Denver Journal of International Law & Policy

Volume 37
Number 2 *Spring*

Article 8

January 2009

Vol. 37, no. 2: Full Issue

Denver Journal International Law & Policy

Vol. 37, no. 2: Full Issue

Denver Journal

of International Law and Policy

VOLUME 37 NUMBER 2 SPRING-2009

TABLE OF CONTENTS

GENERAL ARTICLES

2007-2008 LEONARD V.B. SUTTON AWARD

CAUTIOUSLY OPTIMISTIC: ECONOMIC LIBERALIZATION AND RECONCILIATION IN RWANDA'S COFFEE SECTOR

KAROL C. BOUDREAUX AND PUJA AHLUWALIA*

I. INTRODUCTION

In some countries, particular industries play especially important roles. In the United States, for example, the automotive industry has provided hundreds of thousands of jobs and helped shape the image of America as the land of the automobile.[1] More recently, the computer industry has helped create a new image of the U.S. as a high-tech, well-connected service economy.[2] These industries have contributed to the development of an "American identity."

Coffee has played a unique role in Rwanda's development. For decades, coffee has been Rwanda's top export and chief source of foreign exchange.[3] Thousands of Rwandans have been involved in coffee's cultivation and sale. In the twenty-first century, the industry continues to provide a livelihood for some 500,000 Rwandan families,[4] many of whom work in cooperatives and grow coffee on small plots on the country's hillsides.[5]

---

* Karol C. Boudreaux is senior research fellow at the Mercatus Center at George Mason University. Puja Ahluwalia is a J.D. candidate at Stanford Law School. We extend sincere thanks to Jutta Tobias. Without her hard work, vision, and excellent organization skills the survey work in Rwanda would not have been possible. We also express appreciation for her comments on an earlier draft. We thank Albert Nsengiyumva, Rama Rao, Tim Schilling, Edwige Musabe, Anasthase Shyaka, and Gerald Rwagasana for their support, contributions, and help in Rwanda. A special note of thanks to the wonderful students from the National University of Rwanda who administered our survey in the field with creativity and care. Thanks to Daniel Sacks for his continued thoughtful assistance in the US. Any errors are ours alone.

1. Kathy El-Messidi, MSN ENCARTA, *Automobile Industry*, http://encarta.msn.com (last visited Feb. 28, 2009) (type "automobile industry" into the search bar).

2. Andrew Pollack, *Japanese Portables Threaten American Lead in Computers*, N.Y. TIMES, Nov. 24, 1990, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C0CE7DB1530F937A15752C1A966958260&sec=&spon=.

3. *Coffee: Rwanda,* 43(8) AFRICA RESEARCH BULLETIN: ECONOMIC, FINANCIAL AND TECHNICAL SERIES 17090B (2006); *see also* Government of Rwanda, Agricultural Production: Tea and Coffee, http://www.minagri.gov.rw/article.php3?id_article=22 (June 10, 2006).

4. Project Rwanda, The Coffee Bike, http://projectrwanda.org/The-Coffee-Bike.php (last visited Nov. 13, 2008); Green Living Project, SPREAD, Rwanda: Coffee Awakens a National Economy, (Apr. 19, 2008), http://www.greenlivingproject.com/spread-rwanda-coffee-wakes-up-a-national-economy/.

5. RESEARCH INTO USE, RWANDA MIL SCOPING VISIT REPORT 9 (2007), *available at* http://www.researchintouse.com/downloads/Rwanda_-_MIL_Scoping_Study_-_Apr_07.pdf.

Over the past decade, the coffee sector has been transformed from a highly controlled, politicized industry to one that is liberalized and quickly developing a prized niche product: specialty coffee. Rwandans have successfully built a reputation for quality that buyers in the U.S., Europe, and Asia recognize. These changes are translating into increased income and greater economic empowerment for some Rwandan farmers.[6]

In addition to improving incomes, the liberalized coffee sector increases opportunities for commercial cooperation among Hutus and Tutsis. Smallholders are now free to sell their coffee on world markets at prices they negotiate, creating incentives to form cooperatives in order to benefit from economies of scale.[7] Because smallholders retain profits from coffee sales, they also have incentives to work together to improve the quality of their product. And because coffee in Rwanda is grown by smallholders, who make up the vast majority of the population (90%)[8], liberalized coffee policies have the potential to benefit many Rwandans – Hutus as well as Tutsis.

Rwanda's coffee liberalization, therefore, is likely different from liberalizations that benefit elites (such as Russian privatizations or Kenya land titling reforms).[9] It is, to date, an inclusive reform with positive distributional effects. Because coffee-sector liberalization has raised income, rather than costs, for the rural poor, this liberalization is less likely to promote conflict than liberalizations where costs are spread widely (such as the removal of subsidies) and benefits are narrowly concentrated (such as many privatizations).[10] We note that this is an issue that requires further research.[11]

Journalistic evidence suggests that commercial cooperation exists among Hutu and Tutsi members of coffee cooperatives and that this cooperation may contribute to informal reconciliation.[12] In June 2008, we sponsored and participated in exploratory survey work in Rwanda to investigate this issue. Over ten days, 235 smallholder farmers and employees at coffee washing stations

---

6. USAID, FrontLines, Mission of the Month: Rwanda (Apr. 2006), http://www.usaid.gov/press/frontlines/fl_apr06/dialogue.htm.

7. RUKAZAMBUGA NTIRUSHWA T. DANIEL, DRAFT REPORT ON AGRICULTURAL INNOVATION AND TECHNOLOGY IN AFRICA: RWANDA EXPERIENCE 14 (2008), *available at* http://info.worldbank.org/etools/docs/library/243550/RwandaInnovationStudyreport.pdf.

8. *Id.* at 6.

9. *See* E. Sam Overman, *Privatization in China, Mexico, & Russia: A Comparative Study*, 19 (1), PUB. PRODUCTIVITY & MGMT REV. 46, 55 (1995) ("Only two groups appear to have the domestic capital that could finance privatization. One group is the established political elite and the party bureaucracy.").

10. Jonathan Morduch et al., *Distributional Consequences of the Russian Price Liberalization*, 42 (3), ECON. DEV. & CULTURAL CHANGE 469, 469 (1994).

11. *See* PAUL COLLIER ET AL., BREAKING THE CONFLICT TRAP: CIVIL WAR & DEVELOPMENT POLICY 53 (Oxford University Press, 2003) (arguing that "the key root cause of conflict is the failure of economic development. Countries with low, stagnant, and unequally distributed per capita incomes that have remained dependent on primary commodities for their exports face dangerously high risks of prolonged conflict.") Rwanda pre-1994 fits this description and, to a large extent, still does.

12. *See infra* Part VII.

completed surveys regarding their attitudes toward reconciliation, among other issues.[13] Results from these surveys are encouraging, if not dispositive: membership in a coffee cooperative, as well as longer-term association with a coffee washing station, and economic and general life satisfaction are significantly correlated to positive attitudes towards reconciliation.[14] Farmers we surveyed reported an increased willingness to engage in socially inclusive behavior today in comparison to the past. Members of cooperatives were less likely to report high distrust than workers not associated with a cooperative. With respect to material prosperity, farmers are earning more for their coffee beans today than they were in the past and are reporting greater economic satisfaction compared to five years ago.[15]

Changes in levels of economic satisfaction stem in part from income earned through the sale of specialty coffee. Farmers who earn more from the sale of coffee, and who work together with others in cooperatives (or at private washing stations), express an improvement in the way they view others.[16] We caution though, that to the extent that reconciliation is taking place, it is unclear if the reconciliation is short-term and necessitous or longer-term and sustainable. This is another question that requires further research.

We believe the Rwandan experience suggests an interesting question: do government policies that expand commercial interaction among former enemies, and that spread the benefits of trade to many, prompt commercial cooperation and perhaps even reconciliation? This suggestion runs counter to some literature on liberalization and conflict, which suggests that economic liberalization often contributes to conflict.[17]

---

13. Interviews were conducted in the local language, Kinyarwanda, at 10 coffee washing stations in the southern part of the country. Interviews were conducted by a team of students from the National University of Rwanda in Butare. Five of the ten survey sites were coffee cooperatives; the remaining five were privately owned coffee washing stations. In the case of interviewees at cooperatives they included both employees and farmers (in some cases a farmer might also be an employee). Similarly, at the privately owned coffee washing stations (i.e., non-cooperatives) interviewees were a mix of employees of the stations and smallholder farmers selling their beans to the station. The methodology and survey procedure is described in Jutta Tobias, Intergroup Contact Caused by Institutional Change: An Exploration of the Link Between Deregulation and in Rwanda's Coffee Sector and Attitudes Towards Reconciliation (2008) (unpublished PhD dissertation, Washington State University) (on file with author), 25-31. [hereinafter Intergroup Contact]. Surveys on-file with author [hereinafter Coffee Survey].

14. *See* Coffee Survey, *supra* note 13.

15. *Id.*

16. *Id.*

17. *See, e.g.*, CHRISTOPHER CRAMER, VIOLENCE IN DEVELOPING COUNTRIES: WAR, MEMORY, PROGRESS (Indiana University Press, 2006); ROLAND PARIS, AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT 45, 71, 161 (Cambridge University Press, 2004); Andy Storey, *Economics and Ethnic Conflict: Structural Adjustment in Rwanda*, 17 (1) DEV. POL'Y REV. 43, 43-44 (1999); David Keen, *Liberalization & Conflict*, 26 INT'L POL. SCI. REV. 73 (2005); Han Dorussen, *Heterogeneous Trade Interests & Conflict: What You Trade Matters*, 50 (1) J. OF CONFLICT RESOL. 87, 89-92 (2006); Dennis Galvin, *Market Liberalization as a Catalyst for Ethnic Conflict in Senegal & Central Java, Indonesia* 13-18 (paper presented at the 97th meeting of the American Political Science Association, 2001).

The Rwandan reforms may be distinctive in that they have the potential to benefit all farmers, Hutus as well as Tutsis. And, as a vast majority of Rwandans are still engaged in agricultural production, this liberalization creates opportunities for a broad swathe of people to increase their income.[18] Such policies provide for commercial cooperation and may create a climate in which informal reconciliation takes place. If so, then in post-conflict environments, similar broad-based liberalization policies may present an important complement to more formal reconciliation efforts such as international tribunals and local court proceedings.[19]

II. COFFEE AND POWER IN RWANDA

The history of the coffee industry in Rwanda, until recently, is that of unfortunate politicization.[20] Successive governments used control of the coffee trade for their political and financial gain. Through compulsory production, export taxes, and a government-controlled export agency, successive regimes captured the profits of coffee farmers and used these funds to maintain power.[21] So long as international coffee prices remained high, the system was stable; however, once prices dropped in the late 1980s and early 1990s, a key government source of revenue shrank.[22] By the early 1990s, the government lost its ability to pay farmers a subsidized price for coffee, putting at risk its base of rural support.[23]

Missionaries may have first introduced coffee into Rwanda in the early part of the twentieth century, but official government involvement began in the 1930s with the Belgian colonial government's "coffee campaigns."[24] Under these policies, government authorities built nurseries and supplied seeds, but they also required Rwandan farmers to plant coffee trees.[25] The colonial government introduced a mandated minimum price for coffee, created mandatory quality guidelines, and issued special licenses that allowed only some firms to purchase

---

18. *See* The World Bank, Rwanda – Country Brief, http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/RWANDAEXTN/0,,menuPK:368714~pagePK:141132~piPK:141107~theSitePK:368651,00.html (last visited Sept. 4, 2008) (noting that "[a]griculture currently accounts for just fewer than 40 percent of GDP and provides jobs to 90 percent of the population. Most Rwandans rely on subsistence agriculture with limited participation in the market economy"); *see also* AFRICAN DEVELOPMENT BANK, AFRICAN ECONOMIC OUTLOOK 2004/2005 382 (2004).

19. *See infra* Part III.

20. Philip Verwimp, *The Political Economy of Coffee, Dictatorship, & Genocide*, 19(2) EUR. J. POL. ECON. 161, 161 (2003); *see generally* Lode Berlage et al., *Dictatorship in a Single Export Crop Economy*, (Oct. 2004), *available at* http://www.hicn.org/papers/dicta.pdf. *See* Learthen Dorsey, The Rwandan Colonial Economy: 1916-41, (1983) (unpublished PhD dissertation, Michigan State University) (on file with author).

21. For a discussion of a variety of African experiences with export agencies, *see* ROBERT H. BATES, MARKETS & STATES IN TROPICAL AFRICA: THE POLITICAL BASIS OF AGRICULTURAL POLICIES, 11-29 (University of California Press, 1981); *see also* TAKAMASA AKIYAMA ET AL., COMMODITY MARKET REFORMS: LESSONS OF TWO DECADES 84-85 (The World Bank, 2001).

22. Verwimp, *supra* note 20, at 171-75.

23. *Id.* at 175; *see also* Andy Storey, *Structural Adjustment, State Power & Genocide: The World Bank and Rwanda*, 28 REV. AFR. POL. ECON. 365, 371, 375 (2001) [hereinafter Storey, Structural Adjustment].

24. Dorsey, *supra* note 19, at 169.

25. *Id.* at 166-68.

coffee.[26] They imposed export taxes on coffee sales and individual income taxes on the local producers, most of whom were Hutu farmers. Tutsi chiefs collected these taxes, which supported the colonial government and their Tutsi allies.[27]

The post-independence Kayibanda government (1962-1973) maintained a tight grip on the coffee sector.[28] Under this regime, a government agency (OCIR), together with a monopsony export company (Rwandex), purchased and then sold on world markets all coffee grown in Rwanda.[29] The farm gate price paid to coffee farmers was set by the government (by OCIR-Café after it was created in 1978).[30] Middlemen bought beans from farmers and sold them to a monopsony exporter, Rwandex. The markets where smallholders brought their beans for purchase acted as "the economic arm of the Gitarama (i.e. Kayibanda) regime."[31]

Heavy government involvement in the coffee sector continued under the Habyarimana regime (1973-1994).[32] During the 1970s and 1980s, as world coffee prices increased, coffee exports provided between 60 and 80 percent of Rwanda's export revenue.[33] Habyarimana ensured control of these important rents by appointing relatives and supporters to positions of authority at the powerful and lucrative state-run coffee agency, OCIR-Café.[34]

---

26. *Id.* at 181.

27. *Id.* at 55-56.

28. David Norman Smith, *Globalization and Genocide: Inequality and Mass Death in Rwanda*, *in* ON THE EDGE OF SCARCITY 149, 158 (Michael N. Dobkoski et al. eds., 2002).

29. Interview by World Investment News with Mr. Anastase Nzirasanaho, Director, Office des Cafes du Rwanda, *available at* http://www.winne.com/rwanda/to13interview.html (last visited Sept. 4, 2008) (noting that before 1978 the Offices des Cultures Industrielles du Rwanda (OCIR) was responsible for both the coffee and tea sectors. In 1978, OCIR-Café was created to 'promote the sector on local and international markets.' Before the liberalization of the sector in the 1990s, OCIR-Café managed approximately 30 percent of the country's export volume. The remainder of the exports flowed through RWANDEX, S.A., a company partially government-owned and created in 1964.).

30. Paul DeLucco, *Raising the Bar: Producing Quality Coffee in Rwanda*, *in* ADCI/VOCA WORLD REPORT 13, 14 (Spring 2006), *available at* http://www.acdivoca.org/852571DC00681414/Lookup/WRSpring06-Page 13-14-RaisingtheBar/$file/WRSpring06-Page13-14-RaisingtheBar.pdf.

31. Verwimp *supra* note 20, at 163 (stating that monopsony export agencies were common in Africa before the 1990s. Typically, they bought low and sold high: purchasing commodities at a mandatory price which was lower than the world market price, but selling at higher, market rates. The agency kept the difference and, in this way, imposed a tax on producers, most of whom were poor.); *see also* P.T. BAUER, DISSENT ON DEVELOPMENT: STUDIES & DEBATES IN DEVELOPMENT ECONOMICS 387-388 (Harvard University Press, 1972).

32. *See* Berlage et al., *supra* note 20, at 22 (noting the policy was contained in a 1978 coffee cultivation law that made the neglect of coffee trees "punishable" and that created commune-level coffee monitors who both advised and controlled smallholder farmers. While there was, the authors note, little pressure to enforce these laws in the early 1980s – because coffee prices were high and farmers were content to grow coffee- pressures to enforce would have changed in the mid-1980s as worldwide coffee prices began to tumble.).

33. Berlage et al., *supra* note 20, at 14. *See also* David Tardiff-Douglin et al., *Find the Balance Between Agricultural & Trade Policy, Rwanda Coffee Policy in Flux* 1 (MSU International Development Working Papers, No. 59, 1996).

34. Berlage et. al, *supra* note 20, at 14.

A rise in coffee prices allowed the government to modestly increase the price it paid to farmers, although the government continued to retain much of the difference between the gate price paid to smallholders and the world market price. Verwimp states: "The very high world market coffee prices allowed the [Habyarimana] regime's elite to increase both its personal consumption and its power over the population."[35] The government used its additional revenue to buy loyalty in rural areas (through higher prices paid for coffee and through subsidized agricultural inputs) and to spend more on monitoring the population.[36]

A crisis began when worldwide coffee prices tumbled in the late 1980s and the government rapidly lost revenue.[37] For a few years it attempted to keep payments for coffee stable, but this was an unsustainable policy—especially as, from 1990 onwards, the government needed resources to fight the invading Rwandan Patriotic Front (RPF) forces. By the early 1990s, the government lowered the price it paid to smallholders; price supports to coffee farmers ended in 1992.[38] Storey writes: "[f]or the great mass of ordinary people, the benefits accruing from the fact that they were ruled by Hutu rather than Tutsi were wearing thin, with the result that a rupture between rulers and ruled was deepening."[39]

With their income falling, farmers wanted to shift into production of another cash crop, bananas, but this was forbidden by law (the government may have refused to modify the law because of coffee's role as the major source of export revenue and a lack of readily available, viable substitutes).[40] With an extensive system of local monitors in place, it was difficult for farmers to ignore the law.[41] However, in the face of falling income and hunger, farmers uprooted as many as 300,000 coffee trees[42] and planted food and other more attractive cash crops.[43]

The fall in coffee prices, coupled with growing military expenditures in response to the 1990 RPF invasion, meant that Habyarimana faced a political and

---

35. Verwimp, *supra* note 20, at 172.

36. *Id.* at 171-73. Under the Habyarimana regime, the powerful OCIR-Café agency was run by relatives of the dictator's wife, members of the *clan de Madame* also know as the "akazu." *Id.*

37. *Id.* at 173-75. *See also* Berlage et. al., *supra* note 20, at 22-24.

38. *See* Storey, *supra* note 17, at 47.

39. Storey, Structural Adjustment, *supra* note 23, at 369.

40. Verwimp, *supra* note 20, at 173-74.

41. *Id.* at 162. Peter Uvin writes of the reach of the post-colonial Rwandan state: "the Rwandese state has been able to expand its presence to the most remote corners of the territory and of social life. Representatives of the state and of the single party were present at even the lowest level of social organization: each "colline" (hill—the basic geographical reference in Rwanda), each extended family was in permanence surrounded by centrally-appointed administrators, teachers, agricultural monitors, internal security agents or police agents, as well as by local party cadres of all kinds." Peter Uvin, *Prejudice, Crisis and Genocide in Rwanda,* 40 (2) AFR. STUD. REV. 91, 97 (1997). In a similar vein, Hintjens writes: "[p]ost-independence Rwanda inherited a legacy of close public scrutiny of all spheres of life, continuing the former colonial and monarchical state's ability to control each individual through a network of controls, extending from the apex of the regime to its base at household level." Helen M. Hintjens, *Explaining the 1994 Genocide in Rwanda*, 37(2) J. MOD. AFR. STUD., 241, at 245 (1999).

42. Storey, Structural Adjustment, *supra* note 23, at 369.

43. Verwimp, *supra* note 20, at 173-74.

fiscal crisis.[44] One option to deal with the fiscal crisis was to find other sources of revenue. To this end, the government confiscated property and raised taxes to supplement the budget and there was some reduction of consumption by elites.[45] At the same time, foreign aid became an increasingly important part of the budget.[46] Prunier argues that in the 1980s, Rwanda's elite relied on three sources of "enrichment:" coffee and tea exports, tin exports for a brief time, and foreign aid.[47] As the commodity revenues shrank, "there was an increase in competition for access to that very specialized resource (foreign aid), which could only be appropriated through direct control of the government at high levels."[48]

However, the reliance upon, and competition for, foreign aid created serious problems within the elite *akazu* group:[49] "the various gentlemen's agreements which had existed between the competing political clans since the end of the Kayibanda regime started to fracture as the resources shrank and internal power struggles intensified."[50] With its growing dependence on foreign aid, and in a bid to remain in power, the government agreed to an International Monetary Fund (IMF) structural adjustment program in 1990 that led to further hardships for farmers.[51]

Verwimp argues that in the early 1990s the regime was no longer able to raise the revenue it needed to buy rural support.[52] Faced with rural discontent, Habyarimana used repression and violence as alternatives to the purchase of rural

---

44. Patrick Cannon, Elusive Quest? The Political Economy of Reconciliation in Post Genocide Rwanda, Address at the Sacramento State Center for African Peace & Conflict Resolution 14th Annual Africa/Diaspora Conference (2005), http://www.csus.edu/org/capcr/documents/archives/2005/ConferenceProceedings/Cannon-1.pdf.

45. Verwimp, *supra* note 20, at 174-76.

46. Storey, Structural Adjustment, *supra* note 23, at 371-72.

47. GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 84 (Columbia University Press 1995).

48. *Id.*

49. "Akazu" can be translated as "small house" and in the Habyarimana regime it referred to a group of senior-level military and civilian advisors who were connected to Agathe Habyarimana, the President's wife. *See* Hintjens, *supra* note 41, at 259.

50. *See id.;* PRUNIER, *supra* note 47.

51. PETER UVIN, AIDING VIOLENCE: THE DEVELOPMENT ENTERPRISE IN RWANDA 57-59 (Kumarian Press 1998). Uvin writes that in 1991 Rwanda entered into a $90 million structural adjustment program with the World Bank. In 1992 and 1993 additional "loans were negotiated but only partially implemented." Key policy goals of the program included improving fiscal and monetary discipline, expanding the private sector and limiting government involvement in this sector, liberalizing trade, increasing export production and allowing for increased internal migration of workers. These loans also required a currency devaluation, which sparked inflation. Uvin notes most of these policy changes were not implemented so aid disbursements for structural readjustment were suspended. *Id.*

52. Verwimp, *supra* note 20, at 177-78.

loyalty.[53] Evidence shows rising numbers of arbitrary arrests, massacres of Tutsis, confiscations of property, and rapes during these years.[54]

To rebuild its popularity, the regime diverted attention from its own economic policies to the Tutsi/RPF threat, using this as an excuse for the increased level of repression within Rwandan society.[55] The government demonized the invaders, argued that allowing Tutsis into the country would mean Hutus would have less of the extremely scarce resource of land, [56] and used the media to foment ethnic hatred.[57] Mostly, the repression was directed at the Tutsi minority, though some spilled over to Hutus.[58] The ultimate results were disastrous. In the three months between April and June of 1994, approximately 800,000 people[59] were murdered and up to 250,000 raped[60] in a country with a population between seven and eight million,[61] roughly the size of Connecticut.[62] Three quarters of Rwanda's Tutsi population[63] and many moderate Hutus and Hutu opponents of the Habyarimana government died.[64] The Rwandan genocide was stopped not by international

53. Verwimp, *supra* note 20, at 175, 177. Storey points out that in 1992 Habyarimana did agree to the creation of a coalition government. With rival Hutus in office, the older guard may have felt their positions in danger, especially as the economic outlook was dire, so Storey argues they used a variety of strategies to stave off the possible loss of power: electoral manipulation, use of propaganda blaming the Tutsi for the economic crisis, violence against opponents, and finally, genocide. Storey, Structural Adjustment, *supra* note 23, at 369-70, 375.

54. Berlage et. al., *supra* note 20, at 23.

55. Verwimp, *supra* note 20, at 178.

56. For a discussion of land scarcity in pre-genocide Rwanda *see* Catherine André & Jean-Philippe Platteau, *Land Relations Under Unbearable Stress: Rwanda Caught in the Malthusian Trap*, 34 J. ECON. BEHAV. & ORG., 1 (1998).

57. Uvin, *supra* note 41, at 100.

58. *See* Storey, *supra* note 17, at 47.

59. The United Nations reports 800,000 deaths. *See, e.g.*, Letter from Kofi A. Annan, Under-Sec'y-Gen. for Peacekeeping Operations, U.N. Sec. Council, to President of the U.N. Sec. Council (Dec. 15, 1999), http://daccessdds.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement; Alison Des Forges, who triangulates data from three sources, estimates that at least 500,000 were killed. ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 15-16 (Human Rights Watch 1999).

60. HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE & ITS AFTERMATH (1996), *available at* http://www.hrw.org/reports/1996/Rwanda.htm#P324_67660.

61. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1243. For a discussion on regional patterns in violence and how it rapidly spread, *see* SCOTT STRAUS, THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA 53-64 (Cornell University Press 2006).

62. Drumbl, *supra* note 61, at 1250.

63. Alan J. Kuperman, *Provoking Genocide: A Revised History of the Rwandan Patriotic Front*, 6(1) J. GENOCIDE RES. 61 (Mar. 2004).

64. *See* PRUNIER, *supra* note 47, at 265; *see also* Drumbl, *supra* note 61, at 1248 ("Many of the 10,000 to 30,000 Hutu who were massacred during the genocide were killed not because they opposed the genocide per se, but because they were political opponents of the genocidal regime who challenged the grip of that regime on power without necessarily contesting its anti-Tutsi fanaticism."); Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 579 (1998).

action, but by the RPF who killed between 25,000 and 60,000 Hutus during the genocide and in reprisal attacks.[65]

Verwimp sums up the Habyarimana regime's descent into genocide as the result of a failed strategy to maintain political power.[66] The government lost the loyalty of the majority rural population and needed to do something to win back that loyalty or face expulsion (or worse).[67] Rural support was shattered by the government's inability to maintain high coffee prices and by unpopular policies that forced farmers to grow coffee rather than food or other cash crops.[68] In addition, the economic structural adjustment program imposed real hardships on most Rwandans: inflation rose, taxes increased, price controls were removed, fees for health and education were introduced, and price supports for coffee were eliminated.[69] These policy changes imposed substantial costs on Rwandans at a time when the government was forced to defend itself (and hence, expend scarce resources) against the invading RPF.[70] To maintain power, the government tried to legitimize its reign by resorting to ethnic ideology.[71] Frightening farmers with the specter of Tutsi violence was a means to regain rural support.[72]

---

65. Ariel Meyerstein, *Between Law & Culture: Rwanda's Gacaca & Postcolonial Legality*, 32 L. & SOC. INQUIRY 467, 472 (2007). RPF soldiers also killed thousands of Hutu civilians after 1994 in wars in the eastern Democratic Republic of Congo, the anti-insurgency campaign in northwest Rwanda in 1997 and 1998 and during the closing of the refugee camps in 1995. Lars Waldorf, *Massjustice for Massatrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, n. 338 (2006). *Compare* DES FORGES, *supra* note 59, at 705 (describing widespread and systematic human rights abuses by the RPF before and during the genocide and noting how the RPF massacred groups of unarmed civilians in public meetings after combat was finished, in places where there had been little or no slaughter of Tutsi and where militia did not appear to threaten their advance.), *with* PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 219 (Farrar, Straus & Giroux 1998) ("What most vividly impressed observers in the waning days of the genocide was the overall restraint of this rebel army, even as its soldiers were finding their ancestral villages, and their own families, annihilated.").

66. Verwimp, *supra* note 20, at 161.

67. *Id.* at 173-74.

68. *Id.*

69. Storey, *supra* note 17, at 47-48.

70. Uvin, *supra* note 41, at 108.

71. Many historians and ethnographers do not consider Hutus and Tutsis to be distinct ethnic groups. GOUREVITCH, *supra* note 65, at 47-48 (1998); UVIN, *supra* note 41, at 92-93. Both groups speak the same language (Kinyarwanda), belong to the same clans (ubwoko), practice the same religions, live side-by-side, intermarry and share art, music, and culture. Drumbl, *supra* note 61, at 1242-44; DES FORGES, *supra* note 59, at 4; PRUNIER, *supra* note 47, at 15. In pre-colonial Rwanda, the terms "Hutu" and "Tutsi" referred to farmers and cattle-herders, respectively. Animal husbandry brought greater status and power, and therefore Tutsis generally enjoyed higher social status and wealth than Hutus. However, the categories were fluid, and a Hutu could become a Tutsi by acquiring more cattle. Colonialism, however, changed the significance of the meaning of "Hutu" and "Tutsi." When Europeans explored Rwanda in the early nineteenth century, they identified Rwandan Tutsis as the superior race, being generally taller, lighter and in control of Rwanda's pre-colonial monarchy (one of the most sophisticated in Eastern Africa at the time). Under Belgian colonialism, identity cards hardened and institutionalized the categories "Hutus" and "Tutsis" and in a system of indirect rule, privileges reinforced Tutsi's political dominance. The terms no longer referred exclusively to status and economic activity, but referred to two "races," one of which enjoyed greater political power. DES

This is certainly *not* to say that government control of the coffee sector was a direct cause of the genocide.[73] It is to say that the politicization of the coffee sector by the Habyarimana regime empowered some elites to use a portion of the coffee revenue to perpetrate violence. The consequences of extensive government involvement in this key sector were not simply economic; they were deeply political and, ultimately, catastrophic for many.[74]

However, other factors—such as prejudice, strong resentment over land shortages, a severe refugee problem, resentment over rising prices that resulted from the IMF-directed economic restructuring, and fear generated by the RPF incursions—also played important roles in sparking the genocide.[75]

III. REBUILDING RWANDA

The broad participation in Rwanda's genocide has posed significant challenges to meting out justice, restoring peace, and rebuilding Rwanda's economy.[76] Before the genocide, Hutus and Tutsis farmed the same hills, "attended the same schools and churches, worked in the same offices, and drank in the same bars."[77] Some intermarried and by one estimate, one quarter of Rwandans have both Hutu and Tutsi among their eight great-grandparents.[78]

Despite sharing so much, violence among Rwandans was widespread. Killings were public and neighbors often perpetrated the violence with machetes, sticks, and tools.[79] "Perpetrators" numbered in the hundreds of thousands,[80] while

---

FORGES, *supra* note 58, at 31-38; STRAUS, *supra* note 61, at 18-23 (debunking the "ancient tribal hatred" as an explanation of the genocide); PRUNIER, *supra* note 47, at 5-23 (describing the colonial impact on Rwandese society.).

72. Verwimp, *supra* note 20, at 178.

73. *See id.* at 180 ("It is not the fall of the coffee price that caused the genocide, but the desire of the ruling elite to stay in power at all cost.").

74. *Id.* at 172.

75. Uvin, *supra* note 41, at 96-105. For an analysis of the participation and spread in violence, *see* Straus, *supra* note 61, at 35-40 (analyzing the hypotheses of nationalism, racial ideology, dehumanization, deprivation, group conformity, deviant behavior, material incentives, and the security dilemma hypothesis.).

76. Wole Soyinka, *Hearts of Darkness*, N.Y. TIMES, Oct. 4, 1998, § 7, at 11 (reviewing PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES), ("To capture the uniqueness of the Rwandan crime, one must imagine that nearly the entirety of the German population participated in the liquidation of the Jews, or that the Russian masses responded to Stalin's war against the kulaks, armed themselves with picks and shovels and massacred the kulaks in village after village, instead of merely watching them being herded off to their eventual extermination.") Under one estimate, "[t]he dead of Rwanda accumulated at nearly three times the rate of the Jewish dead during the Holocaust. It was the most efficient killing since the atomic bombs of Hiroshima and Nagasaki." GOUREVITCH, *supra* note 64, at 4.

77. DES FORGES, *supra* note 59, at 4.

78. ORGANIZATION OF AFRICAN UNITY, RWANDA: THE PREVENTABLE GENOCIDE para. 2.4 (2000), *available at* http://www.cfr.org/publication/15629/rwanda.html.

79. *Id.* at para. 16.58.

80. Scott Straus, *How Many Perpetrators Were There in the Rwandan Genocide? An Estimate*, 6 J. GENOCIDE RES. 85, 85-95 (2004). Straus defines "perpetrators" as "any person who participated in an attack against a civilian in order to kill or to inflict a serious injury on that civilian" and estimates

others facilitated killings or looted. As Mark Drumbl noted, "[m]any Rwandans provided lists of Tutsi in their region to their killers. Teachers identified students, physicians identified patients, and pastors identified the faithful.... Many of these individuals stood silent as murder plagued their streets, but then promptly moved into a suddenly vacant home."[81]

After the genocide, the RPF government began controversial mass arrests and detentions, often relying on accusations by opportunistic neighbors.[82] Many of the detainees had incomplete case files without specified charges or investigations.[83] By October 1994, approximately 58,000 people were detained in a facilities designed for 12,000.[84] Within three years, this number doubled to 125,000.[85] With Rwanda's judicial infrastructure in ruins, these dententions posed a significant due process challenge.[86] Over 80% of Rwanda's legal personnel had been killed or fled the country.[87] Many courts had been damaged or looted.[88] Of the personnel that remained, few had formal legal training.[89]

---

approximately 200,000. A low-end estimate would be tens of thousands perpetrators. BRUCE D. JONES PEACEMAKING IN RWANDA: THE DYNAMICS OF FAILURE 41 (2001). A high-end estimate would be hundreds of thousands. DES FORGES, *supra* note 59, at 2; MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 7 (2002); CHRISTIAN P. SCHERRER, GENOCIDE AND CRISIS IN CENTRAL AFRICA: CONFLICT, ROOTS, MASS VIOLENCE, & REGIONAL WAR 126 (2001) (estimating that "every fourth person in Rwanda's Hutu population including men, women, and children - was probably directly involved in the genocide, and millions rendered themselves indirectly responsible.").

81. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 98 (Cambridge Univ. Press 2007).

82. Waldorf, *supra* note 65, at 41-42. *See also* DES FORGES, *supra* note 59, at 754 ("Because the overburdened judicial system has failed to discover and punish false accusations increasing numbers of people have brought false charges for their own interests. In some cases . . . persons have been obliged to pay others in order to avoid being false accused and imprisoned or they have been asked to provide a substantial sum of money to officials in order to arrange for the release of a family member."); ORGANIZATION OF AFRICAN UNITY, *supra* note 77, at § 18.39. ("In too many cases, false accusations were made against those whose only 'crime' was inhabiting land or property or working in a post that returning Tutsi refugees coveted. In other instances, accusers were known to be seeking retribution for some current or past wrong, real or imagined, but unconnected to the genocide.").

83. U. S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: RWANDA 2001§ 1(d) (2002) (reporting that, in 2001, ninety-five percent of approximately 112,000 individuals incarcerated were awaiting trial on genocide-related charges, the majority of whom had incomplete files). Many pre-trial detentions were retroactively legalized. HUMAN RIGHTS WATCH, LAW & REALITY: PROGRESS IN JUDICIAL REFORM IN RWANDA 13 (2008), *available at* http://www.hrw.org/reports/2008/rwanda0708/.HUMAN RIGHTS WATCH, LAW & REALITY, *supra* note 82, at 14.

84. HUMAN RIGHTS WATCH, LAW & REALITY, *supra* note 83, at 14.

85. GOUREVITCH, *supra* note 65, at 242. *See also infra* note 110 for more discussion of prison conditions.

86. Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 371 (2005).

87. *Id.* at 371-72. Estimates vary as to the number of legal personnel in Rwanda after the Genocide. National Service of Gacaca Jurisdictions, Gacaca Overview, http://www.inkiko-gacaca.gov.rw/En/Generaties.htm (last visited Sept. 9, 2008) (reporting 758 judges and 70 prosecutors before the genocide and 244 judges and 12 prosecutors after); UNITED STATES INSTITUTE FOR PEACE,

The government periodically began granting provisional releases of genocide suspects in 1994—first the elderly, sick, young, those accused without case files, and later those who had served their sentences in pretrial detention or had confessed.[90] By 2006, the number of genocide suspects in pre-trial detention shrank to roughly 66,000.[91] While some releases benefited the wrongly accused, they have predictably also heightened tensions within Rwanda. As Drumbl notes: "in the aftermath of the genocide both victim and aggressors must live unavoidably side-by-side . . . and share common public spaces.[92]

To heal wounds, the RPF-led government has adopted a variety of strategies. The government has participated in international court proceedings, created and strengthened national and local-level dispute resolution institutions while also pursuing a program of economic liberalization that seems to provide an alternate channel for informal reconciliation.[93] By most accounts, these institutional and policy changes in Rwanda have varying records in terms of promoting reconciliation and providing justice to aggrieved parties and to defendants. We discuss some of these formal efforts below.

A. Creating the ICTR

With the reluctant support of Rwanda,[94] the United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR) to prosecute crimes of genocide and violations of international humanitarian law.[95] Despite its

---

RWANDA: ACCOUNTABILITY FOR WAR CRIMES & GENOCIDE (Special Report No. 13, 1995), *available at* http://www.usip.org/pubs/specialreports/early/rwanda1.html (reporting that 40 out of 800 judges and lawyers were alive and in the country after July 1994).

88. HUMAN RIGHTS WATCH, LAW & REALITY *supra* note 83, at 12. Damage to the ministry building was so severe that the Minister of Justice had to work from his hotel room and file documents in boxes under his bed. *Id.*

89. William A. Schabas, *Genocide Trials & Gacaca Courts*, 3 J. INT'L CRIM. JUST. 879, 883 (2005) ("There were only about 20 lawyers with genuine legal education in the country when I visited Rwanda in November 1994.").

90. Waldorf, *supra* note 65, at 42-43.

91. U. S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: RWANDA 2006 § 1(c) (2007).

92. Drumbl, *supra* note 60, at 1238.

93. *See supra* Parts III.A-B, IV.

94. The U.S. government sent Assistant Secretary John Shattuck to solicit the necessary request from Rwanda for the Tribunal. Before Rwanda consented, Paul Kagame—who at the time served as Vice-President and Minister of Defense—expressed concerns that crimes of genocide would not be punished with the death penalty; the international court would be removed from Kigali and therefore justice would not be palpable to Rwandans; and Rwanda would not have jurisdiction over criminals who fled outside Rwanda. David P. Rawson, *Prosecuting Genocide: Founding the International Tribunal for Rwanda*, 33 OHIO N.U.L. REV 641, 648-49 (2007) (citation omitted). Consequently, these reservations hardened into opposition, particularly when it was clear that Tribunal would not sentence genocide leaders to death, and Rwanda ultimately voted against the Resolution establishing the Tribunal. *Id.* at 654-55.

95. *See* Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, Annex, art. 1-4, 7 U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR statute] (giving the ICTR substantive jurisdiction over crimes of genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Temporal jurisdiction was between January 1,

location in Arusha, Tanzania, the ICTR has concurrent jurisdiction with Rwandan national courts, though it theoretically has primacy and can ask national courts to defer to it in any case.[96] The ICTR was modeled after the International Criminal Tribunal for Yugoslavia (ICTY) and—for the sake of economy and consistency in law—it shares institutional links;[97] its rules of evidence and procedure mimic the ICTY's with some modification,[98] and it consists of three trial chambers, a registry, a head prosecutor,[99] and an appeal chamber similar to the ICTY.[100]

There were several motivations behind creating the ICTR. Because the Rwandan court system was in shambles after the genocide,[101] there were concerns that vengeance would compromise fair trials and due process.[102] The ICTR, empanelled with judges selected by the General Assembly,[103] would presumably be in a better position to mete out justice impartially. Some also believed that an international tribunal would expedite extradition and deter genocide in other countries.[104]

As of April 2007, the Tribunal has handed down twenty-seven judgments upon individuals holding leadership positions during the genocide, including the

---

1994 and 31 December 31, 1994 to allow prosecution of genocide planners.).

96. *See id.* at art. 8; S.C. Res. 977, ¶ 1, U.N. Doc. S/RES/977 (Feb. 22, 1995). For a further discussion of the difficult relationship between the Tribunal and Rwanda, *see* Eric Husketh, *Pole Pole: Hastening Justice at the UNICTR*, 3 NW. U. J. INT'L HUM. RTS 8, 11, 50-65 (describing how after ICTR's decision to release Barayagwiza—considered one of the top criminals in Rwanda—the Rwandan government suspended cooperation with the Tribunal, preventing the travel of witnesses to Arusha and refusing to issue the Chief Prosecutor a visa to enter the country, although her office and investigating staff were in Kigali.). *See also* INTERNATIONAL CRISIS GROUP, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: TIME FOR PRAGMATISM (2003), *available at* http://www.crisisgroup.org/home/index.cfm?l=1&id=2303 [hereinafter TIME FOR PRAGMATISM] (describing how the Rwandan government prevented the travel of witnesses because it objected to the prosecutor's inquiries into war crimes presumed to have been committed by the RPA in 1994).

97. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955*, ¶ 9, *delivered to the Security Council*, U.N. Doc. S/1995/134 (Feb. 13, 1995).

98. ICTR statute, *supra* note 95, at art. 14.

99. In 2003, the Security Council split the prosecutorial duties for the criminal tribunals for Rwanda and the former Yugoslavia. S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

100. ICTR statute, *supra* note 95, at arts. 10, 11, 13, 15, 16.

101. *See supra* text accompanying notes 84-87.

102. According to Human Rights Watch, "[m]ore than one hundred persons were condemned to death for genocide [and] [m]any international leaders and organizations opposed the executions, both on general principle and because some of the trials had failed to meet international standards of due process. In several, the accused had no access to counsel and presented no witnesses in their defense. In the case of former prosecutor Silas Munyagishari, political considerations may have influenced the verdict. The executions were carried out in several towns before large and often festive crowds." HUMAN RIGHTS WATCH, WORLD REPORT 1999, *Rwanda: Human Rights Developments*, *available at* http://www.hrw.org/worldreport99/africa/rwanda.html; *see also* David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 483 (1999) (discussing the possible perception of national trials as illegitimate and "a case of 'victor's justice.'").

103. ICTR statute, *supra* note 95, at art. 12.

104. The Secretary-General, *Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council*, ¶ 138, *delivered to the Security Council*, U.N. Doc. S/1994/1125 (Oct. 4, 1994).

former Prime Minister, six Ministers, one Prefect, and seven Bourgmestres.[105] It has convicted the first head of government for committing genocide and, since the Nuremberg Trials, the first media leaders for inciting genocide.[106] By some accounts, it also advanced the definitions of "ethnicity" and "rape" for the purposes of proving genocide.[107] By the end of 2008, eighty-six accused persons will have been brought before the ICTR.[108]

Scholars have suggested that the Tribunal creates other indirect benefits. It has been argued that internationalizing the justice process has motivated countries to apprehend extremist Hutu leaders, which has thereby thwarted military reorganization of a defunct *Interahamwe* (the Hutu paramilitary force that was responsible for much of the genocide violence) that continued to launch attacks against the RPF until 1999.[109] Some have also suggested that the ICTR has made the Tutsi government more cautious about violent reprisals against Hutus, as the Tutsi government benefits from distinguishing itself morally from the previous leadership and maintaining international legitimacy.[110]

The ICTR's accomplishments, however, have not been without costs or criticism.[111] In its early years, the Tribunal was mired in charges of financial

---

105. International Criminal Tribunal for Rwanda, The Tribunal at a Glance, paras. 1, 8, http://69.94.11.53/default.htm (last visited Nov. 9, 2008).

106. *Id.* at paras. 5, 8. *See also* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Sentence, paras. 1095-1101 (Dec. 3, 2003).

107. International Criminal Tribunal for Rwanda, Achievements of the Tribunal, http://69.94.11.53/default.htm (last visited Nov. 9, 2008); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Decision by Appeals Chamber (June 1, 2001) (affirming prior judgment of ICTR Trial Chamber, as well as convicting defendants for complicity in genocide and crimes against humanity); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence (May 15, 2003) (advancing the definition of "conspiracy"); Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T (May 16, 2003); *see also* Payam Akhavan, *Focusing on ICTR Case Law-The Crime of Genocide in the ICTR Jurisprudence*, 3.4, J. INT'L CRIM. JUST. 989 (2005) (discussing how the Trial Chambers went to great lengths to characterize Tutsis as an 'ethnic' group in order to justify the label of genocide).

108. *ICTR Newsletter* (Int'l Crim. Tribunal for Rwanda), June 2008, at 1, *available at* http://69.94.11.53:80/ENGLISH/newsletter/june08/june08.pdf.

109. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 23 (2001).

110. *Id.* at 24 (noting also the "occasional punishment of crimes perpetrated by government forces against Hutu civilians"). *See also Rwanda: Human Rights Developments*, *supra* note 102 ("An increasingly active military justice system [has] tried soldiers for indiscipline and common crimes, sentencing several to prison and even to death after conviction for charges such as theft and murder."). *But see* Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, *in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 49, 61 (Eric Stover & Harvey M. Weinstein eds., 2004) (noting that "[t]rials of genocide suspects – and a pointed avoidance of substantial legal cases against RPA soldiers have sought to shape public perception to recognize the moral failings of many Hutu leaders while raising the moral standing of the current national leadership."). *See also supra* note 65 for more information on RPF war crimes.

111. For a general criticism of international criminal trials see Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L. J. 75, 147 (2005) ("If only the strongest states have the power to establish international tribunals, determine their memberships, set their agendas, and thus influence the development of international criminal law, predictably the resulting norms of international criminal law will reflect the interests of the strong states, not the weak ones.").

corruption and mismanagement.[112] For example, some genocide suspects were on the payroll as defense-team investigators.[113] The proceedings continue to be criticized as slow and expensive,[114] and some argue that the ICTR diverts resources away from rebuilding a rule of law in Rwanda.[115] For 2008 and 2009, the ICTR will have a budget of $247,466,600[116] to complete six trials and commence two.[117] Despite the ICTR's mandate to complete all trials by the end of 2008 and all work by 2010,[118] twenty-nine detainees are currently on trial while seven await trial.[119] Already, the ICTR has applied for a one-year extension.[120]

---

112. In 1997 the United Nations Office of Internal Oversight Services reported that in the Tribunal's Registry not a single administrative area functioned effectively ("Finance had no accounting system and could not produce allotment reports, so that neither the Registry nor United Nations Headquarters had budget expenditure information; lines of authority were not clearly defined; internal controls were weak in all sections; personnel in key positions did not have the required qualifications . . . ."). The Secretary-General, *Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, Annex, ¶ 9, *delivered to the General Assembly*, U.N. Doc. A/51/789 (Feb. 6, 1997). The report also noted that the "Chief of Finance did not have the required degree in administration, finance or accounting nor . . . [the] relevant United Nations experience in those fields." *Id.* at ¶ 20.

113. Victor Peskin, *Rwandan Ghosts*, LEGAL AFFAIRS, Sept./Oct. 2002, *available at* http://www.legalaffairs.org/issues/September-October-2002/feature_peskin_sepoct2002.msp.

114. *See* Yacob Haile-Mariam, *The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court*, 22 HASTINGS INT'L & COMP. L. REV. 667, 736 (1999) (asserting that the Rwandan courts began prosecuting defendants a year after the ICTR and closed four hundred cases by the middle of July 1998, whereas the ICTR had not completed one trial by the middle of August 1998). *But see* Husketh, *supra* note 96, at 6 (pointing to the increased efficiency of the ICTR as the rate of completion nearly doubled between the first and second mandate and attributing the delays to a lack of technical and translation services, infrastructure, security of lawyers, transportation costs between the two offices, perverse financial incentives for defense lawyers, failure to utilize plea bargaining, and fee-splitting).

115. Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 466 (1999) ("[E]ach dollar spent by the international community on the ICTR is one less dollar available for assistance to Rwandan courts . . ."). *Compare* Akhavan, *supra* note 109, at 25-26 (arguing against Alvarez by pointing to violence against judicial personnel, emotionally charged prosecutions and politicization of the Rwandan judiciary), *and* Des Forges & Longman, *supra* note 110, at 62 ("Given [Rwanda's] politicization of the judiciary, it is not at all clear that investing more in the Rwandan justice system would have promoted the rule of law and encouraged reconciliation in the country.").

