *Foreign use of Chinese Herbs to Produce New Drugs*

An interesting twist on foreign business relations with China has occurred through the increasing application of biotechnological processes on plants traditionally used in Chinese medicine to produce new drugs. Thus, herbal medicines originated by the Chinese are now being adapted through biotechnology to produce drugs capable of fighting various diseases. Unless the Chinese institute formal agreements that ensure adequate compensation for the use of their flora and fauna, foreign firms are likely to exploit China's natural habitat without fairly distributing any of the profits that have been accrued from the new biopharmaceuticals. The foreign use of Chinese plants to produce biopharmaceuticals underscores China's momentary failure to commercialize its own products, export its technology into the Western world, and to bring in developing Western technology for its own market. To date, China has acknowledged some of these failures by constructing joint ventures with foreign firms so that they can not only reap a share of the profits from the use of their plant/animal life but also gain an insight onto the technology employed to produce the new drugs.

For example, a joint venture was established by Global Pharm Ltd, a Bermuda based company, with Northeast No. 6 Pharmaceutical Factory in Shen Yang, China.[112] Global Pharm began its operations in 1995 and has sought to expand the market for Chinese government approved human-use pharmaceuticals. The company has also planned to select and acquire unrecognized Chinese pharmaceuticals for development in

111. *Id.*
112. *T Cell looks to China,* BIOTECHNOLOGY BUS. NEWS, June 23, 1995, at 7.

other territories.[113] Like many foreign companies, Global Pharm chose China for access to its large, emerging market opportunities in therapeutic products, as well as access to new product candidates for development outside China. The first product to be marketed by the venture is for the treatment of hypertension and microcirculation disorders.[114] The drug is a synthetic copy of the active ingredient found in a Chinese herb.[115]

The British firm Xenova has signed drug discovery agreements with the Institute of Medicinal Plant Development (hereinafter IMPLAD) and the Institute of Botany, both in the Peoples Republic of China.[116] The agreement establishes that IMPLAD will supply plant extracts and the Institute of Botany will supply a combination of plant extracts and phytochemicals to Xenova. The British firm will then run screening tests to identify potential drug activities against illnesses such as cancer, cardiovascular disease, and immune-inflammatory disorders.[117] Thus, Xenova uses its biotechnologies to formulate new drugs from natural sources. The arrangement further provides that Xenova will have marketing rights outside China for any therapeutics discovered, and China will both retain exclusive internal marketing rights and receive royalties on Xenova's sales.[118]

In the early 1980's, UCLA biochemists received several ancient lotus seeds from the Beijing Institute of Botany that were recovered from a lake in Pulantien, China.[119] The UCLA scientists have since discovered a powerful genetic system in the seeds to delay its aging.[120] Upon examining the lotus embryos, the scientists found a protein repair enzyme which limits the accumulation of damaged proteins and helps the plant adapt to environmental stresses.[121] The enzyme, known as MT, is now being employed on longevity experiments with mice.[122]

For the most part, China has been able to control the foreign manipulation of traditional Chinese herbs by either forming joint ventures or contracting for a share of the profits derived from foreign biomedical

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Xenova looks at Chinese Medicinal Plants for New Drugs*, GENETIC TECH. NEWS TECH. INSIGHTS, INC, Dec. 1, 1992.

117. *Id.*

118. *Id.*

119. *After Thousand-Year Sleep, Lotus Sprouts Chemistry of Longevity Theories*, BIOTECHNOLOGY NEWSWATCH, Jan.1, 1996, at 1.

120. *Id.*

121. *Id.*

122. *Id.*

enterprises. Once the industry has a few years to grow, China may be able to exclusively transform materials from their natural habitat into new pharmaceuticals without the need for any foreign control. If China can amass enough capital, establish strong research teams, and produce qualified economists, the only remaining foreign component that is required to construct biopharmaceuticals is high tech machinery.