116. International Criminal Tribunal for Rwanda, General Information, http://69.94.11.53/default.htm (last visited Nov. 9, 2008).

117. According to the most recent completion strategy report, "[f]our cases concerning seven accused are in judgement [sic] drafting phase and two-single accused cases are completed, with the closing arguments yet to be heard. There are six trials involving 19 accused currently ongoing. Two single-accused trials are scheduled to commence shortly. There are four new cases which are to be prepared for trial and four single-accused cases for which request for referral to Rwanda are pending." President of the International Criminal Tribunal for Rwanda, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶ 4, *delivered to the Security Council*, U.N. Doc. S/2008/322 (May 13, 2008).

118. S.C. Res. 1503, *supra* note 99.

119. International Criminal Tribunal for Rwanda, Detainees-Status on 10 October 2008, http://69.94.11.53/default.htm (last visited Nov. 9, 2008).

120. *ICTR Newsletter*, *supra* note 108, at 2.

It is also uncertain how much the ICTR has healed wounds amongst Rwandans. Despite ICTR's outreach program (established in 2000),[121] many Rwandans are unaware of the Tribunal's far-removed work in Tanzania.[122] Of the Rwandans are aware, many are skeptical. High-ranking suspects at the ICTR enjoy better defense lawyers and judges than low-ranking suspects who are tried in Rwanda, often without representation,[123] before judges with minimal experience.[124] They also receive a higher quality of health care than victims and at maximum can be sentenced to life imprisonment (sometimes in a Scandinavian jail).[125] Until recently,[126] lesser offenders in Rwanda could receive death sentences if convicted and otherwise face harsh, over-crowded prison conditions.[127] These differences in treatment between Rwandan courts and the ICTR have led to accusations of class justice,[128] and many Rwandans believe that the ICTR places too much emphasis on responding to the rights of the accused and not enough to victims and survivors,[129] including those who serve as witnesses.[130] Hutus have other reasons to be

121. The Outreach Program primary locale is the Information Centre *Umusanzu mu Bwiyunge* in Kigali. The Centre provides briefings, lectures, workshops and films about the Tribunal's work. The Tribunal also established an internship program in 2000 to allow Rwandan law students to work at the court each year and began translating court documents into Kinyarwanda. International Criminal Tribunal for Rwanda, *supra* note 106. *See also* Victor Peskin, *Courting Rwanda-The Promises and Pitfalls of the ICTR Outreach Programme*, 3.4 J. INT'L CRIM. JUST. 950 (describing the Programme as ineffective). According to Alison Des Forges and Timothy Longman, the outreach centre is "[a]ttractive to a tiny part of the urban elite . . . [but] offers little to the majority of Rwandans, who are illiterate and live in rural areas." Des Forges & Longman, *supra* note 110, at 56.

122. A survey conducted in 2002 of 2,091 Rwandans found that 87% either were "not well informed" or "not informed at all" about the Tribunal. Eric Stover & Harvey M. Weinstein, *Conclusion: A Common Objective, A Universe of Alternatives*, *in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 323, 334 (Eric Stover & Harvey Weinstein eds., 2004).

123. *See infra* note 139.

124. Haile-Mariam, *supra* note 114, at 736.

125. *See id.*

126. Organic Law No. 31/2007, July 25, 2007, http://www.unhcr.org/refworld/type,LEGISLATION,,RWA,46bada1c2,0.html, art. 4-5; *see also* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report on the Situation of Human Rights in Rwanda*, ¶ 136, U.N. Doc. E/CN.4/2000/41 (Feb. 25, 2000) (*prepared* by Michel Moussalli) (finding that of the some 2,406 persons tried by the special genocide courts, 14.4% were sentenced to death, 30.3% to life imprisonment, 34% to jail terms of between 20 years and one year, and 19% acquitted).

127. *Rwanda: Gacaca: A Question of Justice*, AMNESTY INT'L, Dec. 17, 2002, at 8, *available at* http://www.amnesty.org/en/library/info/AFR47/007/2002 ("Preventable diseases, malnutrition and the debilitating effects of overcrowding resulted in a reported 11,000 deaths between the end of 1994 and end of 2001."); *see also* Yassin Yusingwire, *Harsh Prison Conditions Propagating HIV/Aids - Study Reveals*, RWANDA NEWS AGENCY, July, 2 2008, *available at* http://www.rnanews.com/index.php?option=com_content&task=view&id=39&Itemid=31.

128. Haile-Mariam, *supra* note 114, at 736.

129. Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26:2 FLETCHER F. WORLD AFF. 21, 29 (2002).

130. Stephen Buckley, *Witnesses of Genocide Targeted; Protection Efforts Fail Rwandans Waiting to Testify in Tribunals*, THE WASH. POST, Jan. 20, 1997, at A24 (reporting that assailants opened fire on a shop owner and eleven others; also reporting assaults on U.N. officials by Hutu former-exiles);

skeptical of the ICTR. For Hutus who did not perpetrate violence, but suffered violations of international humanitarian law in attacks by the RPF, the ICTR's exclusive focus on prosecuting Hutus has left them without a remedy.[131] Zorbas argues that: [i]t is nearly impossible to overstate the bitter disappointment and ill will the ICTR's alleged rampant corruption, bureaucracy, incompetence, and above all its meager results... has generated with the RPF government, the Rwandan people and internationally."[132]

B. Rebuilding National Courts

Rwanda's courts reopened in 1996 understaffed, with 324 magistrates, 100 deputy prosecutors and 298 judicial police officers.[133] To try genocide crimes,[134] the government established specialized chambers in civil and military courts and carved out four categories of culpability for acts related to the genocide: Category 1 for planners, notorious murderers, and rapists; Category 2 for perpetrators, conspirators, and accomplices of homicide; Category 3 for persons accused of serious but non-lethal assaults; and Category 4 for perpetrators of property offenses.[135] Penalties initially ranged from death and life imprisonment for

---

Hirondelle News Agency, *Rwanda and UN Court Vow to End Witness Deadlock*, ARUSHA TIMES, Feb. 5-11, 2005 (reporting the murder of a confessed genocide killer upon return from the ICTR); Husketh, *supra* note 96, at 58 ("In December 1996, a witness was killed with his daughter, brother, nephew and seven others. The witness had asked investigators for protection, but the nearest telephone was more than 20 miles away. The next month, January of 1997, another witness and her entire family of eight were killed after returning from testifying in Arusha.").

131. *See The International Criminal Tribunal for Rwanda: Justice Delayed*, INT'L CRISIS GROUP, June 1, 2001, at iii; *see* Husketh, *supra* note 96, at 2 (suggesting that the Security Council's decision to not renew Prosecutor Cara del Ponte's mandate was partially motivated by the Rwandan's government animus against her as well as its desire to preempt her continued investigation into war crimes by the RPF/RPA); TIME FOR PRAGMATISM, *supra* note 75 (describing pressure from the Rwandan government to not prosecute members of the Rwandan patriotic army (RPA)). Letter from Sidiki Kaba, President, International Federation of Human Rights & Kenneth Roth, Executive Director, Human Rights Watch to Council Members (June 2, 2006), *available at* http://hrw.org/english/docs/2006/06/02/rwanda13504.htm (urging the Security Council to assure the Prosecutor will be afforded the necessary time to prosecute RPA cases even if those proceedings continue beyond 2008).

132. Eugenia Zorbas, *Reconciliation in Post-Genocide Rwanda*, 1 AFR. J. OF LEGAL STUD. 29, 34 (2004); *see also* De Forges & Longman, *supra* note 110, at 56-57 (noting that "although the majority of the population is not hostile to the ICTR, people tend to see it as an activity of the international community conducted primarily for its own benefit, with little relevant to the process of reconciliation in Rwanda.").

133. *See Gacaca: A Question of Justice*, *supra* note 127, at 12.

134. Rwanda had no provision for prosecuting and punishing genocide crimes in its domestic penal code, though it had ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions and other conventions of international humanitarian law in 1975. *See* HUMAN RIGHTS WATCH, *supra* note 83, at 14-16 (discussing and criticizing how Rwanda established the legal basis for prosecution).

135. Organic Law No. 08/96, Aug. 30, 1996, art. 2, http://www.preventgenocide.org/law/domestic/rwanda.htm [hereinafter 1996 Genocide Law]; *see also* Zorbas, *supra* note 130, at 35.

Category 1 offenders to civil damages for Category 4 offenders, though sentences could be reduced through plea-bargaining.[136]

By December 2003, the twelve national specialized courts had tried 9,700 accused.[137] These trials have been criticized for a number of shortcomings, including, but not limited to: a lack of due process,[138] unqualified judges,[139] inadequate defense representation,[140] executive influence,[141] "Tutsification,"[142] impunity for RPF war crimes,[143] and creating a sense of collective guilt against Hutus.[144] To victims, the court proceedings were often inaccessible and provided little reparation.[145] To the accused, Tutsi-dominated juries led some to view

136. 1996 Genocide Law, *supra* note 135, at art. 14-15.

137. Waldorf, *supra* note 65, at 44.

138. *See* U.S. DEP'T OF STATE, RWANDA: COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2007 (Mar. 11, 2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100499.htm (reporting that judiciary is subject to executive influence and does not always ensure due process or expeditious trials).

139. *Gacaca: A Question of Justice*, *supra* note 127, at 12 (observing that "[f]ew of the magistrates were jurists and less than a quarter had adequate legal training").

140. 1996 Genocide Law, *supra* note 135, at art. 36 (stating that the Rwandan government is not obliged to pay for defense counsel); THE DANISH INST. FOR HUMAN RIGHTS, LEGAL AID IN RWANDA: A REPORT ON THE LEGAL ASSISTANCE AVAILABLE IN RWANDA annex at 83 (2004) (estimating that only half of the defendants have benefitted from representation).

141. *See* HUMAN RIGHTS FIRST, PROSECUTING GENOCIDE IN RWANDA: A HUMAN RIGHTS FIRST REPORT ON THE ICTR AND NATIONAL TRIALS (Jul. 1997), *available at* http://www.humanrightsfirst.org/pubs/descriptions/rwanda.htm (finding that Hutu prosecutors and judges who did not arrest or convict suspects because a lack of evidence were sometimes charged with genocide or corruption); HUMAN RIGHTS WATCH, RWANDA: HUMAN RIGHTS DEVELOPMENTS (1999), *available at* http://www.hrw.org/wr2k/Africa-08.htm (in 1999, the Supreme Court disbanded); HUMAN RIGHTS WATCH, WORLD REPORT 2003: RWANDA: HUMAN RIGHTS DEVELOPMENTS (2003), *available at* http://www.hrw.org/wr2k3/africa9.html (finding that in 2002 six Supreme Court judges were forced to resign after the Prosecutor General threatened to jail them on corruption charges).

142. HUMAN RIGHTS WATCH, *supra* note 102 (concluding that the "judiciary [was] largely in the hands of Tutsi, many of whom were recent returnees."); ORGANIZATION OF AFRICAN UNITY, *supra* note 78, at §18.38 ("as in virtually all other sectors of Rwandan public life, the justice system was dominated by Tutsi").

143. When the ICTR prosecutors attempted to investigate crimes by RPA soldiers, Rwandan officials forced the suspension of the trials by not allowing the witnesses to travel. When other countries, such as France and Spain, have issued arrest warrants for RPA soldiers and officers, Rwanda has broken diplomatic relations and ignored the warrants. HUMAN RIGHTS WATCH, *supra* note 83, at 4 ("only 32 soldiers have been brought to trial for crimes committed against civilians in 1994, with 14 found guilty and punished with light sentences"); Waldorf, *supra* note 65, at n. 338 (citation omitted) (Lieutenant Colonel Fred Ibingira, for example, who commanded the troops that massacred an estimated 2000-4000 Hutu refugees at the Kibeho refugee camp in April 1995 was sentenced to eighteen months in prison for "failing to give assistance to a person in danger."); *see also* Des Forges & Longman, *supra* note 110, at 61 (noting that the courts have been used extensively to intimidate potential critics and opponents of the regime).

144. Waldorf, *supra* note 65, at 40 ("Early on, the RPF seemed more interested in using the judicial system to impose collective guilt and social control on the Hutu majority than in establishing individualized accountability for the genocide.").

145. Goldstein-Bolocan, *supra* note 86, at n. 375 ("although compensation for victims has been awarded in 50 percent of civil verdicts, in none of these cases were the verdicts awarded against the state or against those found criminally guilty") (citation omitted).

themselves as prisoners of war on the losing side, rather than as defendants in a criminal trial.[146] Given the enormous caseload and the judiciary's limited resources, it would have taken over eighty years to try all of the accused.[147]

The Rwandan government undertook two dramatic initiatives to improve the delivery of justice. First, it sought to reform the judiciary[148] by introducing greater autonomy,[149] raising the educational criteria for judicial posts,[150] and increasing the pace of justice.[151] Second, it launched *gacaca,* a form of popular justice modeled on past customary conflict-resolution practices, to judge most genocide cases.[152] Although *gacaca* and the conventional courts differ in law, procedure, and personnel, the two now constitute a single judicial system.[153]

C. Institutionalizing Gacaca

"*Gacaca*" translates to "lawn" or "small grass," the setting of traditional, informal gatherings where community[154] elders resolved minor conflicts over

146. Drumbl, *supra* note 61, at 1290; Des Forges & Longman, *supra* note 110, at 62-63 ("domestic trials have been politicized and many Rwandans view them as one-sided . . . ."); Straus, *supra* note 80, at 151 (finding that many interviewed perpetrators equated killing Tutsis with fighting the enemy and that the most powerful predictor of why one perpetrator committed more violence than the other was whether a respondent described himself as motivated by war-related fear or anger).

147. Schabas *supra* note 89, at 888; ORG. OF AFR. UNITY, *supra* note 78, at § 18.37 (estimating between two to four centuries to try all those in detention).

148. HUMAN RIGHTS WATCH, *supra* note 83, at 23 (stating that a commission consisting of members of the supreme court, prosecutor's office, bar association, ministry of justice, and law faculty drafted 13 laws, which were mostly introduced in 2004 to reform the judiciary).

149. *See generally* Organic Law No. 07/2004, Jan. 1, 2004, http://www.amategeko.net/display_rubrique.php?ActDo=all&Information_ID=2&Parent_ID=9&type=public&Langue_ID=An&rubID=30692036#30692036, [hereinafter 2004 Organisation of Courts Law] (determining the Organisation, Functioning, & Jurisdiction of Courts). The president of the Supreme Court now has hiring and removal powers with the approval of the Superior Council of the Judiciary, a group consisting of judged elected by peers, the President of the National Commission of Human Rights, two representatives of law faculties, and the ombudsman. *Id.* at art. 6. The office of the public prosecutor was guaranteed financial and administrative autonomy from the Ministry of Justice. Organic Law No. 03/2004, Mar. 20, 2004, art. 2, http://www.kituochakatiba.co.ug/prosecutionservice.pdf. To discourage corruption, judges' salaries increased between two and five-fold. HUMAN RIGHTS WATCH, *supra* note 83, at 26.

150. HUMAN RIGHTS WATCH, *supra* note 83, at 27 (finding that before the reforms, approximately 10% held law degrees and some lower court judges had only finished primary school. In 2004, a law was passed requiring law degrees and six years of experience for High Court judges and eight years for Supreme Court judges).

151. To streamline the judicial system, the government cut the number of courts and judges. *See generally* 2004 Organisation of Courts Law, *supra* note 149, at title I. Judges are also now required to deliver an official judgment, including reasons for the decision, within 30 days of the closure of trial proceedings. *Id.* at art. 168.

152. Between 2005 and 2008, the conventional courts tried only 222 genocide cases. As of 2008, all remaining cases will be sent to *gacaca* with the exception of national or provincial leaders and those accused sent back to Rwanda from other national or international jurisdictions. HUMAN RIGHTS WATCH, *supra* note 83, at 17.

153. *Id.* at 2.

154. Rwandan communities traditionally were separate homesteads spread out on hillsides rather than villages. HUMAN RIGHTS WATCH, UPROOTING THE RURAL POOR IN RWANDA § III (2001),

property, inheritance, personal injury, and marital relations.[155] Historically, *gacaca*'s goal was to restore tranquility to the community.[156] All community members participated and, apart from women, anyone could voice their opinion.[157] Both parties were expected to accept the sentences imposed, and after the conflict was resolved, to maintain a social relationship.[158] In addition to collectively meting out punishments, communities performed welcoming rites for persons who had completed their punishments to recreate a sense of belonging.[159]

Throughout the colonial period, *gacaca* continued to play a role in resolving local disputes even as parts of the legal system formalized. Colonial courts often accepted *gacaca* judgments, and in some cases, the courts reviewed rather than re-litigated appeals.[160] By the 1980s, local authorities (or sector officials) used *gacaca* as a "semi-official" institution to adjudicate disputes outside state courts.[161] Though *gacaca* ceased in most communities during the genocide, some reorganized it afterwards to arrest genocide suspects and deal with property disputes arising from returnees.[162] In 1998, some detainees, encouraged by prison officials, began their own *gacaca* to hear confessions of inmates.[163]

In 2001, the Rwandan government passed legislation to revive and adapt *gacaca* to try all genocide-related cases, except Category 1 cases which would be heard by national courts.[164] Local communities elected over 250,000 judges[165] and

---

available at http://www.hrw.org/reports/2001/rwanda/. *See also* Zorbas, *supra* note 132, at 36-7.

155. For more serious crimes such as murder and cattle theft, the king's representatives or chiefs generally had jurisdiction. Waldorf, *supra* note 65, at 48.

156. Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 (2) HUM. RTS. BRIEF 16, 16 (2007).

157. Waldorf, *supra* note 65, at 48.

158. Jessica Raper, *The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide*, 5 PEPP. DISP. RESOL. L. J. 1, 30 (2005). In recent times, the losing party had to provide beer to the community as a form of reconciliation. Waldorf, *supra* note 65, at 49.

159. Paul E. Nantulya, *The Gacaca System in Rwanda*, 4 CONFLICT TRENDS, at 53-54 (2001), *available at* http://www.accord.org.za/downloads/ct/ct_2001_4.pdf.

160. *Id.*

161. Waldorf, *supra* note 65, at 49.

162. Jennifer Widner, *Courts & Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 65-66 (2001) (noting how the voluntary character of resettlement after the genocide—with families and friends banding together to form new villages—meant that members of these new communities trusted each other enough to make election an acceptable means of selecting gacaca members, and the number of gacaca rapidly increased).

163. PENAL REFORM INTERNATIONAL, GACACA JURISDICTIONS AND ITS PREPARATIONS 29 (2002), *available at* http://www.penalreform.org/resources/rep-ga1-2002-preparations-en.pdf (noting that in Kigali Central Prison, the gacaca committee heard 1127 confessions from approximately 8000 inmates from late 1998 to late 2001).

164. Organic Law No. 40/2000 of 26/01/2001, art. 2. After the accusation phase ended, approximately 818,000 persons had been accused, 77,000 of which were in category 1. In March 2007, the government redefined the categories to move some accused from category 1 to 2. HUMAN RIGHTS WATCH, *supra* note 83, at 21-22.

165. Judges are not required to have legal qualifications. Rwandans of "integrity" who are at least twenty-one years of age can be elected as Gacaca judges so long as they have not participated in the genocide; are free from the spirit of "sectarianism"; have not been sentenced to a penalty of at least six

after an 18-month pilot phase in approximately 10% of the cells in Rwanda,[166] *gacaca* was launched with some modification nationwide in January 2005.[167]

The modernized *gacaca* system departs from traditional *gacaca* in fundamental ways.[168] First, *gacaca* judges are not community elders, but elected, relatively young citizens, including women.[169] Second, *gacaca* courts judge serious crimes, such as homicide, whereas traditional *gacaca* resolved only minor civil disputes.[170] Third, modern *gacaca* is an official state institution that applies codified, rather than "customary" law, with powers to summon persons, issue warrants, conduct searches, confiscate property, and impose sentences up to 30 years in prison.[171] In traditional *gacaca*, family and clan members, rather than individuals, paid assessed judgments, as all members were "parties to the conflict."[172] Finally, modern *gacaca*'s goals are a mix of retributive and restorative justice,[173] rather than a restoration of communal tranquility.[174]

---

months of imprisonment; are of high morals and conduct, truthful and honest; and are characterized by a spirit of speech sharing. Jacques Fierens, *Gacaca Courts: Between Fantasy and Reality*, 3 J. INT'L CRIM. JUST. 896, 914 (2005); Organic Law No. 16/2004, June 19, 2004, art. 14 [hereinafter Gacaca Law] (establishing the organization, competence and functioning of gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994).

166. 762 gacaca courts were established. Meyerstein, *supra* note 65, at 474. In the first nine months of trials, 2000 defendants pled guilty and almost 6000 were convicted. But more than 10,000 fled Rwanda fearing "false accusations and unfair trials." Le Mon, *supra* note 156, at 17.

167. In June 2004, the government amended the law to combine Categories 2 and 3 into a single category, slightly modified the definitions of crimes, reduced the number of courts and judges, lowered the quorum from fifteen to seven, reduced some penalties to encourage more guilty pleas, capped the maximum sentence to thirty years (instead of life), and provided for mitigating circumstances. Waldorf, *supra* note 65, at 53-54; Gacaca Law, *supra* note 165, at arts. 18, 23, 51, 55, 56, 81.

168. Waldorf, *supra* note 65, at 52. For a description of the Gacaca's proceedings and their differences from American trials *see* Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda*, 14 NEW ENG. INT'L & COMP. L. 41, 45-47 (2007).

169. Waldorf, *supra* note 65, at 52 (citing NAT'L SERVICE OF GACACA COURTS, REPORT ON IMPROVING THE LIVING CONDITIONS FOR THE INYANGAMUGAYO 2 (2005)) (finding on the basis of surveys that thirty-four percent of gacaca judges are women)). We attended a *gacaca* proceeding in Butare on May 28, 2008. The panel of judges hearing cases that day was composed of two women (one older, one younger) and four men. The lead judge was an older man.

170. Waldorf, *supra* note 65, at 52.

171. Meyerstein, *supra* note 65, at 475-76. The Gacaca jurisdictions can impose sentences as severe as thirty years of imprisonment for Category 2 defendants who have killed or attempted to kill their victims and refuse to confess, whereas Category 3 defendants can only be ordered to pay civil compensation for damages to victims' property. Gacaca Law, *supra* note 165, at arts. 73-75.

172. Leah Werchick, *Prospects for Justice in Rwanda's Citizen Tribunals*, 8 (3) HUM. RTS. BRIEF 15, 17 (2001); Goldstein-Bolocan, *supra* note 86, at 376; Waldorf, *supra* note 65, at 48.

173. Waldorf, *supra* note 65, at 14 ("Under retributive justice, offenders are punished generally with incarceration. Under restorative justice, offenders offer atonement and victims forgive though a process of face-to-face mediation. Apologies, community service, and other forms of restitution replace incarceration."); *see also* John Braithwaite, *Restorative Justice: Assessing Optimistic & Pessimistic Accounts*, 25 CRIME & JUST. 1 (1999) (providing a general overview of restorative and retributive justice). For a criticism of how restorative justice can sacrifice due process, reinforce pre-existing power relations, fail to deter, and short-change victims, *see* Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, & Justice*, 52 STAN. L. REV. 751 (2000).

Gacaca begins at the cell level[175] where every Rwandan is legally obligated[176] to participate as a member of the general assembly, in a public enterprise of evidence gathering.[177] Initially, Rwandans accused alleged perpetrators in front of the general assembly.[178] But due to lackluster participation, in 2004, the government mandated local administrative officials and *nyumbakumi* (persons in charge of ten households) to gather information from small groups and individuals.[179] The information gathered during this accusation process (which the accused cannot contest[180]), coupled with prisoner confessions and state prosecutor files, constitute the basis for categorization by the court—nine adults of "integrity" elected by the general assembly.[181] The court then tries suspects accused of lower-level crimes and passes the more serious Category 2 offenders up to *secteur* (or "sector") level tribunals and Category 1 offenders to the Public Prosecution Office.[182]

To encourage confessions, persons who plead guilty to Category 2 or 3 crimes are eligible to serve only half of their sentences, half of which would be in community service.[183] Although the court can reject a confession deemed incomplete or insincere,[184] anecdotal evidence suggests that the benefit of expedited trials, provisional release, and reduced sentences has encouraged false, insincere, and formulaic confessions.[185]

---

174. The official goals of the *gacaca* are: (1) to reveal the truth about what has happened, (2) to accelerate the genocide trials, (3) to eradicate the culture of impunity, (4) to reconcile the Rwandans and reinforce their unity, and (5) to prove that Rwandan society has the capacity to settle its own problems through a system of justice based on Rwandan custom. National Service of Gacaca Jurisdictions, The Objectives of the Gacaca Courts, http://www.inkiko-gacaca.gov.rw/En/EnObjectives.htm (last visited Nov. 10, 2008).

175. Gacaca has three courts: a cell gacaca court, a sector gacaca court, and a sector's gacaca court of appeals. Gacaca Law, *supra* note 165, at arts. 33-38.

176. Persons who refuse to testify can be prosecuted by Gacaca courts and sentenced to up to one year imprisonment. *Id.* at art. 29.

177. Gacaca hearings are public, except for rape related proceedings and other exceptional cases in which hearings are conducted in camera. *Id.* at arts. 21, 38.

178. *Id.* at art. 32.

179. Meyerstein, *supra* note 65, at 488.

180. The *nyumbakumi* present the accusations to the assembly to confirm the accuracy of the information recorded, not to test its truth. Gacaca Law, *supra* note 165, at arts. 33, 35-37. *See* HUMAN RIGHTS WATCH, *supra* note 83, at 21 for a discussion of how the *nyumbakumi* had disproportionate power to influence the nature and amount of information that would form the basis of judicial files of accused persons and how the method undermined the intended openness of the process; in some cases, when Category 1 suspects were brought to trial in conventional courts, judges used information gathered in gacaca to justify its conviction without independently assessing the information's validity.

181. Gacaca Law, *supra* note 165, at arts. 33-34.

182. *Id.* at art. 34.

183. *Id.* at art. 73.

184. Waldorf, *supra* note 65, at 73 ("Gacaca courts do not have to accept confessions, even if the prosecutor has certified them as truthful.").

185. *Id.* at 72-74; *see also* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 361 (1997).

Gacaca has been criticized by some and celebrated by others. Some have praised it as an innovation in transitional justice that combines traditional, local institutions with modern judicial practices leading to transformative, democratic effects.[186] Others, however, criticize *gacaca* for failing to meet international human-rights standards with respect to due process,[187] impartial and qualified judges,[188] a right to appeal,[189] a right to defense,[190] and separating prosecutorial and judicial roles.[191] Some also criticize *gacaca* for failing to advance justice or reconciliation, and instead delivering participatory popular punishment and collectivizing guilt against Hutus.[192] Acknowledging its shortcomings, however,

---

186. Le Mon, *supra* note 156, at 16. *See* Rosa E. Brooks, *The New Imperialism: Violence, Norms & the Rule of Law*, 101 MICH. L. REV. 2275, 2336 (2003) ("[G]acaca . . . may hold out Rwanda's best hope of coming to terms with the genocide in a way that rebuilds confidence in the government and the rule of law."). *See also* Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 376-77 (discussing how gacaca may help to promote democracy and the rule of law and that the sheer number of tribunals should protect the process as a while from undue influence by the central government). *See also* Christine M. Venter, *Eliminating Fear Through Recreating Community in Rwanda: The Role of Gacaca Courts*, 13 TEX. WESLEYAN L. REV. 577, 581 (2007) (arguing that if gacaca courts were properly funded and organized it could provide a link between the past of the genocide and the participatory democracy Rwanda hopes to be). *See* Aneta Wierzynska, *Consolidating Democracy Through Transitional Justice: Rwanda's Gacaca Courts*, 79 N.Y.U.L. REV. 1934, 1958 (2004) (stating that gacaca creates "a critical communication bridge between the people and the State that did not exist before."). *But see* Waldorf, *supra* note 65, at 77 (noting that these arguments assume incorrectly that the RPF-dominated government is moving toward greater democracy and that gacaca is truly participatory).

187. *See* HUMAN RIGHTS WATCH, *supra* note 83, at 2. *See also* Daly, *supra* note 186, at 383.

188. *See Gacaca: A Question of Justice*, *supra* note 127 at 38. *See also* Meyerstein, *supra* note 65, at 479 (discussion of how the training of gacaca judges is inadequate).

189. *See* Gacaca Law, *supra* note 165, arts. 89-92. *See also* Goldstein-Bolocan, *supra* note 86 at 389. *But see* Daly, *supra* note 186 at 383 (noting that the appellate process may undue some benefits of gacaca because they take time, do not strengthen the community and depend on the commitment of the authorities to the rule of law).

190. *See* Gacaca Law, *supra* note 165, at art. 32 (noting Gacaca law does not entitle defendants to be represented by a lawyer, but allows the defendant to speak for himself, and for individuals at the hearings to speak for or against the defendant). *See also* Goldstein-Bolocan, *supra* note 86, at 388-89 (noting defendant's position may be further compromised because most cases will be judged on the basis of the files prepared and handed over to the Gacaca judges by the public prosecutor's offices, making it difficult for lay judges and defendants to challenge the information). *See also* HUMAN RIGHTS WATCH, *supra* note 83, at 20-21.

191. *See* Gacaca Law, *supra* note 165, at art. 33 (nothing that individuals responsible for gathering evidence and categorizing cases may also called as witnesses). *See also* Meyerstein, *supra* note 65, at 488-90 (discussing how local authorities and *nyumbakumi* abused their positions to protect themselves and their families during the information gathering and accusation stage and ultimately played the role of gacaca judges, who were relegated to recording and confirming the accuracy of the transcriptions without confirming its validity). *See generally* HUMAN RIGHTS WATCH, *supra* note 83, at 43-45.

192. *The Gacaca Courts Prepare to Finish Their Mandate*, HIRONDELLE NEWS AGENCY, Apr. 24, 2007, http://www.hirondellenews.com/content/view/402/135/ (reporting as of 2007, 818,564 cases accusing crimes of genocide had been prepared, including 77,269 in the first category of politicians and planners, 432,557 in the 2nd category of executors and 308,738 cases of looting. 71,405 cases had been heard, verdicts had been rendered in 64,800 and remain for 6,605. There had been intended acquittals for 15,219 while 7,200 verdicts had been appealed.). *See also* Waldorf, *supra* note 65, at 80-81 (arguing that gacaca will likely criminalize a vast swathe of the Hutus population, given that naming

others conclude that it was the best alternative for delivering justice in post-genocide Rwanda.[193]

Given the range of criticism directed towards *Gacaca*, it is unclear the extent to which it has healed wounds. Rather, the process may have inflamed animosities amongst Hutus and Tutsis. According to Lars Waldorf, "Hutu[s] generally view [gacaca] as a way to release family members wrongly imprisoned, while Tutsi survivors often see it as a disguised amnesty for those who killed their family members."[194] Initially, the majority of Rwandans supported *gacaca*.[195] Yet, despite mandated attendance at *gacaca* court,[196] participation has declined significantly, suggesting a shift in attitudes.[197]

---

accomplices provides sentence reductions; opportunistic looters are technically genocidaires; accomplice liability is broadly defined; accomplices are treated as perpetrators; there is no provision for defenses and justifications, even though there might be colorable claims of duress; and bystanders will be prosecuted for failing to render assistance). *See also* Daly, *supra* note 186, at 385 (noting that gacaca has only a limited ability to promote reconciliation since its rebuilds communities under a cloud of punishment and retribution). *See also* HUMAN RIGHTS WATCH, THERE WILL BE NO TRIAL: POLICE KILLINGS OF DETAINEES AND THE IMPOSITION OF COLLECTIVE GUILT 27-30 (2007), *available at* http://hrw.org/reports/2007/rwanda0707/ (observing that since the end of 2006, officials have been imposing collective punishments on residents, including fines, obligatory labor, and beatings when survivors suffer property damage.). *But see* Meyerstein, *supra* note 65, at 491 (arguing that the abuses of power by local officials actually serve to protect the Hutu population and thus work against a collectivized guilt against the Hutu majority).

193. *See* Meyerstein, *supra* note 65, at 467 (arguing that Amnesty International's legalist approach to the gacaca prevents it from appreciating its unique postcolonial hybrid form that is perhaps uniquely capable of responding to the genocide). *See also* Carter, *supra* note 168, at 49-50 (acknowledging that gacaca is an ingenious solution since it spreads out the work among a large number of people with the possibility of justice on a large scale); Widner, *supra* note 162, at 66 (arguing that gacaca is integral to reconstructing the rule of law because an ineffective, overused judicial system risks undermining judicial legitimacy and leads people to turn away from law altogether).

194. Waldorf, *supra* note 65, at 74 (citation omitted). *See also* Goldstein-Bolocan, *supra* note 86, at n.249 (citing Jeremy Sarkin, *The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 J. AFR. L. 143, 288-89 (2001), quoting Alison Des Forges who suggests that that "the fairness of the proceedings will vary enormously . . . (and) the result in any one community will be determined by the local balance of power.") (citation omitted in original).

195. TIMOTHY LONGMAN ET AL., *Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda*, *in* MY NEIGHBOR, MY ENEMY, 222 (Eric Stover & Harvey Weinstein, eds., Cambridge University Press, 2004) (stating gacaca was the most popular alternative. In 2002, when polled on how much contribution the judicial alternatives would make in advancing reconciliation, 33.8% believed the ICTR would make a significant or very significant contribution, whereas 69.2% thought the genocide trials would, and 84.2% believed that gacaca would.). *See also* PETER UVIN, THE INTRODUCTION OF MODERNIZED GACACA FOR JUDGING SUSPECTS OF PARTICIPATION IN THE GENOCIDE AND MASSACRES OF 1994 IN RWANDA 8, *available at* http://fletcher.tufts.edu/humansecurity/pdf/Boutmans.pdf (citing over 70% support for gacaca). *But see* Waldorf, *supra* note 65, at n.366 (suggesting that attitudinal surveys may have measured respondents' ability to parrot widespread government propaganda, rather than actual support for gacaca).

196. Waldorf, *supra* note 65, at 66, n.370 & n.378 (noting that in the pilot phase, absenteeism was a problem in eight out of the twelve jurisdictions, partially because of the harsh economic realities. Ninety percent of the Rwandan labor force are subsistence farmers. Many are already required to participate in government sensitization campaigns and community labor typically (umuganda) five

Some attribute this decline in supportto the public perception that *gacaca* court judges are corrupt. Judges serve without pay and lack legal qualifications,[198] which make them susceptible to corruption. Some defendants have successfully bribed judges,[199] for example, to avoid, for example, a Category 1 classification,[200] and tens of thousands of judges have been accused of participating in the genocide.[201] Judgments also aren't always enforced against indigent *genocidaires*.[202] Without a guarantee of compensation, Tutsi survivors are reluctant to participate as witnesses, particularly when they fear retaliation and violence by their Hutu neighbors[203] and by *genocidaires* who have confessed but have been provisionally released.[204]

Hutus too have little incentive to participate in *gacaca* when they have no opportunity to discuss the suffering inflicted on them by the RPF, or when they fear accusation.[205] False denunciations, though punishable by law, are a simple

---

times a month.). *See also* 2004 Gacaca Law, *supra* note 165, at art. 29 (noting that the Rwandan government now mandates participation, penalizes absenteeism with 3 to 6 months in prison and for repeated absentees, 6 months to 1 year). *But see* Goldstein-Bolocan, *supra* note 86, at 392, for a criticism of the state-mandated use of Gacaca to deal with genocide cases may undermine its original value as an informal, spontaneous dispute resolution mechanism.

197. AVOCATS SAN FRONTIERES, MONITORING OF THE GACACA COURTS JUDGMENT PHASE, ANALYTICAL REP. 10, 25 (Mar.-Sept. 2005) (reporting that "although the local population may have been present in large numbers, they were reluctant to become involved" and hypothesizing the mains reasons to be fear of reprisals, refusal to denounce friends and families, and fear of being convicted for false testimony). *See also* HUMAN RIGHTS WATCH, OVERVIEW OF HUMAN RIGHTS ISSUES IN RWANDA 1 (Jan. 2006), *available at* http://hrw.org/wr2k6/pdf/rwanda.pdf (noting that many Rwandans did not trust gacaca courts and boycotted sessions).

198. *See* Waldorf, *supra* note 65, at 67.

199. *See* Le Mon, *supra* note 156, at 17. *See generally Seven Gacaca Judges of a Same Court Arrested*, HIRONDELLE NEWS AGENCY (Dec. 7, 2007), http://www.hirondellenews.com/content/view/1325/461/.

200. *See* Le Mon, *supra* note 156, at 17 (referencing articles that reported bribery of judges).

201. *Id.* at 18 (citing report by Rwandan government office in charge of gacaca courts indicating that authorities suspect 45,396 gacaca court judges of having committed crimes during the genocide). *See also* Waldorf, *supra* note 65, at 67, n.386 (estimating 1319 judges had been replaced as of January 2004, with 656 having been accused of genocide. In the Murama Sector, the gacaca president stated that the removal of all judges who had pillaged in 1994 would leave gacaca without any judges.) (citations omitted).

202. Waldorf, *supra* note 65, at 57 & n.317 (noting that "in a sample of 192 judgments from 1997 to 1999, civil parties obtained the right to compensation only half the time). Compensation through community service could exacerbate ethnic tensions if seen as a return to the colonial-era forced labor system where Hutu clients worked for Tutsi patrons. *Id.*

203. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2007) (reporting between 11 and 25 genocide witnesses were killed in 2007, while another 22 reportedly committed suicide). *See also* Le Mon, *supra* note 156, at 17-18, nn.10, 13, & 14 (citing reports of multiple cases of retaliation against witnesses).

204. Arthur Asiimwe, *36,000 Genocide Suspects Freed from Rwandan Jails*, THE INDEPENDENT (London), July 30, 2005 (reporting that a genocide survivor told a journalist, "It will now be useless to attend these gacaca courts. These [released detainees] will stick together and hide the truth."). *See* Meyerstein, *supra* note 65, at 487-91, for a discussion of how prisoner releases has contributed to the atmosphere of anxiety and distrust.

205. *See* Le Mon, *supra* note 156, at 18-19. *See also* Timothy Longman & Theoneste Rutagengwa,

route to get rid of a neighbor whose property one covets or to resolve a property dispute that the *gacaca* courts do not hear.[206] Indeed, when the national phase began, ten thousand Hutus fled to Burundi,[207] causing an international refugee crisis. Many feared they would be accused as perpetrators or bystanders, killed in revenge after being named, or, in the case of provisional releases, be sent back to prison.[208] Some Hutu extremists and families of prisoners propagated rumors that *gacaca* was a harbinger of a counter-genocide, designed to round up Hutus and kill them *en masse*.[209] The tactics adopted at the local level to coerce participation (i.e. fines and public admonishments) have reinforced these fears and help perpetuate a culture of secrecy,[210] where silence is perceived as loyalty to kin and patrons rather than as deception.[211]

The Rwandan government has further frustrated *gacaca's* potential to advance reconciliation by criminalizing certain challenges to *gacaca* courts. At times, the government has accused citizens and international organizations[212] who

---

Memory, Identity and Community in Rwanda, *in* MY NEIGHBOR, MY ENEMY, 176 (Eric Stover & Harvey Weinstein, eds., Cambridge University Press, 2004) (finding in attitudinal surveys that "[m]any Hutu resent the fact that their experience of suffering is excluded from official discourse.").

206. Waldorf, *supra* note 65, at 72, n.420 (noting that Gacaca courts do not hear property disputes stemming from the ethnic violence before the genocide, the RPF's displacement of hundreds of thousands of Hutu in northern Rwanda during the civil war of 1990 to 1993, the return of several hundred thousand Tutsi exiles who had fled before 1994, some of their families having left Rwandan in 1959, and the return of about two million Hutu refugees who had fled after the RPF victory in 1994). *See also* ORG. OF AFR. UNITY, *supra* note 78, at §17.9 (reporting that according to the OAU, the return migration totaled 750,000 just four months after the genocide. "In a literal sense, it was almost an entire new Tutsi population that emerged after the war," many of whom had no connection to villages or communities in Rwanda.).

207. Meyerstein, *supra* note 65, at 490.

208. U.S. DEP'T OF STATE, COUNTRY REPORTS 2005, HUMAN RIGHTS PRACTICES (Mar. 8, 2006), http://www.state.gov/g/drl/rls/hrrpt/2005/61587.htm (reporting that in late April 2005, more than 6500 Hutu fled Rwanda). *See also* Mary Kimani, *600 Tried, Thousands Flee*, INT'L JUST. TRIB. (May 22, 2005) (quoting one fleeing Hutu, "We fled because of one-sided justice. It is one community judging the other.").

209. *See* Waldorf, *supra* note 65, at 67-68.

210. *See* GOUREVITCH, *supra* note 65, at 22 ("Rwandan culture is a culture of fear . . ."). *See also* DANIELLE DE LAME, A HILL AMONG A THOUSAND: TRANSFORMATIONS AND RUPTURES IN RURAL RWANDA 14-15 (University of Wisconsin Press, 2005) ("Secrets are a preferred tool for forging an identity, both individual and collective . . Shared secrets develop internal solidarity rooted in trust in each other's ability not to reveal them . . . Secrecy persisted as a cultural habit well beyond pre-colonial and colonial Rwanda, where people, subjected to a climate of constant insecurity, were at the mercy of capricious chiefs whose intrigues affected their lives The habit of secrecy continues in the most ordinary circumstances: one's dwelling place is mentioned evasively, and the rooms of a house are set up so as to conceal the state of one's provisions.").

211. Waldorf, *supra* note 65, at 70.

212. HUMAN RIGHTS WATCH, *supra* note 83, at 39, n.104 ("Among the international organizations accused of supporting divisionist and genocidal ideas by one or both of the parliamentary commissions were CARE International, Trocaire, Norwegian People's Aid, 11-11-11, Kolping Family, Pax Christi, Voice of America (VOA), British Broadcasting Corporation (BBC) and Human Rights Watch as well as the Catholic Church, the Association of Pentecostal Churches in Rwanda, Jehovah's Witnesses, Seventh Day Adventists, the International United Methodist Church, and the Mennonites.").

have spoken out against or not participated in *gacaca* as harboring "divisionism"[213] or "genocidal ideology,"[214] which is punishable by a maximum of five years in prison.[215] In one case, a local government official accused citizens of having "genocide and ethnic ideologies" for boycotting a *gacaca*, though the boycott was based on allegations that judges were soliciting bribes.[216]

The Kagame government's increasingly authoritarian tendencies have not passed unnoticed by international watchdog organizations. Amnesty International reports that Rwandan journalists continue to face violence, intimidation, and harassment.[217] Human Rights Watch has condemned the recent killings of genocide survivors and extrajudicial executions, calling for "prompt, effective, and impartial investigations and prosecutions in all situations, including in the killing of genocide survivors."[218] Such killings clearly raise tensions between ethnic groups in the country. In the past two years, Human Rights Watch has also denounced illegal detentions, police killings, and the disappearance of prominent business people within the country.[219] In its 2008 Country Report on Human Rights in Rwanda, the U.S. State Department says:

---

213. *Id.* at 35. "In 2002 'divisionism' (then called 'sectarianism') was made a crime . . . ." *Id.* The crime of sectarianism occurs when the author makes use of any speech, written statement or action that causes conflict that causes an uprising that may degenerate into strife among people. *Id.* "When asked to define 'divisionism,' not one judge interviewed by Human Rights Watch researchers was able to do so, despite having convicted defendants on divisionism charges." *Id.* (internal citations omitted).

214. *Id.* ("Under the 2003 law punishing genocide, persons condemned for denying or grossly minimizing genocide, attempting to justify genocide or destroy evidence related to it were liable to a minimum of ten years and a maximum of twenty years in prison.") (internal citations omitted); *see also* CONST. OF THE REPUBLIC OF RWANDA, pmbl, arts. 9, 13, 33 (June 4, 2003) (stating that that revisionism, negationism, the minimization of genocide and all ethnic, regionalist, and racial propaganda based on an form of division is punishable by law); *see also* Human Rights Watch, *Preparing for Elections: Tightening Control in the Name of Unity*, HUMAN RIGHTS WATCH BACKGROUNDER, May 8, 2003, http://www.hrw.org/backgrounder/africa/rwanda0503bck.htm (noting that in 2003, the government accused forty-six MDR politicians and their alleged supporters of divisionist ideology.); *see also* HUMAN RIGHTS WATCH, *supra* note 83, at 40-41 (offering further discussion of problematic prosecutions that have led to marginalization of political opposition, chilled dissent against government policies such as land reform, social isolation of individuals charged and approximately 1,300 prosecutions in 2007-2008 alone).

215. HUMAN RIGHTS WATCH, *supra* note 83, at 38.

216. Le Mon, *supra* note 156, at 19; *Kamembe Residents Boycott Gacaca,* THE NEW TIMES (KIGALI), (Sept. 29, 2006); *see also Genocide Survivor Boycotts Gacaca, Cites Harassment,* THE NEW TIMES (KIGALI), Nov. 16, 2006.

217. *See* AMNESTY INT'L REPORT 2008: STATE OF THE WORLD'S HUMAN RIGHTS, RWANDA (2008), http://thereport.amnesty.org/eng/regions/africa/rwanda.

218. Human Rights Watch, *Killings in Eastern Rwanda*, HUMAN RIGHTS WATCH BACKGROUNDER, (JAN. 2007), http://www.hrw.org/backgrounder/africa/rwanda0107/rwanda0107web.pdf.

219. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2007, RWANDA – EVENTS OF 2006 (2007), http://www.unhcr.org/refworld/publisher,HRW,,RWA,45aca2a5b,0.html ("Police and members of Local Defense Forces illegally detained and abused hundreds of persons, many of them street children and members of other vulnerable groups in Kigali, the capital, during the first months of 2006.").

> Significant human rights abuses occurred, although there were important improvements in some areas. Citizens' right to change their government was restricted, and extrajudicial killings by security forces increased. There were reports of torture and abuse of suspects, although significantly fewer than in previous years. Police sometimes imposed collective punishments, including beatings, on residents of communities in which the property of genocide survivors had been damaged or destroyed.... Security forces arbitrarily arrested and detained persons.... There continued to be limits on freedom of speech and association, and restrictions on the press increased.[220]

Filip Reyntjens goes so far as to say that "[t]en years after the 1994 genocide, Rwanda is experiencing not democracy and reconciliation but dictatorship and exclusion."[221] Reyntjens discusses the conflicts and disagreements that have wracked the RPF over the past decade. These include allegations of abuse of power, human rights violations, discrimination, and intimidation of opponents and critics.[222] He concludes that the RPF is continuing the authoritarian tendencies of the Habyarimana regime and warns that the international community should not be blinded by the competent, technocratic rule of the RPF.[223] Reyntjens sees "ominous" signs that the situation in Rwanda might further deteriorate and that the seeds for "massive new violence in the medium to long run" may already be sown.[224] An echo of this concern is found in the U.S. Millennium Challenge Corporations' 2007 country scorecard for Rwanda which gives the country low marks in the category of "Ruling Justly."[225]

Given the scope of the 1994 genocide, and the enormous number of people involved as perpetrators or accomplices, it is unsurprising that both the ICTR and the national legal system have experienced real difficulties in effectively and efficiently prosecuting cases. Empowering local communities to draw on their local knowledge and resolve genocide-related disputes relieves stress on the formal legal system and may speed justice for some. *Gacaca* holds the potential to promote inter-ethnic reconciliation, but it is unclear if the process is living up to this potential.

Strategies for promoting reconciliation do not rely solely on legal process; however, in addition to the courts and *gacaca*, the government has undertaken a variety of other efforts to promote reconciliation. These include creating the

---

220. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – RWANDA, (March 11,2008), http://www.state.gov/g/drl/rls/hrrpt/2007/100499.htm.

221. Filip Reyntjens, *Rwanda, Ten Years On: From Genocide to Dictatorship*, 103 AFR. AFF. 177, 177 (2004).

222. *Id.* at 180.

223. *Id.* at 209.

224. *Id.* at 209-10.