B. The Effect of the Reunification with Hong Kong on China's Biotech Industry

In the late 1980's, biotechnology was identified as one of the major areas in which new profitable business opportunities could be generated in Hong Kong. Shortly thereafter, the Hong Kong Institute of Biotechnology (hereinafter HKIB) emerged on the shore of Tolo Harbor as a joint venture operation with a major U.S. pharmaceutical company, Syntex Corporation, for the discovery of novel therapeutic agents based on Chinese herbal medicines.[123] The joint venture had the express task of trying to merge ancient Chinese remedies with Western technology to find novel drugs to cure or treat twentieth century diseases.[124] Accordingly, the institute has signed an agreement with a Chinese research facility to internationally market a compound discovered in China which may help to treat cancer patients.[125] More importantly, however, the founders of HKIB viewed its formation as a link to biotechnology bases in Asia.[126]

Besides HKIB's major project, some of China's leading scientists in genetic engineering, together with a third group of scientists in Houston, are collaborating on a project headed by HKIB's founding director. The group seeks to develop new drugs to combat neurological disorders such as epilepsy, Alzheimer's disease, Parkinson's disease, depression and substance abuse.[127] A major part of the research includes the transfer of human neurological genes into mouse cells to construct specific genetic engineered cell lines.[128] The scientists hope that the cloned cells will be able to shed light on the molecular basis of many brain functions. They also hope that the cells will be useful for the discovery of new pharmaceutical agents against a number of brain and cardiovascular diseases.

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123. *Jonathan Lange, Brainstorming the Brain Cells*, WORLDWIDE BIOTECH, Sept. 1, 1992.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

Based on the success of HKIB and similar companies, researchers at the Massachusetts Institute of Technology announced a study in early 1997 that Hong Kong would be a major player in the field of biopharmaceuticals produced from traditional Chinese medicines.[129] The researchers at MIT believed that Hong Kong's success would be driven by the historical acceptance of these medicines and the extensive data which has been collected about them.[130] They cited that another important advantage Hong Kong has over its rivals is its close proximity to China.[131] The close link between the territory and the mainland has enabled local companies to draw on the expansive breadth of knowledge that the Chinese have amassed over the centuries regarding the proper use of their medicinal plants.

A second event in early 1997 made Hong Kong a focus site for biotechnology. The Beijing Institute of Developmental Biology at the Chinese Academy of Sciences decided to collaborate with the University of Hong Kong to combine China's animal husbandry expertise with Hong Kong's research skills and equipment.[132] The goal of the collaboration was the development of improved gene targeting methods in creating transgenic animals.[133] China had been genetically altering pigs and goats to produce drugs from their milk and sought to increase the scope of their research capabilities by forming the agreement.[134]

Finally, on the evening of June 30, 1997, the world watched the official ceremonies and fireworks celebrations that marked Hong Kong's return to Chinese control. Although there has been much speculation on the future of Hong Kong, the Chinese government has promised to maintain 'one country, two systems' for the next fifty years. In fact, China has erected enormous advertising billboards on the southern border between Hong Kong and Shenzhen which emphatically announce that 'Hong Kong will have a more beautiful future.' The same slogan can even be glimpsed on t-shirts sold to tourists in the Temple Street night market.

Although there are many skeptics on China's ability to economically handle Hong Kong, the realm of biotechnology appears more secure. Since China sought to absorb Hong Kong's biomedical research capabilities before the handover occurred, and since China is intent on

129. *Biotechnology Profile: A New industry Mushrooms*, HONG KONG INDUSTRIALIST, May 1, 1997.

130. *Id.*

131. *Id.*

132. *China, Hong Kong to Collaborate*, BIOTECHNOLOGY NEWSWATCH, Mar. 17, 1997.

133. *Id.*

134. *Id.*

the success of its own biotech industry, it is likely that the Chinese government will attempt to properly maintain Hong Kong's businesses and research facilities. Moreover, the Chinese will increasingly rely upon Hong Kong's biotech facilities after the handover to support their own growing biotech industry. Although Shanghai will be a top contender for receiving imports, Hong Kong's port capabilities will ease China's former import hassles because once the technologies reach Hong Kong, they can be channeled into China with reduced customs procedures. China may also be able to learn from the structure of Hong Kong's more Western style biotech system while perfecting their own. Therefore, the biotech development that occurred in Hong Kong during the years preceding the handover will only benefit China's expanding system.