225. Millennium Challenge Corp., *Rwanda Candidate Country Scorecard FY08*, (2007), http://www.mcc.gov/documents/score-fy08-rwanda.pdf (demonstrating that although Rwanda scores well in terms of controlling corruption, it scores poorly in terms of the protection of civil and political rights and in terms of voice and accountability).

National Unity and Reconciliation Commission, which organizes meetings, conferences, and workshops to discuss unity and reconciliation;[226] building genocide memorials and museums;[227] and sponsoring remembrance events, such as the national day of mourning and the annual mourning period in April.[228] In addition to these programs, informal reconciliation in Rwanda may be encouraged by the government's policy of economic liberalization. We discuss the government's effort to liberalize the economy generally and the important coffee sector particularly below.

IV. LIBERALIZATION IN RWANDA

Over the past decade, the Rwandan government has liberalized much of the economy, albeit slowly and with some difficulty. There are currently no restrictions on investments in Rwanda,[229] which is also a member of several regional trade groups, including the East African Community.[230] Tariffs have been eliminated on goods entering from COMESA countries but they remain a weighted 9.7% in 2005 for other goods from other nations.[231] The government has privatized a large number (70 of 104) of industries.[232] While Rwanda scores reasonably well on a recent economic freedom index in terms of fiscal, trade, and monetary freedom, it scores poorly in terms of property-rights protection and corruption.[233] Overall, the trend in Rwanda over the past 10 years is towards increased economic freedom and in November 2006, Rwanda was designated as a "Threshold" country by the Millennium Challenge Corporation (MCC) in the U.S., and cited for having "demonstrated an impressive track record on economic reform."[234]

VISION 2020 creates a strategic plan for economic change in Rwanda.[235] This plan "has served as the platform for sector policy-setting in each ministry since late 2003."[236] The goals created by VISION 2020 and Rwanda's Poverty

---

226. Zorbas, *supra* note 132, at 38. The NURC was created in 1999. It participated in "civic reeducation" aimed at former Interhamwe members or other demobilized soldiers by providing courses. *Id.*

227. *Id.* at 39.

228. *Id.* at 40.

229. THE HERITAGE FOUND., 2008 INDEX OF ECONOMIC FREEDOM, RWANDA (2008), http://www.heritage.org/Index/country.cfm?id=Rwanda.

230. John Gahamanyi, *Finanical Institutions: Rwanda Joins EADB Board*, THE NEW TIMES (Kilgali), Nov. 6, 2008, *available at* http://newtimes.co.rw/index.php?issue=13706&article=10550.

231. THE HERITAGE FOUND., *supra* note 229.

232. *Id.*

233. *Id.*

234. Press Release, Millennium Challenge Corp., Millennium Challenge Corporation Board of Directors Announces 2007 Threshold Program Countries Niger; Peru; and Rwanda (Nov. 8, 2006), *available at* http://www.mcc.gov/press/releases/2006/release-110806-thresholdcountryselection.php; *see also* MILLENNIUM CHALLENGE CORP., *supra* note 225.

235. REPUBLIC OF RWANDA MINISTRY OF FIN. AND ECON. PLANNING, VISION 2020 (July 2000), *available at* http://www.moh.gov.rw/docs/VISION2020.doc.

236. Int'l Fund for Agric. Dev., *Enabling the Rural Poor to Overcome Poverty in Rwanda*, www.IFAD.org, Nov. 2006, http://www.ifad.org/operations/projects/regions/Pf/factsheets/rwanda_e.pdf

Reduction Strategy Paper (PRSP) include improving the institutional environment to allow for private-sector development and infrastructure improvements; focusing on good governance (including democratization, national reconciliation, political stability, and security); improving productivity (especially of land); improving human capital through investments in health and education, creating a service-based economy with a focus on ICT (information communications and technology);[237] reducing external support; relying more on exports; and promoting regional integration.[238]

Progress towards the VISION 2020 goals has been mixed. As a result of these policy changes, the annual economic growth rate was above 10% between 1994 and 2004; this was the second highest growth rate in Africa during that period.[239] *Per capita* GDP rose at a rate of 5.3% during this same time period and this was the third highest growth rate in Africa.[240] The British overseas development agency, DFID, reports that poverty levels dropped from 70% of the population in 1994 to under 57% in 2006.[241] The government has improved tax collections. The amount collected by the Rwandan Revenue Authority has increased three-fold from the equivalent of 60 million pounds in 1998 to the equivalent of 240 million pounds in 2006.[242] The government has also devoted much time and attention to diversifying the economy. Results have been good enough that in 2006 the British government and the Rwandan government signed a Memorandum of Understanding that commits the bilateral partners to continuing reforms and financial support.[243]

Despite this progress the *per capita* GDP is depressingly low at $260.[244] Most Rwandans still work in agriculture.[245] The World Bank reports that only 6%

237. Xan Rice, *Poverty-stricken Rwanda puts its faith and future into the wide wired world*, THE GUARDIAN (London), Aug. 1, 2006, at 20, *available at* http://www.guardian.co.uk/rwanda/story/0,,1834621,00.html.

238. RWANDAN AUTHORITIES, AN APPROACH TO THE POVERTY REDUCTION ACTION PLAN FOR RWANDA: THE INTERIM PRSP 12 Int'l Monetary Fund (2000), *available at* http://www.imf.org/external/NP/prsp/2000/rwa/01/110100.pdf.

239. Press Release, Dep't for Int'l Dev., Rwanda's remarkable recovery leads UK to commit funds for next 10 years, (March 1, 2006), *available at* http://www.dfid.gov.uk/news/files/pressreleases/rwanda-commitment.asp.

240. Dep't for Int'l Dev., Organization Record (Jan. 6, 2007), http://www.afdevinfo.com/htmlreports/org/org_35681.html.

241. Dep't for Int'l Dev., *A Way to Help Governments Reduce Poverty* , WWW.DFID.GOV.UK, Jan. 7, 2008, http://www.dfid.gov.uk/news/files/prbs-hovs-reduce-poverty-examples.asp#Rwanda. If these figures are accurate, then such changes go some way towards addressing two prongs of Collier's conflict trap: economic growth and low incomes. COLLIER ET AL., *supra* note 11, at 53. However, past experience may not be replicated in the future. *Id.*

242. Dep't for Int'l Dev., *Good Taxes Reduce Poverty in Rwanda*, WWW.DFID.GOV.UK, Jan. 10, 2008, http://www.dfid.gov.uk/casestudies/files/africa/rwanda-tax.asp.

243. Dep't of Int'l Dev., *supra* note 239.

244. U.S. Dep't of State, Background Note: Rwanda, http://www.state.gov/r/pa/ei/bgn/2861.htm.

245. *Id.*

of Rwandans have access to clean water and electricity.[246] And, Rwanda scores a low 150 out of 178 in the World Bank's latest (2008) *Doing Business* report.[247]

V. MODEST GAINS AND ENCOURAGING SIGNS IN THE COFFEE SECTOR

One area where the government's liberalization policies have created benefits for many poor Rwandans is in the coffee sector. Economic liberalization in this important sector has benefited thousands of Rwanda's smallholders.[248] Reforms have freed farmers from mulching requirements and the legal obligation to grow coffee. Farmers can now interplant coffee with other crops,[249] freely contract with buyers,[250] and join together in cooperatives to take advantage of economies of scale.[251]

Rwandex S.A., the old monopsony purchaser/exporter, was sold to a private owner in 2007.[252] Recent reports suggest the company may face liquidation as a result of excessive debt. [253] If this were to happen, Rwanda would still have four

246. World Bank Group Dev. Outreach, Poverty Alleviation and Economic Growth in Rwanda through S&T, http://www1.worldbank.org/devoutreach/january07/article.asp?id=397.

247. *Doing Business 2008: Comparing Regulations in 178 Economies* 6 (World Bank, Working Paper No. 41938, 2008), *available at* http://go.worldbank.org/DXNFXDD490.

248. AKIYAMA ET. AL., *supra* note 21, at 88 (noting that after Uganda liberalized its coffee sector "Rwandan policy makers became keenly aware of the sound performance of Uganda's subsector following liberalization and were eager to apply similar policies.").

249. Scott Loveridge, Edson Mpyisi & Michael T. Weber, *Farm-Level Perspectives in Rwanda's Coffee Supply Chain Coordination Challenge,* 4 Agricultural Policy Synthesis: Rwanda Food Sec. Project/MINAGRI, No. 2E (2002), *available at* http://www.aec.msu.edu/agecon/fs2/rwanda/ps_2e.pdf.

250. DeLucco, *supra* note 30, at 13.

251. A cooperative is defined as: "a private business organization that is owned and controlled by the people who use its products, supplies or services." Univ. of Cal., Davis Dep't. of Agric. and Res. Econ., Rural Coop. Ctr., What is a Co-op?, http://www.cooperatives.ucdavis.edu/whatis/index.htm (last visited Nov. 13, 2008). Agricultural cooperatives form when farmers voluntarily choose to associate in a larger group to pursue some common goal(s) or benefits. These benefits might include access to processing equipment, economies of scale, risk spreading, socializing opportunities, microloans, or improved health or education facilities. Cooperative members may also work at the cooperative as employees. Cooperatives operate under bylaws that specify roles and responsibilities of members, management, and the board of directors. Members elect the cooperative's management and board of directors. In addition, members meet regularly to debate the cooperative's direction. In the field study, when asked what the benefits of being a coffee cooperative member was, roughly 27% responded "earning money and improving living conditions," 20% responded "getting loans," 20% responded "getting inputs" (e.g., fertilizer, pesticide), 15% responded "training and quality improvement" and 15% responded to "join others and socialize." Jutta M. Tobbias, Data Analysis from Field Study [hereinafter Field Study 2008] (unpublished manuscript, on file with author).

252. African Agriculture, Rwanda Coffee Company Privatized, Value-Addition Estimates Expected, http://africanagriculture.blogspot.com/2007/03/rwanda-coffee-company-privatized-value.html.

253. Before the sale of the company, the government of Rwanda owned a 51% share in the company. *Id.* On the recent liquidation of Rwandex, *see* Gertrude Majyambere, *Coffee Sector: Why Rwandex Was shut Down,* THE NEW TIMES, (Kigali, Rwanda) May 18, 2008, *available at* http://www.newtimes.co.rw/index.php?issue=13630&article=647&week=15.

coffee exporters operating in the country, an increase in competition that may improve marketing efficiency.[254]

Important improvements in this sector have come from bilateral and multilateral development assistance. NGOs have helped farmers establish cooperatives and have trained cooperative members in quality control, processing, and marketing efforts.[255] Removing a coffee bean from its cherry (depulping) is a lengthy process,[256] and the government, donors, NGOs, and the private sector have worked with smallholders to improve the process, in part by helping to build scores of washing stations[257] around the country to improve quality.[258] The result is

254. AKIYAMA ET. AL, *supra* note 21, at 109 (discussing coffee sector liberalization in India, Uganda, and Togo write: "the disappearance of inefficient marketing parastatals, and increased competition (the result of private traders entering the coffee market) marketing efficiency has improved substantially in Togo and Uganda." Rwanda's liberalized export sector should result in a similar improvement in marketing efficiency).

255. Samuel Goff, Tex. A&M Univ., International Partnerships for the Development of the Specialty Coffee Sector in Rwanda, Address Before the AIAEE 22nd Annual Conference (May 16, 2006), *in* International Teamwork in Agriculture and Extension Education, May 2006, at 244, *available at* http://www.aiaee.org/2006/Accepted/244.pdf.

256. The coffee season in Rwanda runs from March through July. As coffee cherries ripen, farmers go to their fields every few days to pick the fruit. The coffee bean is the seed of this fruit. To get the bean, the fruit must be removed by either a dry or wet process. Dry processing is a low-technology approach that uses the sun to dry the fruit which is subsequently milled. In a wet process, used at coffee washing stations in Rwanda, growers bring their cherries to a washing station to be weighed and de-pulped. The cherries are pre-sorted, by floating them in water to separate the heavier cherries from the lighter ones. The cherries are run through pulping machines that remove much of the fruit from the bean. The fruit from the pulping may be retained to use as fertilize, but the beans ferment in holding tanks, as fermentation makes it easier to remove the remaining mucilage. After the fermentation process is complete, the beans are washed four to five times. The beans are sorted again and left to float for 24 hours. After this 24-hour period, the beans are laid out on sorting tables, and workers pick out damaged or irregular beans. The beans are dried in the sun until they reach a desired moisture level, which may take between ten days to two weeks depending upon the weather. This "parchment" coffee is then packed in burlap bags and stored for shipment to a miller who will remove the parchment and produce green coffee beans. Beans are typically exported after this and roasted by the importer. For more discussion of this process and supply chain concerns as they relate to coffee production *see* Raphael Kaplinksy, *Competitions Policy and the Global Coffee and Cocoa Value Chains* 8-9 (paper prepared for United National Conference for Trade and Development 2004), *available at* http://www.acp-eu-trade.org/library/files/Kaplinsky-Raphael_EN_052005_IDS_Competition-policy-and-the-global-coffee-and-cocoa-value-chains.pdf.

257. Coffee washing stations are generally located in the rural, Rwandan hills where there is little infrastructure. US AID was instrumental in building the first washing station in Rwanda. By 2005, 46 washing stations had been built, 38 with the financial assistance from US AID. By 2007, the number of washing stations in operation more than doubled to 120. SPREAD, a US AID Project currently provides NGO support to 95 washing stations. *See infra* note 259. Still in 2007, less than 10% of all Rwandan coffee was sold fully washed, indicating more growth opportunities. OTF Group, Coffee Strategy Update, *Continuing Achievements Made in the High Quality Arabica Coffee Market*, 2007-10 (on file with author).

258. Peter Hulm, *Rwandan Coffee Goes from Ordinary Coffee to Star(bucks)*, International Trade Forum (Jan. 2007), http://www.tradeforum.org/news/fullstory.php/aid/1134 (last visited Sept. 5, 2008).

increasing demand for Rwandan fully washed coffee, some of which is considered "specialty coffee."[259]

One of the major effects of the liberalizing Rwanda's coffee industry is that smallholders who produce higher valued specialty coffee have higher incomes. The price that cooperatives and private buyers are paying farmers for unwashed coffee cherries has risen from 60 to 80 Rwandan francs in 2004 to 120-150 francs in 2007.[260] Once the cherries are washed they can be sold to buyers for an even higher price. In 2004, the Maraba cooperative sold washed coffee for $3.26 per kilo; in 2007, the cooperative was able to charge $4.08 per kilo.[261] In 2007, the COOPAC cooperative was selling its cherries for $4.00 per kilo,[262] and the Rusenyi cooperative was selling in a range between $4.40 and $5.50 per kilo.[263] In a truly remarkable achievement, in September 2007, importers paid as much as $55.00 per kilo for the best Rwandan coffee.[264] In 2008, the Rwandan government projects that 25% of the beans sold for export will qualify as high-value, defect-free specialty coffee.[265] Cooperatives use the income these sales generate to pay farmers for cherries, to pay salaries for washing-station staff, and they may provide other benefits to members—short-term loans and improvements to local schools would be just two examples.[266]

A 2006 report to US AID details that "[a]pproximately 50,000 households have seen their incomes from coffee production double, and some 2,000 jobs have

---

259. "Specialty" coffee is defined by the Specialty Coffee Association of America as: "coffee that has no defects and has a distinctive flavor in the cup." Specialty Coffee Ass'n of America, Coffee Term Definitions, http://www.scaa.org/pdfs/glossary.pdf (last visited Sept. 4, 2008). Coffee is ranked into five classes. Class 1 is "specialty" coffee and may have between 0 and 5 defects. The next class, "premium grade" has between 6 and 8 defects. Coffeesearch.org, Coffee Trade: New York Coffee Exchange, http://www.coffeeresearch.org/market/coffeemarket.htm (last visited Sept. 4, 2008). Washing coffee may increase the quality of the coffee, which, in turn, might improve the chances of a particular lot of coffee being considered "specialty. *See* Loveridge et al *supra* note 249, at 3.

260. Richard Swanson & Tom Bagaza, Sustaining Partnerships to enhance Rural Enterprises and Agribusiness Development (SPREAD Project), *SPREAD-Growers First Coffee Cooperative Assessment & 2008 Cooperative Development Work Plan*, 22-24, (report prepared for the Tex. A&M Univ. Sys. Borlaug Inst. of Int'l Agric. and Growers First, 2008), *available at* http://www.spreadproject.org/documents/SPREAD%20Coffee%20Cooperative%20Assessment%20and%20Workplan.pdf.

261. *Id.* at 22.

262. *Id.* at 24.

263. *Id.* at 23.

264. At the Golden Cup coffee auction and competition in Kigali, in September of 2007, Rwandan coffee was bought by U.S. coffee importers for as much as $55 per kilo (approximately $25 per pound), a Rwandan record price comparable to the world's most expensive coffees. Rwanda Dev. Gateway, *Coffee Sells at Record Prices* (Sept. 10, 2007), http://www.rwandagateway.org/article.php3?id_article=6848.

265. *Coffee Revenues Double Before Year End*, RWANDA NEWS AGENCY, July 24, 2008, *available at* http://allafrica.com/stories/200807240894.html.

266. *See infra* text accompanying note 393 for further discussion of cooperatives and potential benefits. In Field Study 2008, 83% of respondents who were members of cooperatives believed that they could not have received the economic and social benefits without being a member of the cooperative. Field Study 2008, *supra* note 251, at question 14.

been created at coffee washing stations."[267] An NGO involved in the US AID project reports: "incomes (in the specialty coffee sector) have doubled or tripled, and business skills, labour conditions and community spirit have been enhanced."[268] In US AID-supported coffee zones, earnings increased by 50-100% between 2004 and 2007.[269] With more income, farmers can repair their homes, buy clothes and livestock, pay school fees for their children, and get through the long months between harvests more easily than before.[270]

The results from our exploratory field survey[271] conducted in the June 2008 among rural Rwandan coffee farmers confirm that smallholder farmers are benefiting from changes in the coffee sector. Sixty-four percent of those polled said that their workload had been reduced in the past five years or, alternatively, since joining a cooperative.[272] Farmers reported using this extra time to pursue other income generating activities, helping care for family and friends, and to meet socially.[273] When asked to compare the level of happiness with their economic situation now versus in the past (i.e. five years ago, or alternatively before they joined the co-op), only 3% polled said they were very happy before, whereas 40% said they were very happy now.[274] Seventy-two percent reported feeling very confident that there are now good opportunities to make a better life for themselves and their families.[275] While these results are not dispositive, they further corroborate the thesis that farmers are experiencing important economic gains that may, in turn, help promote more positive feelings towards others, a step towards reconciliation.

---

267. Chemonics Int'l, *Assessing US AID's Investments in Rwanda's Coffee Sector – Best Practices & Lessons Learned To Consolidate Results & Expand Impact* 4 (2006), *available at* http://www.minagri.gov.rw/IMG/pdf/USAID_Rwanda_Coffee_Assessment.pdf.

268. ACDI/VOCA, *Specialty Coffee: Increased Quality & Profits for Smallholders*, *available at* http://www.acdivoca.org/852571DC00681414/Lookup/coffeebroweblayout/$file/coffeebroweblayout.pdf (last visited Sept. 4, 2008).

269. Swanson & Bagaza, *supra* note 260, at 22-24.

270. Interviews with members of the COOPAC cooperative, Gisenyi, Rwanda, (Mar. 16 2006); Field Study 2008, *supra* note 251, at question 20.

271. The proportion of Hutu to Tutsi ranged from 54% Hutu (to 38% Tutsi) to 83% Hutu (to 13% Tutsi) across the locations. Intergroup Contact, *supra* note 13, at 38. Although the study's sample represents a minority of coffee farmers in Rwanda, i.e. those benefiting from the results of privatization in Rwanda's coffee sector, and the survey design prohibits generalizations beyond the group examined, the observed correlations match current theories of reconciliation and are corroborated by journalistic evidence. Moreover, while correlation is not the same as causation, the absence of a correlation suggests the absence of a causal relationship. Here, there are strong correlations. *Id.*

272. Field Study 2008, *supra* note 251, at question 18. Because not all farmers were members of cooperatives but sold their cherries to private washing stations, we used a 5 year time horizon as a reference point for these participants as opposed to membership in a cooperative. *Id.* Part VII offers a more in-depth discussion of private washing stations.

273. Field Study 2008, *supra* note 251, at question 19.

274. *Id.* at question 21.

275. *Id.* at question 38.

There are a number of reasons to believe these benefits will continue.[276] While growth worldwide in ordinary-grade coffee consumption remains modest, the consumption of high-quality specialty coffee (currently 7% of the coffee volume in the international market) is rising by 20% annually.[277] Even with increased competition and somewhat lower prices, Rwanda's specialty coffees should continue to command a good price.[278] In 2006, coffee exports were expected to grow from 17,000 to 21,000 metric tons—a 23.5% increase—and generate $46 billion in revenue—which would mark a 21% increase from 2005 figures.[279] Coffee, along with tea, still earns more than 50% of Rwanda's trade revenue,[280] and the amount of fully washed coffee is also rising as the number of washing stations increases.[281]

In an interview in 2006, Rwanda's then-Minister of Agriculture, Anastase Murekezi, said that the specialty coffee industry's most successful story to date (in terms of wealth being created for Rwandans) was with American companies.[282] Importers such as Starbucks and Green Mountain buy Rwandan coffee, bringing much needed income to smallholders,[283] but so too are less well-known but highly discriminating American importers such as Intelligensia, Thanksgiving, and Counter Culture Coffee.[284]

As noted above, several NGOs have helped Rwandans take advantage of this liberalized environment, providing training and technical assistance and helping farmers develop relationships with foreign buyers. For example, US AID has used part of its relatively small budget in Rwanda to support rural economic growth through three coffee-related projects: the Partnership for Enhancing Agriculture

276. RWANDA NEWS AGENCY, *supra* note 265 (noting that through July, 2008 export revenue for Rwandan coffee was reported to be $15 million, up from $6.8 million for the whole of 2007).

277. Specialty Coffee Statistics & Coffee Facts, http://www.e-importz.com/Support/specialty_coffee.htm (last visited Sept. 8, 2008).

278. ECONOMIST INTELLIGENCE UNIT, COUNTRY REPORT: RWANDA (2007), (observing that in its 2007 Country Report on Rwanda, the Economist Intelligence Unit notes: "Stagnation in many of the traditional coffee-drinking markets of North America and Western Europe will restrict growth in demand, although demand for high-quality specialty coffees, including Rwanda's finest fully washed Arabica, will remain more buoyant.").

279. Reuters, *Rwanda 2006 Coffee Output Seen at 21,000 T*, FLEXNEWS, Oct. 19, 2006, http://www.flexnews.com/pages/5321/Africa/Coffee/rwanda_2006_coffee_output_seen_21000_t.html.

280. TRADE POLICY REVIEW BODY REPORT, RWANDA-REPORT BY THE GOVERNMENT, WT/TPR/G/129 (Aug. 31, 2004), *available* at http://www.wto.org/english/tratop_e/tpr_e/g129_e.doc (noting that "The chief cash crops are tea and coffee, which provide more than half of Rwanda's export revenue.").

281. Swanson & Bagaza, *supra* note 260.

282. Interview with Anastase Murekezi, Minister of Agriculture, Rwanda, in Kigali, Rwanda, (Mar. 14, 2006) (on file with author).

283. *See* Laura Fraser, *Coffee, and Hope, Grow in Rwanda,* N.Y. TIMES, Aug. 6, 2006, § 3, at 31.

284. Description of Rwandan Intelligentsia Coffee, http://www.intelligentsiacoffee.com/origin/offerings/02-15-2008; Description of Thanksgiving Coffee's use of Cooperatives in Rwanda, http://www.thanksgivingcoffee.com/cooperatives; description of Counter Culture Coffee's use of Rwandan Coffee, http://www.counterculturecoffee.com/index.php?option=com_content&task=view&id=606&Itemid=49.

through Linkages (PEARL), the Agricultural Cooperative Development International/Volunteers Overseas Cooperative Assistance (ACDI-VOCA), and the Agribusiness Development Assistance Project in Rwanda (ADAR).[285]

Each group has made important contributions to strengthening the coffee sector. For example, the PEARL project, working closely with the National University of Rwanda in Butare focused on helping farmers form cooperatives to produce high-quality specialty coffee.[286] PEARL team members taught local growers how to improve their quality-control measures, develop effective marketing strategies, and create beneficial relationships with specialty coffee importers.[287] PEARL has helped thirteen cooperatives win government approval, and also assisted coffee washing stations by helping to improve quality-control capabilities, improving market access, and improving management skills.[288] Whether these cooperatives can develop effective management structures remains an open question, one the new SPREAD project (an outgrowth of PEARL) is attempting to address.[289]

Trainers and buyers from Europe, China, and Japan are also routinely visiting the country, bringing expertise that helps improve the local industry, as well as income to farmers. Minister Murekezi said: "You see richness growing and poverty decreasing. You see people happier, more children at school, more homes being improved, more people in savings schemes for health. And people say they want to continue to improve their lives through coffee."[290]

In the 2006 interview, the Minister also noted that in the areas around washing stations, employment and revenues are both rising. Besides increased incomes for farmers, the benefits from specialty coffee extend beyond the cooperative. Goff notes: "[A]s income levels of the cooperative members have increased so has the flow of money in the community.... The positive feelings among community members are a reflection of increased incomes in the area (of the cooperatives)."[291] Coffee production cannot, by itself, solve the many

285. Chemonics Int'l, *supra* note 267, at 15-16 (noting that budgets for these projects have been relatively small: ACDI-VOCA's budget was approximately $600,000 from 2001 to 2003; ADAR and PEARL had annual budgets of approximately $1.5 million. ADAR and PEARL were six-year projects).

286. *Id.* at 16.

287. *Id.* at 32, 33, 39.

288. *See generally* Partnership to Enhance Agriculture in Rwanda through Linkages, http://www.iia.msu.edu/pearl/index.htm (discussing PEARL's functions); *see also* Swanson & Bagaza, *supra* note 260, *and* Intergroup Contact, *supra* note 13, at 26 (explaining that the PEARL project was succeed by a new project know as SPREAD (Sustaining Partnership to enhance Rural Enterprise and Agribusiness Development). SPREAD currently assists 15 coffee cooperative and 5 privately owned coffee ventures. SPREADS also assists with technical support and health care services. 95 coffee washing stations, 9 of which are privately owned. 20,000 farmers are associated with the cooperatives that receive assistance from SPREAD, and 5000 farmers sell to private washing stations that have also benefited from SPREAD.).

289. Swanson & Bagaza, *supra* note 260, at 26-36.

290. Murekezi interview, *supra* note 282.

291. Samuel Neal Goff, A Case Study of the Management of Cooperatives in Rwanda, 70 (2006) (unpublished Master's thesis, Texas A&M University) (on file with Texas A&M University Libraries).

problems these farmers face. Indeed, it remains to be seen if the benefits of coffee-sector liberalization will continue to flow to the rural poor. Taken together, concerns over the quality of cooperative management, the government's coffee agency, and a problematic land law[292] may bode ill for farmers.[293] However, if capacity issues can be addressed and harmful government interference avoided, then the positive gains of the past several years might translate into continued economic and social benefits for Rwanda's poor farmers.

VI. ECONOMIC LIBERALIZATION AND CONFLICT

Economic liberalization entails reforms that "extend the scope of the market, and in particular of international markets."[294] Political liberalization seeks to expand democracy, strengthen and broaden participation in the political arena, increase voice for all members of society.[295] While both sets of reforms may be jointly pursued one often precedes the other (as in South Korea and China).

The goal of economic liberalization is a more open economy. Typical strategies for accomplishing the goal are privatization, deregulation, reductions in tariff and non-tariff barriers to trade, elimination of price controls and subsidies, and the removal of barriers to investment.[296] Structural adjustment programs (SAPs) were one manifestation of economic liberalization and a common feature of IMF lending in the 1980s and 90s.[297] SAPs typically required developing world governments to change their monetary policies to reduce inflation, to reduce tariff rates, to shrink government budgets and to privatize state-owned industries.[298]

---

292. Organic Law Determining the Use and Management of Land in Rwanda § 20 No. 8/2005 Gazeti ya leta ya Rebublika Rwandaise, Sept. 15, 2005.

293. *See* Goff, *supra* note 291 (discussing management concerns at coffee cooperatives in Rwanda); *see* Swanson & Bagaza, *supra* note 260, at 9 (discussing current concerns with cooperative management and capacity). For a discussion of the problematic role played by OCIR-Café *see* Karol Boudreaux, *State Power, Entrepreneurship and Coffee: the Rwandan Experience*, 15 MERCATUS POL'Y SERIES 1, 22-23, (2007). Boudreaux also discusses the troubling 2005 Land Law. *Id.* On the concerns raised by the Land Law *see also*, Johan Pottier, *Land Reform for Peace? Rwanda's 2005 Land Law in Context*, 6 J. AGRARIAN CHANGE 509 (2005), *and* Herman Musahara, *Improving Tenure Security for the Rural Poor: Rwanda—Country Case Study* (LEP/FAO Working Paper No.7, 2006), *and* Int'l Conference on Agrarian Reform and Rural Dev., *A Case Study On the Implications of the Ongoing Land Reform on Sustainable and Rural Development and Poverty Reduction in Rwanda And The Outcome Report of the Thematic Dialogue* (Jan. 20, 2006) [hereinafter Implications Case Study], *and* Saskia Van Hoyweghen, *The Urgency of Land and Agrarian Reform in Rwanda*, 98 AFR. AFF. 353 (1999).

294. Francesco Giavazzi & Guido Tabellini, *Economic and Political Liberalizations*, 52 J. MONETARY ECON. 1297, 1298 (2005).

295. *See, e.g.*, POLITICAL LIBERALIZATION & DEMOCRATIZATION IN THE ARAB WORLD 3-4 (Rex Brynen et al. eds., 1995).

296. Global Trade Negotiations Home Page, http://www.cid.harvard.edu/cidtrade/issues/washington.html.

297. *See* Paul Collier and Jan Willem Gunning, *The IMF's Role in Structural Adjustment*, 109 The Econ. J. 634, 634 (1999). *See also* J. Barry Riddell, *Things Fall Apart Again: Structural Adjustment Programmes in Sub-Saharan Africa*, 30 J. MOD. AFR. STUD. 53(1992).

298. Morris Goldstein, *IMF Structural Conditionality: How Much is Too Much?* (Institute of International Economics Working Paper No. 4, 2000).

This conditional lending has been widely criticized for imposing the costs of "austerity" measures on the people least able to bear them: the developing world's poor.[299]

An extensive literature explores the role that economic and political liberalization play in promoting peaceful relations among nations and in intrastate conflicts.[300] The key insight of this work—which is also known as the "liberal peace thesis"—is that market-oriented democracies rarely go to war against each other.[301] Polacheck and Seiglie, for example, write that "countries with the most trade (and the greatest gains from trade) have the most to lose from conflict. *Ceteris paribus*, these countries have lesser amounts of conflict."[302] They go on to argue that, "nation pairs with more trade exhibit less conflict and democracy-pairs exhibit more trade."[303] The liberal peace thesis also applies to intrastate conflict, as market democracies experience lower levels of internal conflict, rebellion, assassination, and other disturbances than do authoritarian regimes or closed economies.[304]

Extending this insight, commercial activities within a country, which typically require collaborative efforts to bring goods or services to the market, may also act as a catalyst for generating trust.[305] Such collaboration can contribute to the

---

299. *See generally*, Storey, *supra* note 17.

300. Michael Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151 (1989); Cramer, supra note 17, at 202-05; R.J. RUMMEL, UNDERSTANDING CONFLICT AND WAR, VOL. 4: WAR, POWER, PEACE (1979).

301. *See generally* John R. Oneal and Bruce Russett, *Assessing the Liberal Peace with Alternative Specifications: Trade Still Reduces Conflict*, 36 J. PEACE RES. 423, 433, 439 (1999) (noting that "there is statistically significant evidence for the pacific benefits of economi- cally important trade" as well as joint democracy); *see generally* Håvard Hegre, *Development and the Liberal Peace: What Does it Take to be a Trading State*? 37 J. PEACE RES. 5, 17 (2000) (concluding that the pacifying effect of trade increases with increased development but that in cases where a trading pair includes one country that is very poor, GDP per capita of less than $300, increased interdependence may increase the incidence of fatal disputes); *see generally* Cullen F. Goenner, *Uncertainty of the Liberal Peace*, 41 J. OF PEACE RES. 589, 600 (2004) (discussing the three main theoretical approaches to liberal peace and finding that while trade interdependence is not a strong predictor of military conflict democracy is.); *see generally* Dale C. Copeland, *Economic Interdependence and War: A Theory of Trade Expectations,* 20 INT'L SECURITY 5 (1996) (arguing that interdependence can foster peace only when states expect that trade will be high into the foreseeable future and that when expectations for future trade are low, the most highly dependent states will be the ones most likely to initiate war for fear of losing economic wealth that supports long-term security).

302. Solomon Polachek & Carlos Seiglie, *Trade, Peace and Democracy: An Analysis of Dyadic Dispute* 14 (*IZA Discussion Paper* No. 2170, 2006).

303. *Id.* at 48.

304. *See* Mirjam E. Sorli, The Liberal Peace Argument in the Middle East: Ali in Wonderland or Crude (Oil) Reality? (Sept. 8, 2001) (unpublished Master's Thesis, University of Oslo), *available at* http://www.prio.no/sptrans/-68957771/file38409_canterbury_mirjam.pdf (analyzing the liberal peace theory on an interstate and an intrastate level. Regarding the liberal peace theory, the author states, "Democracy and economic growth are today seen as the main ingredients in a recipe for a peaceful world.").

305. *See, e.g.*, T. Saguy & A. Nadler, *Social psychology and the process of trust building: Interviews with Israelis and Palestinians involved in joint projects*, 44 MEGAMOT, 2006, at 354. Our

development of a new, shared identity among members of different groups,[306] thereby reducing prejudice among previously hostile groups.[307]

The idea that a "liberal peace" exists is not new, but renewed interest in the subject over the past twenty years has generated a large body of theoretical and empirical work.[308] In addition, the claim that liberal market democracies are more peaceful than other societies provided support for efforts to export both democracy and free-market economic policies to countries lacking these institutions.[309]

However, the liberal peace thesis has its critics.[310] As Paris notes, it might be the case that existing liberal democracies are peaceful, but the shift from authoritarianism and/or a closed economy to market liberalism can be fraught with conflict.[311] Some liberalization policies, such as those adopted in Rwanda in the early 1990s, impoverish, rather than enrich or empower, the poor.[312] Some privatization efforts benefit political insiders at the expense of the broader

---

fieldwork supports this hypothesis. When polled on levels of trust towards buyers, 32% of farmers indicated intermediate and high levels of trust previously (i.e. 5 years ago or alternatively before joining the cooperative), whereas 89% indicated intermediate and high levels of trust now. Field Study 2008, *supra* note 251, at question 17.

306. For a discussion of social identity theory *see generally* Matthew J. Hornsey, *Social Identity Theory and Self-categorization Theory: A Historical Review*, 2/1 SOC. AND PERSONALITY PSYCHOL. COMPASS 204, 204-06 (2008), *available at* http://dx.doi.org/10.1111/j.1751-9004.2007.00066.x.

307. Samuel L. Gaertner et al., *How does Cooperation Reduce Intergroup Bias?* 59, No. 4 J. PERSONALITY AND SOC. PSYCHOL., 692 (Oct. 1990) (showing how intergroup cooperation may contribute to the development of a new, shared identity among previously hostile groups); MUZAFER SHERIF, IN COMMON PREDICAMENT: SOCIAL PSYCHOLOGY OF INTERGROUP CONFLICT & COOPERATION (Houghton-Mifflin 1966) (suggesting that when two parties who have experienced conflict over limited resources are faced with a superordinate goal- task or challenge that both groups want to have resolved, and that requires joint effort- hostile behavior subsides); *see also* GORDON ALLPORT, THE NATURE OF PREJUDICE (Oxford, 1954); Thomas F. Pettigrew, *Intergroup Contact: Theory, Research and New Perspectives*, 49 ANN. REV. PSYCHOL. 65, 65-71 (1998) (providing evidence how positive interaction between antagonistic groups can lead to reductions in prejudice and hostility).

308. For a sense of the literature, *see, e.g.*, John R. O'Neal, Frances H. O'Neal, Zeev Maoz & Bruce Russett, *The Liberal Peace: Interdependence, Democracy and International Conflict, 1950-85*, 33 (1) J. PEACE RES. 11, 11 (1996); *see also* John O'Neal & Bruce Russett, *Clear and Clean: The Fixed Effects of the Liberal Peace*, 55 (2) INT'L ORG. 469, 469-71 (2001); *see also* Michael Mosseau, Håvard Hegre & John R. O'Neal, *How the Wealth of Nations Conditions the Liberal Peace*, 9 (2) EUR. J. INT'L REL. 277, 278 (2003).

309. Paris, *supra* note 17, at 44.

310. *Katherine Barbieri & Gerald Schneider,* Globalization and Peace: Assessing New Directions in the Study of Trade and Conflict, *36 (4) J. OF PEACE RES., 387 (1999); Cullen Goenner,* Uncertainty of the Liberal Peace, *41 (5) J. PEACE RES., 589, 589-90 (2004); Erik Gartzke, Quan Li & Charles Boehmer,* Investing in the Peace: Economic Interdependence and International Conflict, *55 INT'L ORG., 391 (2001).*

311. Paris, *supra* note 17, at 44; CRAMER, *supra* note 17, at 204-205 (arguing that "[t]he liberal free trade vision of capitalism . prettifies reality in two main ways. First, it glosses over the reality of how capitalism takes root in a society and how societies have developed into advanced capitalist societies. The beginnings and the effective and progressive development of capitalism are always painful.").

312. Storey, Structural Adjustment, *supra* note 23, at 375-77.

society.[313] When liberalization policies benefit the few and the favored at the expense of the majority of a citizenry, creating or exacerbating economic cleavages, they may prompt conflict.[314] Therefore, how liberalization policies are crafted may help determine if they are conflict-generating or conflict-reducing.

In Rwanda, liberalization policies in the coffee sector have imposed some costs on farmers (the costs associated with developing and marketing a high-quality product) but, foreign aid projects implemented by NGOs have both off-set these costs and have helped farmers develop valuable market linkages needed to compete globally.[315] These projects have also helped farmers form cooperatives, improve their product, raise capital, identify buyers, and learn how to negotiate contracts.[316] Providing farmers with the skills needed to transition from producing low-quality commercial grade coffee to high-quality specialty coffee has been an important part of transformation in Rwanda's coffee sector.[317] Government policies creating greater scope for local decision making and for entrepreneurship, coupled with support from the development community, have energized this sector. Unlike other liberalizations, the benefits of the coffee-sector liberalization are spread broadly.[318] Any farmer can choose to grow coffee.[319] No one ethnic group seems to be benefiting at the expense of another. To date, the reforms seem to be conflict-reducing rather than conflict-enhancing.[320]

VII. COOPERATION AND RECONCILIATION

The economic imperatives discussed above mean that for many smallholders there are potential benefits from joining together in cooperatives to produce and process coffee. Most Rwandan coffee farmers are smallholders, and they face serious obstacles identifying possible foreign buyers, marketing their product, and negotiating sales contracts.[321] Sharing costs and spreading risks is a sensible strategy for many of these farmers, so they join together in cooperatives.[322]

---

313. KATHERINE VERDERY, THE VANISHING HECTARE: PROPERTY AND VALUE IN POSTSOCIALIST TRANSYLVANIA 113-14 (Cornell University, 2003).

314. Cannon, *supra* note 44, at 42.

315. *See supra* Part V.

316. Karol Boudreaux, Comment, *State Power, Entrepreneurship, and Coffee: The Rwandan Experience*, MERCATUS POL'Y SERIES, Policy Comment No. 15, at 5, 8, 17, 27, Oct. 2007.

317. *Id.* at 15.

318. *Id.* at 12, 18.

319. *Id.* at 8.

320. *Id.*

321. *Id.* at 29.

322. *Id.* Discussing work done over the course of a number of years, Fort and Schipiani identify four possible contributions that business can make towards the creation of more peaceful societies. These contributions include: fostering economic development and creating jobs, adopting external evaluation principles, "creating a sense of connectedness among members of an organization" and in mediating power contests. For our purposes, the role that local businesses (cooperatives and/or private washing stations) play in terms of economic development, job creation, and encouraging connectedness among members are of key importance. *See* Timothy L. Fort and Cindy A. Schipani, *An Action Plan for the Role of Businesses in Fostering Peace*, 44 AM. BUS. L.J. 359, 364-67 (2007); *see also*, Thomas W. Dunfee & Timothy L. Fort, *Corporate Hypergoals, Sustainable Peace, & the Adapted Firm*, 36

Compared to individual production, well-run cooperatives can give smallholders a leg up in a competitive marketplace and provide other benefits that are sorely lacking, such as small loans, agricultural inputs, training, and a social forum.[323]

Cooperatives are not new in Rwanda.[324] Uvin writes that hundreds of cooperatives were created in the 1980s and thousands of less formal farmers' organizations were also started during this time.[325] A US AID report says that the Habyarimana government had an "*associez-vous, on vas vous aider*" policy "but without there necessarily being a real reason for associating."[326] Today, the Rwandan government encourages the formation of cooperatives, but is not directly involved in running cooperatives.[327] Farmers who choose not to be members of cooperatives have alternatives of selling their cherries to private buyers or to private coffee washing stations.[328] These "middlemen" will sell the cherries to millers and/or exporters.[329]

Because bringing coffee to the market requires significant coordination amongst workers at cooperatives and private washing stations,[330] both organizations may facilitate cooperation.[331] An International Alert study from

---

VAND. J. TRANSNAT'L L. 563, 594 (2003).

323. *See* Swanson & Bagaza, *supra* note 260, at 14 (describing the cooperative management structure and polled benefits).

324. Chemonics Int'l, *supra* note 267, at. 8. In a summary report, US AID notes: "[p]rior to the establishment of the COOPACABI coffee cooperative in Bicumbi in 1996, no coffee cooperatives existed in Rwanda. Farmers sold semi-washed coffee directly to RWANDEX agents, at prices pre-determined by the GOR (Government of Rwanda). However, coffee producer associations did exist, but served the limited function of input distribution (and eventual reimbursement) of products supplied by OCIR-Café." USAID, *Assessing USAID'S Investments In Rwanda's Coffee Sector: Best Practices and Lessons Learned to Consolidate Results and Expand Impact*, April 2006, http://pdf.usaid.gov/pdf_docs/PNADG793.pdf.

325. UVIN, *supra* note 50, at 164-65.

326. Translates roughly: "if you join together we will help you." *See* Interview with Tom Bagaza, Producer Relations Coordinator, SPREAD, Kigali, Rwanda (Feb. 19, 2008) (explaining that before 1994, OCIR-Café encouraged farmers to form associations so that it could deliver agricultural inputs to centralized locations rather than to individual farmers – so coffee associations made the government's job of supporting farmers easier, they did not have a strong business focus.).

327. Chemonics Int'l, *supra* note 323, at 12-13.

328. *See, e.g.*, USAID, *The Ties That Bind: Case Studies in Making Buyer-Supplier Relationships Last*, Research Report, July 2007, http://pdf.usaid.gov/pdf_docs/PNADL009.pdf.

329. *Id.* Interestingly, our field study found that 23% of coffee cooperative members reported selling to their cooperative instead of private washing stations out of loyalty. Field Study 2008, *supra* note 251, at question 17; *see also supra* text accompanying notes 260-61 for a description of the coffee washing process and private washing stations. Of course, cooperatives are also a kind of a "middleman." *See id.*

330. *See infra* text accompanying notes 400-404; *see also* note 305 for data regarding trust towards buyers.

331. Discussing the role that multinational corporations can play in promoting peace, Fort argues: "[c]onceptually, businesses do possess the capability to reach across borders and to get people who may not otherwise work together to do so, even if the only common goal they have if profitability. Some businesses even intentionally hire employees from otherwise conflicting ethnic or religious groups in order to get them to have the experience of cooperating." Timothy L. Fort, *The Times and Seasons of Corporate Responsibility*,44 AM. BUS. L.J. 287, 322 (2007).

2006 posits that in a post-conflict environment local business has a role to play by facilitating the rebuilding of damaged societies and by promoting dialogue among former enemies.[332] Local businesses, this report argues, provide a space for people to participate in joint economic activities:

> Doing business may be one of the few remaining points of contact between two sides in a conflict—and one of the first to resume in its aftermath. *In many instances, these points of contact are both profitable and inspiring as they demonstrate that peaceful interaction for mutual benefit is possible as well as desirable.*[333]

The exploratory survey mentioned above, coupled with journalistic evidence, suggests that the increased collaboration (and economic rewards) that have resulted from the pursuit of commercial activities in the coffee sectors is encouraging more positive feelings towards others and towards reconciliation.[334]

To provide further detail, the exploratory field survey we sponsored was conducted in the June 2008. Coffee farmers[335] were asked ninety-four questions related to their membership (if appropriate) in a coffee cooperative; the social climate (either in a cooperative or the local community for people selling at private washing stations); the economic benefits of coffee production; and their attitude towards reconciliation with the other ethnic group (as well as demographic questions).

Survey results suggest[336] that membership in a coffee cooperative, being associated with a particular coffee washing station comparatively longer, and economic as well as general life satisfaction are significant correlates of positive attitudes towards reconciliation.[337] In particular, participants with greater

---

332. International Alert, *Local Business, Local Peace: the Peacebuilding Potential of the Domestic Private Sector – Executive Summary*, *available at* http://www.international-alert.org/pdf/LBLP_Russian_exec_sum.pdf.

333. *Id.*

334. Reconciliation can be defined as a change in identity. Herbert C. Kelman, *Reconciliation as Identity Change: A Social-Psychological Perspective in* FROM CONFLICT RESOLUTION TO RECONCILIATION 111 (Yaakov Bar-Siman-Tov, Ed.) (Oxford University Press 2004). It can also be defined as a change in psychological orientation towards the other, involving mutual acceptance between groups, Ervin Staub, *Reconciliation After Genocide, Mass Killing or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery and Steps Toward a General Theory*, 27(6) POL. PSYCHOL., 867, 868 (2006). Another definition is a process involving reciprocating empathy and compassion as well as a peaceful expectation of future intergroup relationships Arie Nadler & Ido Liviatan, *Intergroup Reconciliation: Effects of Adversary's Expressions of Empathy, Responsibility, and Recipients' Trust*, 32 (4) PERSONALITY AND SOC. PSYCHOL. BULL. 459, 462 (2006).

335. Field Study 2008, *supra* note 251 (discussing the demographic polled).

336. *Id.* Although the study's sample represents a minority of coffee farmers in Rwanda, i.e. those benefiting from the results of privatization in Rwanda's coffee sector, and the survey design prohibits generalizations beyond the group examined, the observed correlations match current theories of reconciliation and are corroborated by journalistic evidence. Moreover, while correlation is not the same as causation, the absence of a correlation suggests the absence of a causal relationship. Here, there are strong correlations. *See, e.g.*, Staub, *supra* note 334, at 874; Kelman, *supra* note 334, at 24.

337. Field Study 2008, *supra* note 251.

economic security reported low distrust towards members of the other ethnic group, and a tendency towards conditional forgiveness.[338] Coffee washing stations that had been in operation for a comparatively longer period of time were also significantly correlated with a reduction in ethnic distance over time.[339] Life satisfaction significantly correlated with economic security variables, and those farmers reporting greater satisfaction with life also expected a more positive, peaceful future in Rwanda.[340] These observations were discernible independent of gender, education, the participants' ethnicity or the ethnic mix at a location.[341]

The survey also revealed a change in attitudes over time. Of the participants that reported disagreements in their community, 75% reported fewer disagreements[342] today than in the past (i.e. since joining the cooperative or, for non-cooperative members, in the past five years).[343] Conversely, 91% of all survey respondents reported that conflicts are better resolved today than in the past.[344] When polled on levels of trust towards buyers, 32% of farmers indicated intermediate and high levels of trust before, whereas 89% indicated intermediate and high levels of trust now.[345] Perhaps the most suggestive data was the increase in farmers willing to engage in socially inclusive behavior today in comparison to the past.[346] Out of the three-quarters of participants who answered questions about their willingness to greet a member of the other ethnic group, work with this person every day, share a beer, or allow their child to marry such a person, the percentage of those who engaged in such social behavior today, compared to the past, had more than doubled across all questions.[347] Moreover, 46% of the respondents who answered these questions reported that they had not carried out any of these social acts in the past.[348] Only 1% reported not doing so today.[349]

Interestingly, the survey data further suggests that membership at cooperatives provides greater economic and social benefits. Members of coffee cooperatives were more likely to have experienced a positive change in economic

338. *Id.* at questions 55, 60.

339. *Id.* at questions 61-62.

340. *Id.* at questions 55, 60.

341. *Id.* at question 55.

342. At cooperatives, the main disagreement is how money is used. Other disagreements (at both cooperative and private washing stations) include how much farmers are paid for cherries, job opportunities, and how benefits are shared. *Id.* at question 25.

343. *Id.* at question 24.

344. Throughout the survey, the past was framed as since joining the cooperative for cooperative members. For non-cooperative members, the past was defined as five years ago. *Id.* at question 48.

345. For cooperative members, the past was defined as since joining the cooperative. For non-cooperative members, the past was defined as five years ago. *Id.* at question 17.

346. Not all participants answered these questions (approximately 75% did). However, given that the question was framed towards the present and the past, it's unlikely that a participant would feel compelled to answer positive towards one and not the other, and moreover, answer positive to the present but not to the past. Field Study 2008, *supra* note 251.

347. *Id.*

348. *Id.*

349. *Id.* at question 52.

satisfaction, and also rated their life satisfaction today higher than coffee workers not associated with a cooperative. They were also less likely to report high distrust. Members also reported more positive contact affect as well as significantly deeper contact with members of the other ethnic group.[350]

As noted above, this survey was exploratory in nature. These results do not establish a causal link between economic liberalization and informal reconciliation. Rather, they suggest that in these particular settings coffee farmers are experiencing a variety of positive benefits, including lower levels of distrust towards members of the other ethnic group, when economic benefits are experienced. To the extent that broad-based economic liberalization creates opportunities for increased positive collaboration and economic benefits, levels of trust and feelings about reconciliation among former enemies may improve—an important insight for policy making options in post-conflict environments.

This survey work was inspired by a body of journalistic evidence that identifies a link between working in a cooperative and reconciliation. For example, a 2006 article in the *New York Times* tells the story of Gemima Mukashyaka, a member of the Maraba coffee cooperative.[351] Ms. Mukashyaka lost most of her family during the genocide.[352] Her life was spared only because a young Hutu man intervened with the *Interahamwe* militia and bought her.[353] After the killing ended she escaped and, with two surviving sisters, returned to her family farm, only to find it devastated.[354] Laura Fraser writes, "After joining the co-op, Ms. Mukashyaka doubled her coffee earnings in one year. She also grew less isolated and less distrustful of her neighbors, since she had people to talk to at the washing station and in co-op meetings."[355] Gemma Uwera, another member of the Maraba co-op is quoted as saying:

> After the genocide, I feared other people's reaction when they got to know that my husband is in jail, so it was not easy to join the co-op.... Now I have friends, I meet regularly with widows of genocide, and we plan how we can help each other if someone has a problem.[356]

A *Christian Science Monitor* story discusses Jeannette Nyirabaganwa, who lost her husband, parents, and a child in the genocide.[357] Anastaz Turimubakunzi is, the report says, "a confessed killer who, Jeannette says, helped murder her

350. *Id.* at question 56.

351. Laura Fraser, *Coffee, and Hope, Grow in Rwanda,* N.Y. TIMES, Aug. 6, 2006, *available at* http://www.nytimes.com/2006/08/06/business/yourmoney/06coffee.html?_r=1&pagewanted=all&oref=slogin#.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.; see also Coffee 'Key to Reconciling Rwandans'*, BRIT. BROAD. CORP., http://news.bbc.co.uk/2/hi/africa/5299286.stm (last visited Nov. 10, 2008).

357. Abraham McLaughlin, *Why Jeannette Employs Her Family's Killers*, THE CHRISTIAN SCI. MONITOR, Oct. 24, 2006, *available at* http://www.csmonitor.com/2006/1024/p01s03-woaf.html.

husband."[358] Today, Jeannette runs a coffee farm and pays Anastaz to work in her fields. Jeannette explains how it is possible for her to work with a man who helped kill her husband: "The only solution was to go together with my countrymen – even the killers. There was no alternative."[359] So in 1999, a group of neighbors decided to start a coffee cooperative, the Abahuzamugambi Cooperative.[360] Jeannette wanted to participate to increase her income, but that was not her only motive. She is quoted as saying: "I thought that coffee-growing could connect me to other people."[361] Jeannette goes on to say that because of the cooperative "we've been building a relationship that changed our lives. We ended up reconciling in a way we didn't know." And this, the story argues: "is a tale of Rwandan-style reconciliation. It may seem almost incomprehensible to outsiders, yet in some cases it works here."[362] In a different report, Fatuma Ngangiza, head of Rwanda's National Unity and Reconciliation Commission says of coffee farmers, "[as] they work together, cleaning the coffee, they talk together so they start talking business but later they start talking family affairs. It fosters relationships and reconciliation."[363]

There is some research that suggests that women have played a particularly important role in reconciliation efforts in Rwanda.[364] After the genocide, women like Gemima and Gemma, one a survivor, the other married to an alleged perpetrator, returned to ruined farms.[365] There were few able-bodied men at the time available to work so the women, on their own, had to manage their farms and feed and care for their children.[366] In a desperate situation it is reasonable to imagine they would recognize the benefits of working together cooperatively in order to rebuild their lives and livelihoods.[367]

---

358. *Id.*

359. *Id.*; *see also* Jim Fisher-Thompson, *U.S. Interests in Conflict and Coffee Combine to help Rwanda*, WASH. FILE, May 28, 2006, http://www.america.gov/st/washfile-english/2006/May/20060528102558nospmohtrehsifj0.6521723.html (last visited Sept. 5, 2008) (quoting Steven Livingston, who states: "[w]ith the coffee cooperatives and role of Starbucks" (which has purchased Rwandan coffee for its Black Apron product line) "'and other coffee companies interested in Rwanda what we see is that if you give people the expectations of hope from economic development' ethnic tensions are lessened.").

360. McLaughlin, *supra* note 357.

361. *Id.*

362. *Id.*

363. BRIT. BROAD. CORP., *supra* note 355; *see also* Land of a Thousand Hills Coffee, http://www.landof1000hills.com/learn/our_story (last visited Nov. 10, 2008).

364. ELIZABETH POWLEY, STRENGTHENING GOVERNANCE: THE ROLE OF WOMEN IN RWANDA'S TRANSITION (Sanam Naraghi Anderlini ed., 2003), *available at* http://www.huntalternatives.org/download/10_strengthening_governance_the_role_of_women_in_rwanda_s_transition.pdf.

365. Fraser, *supra* note 351.

366. *Id.*

367. Powley, *supra* note 364, at 16 (citing one interviewee: "[m]ost of the widows have children to take care of. Naturally they find that they can't cope on their own. Even if she is a [genocide] survivor in the middle of all those people she thinks were against her, she is forced to work with them because she has nobody to turn to . . . . Women need more cooperation in the community.").

Our field study supports the journalistic evidence that women have played an important role in reconciliation and suggests further that women are enjoying greater empowerment in post-conflict Rwanda. Ninety-two percent of those surveyed believed that women contributed significantly to reconciliation,[368] and 79% believed that women definitely play a large role in resolving conflict.[369] When farmers were asked if it is better to have a man in change, 59% of those surveyed responded definitely not[370] (49% of those surveyed were women[371]). When asked if men make better peace-makers, 53% strongly or moderately disagreed.[372] While this area requires further research, the evidence suggests that opportunities present in the liberalized coffee sector are benefiting women. Women are enjoying greater economic empowerment and a political voice. Eighty-six percent reported that participation of women in decision-making had improved since the joining the cooperative or, alternatively, in the past five years in the community.[373] Seventy-one percent believed that women could participate in decision-making as much as men.[374]

The anecdotal/journalistic and survey evidence presented is not dispositive but rather strongly suggestive of the role that necessity and economic opportunity can play in improving relations among former enemies and also possibly empowering previously disenfranchised groups, like women. However, the Rwandan experience raises a challenging question: does this cooperative behavior represent merely a short-term and necessitous change or is it likely to be something more substantial, a long-term shift in behavior and perspective? In other words, is cooperation in cooperatives prompting informal reconciliation or something else?

The answer is still unclear. However, the Rwandan coffee sector has become a forum for people of all groups to engage in repeat dealings and to work jointly in pursuit of a common goal: making ends meet. Working together to achieve a goal that everyone desires—earning a better living—seems to be helping some farmers overcome animosities. People in Rwanda recognize that commercial activities generally, and the coffee industry specifically, are a potential path to reconciliation. Dr. Timothy Schilling of PEARL has said that:

> By bringing villagers together to work toward a common economic goal... co-ops have helped Rwandans with the monumental task of reconciliation, since genocide widows work side by side with women whose husbands are in jail for participating in the killing.... What's reconciliation if it's not people who have conflict getting together and talking?[375]

368. Field Study 2008, *supra* note 251, at question 58.
369. *Id.* at question 27.
370. *Id.* at question 42.
371. *Id.* at question 87.
372. *Id.* at question 79.
373. *Id.* at question 49.
374. *Id.* at question 41.
375. Fraser, *supra* note 350.

Similarly, Rwandan Minister of Agriculture Murekezi, argued:

> Industry has certainly contributed to reconciliation... in every village we've had this very bad experience with genocide. Coffee producers were both victims and killers. Afterwards, the killers were imprisoned. Their wives and their children were at home. Close by were the survivors of the genocide. The victims were living next to the families of those killed. But now we have the experience of people working together. We have seen coffee producers working together.
>
> I believe the secret is increasing income through washing coffee. This is the same concern for all the families. They are working together now through co-ops. The co-ops are friendly associations. These farmers are getting more income now than in the past, and they are happy to get more because they are working together. Now, we can value each family based on [its] real achievements in improving quality and quantity of coffee, not on ethnicity. This is a new value: a focus on work and results.[376]

Minister Murekezi suggested that people now work together precisely because of the market signals associated with specialty coffee production.[377] Specialty coffee fetches higher prices so more farmers would like to produce it.[378] To do this, they often join a cooperative. Once they are members of a cooperative, they have an opportunity to work with other farmers to accomplish a shared goal.[379] The stories above, and our survey results, suggest this joint effort produces positive social benefits as well. If, as seems to be the case, Rwanda's inclusive liberalization catalyzes inter-group cooperation then, importantly, policies that expand economic opportunity for many citizens provide an additional strategy for post-conflict reconciliation.

VIII. REASONS FOR CAUTION IN THE COFFEE SECTOR

The specialty coffee industry is doing good things in Rwanda. However, the smallholder farmers and the entrepreneurs who work in this sector face several challenges. These include improving the management of cooperatives to benefit members, limiting the possibility of harmful interference by OCIR-Café, the government-run coffee board, and avoiding dislocations to poor Rwandans, particularly women, that may result from the 2005 Land Law.[380] These issues are discussed below.

A. The Need for Better Cooperative Management

A serious challenge for smallholders who voluntarily join together into cooperatives is to create a culture of entrepreneurship within the cooperatives so

376. Murekezi interview, *supra* note 282.
377. *Id.*
378. *Id.*
379. *Id.*
380. *See generally* Swanson & Bagaza, *supra* note 260.

that cooperatives become more "business minded."[381] A key problem identified by the SPREAD project is the need to attract and retain more professional managers in cooperatives and, at the same time, to reduce the influence of volunteer Boards of Directors (BOD).[382] A recent assessment of a group of Rwandan cooperatives states "[a] professional, entrepreneurial General Manager is the most important individual to a cooperative's ultimate success."[383]

However, the report's authors find that no cooperatives in the group under investigation have such a manager. The reason for this seems to be that the BODs are reluctant to pay high enough salaries to attract a professional manager.[384] Further, the BOD often prefers to have a local person, rather than an "outsider," fill this role.[385] However, locals are less likely to have the skill set needed to manage the cooperative effectively. Cooperatives are capable of producing very high quality coffee, but they are experiencing real difficulties creating effective management structures.[386]

A related problem is that the BOD often interferes inappropriately in the daily management of the cooperative. The assessment notes that "BOD members, particularly Presidents, do not want to relinquish their authority to a strong General Manager."[387] While it is essential that the BOD take seriously its fiduciary duties to create general policies and oversee management activities, the assessment recommends that they give managers increased decision-making authority and discretion.[388]

Management of the cooperatives, BOD and professional managers, need to communicate more effectively with members so that members understand the ownership structure of the cooperative as well as the rights members hold.[389] To date, this has not been done effectively. Members report that they are unclear as to who "owns" the cooperative,[390] and some believe cooperative leaders are over compensated for their work.[391] Cooperatives also need to develop and communicate effective business plans and to improve financial record keeping and documentation. When members lack clear information about the financial state of the cooperative, and about likely prices for cherries and benefits to cooperative members, the possibility of corruption and conflict over resources rises. In our field study, 41% of cooperative members had expected benefits they had not

381. *Id.* at 11.
382. *Id.* at 8.
383. *Id.* at 12.
384. *Id.*
385. *Id.* at 11.
386. *Id.* at 8.
387. *Id.* at 13.
388. *Id.* at 11.
389. *Id.* at 14, 15.
390. *Id.* at 14.
391. 55% moderately or strongly disagreed with the statement that "cooperative leaders get more than they deserve." Field Study 2008, *supra* note 251, at question 46. 62% moderately or strongly agreed with the statement that "cooperative leaders earn what they deserve." *Id.* at question 50.

received, and about half moderately and strongly believed that there was anger in the cooperative because benefits were not distributed fairly.[392] These are especially important issues to resolve because cooperatives are facing increasing competition from other coffee entrepreneurs and must find a way to meet this challenge.[393]

Cooperatives have provided a pivotal role for Rwanda's smallholder farmers, allowing them to earn more money from coffee, develop additional skills, and work cooperatively with others in ways that may promote reconciliation. However, cooperatives must now address serious shortcomings in terms of management practices and capabilities if they hope to continue playing this role in the future. There is, however, reason to be optimistic. In our field study, approximately three-quarters of cooperative members indicated that their trust in cooperative leaders had improved since joining, as has the level of participation from ordinary farmers in cooperative decision-making.[394] As cooperatives seem to provide a space for cooperative behavior and even informal reconciliation, further support efforts to help accomplish the goal of creating transparent and accountable management may well be justified.

B. The Role of OCIR-Café

A different concern is that the government agency OCIR-Café may interfere with positive developments in the industry.[395] Although this agency's role has been modified over time, OCIR-Café continues to create policies and strategies for the coffee sector to implement these policies and strategies, to set up quality norms and classification systems, quality control, and delivery of Origin Certificates.[396] It is also supposed to provide extension services, research, and training to farmers.[397] OCIR-Café continues to supply some subsidized inputs to coffee farmers.

It is, however, the agency's role as the official "brander" of Rwandan coffee that raises most concerns. The agency claims a key role in creating "quality norms and classification systems," including the issuance of Origin Certificates.[398] In an interview in March 2006, the then-Director General of OCIR-Café, Laurien Ngirabanzi, argued that the government should help train producers to meet these quality standards.[399] However, Mr. Ngirabanzi added that if farmers fail to comply, the agency should consider fining them or seizing their crops.[400]

---

392. Statements such as "we buy fertilizer at the same price as non-coop members," "sometimes we don't get profits," "promised to get bike (or loan) but not yet," "no subsidies, the prices are low," and "inputs are not available for all" were common. Field Study 2008, *supra* note 251, at questions 14, 15, 30.

393. Swanson & Bagaza, *supra* note 260, at 10.

394. Field Study 2008, *supra* note 251, at questions 45, 47.

395. OCIR-Café is a department of Rwandan Ministry of Commerce. *See The Role Of OCIR Coffee In The Coffee Industry,* WORLD INVESTMENT NEWS, *available at* http://www.winne.com/rwanda/to13.html/to000.html (last visited Sept. 8, 2008).

396. *Id.*

397. *Id.*

398. *Id.*

399. Interview with Laurien Ngirabanzi, Director General of OCIR-Café, in Kigali, Rwanda, (Mar.

More recently, coffee dealers have been pressuring the agency to "abolish" the traditional, dry-process production of coffee.[401] Because the country has a limited number of coffee washing stations, the majority of Rwandan coffee is still processed in the traditional way—at home by smallholder farmers.[402] These beans are then sold to local dealers, who in turn, sell to exporters.[403] Because home processing does not ensure high quality, these beans command a lower price on the market than does specialty coffee.[404] While it is clearly a worthwhile goal to raise farmers' incomes, the agency should, at best, educate farmers about the benefits of washing coffee and avoid coercing farmers by seizing their home-based equipment (as suggested by one coffee processor).[405] For this industry to continue benefiting smallholders, government involvement in the production process should be limited.

In particular, there is little reason why a government agency needs to oversee quality control functions and issue certifications of origin. Rather than entrust a government agency, which is subject to a variety of political pressures, to handle such tasks, private-sector organizations, such as the East African Fine Coffees Association (EAFCA), can serve this role. EAFCA "is an association of coffee producers, processors, marketing people, and organizations in the ten Eastern and Southern African countries of Burundi, Ethiopia, Kenya, Malawi, Rwanda, Tanzania, Uganda, Zambia, Zimbabwe, and the Democratic Republic of Congo as well as others from outside Africa.[406] Membership thus includes processors, associations, roasters, dealers, retailers, and coffee professionals from all over the world."[407] The association conducts trade missions and creates linkages between producers and buyers.[408] It holds national cupping competitions to help improve quality and sponsors an annual African Taste of Harvest competition in which producers across East Africa compete.[409] Not subject to the kinds of pressures that a public institution faces, EAFCA already serves as a training resource, provides quality control information, and assists with marketing.[410]

2006) (on file with author).

400. Since March 2006, several different people have filled the role of Director General of OCIR-Café. Interview with Tom Bagaza, Assistant Director, SPREAD, in Kigali, Rwanda, (Feb. 18, 2008) (on file with author).

401. Eugene Kwibuka, *Rwanda: Country Must Enhance Traditional Ways of Milling Coffee Cherries to Improve Quality*, THE NEWS TIMES (Kigali), Aug. 31, 2008, *available at* http://allafrica.com/stories/200809010695.html.

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. E. African Fine Coffees Ass'n, *About Eastern African Fine Coffees Association (EAFCA)*, http://www.eafca.org/about.htm (last visited Sept. 8, 2008).

407. *Id.*

408. *Id.*

409. E. African Fine Coffees Ass'n, *What is the AToH&A?*, http://www.eafca.org/atoh.htm (last visited November 10, 2008).

410. *Id.*

Unquestionably, Rwandan coffee producers and cooperative members have many needs. They must improve a variety of skills; they must continue to improve the quality of their product; and they must get more of their product to market in a cost-effective manner.[411] The question is not whether there are continuing needs within the sector; the question is what is the best way to meet these needs? With growing international acclaim for Rwandan specialty coffee,[412] opportunities arise for producers to partner with importers, to raise capital, and to improve production processes. Creating private-sector partnerships may, in the long-run, be a more effective strategy for ensuring the growth of Rwanda's coffee sector than is one that relies too extensively on a centralized, government-run marketing board.

C. A Problematic Land Law

As an extremely scarce resource, land is highly contested in Rwanda: "[L]and was a factor behind social tensions before every major open conflict. Even today, more than 80% of all disputes in Rwanda are related to land."[413] For much of its history, Rwanda's rulers have owned most of the land.[414] With control of land in the hands of government, formal land markets did not develop.[415] Transfers often took place informally, and confusion and insecurity were common.[416] Local officials had great discretion over land allocation and could favor politically powerful individuals over marginalized people who may have held traditional use rights.[417]

In 2003, the Rwandan Parliament approved a Land Reform Decree that provides for individualized rights to property.[418] This policy provided the basis for the 2005 Land Law.[419] The Land Law specifies that people or associations that

411. *See* Kwibuka, *supra* note 401.

412. This growing acclaim is perhaps best illustrated by the fact that for the first time, in 2008, an African country hosted the Cup of Excellence coffee competition—the country was Rwanda. *See* Cup of Excellence, 2008 Rwanda Program, http://cupofexcellence.org/CountryPrograms/Rwanda/2008Program/tabid/418/Default.aspx (last visited Sept. 8, 2008).

413. Implications Case Study, *supra* note 293; *see also* Van Hoyweghen, *supra* note 293.

414. *See Rwanda-History*, EAST AFRICA LIVING ENCYCLOPEDIA, African Studies Center at the Univ. of Pa., http://www.africa.upenn.edu/NEH/rwhistory.htm (last visited November 11, 2008); *see also* Tor Sellstrom and Lennart Wolgemuth, The International Response to Conflict and Genocide: Lessons from the Rwanda Experience, STEERING COMMITTEE OF JOINT EVALUATION OF HUMANITARIAN ASSISTANCE TO RWANDA at Ch. 2, March 1996, http://www.reliefweb.int/library/nordic/book1/pb020.html.

415. Implications Case Study, *supra* note 293, at 11.

416. *Id.*

417. *Id.* (explaining that sales were restricted according the size of the buyer and seller's total land holdings); *see also* Musahara, *supra* note 293, at 4.

418. INDEPENDENT REVIEW OF LAND ISSUES, VOL. III, 2006-2007, EASTERN AND SOUTHERN AFRICA 29-30 (Martin Adams and Robin Palmer eds., 2007), *available at* http://www.kubatana.net/docs/landr/adams_palmer_indep_review_land_issues_0706.pdf.

419. Organic Law No. 08/2005 of 14/07/2005, Determining the Use and Management of Land in Rwanda, July 14, 2005, http://www.minirena.gov.rw/IMG/pdf/LOI_ORGANIQUE_FONCIERE.pdf. As of May, 2008 the Land Law had not yet been fully implemented as orders were still being drafted to facilitate the implementation. Interview with Minister of Natural Resources in Kigali, Rwanda (June 3,

own land via custom, or who have obtained land by previous purchase, or who have previously acquired it from a "competent authority" are "allowed to own it on long term lease."[420] These leases may be sold and transferred. Rural land is being registered locally, and urban, commercial property will be registered in a national cadastre in Kigali.[421] The government maintains a role in the resettling of people and in devising land-use and land-planning policy.[422]

The government hopes the land law will promote the consolidation of land holding.[423] By permitting the sale of leaseholds, small parcels could be sold to commercial farmers who will consolidate the land and create viable agri-businesses. This is both good and potentially bad. Farmers who wish to sell their land may benefit from a more formalized market. However, the law also contains provisions that could force some farmers to give up small parcels of land.[424] As Musahara notes, small, dispersed land holdings serve as a kind of insurance policy for subsistence farmers who would, in bad year, would risk losing all crops if land were consolidated:

> [L]and fragmentation in Rwanda serv[es] as a coping mechanism in smallholder agriculture, the typical Rwandan household farms an average of five plots. Some are in the valleys, others are upland and some near the household. In some parts of southern Rwanda, a household may have up to 14 crops growing in different fragments at different seasons.... Recently, Blarel, *et. al.*, noted that the costs of consolidation in Rwanda may not exceed the benefits of using land fragmented over the years in adopting to land scarcity.[425]

A more open, transparent land market is desirable, but the coercive provisions of the law could limit the evolved coping strategies of the poor. Pottier suggests that the law may actually bar people who own less than one hectare from registering their property.[426] The government is supposed to provide compensation for such confiscations, but it has not established clear standards for such payments. Although the government says that it wants to increase tenure security,[427] the new law may increase insecurity for those who are most vulnerable. These prohibitions and potentially vague use requirements place undesirable limits on the market for

---

2008); *see also* Pottier, *supra* note 293, at 510.

420. Organic Law No. 08/2005, *supra* note 419, at art. 5.

421. *Id.* at art. 31.

422. *See id.*

423. *Id.* at art. 20.

424. *Id.*

425. Musahara, *supra* note 293, at 11.

426. Pottier, *supra* note 293, at 521 (interpreting Arts. 62-65); *see also* Cramer, *supra* note 17, at 208-10 (discussing the English enclosure movement). The Rwandan land law may call the enclosure movement to mind. *Compare* Pottier, *supra* note 293, *and* Cramer, *supra* note 17.

427. The government "sees increased security of tenure or rights of address to land, and more effective land management, as important factors for the improvement of the agricultural sector and the economy as a whole, helping to create the resources needed to reduce poverty and to consolidate peace and social cohesion." Pottier, *supra* note 293, at 511.

real property. Further, they might well promote more corruption if individuals wish to consolidate land, or skirt these constraints and demands.

The new law may pose a special problem for women smallholders and their children. Under the 2005 law, people are required to register all parcels of land in the country;[428] however, women will face particular difficulties registering, inheriting and acquiring rights to land. Although the law prohibits discrimination on the basis of sex in relation to the ownership of or possession of rights over land,[429] Musahara argues that the law applies only to legally married women: "those in long-term unmarried relations (who are numerous) are not covered."[430] Only legally married women and their children are considered joint owners capable of providing consent[431] to the sale of jointly owned property; thus, unmarried women may not be able to stop the sale of land by their partners. There is uncertainty in the law regarding inheritance. For example, it is unclear if women inherit via the inheritance law or via the land law, for example.[432] Also of concern is the fact that custom still bars women from exercising their legal rights under the Land Law.[433] Unless these issues are resolved, the Land Law may create special difficulties for Rwanda's women, who do most of the agricultural work in the country.[434]

Security and clarity of tenure rights, whether customary or leasehold, are essential both to avoid future conflicts and to encourage increased investment in agriculture. However, the Land Law raises serious concerns, especially for women and for uneducated farmers who might be dispossessed of their land. Surely, these risks are undesirable in a nation with such high levels of poverty and such strong dependence on agriculture as a livelihood.

IX. CONCLUSION

Despite strong economic growth and clearly beneficial liberalization efforts in the coffee sector, much remains to be done to move Rwanda towards the VISION 2020 goal of becoming a stable, middle-income nation. Most Rwandans remain desperately poor and many will bear the physical and psychological wounds of genocide to their graves.

Yet there is reason for cautious optimism. The recent success of the nation's specialty coffee industry means that the income of some smallholder farmers is rising, and in turn, they are better able to feed themselves and their family, to send children to school, to buy insurance, to repair or improve homes, and to do other things that improve their standard of living. These benefits can be attributed to the

428. Organic Law No. 08/2005, *supra* note 419, at art. 30.

429. *Id.* at art. 4.

430. Musahara, *supra* note 293, at 12 (pointing out that "many couples are not legally married because of the expense, and polygamous households are not legally recognized and their offspring are not eligible to receive land as inheritance.").

431. Organic Law No. 08/2005, *supra* note 419, at art. 36.

432. Musahara, *supra* note 293, at 12.

433. *Id.*

434. *Id.* at 11.

government's liberalization of the coffee sector, which allows smallholders to keep more of the value of the product they grow. By freeing the coffee sector from the heavy-handed involvement of the government, the post-genocide administrations have given all farmers, Hutus and Tutsis, greater freedom to pursue entrepreneurial opportunities.

To deal with the nations' tragic past, the Rwandan government has adopted a multifaceted approach to reconciliation, including participation in the International Criminal Tribunal for Rwanda, creation of the Gacaca Courts, the National Unity and Reconciliation Commission, and a National Human Rights Commission. These efforts will likely bring a sense of justice and healing to citizens. However, these efforts have proved disappointing to many. What is perhaps most intriguing about the rise of the country's specialty coffee sector is the unintended consequence of this particular, broad-based liberalization: commercial activity within the sector seems to be prompting the development of more positive attitudes towards others. People who work together in the sector, at coffee cooperatives particularly, are more willing than they were in the recent past to interact with members of the other ethnic group. Trust levels are rising and people have more positive attitudes towards reconciliation. Though additional research needs to be done in this area, our exploratory survey work, combined with journalistic evidence presented above, suggests that people working together in the specialty coffee sector are finding an alternative path towards reconciliation.

Whether this kind of reconciliation is effective in the medium to long-term remains to be seen; however, the experiences of workers in the coffee sector strongly suggests that in post-conflict environments, governments should follow Rwanda's lead and liberalize trade and promote commercial interaction between former enemies. Such policy changes might just provide a cost-effective complement to more traditional reconciliation efforts and help forge new, shared identities.

FOREIGN DIRECT INVESTMENT, TRADE, AND CHINA'S COMPETITION LAWS*

MARK S. BLODGETT**

RICHARD J. HUNTER, JR.***

ROBERT M. HAYDEN****

"Whether a cat is black or white makes no difference. As long as it catches mice, it is a good cat." Deng Xiaoping

I. INTRODUCTION

The People's Republic of China, or the PRC, known more widely simply as China, holds nearly one-sixth of the world's population. It possesses one of the fastest growing economies in the world. In 2007, China experienced a growth rate of 11.4%.[1] As a result of its strong economy and growing population, China has the ability to greatly influence the global economy. It is not surprising, therefore, that the newly adopted Chinese Anti-Monopoly Law, or AML, has been the subject of much interest, discussion, and debate. The legislation, which became effective August 1, 2008, has a variety of purposes: to safeguard competition in China; to protect the Chinese economy against monopolistic conduct; to improve economic efficiency; and, perhaps most importantly from the Chinese perspective, to promote the healthy development of its "socialist market economy."[2]

---

* The Denver Journal of International Law and Policy expresses no opinion as to the accuracy of this article's Chinese language sources, with regard to citations, references, and translation.

** Associate Professor of Business Law & Ethics, Sawyer Business School, Suffolk University, Boston, Mass. Director, Center for Global Business Ethics & Law.

*** Professor of Legal Studies and International Business, Stillman School of Business, Seton Hall University, South Orange, New Jersey. Fellow, Institute for International Business.

**** Assistant Vice President, The Bank of New York Mellon.

1. Information relating to economic growth, investment, foreign trade, population, and other economic and political factors are garnered and adapted from the CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2007), https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html#Econ [hereinafter CIA].

2. Not surprisingly, various translations and drafts of the AML exist. *See* Anti-Monopoly Law of China (adopted by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007), art. 1, *translated in* Nathan Bush, O'Melveny & Myers L.L.P., *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, THE ANTITRUST SOURCE, at app. 1-14 (Oct. 2007), http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf; Anti-Monopoly Law of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), 2007 Order of the President No. 68, *translated in* 2007 China Law LEXIS 1950. The content of this article, however, refers to the AML translation provided in Nathan Bush, *The PRC Antimonopoly Law. See also* H. Stephen Harris, Jr., *Legal Implications of a Rising China: The Making of an Antitrust Law:*

Minister of the National Development and Reform Commission, Ma Kai, has underscored the contextual importance of China's transformation and transition in the development of the AML. The Minister noted on July 12, 2005, that China had essentially completed the transition to a socialist market economy from a highly centralized planned economy "after 26 years' endeavor on reform."[3] Minister Ma asserted that China had successfully established the fundamental basis of an economic system in which public ownership of the economy plays the "leading role and co-exists and shares opportunities with the economy in various other ownerships."[4] Indeed, by the end of 2004, more than fifty percent of the nearly 3,000 state-owned or state-controlled large major enterprises had turned into stock-sharing (so-called *joint stock*) companies.[5] As an indication of the pervasiveness of market forces in the "new Chinese market," the private sector now provides "four-fifths of new job opportunities and generate[s] one-third of Chinese GDP."[6] In this context, the drive for both foreign direct investment and foreign trade—key aspects of the Chinese economy that would rely heavily on the proper functioning of a truly competitive market—occupy unique positions of importance.

The Chinese AML was drafted within the context of three principal international concerns relating to the restrictive or monopolistic nature of competition within the Chinese market: *regional monopolies*, enjoying local or regional protection; certain *sectoral monopolies* by established Chinese firms and state-owned enterprises (SOEs), termed *administrative monopolies*; and the perception of significant *abuse of their dominant positions* by some *multinationals* operating within the Chinese market.[7]

While the legislation represents yet another significant step towards China's transition to a full market economy and away from one that is centrally planned,[8]

The Pending Anti-Monopoly Law of the People's Republic of China, 7 CHI. J. INT'L L. 169, 183-84 (2006) (providing information on the AML history and draft).

3. *China has Socialist Market Economy in Place*, PEOPLE'S DAILY ONLINE, July 13, 2005, http://english.peopledaily.com.cn/200507/13/eng20050713_195876.html.

4. *Id.*

5. *Id.*

6. *Id.*

7. *See* Jun Wei & Janet L. McDavid, *Antitrust Law, China's Anti-Monopoly Law*, NAT'L L. J., Oct. 15, 2007, *available at* http://www.hhlaw.com/files/Publication/1495de2a-b30d-44ad-822c-6ffea0cd69bf/Presentation/PublicationAttachment/145c9a50-b1eb-4083-885f-863242014c68/15Oct07_NLJ_ChinaAntiMonopoly_JWei_JMcDavid.pdf.

8. The Polish process of economic transformation is quite instructive and has provided a more general model for Eastern and Central European nations, as well as for a systemic comparison for China. Named for the Minister of Finance and Deputy Prime Minister Leszek Balcerowicz, the program in Poland was based on five philosophical *pillars of economic transformation:* (1) transformation of the monocentric system of state central planning into a functioning market economy; (2) liberalization of economic functions, especially in relation to foreign trade and foreign direct investment; (3) privatization of state-owned-enterprises (SOEs); (4) construction of an effective social safety net; and (5) mobilization of international financial assistance to support the process. In the process of economic transformation, Balcerowicz was aided by a well-prepared transition team consisting of Polish nationals and so-called "Polonia" (émigré) specialists. The leading foreign expert was Harvard Economist Jeffrey Sachs. Both Balcerowicz, who later served as President of the National Bank of Poland, and Sachs remain enigmatic and quite controversial figures even today in Poland. For

many commentators have expressed concern over the vague and inefficient mechanics of the proposed legislation.[9] One specific concern is that China will reserve to itself the ability to review any transaction affecting its "national security," which may provide China with unreasonable control over multi-nationals operating in the Chinese market.

This article will analyze several of the concerns raised by the new legislation. In order to accomplish this purpose, the article will first discuss the history and progression of the legislation, beginning with the circumstances that led to initial discussions on the issue which began as early as 1994. Information on the background of the legislation from a *comparative systemic viewpoint*—that is, from the standpoint of Poland, itself a "transition economy"—will be offered. The article will next review several of the most important provisions of the new law and will discuss similarities and differences between the final draft legislation and the competition laws of other nations. Finally, the article will conclude with an analysis of why the legislation may prove unworkable for China in the long run in the global business environment without significant refinement or amendment by raising several of the persistent concerns raised by its implementation.

II. CHINA IN TRANSITION – THE CONTEXT

In 1978, Chinese President Deng Xiaoping began a series of initiatives in order to transform China's economy from a traditional command-and-control economy into China's version of a "market economy," later termed a "socialist market economy." In fact, the Chinese Constitution itself was amended in 1988 and 1999 to incorporate the concept of a "socialist market economy," rather than one based solely on state central planning.[10] The initiatives carried out were a part

---

a discussion of the core transformation program from a "foreign" viewpoint, see JEFREY SACHS, POLAND'S JUMP TO THE MARKET ECONOMY 45-46 (1994). For a unique "insider" view of the process, see LESZEK BALCEROWICZ, SOCIALISM, CAPITALISM, TRANSFORMATION 273-369 (1996). Interestingly, the elements of the "Balcerowicz Plan" all have been implemented, in one form or another, in China in its transition to a socialist market economy.

9. Leszek Balcerowicz, the architect of "shock therapy" in Poland, has identified certain *derivative traits* of the command-and-control economy that were pervasive in the entire region of Central and Eastern Europe, and as well in China, and which were the object of systemic economic reform. These include:

- Administrative *price fixing* by central authorities;
- *Isolation* of domestic producers from foreign markets;
- Excessive *regulation of imports* through licenses and import quotas;
- The tendency by central planners to engage in "*import substitution*," often accomplished through rationing, queues, lines and coupons;
- "*Soft budget constraint*" in which targets of planning are revised downward or inputs significantly increased in order to meet plan targets;
- The *lack of true commercial and financial institutions*;
- *Monopolization* of the state sector due to extreme organizational concentration, the centralization of organizational rights, and the lack of foreign competition; and perhaps most importantly,
- The *lack of any motivation mechanisms* for either line managers or workers.

See generally RICHARD J. HUNTER, JR. & LEO V. RYAN, FROM AUTARCHY TO MARKET: POLISH ECONOMICS & POLITICS 1945-1995, 37 (1998).

10. *See* XIAN FA art. 15 (1988) (P.R.C.) (amended Mar. 29, 1993); XIAN FA pmbl. (1988) (P.R.C.)

of a pursuit of *Four Modernizations* in the areas of industry, agriculture, science and technology, and the military.[11] During this transition period, China became more and more reliant on international trade and foreign investment for its growth. Professor Mark Williams has noted:

> The expansion of China's participation in international trade has been one of the most outstanding features of the country's economic development. Chinese exports rose on average 5.7 percent in the 1980s, 12.4 percent in the 1990s, and 20.3 percent between 2000 and 2003. By 2003, China's exports growth rate was seven times higher than the export growth rate recorded by the world as a whole. Foreign direct investment has also soared, and currently over a billion dollars in FDI are invested in China each week.[12]

(amended Mar. 14, 2004); XIAN FA art. 11 (amended Mar. 14, 2004) *available at* http://english.people.com.cn/constitution/constitution.html (last visited Nov. 13, 2008). For a definitive description of the system of central planning, *see* JÁNOS KORNAL, THE SOCIALIST SYSTEM: THE POLITICAL ECONOMY OF COMMUNISM (1992). As early as 1960, Polish economist and diplomat Oskar Lange had written of a "'new economic calculus' where decentralization in planning and management of the economy was both vital and necessary." Lange had argued that the Stalinist scheme was not suited to a "mechanical translation," and that prices, for example, should be fixed on the basis of a "market mechanism," linking state planning to market forces. *See* HUNTER & RYAN, *supra* note 9, at 23-24; *see also* OSKAR LANGE, FUNKCJONOWANIE GOSPODARKI SOCJALISTYCZNEJ [The Functioning of the Socialist Economy] (1960). For a spirited criticism of Lange, however, *see* JOHN MONTIAS, CENTRAL PLANNING IN POLAND 267 (1963). While Lange's criticisms were made in the context of analyzing the flaws of central planning in Poland, their application can be seen as relevant for China as it has sought to adapt its Stalinist economic model to the market.

11. *See* Robert C. Berring, *Chinese Law, Trade and the New Century*, 20 NW. J. INT'L L. & BUS. 425, 436 & 444 (2000) ("Call the current economy 'market socialism' if you wish, but it bears no relation to communist or socialist theory.").

12. Mark Williams, *Wal-Mart in China: Will the Regulatory System Ensnare the American Leviathan?* 39 CONN. L. REV. 1361, 1366 n.9 (2007) (citing Javier Silva-Ruete, Alternate Executive Dir. of IMF for the Constituency of Arg., Bol., Chile, Para., Peru, & Uru., The Development of China's Export Performance, Address before Conference at the Central Reserve Bank of Peru (Mar. 7, 2006), *available at* http://www.imf.org/external/np/speeches/2006/030706.htm). Professor Williams describes the influx of foreign capital into China and notes that "[f]oreign investment in China is generally structured via a joint venture vehicle with a local enterprise." *Id.* at 1371. In the 1990s, Chinese law required foreign owned retailers to be in the form of a joint venture and, in addition, imposed other restrictions. *Id.* at 1367. This regulation was repealed as a result of Chinese accession to the WTO. *Id.* at 1371. As a result, China now permits foreign investors to establish wholly-owned foreign enterprises, which are Chinese legal entities, possessing a separate legal personality. Many may also have limited liability. *See id.* at 1372 n.39 (citing Law on Wholly Foreign-Owned Enterprises (Adopted by the Standing Comm. Nat'l People's Cong. Apr. 12, 1986, revised Jul. 24, 2006), *available at* http://openchina.com.es/wp-content/uploads/2007/04/wholly-foreign-owned-enterprise-law-of-the-people.pdf). The international law firm of Jones Day reports the following information concerning the basics of foreign investment in China:

> Direct foreign investment into the People's Republic of China ("PRC") is generally carried out through the establishment of a Sino-foreign joint venture (either an equity joint venture ("EJV") or a cooperative joint venture ("CJV") or a wholly foreign-owned enterprise ("WFOE") (such vehicles are collectively referred to as "foreign investment enterprises," or "FIEs"). For more passive, indirect business activities . foreign companies may establish representative offices in China.

With the development and growth in international trade and international investment, China recognized a need to ensure that its domestic market would be free from price fixing, monopolization, and the effects of invidious agreements between suppliers and/or competitors that restricted competition. There was also a strong perception that China needed to curtail foreign economic dominance and to transform poorly performing state-owned-enterprises (SOEs) into fully-functioning private enterprises. Attorney Stephen Harris noted: "These policies and many subsequent structural reforms have been pursued in an avowed effort to transform China's centrally planned economy, dominated by state-owned-enterprises, to a system that embodies free market characteristics but retains certain socialist attributes."[13] An early attempt at reform was the enactment of the *Enterprise Act of 1988*. This law promised that factories would no longer be able to depend on state subsidies and state support and would face the real prospect of "bankruptcy if they failed to adapt to market competition."[14] This law, seen as revolutionary in its time, was described by Zhang Yanning, Deputy Minister of the State Commission for Restructuring the Economy, as moving away from direct control of central government departments or authorities over industries toward a system in which "the state regulates the market, which in turn guides the enterprises," in large part by making managers responsible for profits and losses.[15] However, the effect of

---

In terms of the legal form, FIEs are almost always established as limited liability companies, although joint stock companies are also permitted under PRC law. FIEs closely resemble Western-style corporations in many respects but also differ in certain fundamental areas, such as the following:

- Investors in an FIE limited liability company do not hold issued shares *per se,* but instead hold equity interest in the "registered capital" of the relevant FIE;
- Voting and decision-making authority in an FIE is generally vested in the board of directors rather than the investors;
- FIEs generally have a specified term (*e.g.*, 30 years) depending on the nature of the project, which term can be renewed under PRC law, although the conditions of any such renewal are not clearly specified in the law;
- Various matters, including the initial establishment of an FIE, transfer of a party's equity interest, increase of an FIE's registered capital, change of an FIE's business scope, and dissolution of an FIE, are subject to approval by the Chinese authorities; and
- FIEs must operate within an approved "scope of business," which tends to be relatively specific and, for manufacturing FIEs in particular, will limit sales activities to the sale of "self-manufactured" products.

Jack J.T. Huang et al., JONES DAY, *Mergers and Acquisitions in China*, July 2006, http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S3571. As Professor Berring notes, "To attract foreign investment China had to do several things. The first was change its internal culture, the second was to win the trust of the rest of the world that investing in China was a rational move." Berring, *supra* note 11, at 437.

13. Harris, *supra* note 2, at 173 (citing the Chinese Enterprise Act (1988), the Anti-Unfair Competition Law of 1993, the Company Law (1993), and the Price Law (1997)).

14. *Id.* (citing Mark E. Monfort, *Reform of the State-Owned Enterprises and the Bankruptcy Law in the People's Republic of China*, 22 OKLA. CITY U. L. REV. 1067 (1997)).

15. *China Enacts Law Giving More Power to Enterprises,* ASSOCIATED PRESS, Aug. 1, 1988

this law was problematic. Harris notes that "it [was] broadly agreed that entrenched government monopolies and local and regional protectionism have hampered any wholesale transition to market competition."[16]

Perhaps reflecting this lack of real progress, China engaged in a wholesale revamping of its legal system in areas dealing with monopolistic conduct. One of the first laws enacted was the *Law Against Unfair Competition*.[17] This law was

---

(quoted in Harris, *supra* note 2, at 173 n.15).

16. Harris, *supra* note 2, at 173. One of the reasons for this failure may have been the existence of the bureaucratic system in managing enterprises. An analogy to the Polish experience seems apt. By the time of the collapse of the Soviet system in Poland in the period 1989-1991, the *nomenklatura* or bureaucratic system in Poland had developed into a highly centralized administrative structure—not only for national economic and political organs, but also for intermediary organizations, whereby smaller enterprises operated only as a part of a huge centrally organized bureaucracy. By the 1980's, the system had virtually elapsed into a "lunatic collage of incompetence, privilege, pandering and outright corruption," based on a principle of underqualification and a perverted practice of negative selection. *See*, LAWRENCE WESCHLER, SOLIDARITY, POLAND IN THE SEASON OF ITS PASSION102 (1982). It appears that the Chinese system has exhibited many of these same characteristics. For a description and discussion of the Chinese bureaucratic system, *see* Eric Zusman & Jennifer L. Turner, *Beyond the Bureaucracy: Changing China's Policymaking Environment*, CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 121 (Kristen A. Day ed., 2005); David Li, Address at the Shorenstein Seminars on Contemporary East Asia on The Dynamics of Institutional Change in China: The Role of the Bureaucracy (Mar. 31, 1998), http://ieas.berkeley.edu/Shorenstein/1998.03.html; DAVID M. BACHMAN, BUREAUCRACY, ECONOMY, AND LEADERSHIP IN CHINA (1991). For an interesting "inside" description of the *nomenklatura* system as it operated in Central and Eastern Europe, see MILOVAN DJILAS, THE NEW CLASS (1957). Djilas is credited with coining the term "New Class" as a description of the political and economic bureaucracy. The term "*apparatchik*" usually referred to party members, especially in the former Soviet Union. The term most often used in China to describe the "ruling class" is *oligarchy*. *See also, e.g.*, Richard J. Hunter & Leo V. Ryan, *Economic Transformation Through Foreign Direct Investment in Poland*, 6 J. EMERGING MKTS. 18 (2001) (providing a comprehensive "country study" of Poland). The role of the *nomenklatura* is still hotly debated in Polish society, as it will no doubt be in China. A pattern was common in transition economies throughout the region of Central and Eastern Europe that has been duplicated during the Chinese "transition." Not surprisingly, members of the *nomenklatura* in Poland almost immediately became active in private businesses and banks—especially as the prospects for advancing their bureaucratic careers in the "new system" appeared more limited. The particular type of privatization carried out by the *nomenklatura* in the early period has sometimes derisively been referred to as "spontaneous privatization," but was, in reality, theft of public assets and property. For a discussion of the phenomenon of "spontaneous privatization," *see* HUNTER & RYAN, *supra* note 9, at 112-13. Directors and managers often used their new authority to split up or divide state companies or to spin off or divest units into limited liability companies or other new joint ventures—many under their own control or the control of their friends and associates. Skilled workers were often transferred to the new enterprises to the detriment of their former enterprises. In many nations of Central and Eastern Europe—but most especially in Poland—members of the *nomenklatura* also greatly benefited both politically and economically from popular discontent that was practically unavoidable during economic reforms started under very difficult economic and political conditions and circumstances. Members of the *nomenklatura* were seen as major "winners" in the transformation process. The issue of *winners vs. losers* in post-Communist Poland is discussed at length in Richard J. Hunter, Jr. et al., *Out of Communism to What?: The Polish Economy and Solidarity in Perspective*, 39 THE POLISH REV. 328-329, 334-335 (1994). We offer this information for comparative purposes based on our extensive study of the processes and results from the transformation throughout the region of Central and Eastern Europe.

17. Law Against Unfair Competition (promulgated by the Standing Comm. Nat'l People's Cong.,

enacted in 1993 and would be administered by the State Administration of Industry and Commerce (SAIC). The major significance of this legislation was that while it prohibited a broad range of anticompetitive acts, in practice, the law only applied to the protection of trademarks.[18]

The next significant piece of legislation was the *Price Law*, which became effective in 1997, and was administered by the National Development and Reform Commission (NDRC).[19] Similar to the *Law Against Unfair Competition*, this legislation had a broad scope—namely, to outlaw all price fixing. Yet, in a similar fashion, the *Price Law* was applied in a more narrow fashion. In particular, the *Price Law* merely provided local authorities with the power to control prices and thus served goals other than ensuring free competition.[20] In addition, China enacted other laws, such as the *Protection of the Rights of Consumers Act* (1993) and *The Company Law* (1994)—but these laws too were narrowly construed.[21] General confusion seemed to reign among the various governmental agencies as to which agency would enforce which laws,[22] different remedies were provided for the same underlying actions, and perhaps most importantly, Chinese officials lacked the expertise to fully appreciate the complexities of market forces and the harmful effects that certain other seemingly minor actions might have on the creation of an otherwise competitive market.