1. The Biotechnological Impact of the Bird Flu in Hong Kong

In the months following the handover, however, Hong Kong suffered from what has become popularly known as the "bird flu." Since the onset of the outbreak, there have been a total of eighteen patients diagnosed with the virus, six of whom have died.[135]Because Hong Kong and southern China have been historically characterized as breeding grounds for new strains of influenza, the avian virus spread fears of a worldwide epidemic.[136] As a result of these rising fears, the National Institutes of Health awarded Protein Sciences Corporation, a U.S. company, the vaccine contract in December 1997, after receiving an urgent request from Hong Kong.[137] By February 3, 1998, the biotechnology company successfully produced a genetically engineered vaccine to combat the virus.[138] Chief Executive Officer of Protein Sciences, Daniel D. Adams, commented, [Through the use of biotechnology] "it is now feasible to respond in a timely fashion to emerging new influenza virus strains and to decide on which strains to include in the annual flu vaccine much closer to the time the vaccine is needed."[139] Although Hong Kong required the aid of U.S. biotechnology companies in order to produce a vaccine for the current strain of avain virus, it is possible that in the future, Hong Kong will have the capacity from its own biotech companies to handle another outbreak. Because new strains of influenza

135. Marilyn Chase, *Flu Viruses HitHard As Researches Plan Their Next Defense*, WALL ST. J., Jan. 19, 1998, at B1.

136. Craig S. Smith, *Hong Kong Halts Live Chicken Imports From China Due To Avian Flu Virus*, WALL ST. J., Dec. 16, 1997, at B7.

137. *Emergency Human Vaccine Against Hong Kong H5N1 Influenza "Bird Flu" Developed by Connecticut Biotechnology Company* (visited Mar. 1, 1998) <http://www.proteinsciences.com>.

138. *Id.*

139. *Id.*

commonly occur in Hong Kong and Southern China[140] , the Chinese have an incentive to form biomedical companies which can quickly produce vaccines. These vaccines can also be used to prevent infection in animals and break the chain of transmission from animals to humans.[141] Since the current bird flu was able to spread among thousands of chickens before being discovered, subsequently requiring their mass slaughter,[142] Hong Kong has suffered a significant economic loss. If, in the future, China can focus its energies on establishing successful biotech companies, substantial economic loss caused by influenza could be prevented.

V. Conclusion

Based on China's stunning capabilities to not only transform an entire body of law, but also to shape a high tech industry within a mere decade, the Chinese will likely disarm the world in the coming years with its biomed/biotech industry. China has strategically recognized the need for foreign support in getting its biotech industry off the ground. Once the Chinese, however, gain the facilities to produce the high tech equipment required for the formation of biomedical materials, they will no longer have to wholly rely upon foreign investment. Moreover, the Chinese are host to an enormous array of naturally growing flora and fauna which is currently the fastest developing sector of biomedicine. When the standard of living increases in China, the Chinese will have the first opportunity to tap a market of 1.2+ billion people. The Chinese population, afflicted in large numbers with hepatitis B and other diseases due to malnutrition and unsanitary living conditions, will doubtlessly require the new pharmaceuticals that China is manufacturing. In addition, China will be able to market the new biopharmaceuticals globally. If the Chinese market their drugs at a favorable time, as the trend is now shifting to favor Eastern style medicine, China may be extremely successful in the biomedical field. While China's success admittedly hinges on many 'if's', the development of biotechnology in China has shown enormous growth in a very short period of time. As long as China can maintain a similar rate of growth in the next decade, then

140. Smith, *supra* note 136.

141. *Emergency Human Vaccine Against Hong Kong H5N1 Influenza "Bird Flu" Developed by Connecticut Biotechnology Company* (visited Mar. 1, 1998) <http://www.proteinsciences.com>.

142. Peter Stein, *In Hong Kong, Chicken Slaughter Fails to Kill Fears*, Wall St. J., Jan. 5, 1998 at A17.

biotechnology may very well be the field that restores China to its former magnificence.

Leslie Cataldo