III. CHINA AND THE WTO

China concluded negotiations with the World Trade Organization (WTO) on September 17, 2001, concerning China's terms of membership. Among the commitments undertaken by China were the following:

- China will provide non-discriminatory treatment to all WTO Members. All foreign individuals and enterprises, including those not invested or registered in China, will be accorded treatment no less favorable than that accorded to enterprises in China with respect to the right to trade.
- China will eliminate dual pricing practices as well as differences in treatment accorded to goods produced for sale in China in comparison to those produced for export.

Sept. 2, 1993, effective Dec. 1, 1993), *translated in* CCPIT Patent and Trademark Law Office, http://www.ccpit-patent.com.cn/references/Law_Against_Unfair_Competition_China.htm (last visited Dec. 23, 2008) (P.R.C.).

18. Harris, *supra* note 2, at 175 (citing Paul B. Birden, Jr., *Trademark Protection in China: Trends and Directions*, 18 LOY. L.A. INT'L & COMP. L. REV. 431, 447-49 (1996)). *See* Law Against Unfair Competition, art. 5(1).

19. Price Law (issued by President's decree, Dec. 29, 1997, adopted by the Standing Comm. Nat'l People's Cong., May 1, 1998), *translated at* China Development Gateway (2004), http://en.chinagate.com.cn/english/430.htm.

20. Again, the purpose of the law was to establish a new pricing system "compatible with the requirements of a socialist market system." Harris, *supra* note 2, at 176 n.33 (citing *China's Price Law Embodies Features of Modern Market Economy*, CHINA BUS. INFO. NETWORK, (Apr. 30, 1998)(quoting Wei Dale of the State Development Planning Commission). *See* Price Law, art. 19.

21. *See* Monfort, *supra* note 14, at 1095.

22. *See* Harris, *supra* note 2, at 175.

- [P]rice controls will not be used for purposes of affording protection to domestic industries or services providers.
- [T]he WTO Agreement will be implemented by China in an effective and uniform manner by revising its existing domestic laws and enacting new legislation fully in compliance with the WTO Agreement.
- Within three years of accession, all enterprises will have the right to import and export all types of goods and trade them throughout the customs territory with limited exceptions.
- China will not maintain or introduce any export subsidies on agricultural products.[23]

As China acceded to membership in the WTO on November 11, 2002, many of China's potential trading partners were quite skeptical that China would be able to abandon practices that discriminated in its own favor, or would be able to enact comprehensive legislation aligning the Chinese legal system with *global trade rules and norms*.[24] After all, it was widely held that "China has traditionally been suspicious of trade with the West, and has imposed substantial limits and regulations upon foreigners within the country."[25] In addition, China voiced a concern that following "international norms" might result in significant job losses as a result of the almost inevitable demise of its state-owned-enterprises.[26] However, in balancing these concerns with the prestige and power that membership in the WTO would certainly bring to China, the overriding hope of China's accession was that membership in the WTO would act as a "catalyst for reform as investors seek a more stable, predictable destination for capital."[27] Professor Hoogmartens writes: "The international investor confidence resulting from WTO membership determines its attractiveness and allows the country to amass foreign capital to pay for sound domestic reforms and hence, further industrialization."[28]

In this process, the legal system necessarily would play an important, perhaps critical, role. The World Bank had noted in 1997: "The transition from a command economy to a market-oriented economy makes legal rules matter. Direct

23. Press Release, World Trade Organization, WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001), *available at* http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

24. *See generally* Lindsay Wilson, note, *Investors Beware: The WTO Will Not Cure All Ills in China*, 2003 COLUM. BUS. L. REV. 1007, 1007 & 1009-14 (2003) (describing the main issues confronting the Chinese legal system). By 1980, China had joined both the IMF and the World Bank. *See* HAROLD K. JACOBSON & MICHEL OKSENBERG, CHINA'S PARTICIPATION IN THE IMF, THE WORLD BANK, AND GATT: TOWARD A GLOBAL ECONOMIC ORDER 75 (1990). China gained observer status in GATT in 1984—a prelude to full WTO membership.

25. Wilson, *supra* note 24, at 1007.

26. *See generally* Jan Hoogmartens, *Can China's Socialist Market Survive WTO Accession? Politics, Market Economy and Rule of Law*, 7 LAW & BUS. REV. AMS. 37 (2001).

27. Wilson, *supra* note 24, at 1029.

28. Hoogmartens, *supra* note 26, at 43 (citing Monica Hsiao, comment, *China and the GATT: Two Theories of Political Economy Explaining China's Desire for Membership in the GATT*, 12 UCLA PAC. BASIN L.J. 430, 431 (1994)).

government control over economic decisions is replaced by the rule of law that is necessary to protect private property and contract rights."[29] As early as 1999, China had announced a Five Year People's Court Reform Plan which sought to "improve China's court system by improving the expertise of judges, enforcing anticorruption regulations, allowing some discovery, and improving the efficiency and enforcement of judgments."[30] It may seem ironic, but "The WTO does not require a member state to have a good legal system, however, or even a fair one. Instead, it merely insists that foreigners and nationals are treated alike, for better or for worse."[31] Attorney Lindsay Wilson identified three major "points of interest" concerning Chinese legal institutions "(1) the lack of a cohesive legal "system;" (2) pervasive vagueness in the language of statutes and administrative rules; and (3) difficulty of enforcing judgments once they are obtained."[32]

---

29. The Asian Development Bank (ADB) notes: "The rule of law is generally defined as (i) general, abstract rules that are prospective, never retrospective, in their effect; (ii) rules that are known and certain; (iii) rules that are equal in that they do not discriminate based on irrelevant distinctions; and (iv) a separation between regulators and the regulated. The rule of law in the business environment is expected to guarantee transparency, predictability, and consistency." ASIAN DEVELOPMENT BANK, PRC PRIVATE SECTOR ASSESSMENT, PEOPLE'S REPUBLIC OF CHINA 23 (2003), http://www.adb.org/Documents/Reports/PSA/PRC/PRC_PSA.pdf. During the 1980s, judges were routinely appointed from among the ranks of the Chinese Communist Party or from the military. "Only rarely did these judges have a college education, let alone any sort of legal training." *See* Wilson, *supra* note 24, at 1010. In terms of reforming the "lawyer system" itself in the PRC, it is also important to note that prior to 1993, lawyers were classified as "state legal workers," and virtually all law firms were owned or controlled by the State. Beginning in 1993, the Ministry of Justice took several measures to achieve a fundamental change. These measures included encouraging lawyers to set up private law firms. *See* Ma Chenguang, *Better Legal Services Sought*, CHINA DAILY, Jan. 5, 1994, at 1; encouraging more Chinese citizens to take up the legal profession. *See also* Chang Hong, *State Aims to Triple Number of Lawyers*, CHINA DAILY, July 22, 1993, at 3 (scheduling national bar examinations once each year instead of once every two years); *Annual Exam Set for New Lawyers*, CHINA DAILY, June 12, 1993, at 3 (granting lawyer status to those who have obtained law degrees in foreign countries, without first having to pass national bar examinations, provided that the lawyer has worked in a domestic law firm for one year—designed to accommodate the need for lawyers with certain critical "specialties" or skills); He Jun, *Lawyers to Grow in Number and Role*, CHINA DAILY, Oct. 16, 1993, at 1. An interesting parallel to Poland's entry into the EU can be seen in China's accession to the WTO.

30. Stephanie M. Greene, *Protecting Well-Known Marks in China: Challenges for Foreign Mark Holders*, 45 AM. BUS. L.J. 371, 382-83 (2008).

31. Wilson, *supra* note 24, at 1009.

32. *Id. See also* Greene, *supra* note 30, at 383. For a comparative view of various legal aspects of the transformation process, see Richard J. Hunter, Jr. et al., *Legal Aspects of the Transformation Process in Poland: Business Association Forms*, 40 THE POLISH REV. 387, 387-407 (1995). *See also* RICHARD J. HUNTER, JR. ET AL., POLAND: A TRANSITIONAL ANALYSIS (2003) (discussing the issues of foreign direct investment, international trade, taxation, and Poland's accession to the European Union in the context of economic transition). These issues are equally central in the context of China's continuing transition or evolution to its unique "socialist market economy." Poland's antimonopoly law is today a mainstay of its economic transformation. It is termed The Law on Competition and the Protection of Consumers' Interests of 15 December 2000, and provides:

- Prohibition of concerted practices, agreements and associations between firms which may prevent, restrict or distort competition and prohibition of abuse of a dominant position;
- Preventive supervision of mergers which may create or strengthen a dominant market position.

POLISH INFORMATION AND FOREIGN INVESTMENT AGENCY, COMPETITION LAW (2006), http://www.paiz.gov.pl/index/?id=0e139b17a92b2df7d6c3c840e51465fe (summarizing the law and

As of September 2002, as a part of its accession to the WTO, 2,300 of China's laws and government regulations that were deemed potentially incompatible with WTO requirements were carefully reviewed and either amended or repealed.[33] China further announced that if there were a conflict between domestic law and China's obligations to the WTO, the latter would rule—as an indication that the Chinese Government was committed to the adaptation of the WTO rules-based regime.[34] In addition, and perhaps most importantly, in March of 2001, China's National People's Congress (NPC) Standing Committee declared that China would soon issue a draft of a comprehensive antitrust law that would deal directly with many of the perceived difficulties in assuring real competition in the Chinese market.[35]

IV. DRAFTING THE ANTIMONOPOLY LAW

As China began to develop its unique socialist market economy, many commentators noted that it was important to create a transparent legislative regime that would apply to transactions that directly involved the acquisition of domestic companies by foreign investors (termed *onshore transactions*), as well as to foreign transactions (termed *offshore transactions*). There were several attempts in the period 2002-2005 to construct viable and workable antimonopoly legislation.[36] The following are the main highlights of the process:

- "In 2002, the Ministry of Foreign Trade and Economic Cooperation ('MOFTEC'), a predecessor of MOFCOM [the Ministry of Commerce], promulgated draft rules on the notice and approval process for *concentrations* involving foreign multinationals. These rules were largely based upon... preexisting restrictions on foreign investment, and were criticized for the implication that they would be applied solely to foreign companies [and not to Chinese organizations]."[37]
- "In March 2003, the Provisional Mergers & Acquisitions Rules were promulgated by MOFCOM and SAIC [the State Administration for Industry and Commerce]."[38]
- In June 2003, the National Development and Reform Commission (NDRC) promulgated the so-called "Provisional Rules" in order to deal with the

---

explaining that it deals with antitrust, merger control, and state aid).

33. *See generally,* ASIAN DEVELOPMENT BANK, *supra* note 29. Among the laws that were repealed in China was the law that required foreign-owned retailers to be in the form of joint ventures. *See Amendments to Law on Chinese-Foreign Equity Joint Ventures Submitted to NPC*, PEOPLE'S DAILY ONLINE, Mar. 9, 2001, *available at* http://english.peopledaily.com.cn/200103/09/eng20010309_64556.html.

34. ASIAN DEVELOPMENT BANK, *supra* note 29.

35. Harris, *supra* note 2, at 176-77.

36. A chronology of the various iterations and stages of the antimonopoly law may be found in Harris, *supra* note 2, at 177-181. Harris is a distinguished and recognized expert in the field and was a participant in a major conference hosted by MOFCOM outside of Beijing in October 2003, attended by leading academics from China and practitioners from Japan, Germany, and the United States.

37. *Id.* at 176-77 (citing ECONOMIST INTELLIGENCE UNIT, *New Antitrust Rules* (Oct. 24, 2002).

38. *Id.*

expected flood of foreign direct investment prior to the final enactment of any comprehensive legislation.[39] These "provisional rules" were later called "Regulations on the Mergers and Acquisitions of Domestic Enterprises by Foreign Investors."[40] The limited application of the 2003 rules concerned some foreign investors who interpreted the regulation's "target" on foreign investors as a possible harbinger of biases that might continue to prevail in the substance or enforcement of any future legislation. These "Provisional Rules" included several more traditional antitrust provisions dealing with price fixing, monopolistic conduct, and predatory pricing. Harris notes that some saw these provisional rules as a "serious move toward the enactment of a comprehensive antitrust law. Others, however, saw the Provisional Rules as an indication that the drafting of such a law was bogged down, resulting in a few elements of the draft law being issued in the form of the Provisional Rules. Enforcement of the Provisional Rules was ultimately abandoned."[41]

- In 2003, the State Council Legislative Office (LAO) undertook a thorough review of the 2002 Draft Antimonopoly Law, prepared by the former State Economic and Trade Commission (SETC).[42] The October 2002 Draft had proscribed collusion among businesses, abuse of market dominance, and excessive concentrations. The 2002 draft had also included provisions prohibiting abuses of administrative power by governmental units through what were termed *administrative monopolies*. Interestingly, Chapter 6 of the 2002 Draft Law provided for the creation of an Anti-Monopoly Management Body of the State Council. A later draft diffused enforcement of the Draft Law among three separate agencies: MOFCOM, with responsibility for merger review and administrative (state) monopolies; SAIC, responsible for overseeing "monopoly agreements" and abuses of a dominant position; and the NDRC, responsibility for price collusion and bid-rigging.
- The February 2004 draft called for the establishment of a *single* "competent Anti-Monopoly Authority under the Ministry of Commerce."[43] This provision was retained in the July 2004 draft (it was actually promulgated in March 2004) issued by MOFCOM. Concerns about abuses

39. *Id.*

40. *See Do's, Don'ts of M & As*, CHINA DAILY, May 30, 2005, *available at* http://www.chinadaily.com.cn/english/doc/2005-05/30/content_446763.htm. *See also* FRESHFIELDS BRUCKHAUS DERINGER, NEW CHINESE MERGER CONTROL RULES 1 (2003), http://www.freshfields.com/publications/pdfs/practices/5356.pdf (noting that the rules stipulate that mergers and acquisitions may not "result in excessive concentration and exclusion of competition and may not disturb the social or economic order or harm public interest"). The four issuing governmental bodies were the Ministry of Foreign Trade and Economic Cooperation (MOFTEC—now the Ministry of Commerce), the State Administration for Industry and Commerce (SAIC), the State Administration of Taxation, and the State Administration of Foreign Exchange.

41. Harris, *supra* note 2, at 178.

42. *Id.*

43. *Id.* at 179.

by foreign firms—including Microsoft, Kodak, and TetraPak[44]—were raised in a report issued by the Fair Trade Bureau of SAIC, although allegations were vigorously denied by these firms.[45] Prior to the release of the February and March drafts, SAIC indicated in January 2004 that it supported a limitation of enforcement to private conduct, thereby *exempting* official government conduct.[46] MOFCOM proceeded to set up its own Anti-Monopoly Office in September 2004.

- MOFCOM's Anti-Monopoly Office proffered a "Submission Draft" in February 2004, which was similar to a subsequent March 2005 draft.[47] This draft dropped the reference to creation of the MOFCOM enforcement authority and instead called for the establishment of an "anti-monopolization authority under the State Council." In April 2005, the State Council released a draft law, providing for the establishment of an Anti-Monopoly Authority under the State Council[48] with broad powers to both implement and enforce the underlying law.[49]
- A revision dated July 27, 2005, provided a strong basis for the eventual Anti-Monopoly Law. This draft provided for an Anti-Monopoly Authority

---

44. *See* Wang Xiaoye, *Report: Anti-Monopoly Law Vital*, CHINA DAILY, Aug. 20, 2004, at 11, *available at*: http://www.chinadaily.com.cn/english/doc/2004-08/22/content_367692.htm (cited in Harris, *supra* note 2, at 179 n.52).

45. *See, e.g.*, *Kodak Denies Monopolistic Accusations*, CHINA DAILY, June 8, 2004, *available at*: http://www.chinadaily.com.cn/english/doc/2004-06/13/content_338954.htm (cited in Harris, *supra* note 2, at 179 n.53).

46. *See* Xue Zheng Wang, *Challenges/Obstacles Faced by Competition Authorities in Achieving Greater Economic Development through the Promotion of Competition*, ¶ 2, Org. Econ. Coop. Dev. [OECD] Doc. CCNM/GF/COMP/WD(2004)16 (Jan. 9, 2004), *available at*: http://www.oecd.org/dataoecd/18/51/23727203.pdf (cited in Harris, *supra* note 2, at 180 n.54) (asserting that "[a]ntitrust law is supposed to be against private anticompetitive conduct and is not supposed to be applied to markets that are controlled or regulated by the government"). The SAIC submission was to an OECD Global Competition Forum.

47. Harris, *supra* note 2, at 180.

48. Beijing Official Website International, Political System and State Structure, http://www.ebeijing.gov.cn/BeijingInfo/BJInfoTips/BeijingHistory/t951208.htm (last visited Nov. 15, 2008) ("The State Council, the Central People's Government, is the highest state administrative body. The State Council carries out the laws enacted and decisions adopted by the NPC and its Standing Committee. The State Council is responsible to the NPC and its Standing Committee, and reports to them on its work. The State Council exercises the following functions and powers: in accordance with the Constitution and statutes, formulates administrative measures, enacts administrative regulations, promulgates decisions and orders; exercises unified leadership over the work of the ministries and commissions and the work of other organizations under its jurisdiction; exercises unified leadership over the work of local state administrative bodies at different levels throughout the country; draws up and implements national economic and social development plans, and the state budget; directs and administers economic work, urban and rural development, and work in education, science, culture, public health, physical culture and family planning; directs and administers civil affairs, public security, judicial administration and supervision, as well as national defense construction; manages foreign affairs and concludes treaties and agreements with foreign states; and in accordance with the law, appoints, removes and trains administrative officers, appraises their work, and rewards or penalizes them. The State Council is composed of the premier, vice-premiers, state councillors, the heads of the various ministries and commissions, the auditor-general and the secretary-general.").

49. Harris, *supra* note 2, at 180-81.

under the State Council, as did the later drafts of September 14, 2005, September 30, 2005, and of November 2005.[50]

The Draft Anti-Monopoly Law of 2005 was the culmination of the previous efforts which began in 2002. Article 1 of the Draft is important because it sets forth the general parameters and objectives of antimonopoly policy in China: [51]

> This law is enacted for the purposes of prohibiting monopolistic conduct, protecting and promoting market competition, safeguarding the legitimate rights and interests of consumers and public interests, and ensuring the healthy development of the socialist market economy.

Article 3 of the 2005 Draft defined monopolistic conduct as follows:

> "'Monopolistic conduct' is defined in this law as the following activities which eliminate or restrict competition or are likely to have the effects to eliminate or restrict competition:
>
> (i) actions among undertakings to come to agreements, decisions, or other consensus that eliminate or restrict competition (termed "Monopoly Agreements");
>
> (ii) abuse of dominant market positions by undertakings;
>
> (iii) concentration of undertakings that are likely to have the effects of eliminating or restricting competition."[52]

This article will not extrapolate on the 2005 Draft and the other "intermediate steps" noted above. Suffice to note that the drafting of the final legislation in 2006 provoked a great amount of both internal and external debate, including the solicitation of views and commentary from several international experts and international organizations such as the OECD, the World Bank, the United Nations Conference on Trade and Development [UNCTAD], the Asia-Pacific Economic Cooperation, and nations such as the United States, Japan, Australia and South Korea, as well as the European Union.[53] In early June 2006, the State Council

---

50. *Id.* at 182.

51. *Id.* at 183-84 (asserting that the 2002 Draft had prohibited the existence of "monopoly status," seemingly condemning the *status* of having achieved dominance in the market, even through *lawful* competition or conduct). The April 8, 2005 Draft and all subsequent drafts have clearly prohibited "monopolistic conduct" rather than monopoly itself—placing Chinese law in line with the prevailing world viewpoint regarding monopolistic conduct. *See, e.g.*, Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 82, *available at* http://www.okm.gov.hu /doc/upload/200509/hatalyos_alapszerzodes_en.pdf (prohibiting *abuse* of a dominant position, not the possession or status of a dominant position within the European Union).

52. Harris, *supra* note 2, at 184.

53. *Id.* at 175-76. An important International Seminar on Anti-Monopoly Legislation was held in Beijing in May 2005, hosted by the LAO. The *Financial Times* recently reported that "China and India are implementing regimes based on the European Union model, covering anti-competitive agreements, abuses of dominance, and merger control—with the potential effect on M&A causing concern among multinational companies." Sundeep Tucker & Patti Waldmeir, *Asian Antitrust Laws Threaten Deals*, FIN. TIMES, Jul. 27, 2008, *available at* http://us.ft.com/ftgateway/superpage.ft?news_id =fto072720081742322031. However, the authors note that "[l]awyers and business executives believe China and India's thresholds for merger filings are too low, and are likely to ensnare global deals that

approved in principle the 2005 Draft.[54] China's National Party Congress finally adopted the new Anti-Monopoly Law on August 31, 2007, effective August 1, 2008.[55]

V. CHINA'S NEW ANTI-MONOPOLY LAW (AML)[56]

The AML seeks to address issues centering on competition in a comprehensive manner, not just those relating to monopolization. Thus, the legislation covers price fixing, conspiracies, mergers, and the abuse of intellectual property rights, as well as providing a definition of the "market" and penalties for substantive violations of the law. Article 1, which tracks the 2005 Draft version very closely, lays out the broad purposes of the AML:

> This law is enacted for the purposes of preventing and prohibiting Monopolistic Conduct, protecting fair market competition, promoting efficiency of economic operation, safeguarding the interests of consumers and the public interests, and promoting the healthy development of the socialist market economy.[57]

Article 4 is also expositive of the general framework for the creation of the AML:

> The State shall formulate and implement competition rules suitable for the socialist market economy to improve control of the macro-economy and to strengthen a unified, open, competitive, and orderly market system.[58]

There are four major aspects of the AML that will be reviewed in detail: sections dealing with the scope of review, sections dealing with the creation and duties of the Anti-Monopoly Commission, sections dealing with prohibited conduct, and sections dealing with legal liabilities and penalties.

A. Scope of Review

Chapter 1, Article 2 discusses the scope of review. The AML is applicable to monopolistic conduct[59] in economic activity *within* the territory of the People's Republic of China (PRC). The AML is also "applicable to monopolistic conduct *outside* the territory of the People's Republic of China that have eliminative or

---

will have little effect on competition locally. They also fear enforcement agencies in each country will lack the resources and expertise to deal quickly with complex merger cases." *Id.*

54. Hu Yuanyuan, *China Okays Draft Anti-Monopoly Law*, CHINA DAILY, Jun. 8, 2006, *available at* http://www.chinadaily.com.cn/china/2006-06/08/content_611238.htm.

55. *China Legislature Passes Anti-Monopoly Law*, THE CHINA POST, Aug. 31, 2007, *available at* http://www.chinapost.com.tw/business/asia/2007/08/31/120617/China%2Dlegislature.htm.

56. AML, *translated in* Bush, *supra* note 2, at app.

57. *Id.* art. 1.

58. *Id.* art. 4.

59. *Id.* art. 3. "Monopolistic Conduct," as defined in Article 3, includes:

(1) conclusion of monopoly agreements by undertakings;
(2) abuse of dominant market positions by undertakings;
(3) concentrations of undertakings that have or are likely to have the effect of eliminating or restricting competition.

restrictive effects on competition in the domestic market of the People's Republic of China."[60]

It is important to note that Article 7 specifically addresses questions relating to activities of state-owned-enterprises or industries that are controlled by the state that are deemed "critical to the wellbeing of the national economy and national security, as well as industries in which exclusive operation and exclusive sales are the norm of business in accordance with the law...."[61]

B. Creation of the Anti-Monopoly Commission

Chapter 1, Article 9 calls for the State Council to establish an Anti-Monopoly Commission which will be responsible for "organizing, coordinating, and guiding" the administrative activities associated with prohibited conduct.[62] Specifically, the Anti-Monopoly Commission is charged with carrying out the following responsibilities or duties:

(1) to research and formulate competition policies;
(2) to organize investigations, access the overall market competition conditions, and publish assessment reports;
(3) to formulate and promulgate anti-monopoly guidelines;
(4) to coordinate the anti-monopoly administrative enforcement work; and
(5) to undertake other duties as designated by the State Council.[63]

Article 9, however, does not establish whether an existing agency such as MOFCAM or SAIC will be designated as the Commission or whether a wholly new Commission will be created. Interestingly, the creation of the Anti-Monopoly Commission may not completely alleviate concerns over the lack of expertise or biases of judges who will hear disputes. However, as noted by Subrata Bhattacharjee of the American Bar Association's Antitrust Section, "since the enforcement of antitrust law is a relatively new phenomenon [for China], judges may not have the requisite level of knowledge to produce decisions that conform to international practice and reflect micro-economic analysis, an observation admittedly common to many jurisdictions."[64] In addition, "in the context of

60. Harris, *supra* note 2, at 186.

61. AML, art. 7, *translated in* Bush, *supra* note 2, at app. *See, e.g.,* Robin Gerofsky Kaptzan & Michael Jacobs, Blake Dawson Waldron, *The New Chinese Anti-Monopoly Law and Foreign Business in China, available at:* http://www.abanet.org/intlaw/committees/business_regulation/antitrust/China'sAntiMonopolyPowerPoint.ppt (last visited Dec. 23, 2008) (listing that the SOEs operating in *strategic sectors* of the Chinese economy are "petroleum, natural gas, telecoms, electricity, coal, civil aviation, waterway transport, and national defense"); *see, e.g.,* Zhengjun Zhang & Zhaoxi Li, Enterprise Research Institute & Development Research Center of the State Council China, *Policy Challenges of Corporate Governance Reform of SOEs in China* (May 15-16, 2006), *available at:* http://www.oecd.org/dataoecd/60/35/37340418.pdf (discussing current issues concerning Chinese SOEs).

62. AML, art. 9, *translated in* Bush, *supra* note 2, at app, 2.

63. *Id.*

64. Subrata Bhattacharjee, *The Merger Review Process under the New PRC Anti-Monopoly Law: Selected Issues,* 2008 A.B.A. SEC. ANTITRUST 9 (presentation at the New Chinese Anti-Monopoly Law Teleseminar, Jan. 23, 2008). *See also* Youngjin Jung & Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 NW. J. INT'L L. & BUS. 107, 164 (noting that before

China's current legal system, it has been suggested that the Chinese judiciary lacks independence."[65] Mr. Bhattacharjee continues:

> The current structure of China's court system and the process for selecting and promoting judges allows local governments to influence decisions regarding personnel, as well as financial and material resources. Accordingly, even if a party exercises its right to judicial review, some would argue that it is unlikely that a court will come to a different decision from the one made by the Authority, which may result in interpretations that are not based on economic principles.[66]

C. Prohibited Conduct

Articles 13 through 37 describe the types of conduct that are proscribed by the AML. The following types of conduct are generally prohibited.

1. Vertical and Horizontal Agreements:

The first type of conduct that is prohibited under the AML is the creation of *horizontal agreements*—agreements between competing companies, which are termed Monopoly Agreements among undertakings with competing relationships—that restrain trade; or *vertical agreements*—agreements between a manufacturer or a distributor within the same marketing chain, which are termed Monopoly Agreements with their counter-parties.[67]

Article 13 prohibits the following *horizontal* Monopoly Agreements that concern:

(1) fixing or changing the price of commodities;
(2) limiting the outputs or sales volume of commodities;

---

the adoption of the so-called *Judge's Law* in 1995, "no uniform credentials were required of judges, and formal legal training was also not a prerequisite"); *see also* Judge's Law (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective July 1, 1995), *translated in* http//www.accci.com.au/judges-law.htm (2002).

65. Bhattacharjee, *supra* note 64, at 9.

66. *Id.* Attorneys H. Stephen Harris, Jr. and Rodney J. Ganske note:

> In countries transitioning to market-based economies, especially where there is no history of competition enforcement, it is often best not to rely on existing courts for competition enforcement. A manageable number of specialized competition judges could be trained within a reasonable time following enactment and prior to the August 1, 2008 effective date of the Anti-Monopoly Law, participating perhaps in appropriate portions of the training to be provided to the staff of the Anti-Monopoly Enforcement Authority. The need for such a specialized court would seem most important in cases involving allegations of violations through single-firm conduct, i.e., abuses of dominance under Chapter III, as such cases require sophisticated understanding of definitions of product and geographic markets and an understanding of alleged effects on competition, unlike more straightforward cases involving horizontal collusion such as bid-rigging or market division.

H. Stephen Harris, Jr. & Rodney J. Ganske, Alston & Bird LLP, American Bar Association Section of Antitrust Law 56th Annual Antitrust Spring Meeting, *The Monopolization and IP Abuse Provisions of China's Antimonopoly Law* 19 (Mar. 26-28, 2008), *available at*: http://www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/08/03-28-08-Harris-Ganske.pdf.

67. Harris, *supra* note 2, at 189-90.

(3) allocating the sales markets or the raw material purchasing markets;
(4) restricting the purchase of new technology or new equipment or restricting the development of new products;
(5) jointly boycotting transactions; or
(6) other Monopoly Agreements determined by the AML Enforcement Authority under the State Council.[68]

Article 14 prohibits the following *vertical* agreements that:

(1) fix the resale price of commodities sold to third parties;
(2) limit the minimum resale price of commodities sold to third parties; or
(3) other Monopoly Agreements determined by the AML Enforcement Authority under the State Council.[69]

However, Article 15 contains significant exceptions to what otherwise might be considered as "*per se*" violations of the AML under both Article 13 and Article 15. These include activities conducted:[70]

(1) for the purpose of improving technology, researching and developing new products;
(2) for the purpose of improving the product quality, reducing costs, enhancing efficiency, unifying specifications and standards of products, or implementing division of labor based on specialization;
(3) for the purpose of improving operational efficiency of small and medium-sized undertakings and enhancing their competitiveness;
(4) for the purpose of achieving public interests, but not limited to, energy saving, environmental protection, and disaster relief;
(5) for the purpose of alleviating serious decreases in sales volume or distinctive production surpluses due to economic depression;
(6) for the purposes of safeguarding legitimate interests in foreign trade and foreign economic cooperation;
(7) other circumstances as stipulated by laws and by the State Council.[71]

---

68. AML, art. 13, *translated in* Bush, *supra* note 2, at app. *See id.* art. 10 (creating the Anti-Monopoly Law Enforcement Authority under the State Council to perform the function of anti-monopoly enforcement. The AML specifically permits the delegation of this authority to the "corresponding agencies of the People's Governments at levels of province, autonomous region and municipality directly under the central government responsibilities....").

69. *Id.* art. 14.

70. *Id.* art. 15. *See also* United States v. Topco Associates, Inc., 405 U.S. 596, 607-08, 615-19 (1972) (discussing a comparative review of *per se* violations under United States antitrust law, "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act."). Traditional examples of *per se* violations include horizontal price fixing and horizontal division of markets.

71. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911) (explaining the view of the United States concerning the application of the reasonableness test and applying a rule or reason test in recognition that there is a range of economic effects that may result from different types of restraints in different market structures.). The reasonableness test under the Chinese AML differs from the United States' reasonableness test in that the United States does not balance the anticompetitive effects of an agreement against its social or political benefits. It simply inquires whether the agreement promotes or suppresses competition. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (expressing that "[T]he statutory policy [of the Sherman Act] precludes inquiry into the question of whether competition is good or bad."). The United States Supreme Court noted: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes

Interestingly, if clauses 1-5 are offered as reasons for the non-applicability of the provisions of Articles 13 and 14, the "relevant undertakings[72] must also prove that the agreement so concluded will not materially restrict competition in the Relevant Market[73] and that the agreement can allow consumers to share the benefits generated therefrom."[74]

In addition, also reflecting a "reasonableness" standard, Article 27 contains the "factors [that] shall be taken into consideration in the review of concentrations by undertakings":

(1) the market shares of undertakings participating in the concentration in the Relevant Market and their ability to control... the market;
(2) the degree of concentration in the Relevant Market;
(3) the effect that the concentration of undertakings may have on market access and technological progress;
(4) the effect that the concentration of undertakings may have on consumers and other relevant undertakings;
(5) the effect that the concentration of undertakings may have on the development of the national economy;
(6) other factors affecting the market competition that the AML Enforcement Authority under the State Council deems shall be taken into consideration.[75]

---

competition or whether it is such as may suppress or even destroy competition." *Id.* at 691 (citing Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 246 (1918), quoted in Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 n.15 (1977)). The United States Supreme Court continued in its discussion of the considerations contained in a rule of reason analysis. "In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress." *Id.* at 692.

72. As used in the AML, "undertakings" refers to natural persons, legal persons, and other organizations that are engaged in manufacturing or otherwise dealing with commodities, or providing services. AML, art. 12, *translated in* Bush, *supra* note 2, at app, 3.

73. As used in the AML, "Relevant Market" generally means the "scope of commodities and the scope of territory within which the undertakings compete with each other during a specific period of time with respect to specific commodities or services (collectively 'commodities')." *Id.*

74. *Id.* art. 15(7).

75. *Id.* art. 27.

2. Abuse of Power by Dominant Market Holders

A second type of prohibited conduct, stemming from the "abuse of power" by "dominant market holders,"[76] is considered in Chapter 3, Article 17. These activities include:

(1) selling commodities at unfair high prices or buying commodities at unfair low prices;
(2) selling commodities at prices below cost without any justification;[77]
(3) refusing to transact with counter-parties with respect to a transaction without any justification;
(4) restricting, without any justification, their counter-parties to transact with such undertakings exclusively or to transact with other parties designated by such undertakings exclusively;
(5) engaging in tie-in sales of commodities or imposing other unreasonable conditions with respect to transactions without any justifications;
(6) applying differential treatments to counter-parties to transactions who have the same qualifications with respect to transaction price and other transaction terms, without any justification;
(7) other activities that are deemed by the AML Enforcement Authority of the State Council as abusing dominant market positions.[78]

As with other prohibited conduct, this type of conduct is subject to the "reasonableness" standard, meaning that the conduct may be proved justified or legitimate. However, undertakings may be *presumed* to have a Dominant Market Position if they satisfy any of the following conditions:

(1) the market share of one undertaking in the Relevant Market accounts for 1/2;

---

76. The determination that an undertaking has a Dominant Market Position is based on the following factors as found in Article 18:

(1) The market share of the undertaking in the Relevant Market, and the competition conditions in the Relevant market;
(2) the ability of the undertaking to control the sales market or the raw material purchasing market;
(3) the financial resources and the technical capacities of the undertaking;
(4) the extent to which other undertakings depend on the subject undertaking with respect to relevant transactions;
(5) the level of difficult for the undertakings to enter the Relevant Market;
(6) other factors relating to its determination whether the subject matter has a Dominant Market Position.

77. The problem of dumping is an especially vexing one for China. Dumping requires a comparison of "the price of export with the home-market price to see if the former is lower than the latter so that there is a 'margin of dumping.'" JOHN H. JACKSON, THE WORLD TRADING SYSTEM 335 (2nd ed. 1997). Jackson continues:

> Almost by definition, given that such an economy is not based on pricing principles, the nominal price of goods may bear little relation to prices that would be set by enterprises in a market/price oriented economy. The prices may be set by a state planning commission, and may vary according to end user. Furthermore, the prices may bear little relation to the cost of an enterprise, or 'profitability.'

Id.

78. AML, art. 17, *translated in* Bush, *supra* note 2, at app, 5.

(2) the joint market share of two undertakings in the Relevant Market accounts for 2/3; or
(3) the joint market of three undertakings in the Relevant Market accounts for 3/4.[79]

In the case of circumstances set forth in clauses 2 and 3 above, if any of such undertakings has a market share of less than 1/10, it shall not be presumed to have a Dominant Market Position. Further, if an undertaking which is presumed to have a Dominant Market Position presents evidence showing otherwise, it shall not be deemed to have a Dominant Market Position. Attorneys Harris and Ganske write that although Article 27 contains the factors noted above for determining "market dominance," the AML does not fully define how product and geographic markets will be identified. Further, the inadequacy of this definition has been described as "unique and troubling" by some scholars.[80]

3. Certain Concentrations with and without Notification or Approval

There are three concentrations contemplated by Chapter 4, Article 20:

(1) a merger of undertakings;
(2) an acquisition by an undertaking of the control of other undertakings through acquiring equity or assets;
(3) an undertaking, by contracts or other means, acquiring control of other undertakings or the capability to exercise decisive influence on other undertakings.[81]

Article 21 stipulates that if a concentration described above meets the thresholds for notification as stipulated by the State Council, the relevant undertakings shall file a notification with the Anti-monopoly Law Enforcement Authority under the State Council in advance. Without filing such a notification, the undertakings will be prohibited from implementing the concentration. In such a case, the undertakings are required to file a variety of documents and other materials.[82]

---

79. *Id.* art. 19.

80. *See generally* Harris & Ganske, *supra* note 66 at 2. The authors report that "[u]nder U.S. antitrust law, market share is the 'usual starting point' for assessing the existence of market power." *Id.* at 10-11. *See also* A.B.A. ANTITRUST SECTION, I ANTITRUST LAW DEVELOPMENTS 66 (6th ed. 2007). Low market shares "virtually preclude a finding of market power, whereas a high market share indicates the possibility that market power exists." *Id.* Indeed, proof of a "dominant market share" has been held to be a requirement for the establishment of market power. *See* Flegel v. Christian Hosp., 4 F.3d 682, 689 (8th Cir. 1993). However, a high market share alone is *not* proof of market power. An economic analysis of other "competitive factors" may be able to demonstrate the absence of the requisite market power despite a high market share, particularly when barriers to market entry are low. In sum, unlike the application of China's market share percentages, U.S. antitrust law does not establish presumptions of market power based *solely* on market share. *Id. See, e.g.*, Ball Mem'l Hosp. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1336 (7th Cir. 1986). *See generally* A.B.A. ANTITRUST SECTION, MARKET POWER HANDBOOK: COMPETITOIN LAW AND ECONOMIC FOUNDATIONS (2005).

81. AML, art. 20, *translated in* Bush, *supra* note 2, at app, 6.

82. Included are the following documentation items: the notification, including the name, address, and business scope of the participating undertakings, the proposed date for implementing the concentration, and other matters stipulated by the AML Enforcement Authority under the State Council; a statement explaining the impact of the concentration upon the competitive conditions (i.e.,

Article 27 lays out the factors that should be taken into account in the review of the proposed concentration by the AML Enforcement Authority under the State Council. These include:

(1) the market shares of the participating undertakings in the Relevant Market and their ability to control the market;
(2) the degree of concentration in the Relevant Market;
(3) the effect that the concentration may have on market access and technological progress;
(4) the effect that the concentration may have on consumers and other relevant undertakings;
(5) the effect that the concentration may have on the development of the national economy;
(6) other factors affect competition that the AML Enforcement Authority under the State Council deems shall be taken into consideration.[83]

In reviewing these considerations, the AML Enforcement Authority under the State Council shall prohibit a proposed concentration "if such [a] concentration has or may have the effect of eliminating or restricting competition."[84] However, the authorities may instead decide not to prohibit a concentration "if the undertaking can prove that the positive effects of such concentration on the competition obviously overweigh its negative effects or that the concentration is *in the public interest*." [85] In the alternate, if the AML Enforcement Authority under the State Council does not prohibit the concentration, it may instead decide to impose restrictive conditions in order "to reduce the adverse effects that the concentration may have on competition."[86] In either case, the AML Enforcement Authority under the State Council shall publicize, in a timely manner, its decision to prohibit the concentration or to impose any restrictive conditions.[87]

A second category of prohibited conduct under Chapter 4 is the merging or acquiring of companies under certain circumstances *without notification or approval,* found in Article 22. Undertakings are not required to file any notification with the AML Enforcement Authority under the State Council if their concentration meets *any* of the following conditions:

(1) one undertaking participating in the concentration owns more than 50% of the voting shares or assets of each of the other participating undertakings;

---

competition) of the Relevant Market; the concentration agreement; audited financial and accounting reports of the undertakings participating in the proposed concentration in the preceding fiscal year; and other documents and materials under the AML Enforcement Authority under the State Council. *Id.* art. 23.

83. *Id.* art. 27.

84. *Id.* art. 28.

85. *Id.* (emphasis added).

86. *Id.* art. 29.

87. *Id.* art. 30. Articles 24-26 deal with issues concerning the required filing of supplementary documents (Art. 24), a preliminary review and notification requirements (Art. 25), the completion of the review (Art. 26), and the circumstances that involve an extension of time (Art. 26, para. 2 (1)-(3)).

(2) more than 50% of the voting shares or assets of every undertaking participating in the concentration are owned by a single undertaking that does not participate in the concentration.[88]

Four specific problems may be identified concerning Article 22. First, acquiring *control* of a company is considered a concentration, but the term *control* is never fully defined.[89] Bhattacharjee cited Harris and Yang, and notes somewhat wryly that "experience in other jurisdictions reveals that creative lawyers and businesspersons can structure transactions in a manner to avoid being caught by the merger rules."[90] Second, no specific timeline has been established concerning the time period during which a company must notify Chinese authorities; instead, Article 21 uses the term "in advance." Third, as with other provisions, Article 28 permits parties to attempt to persuade the AML Enforcement Authority that the positive effects of a concentration outweigh (overweigh) any negative effects; but the AML provides no real guidelines on this point, unless the provisions established under Article 15 are applicable under this article as well. Fourth, thresholds for concentrations requiring notifications are not set, perhaps reflecting the earlier criticisms of notification requirements generated in earlier drafts and in the current mergers and acquisitions rules.[91] Article 22 describes only two situations, noted as "exemptions," from the notification requirements, and these exemptions do not reference traditional exemption thresholds, such as concentrations not exceeding certain defined market shares or market values. On this specific topic, Bhattacharjee noted:

> The AML is silent on the nature of merger notification thresholds. Ordinarily, this would not be a concern, given the tendency in many jurisdictions to leave such details (which may change over time) to regulation. However, the AML is silent with respect to the basis for notification. Earlier drafts of the AML included notification thresholds based on assets, turnover and market share, but the current AML does not define the notification threshold in any way.[92]

In addition, and perhaps most importantly, Article 31 requires approval that is *separate* from the normal merger approval for concentrations between a foreign investor and a domestic company which "concerns national security." This provision is highly controversial and problematic, both because it fails to define

---

88. *Id.* art. 22.

89. *See* Bhattacharjee, *supra* note 64, at 8 (noting that examples night include defining "control" as control at the board of directors level through the holding of voting interest or the possession of contractual power to designate a portion of the board—as is the case in the United States and Canada). The author also raises the possibility that control might include exercising "decisive influence" over an undertaking—as is the case in the European Union. The issue of control raises the question of the continued existence of the "Golden Share" in China, which perpetuates majority Chinese control of foreign investment. The existence of the "Golden Share" is problematic in light of China's membership in the WTO.

90. H. Stephen Harris & Kathy Lijun Yang, *China: Latest Developments in Anti-Monopoly Law Legislation*, 19 ANTITRUST 89, 92 (2005) (cited in Bhattacharjee, *supra* note 64, at 7 n.28).

91. *See* Harris, *supra* note 2, at 211 (describing the criticism of the prior legislative thresholds).

92. Bhattacharjee, *supra* note 64, at 8.

"national security," and because it is not standard policy for a sovereign to frame its antitrust laws to this extent and in this manner.[93] Many commentators have voiced concern that the vagueness of this provision will allow China to reject or approve a transaction for political rather than legal or economic reasons,[94] reflecting the increasing concern that China has voiced about alleged foreign domination in important sectors of its domestic market. In defense of the Chinese position, however, it should be noted that in 2002, Kodak dominated almost 50% of the photographic film market in China; Nestle held about 40% of the instant coffee market; Procter and Gamble had a 30% share of the hair care market; Hewlett-Packard held 25% of the commercial internet-service market; and Epson held a 30% share of the computer-printer market.[95]

4. Abuse of Intellectual Property Rights

The fourth type of prohibited conduct is the abuse of intellectual property rights (IPRs).[96] Specifically, Article 55 of the AML states:

> This law shall not apply to Undertakings' conducts that are exercising their intellectual property rights in accordance with the provisions of laws and administrative regulations relating to intellectual property rights. However, this law shall apply to Undertakings' conducts that

---

93. For a full discussion of the issues surrounding an assertion of "national security," *see id.* at 9-10. *See also id.* at 10 n.41 (providing "negative media attention" and citing Jamil Anderlini, *Investors Fear China Monopolies Law*, FIN. TIMES, Aug. 30, 2007); *China Approves Anti-Monopoly Law that Bans Discrimination Fears*, INSIDE US-CHINA TRADE, (Sept. 5, 2007).

94. *See* Zhuoyao Hui, *Chinese Anti-Monopoly Law: A Pretext for Local Protection or an Aspiration to Comply with the International Norm?* ILL. BUS. L.J. (2007), *available at* http://iblsjournal.typepad.com/illinois_business_law_soc/2007/11/chinese-anti-mo.html (noting that Chinese AML is based upon the European Community (EC) anti-competition law, Japanese AML, and U.S. Antitrust Law, and stating that none of these countries' competition laws include some "abstract aspirational goals that might give the Chinese government grounds for invalidating a foreign enterprise's business conduct").

95. *See* MARK WILLIAMS, COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN 198 (2005).

96. For a general discussion of key IPR issues in international business, see Richard J. Hunter, Jr., *A Primer on Key International Intellectual Property (IPR) Issues,* 5 EUR. J. ECON., FIN. & ADMIN. SCI. 103 (2006). The International Chamber of Commerce has identified general issues and "tensions" between intellectual property rights and antitrust and three "distinct ways in which anti-competitive practices may prove to be anticompetitive:

> (i) A dominant position resulting from ownership of IP property may be abused by its owner.
> (ii) A licensor may impose restrictive licensing terms on his licensee which secure inappropriate reward for his intellectual property.
> (iii) If a patent Office grants patents of low quality, and if the law is generally uncertain, competitors of patentees may choose to respect them rather than to ignore or challenge them."

INTERNATIONAL CHAMBER OF COMMERCE, CURRENT AND EMERGING INTELLECTUAL PROPERTY ISSUES FOR BUSINESS 65 (9th ed. 2008), *available at* http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual_property/pages/IP_Roadmap-2005(1).pdf.

> eliminate or restrict competition by abusing their intellectual property rights.[97]

Revamping of Chinese law in the area of IPR protection was seen as critical to the prospects for the long-range development of the Chinese economy, as "Rampant piracy of intellectual property in China has undermined foreign confidence in the Chinese market's ability to absorb foreign technology and copyrighted material without cannibalizing it."[98] Lee and Mansfield reported that China's weak IP protection has "a significant negative impact on the location of U.S. FDI."[99] As a result of the world-wide importance placed on IP protection, this provision perhaps may be the most controversial of all because of its vagueness and because China has historically offered limited, if any, protection to intellectual property holders. Jianyang Yu, a partner in a Chinese law firm, reported on the early period of China's transition from a socialist to a market economy. Yu noted that despite major changes in the IPR regime in China, "problems continue[ed] to exist in the protection of intellectual property. There are defects in intellectual property laws and in the coordination among the courts and government agencies, and there is much to be done to enforce the intellectual property laws effectively."[100] "According to Maria Lin, an attorney with Morgan

---

97. AML, art. 55, *translated in* Bush, *supra* note 2, at app, 14.

98. Jonathan C. Spierer, *Intellectual Property in China: Prospectus for New Market Entrants*, HARV. ASIA Q., 46 (Summer 1999) (cited in Yahong Li, *Pushing for Greater Protection: The Trend Toward Greater Protection of Intellectual Property in the Chinese Software Industry and the Implications for the Rule of Law in China*, 23 U. PA. J. INT'L ECON. L. 637, 640 n.14 (2002)).

99. Reported in Yahong Li, *supra* note 98, at 641 n.16. It is also quite ironic, but as Alford points out, "[t]he most significant rationale for intellectual property law lies with the welfare of the Chinese people themselves. They are now, and seem likely in the foreseeable future to continue to be, the greatest victims of the infringement of intellectual property that is rampant throughout the vast nation." William P. Alford, *Making The World Safe for What? Intellectual Property Rights, Human Rights, Property Law and American Foreign Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 136 (1997). *See also* Robert Bird & Daniel R. Cahoy, *The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach*, 45 AM. BUS. L.J. 283 (2008).

100. For a description of the early efforts (1992-1994) at reforming the Chinese IPR regime, see Jianyang Yu, *People's Republic of China: Protection of Intellectual Property in the P.R.C.: Progress, Problems, and Proposals*, 13 UCLA PAC. BASIN L.J. 140 (1994). Yu counted among the various changes an amended Patent Law and Trademark Law; China's joining four international conventions on intellectual property; strengthening or making available criminal sanctions on infringement of intellectual property; and China's courts and administrative authorities aggressively attempting to enforce its IPR law in practice. *Id.* at 161. Among the international conventions mentioned by Yu include the Berne Convention for the Protection of Literary and Artistic Works, effective on October 15, 1992; the Universal Copyright Convention, effective on October 30, 1992; the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, effective on April 30, 1993; and on September 25, 1992, China issued the International Copyright Treaties Implementation Rules ("Rules"), which became effective on September 30, 1992. These rules were formulated in order to implement the various international conventions which China had joined—most especially the Berne Convention. Key provisions of the 1992 "Rules" include:

- protecting unpublished foreign works under the copyright laws;
- protecting foreign works of applied art for a term of twenty-five years;
- protecting foreign computer programs as literary works without requiring their registration;
- protecting foreign works that are created by compiling non-protectable materials, but which

& Finnegan, 'While China has many laws to protect intellectual property,... enforcement of such laws has been problematic as the court system is still in the process of reform, and relevant administrative bureaus have problems delegating authority.'"[101]

Concern over the lack of protection of IPRs was voiced by the International Bar Association in 1995, which noted:

> [T]he borderline between fair exercise of IP rights and the abuse of IP rights is not well defined under any jurisdiction. An attempt to draw a dividing line through legislation is commendable but should leave no illusions as to the urgent need for future clarification through case-law or administrative practice.... Therefore, timely guidance on the concept of restrictions of competition "beyond the laws and administrative regulations on intellectual property rights," under this provision would be appreciated, especially as intellectual property laws are typically silent on competition-related questions.[102]

Attorneys Harris and Ganske report that the vagueness of the AML concerning issues relating to the abuse of IPRs has caused many to question

---

possess originality;

- eliminating certain limitations imposed by the Copyright Law on the copyright owner's rights to comply with the Berne Convention; and
- protecting foreign works which, at the moment when the various international conventions came into force in China, have not yet fallen into the public domain in the country of origin after the expiration of the term of protection.

Id. at 143. Yu also identifies a problem with the legal system itself. China officially operates on the basis of the "civil law" system in which judicial decisions do not enjoy *stare decisis* status, "[h]ence there are notable disparities among court decisions and no clear judicial tests to determine whether infringements have occurred." *Id.* at 158. Yet, as Professor Berring notes, "[t]he existing Chinese legislative opus is a patchwork drawn from both the civil and common law traditions. Each year it grows more complete and its implementation improves. Huge problems remain in predictability and enforcement but the commercial structure grows more stable." Berring, *supra* note 11, at 439 (citing STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 383-432 (1999)). The situation may have been exacerbated by China "reclaiming" Hong Kong on July 1, 1997. Hong Kong had generally adopted the Common Law system, based on precedent and the rule of *stare decisis*. Hong Kong has held an advantage in that its common law tradition has allowed it to maintain its status as a part of a global legal system, with membership in a number of international treaties and organizations. Thus, at least as it relates to commercial transactions involving Hong Kong and China, there exists the paradigm of "one nation, two systems." *See* Berry Fong-Chung Hsu, *Legislative Control of Hong Kong Financial Markets: Some Aspects of Banking and Securities Regulations*, 28 LAW & POL'Y INT'L BUS. 649, 651-52 (1997). Interestingly, as Shanghai has made known its intentions to be the commercial leader in China, its legal system has come under some scrutiny. In contrast to Hong Kong, Shanghai has a reputation for rendering verdicts "in the national interest"—at least in its maritime courts. *See* Richard McGregor, *Shanghai Sees Law as Key to Being Commercial Hub*, FIN. TIMES, July 1, 2002. *See also* Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97, 99-100 (2005).

101. Yahong Li, *supra* note 98, at 650.

102. *See* Working Group on the Development of Competition Law in the People's Republic of China, International Bar Association, Comments on the Draft Anti-Monopoly Law of the People's Republic of China (PRC) 69-70 (2005), *available at* http://www.ibanet.org/images/downloads/IBA%20Submission.pdf.

whether this provision, as it will be enforced, will result in the loss or diminution of adequate intellectual property protection in China. They urge that the law be significantly clarified and note:

> Absent such clarification, holders of valuable IP may fear the imposition of compulsory licensing (or compulsory disclosure of technical data) as a sanction for a finding of an abuse based on a mere refusal to license IP, or the imposition of conditions in IP licenses that are later determined to be unfair.[103]

The United States has been especially pointed in its criticism of China's IPR policies. The Office of the United States Trade Representative annually issues a *"Special 301 Report"* on the adequacy and effectiveness of intellectual property rights (IPR) protection by U.S. trading partners.[104] This Report provides an important worldwide benchmark for the evaluation of China's IPR regime. Article 55 of the AML is an attempt to deal with the problematic nature of China's IPR protection.[105]

Concerns have been raised concerning the vagueness of Article 55. Some observers have been optimistic that this provision will, in fact, be further clarified and that Article 55 will provide adequate protection of intellectual property rights. They point to the creation of a Judicial Court of Intellectual Property as an

---

103. Harris & Ganske, *supra* note 66, at 7.

104. *See* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT 19 (2008), *available at* http://www.ustr.gov/Document_Library/Reports_Publications/2008/2008_Special_301_Report/Section_Index.html. Concerning China, the Report notes:

> China remains a top intellectual property enforcement and TRIPS compliance priority for the United States. China will remain on the Priority Watch List, and remain subject to Section 306 monitoring. The United States is seeking to resolve its concerns with respect to three IPR protection and enforcement issues through WTO dispute settlement with China . . . . The United States recognizes and appreciates the efforts of the many officials in China who continue to give voice to China's commitment to protecting intellectual property rights and are working hard to make it a reality. In spite of these efforts, the shared goal of significantly reducing IPR infringement throughout China has not yet been achieved.

Id. The Special 301 Report placed forty-six countries on the *Priority Watch List*, the *Watch List*, and the *Section 306 Monitoring List*. There are nine countries that have been placed on the 2008 Priority Watch List: China, Russia, Argentina, Chile, India, Israel, Pakistan, Thailand, and Venezuela. According to the United States government, through the office of the United States Trade Representative, countries on the Priority Watch List "are the focus of increased bilateral attention concerning the problem areas." *Id.* at 18. Thirty-six trading partners are on the lower level Watch List, meriting *bilateral attention* to address IPR problems: Algeria, Belarus, Bolivia, Brazil, Canada, Colombia, Costa Rica, Czech Republic, Dominican Republic, Ecuador, Egypt, Greece, Guatemala, Hungary, Indonesia, Italy, Jamaica, Kuwait, Lebanon, Malaysia, Mexico, Norway, Peru, Philippines, Poland, Republic of Korea, Romania, Saudi Arabia, Spain, Taiwan, Tajikistan, Turkey, Turkmenistan, Ukraine, Uzbekistan, and Vietnam. Paraguay will continue to be subject to Section 306 monitoring under a bilateral Memorandum of Understanding that establishes objectives and actions for addressing IPR concerns in that country. *Id.*

105. AML, art. 55, *translated in* Bush, *supra* note 2, at app, 14.

indication of the seriousness of China's intentions.[106] Harris stresses the importance of effecting further concrete steps in the area of IP protection:

> One step toward reaping these rewards would be clarifying the provision regarding possible violations of the new law by virtue of undefined "abuses" of intellectual property rights. Otherwise, a contraction in investment in China's high technology markets and a forestalling in the licensing of leading technologies to Chinese enterprises can be expected.[107]

However, on the other hand, other commentators are less optimistic, noting recent comments by We Zhenguo, Deputy Director General of MOFCOM's Department of Treaty and Law/Anti-Monopoly Office, who described common abuses from IP holders that limit "competition and seek monopolies by means of a package of compulsory licensing, placement of supplementary irrational conditions in licensing contracts and collection of irrational license fees by making use of their dominant market positions."[108]

Finally, a substantive criticism of Article 55 lies in the fact that the AML is silent on the question of punishment of an Article 55 violation. Columnist Adam Cohen notes that the Article must clarify whether a consequence of a violation of Article 55 should include nullification of the rights or compulsory licensing.[109]

D. Legal Liabilities and Penalties

A discussion of *Legal Liabilities and Penalties* may be found in Chapter Seven, Articles 46-50. These articles are "subject matter/category" based. In general, Article 46 provides for several generic penalties by the AML Enforcement Authority in the case where undertakings *conclude and implement* illegal Monopoly Agreements. These penalties and actions include:

- an order to the undertakings to stop such illegal acts (similar to a "cease and desist" order under U.S. antitrust law);

---

106. *China to Open Anti-piracy Court*, BBC NEWS, March 10, 2006, http://news.bbc.co.uk/2/hi/business/4793530.stm. The article reported that in 2005, 700 people had been convicted in 505 criminal piracy cases; China also shut down 76 websites and demanded that 137 others remove illegal materials. Ironically, the BBC reported that "The vast majority of product piracy cases—95%—involve *imitation of Chinese products by Chinese companies*." *Id.* (emphasis added).

107. Harris, *supra* note 2, at 171.

108. Reported in Harris & Ganske, *supra* note 66, at 8.

109. Adam Cohen, *China's Draft Antitrust Law Sows Worries in the West*, WALL ST. J., Jan. 30, 2006, at A12 (describing the concerns of the world's largest holders of patents and the possibility of forced royalty-free licensing). The WTO defines compulsory licensing as "[W]hen a government allows someone else to produce the patented product or process without the consent of the patent owner. It is one of the flexibilities on patent protection included in the WTO's agreement on intellectual property — the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement." WORLD TRADE ORGANIZATION, COMPULSORY LICENSING OF PHARMACEUTICALS AND TRIPS (2006), http://www.wto.org/english/tratop_e/TRIPs_e/public_health_faq_e.htm. *See also* Agreement on Trade—related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Multilateral Trade Negotiations—Results of the Uruguay Round, 33 I.L.M. 81 (1994).

- confiscation of "illegal gains";[110] and
- the imposition of fines of more than 1% and less than 10% of their sales in the preceding year.[111]

Article 46 provides that if the monopoly agreement has *not been implemented*, fines of less than RMB 500,000 may be imposed.[112] Further, if the undertakings on their own initiative report information and provide important information, the AML Enforcement Authority may reduce the penalty imposed or grant an exemption from the penalty.

Article 47 provides for the same penalties as noted above where undertakings illegally abuse their Dominant Market Positions.[113] Article 48 provides for penalties in the cases of illegal concentrations, relating to illegal merger or acquisition activities. In such cases, the AML Enforcement Authority shall:

- order the undertakings to stop implementing the concentration;[114]
- dispose of equity or an asset within a specified time limit;[115]
- transfer their business within a specified time limit;[116] and
- take other necessary measures to revert to the condition of the undertakings before the concentration.[117]

In addition, the AML Enforcement Authority may impose a fine of no more than RMB 500,000. In considering the appropriateness of any potential fines to be levied under Articles 46, 47, and 48, Article 49 stipulates that the AML Enforcement Authority shall take into account the "nature, extent and duration of the illegal act and other factors in determining the specific amount" of any fine imposed.[118]

Article 50 is both interesting and potentially controversial. It provides that "Undertakings that cause loss to others as a result of their Monopolistic Conduct

110. In infringement cases, damages are usually calculated on one of the following bases: "(1) the intellectual property owner's actual economic loss caused by the infringement; (2) the infringer's total profits derived from the infringement; or (3) an amount no less than a reasonable royalty." Jianyang Yu, *supra* note 100, at 159.

111. AML, art. 46, *translated in* Bush, *supra* note 2, at app, 12.

112. As of the writing of this paper, 1 CNY (China Yuan Renminbi- RMB) = 0.1458 USD (July 7, 2008). Exchange Rates Data, Chinese Yuan, American Dollar, x-rates.com, http://www.x-rates.com/d/USD/CNY/data120.html (last visited Nov. 15, 2008). RMB 500,000 would amount to a maximum fine of approximately $72,900. The RMB is a "fixed currency." The current amount of any fine would not be expected to fluctuate greatly.

113. AML, art. 47, *translated in* Bush, *supra* note 2, at app, 12.

114. *Id.* art. 46.

115. *Id.* art. 48.

116. *Id.*

117. *Id.*

118. *Id.* art. 49.

shall be liable for civil liabilities in accordance with laws."[119] At least one commentator has argued that this provision applies to consumers[120] but may not be applicable to competitors within or outside the Chinese market.

VI. TENTATIVE OBSERVATIONS AND CONCLUSIONS

China's new AML represents a significant step in China's transition from its command-and-control economy toward the creation of a socialist market economy—however that may ultimately be defined. The enactment of the comprehensive AML also represents a significant step towards assuring the global acceptance of China as a full international partner in international trade and in the continued attraction of significant amounts of foreign direct investment.[121] However, the AML which became effective on August 1, 2008, is but the first step in what may prove to be a long process of reconstruction and revision of China's antimonopoly regime. In their evaluation, Harris and Ganske lay out several major concerns that will need to be addressed if China is to remain on its glide path to success and continued economic progress.[122] We strenuously urge policy makers—both in China and in the capitals of their trading partners—to pay special and close attention to the recommendations of these noted policy experts. Based upon our detailed analysis of the most important provisions of the AML, we will amplify upon these conclusions and add our own concerns. These include:

1. Provisions of the AML related to dominant market position (Articles 6 and 17) are vague and will require significant refinement and the adoption of clarifying guidelines in a relatively short time after the effective date, through the adoption of Implementation Rules or other clarifying guidelines.

---

119. *Id.* art. 50.

120. Michael X.Y. Zhang, Private Civil Lawsuits under China Anti-Monopoly Law, Antitrust Law Blog, http://www.antitrustlawblog.com/2008/04/articles/article/private-civil-lawsuits-under-china-antimonopoly-law (April 7, 2008) (hosted by Sheppard Mullin Richter & Hampton L.L.P.). It appears that the writers of the AML changed the wording of Article 50 to "others" from the terms previously used in earlier version—"party with interest." *Id.* Zhang concludes that "The AML should be very cautious in granting the right to sue to competitors, and perhaps withhold entirely until the potential procedural abuses are resolved, and the scope of the AML itself is more established." *Id.*

121. The CIA reports that aggregate FDI into China had reached 758,900,000, 000 in 2007. In addition, Chinese exports reached 1,217,000,000,000 and imports into China were 901,300,000,000 in 2007. CIA, *supra* note 1. The Asian Development Bank reported that government policy in China has "changed substantially" and has evolved through several stages. In the initial stage (1978-1985), foreign investors were restricted to export-oriented operations. This stage saw "export processing zones" established for Hong Kong, Guangdong, and the four original "special economic zones" that had been created in Shantou, Shenzhen, Xiamen, and Zhuhai. Hainan was later added, offering foreign investors preferential treatment in the form of tax incentives. The second phase (1986-1991) provided a list of industrial sectors to which FDI was "encouraged, restricted, and prohibited." Foreign investors were also allowed to sell and manufacture goods in China. *See* ASIAN DEVELOPMENT BANK, *supra* note 29, at 16.

122. Harris & Ganske, *supra* note 66, at 1-2.

2. Because of the enormity of the issues involved and their importance in attracting FDI, the AML's relationship to intellectual property rights needs more clarity, especially in light of the strong worldwide perception of the lack of enforcement of IPRs in China in the past. Issues relating to *piracy, industrial espionage, and "grey market goods"* must be specifically addressed.
3. The Chinese approach to what has been termed "collective dominance," which presumes the dominant position of multiple entities based on their combined market share, "is unique and troubling."[123]
4. There have been grave concerns raised about the administration of the AML in two quarters. First, the AML Enforcement Authority has been placed within the competency of the Chinese State Council—essentially a political body with close ties to the Chinese Communist Party. In addition, there is concern that under Article 10, administration of the AML may be devolved to lower level or local government bodies with potentially skewed or biased views[124] against foreign competition.
5. The lack of experience within the legal system in the administration of antitrust[125] or anti-competition law and a lack of expertise on the proper functioning of a capitalist market economy in courts of "general jurisdiction" throughout China may indicate that Chinese courts may be unable to properly interpret the AML.
6. Provisions relating to "national security" need to be fleshed-out and limited to circumstances generally accepted as such under international norms and international law with due respect given to Chinese sovereignty.
7. Provisions relating to the "well being of the national economy" found in Article 31 need to be developed and defined. A clear reference point must be established.
8. The term "public interest" found in Article 1 and Article 15 must be defined and explained.
9. The phrase, "legitimate interest in foreign trade and foreign economic cooperation," must be refined and extrapolated.

---

123. *Id.* at 1.

124. There continues to be a problem with enforcing judgments in the Chinese legal system. Attorney Lindsay Wilson reports "Judgments also remain unenforced because of local protectionism and 'selfish departmentalism.' Government departments often simply refuse to cooperate, and parts of the government, such as the military, are immune from any legal action unless they choose to submit. In the private sector, insolvent corporations can escape payment, and it is difficult to dock the wages of employees. Courts, which depend on political capital even in the most balanced systems, are reluctant to coerce compliance with their dictates." Wilson, *supra* note 24, at 1022 nn.105-108 (citing LUBMAN, *supra* note 100, 266-68).

125. *See* Tucker & Waldmeir, *supra* note 53. The authors note that ironically, in fact China's threshold for merger filings may be *too low*—fearing that enforcement agencies may lack both the resources and expertise to deal with more complex merger cases.

10. Chinese authorities must explain exactly what is meant when they assert that they will *balance* any anticompetitive effects of an agreement against "social or political benefits." What exactly are these "social or political benefits"?
11. Concerning abuses in the market, Chinese authorities must define "unreasonable conditions" concerning the existence of permissible "tie-ins" in the domestic Chinese economy, especially as China continues to develop its activities in international franchising and leasing.[126]
12. The persistent use of the term "other factors related to its determination" needs to be accompanied by clear legislative or administrative guidance so as to avoid the impression that the established rules are subject to the vagaries of interpretation of the Anti-Monopoly Law Enforcement Authority.
13. China must continue to reform its legal system, especially emphasizing the need for the existence of a judiciary free from Communist Party influence.

However, even given these perceived deficiencies—which may more positively be considered as opportunities for significant improvements—China's experience with developing its unique "socialist market economy" has generally proven to be positive.

Today, China is very different from the one established in revolution in 1949 when "Chairman Mao mounted Tiananmen and declared the founding of the People's Republic of China";[127] or when China began its "March to the Market" in 1978; or when China began creating an efficient and functioning antimonopoly regime in 2002. In fact,

> [Three hundred] million people have escaped poverty in less than a generation, and millions are migrating from the countryside to places like Chongqing, where the juggernaut of capitalism is powering a rapid transformation.... In the past one saw the occasional car; now the nation is putting 25,000 new vehicles on the road every day.... People talked openly about wanting to get rich, a desire once verboten.[128]

The 2008 AML is yet another step in this progression.

---

126. *See generally* Héctor R. Lozada et al., *Master Franchising as an Entry Strategy: Marketing and Legal Implications*, 4 COASTAL BUS. J. 16, 24-25 (2005), *available at*: http://www.coastal.edu/business/cbj/pdfs/articles/spring2005/lozada_hunter_kritz.pdf.

127. Berring, *supra* note 11, at 443.

128. Felicia R. Lee, *Ted Koppel Tours a China Brimming with Dreams and Consumerism*, N.Y. TIMES, July 8, 2008, at E3 (discussing Ted Koppel's recent visit to China and the documentary "Koppel on Discovery: The People's Republic of Capitalism").

COUNTER-TERRORISM AND HUMAN RIGHTS: THE EMERGENCE OF A RULE OF CUSTOMARY INT'L LAW FROM U.N. RESOLUTIONS

DR. JOSEPH ISANGA*

In response to the global threat of international terrorism and the counter-terrorism efforts by national governments, the United Nations General Assembly (G.A.) and the United Nations Security Council (S.C.) have adopted various resolutions and conventions.[1] The effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism. However, the absence of such agreement to date has, *inter alia*, thwarted efforts aimed at adopting a comprehensive international, legally-binding instrument regarding international terrorism. In spite of its urgency and the critical importance of terrorism to contemporary international relations, international terrorism has proven not easily amenable to satisfactory or exclusive regulation by treaty. Notwithstanding the definitional dilemma, the United Nations' resolutions regarding counter-terrorism have insisted on the necessity to protect human rights in the context of counter-terrorism.[2]

Although the United Nations currently has no agreed-upon definition of terrorism, this article will argue that it is nonetheless possible to hold States engaged in counter-terrorism efforts liable for violations of international human rights law even when they are not signatories to relevant international treaties. The basis for such an obligation, it will be advocated, derives from various resolutions of the United Nations and decisions of national courts which represent a step toward the codification of a general obligation to protect human rights in the context of counter-terrorism as an emerging rule of customary international law. The substance of such a rule would provide that no State can legally adopt

---

* Assistant Professor of Law, Ave Maria School of Law. LL.B, Makerere University, Kampala, Uganda First Class Honors and First-in-Class; LL.M., University of Notre Dame, Summa Cum Laude; J.S.D. University of Notre Dame, Summa Cum Laude. Teaches International Law, International Human Rights Law, Jurisprudence, and Law, Ethics & Public Policy.

1. *See, e.g.*, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention against the Taking of Hostages, G.A. Res. 146 (XXXVI), U.N. Doc. A/34/46 (Dec. 17, 1979); International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. Doc. A/RES/52/164 (Dec. 15, 1997); International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/49, U.N. Doc. A/RES/54/49 (Dec. 9, 1999); International Convention for the Suppression of Acts of Nuclear Terrorism, G.A. Res. 59/290, U.N. Doc, A/RES/59/290 (Apr. 13, 2005).

2. *See, e.g.*, G.A. Res. 146 (XXXVI), *supra* note 1, at Preamble; G.A. Res. 52/164, *supra* note 1, art. 14; G.A. Res. 54/49, *supra* note 1, art. 17; G.A. Res. 59/290, *supra* note 1, art. 12.

strategies aimed at combating international terrorism if those strategies simultaneously derogate from established international human rights norms. The practical utility of this discussion would be to put States on notice that counter-terrorism efforts oblivious of international human rights standards may be in breach of international law, regardless of the non-existence of an international treaty regime regulating State practices in this area. In that regard, States could be legally liable both domestically and internationally.

As will be discussed, a norm of customary international law depends on the existence of State practices and the engagement in those practices with a sense of legal obligation (*opinio juris*).[3] This article will propose that the relevant international conventions and U.N. General Assembly and U.N. Security Council paper-trail[4] regarding protection of human rights while combating international terrorism, as well as on national and international decisions, establishes a sufficient documentary record of State practice. Similarly, the nature and language of those resolutions, as well as the respect that national governments have accorded the decisions of their own national courts in regard to the need to protect human rights

---

3. *See* discussion *infra* Section I.

4. *See, e.g.*, G.A. Res. 52/164, *supra* note 1, art. 5 (requiring that each State adopt measures that may be necessary including domestic legislation to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by consideration of a political, philosophical, ideological, racial, ethnic, religious or other nature and are punished by penalties consistent with their grave nature); G.A. Res. 54/49, *supra* note 1, art. 4; Human Rights and Terrorism, G.A. Res. 56/160, ¶ 6, U.N. Doc. A/RES/56/160 (Feb. 13, 2002) (calling upon States to "take all necessary and effective measures, in accordance with relevant provisions of international law, including international human rights standards, to prevent, combat and eliminate terrorism . . . and . . . strengthen, where appropriate, their legislation to combat terrorism"); Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 57/219, ¶ 1, U.N. Doc. A/RES/57/219 (Feb. 27, 2003) (affirming that "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights"); Protection of Human Rights and Fundamental Freedoms While Encountering Terrorism, G.A. Res. 59/191, U.N. Doc A/RES/59/191 (Mar. 10, 2005); Human Rights and Terrorism, G.A. Res. 59/195, ¶ 3, U.N. Doc. A/RES/59/195 (Mar. 22, 2005) (rejecting the "identification of terrorism with any religion"); Threats to International Peace and Security Caused by Terrorist Acts, S.C. Res. 1373, ¶ 2, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (calling on all States to ensure that "terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts"); S. C. Res. 1535, U.N. Doc S/RES 1535 (Mar. 26, 2004) (stating that States "must ensure that any measures taken to combat terrorism comply with all their obligations under international law and should adopt such measures in accordance with international law, in particular international human rights"); S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (reiterating much of S.C. Res. 1535); S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005). *See also* U.N. High Comm'r for Human Rights, *Promotion and Protection of Human Rights: Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 8, E/CN.4/2006/94 (Feb. 16, 2006) (stating that states have the right and duty to protect their citizens against terrorist attacks, but state action must be in conformity with international human rights); U.N. Comm'n on Human Rights, *Civil And Political Rights, Including Religious Intolerance*, ¶ 103, E/CN.4/2003/66 (Jan. 15, 2003) (*submitted by* Abdelfattah Amor) (stating that "non-governmental organizations . . . continue to express grave concern that the 'total security' drive being implemented under cover of anti-terrorist laws . have a direct and immediate impact on the entire human rights protection system"); Kofi Annan, Sec'y Gen., U.N., Message for Human Rights Day, Torture, Instrument of Terror, Can Never Be Used To Fight Terror (Aug. 12, 2005), *available at* http://www.un.org/News/Press/docs/2005/sgsm10257.doc.htm.

while combating international terrorism, would support the case for the existence of the requisite *opinio juris*.

The argument that will be developed is premised not only on the recent cases of the International Court of Justice (I.C.J.), but also on the more foundational I.C.J. cases establishing the circumstances under which codification of international norms takes place by reference to resolutions of instruments of the United Nations. In particular, the argument is predicated on the *North Sea/Continental Shelf Case*'s[5] discussion of the codification of customary law from conventional documents, as well as the I.C.J. decisions in the *Case Concerning Military and Par-Military Activities in and Against Nicaragua*,[6] *Case Concerning Armed Activities on the Territory of Congo (Congo v. Uganda)*,[7] the *Construction of A Wall Advisory Opinion*,[8] and the *Threat or Use of Nuclear Weapons Advisory Opinion*[9] in their treatment of the legal effect of U.N. resolutions. Additionally, the article will examine the decisions of several national courts that have ruled anti-terrorism legislations and practices as being overreaching to the extent these derogated from human rights standards. Specifically, courts in the United Kingdom, the United States, and India exemplify this trend, with some of these tribunals having derived their norms of international law by reference to the resolutions of international organizations.

This article is divided into four sections. Section I will discuss how a rule of customary international law generally develops, including discussions of development from conventional sources and the use of United Nations resolutions for finding a rule of customary international law generally. Section II will expound the treatment of and reliance upon the United Nations resolutions as a source of law by the International Court of Justice, in order to facilitate our discussion of an emerging rule of customary international law from resolutions. Section III will consider the limitations for using resolutions as binding statements of *opinio juris*. Finally, section IV will analyze the resolutions of both the General Assembly and Security Council that are particularly relevant to complying with human rights while combating terrorism and advocate that such resolutions have established the necessary *opinio juris* and, combined with the decisions of the high courts of influential countries which abide by the rule, confirms a rule of customary international law that counter-terrorism measures must conform to human rights.

I. DEVELOPMENT OF A RULE OF CUSTOMARY INTERNATIONAL LAW (C.I.L.)

As this article addresses the emergence of a norm of customary international law from resolutions, a fundamental explanation of the typical development of

5. *See* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

6. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

7. *See* Armed Activities on the Territory of the Congo, (Dem. Rep. Congo v. Uganda), 2000 I.C.J. 111 (Nov. 7).

8. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 1).

9. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

customary international law is in order. The list of sources of international law under Article 38 of the Statute of the International Court of Justice[10] includes what is labeled as "international custom," also known as customary international law.[11] Customary international law, which has equal authority with conventional laws, such as treaty law,[12] is often relied upon for its important role inproviding a rule of law in areas of international law in which no widely applicable conventional rule exists.

A. General Requirements for the Development of a Rule of C.I.L.

Customary international law receives the status of "law" because the I.C.J. considers custom as "evidence of a general practice accepted as law" and thus as "part of the *corpus* of general international law."[13] To be accepted as "customary," the proponent of an emerging norm must show that States adhere to a practice demonstrative of such custom and do so with a sense of legal obligation, known as *opinio juris*.[14] In other words, "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[15]

The I.C.J. has various approaches to establish the existence of international custom. In many cases, the I.C.J. is willing to assume the existence of an *opinio juris* on the bases of the evidence of a general practice, a consensus in the literature, or the previous determinations of the Court or other international tribunals.[16] However, in some cases the Court calls for more positive evidence of the recognition of the validity of the rules in question in the practice of States.[17] As respected international law scholar, Ian Brownlie, points out, the choice of

10. This article is often given preeminence by international legal scholars as the starting point for sources of international law. *See, eg.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-5 (6th ed. 2003) (emphasizing that Article 38 of the I.C.J. Statute "is generally regarded as a complete statement of the sources of international law").

11. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter *I.C.J. Statute*].

12. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. §102 cmt. j (1987) [hereinafter *Restatement (Third) of Foreign Relations*].

13. I.C.J. Statute, *supra* note 11, art. 38(1)(b); North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, at 28 (Feb. 20).

14. *North Sea Continental Shelf*, 1969 I.C.J. at 41-42.

15. *Id.* at 44.

16. BROWNLIE, *supra* note 10, at 8.

17. *See, e.g.* S.S. "Lotus," (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 23 (Sept. 7) (commenting "[e]ven if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty").

approach appears to depend upon the nature of the issues – that is, the state of the law may be a primary point of contention – and the discretion of the Court.[18]

B. Development of C.I.L. from a "Conventional" Rule

For rules which develop from purely "conventional" statements of law – i.e. those arrived at by convention or agreement, such as treaties or charters – before finding the existence of such rule, the I.C.J. considers: (i) whether the language of the agreement is norm-creating; (ii) the passage of time since the rule was embodied in the agreement; and (iii) the consistency of State practice concerning the rule.[19]

As to the first requirement, the I.C.J. has stated that "the provision concerned should, at all events, potentially be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[20] Thus, in the *North Sea Continental Shelf Case,* the Court found that the provision concerned was not of a "norm-creating character" for several reasons, including that it was not phrased in the convention as a rule but as a default (to be used where parties did not agree to their own method), unresolved controversies about the scope of the provision existed, and the parties were free to accept the convention while making reservations regarding this provision.[21] In other words, the ability of States to freely derogate from the rule while accepting the remainder of the convention undercut the argument that it had a norm-creating character.[22]

On the passage of time element, the Court held that development of a rule of customary international law over a brief period of time from "conventional" statements of law demands a greater showing of the third element, State practice, than is generally required to prove such a rule.[23] As the I.C.J. expounded in the *North Sea Continental Shelf Case*:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a *purely conventional rule*, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a *rule of law or legal obligation* is involved.[24]

18. BROWNLIE, *supra* note 10, at 9-10.
19. *North Sea Continental Shelf*, 1969 I.C.J. at 41-43.
20. *Id.* at 41-42.
21. *Id.*
22. *Id.*
23. *Id.* at 43.
24. *Id.* (emphasis added).

Thus, the brevity of a practice's existence is not a bar to the I.C.J. finding a rule of customary international law, but may be supplemented by greater uniformity in State practice than normally required. Brownlie observes that "[p]rovided the consistency and generality of a practice are proved, no particular duration is required: the passage of time will of course be a part of the evidence of generality and consistency."[25]

The framework provided in the *North Sea Continental Shelf Case* for the development of a rule of customary international law from conventional sources is of particular relevance to discussing the emergence of such a rule from U.N. resolutions, which arguably serve as conventional sources.[26] In the context of the proposed rule, an analysis will demonstrate that the norm-creating character of the resolutions and uniformity of state practice strongly evidence the rule and trump any concerns surrounding the brevity of the rule's existence.

However, because many would debate that General Assembly or non-Chapter VII resolutions have any legal effect, it must first be demonstrated that it is appropriate to use such resolutions as a conventional source of customary international law. The next section will extract principles from the I.C.J.'s jurisprudence on the use of resolutions to strengthen the argument that U.N. resolutions may be considered a "conventional" source to which the *North Sea* framework applies and from which a customary rule of law may be derived.

II. LEGAL EFFECT OF UNITED NATIONS RESOLUTIONS IN THE I.C.J.'S JURISPRUDENCE

Some international legal scholars would dispute labeling U.N. Resolutions as a "conventional" source, since such label places them in the same category as international agreements, and thus imputes legal value to resolutions.[27] A number of scholars subscribe to the view that resolutions of the United Nations have little or no legal weight and are highly skeptical of any position that puts emphasis on the legal effect of resolutions.[28] As a general observation, this proposition is probably true. Formally, the United Nations Charter regards U.N. General Assembly resolutions as being "recommendations."[29] Moreover, the General Assembly is not an official legislature in the ordinary sense that is associated with

25. BROWNLIE, *supra* note 10, at 7.

26. *See* Gaetano Arangio-Ruiz, The United Nations Declaration on Friendly Relations the System of the Sources of International Law: With an Appendix on the Concept of International Law and the Theory of International Organisation 9 (1979).

27. *Id.*

28. For example, Professor David J. Bederman argues that suggestions that "the resolutions of United Nations bodies (particularly the General Assembly, where each nation has a vote) constitute a binding source of international law are extravagant." DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS, 44 (2d ed., Foundation Press 2006) (2001) [hereinafter BEDERMAN].

29. The U.N. Charter employs the language of "recommend" in referring to the powers and functions of the General Assembly. Charter of the United Nations art. 10-11, June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter *U.N. Charter*].

political discourse in particular national settings and the resolutions of the Security Council bind the members only when speaking under enumerated powers.[30]

Despite such criticism, resolutions of both the United Nations' General Assembly and Security Council are often relied upon as evidence of customary international law both internationally[31] and domestically.[32] The International Law Commission[33] in an early report to the U.N. concluded that customary international law could be derived from the cumulative practice of international organizations, likely having applicability to U.N. Resolutions.[34] More recently, several scholars have emphasized the importance of resolutions to the rapid development of a rule of custom, advising that "[m]odern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs, and generate new customs."[35] This statement resonates with those of U.S. Courts such as in *Siderman de Blake v. Republic of Argentina*,[36] where the 9th Circuit confirmed that "a resolution of the General Assembly of the United Nations... is a powerful and authoritative statement of the customary international law."[37] The advantages of relying on resolutions as a source of custom, as has

30. *See* Lara M. Pair, *Judicial Activism in the ICJ Charter Interpretation*, 8 ILSA J. INT'L & COMP. L. 181, 189 (2001).

31. Arbitral Award on the Merits in Dispute Between Texaco Overseas Petroleum Company / California Asiatic Oil Company and the Government of the Libyan Arab Republic, 17 I.L.M. 1, 28 (1978); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (separate opinion of Judge Ago); Legality of the Threat or Use of Nuclear Weapon, Advisory Opinion, 1996 I.C.J. 226 (July 8).

32. Filartiga v. Pena-Irala, 630 F.2d 876, 882, 884 (2d Cir. 1980); Almog et al. v. Arab Bank, PLC, 471 F. Supp. 2d 257, 279-80 (E.D.N.Y. 2007) (relying upon G.A. Res. 1566 as evidence of a customary international law rule against terrorist acts); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 719 (9th Cir. 1992) ("[A] resolution of the General Assembly of the United Nations . . . is a powerful and authoritative statement of the customary international law of human rights"); Bodner v. Banque-Paribas, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); Burger-Fischer v. Degussa, 65 F. Supp. 2d 248, 255 (D.N.J. 1999).

33. The work of the Commission is a source of law under the I.C.J. Statute. I.C.J. Statute, *supra* note 11, art. 38(1)(d) (stating that "teachings of the most highly qualified publicists" are a subsidiary source of international law).

34. Int'l Law Comm'n, *Report To The General Assembly On Ways And Means For Making The Evidence Of Customary International Law More Readily Available*, A/CN.4/6 (June 1, 1949) (noting that records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations) *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_6.pdf.

35. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001), *relying, in part, on* Eduardo Jiménez de Aréchaga, *Remarks, in* CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 48 (Antonio Cassese & Joseph H. H. Weiler eds., 1988) [hereinafter *Roberts*]. *See also* Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 544 (1993) ("Today, major developments in international law often get their start of substantial support from proposals, reports, *resolutions*, treaties or protocols debated in such forums . Sometimes these efforts result in consensus on solving the problem and express it in normative terms of general application.") (emphasis added) [hereinafter *Charney*].

36. *Siderman de Blake*, 965 F.2d 699.

37. *Id.* at 719.

been observed, is that the method "is potentially more democratic [than looking to other sources] because it involves practically all States."[38]

Consistently, the International Court of Justice has affirmed that General Assembly resolutions and non-Chapter-VII resolutions of the United Nations Security Council have legal significance under certain circumstances. For instance, in the *Construction of A Wall Advisory Opinion*,[39] the I.C.J. included "relevant resolutions adopted pursuant to the U.N. Charter by the General Assembly and the Security Council" among the "rules and principles of international law" which were useful in assessing the legality of the measures taken by Israel.[40] In various cases, therefore, the International Court of Justice has employed resolutions of the General Assembly and non-Chapter-VII Security Council resolutions not only as material sources of international law but, more importantly, in providing norms for resolution of international disputes, especially in the context of surveying and establishing the development of a rule of customary international law.

To the extent the I.C.J.'s jurisprudence is relevant to establishing a norm of customary international law from various resolutions of the General Assembly and Security Council, this discussion is narrowly focused on the purposes for which resolutions have been invoked by the Court. The three primary purposes for which resolutions have been used – those that are relevant to our analysis – are: (i) as indicative of a State's subscription to or pledge to abide by the norm embodied in the relevant resolution; (ii) as evidence of the ongoing practices of States; and (iii) as proof of *opinio juris*. Each of these uses will be discussed in turn.

A. State's Votes on Resolutions as Subscription to the Embodied Norm

As to the first purpose, the I.C.J. has indicated that States must be careful in voting for resolutions, as such votes evince a pledge to uphold the resolution's embodied norm and may be legally binding against the States if a later controversy arises.[41] For example, in the *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*,[42] the Court was called upon to resolve a dispute concerning the delimitation of the boundary between the States and Cameroon's sovereignty over the Bakassi Peninsula. Resorting to a resolution of the General Assembly, the Court observed that "this frontier line was acknowledged by Nigeria when it voted in favour of General Assembly resolution 1608 (XV)."[43] Nigeria's acknowledgment by voting in favor of the resolution had therefore become binding upon it as a legal recognition of Cameroon title to the disputed territory, and the

38. Roberts, *supra* note 35, at 768.

39. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

40. *Id.* at 171.

41. *See, e.g.*, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.; Eq. Guinea intervening), 2002 I.C.J. 303, 410 (Oct. 10).

42. *Id.*

43. *Id.* at 410.

Court held that "[n]o Nigerian *efectivités* in Bakassi before that time can be said to have legal significance for demonstrating a Nigerian title."[44]

The Court's opinion in the *Land and Maritime Boundary Between Cameroon and Nigeria* case indicates that any State which votes in favor of the United Nations resolutions must be aware that its vote indicates both that it agrees with the norm that the Assembly, as a whole, subscribes to in that resolution and also that it cannot be allowed by the Court to repent of its position if a matter is raised against it by another State and that resolution is invoked.[45] Further, this principle would likely extend not only to resolutions of the General Assembly, but also non-Chapter-VII Security Council resolutions as well for States which hold or have held a position on the Council.

B. Resolutions as Evidence of Ongoing State Practice

The second purpose for which resolutions have been used is as evidence. To successfully demonstrate the existence of a State practice for the purpose of proving a rule of customary law, a court needs evidence, and one way to adduce such evidence may be to rely upon a long string of resolutions on a particular topic.[46] Not surprisingly, therefore, the I.C.J. has placed considerable reliance on resolutions of the General Assembly for this purpose.

For instance, in the *Case Concerning Armed Activities on the Territory of the Congo*,[47] the I.C.J. used United Nations resolutions liberally for evidentiary purposes. Both parties presented to the Court various resolutions of the United Nations Security Council.[48] Many of the resolutions invoked were not promulgated under Chapter-VII of the U.N. Charter and would not be considered legally binding, such as resolution 1234,[49] which called for an immediate signing of the ceasefire agreement.

In rejecting Uganda's self-defense excuse for the use of force in the Congo, without discriminating between "Chapter-VII" and "non-Chapter-VII" resolutions,

---

44. *Id.* at 416.

45. Some commentators would remark that votes in organizations like the U.N. General Assembly are "political" and therefore non-binding in any legal sense. *See, e.g.*, Stephen Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566, 589 (1980) ("Formal votes, when taken, are often taken for a political purpose . . . ; they may attempt to set norms for States to follow, but they do not legally bind the organization or its members to carry out specific activities . . . The U.N. General Assembly is the clearest example . . . "); Damir Arnaut, *When in Rome . . .? The International Criminal Court and Avenues for U.S. Participation*, 43 VA. J. INT'L L. 525, 581 n.258 ("[T]he history of General Assembly resolutions may be understood to demonstrate that they are often based on purely political considerations "). Such categorization may be applicable to votes which are simultaneously accompanied by State declarations that such votes are considered political. *See, e.g.*, *infra* note 62. It does not address the circumstance where a simultaneous declaration of that purpose is absent, nor the weight given votes in I.C.J. jurisprudence, to the extent it is critical of General Assembly votes as a whole.

46. *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1, 128-29 (Dec. 19).

47. *Id.*

48. *Id.* at 15.

49. S.C. Res. 1234, U.N. DOC. S/RES/1234 (Apr. 9, 1999).

the Court referred to what it respectfully recognized as being the "long series" of U.N. Security council resolutions[50] which "*testif[ied]* to the magnitude of the military events and the attendant suffering."[51] The series cited by the Court was composed not only of resolutions passed both under Chapter-VII and non-Chapter-VII powers of the Council, but in fact consisted of a majority of non-binding, non-Chapter-VII resolutions.[52] The Court further relied on resolution 1304[53] for evidence showing that a "loss of civilian lives... and damage to property inflicted by the forces of Uganda" were present and for the observation that the United Nations Security Council had "identified Uganda and Rwanda as having violated the sovereignty and territorial integrity of the Congo and as being under the obligation to withdraw their forces."[54] Indeed, the Court went on to cite even U.N General Assembly resolutions.[55] For example, in deciding the issue of whether or not any armed attack took place on Uganda emanating from the Congo, the Court relied on Article 3(6) of General Assembly resolution 3314[56] for the definition of aggression.[57]

Based upon the Court's practices, embodied in *Congo*, the Court's reliance on the United Nations resolutions as evidence of a State practice is a natural extension of the evidentiary function of resolutions. The Court's employment of non-binding resolutions in an evidentiary context indicates how seriously the Court takes those resolutions as evidence of State action and, it can also be assumed, of State practice.

C. Resolutions as Providing Necessary Opinio Juris

Finally and most importantly, the Court has also looked to resolutions to provide a declaratory basis of the *opinio juris* element for a rule of customary international law. Thus, in the case of *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*,[58] speaking to a circumstance where it had been argued that a rule of customary international law existed, the Court considered whether an *opinio juris* existed as to the binding character of the purported obligation. The Court remarked:

> *This opinio juris may, though with all due caution, be deduced from,* inter alia, *the attitude of the parties and the attitude of States toward certain General Assembly resolutions....* The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the

50. *Armed Activities on the Territory of the Congo*, 2005 I.C.J. at 54.
51. *Id.* (emphasis added).
52. *See id.* at 54.
53. S.C. Res. 1304, U.N. DOC. S/RES/1304 (June 16, 2000).
54. *Armed Activities on the Territory of the Congo*, 2005 I.C.J. at 67, 43.
55. *See id.* at 15, 53.
56. G.A. Res. 3314 (XXIX), U.N. DOC. A/9619 (Dec. 14, 1974).
57. *Armed Activities on the Territory of the Congo*, 2005 I.C.J. at 53.
58. Military and Paramilitary Activities (Nicar. V. U.S.), 1986 I.C.J. 14 (June 27).

> validity of the rule or set of rules declared by the resolution by themselves.[59]

In other words, the I.C.J. could derive the requisite *opinio juris* from a careful analysis of the resolution in order to determine States' attitudes towards the rule embodied.

The Court further found that, with regard to the United States, that the weight of an expression of *opinio juris* could be attached to its support of the resolution of the United Nations on the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the U.N.[60] According to the I.C.J., the adoption by States of this text afforded an indication of their *opinio juris* as to the customary international law on the question.[61] The Court cautioned that multiplicity of resolutions is not, without more, sufficient to establish a rule of customary international law, as it still depends upon the "exact content of the principle accepted" and whether "[State] practice [is] sufficiently in conformity with it" for a rule of C.I.L. to exist.[62] The I.C.J. also indicated that if a State expressly mentions, while voting for a particular resolution, that it regards the resolution as being merely a political statement without legal content, then that resolution may not be invoked against it.[63] Despite these qualifications, the I.C.J. gave G.A. resolutions a prominent place for their ability to demonstrate *opinio juris*.[64]

Further, in the *Legality of the Threat or Use of Nuclear Weapon Advisory Opinion*, the Court expanded upon its statement in the *Nicaragua Case*, examining General Assembly resolutions to determine whether or not such resolutions provided the necessary *opinio juris* for the Court to find a rule of customary international law.[65] The issue arose as some States argued that "the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961,[66] that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons."[67] According to other States, the resolutions in question had "no binding character on their own account" and were not "declaratory of any customary rule of prohibition

---

59. *Id.* at 99-100 (emphasis added).

60. *Id.* at 100; *see generally* G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970).

61. *Military and Paramilitary Activities*, 1986 I.C.J. at 101.

62. *Id.* at 107-08.

63. *Id.* at 106-07 (explaining that while the United States voted in favor of General Assembly resolution 2131(XX), it also declared at the time of its adoption that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law." Resolution 2131 (XX) relates to the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty).

64. *See* BROWNLIE, *supra* note 10, at 15.

65. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254-55 (July 8).

66. *See generally* G.A. Res. 1653 (XVI), U.N. Doc. A/5100 (Nov. 24, 1961).

67. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 at 254.

of nuclear weapons."[68] Additionally, opposing States pointed out that this series of resolutions not only failed to muster the approval of all of the nuclear-weapon States but of many other States as well.[69] The I.C.J. responded to the issues raised by stating that:

> General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[70]

The I.C.J. thus rejected the argument of some States that resolutions were legally insignificant because of their non-binding character, giving resolutions the power to establish *opinio juris* depending upon their content and the conditions of their adoption.

The Court went on to find that "[e]xamined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be 'a direct violation of the Charter of the United Nations'; and in certain formulations that such use 'should be prohibited.'"[71] However, the Court found that "several of the resolutions under consideration in the present case [had] been adopted with substantial numbers of negative votes and abstentions; and thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons."[72] Regardless of the outcome, the clear import of the I.C.J.'s opinion in *Legality of the Threat or Use of Nuclear Weapons* was to signal that, depending upon the level of State consensus,[73] resolutions of the United Nations Security Council and General Assembly can establish the existence of requisite *opinio juris*.[74]

The Court confirmed this principle in the more recent *Case Concerning the Application on the Convention on the Prevention and Punishment of the Crime Against Genocide*.[75] Confronting a patently human rights issue, the Court relied on

---

68. *Id.*
69. *Id.*
70. *Id.* at 254-55.
71. *Id.* at 255.
72. *Id.*
73. *See* discussion *infra* Section III.
74. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254-55 (July 8) (stating that the primary basis for the *opinio juris* as an ingredient of international customary law is the *Statute of the International Court of Justice* itself which refers to "a general practice *accepted as law*") (emphasis added); I.C.J. Statute, *supra* note 11, art. 38(1)(b).
75. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Mont.), 46 I.L.M. 188, ¶ 142 (Feb. 26).

several U.N. resolutions in conjunction with the Genocide Convention as a basis for a customary international law rule that genocide is a crime.[76] The issue in the case concerned whether any legal significance could be attached to the expression "ethnic cleansing" in connection with the crime of genocide.[77] Within the Genocide Convention, the term "ethnic cleansing" had no legal significance of its own.[78] However, the parties to the case submitted, among other sources, several resolutions of the United Nations.[79] The Court resorted to the preamble of General Assembly Resolution 47/121 which refers to ethnic cleansing as a "form of genocide."[80] Further, the Court referenced the "contemporaneous Security Council and General Assembly resolutions condemning the killing of civilians in connection with ethnic cleansing."[81]

More importantly, the Court found that the affirmation that genocide was a crime under international law, not only in Article I of the Genocide Convention but also "read in conjunction with the declaration that genocide is a crime under international law, unanimously adopted by the General Assembly two years earlier in its resolution 96(I)."[82] According to the Court, the "affirmation recognize[d] the existing requirements of customary international law...."[83] In other words, this declaration, which "purport[ed] to reflect legal principles," was considered an expression of the necessary *opinio juris* for finding a rule of customary international law.[84]

The proposal of the I.C.J. that resolutions may serve as the instrument for finding customary international law is consistent with other evidence of international opinion concerning the effect of non-binding resolutions in supplying the necessary *opinio juris* for a rule of customary international law. For example, a memorandum of the United Nations' Office of Legal affairs has stated that:

> [I]n view of the greater solemnity and significance of a 'declaration,'[85] it may be considered to impart, on behalf of the organ adopting it, a

---

76. *Id.* at ¶ 161.

77. *Id.* at ¶ 190.

78. *Id.*

79. *Id.* at ¶ 274.

80. *Id.* at ¶ 190 (noting that the Interim Report of the United Nations Commission of Experts had referred to "ethnic cleansing" to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area").

81. *Id.* at ¶ 274 (noting in particular Security Council Resolution 819 (1993), and General Assembly Resolutions 48/153 (1993) and *49/196* (1994)).

82. *Id.* at ¶ 161.

83. *Id.*

84. *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 12, § 102 note 2, cmt. c (1987) (discussing how General Assembly resolutions have been held to express *opinio juris* for rule of customary international law).

85. "Declarations" are sometimes accorded greater weight than normal resolutions. *See* Noelle Lenoir, *Universal Declaration on the Human Genome and Human Rights: The First Legal and Ethical Framework at the Global Level*, 30 COLUM. HUM. RTS. L. REV. 537, 551 (1999) (noting "U.N. declarations represent a form of action that is both psychological and political. The principles enshrined in them can add leverage to claims for rights, especially claims emanating from non-governmental organizations."); *See also,* Major Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of*

> strong expectation that Members of the international community will abide by it. Consequently, insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.[86]

The "strong expectation" such a declaratory resolution can create that "Members of the international community will abide by it,"[87] supports *opinio juris* by evincing that the State practice in question is not coincidental, but is rather "rendered obligatory by the existence of a rule of law requiring it."[88] The Restatement 3rd of Foreign Relations Law of the United States[89] also accords with this principle, confirming that "[r]esolutions of universal international organizations, if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight."[90]

III. CONDITIONS UNDER WHICH RESOLUTIONS SUPPORT *OPINIO JURIS*

Given that the I.C.J. has repeatedly affirmed that non-binding resolutions of the United Nations can in fact support the *opinio juris* element for finding a rule of customary international law, discerning *when* and under what circumstances they will be given that effect are important. The primary issues which arise are how to assess the weight of resolutions and whether doubt should be cast on the legal force of resolutions when States supporting such resolutions commit inconsistent acts. Discussion of these problems will occur in light of both the I.C.J.'s own decisions and other decisions of domestic and international tribunals.

A. Weighing the Force of Resolutions

A key issue that naturally arises is what conditions must be present to give a resolution force as *opinio juris*. Such weight for resolutions of the General Assembly varies depending upon the voting conditions surrounding the resolutions.[91] The relevant conditions for analysis include not only the amount of support but also the nature of support – whether the States voting for or against the resolution represent a significant block of States which are much differently situated than those in the opposing block.[92] For example, in the dispute concerning *Texaco Overseas Petroleum Company and the Government of Libya*, the arbitrator considered it "important to note" that not only a majority of the assembly had

---

War in Space, 48 A.F. L. REV. 1, 110 n.485 (2000) ("The fact that a General Assembly Resolution assumes for itself the term "Declaration" does highlight the importance of the document.").

86. Office of International Standards and Legal Affairs, *General Introduction to the Standard-Setting Instruments of UNESCO, Recommendations*, *available at* http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html#4.

87. *Id.*

88. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

89. Restatement Third of Foreign Relations Law is considered a subsidiary source of international law under the I.C.J. Statute. *See* I.C.J. Statute, *supra* note 11, art. 38(1)(d)..

90. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 12, §103 cmt. c (1987); *see also id.* at §102 note 2 (discussing how General Assembly resolutions have been held to express *opinio juris* for rule of customary international law).

91. Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. the Government of Libyan Arab Republic, 17 I.L.M. 1, 28 (1978).

92. *Id.*; *see also* Charney, *supra* note 35, at 544-45.

voted for the text at hand, but also that the States voting in favor included both "many States of the Third World, [and] also several Western developed countries with market economies...."[93] The distinction between third world and developed countries did not serve in itself as a standard of evaluation, but rather was remarkable for its relevance to the particular controversy at hand – an economic dispute crossing the divide of developed and third world economies.

Similarly, the U.S. District Court case of *Nguyen Thang Loi v. Dow Chem. Co.*,[94] the only domestic case available from the United States which has also engaged in analysis of the legal weight to be given of a General Assembly Resolutions for the purposes of establishing customary law, evaluated not only the voting record but also the position of important players relative to the subject matter of the resolution. Thus, although a particular resolution concerning the military use of herbicides passed 80-3, the Court held that it did not evince consensus on an issue, where two of the three States voting against the resolutions, the United States, Australia, were among the world's larger military powers, and such "no" votes were accompanied by 36 abstaining.[95] Additionally, the abstention of one-third of the countries was held to "deprive the resolution of even precatory force" as it was demonstrative of a lack of consensus.[96]

In both of these decisions, the tribunals emphasize the same factors in assessing their legal weight. Namely, they used the voting pattern relative to whether a consensus is obtained (sometimes meaning a substantial majority or near-unanimity[97] and at other times described as a lack of express objections to the heart of the norm the resolutions contemplate),[98] the number of abstentions (which in the eyes of some expresses tacit consent),[99] and the positions of key concerned actors are assessed to determine whether a particular resolution is binding. Although the I.C.J. itself has not directly addressed the topic, the I.C.J.'s refusal to derive *opinion juris* from resolutions in *Nuclear Weapons* because of "substantial numbers of negative votes and abstentions,"[100] indicates that the Court would follow this generally accepted methodology, in determining the weight of reductions as providing *opinio juris*.

---

93. *Id.*

94. Nguyen Thang Loi v. Dow Chem. Co. (*In re* Agent Orange Prod. Liab. Litig.), 373 F. Supp. 2d 7, 126-27 (E.D.N.Y. 2005).

95. *Id.* at 126.

96. *Id.*

97. *See, e.g., id.* at 126 (noting "A General Assembly resolution, even though it is not binding, may provide some evidence of customary international law when it is unanimous (or nearly so).").

98. *See, e.g.,* Charney, *supra* note 35, at 544 ("unanimous support is not required . . . The absence of objections, of course, amounts to tacit consent by participants that do not explicitly support the norm. Even opposition by a small number of participating States may not stop the movement of the proposed rule toward law . . . ").

99. *Id.*

100. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 255 (July 8).

B. Inconsistent Actions by States Supporting a Resolution

Some argue that no *opinio juris* can exist if States vote overwhelmingly in support of particular resolutions but their conduct is inconsistent with their words.[101] The example given is that States voted overwhelmingly in the U.N. General Assembly for resolutions condemning State-sponsored torture, yet some of those States continued to engage in torture.[102] Could it, therefore, be said that no customary norm prohibiting States from engaging in torture existed? The fact of the matter is that the law against torture is actually a norm of customary international law.[103] To ignore the words simply because they are at times not accompanied by action would be to ignore an increasingly important source of norms. A particular country's failure to keep its word does not necessarily mean that it does not understand its verbal commitments to have legal effect.

The dispute is given a more than hypothetical character when put in context of the I.C.J.'s jurisprudence on the issue. As previously stated in the discussion above,[104] in the *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*,[105] a country which votes in favor of a resolution may not altogether disregard what their vote signifies and is, in some ways, bound by their vote. Therefore, scholars who make the argument that the inconsistency of some States defeats the binding nature of a resolution must confront the principle the Court referenced in *Cameroon*.

IV. ANALYSIS OF COUNTERTERRORISM AND HUMAN-RIGHTS-RELATED RESOLUTIONS

The resolutions of the U.N. General Assembly and Security Council concerning fighting terrorism in a manner consistent with human rights support the finding of *opinio juris* based upon both their language and voting patterns. As an analysis of the resolutions reveals, the language is of a strong, norm-creating character. Moreover, voting patterns show consistent support of a majority of States which cuts across both the Western democracies waging the "War on Terror," many of whom have approved of the language in one or more resolution, and the developing countries on the front lines. Additionally, the decisions of the high courts of many States[106] have recognized the non-derogability of human rights in fighting terrorism both apart from and in reference to resolutions of the U.N. in that regard, establishing the requisite State practice and cementing the rule of

101. *See* BEDERMAN, *supra* note 28, at 45.

102. *Id.*

103. Filartiga v. Peña-Irala, 630 F.2d 864, 882-84 (2d. Cir. 1980) (relying partially on General Assembly resolutions to hold that torture violates the "law of nations"); BEDERMAN, *supra* note 28, at 45 (describing General Assembly resolutions as mere evidence of state practice and *opinio juris* and not enough alone to form an international legal obligation).

104. *See supra* Part II.a.

105. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), 2002 I.C.J. 303, 431 (Oct. 10).

106. I.C.J. Statute, *supra* note 11, art. 38(1)(d) (providing that decisions of national courts are accorded force as subsidiary sources of international law).

customary law which the resolutions embody. Thus, despite the brevity of this rule's existence, first manifesting itself merely six years ago, the uniform consensus on the norm alleviates the need for a "long" practice.

A. General Assembly Resolutions

The General Assembly Resolutions concerning the topic at issue are primarily G.A. Res. 56/160, G.A. Res. 58/187, G.A. Res. 59/191, G.A. Res. 59/195, and G.A. Res. 57/219. The language of these resolutions is consistent with the *North Sea Case* requirement that a provision must be norm-creating.[107] As a very forceful whole, the resolutions emphasize both the non-derogability of human rights and the duty of states to comply. G.A. Res. 56/160 authorizes States to "take all necessary and effective measures, *in accordance with relevant provisions of international law, including international human rights standards*, to prevent, combat and eliminate terrorism... and... strengthen, where appropriate, their legislation to combat terrorism."[108] Consistently, G.A. Res. 57/219 urges that "States *must ensure* that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights."[109] G.A. Res. 58/187 holds that certain human rights are "non-derogable" and "[*r*]*eaffirms* that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law."[110] The remaining two resolutions, G.A. Res. 59/191[111] and 59/195[112] reaffirm and build off of the principles contained in G.A. Res. 57/219.

Of the five resolutions at issue, two – G.A. Res. 59/191 and G.A. Res. 57/219 – were passed without a vote. Of the remainder, G.A. Res. 56/160, entitled "Human Rights and Terrorism," passed unanimously, 102 votes to none, with sixty-nine abstentions.[113] Those in favor cover many of the nations in what might be deemed the "front lines" on the War on Terror – those States that deal domestically with the suppression of terrorism at its roots – Saudi Arabia, Iran, and Afghanistan among them.[114] Those abstaining, or in the words of one scholar, expressing "tacit consent,"[115] include many of the Western democracies waging the

107. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 41-42 (Feb. 20).

108. G.A. Res. 56/160, *supra* note 4, ¶ 6 (emphasis added).

109. G.A. Res. 57/219, *supra* note 4, ¶ 1 (emphasis added).

110. United Nations General Assembly Resolution on Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 58/187, Preamble ¶ 1, U.N. Doc. A/RES/58/187 (Mar. 22, 2004).

111. G.A. Res. 59/191, *supra* note 4.

112. G.A. Res. 59/195, *supra* note 4.

113. UNBISNET, United Nations Bibliographic Information System, http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=VN27665315312.1231&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=&index=.VM&term=56%2F160&matchopt=0%7C0&oper=and&aspect=power&index=.VW&term=&matchopt=0%7C0&oper=and&index=.AD&term=&matchopt=0%7C0&oper=and&index=BIB&term=&matchopt=0%7C0&ultype=&uloper=%3D&ullimit=&ultype=&uloper=%3D&ullimit=&sort=&x=0&y=0#focus (last visited Nov. 25, 2008) [hereinafter *UNBISNET Vote 56/160*].

114. *Id.*

115. Charney, *supra* note 35, at 544.

war, including the United States, the United Kingdom and France.[116] Moreover, in the context of this particular resolution, it is inapposite to say that the abstentions "deprive it" of its force, as *Ngyuen Thang Loi* phrased it,[117] since the three aforementioned States supported Security Council resolutions with a similar effect (each State having veto powers as permanent members of the Security Council, the resolutions would not have passed but for their votes), and further, the high courts of two of the States have subsequently recognized the need to afford certain human rights to suspected terrorists, as will be discussed below. One can only conclude that the abstentions, rather than a statement of non-support, were for purposes unrelated to the human rights language of the resolution.

Compared to G.A. Res. 56/160, States manifested even greater support for G.A. Res. 58/187, passing the resolution not only unanimously, 181 votes to 0, but with only one country abstaining.[118] The resolution is of particular importance not only for affirming that even in the War on Terror, human rights must be upheld, but also for placing such a statement within the context of the principle of non-derogation.[119] The effect of the resolution in giving rise to a rule of C.I.L. is particularly forceful, having passed unanimously with only one abstention. Moreover, the one country which abstained, India, voted in favor of both G.A. Res. 56/160 previously and G.A. Res. 59/195 subsequently and recognized in the jurisprudence of its Supreme Court a year later[120] that human rights deserve protection even during the War on Terror.[121]

Finally, G.A. Res. 59/195, creates additional support for arriving at our proposed rule of customary international law. The resolution emphasized similar desires as those stated in 59/191 and 57/219, strongly urging States to combat terrorism "in accordance with relevant provisions of international law, including international human rights standards."[122] The General Assembly cast 127 votes in favor and 50 in opposition, with 8 abstentions.[123] The resolution, receiving greater

116. UNBISNET Vote 56/160, *supra* note 113.

117. Nguyen Thang Loi v. Dow Chem. Co. (*In re* Agent Orange Prod. Liab. Litig.), 373 F. Supp. 2d 7, 126 (E.D.N.Y. 2005).

118. UNBISNET, United Nations Bibliographic Information System, http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=12276H69D8I90.3036&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=&index=.VM&term=58%2F187&matchopt=0%7C0&oper=and&aspect=power&index=.VW&term=&matchopt=0%7C0&oper=and&index=.AD&term=&matchopt=0%7C0&oper=and&index=BIB&term=&matchopt=0%7C0&ultype=&uloper=%3D&ullimit=&ultype=&uloper=%3D&ullimit=&sort=&x=0&y=0#focus (last visited Nov. 25, 2008).

119. G.A. Res. 58/187, *supra* note 110.

120. People's Union for Civil Liberties & Anor v. Union of India, [2004] 1 L.R.I. 1, 17 (India), *available at* http://www.lexisnexis.com [hereinafter People's Union].

121. *Id.*

122. GA/RES/59/195, *supra* note 4.

123. UNBISNET, United Nations Bibliographic Information System, http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=1A276M8414R23.4618&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=&index=.VM&term=59%2F195&matchopt=0%7C0&oper=and&aspect=power&index=.VW&term=&matchopt=0%7C0&oper=and&index=.AD&term=&matchopt=0%7C0&oper=and&index=BIB&term=&matchopt=0%7C0&ultype=&uloper=%3D&ullimit=&ultype=&uloper=%3D&ullimit=&sort=&x=0&y=0#focus (last visited Nov. 25, 2008).

opposition than previous resolutions nevertheless received greater support than 56/160 as well, evincing a growing change in attitude of even those who originally remained neutral.

B. United Nations Security Council Resolutions

In addition to the resolutions of the General Assembly that are addressed above, many resolutions of the U.N Security Council touch on human rights while combating terrorism. Those which directly embody the norm that the War on Terror must comport with human rights standards, including resolutions 1456, 1535, and 1624, are non-Chapter VII resolutions, meaning they are not immediately binding upon U.N. Member States.[124] However, resolutions 1373 and 1566, both binding Chapter VII resolutions, are also of relevance to this discussion for indirectly indicating the same norm – 1373 by requiring States to conform to human rights while implementing security measures for their borders and 1566 by broadly "reminding" States of their obligation to respect human rights.

The first counter-terrorism resolution to include the human rights language was Security Council Resolution 1456 in January 2003.[125] The importance of resolution 1456 was twofold: it both stressed the general obligation of nations to combat terrorism "in accordance with international law, in particular international human rights, refugee, and humanitarian law"[126] and also emphasized the more specific obligation to accord terrorists due process rights, stating that States had an obligation under the "principle to extradite or prosecute."[127]

Additionally, Security Council resolution 1535 reiterated the State's obligation to comply with human rights in combating terrorism.[128] In language reminiscent of resolution 1456, the Council stated that "States... must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."[129]

Shortly after the passage of 1535, the Security Council again addressed the issue in Security Council resolution 1566,[130] a binding Chapter-VII resolution.[131] Interestingly, resolution 1566 pairs the obligation of States to combat terrorism in accordance with human rights with the concept that "acts of terrorism seriously impair the enjoyment of human rights."[132] As will be discussed, this implication

124. *See* James A. R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 428 [hereinafter *Nafziger & Wise*]; *see also* Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 NW. J. INT'L HUM. RTS. 24, 102 [hereinafter *Schott*].

125. S.C. Res. 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003).

126. *Id.* at ¶ 6.

127. *Id.* at ¶ 3.

128. S.C. Res. 1535, *supra* note 4; *see also* S.C. Res. 1624, *supra* note 4.

129. *Id.* at Preamble.

130. S.C. Res. 1566, *supra* note 4.

131. *See* Nafziger & Wise, *supra* note 124, at 428; *see also* Schott, *supra* note 124, at 102.

132. S.C. Res. 1566, *supra* note 4, at Preamble.

formed the basis of decisions of at least two national courts in defending human rights in the context of the War on Terror.[133]

Lastly, Security Council resolution 1373,[134] also a binding Chapter-VII resolution, passed shortly after the September 11th attacks, is relevant to this discussion for having affirmed the principle of acting in accordance with human rights in the specific instance of dealing with refugees. Among a list of a number of actions which the Council called upon the States to implement, the Council called for States to "take appropriate measures in conformity with... international standards of human rights..." to scrutinize refugees seeking asylum, ensuring terrorists did not cross borders unsuspected.[135] The language of 1373 is particularly important as it bound the States to implement counter-terrorism measures, yet simultaneously required that human rights would receive priority in considering what measures were "appropriate."[136]

Each of the foregoing Security Resolutions were adopted by a unanimous council that permanently includes the United States, the United Kingdom, and France – three of the Western States most involved in the War on Terror.[137] A commonality exists in each of these resolutions of the Security Council: the non-derogability of human rights in fighting terrorism. Moreover, these resolutions and resolution 1566 in particular, give context to this rule that States respect human rights in the War on Terror, explicating that terror itself is a violation of human rights and, as such, counter-terrorism must not fall victim to the very failings of terrorism. Taken as a unit and in combination with the long string of General Assembly resolutions to the same effect, these Security Council resolutions embody a forceful statement of the nations, evincing an *opinio juris* for the proposed rule.

C. National Decisions Affirming Human Rights in Countering Terrorism

A uniform sense of legal obligation to protect human rights while countering international terrorism is manifested in the decisions of the high courts of several major world powers, including India, the United Kingdom, Australia, and the United States.[138] Moreover, the practice of these particular States is of particular importance to an emerging rule of customary international as these States are among those at the forefront of the global War on Terror and two of these States hold permanent positions on the U.N. Security Council.[139] From these Court

---

133. *See, e.g.*, People's Union, *supra* note 120; R (on the application of Al-Jedda) v. Sec'y of State for Defence, [2007] UKHL 58 (U.K.); *see, also,* discussion *supra* subsection IV(*C*).

134. S.C. Res. 1373, *supra* note 4.

135. *Id.* at ¶ 3(f).

136. *Id.*

137. S.C. Res. 1373, *supra* note 4; S.C. Res. 1456, *supra* note 125; S.C. Res. 1535, *supra* note 4; S.C. Res. 1624, *supra* note 4; S.C. Res. 1566, *supra* note 4.

138. Decisions of national courts are accepted evidence of customary international law according to the I.C.J. Statute, which recognizes "judicial decisions . . . of the various nations . . . " as among the "subsidiary sources" of international law. I.C.J. Statute, *supra* note 11, art. 38(1)(d).

139. U.N. Charter, *supra* note 29, art. 23, ¶ 1;*see* U.S. Department of State, International

decisions – some of which reference the statements by the U.N. in resolutions of the General Assembly and Security Council and some of which do not – may be inferred a State practice implementing the norm embodied in the resolutions discussed above, not to derogate from human rights standards while fighting terror. This practice strongly supports finding a customary rule of that nature as "[t]hose solutions that [are] positively received by the international community through State practice or other indications of support will rapidly be absorbed into international law, notwithstanding the technical legal status of the form in which they emerged from the multilateral forum."[140]

1. India

The Supreme Court of India has acknowledged that the War on Terror must be fought in a manner that upholds human rights, in a passage that is consistent with the principles embodied in Security Council Resolutions 1535 and 1566 and G.A. Resolution 57/219, in the case of *People's Union for Civil Liberties & Anor v Union of India.*[141] Declaring that terrorism itself breeds the grossest violations of human rights, the Court nevertheless emphasized:

> The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and court's responsibility. If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice provides breeding grounds for terrorism. [...] In all cases, the fight against terrorism must be respectful to the human rights.[142]

The opinion of the Supreme Court of India evinces the government's affirmation of the desperate need to protect human rights even while bringing to justice those individuals who would disregard such rights.

2. The United Kingdom

Similarly, the House of Lords of the United Kingdom in *R (on the application of Al-Jedda) v. Secretary of State for Defence,*[143] though not acting pursuant to a specific U.N. resolution, adhered to the principles embodied in those resolutions. The defendant in *Al Jedda* was suspected for smuggling weapons for terrorist acts and complained that he had been held indefinitely, though he had not been charged with any offense.[144] The Court attested to the emerging norm requiring that terror be fought consistent with human rights, recognizing that "[o]n repeated occasions

---

Contributions to the War Against Terrorism, http://www.state.gov/coalition/cr/fs/12753.htm (last visited Nov. 25, 2008).

140. Charney, *supra* note 35, at 545.

141. People's Union, *supra* note 120, at 17.

142. *Id.* at 17.

143. *See generally* R (*in re* Al-Jedda) v. Sec'y of State for Defence, [2007] UKHL 58, [2008] 1 A.C. 332 (H.L. 2007) (appeal taken from Q.B.), *available at* 2007 WL 4266094 (HL).

144. The Queen (*in re* Hilal Abdul-Razzaq Ali Al-Jedda) v. Sec'y of State for Defence, ¶ 1-2, Q.B.D., *available at* 2005 WL 2003226 (DC).

in recent years the U.N. and other international bodies have stressed the need for effective action against the scourge of terrorism but have, in the same breath, stressed the imperative need for such action to be consistent with international human rights standards...."[145] The House of Lords therefore held that though a particular U.N. Security Council Resolution (UNSCR 1546) granted the UK the power to detain, such grant was still not authority to derogate from human rights guaranteed by the European Convention on Human Rights.[146]

In many other cases as well, the House of Lords has upheld human rights standards in the context of counter-terrorism measures. Particularly relevant decisions of the House include *R (A) v Secretary of State*,[147] declaring the inadmissibility of evidence obtained by torturing suspected terrorists as a violation of abuse of process and the right to a fair trial,[148] and *R (Gillan & Anor) v Commission of Police of the Metropolis*,[149] holding that extraordinary search powers were not available for the prevention of terrorist acts. Furthermore, in *R (Abassi & Anor) v Secretary of State*,[150] an unusual opinion concerning a UK citizen who was a detainee in the United States' territory of Guantanamo Bay, the House remarked that it was objectionable to the common law idea of habeas corpus that a suspected terrorist "should be subject to indefinite detention... with no opportunity to challenge the legitimacy of his detention before any court or tribunal."[151] The opinion can be understood as a message from the U.K. to the U.S., disapproving of the United States' practice of disregarding habeas corpus, even in regards to suspected terrorists, as lacking conformity with human rights.[152]

3. Australia

In a 2007 opinion, *Thomas v. Mobray*, the High Court of Australia upheld the right of an acknowledged member of a terrorist organization to be free from certain restrictions on his liberty, striking down a law which had the stated purpose of "allow[ing] obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act."[153] In the face of the defendant's admitted connections to a terrorist organization, the Court held that international law "ratified by and binding on Australia, protects the rights of individuals to be free of arbitrary detention and the unlawful deprivation of liberty."[154]

---

145. *Id.* at 354, ¶ 37.

146. *Id.* at 354-55, ¶ 39.

147. *See generally* A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] 2 A.C. 68, (H.L. 2004) (appeal taken from Q.B.), *available at* 2004 WL 2810935 (HL).

148. *Id.* at ¶ 97.

149. R (Gillan and another) v. Comm'r of Police of the Metropolis and another [2006] UKHL 12, [2006] 2 A.C. 307 (U.K.).

150. R (*In re* Abbasi and another) v. Sec'y of State for Foreign and Commonwealth Affairs and another [2002] EWCA (Civ) 1598, [2002] All E.R. (D) 70 (Eng.).

151. *Id.* at ¶ 66.

152. Rodney C. Austin, *The New Constitutionalism, Terrorism, and Torture*, 60 CURRENT LEGAL PROBLEMS 2007 79, 99 (Colm O'Cinneide & Jane Holder eds., 2007).

153. Thomas v. Mowbray and Others (2007) 237 A.L.R. 194, ¶ 170 (Austl.) (Kirby, J., dissenting).

154. *Id.* at ¶ 379.

4. The United States

Furthermore, the United States Supreme Court, in the cases of *Rasul v. Bush, Hamdi v. Rumsfeld, and Hamdan v. Rumsfeld*, has provided that the suspected terrorists are entitled to certain basic due process rights.[155] In *Rasul v. Bush*, the Supreme Court acknowledged that detainees of the naval base at Guantanamo Bay have the right to petition for *habeas corpus*, to have a judicial determination of the constitutionality of their detention.[156] Additionally, the case of *Hamdi v. Rumsfeld*, decided simultaneously with *Rasul*, recognized the rights of suspected terrorists to limited Due Process, including the right to "a meaningful opportunity to contest the factual basis for [their] detention before a neutral decision-maker."[157] More recently, in *Hamdan v. Rumsfeld*, the Court struck down the use of military tribunals by the U.S. during the prosecution of terrorists as being inconsistent with the procedural rights owed to the defendants in such cases.[158]

5. What Follows

The consistent practice of the high courts of these particularly important States is demonstrative of *opinio juris* regarding the obligation to protect international human rights while countering international terrorism. In many of the decisions mentioned, references were made to international law in the reasoning of the opinions. Additionally, both *People's Union for Civil Liberties & Anor* and *R (on the application of Al- Jedda)*, specifically mentioned the persuasive force of U.N. resolutions on the key issue of the respective cases. From these decisions, it is clear that the States' ready acquiescence in admitting that countering terrorism must still remain consistent with human rights is "rendered obligatory by the existence of a rule of law requiring it."[159]

V. CONCLUSION

Despite the failure of nations to come to agreement as to what constitutes "terrorism," a customary rule has emerged which places on States a positive obligation to respect human rights in taking counter-terrorism measures. This rule has its foundation in the long string of both General Assembly and Security Council resolutions enunciating the rule and in the practice of States, evinced in decisions of their High Courts, which confirms that such rule is obligatory. In consideration of such a rule, States must be aware that violations of human rights in the context of counter-terrorism will not be lawful, regardless of whether they have acceded to human rights treaties. Of further consequence, States are on notice that the rule renders them responsible to the international community for violations.

155. *See* Hamdan v. Rumsfeld, 548 U.S. 577 (2007); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 446 (2004).

156. *Rasul*, 542 U.S. at 484.

157. *Hamdi*, 542 U.S. at 509.

158. *Hamdan*, 548 U.S. 557.

159. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

INVISIBLE BORDERS: MAPPING OUT VIRTUAL LAW?

Kathleen Claussen[*]

I. OVERVIEW

In his preface to a 1945 treatise on international borders, S. Whittemore Boggs opened with this historical overview:

> Boundaries and boundary problems have undergone great changes. When Marco Polo crossed frontiers from one jurisdiction to another there were no precise boundaries like those of our time. Even a century and a half ago the international boundary picture bore little resemblance to that of today. In Asia there were few treaty or other definite lines, but only fluctuating limits of various kingdoms. . . . European boundary concepts have proliferated until they now extend to nearly all international boundaries in all continents.[1]

Since Boggs penned those words over sixty years ago, more than ninety states have made their (re-)introduction to the global landscape.[2] United Nations membership has expanded in forty-two of the last sixty-three years as state borders have been drawn and reconfigured.[3] Independence movements, changes in natural landscapes, and shifting populations as a result of war, famine and disease are among the many causes for border (re-)drawing.

Much is at stake in these cartographic revisions, as made evident by the proliferation of border dispute resolution commissions and the many cases related to territorial sovereignty initiated in the International Court of Justice. For this reason among others, border disputes are some of the most hotly contested controversies to arise in international arbitration.[4] Yet, the 1945 treatise is the most recent comprehensive examination of international law on delimitation and demarcation processes.[5]

---

[*] J.D. candidate, 2010, Yale Law School. The author wishes to gratefully acknowledge Professor W. Michael Reisman for his generous support and guidance on this project.

1. S. Whittemore Boggs, *Foreword* to STEPHEN BARR JONES, BOUNDARY-MAKING: A HANDBOOK FOR STATESMEN, TREATY EDITORS AND BOUNDARY COMMISSIONERS, at vi (1945).

2. United Nations Member States, http://www.un.org/members/growth.shtml (last visited Nov. 23, 2008).

3. *See id.*

4. SURYA PRAKASH SHARMA, INTERNATIONAL BOUNDARY DISPUTES AND INTERNATIONAL LAW 13 (1976).

5. *Id.*

Despite the evolution of the law in other areas of science,[6] the technology of border drawing has advanced significantly while the legal guidelines have not changed. In the absence of any impetus from states or international organizations, the legal norms for demarcation remain the same as those that were used at the time of the Roman Empire.[7] This Essay aims to draw attention to this discrepancy between science and the law on international boundaries and proposes the development of an institutional mechanism that would harness the potential of the recent advances in border technology and assist in ameliorating ongoing boundary-related controversies.

The Essay begins with an overview of the intersection between law and the scientific enterprise. It suggests boundary-marking as a test case for the self-updating prerogative of the law by shedding light on the antiquated and inefficient methodology currently employed by states in demarcating borders. Part II provides a brief overview of the science of demarcation. It addresses the history of demarcation, changes in the methodology, and the terminology used by boundary engineers—geographers, surveyors and cartographers. The third Part takes up changes in the law through the perspective of boundary architects—diplomats and state leaders. It reviews the international law on demarcation by focusing on three boundary commissions and their reasoning in adopting a particular approach to boundary-marking.

I conclude by proposing the creation of a central depository for border information that would serve as the authoritative source of boundary demarcation data. Although some states keep their own records of boundary demarcation data for other states, many of these records contain conflicting information and perpetuate the problematic discrepancies in determining border locations. A central depository within the United Nations that uses the latest technology to effectuate precise and accurate boundaries would help to put an end to measurement error and incongruities in the location of contentious borders.

Note that this Essay is directed at boundary-*marking*, rather than boundary-*making*, but, at the same time, it argues that by drawing upon the most updated technology in the field, these two processes will become inseparably integrated; in other words, through marking the boundary using the most modern technology, delimitation and demarcation will finally produce single, coherent outcomes.

II. LAW AND TECHNOLOGY – AT THE MACRO LEVEL

Domestic legal processes are constantly adjusted with respect to the latest technologies. The development of the "electronic courtroom," for example, has facilitated the use of video conferencing for special hearings over the last ten to twenty years.[8] Everyday tools in legal processes, such as the use of word-

6. *See, e.g.*, KEITH E. MASKUS, INTELLECTUAL PROPERTY, GROWTH AND TRADE (2008) (describing how intellectual property rights affect the provision of public goods and influence prospects for economic development); DAN JERKER B. SVANTESSON, PRIVATE INTERNATIONAL LAW AND THE INTERNET (2007) (discussing characteristics of internet communications relevant to legal processes).

7. A.O. CUKWURAH, SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW 11 (1967).

8. *See, e.g.*, Fredric Lederer, *The Road To the Virtual Courtroom? A Consideration of Today's –*

processing in the taking of depositions, are in fact relatively recent additions to the way in which law is practiced. Likewise, science is continually incorporated into the substance of the law. In both domestic and international realms, the law is constantly bringing itself up-to-date. The propagation of international agreements such as the Cartagena Protocol on Biosafety,[9] the Stockholm Convention on Persistent Organic Pollutants,[10] and the U.N. Convention on the Use of Electronic Communications in International Contracts[11] confirms this anecdotal trend.

Although many of these international conventions aim to restrict the use of technological innovations for malevolent purposes, scientific advances in other areas may ease and empower states and individual actors. The advent of communications technology in the nineteenth century, for instance, vastly changed the framework of admiralty law by giving individuals means to settle disputes through deliberate, immediate and regulated dialogue, rather than resort to complex state negotiations or violent retribution.[12] Looking beyond the restrictive legal mechanisms according to which technology is regulated, lawmakers should be equally interested in exploiting the potential of technological advances in order to realize desired social outcomes.[13]

At first glance, overlaying the scientific agenda on the legal agenda may reveal disparate, though not mutually exclusive, goals. Insofar as both aim to enhance the quality of life for their constituencies, the scientific and legal agenda should be integrated. Some scholars have painted the relationship between law and science as conflictual or problematic, suggesting that technology has the power to destroy international law or that international law and technology will "collide"[14]; however, other areas of the law as noted above and below suggest that this antagonistic relationship is not pre-determined. The Law of the Sea Convention, for example, undertakes to govern states' use of and access to "marine genetic resources" realized by advances in technology.[15] As a result of these developments, the definition of "resource" was expanded; the law was shaped by ingenuity and need.

And Tomorrow's – High Technology Courtrooms, 50 S.C. L. REV. 799, 801-802 (1999).

9. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027.

10. Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, U.N. Doc. UNEP/POPS/CONF/2, 40 I.L.M. 532.

11. United Nations Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, U.N. GAOR, 60th Sess., Supp. No. 17, U.N. Doc. A/RES/60/21 (Nov. 23, 2005).

12. Joseph W. Dellapenna, *Law in a Shrinking World: The Interaction of Science and Technology with International Law*, 88 KY. L.J. 809, 817-19 (2002).

13. *See* W. Michael Reisman, *The View from the New Haven School*, 86 AM. SOC'Y INTL L. PROC. 118, 121-22 (1992).

14. Colin B. Picker, *A View from 40,000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149, 151 (2001).

15. Press Release, Countries to Address Marine Genetic Resources, at United Nations 25-29 June, U.N. Doc. SEA/1889 (June 21, 2007).

Similarly, in boundary-marking, technology and necessity have produced an alternative methodology and, therein, a new modality for international law in this area, though it has not been widely embraced. One explanation for states' reluctance to pursue changes to the status quo is that the science of boundary-marking is intimately interwoven with concerns about sovereignty.[16] The intersection of diplomacy and earth science is inevitably implicated in delimitation and demarcation. Thus, there is not only a delay but also a general reluctance to draw from the inventive solutions geographical positioning and imaging systems might offer.[17] Only a few boundary dispute commissions have employed readily available technologies for the purpose of demarcating the border.[18] The next Part explains demarcation, delimitation and their historiographies in more detail.

III. THE SCIENCE OF DEMARCATION

"The best boundary is one which would promote both minimum world public order, understood as a prohibition of unlawful coercion across adjacent boundary lines, and optimum order, in the sense of the promotion of the greatest cooperation in common interest on both sides of international boundaries."[19]

A. Definition

Border determination involves a multi-step process: allocation of territory, delimitation, demarcation, and ongoing administration.[20] Allocation, as the name suggests, refers to the initial political division of territory.[21] To allocate the territory means to use diplomatic channels to reach an agreement regarding which general area belongs to each state.[22] Delimitation refers to the selection of the boundary site and its written *definition* in words or measures in a treaty or other formal document.[23] In contrast, demarcation refers to the *construction* of the boundary on the ground, originally conceived as the erection of monuments along the line defined in the delimitation process.[24] The final step, administration, is a continuing project of managing the border; administration here does not necessarily refer to the management of goods and people that cross the border, but rather it refers to the physical maintenance of the boundary itself as demarcated.[25]

---

16. *See generally* Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber*, 100 AM. J. INT'L L. 808 (2006).

17. Ron Adler, Presentation at the Forum of International Geography: Surveyors Role in Delineation and Demarcation of International Land Boundaries 5 (Apr. 19, 2002) (on file with the author), *available at* http://www.fig.net/pub/fig_2002/Js20/JS20_adler.pdf.

18. *See id.* at 4-5.

19. JONES, *supra* note 1, at 37.

20. K.T. Chao, *Legal Nature of International Boundaries*, 5 CHINESE TAIWAN Y.B. INT'L L. & AFF. 29 (1985).

21. *Id.* at 30.

22. *See generally id.*

23. CUKWURAH, *supra* note 7, at 27.

24. *Id.* at 28.

25. *Id.* at 83; *see also* Chao, *supra* note 20, at 30.

The terms "delimitation" and "demarcation" became terms-of-art upon their use by Sir Henry McMahon in an 1897 lecture.[26] Although delimitation was designed to be the final political act of the states party engaged in border negotiations and demarcation was its realization by way of monumentation, the Jones treatise outlines the traditional methods of delimitation, all but the first of which indicate that political decisions will be required in later steps.[27] The first method is "complete definition" in which surveying is completed to the highest level of precision possible.[28] Second, and much more common, is "complete definition with the power to deviate" which allows flexibility for natural boundaries not accounted for at the negotiating table as well as for accommodating personal properties along the boundary.[29] Third is boundary definition based on major turning points along an estimated route.[30] Each of the final four methods becomes less precise; the last and most vague delimitation specification is delimitation based on natural features.[31]

Thus, demarcation—the translation of the delimitation agreement onto the landscape—is also a political act that requires real-time decision-making premised on law. In the past, greater precision was inevitably given at this stage to the definition carried out at the delimitation stage when it was otherwise unavailable.[32] But the search for codified and concrete guidance on the *law* governing demarcation is somewhat futile. One might look to the many commission and tribunal decisions overseeing boundary disputes; however, these do not constitute a comprehensive and coherent legal doctrine. Nonetheless, it is instructive to look to history in order to identify state practice, outlined in the following section with greater detail.

B. Derivation

The most common method of marking an international border, introduced by the Roman Empire and still used today, is by means of erecting monuments from concrete or another durable material available in the region.[33] States formally mark their borders with actual monuments built along the delimited line.[34] The

---

26. Dennis Rushworth, *Mapping In Support of Frontier Arbitration: Delimitation and Demarcation*, IBRU BOUNDARY AND SECURITY BULLETIN, Spring 1997, at 61.

27. JONES, *supra* note 1, at 58.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *See, e.g.*, Gbenga Oduntan, *The Demarcation of Straddling Villages in Accordance with the International Court of Justice Jurisprudence: The Cameroon-Nigeria Experience*, 5 CHINESE J. INT'L L. 79 (2006).

33. "It is to be doubted if, today, there is much difference of opinion on this subject, as the monumentation of boundaries is an established practice in all but the wildest lands." JONES, *supra* note 1, at 210; *see also* Dr. Alec McEwen, Presentation at a Training Workshop on The Demarcation and Maintenance of International Boundaries at the University of Durham: The Demarcation and Maintenance of International Boundaries (July 8-10, 2002).

34. There are a few exceptions. Some treaties used maritime delimitations to allocate land territories. *See, e.g.*, Lucius Caflisch, A Typology of Borders 7 (2006) (unpublished manuscript, on file with the author) (noting how the Treaty of Tordesillas of 1494, which marked out the territory

composition of the monuments varies from place to place depending on the materials available for their construction.[35] For example, Canada and the United States use more than twenty-one types of monuments, including iron, granite, aluminum, concrete, stainless steel, and bronze markers.[36] They also allow for "special types" of markers such as lake buoys as necessary.[37]

The monumentation method has always posed some difficulties and is necessarily incomplete. Throughout history, in areas where the physical construction of monuments was not possible, straight lines or physical features, which change over time, were used as reference points.[38] The 1884 Berlin Conference that divided Africa into spheres of control relied on astronomically based straight lines, though technological advances since the time of the Conference have rendered these measurements obsolete.[39] Such a physical manifestation on the ground might have made sense when no other means were available and when passage by foot or animal-back was the norm. The monuments were thought to serve an important function in helping states avoid future disagreement.[40] Still today, the monuments are intended to serve a practical purpose of defining the boundary for inhabitants and travelers on both sides.[41]

Despite their seeming durability and permanency, monuments do not always reflect the exact intention of the parties. Their deviation from the stated terms of an agreement arises at three levels: first, at the stage of surveyance as the boundary engineers attempt to implement the delimitation decision; second, in the time that follows their emplacement; and third, in the years that follow as technology furnishes additional data to boundary-makers.

First, in his 1945 treatise, Jones outlines the legally sanctioned means by which demarcation by surveyance may take place.[42] He locates the earliest and only general instructions to demarcation commissions in the Paris Treaties of 1783.[43] The Treaties specify that the demarcation commission will be responsible for representing the specific definition of the boundary based on the direction provided in the delimitation documents.[44] They provide, in vague terms, the methods available to the commission to account for necessary on-the-ground modifications: adjustment with natural points of reference, geographic coordinates, rectangular coordinates, comparison with neighboring markers, marking on a map, and photographs "taken in known directions."[45] Thus, surveyors are sometimes

---

belonging to the Spanish and the Portuguese, relied on a longitudinal line running through water).

35. McEwen, *supra* note 33, at 6.

36. *Id.* at 5-6.

37. *Id.* at 6.

38. Pierre Englebert, Stacy Tarango & Matthew Carter, *Dismemberment and Suffocation: A Contribution to the Debate on African Boundaries*, 35 COMP. POL. STUD. 1093, 1096 (2002).

39. *Id.*

40. *See id.*

41. McEwen, *supra* note 33, at 5.

42. *See* JONES, *supra* note 1, at Part III.

43. *Id.* at app. 1.

44. *Id.*

45. *Id.*

forced to make decisions and place monuments off the intended course due to limits on their measurements or natural features. In so doing, they often have the liberty to adjust the borders agreed to the delimitation decision—they create their own boundary absent official authorization.

Second, despite their intended resilience, border monuments frequently fall victim to vandalism, theft, or natural disruption of some sort, causing the border states to have to repair and rebuild them as often as every five years.[46] Animals have uprooted pillars and caused their disintegration by trampling on them. Property owners along the border have been known to secretly shift boundary marks. Natural forces like rainfall and water flow in lakes and rivers have caused markers to crumble. In certain environments, border markers have fallen victim to unintending hunters who spray them with bullets. With these problems in mind, surveyors have sought other means by which to demarcate or to replace the marker without delay. For example, placing a "subsidiary mark," such as a metal bar in concrete buried below the original marker, from which an expert can restore the monument should the need arise has become common practice.[47]

Third, as noted above with respect to the Berlin Conference, measurements based on antiquated surveying techniques quickly become outdated.[48] Extensive exploration in colonial territories coincided with the advent of aerial photography, allowing colonizers to create more precise boundaries by learning more about the terrain before placing monuments.[49] Since that time, however, additional developments in technology have made it possible to calculate distances and specify locations with significantly higher degrees of precision using global navigation satellite systems. These developments will be detailed in the following Section.

In light of these concerns regarding the unauthorized, impermanent, and imprecise emplacement of markers, Alex McEwen concedes that "[a]n argument could be made for greater standardization of monumentation," though he suggests doing so "by reducing the variety of types and materials used for demarcation."[50] While this solution may help reduce the need for boundary maintenance, it fails to eliminate the potential for conflict and the discrepancies noted above. Current practice in delimitation agreements is to not specify a plan for the maintenance of a boundary.[51] Because neither side takes ownership of this important task, many monuments disappear or become obscured.[52]

46. McEwen, *supra* note 33, at 5.
47. *Id.*
48. Englebert, et al., *supra* note 38, at 1096.
49. *Id.*
50. McEwen, *supra* note 33, at 6.
51. *Id.* at 7.
52. *Id.*

C. Denotation

As a result of the challenges outlined in the preceding Section, there are neither any official nor truly authoritative lengths for international boundaries.[53] Today, most states keep demarcation reports that describe their boundaries as they believe them to exist.[54] The reports consist of photos of monuments that have been erected to mark out the border as well as their corresponding latitudinal and longitudinal coordinates calculated with reference to whichever datum, or reference point, is selected by the state.[55] These calculations of the monument locations pose still more challenges for universal harmonization of boundary information.

Some states use a national datum, though many apply the WGS84 which is the model used by the United States and its Global Positioning System.[56] When a GPS device computes the coordinates of a particular location on the ground, it is compiling data reflected from five different satellites as calculated with reference to the WGS84 geoid.[57] As mentioned above, some countries use their own points of reference (datums). Kosovo, for example, established its own datum in 2007 for the purpose of carrying out a mass survey of its territory; previously, all calculations were based on the Serbian datum to which Kosovo no longer has access.[58] Japan recently switched its entire system from its own datum to the WGS84 by way of a complex mathematical transformation.[59]

Even in 1945, Jones recognized the limitations on the demarcation methods used at that time:

> The difficulties in defining geometrical boundaries arise from [the fact that] few statesmen or treaty editors possess the technical knowledge of geodesy to frame a precise definition It is also necessary to

53. Email from Ray Milefsky, Specialist, Office of the Geographer and Global Issues, U.S. Department of State (July 16, 2007) (on file with author).

54. *See id.*; Telephone Interview with Ray Milefsky, Specialist, Office of the Geographer and Global Issues, U.S. Department of State (Mar. 31, 2008) (on file with author).

55. Telephone Interview with Ray Milefsky, *supra* note 54.

56. Though the U.S. datum is widely accepted and used by many states around the world, it is still just a reference coordinate and, therefore, subject to abuse. *See* Rushworth, *supra* note 26 (noting that the ideal solution of every point on the earth's surface having a unique set of geographic coordinates has been achieved). This potential for mischief, or system failure, is part of the reason Europe has developed the Galileo system which derives coordinates off of its own datum. In the years ahead, using these two different languages to identify points along the border, states might need to maintain two coordinates to refer to the same point. There will likely be a period of translation during which both sets of coordinates will be made to complement one another. Telephone Interview with Ray Milefsky, *supra* note 54.

57. The Global Positioning System is a system of 24 satellites that transmit signals to a handheld device, enabling the determination of location, speed, direction, and time. It is managed by the United States Government and is the only fully functional global navigation satellite constellation. The geoid is an extremely precise mathematical model of the shape of the earth.

58. Telephone Interview with Ray Milefsky, *supra* note 54.

59. *Id.*

> distinguish between geodetic and astronomic positions. The North American datum differs from that determined astronomically.[60]

However, the real problem for harmonization and universalization of boundary-marking emerges when states and boundary dispute commissions rely on treaties and other documents that include reference coordinates without an indication as to which datum those coordinates are calibrated or if the treaty uses coordinates that are calibrated to an outdated datum for which there is no longer any record. For a stable definition of the interstate boundary, we must turn to the technological advances available to states today for the purposes of standardizing border demarcation and maintaining permanent points of reference for interstate boundaries.

The development of the Global Positioning System technology by the United States, and its European parallel expected to be operational in 2010, has made it possible to calculate, view and monitor borders with significantly greater precision than ever before. More precision at the delimitation stage should lead to fewer controversies at the demarcation stage. Through GIS imagery, for example, states could re-define their borders down to thousands of an inch while being able to view exactly what is located at that point. Additional techniques of higher sophistication are available to those states that can afford them, as described later in this Essay. Regardless of these advances, border discrepancies and disputes continue to pose senseless difficulties at the local and national levels.[61] The distinct, ad hoc methods used by states today perpetuate discrepancies where the development of international law in this area mandating states to utilize the GPS coordinate scheme would harmonize and universalize boundary-marking. The next Part of the Essay examines how boundary commissions have begun to drawn upon these technologies in an effort to put an end to particularly intractable border disputes.

IV. BORDER DISPUTES AND THE LAW

"A new international law on boundaries and borderlands is urgently needed."[62]

In their appraisals of relevant international law for delimitation and demarcation, many boundary dispute commissions, the Permanent Court of Arbitration, and the ICJ have handed down varying opinions regarding *not* which sources of international law are authoritative in boundary determination but rather on *how to interpret* those sources and accurately represent them on the ground.[63]

---

60. JONES, *supra* note 1, at 151. "Geodetic" positions are defined through the use of a geoid, an extremely precise mathematical model of the earth.

61. *See, e.g.*, Englebert, et al., *supra* note 38, at 1097-98.

62. Nsongurua J. Udombana, *The Ghost of Berlin Still Haunts Africa! The ICJ Judgment on the Land and Maritime Boundary Dispute Between Cameroon and Nigeria*, 2002 AFR. Y.B. OF INT'L L. 13, 59.

63. *See* Eritrea-Ethiopia Boundary Commission: Decision Regarding Delimitation of the Border Between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 41 I.L.M. 1057, 1074-75 (Apr. 13, 2002) [hereinafter 2002 EEBC]; *see also* Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 1992 I.C.J. 351, 390-92 (Sept. 11).

Each adjudicatory body has employed different principles of interpretation on a case-by-case—and sometimes a judge-by-judge—basis. In the *Case Concerning Kasikili/Sedudu Island* (Botswana v. Namibia), for example, the International Court of Justice indicated that the "present-day state of scientific knowledge" could be used in order to illuminate the terms of the relevant treaty, a document from 1890.[64] By contrast, Judge Higgins noted in her Declaration in that case that the task of the Court in resolving the dispute was to determine the general idea of the parties at the time of signing the treaty and to realize their original idea through the use of contemporary knowledge.[65] In another case, *Cameroon v. Nigeria*, the Court relied, in part, on the principle of contemporaneity—drawing upon the circumstances prevailing at the time the treaty was concluded.[66] Other decisions make relevant the subsequent practice of the parties, while still others indicate that demarcation is not necessary at all.[67]

I will examine the decisions of three specialized boundary-dispute bodies in detail: the Taba Tribunal (Egypt-Israel, 1988); the Iraq-Kuwait Boundary Dispute Commission (1991); and the Eritrea-Ethiopia Boundary Commission (2006). In each of these cases, the arbitrators confronted the challenge of discrepancies between the delimitation agreements and the corresponding demarcation. The overview and analysis carried out here demonstrate a trend on the part of ad hoc commissions to give shape to the international law on demarcation and attain coherence through an updated means of boundary-marking.[68]

A. Taba: juris vel factis

In 1986, Egypt and Israel jointly agreed to set up a binding arbitration mechanism to resolve the boundary dispute involving fourteen demarcation pillars along their shared border.[69] Their conflict emerged from miscalculations and manipulations regarding the border's demarcation over the previous eight decades.[70] Eighty years prior, in 1906, diplomatic representatives of the Ottoman Empire and Britain, which at the time maintained control over Egypt, signed a treaty requiring that telegraph poles be used to demarcate the boundary between

64. Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, 1060 (Dec. 13).

65. *Id.* at 1114 (separate declaration of Judge Higgins).

66. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.), 2002 I.C.J. 303, 346 (Oct. 10).

67. Delimitation need not be formally marked out, contrary to popular belief. Rao notes that the ICJ has held in the *Las Palmas* decision that delimitation may be achieved "either by so-called natural frontiers as recognized by international law or by outward signs of delimitation that are undisputed or else by legal engagements." In other words, demarcation is not necessary, as a legal requisite for boundary definition. K. Krishna Rao, *The Sino-Indian Boundary Question and International Law*, 11 INT'L & COMP. L. Q. 375, 376-77 (1962).

68. It should be reiterated here that this analysis focuses on which technological medium constitutes the legally authoritative representation of the border. The trend that emerges from the commissions studied in this section is that *methods* of demarcation have shifted and simultaneously, the degrees of legitimacy as representative of the official border of the various media employed in each method shifted.

69. Haihua Ding & Eric S. Koenig, *Boundary Dispute Concerning the Taba Area*, 83 AM. J. INT'L L. 590, 590 (1989).

70. *Id.* at 592-94.

what would later become Egypt and Israel.[71] The surveyor responsible for the original markers noted in his report that his margin of error between where the treaty intended and the coordinates determined using astronomical surveying techniques could be up to twelve meters on either side of the delineated straight line.[72] He also conceded that the poles themselves deviated from the intended line in some places by as much as five hundred meters; while some were corrected or accepted by the Commissioners present at the time as placed; others may not have been addressed.[73]

After the first set of poles was constructed, the Egyptian Office of Public Works undertook to further mark the boundary with its own additional pillars.[74] Commissioners from both sides agreed to this plan and signed off on the proposal to construct supplementary stone markers.[75] In the initial years that followed the construction of the pillars between December 1906 and February 1907, both sides helped to maintain them.[76] Shortly thereafter, however, reports of foul play began to surface.[77] British authorities, among others, were accused of removing border markers in an attempt to monopolize control in the region.[78]

In 1981, new surveys were conducted to re-establish the boundary according to the guidelines of the 1979 Treaty of Peace between Egypt and Israel.[79] The Treaty instructed a Joint Commission to demarcate the boundary by locating existing border stones based on aerial photographs and the descriptions laid out in the 1906 Agreement.[80] The Joint Commission was unable to agree on the location of some of the missing pillars and thus turned to the Tribunal to adjudicate the dispute.[81]

The Taba Tribunal was charged with a very narrowly defined task: "to decide the location of the boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine, in accordance with the Peace Treaty, the April 25, 1982 Agreement, and the Annex."[82] In its decision, the majority deduced that the location of the existing boundary pillars constituted a legally authoritative depiction of the boundary "even if deviations may have occurred or if there are some inconsistencies with maps."[83] Based on an

71. *See id.* at 594.

72. *See* Location of Boundary Markers in Taba between Egypt and Israel, 20 R. INT'L ARB. AWARDS 1, 21 (Sept. 29, 1988) [hereinafter Taba].

73. *Id.*

74. *Id.* at 20.

75. *Id.* at 30.

76. *Id.* at 56.

77. *Id.* at 22.

78. *Id.*

79. *See* Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, art. I, Mar. 26, 1979, 18 I.L.M. 362.

80. *Id.* at art. IV ("organize the demarcation of the international boundary and all lines and zones described in Annex I and this Appendix").

81. Taba, *supra* note 72, at 30-31.

82. *Id.* at 111.

83. *Id.* at 56.

interpretation of an earlier treatise on boundary-making and the *Temple* Judgment by the International Court of Justice,[84] the majority concluded that, in case of contradiction, a *demarcated boundary line prevails over the text of an agreement.*[85] In other words, in case of a discrepancy, the location of the monumentation pillars would trump the language of the treaty and indications made on maps.

In her dissenting opinion to the Award, Ruth Lapidoth argued that the authoritative and proper boundary should be demarcated according to the originally intended location of the 1906 telegraph poles and that, despite their apparent resilience and greater durability, the concrete pillars erected since that time were not recognized by both parties.[86] Lapidoth contended that the majority assumed, erroneously, that "in international law[,] demarcation prevails over delimitation."[87] She based her decision on the parties' textual affirmation rather than the physical manifestations of at least one side's subsequent practice.[88] Cognizant of the potential for manipulation of the boundary markers, Lapidoth relied on the written understanding.[89]

Lapidoth's interpretation of the legal norms on boundaries was rooted in the principle of *uti possidetis juris* according to which "preeminence [is] accorded to legal title over effective possession as a basis for sovereignty."[90] The majority placed heavy weight on the existence of stone pillars in 1906 and cited their appearance in later photographs. Lapidoth, by contrast, emphasized the statements in the agreements between the two sides about where the original pillars were intended to be located.[91] While the majority stressed that when there is a discrepancy its authority rests on the pillars themselves (according to the opposing principle of *uti possidetis factis*), Lapidoth looked mainly to treaty text, declaratory statements, and other records maintained by Egypt and Israel.[92]

The Taba Award is not the only place where the precedence of boundary monuments has been disputed, though it is most clearly seen in these two arguments. Many delimitation agreements fail to specify whether the demarcated boundary or its theoretical position prevails should a conflict arise between them.[93] The discrepancy that develops may be the result of natural causes (such as the effect of gravity), human interference as discussed above, the use of astronomic rather than geodetic coordinates or the limitations of the technology available at the time of the original survey.[94] In arbitration on this point, tribunals and courts

84. Temple of Preah Vihear (Cambodia v. Laos), 1962 I.C.J. 6 (June 15).

85. Taba, *supra* note 72, at 57.

86. *Id.* at 75 (dissenting opinion of Prof. Lapidoth) ("There is thus no reason to prefer pillars . over the line described in the [1906] Agreement").

87. *Id.*

88. *Id.* at 76 (dissenting opinion of Prof. Lapidoth).

89. *Id.* at 75 (dissenting opinion of Prof. Lapidoth).

90. *Id.* at 75 (dissenting opinion of Prof. Lapidoth) (quoting Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 566 (Dec. 22)).

91. *Id.* at 76 (dissenting opinion of Prof. Lapidoth).

92. *See id.* at 76-77.

93. *See* McEwen, *supra* note 33, at 5.

94. *Id.*

have more often than not considered the existing monuments on the ground to be controlling.[95] While some have called this a "commonsense approach" necessary for achieving "stability,"[96] this approach is in fact highly susceptible to abuse and potentially ineffective for achieving finality due to the manipulability of the monuments.

The Taba Award prioritized the pillar locations over not only treaty language but also over maps.[97] Maps, while useful for general guidance and occasionally more helpful than the textual agreement if very precise, are also easily manipulable and therefore unreliable.[98] Most maps are made by a single state and do not represent any kind of joint understanding between the parties.[99] Additional problems that maps introduce include different coordinate reference terms, different names for places, and different cartographic symbols.[100] Furthermore, cartographic techniques change rapidly such that levels of precision and accuracy have been vastly improved in the last thirty years.[101] Older maps lack the exactitude required for effective boundary maintenance.[102]

The two opposing opinions from the Taba Tribunal outline the dispute within international law on demarcation.[103] The next section presents another iteration in the controversy through the work of the Iraq-Kuwait Boundary Commission which came on the heels of the Taba Tribunal in the early 1990s.

B. Iraq-Kuwait: dedicated to demarcation

Following the cessation of hostilities in the Gulf War, the UN Security Council passed Resolution 687 (1991) which called upon the Secretary-General to "lend his assistance to make arrangements with Iraq and Kuwait to demarcate the boundary between them, drawing on appropriate material."[104] Pursuant to the resolution, the Secretary-General appointed the Iraq-Kuwait Boundary Dispute Commission (IKBDC). The Commission was uniquely charged with *establishing* the boundary (not delimiting, but rather demarcating) using coordinates of latitude

---

95. *Id.*

96. *Id.*

97. Taba, *supra* note 72, at 56. With reference to the precedence of existing pillars over maps the tribunal says: "If a boundary line is once demarcated jointly by the parties concerned, the demarcation is considered as an authentic interpretation of the boundary agreement even if deviations may have occurred or if there are some inconsistencies with maps." *Id.*

98. CUKWURAH, *supra* note 7, at 224.

99. *Id.* at 223.

100. *See id.* at 220.

101. *See* Ray Milefsky & William B. Wood, *GIS as a Tool for Territorial Analysis and Negotiations, in* THE RAZOR'S EDGE 107, 108-09 (Clive Schofield et al. eds., 2002).

102. *See, e.g.*, Taba, *supra* note 72, at 48 ("The Tribunal does not consider these map based indications to be conclusive since the scale of the map (1:100,000) is too small to demonstrate a location on the ground as exactly as required . . "); *see also* Dispute Between Argentina and Chile Concerning the Beagle Channel, 21 R. Int'l Arb. Awards 53 (Feb. 18, 1977) [hereinafter Beagle Channel]. This approach is also reflected in Burk. Faso v. Mali, *supra* note 90, at 583, where the Court notes that a map "can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps."

103. *See generally* Taba, *supra* note 72.

104. S.C. Res. 687, ¶ 3, U.N. Doc. S/RES/687 (Apr. 8, 1991).

and longitude as well as representing those coordinates through markers on the ground.[105]

The IKBDC faced the same the challenge of interpreting vague treaty language. It relied on the 1963 "Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters" which referred to points in generalities.[106] For example, the Agreed Minutes make reference to a point "south of . . . Um Qasr"; it is unclear whether the parties meant the Umm Qasr as it existed in 1963 or as it existed in 1932 (the time of the original treaty at issue).[107]

Independent surveyance experts assisted the Commission in its work.[108] They proposed a new survey and mapping of the entire border area to enable the Commission to be as precise as possible, using new and improved technology, and to guide the Commission's work with relevance to the ground situation.[109] Following the Security Council's instructions to draw upon "appropriate technology,"[110] much of the experts' proposed methods were implemented.[111] For example, their proposal included the establishment of a "geodetic control network and ground control points for mapping, using satellite-based ([GPS] and Doppler) methods," using satellite-based technologies, as well as aerial photography.[112]

At the conclusion of the Commission's work, 106 boundary pillars were erected, and twenty-eight intermediate boundary markers and other points along the sea were organized;[113] though it included little legal justification for its selections, the Commission maintained a list of geographic coordinates for each pillar and point as instructed.[114] The Secretary-General specified that "[t]he *coordinates* established by the [IKBDC] Commission *will constitute the final demarcation* of the international boundary . . . ."[115] It is not explicitly clear whether the Council intended for the coordinates to serve as the source of legal authority for the boundary, though that is a feasible interpretation of these instructions.[116]

---

105. S.C. Res. 833, U.N. Doc. S/RES/833 (May 27, 1993). As discussed above, however, in carrying out the surveyance work, the Commission did inevitably define the border to some extent.

106. *Id.*

107. *See* Adler, *supra* note 17.

108. *Id.* at 6.

109. *Id.*

110. The Secretary-General, *Report of the Secretary-General Regarding Paragraph 3 of Security Council Resolution 687* ¶¶ 3-4, U.N. Doc. S/22558 (May 2, 1991).

111. *Id.* at ¶ 4.

112. Adler, *supra* note 17, at 7 ("Four datum stations, 25 geodetic control stations and 137 photogrammetric control points were established toward the end of 1991, by GPS and Doppler survey methods").

113. *Id.* at 9.

114. Jan Klabbers, *No More Shifting Lines? The Report of the Iraq-Kuwait Boundary Demarcation Commission*, 43 INT'L & COMP. L.Q. 904, 906 (1994).

115. *Report of the Secretary-General Regarding Paragraph 3 of Security Council Resolution 687*, *supra* note 110, at ¶ 3 (emphasis added).

116. Here, some scholars have raised concern about the Security Council's exercise of power in determining borders. This international organizational dilemma goes beyond the scope of this Essay,

Following the IKBDC, the Israel-Jordan Boundary Dispute Commission adopted a similar approach in 1995.[117] In that situation, the instructions given to the Commission required the emplacement of boundary pillars, but also clearly invested legal authority in the satellite coordinates determined by the Commission.[118]

Thus, the decisions rendered in the Taba Tribunal, IKBDC and Israel-Jordan Commission reveal a tension and responding shift in the law of boundary-marking. The Taba decision and Lapidoth's dissenting declaration frame the legal dispute debating the authoritative role of the pillars.[119] From there, the IKBDC required coordinates as well as pillars to ensure permanency and to avoid dispute like that which arose in Taba and, under one interpretation, also placed legal authority in the coordinates.[120] The Israel-Jordan Commission, while also emplacing monuments, affirmed the authoritativeness of the coordinates.[121] As the scientific and geographic communities became more comfortable with the technologies, these border commissions incorporated their added accuracy and durability. The inclinations on the part of the IKBDC and the Israel-Jordan Commissions to sustain the legal authority of the coordinates demonstrate the start of a pattern which culminated with the Eritrea-Ethiopia Boundary Commission.[122] The next section investigates how the EEBC drew from the trend out of necessity, and in so doing, may have augured its completion and the effective establishment of an emergent legal norm, rendering the need for pillars moot and utilizing the latest technologies available to design binding demarcation outcomes.

C. Eritrea-Ethiopia and virtual demarcation

The Eritrea-Ethiopia Boundary Commission (EEBC / the Commission) was established in 2000 pursuant to the Algiers Agreement—the culmination of a lengthy negotiation process designed to put an end to the hostilities that broke out in the region from May 1998 to June 2000.[123] In addition to mandating the Commission to adjudicate the delimitation of the shared border, the Algiers Agreement called upon the Commission to "arrange for expeditious demarcation" though it did not specify the means or medium according to which demarcation

---

but is highly relevant for both the IKBDC and the EEBC. *See, e.g.*, Klabbers, *supra* note 114, at 911.

117. *See* Adler, *supra* note 17, at 10 (stating the Israel-Jordan boundary was established through the use of advanced technology such as orthophotos).

118. *Id.* at 10-11 ("The boundary pillars shall be defined in a list of geographic and UTM coordinates based on the joint boundary datum (IJBD 94) to be agreed by the Joint Team of Experts appointed by the Parties using Global Positioning System measurements . . . . This list of coordinates . . . shall be binding and shall take precedence over the maps as to the location of the boundary line of this sector").

119. *See* Taba, *supra* note 72, at 75 (dissenting opinion of Prof. Lapidoth).

120. Adler, *supra* note 17, at 5.

121. *Id.* at 10-11.

122. *See* 2002 EEBC, *supra* note 63; *see also*, 2006 EEBC Statement, *infra* note 127.

123. Ethiopia-Eritrea: Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Peace Agreement), Eth.-Eri., Dec. 12, 2000, 40 I.L.M. 260 (2001).

would be carried out.[124] Still, in the Agreement, Ethiopia and Eritrea committed to "cooperate with the Commission . . . *in all respects* during the process of delimitation and demarcation."[125] Moreover, the parties agreed that "the delimitation and demarcation determinations of the Commission [would] be final and binding."[126]

When both parties later refused to respect the Commission's determination, the Commission turned their earlier agreement back to them, relying on the *Beagle Channel* tribunal decision which held: "It is not admissible that, because of the total non-cooperation of one of the Parties, contrary to its obligation under a valid Award, the Court should be compelled to remain indefinitely in existence in a state of suspended animation."[127] In the case of Ethiopia and Eritrea, the Commission noted that the same principle would apply in light of the non-cooperation of both parties.[128]

On July 8, 2002, the Commission promulgated its Demarcation Directions[129] which instructed the parties to appoint appropriate representatives in order to identify sites for the demarcation pillars.[130] What might otherwise be a simple process of placing pillars in the locations identified by the Delimitation Decision became a controversial ordeal yet to be resolved at the time of writing. In the Commission's attempts to demarcate the central and west sectors of the border, both parties refused to allow the appointed representatives to carry out their work.[131] They proceeded to obstruct the Commission from holding negotiations to resolve the dispute.[132] Resolved against making any progress on the decision of the Commission, Ethiopia and Eritrea disregarded fourteen Security Council resolutions calling for their joint cooperation.[133]

After nearly four years of stalemate, the Commission issued a statement at the end of 2006, following the refusal of Eritrea and Ethiopia to attend the Commission's dispute resolution meeting.[134] In the statement, the Commission revisited its original mandate instructing it to demarcate the boundary.[135] It noted

---

124. *Id.* at art. 4, ¶ 13.

125. *Id.* at art. 4, ¶ 14.

126. *Id.* at art. 4, ¶ 15.

127. Permanent Court of Arbitration: Eritrea-Ethiopia Boundary Commission Statement by the Commission, Nov. 27, 2006, 46 I.L.M. 155, n.1 [hereinafter 2006 EEBC Statement].

128. *Id.*

129. *Id.* at 155.

130. *Id.* Interestingly, the Commission originally notes that it must specify the boundary reference point coordinates as measured from satellite imagery based on the WGS84 datum. The principal reason, it notes, for using this specification is due to the limited availability of information on the (updated Soviet edition) maps available to the Commission. In its decision, the Commission cautions that "All coordinates will be recalculated and made more precise during the demarcation as the commission acquires the additional necessary information." Herein both parties were put on notice of potential changes in the location of the border. 2002 EEBC, *supra* note 63, at ¶ 8.3.

131. 2006 EEBC Statement, *supra* note 127, at 156.

132. *Id.* at 156-57.

133. *Id.* at 159.

134. *Id.* at 157-58.

135. *Id.* at 157.

that it had previously interpreted the mandate to mean that it must oversee the actual emplacement of pillars at turning points of the boundary; however, in order to carry out this task, the Commission assumed it would receive the proper funding and support from the parties and from the United Nations Mission in Eritrea and Ethiopia (UNMEE).[136] In the absence of the parties' cooperation, the Commission found it necessary to interpret its mandate in such a way so as to discharge all its functions effectively.[137] It derived a new interpretation on the basis of changed facts to which it had to adapt and announced its decision to "adopt another approach to effect the demarcation of the boundary."[138] The Commission declared:

> If, by the end of [the twelve-month] period, the Parties have not by themselves reached the necessary agreement and proceeded significantly to implement it . . . the Commission hereby determines that the boundary will automatically stand as *demarcated by the boundary points* [determined by the Commission] and that the mandate of the Commission can then be regarded as fulfilled.[139]

To this end, the Commission discussed how modern techniques of "image processing and terrain" facilitate demarcation by geographical coordinates with incomparable accuracy that would achieve most of the same goals as monument emplacement in the field.[140] It drew in large part from the IKBDC decision noting how, in the aftermath of its decision, the Security Council supported the legal principle that coordinates could and would be authoritative boundary markers.[141] By way of filling in the legal reasoning lacking in the IKBDC and Israel-Jordan decisions, the Commission also referred to two comparable situations where relevant principles have been asserted. First, it made reference to the *Argentina-Chile Frontier Case* (1966) in which aerial photography was used to specify the boundary points.[142] The Argentina-Chile Tribunal held that points indicated on aerial photographs would constitute "the sole authority for the exact location of the points."[143] Second, the Commission noted how maritime boundaries, as specified in the Law of the Sea Convention, rely on a coordinate-only demarcation system.[144]

Following this proclamation, neither side attempted to emplace pillars as instructed and the Commission's decision became final and binding in November 2007 at which point the Eritrea-Ethiopia Boundary Commission (EEBC) officially dissolved itself.[145] As no further action would convince the parties to fulfill their

136. *Id.* at 158.
137. *Id.*
138. *Id.*
139. *Id.* at 159 (emphasis added).
140. *Id.* at 158.
141. *Id.* at 159.
142. *Id.* at 156, n.4.
143. *Id.* (quoting Argentina-Chile Frontier Case, 38 I.L.R. 10 (1966)).
144. *Id.* at 159.
145. The Secretary-General, *Report of the Secretary-General on Ethiopia and Eritrea*, ¶ 26 & Annex II, paras. 1, 3-4, 10-11, 40, *delivered to the Security Council*, U.N. Doc. S/2008/40 (Jan. 23,

obligations under the terms of their prior agreement, the Commission followed through with its intended plan to disband.[146] With the stroke of a pen, it reported to the Secretary-General and to the world that the new boundary between Eritrea and Ethiopia had been defined and, regardless of the lack of physical manifestations of it on the ground or the consent of the parties, the coordinates the EEBC had finalized would serve as authoritative markers of the international border.[147]

Although the international media reported that the Commission chose to "leav[e] the two states to work it out alone,"[148] the Commission was clear about the significance of its conclusions.[149] Leaving behind an Annex containing the results of its Delimitation Decision set out in geographic coordinates, the Commission had "virtually" demarcated the boundary.[150] The Annex includes detailed specifications regarding where the border between Eritrea and Ethiopia stands in terms of GPS satellite coordinates.[151] It instructs the demarcators on 146 boundary points, plus seven pages of comments, on how to place each marker and how to move from one to the next.[152]

It is important to note that the Commission expressed its support for the monumentation principle and emphasized its attempt to enforce the principle, but in light of the lack of cooperation of the parties to fulfill their obligations, it used the coordinate-only demarcation method of equal validity.[153] Rather than reject the monumentation concept, the Commission affirmed it but found another method to be equally sufficient.[154] In a letter to the President of the Security Council dated January 18, 2008, the President of Ethiopia decried the Commission's decision as having "no validity in international law."[155] Despite the legal reasoning outlined in the decision with reference to the IKBDC and *Argentina-Chile* decisions, Ethiopia maintains that the coordinates are invalid "because they are not the product of a demarcation process recognised by international law."[156] As shown above, however, while monumentation may be considered evidence of an accepted practice, not all international borders are demarcated with monuments and there is

---

2008).

146. *Id.*

147. *See id.*

148. Daniel Wallis & Andrew Cawthorne, *U.N. Probes Eritrea-Ethiopia Border Gunfire* (Dec. 27, 2007), http://www.alertnet.org/thenews/newsdesk/L27074831.htm.

149. *See Report of the Secretary General on Ethiopia and Eritrea*, *supra* note 145.

150. Eritrea-Ethiopia Boundary Commission Annex to the Commission's Statement of 27 November 2006 List of Boundary Points and Coordinates, http://www.pca-cpa.org/showfile.asp?fil_id=110.

151. *See id.*

152. *Id.*

153. 2006 EEBC Statement, *supra* note 127, ¶ 20.

154. *See id.*

155. *Report of the Secretary-General on Ethiopia and Eritrea*, *supra* note 145, ¶ 23 (quoting portions of the Foreign Minister's letter).

156. *Id.* ¶ 41. Notably, no other states have spoken in support of this position. *See* 2006 EEBC Statement, *supra* note 127, at 159.

no source of legal authority suggesting it is required.[157] For its part, Eritrea has accepted the Commission's decision as binding, though it has not made efforts to emplace pillars as instructed.[158]

V. A MAP FOR THE FUTURE?

Developing norms of precedence and interpretation for boundary determination is a daunting task particularly in light of the conflictual holdings by the International Court of Justice and the various border dispute tribunals.[159] The first step in border maintenance or border dispute resolution is to look for existing, authorized documentation agreed to by both sides. The majority in the Taba Tribunal, as well as the IKBDC, pursued such authorization, but found conflicting information.[160] Written documentation, authorized by both states, regarding the location of the border should be legally binding, but this clarification does not necessarily solve boundary disputes where documentation conflicts, as was seen in the case of the IKBDC.[161] Next, the Taba Tribunal looked to monuments along the border.[162] The boundary pillars, preferably accompanied by at least partial documentation, represent the de facto situation which supports a claim under the principle of *uti possidetis factis*.[163] Although the Taba arbitrators attempted to identify which monuments were the original monuments from the 1906 replacement, it was nearly impossible to do so.[164]

These practical challenges precipitated a call to consider other methods of demarcation. The monumentation approach might have made sense when no other means were available; however, in the twenty-first century, when the law has kept pace with technology in other areas of science, border demarcation should do the same. Moreover, inconsistencies among boundary commissions and the variety of state methodologies indicate a need for harmonization in order to clarify and establish coherent legal norms in this field. Virtual demarcation achieves this goal.

The actual process of carrying out all the calculations and measurements necessary for virtual demarcation varies depending on the technology employed. The most accurate and reliable method available today is stereophotogrammetry.[165] Stereophotogrammetry is commonly used for marking points where it would be

157. *See supra* notes 140-144 and accompanying text.

158. *See Report of the Secretary-General on Ethiopia and Eritrea*, *supra* note 145, ¶¶ 26, 41 & Annex II, para. 4.

159. *Cf.* Convention Revising the General Act of Berlin and the Declaration of Brussels (Treaty of St. Germain-en-Laye) art. 28, Sept. 10, 1919, 49 Stat. 3027, 8 L.N.T.S. 25 (declaring clear interpretive rule that"[i]n case of differences between the text and the map, the text will prevail.").

160. *See* Taba, *supra* note 72, at 44-45; The Secretary-General, *Letter Dated 21 May 1993 from the Secretary-General Addressed to the President of the Security Council*, ¶¶ 27-45, U.N. Doc. S/25811 (May 21, 1993).

161. *See Letter Dated 21 May 1993 from the Secretary-General Addressed to the President of the Security Council*, *supra* note 160, ¶¶ 27-45.

162. *See* Taba, *supra* note 72, at 47-67.

163. *See id.* at 44-45.

164. *Id.* at 48-49.

165. Interview with Laurent Bonneau, Research Associate for Geology and Geophysics, Yale University, in New Haven, Conn. (Mar. 28, 2008) (on file with author).

impossible to emplace monuments, such as on mountain tops. Geographers use stereophotogrammetry to ascertain a point that parties agree to on the basis of a particular set of stereo reference data. Thus, Ethiopia's claim that there is no precedent for this *type* of demarcation is incorrect to the extent that stereophotogrammetry is used in these remote areas.[166]

Despite its value for stability and finality, stereophotogrammetry is also grossly expensive. Another process known as orthorectified aerial photography is more commonly used through means of either airplane or satellite. At high levels of resolution, satellites and traditional aerial photography offer sub-decimeter resolution. Still, "complete and uniform coverage at the appropriate resolution is often lacking for much of the developing world."[167] Moreover, full coverage of a long boundary even using this less complicated technology can cost millions of dollars.

While resources might not be available for all states to carry out these methods on their own, there are fewer obstacles preventing an international institution from taking on this responsibility and serving as the central depository for international boundary coordinates. The United Nations, or an affiliated intergovernmental organization, should develop a shared informational and standardized system, based on a single datum, that lists all the international boundaries on record. Resembled after the international treaty series, it need not be more than a simple list of coordinates that serves as the authoritative source of coordinate information, demarcating all boundaries with the same (highest available at the time) level of precision, but with the express purpose of finalizing the location of international boundaries. Moreover, although the states between whom the border divides the territory have the most immediate interest in the delimitation and demarcation processes, these processes have *erga omnes* effect such that all states must respect and accept the boundary as recognized; thus, it becomes increasingly obvious than an international record should be maintained.[168] Boundaries remain even if treaties that created them are no longer in force.[169]

With the precision and permanency of these geographic coordinates, this system would far out-last any monument and be less subject to abuse. Still, it would likely face challenges, at least in the short-term. First, as shown in the case of Ethiopia, it is unlikely that states would willingly surrender their border-marking authority.[170] Second, if an intergovernmental organization such as the United Nations were to assume control for boundaries and institute a system of

166. *Id.*

167. Milefsky & Wood, *supra* note 101, at 116.

168. A related theme meriting further research is the strategy used by states to recognize third-party (non-bordering states) boundaries; the central boundary depository would harmonize recognition methodologies with the long-term goal of eliminating the need for "recognition" of contentious borders since all would be officially recorded.

169. ANTONIO CASSESE, INTERNATIONAL LAW 83-84 (2d ed. 2005).

170. Given military concerns over border regions, both parties are unlikely to be willing to use imagery as part of their negotiations. *See id.* at 423-24.

virtual demarcation, it could instigate an eruption of minute and large-scale border disputes as states rush to update and clarify their records.

Although it is an area where technology has the potential to play a significant role in the creation and modification of international law, boundary-marking has received little attention in this respect.[171] The systematic transition suggested herein will undoubtedly take considerable time and effort.[172] Just as the GPS coordinate system would eliminate the need for street addresses, this Essay is not suggesting that we re-design the postal system. Rather, it aims to harmonize and remodel boundary-marking in such a way that will avoid conflict – physical as well as numerical.

VI. BORDER-MARKING MEETS BORDER-MAKING

"La caractere marquant de la notion de frontiere est son universalite d'acception."[173]

Although the technology for "virtual demarcation" is available, it produces a sort of cognitive dissonance for geographers who have relied on grounded monuments. As one geographer notes, "demarcation, by definition, means 'mark on the ground.'"[174] On the other hand, many international lawyers concede that the monumentation principle is not, in fact, required by law.[175] It is a purely technical operation of minor importance. In fact, most boundaries are not demarcated due to expense, effort, adverse climate, or emotions of local inhabitants as to the erection of monuments.[176] In his 1928 treatise, de Lapradelle asserted that "*[l]a demarcation, si elle est utile, d'est pas, en droit, necessaire.*"[177]

Thus, the controversy over virtual demarcation oversubstantiates the nature of any potential contradiction in international law. While monumentation may be preferable at some levels, a universal, coordinate-based system, maintained by an

---

171. *But see* Martin Pratt, *The Role of the Technical Expert in Maritime Delimitation Cases*, *in* MARITIME DELIMITATION 79, 80 (Rainer Lagoni & Daniel Vignes eds., 2006) ("[S]tates are becoming increasingly aware of the need for geodetically precise boundaries . . . . [Boundary] courts and tribunals are coming under closer . . . scrutiny by technically-proficient analysts, and errors or deficiencies in the definition of a . . . boundary are sure to be exposed . . . . [I]t is recommended that a) adjudicators ensure that they have adequate technical support themselves, and b) they encourage the parties . . to agree [on] technical standards for delimitation before the adjudicators begin their deliberations.").

172. *See* Dennis Rushworth, *Mapping in Support of Frontier Arbitration: Coordinates*, IBRU BOUNDARY AND SECURITY BULLETIN, Autumn 1997, at 55, 56 ("[I]t will be many years before all current mapping is compatible with WGS coordinates. Since older mapping and survey data is never likely to be converted, frontier arbitration proceedings will have to take into account the existence of incompatible coordinate values for the foreseeable future.").

173. P. G. DE LAPRADELLE, LA FRONTIER: ETUDE DE DROIT INTERNATIONAL 9 (1928), *quoted and translated in* Ron Adler, *Geographical Information in Delimitation, Demarcation and Management of International Land Boundaries*, 3 IBRU BOUNDARY AND TERRITORY BRIEFING No. 4 (2001), at 1 & n.1 ("The notable characteristic of the idea of a frontier is its universality.").

174. Telephone Interview with Ray Milefsky, *supra* note 54.

175. *See* discussion *supra* note 67.

176. Adler, *supra* note 173, at 10-11.

177. DE LAPRADELLE, *supra* note 173, at 143 (*quoted and translated in* Adler, *supra* note 173, at 10 & n.5 ("Demarcation, although useful, is not necessary in law.")).

international institution would achieve more uniformity and cultivate worldwide acceptance of exactly where international boundaries lie.

Although here I have examined the hybrid process of boundary-marking through the lens of international law, it is the role and purpose of borders that rightly dominates much of the social science literature on boundaries. After all, "a boundary is not an idea, nor a paragraph in a treaty, nor a line on a map, but a functional feature on the face of the earth."[178] The importance of border security with respect to both people and goods obliges states to keep careful watch over their boundaries; even in the absence of any controversy between them, neighboring states often construct multiple legislative and law enforcement mechanisms for border management. For example, in order to determine and maintain their border, France and Italy have three treaties, four demarcation agreements, a maintenance agreement which establishes a binational border commission, and no fewer than five state agencies responsible for geodetic measurements, mapping and documentation.[179] Still, adjoining states will sometimes publish differing lengths for common boundaries which may never be resolved or may go unnoticed.[180]

This Essay has evaluated the current state of affairs with respect to the technology/supranational law-making nexus in an area that has a significant bearing on the fundamental values of the discipline. It has argued that a normatively coherent techno-legal regime in this field is only achievable by integrating the work of the boundary engineers into the work of the boundary architects. As long as boundary architects and engineers remain captive to the monumentation principle as a necessary legal tool in boundary dispute resolutions, they perpetuate the possibility for further controversy as discrepancies develop outside their control. The Eritrea-Ethiopia Boundary Commission has signaled a new approach for border-marking that, at the very least, merits jurisprudential and institutional consideration and has the potential to revolutionize boundary-marking *and* boundary-making.

178. JONES, *supra* note 1, at 6.

179. Michael Bacchus, The Maintenance of Boundary Pillars and Boundary Lines in France (Dec. 12, 2006) (unpublished conference presentation, *available at* http://www.dur.ac.uk/resources/ibru/conferences/thailand/france_1.pdf).

180. Email from Ray Milefsky, *supra* note 53; *see also* Interview with Kakha Khandolishvili, Chief of Internal Affairs, Georgian Border Police, in Tbilisi, Geor. (June 27, 2007) (on file with author).

RIGHTS OF ACTION FOR PRIVATE NON-STATE ACTORS IN THE WTO DISPUTE SETTLEMENT SYSTEM

AARON CATBAGAN*

I. INTRODUCTION

The WTO's Dispute Settlement Understanding (DSU),[1] and the multi-tiered dispute settlement system it governs have been heralded as lasting triumphs of the Uruguay Round.[2] Indeed, the WTO's dispute settlement system avoids many of the political pitfalls that weakened the dispute settlement system under the original GATT.[3] The WTO's dispute settlement system has also been praised as an innovation in the ability of member states, whether economic key players or much less influential members, to challenge violations of international trade law in ways that may not be practicable through pure negotiation and consultation.[4]

In spite of many positive qualities attributed to the contemporary dispute settlement system, commentators argue that developing countries find themselves at a disadvantage when it comes to effectively litigating trade disputes before dispute settlement panels and securing remedies against developed WTO member states. This article proposes and examines an alternative method of resolving disputes under the DSU. The alternative method is a proposal to give non-state actors in developing member states opportunities to initiate complaints against WTO member states. The WTO dispute settlement system would provide the framework to enable non-state actors to seek remedies for violations of international trade law through arbitration with WTO member states. The heart of the proposal is simple: private non-state actors such as firms, industrial associations, and organizations comprised of business entities of various sizes would play an important role in ensuring greater equality in the WTO dispute settlement system.

---

* J.D., University of Denver Sturm College of Law (2008); M.A., Josef Korbel School of International Studies (2008). The author is indebted to Assistant Professor Phoenix X. F. Cai for her encouragement and insightful advice throughout the composition and editing process. Any errors are solely the responsibility of the author.

1. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments--Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

2. John A. Ragosta, *Unmasking the WTO--Access to the DSB System: Can the WTO DSB Live up to the Moniker 'World Trade Court'?*, 31 L. & POL'Y INT'L BUS. 739, 739-40 (2000).

3. G. Richard Shell, *The Trade Stakeholders Model and Participation by Non-state Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 362-63 (1996).

4. *See id.* at 363.

The alternative method proposed in this article deviates from dispute settlement procedures in the DSU in that, at present, only member states may initiate complaints against other member states. This proposal has the potential to radically alter the landscape of jurisprudence relating to international trade disputes, not to mention the commonplace operation of the WTO dispute settlement system. It is also an opportunity to bolster the credibility of the WTO following the collapse of the Doha Round and improve benefits available to developing countries in the global trading system.

This article will provide a brief overview of the current dispute settlement system of the WTO in Part II. The proposal allowing non-state actors to arbitrate alleged violations of international trade law under the WTO dispute settlement system will be explained in Part III. In Part IV, a case study involving the garment export industry in Vietnam will be examined to demonstrate why rights of action for non-state actors would improve the contemporary dispute settlement system and help the WTO promote international trade between developed and developing countries.[5] Benefits of the proposal and counterarguments are discussed in Part V, with brief concluding statements in Part VI.

II. CURRENT METHODS FOR SETTLING TRADE DISPUTES UNDER THE DSU

A. Contemporary dispute settlement by WTO member states

The current system for resolving trade disputes between WTO member states constitutes an improvement over the dispute settlement system originally devised under the 1947 GATT.[6] In the early years of the GATT system, consensus among member states was required to establish a dispute settlement panel and to adopt final panel decisions.[7] This was particularly problematic for developing member states, which often lacked the political and economic clout necessary to initiate dispute proceedings on the basis of consensus among member states.[8]

The contemporary system of formal dispute settlement provides appellate review following consultations between the complaining member state and member states accused of violating obligations arising from the agreements listed in Annex 1 of the DSU.[9] The purpose of consultations is to encourage member states to voluntarily withdraw problematic trade measures without the need for formal dispute settlement proceedings. Consultation is a preferred method for resolving trade disputes because the process is more efficient and less time-consuming than litigation before a dispute settlement panel.[10] If consultations prove to be unsuccessful, the member state raising the complaint may request the

---

5. Marrakesh Agreement Establishing the World Trade Organization, pmbl. para. 2, 33 I.L.M. 1125, 1144 (1994).

6. Ragosta, *supra* note 2.

7. THOMAS A. ZIMMERMAN, NEGOTIATING THE REVIEW OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING 50-51, 55 (2006); Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2283 (1997).

8. *See* ZIMMERMAN, *supra* note 7, at 48, 49.

9. DSU arts. 1.1, 2.1, 4, 7, 17; *see also* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L. J. 829, 849-53 (1995).

10. *See* DSU arts. 3.7, 4.

establishment of a dispute settlement panel after sixty days of the request for consultations, or within the sixty-day period if the parties jointly determine that consultations are unsuccessful.[11] The first level of review is conducted by panels established by the Dispute Settlement Body (DSB),[12] with a final level of review conducted by the Appellate Body.[13] Consensus among member states is not required to adopt decisions by the Appellate Body or DSB. Consensus is only necessary in case the DSB vetoes panel formation, rejects adoption of panel findings, or rejects judgments of the Appellate Body.[14] Under the contemporary system, only member states may raise dispute claims or defend against claims raised by other complaining member states.[15]

Remedies available to complainants may be found in Article 22 of the DSU.[16] Compensation and suspension of concessions are the chief remedies for successful complainants if respondents fail to implement panel findings after a reasonable time. However, these remedies are also described as last resorts.[17] Additionally, monetary damages are not specifically contemplated. Exclusion of monetary damages precludes damages for anticipated failures by respondents to comply with Appellate Body decisions, and eliminates the possibility of attorneys' fees.[18]

B. Roles for non-state actors in the WTO Dispute Settlement System

Although the DSU only provides for dispute settlement among member states, non-state actors such as firms and industry lobbying groups already play a significant role in the way that member states initiate and resolve trade disputes under the DSU.[19] As Gregory Shaffer has stated, "public and private actors depend on each other's resources...[and] have also adapted public-private collaborative governance modes to enforce WTO law and otherwise advance their interests...."[20]

---

11. *Id.* art. 4.7.

12. *Id.* arts. 6, 8, 11-12.

13. *Id.* arts. 6, 17.

14. *Id.* arts. 16.4, 17.14.

15. *See id.* arts. 2.1, 10, 17.4.

16. *Id.* art. 22.

17. *Id.* art. 22.1-22.2. Article 3, paragraph 7 also states: "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned ; [t]he provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable . . [t]he last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis . . . ."

18. *See* Joel P. Trachtman, *Private Parties in EC-US Dispute Settlement in the WTO: Toward Intermediated Domestic Effect*, *in* TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US, AND THE WTO 527, 536 (Ernst-Ulrich Petersmann & Mark A. Pollack eds., 2003); Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 641, 654 (2005). *See also* Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 HARV. INT'L L. J. 337, 338-40 (2007). *See also* Alan Wm. Wolff, *Remedy in WTO Dispute Settlement*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 783, 807-08 (Merit E. Janow et. al. eds., 2008).

19. *See* GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 144-46 (2003).

20. *Id.* at 144.

These "collaborative governance modes," also labeled public-private networks by Gregory Shaffer, serve an important function in successful dispute settlement for developed countries.[21]

1. Private Actors in the United States and the European Union

Public-private networks integrate the interests of private actors and government authorities. Public-private networks are an important tool that non-state actors in the United States wield in addressing international trade disputes. Unlike other developed countries, the "approach to public-private networks [in the United States] tends to be more 'bottom-up,' with firms and trade associations playing a proactive role."[22] Public-private networks in the United States center around formal and informal channels for lobbying and consultation. Domestic firms, industry associations, and trade groups directly petition representatives of the U.S. government to combat perceived trade barriers and discriminatory policies enacted by foreign governments.[23] For some time, the WTO dispute settlement system has been acknowledged as an option that U.S. companies might use to combat trade-restricting policies enacted by foreign governments. WTO litigation has been touted as "a powerful tool in opening foreign markets to U.S. companies" which could "add significant value for companies seeking to penetrate promising new markets."[24] Over time, collaborative public-private networks have become a critical part of WTO dispute settlement strategy in the United States.

Non-state actors in the United States used formal and informal channels to influence trade dispute settlement even before the United States joined the WTO. For example, a meeting between U.S. Trade Representative Mickey Kantor, the president of the Chiquita Brands banana company, and former Senator Robert Dole significantly impacted United States policy on the decision to join the WTO and to initiate a long-running trade complaint against the European Communities (EC).[25] The meeting serves as an example of informal collaboration between senior members of the U.S. government and industry leaders where both public and private decision-makers influenced the course of United States trade policy and trade dispute settlement.[26] As a result of the informal agreement that arose among participants of the meeting, political objectives of the Clinton Administration regarding the WTO were advanced by Republican leaders in Congress. This outcome was achieved because U.S. Trade Representative Kantor, as a senior

---

21. *Id.*

22. *Id.* at 6.

23. *Id.* at 19.

24. Homer E. Moyer, Jr. & Hal S. Shapiro, *Are WTO Dispute Settlement Proceedings Right for Your Company?*, CORP. LEGAL TIMES, Dec. 1998, at 53.

25. Although reference to the European Union is made throughout this article, European Communities (EC) constitutes the legal name of the organization in Uruguay Round agreements and consequently WTO dispute settlement proceedings. *See* Jörn Sack, *The European Community's Membership of International Organizations*, 32 COMMON MKT. L. REV. 1227 (1995) (detailing European Communities membership in the WTO); *see also* Rafael Leal-Arcas, *Polycephalous Anatomy of the EC in the WTO: An Analysis of Law and Practice*, 19 FLA. J. INT'L L. 570, 576 nn.22-23 (2007).

26. *See* SHAFFER, *supra* note 19, at 23-24.

official in the Clinton Administration, agreed to take up a trade dispute case against the European Communities on behalf of Chiquita.[27]

Formal methods that were intended to foster public-private cooperation have also resulted in "collaborative arrangements" between non-state actors, the U.S. Department of Commerce, and the Office of the U.S. Trade Representative over trade dispute claims.[28] A significant legal mechanism was established as part of the U.S. Trade Act of 1974. Under the Trade Act, the U.S. Trade Representative is responsible for investigating and combating foreign trade barriers "in response to petitions filed by private firms and trade associations...."[29] Non-state actors in the United States may draw attention to purported violations of trade law by other WTO member states. As a result, those actors influence the types of complaints that the Office of the U.S. Trade Representative eventually raises under the DSU.[30] Under Section 302 of the 1974 Trade Act, "[a]ny interested person may file a petition... requesting that action be taken... and setting forth the allegations in support of the request."[31] As such, non-state actors in the United States have several ways to influence the course of U.S. dispute settlement. Non-state actors play an integral role in detecting purported violations of international trade law. Non-state actors also maintain political pressure to ensure that amenable outcomes are, as near as possible, achieved by government representatives at the conclusion of dispute settlement proceedings.[32]

Although public-private networks in the European Union operate differently from those in the United States, European businesses and authorities have also benefited from increased levels of collaboration with respect to WTO dispute claims and settlements.[33] The motivation to develop strong public-private collaboration is in part based on the interest of authorities in the European Union to appear responsive to the interests of European businesses due to competitiveness between similarly-tasked domestic authorities in EU member states.[34] Companies in the EU are now able to register complaints with the Commission using a centralized Complaint Register webpage.[35] The practice arose out of the consolidation of the Market Access Unit, an organization charged with developing

---

27. *See id.* at 24.

28. *See id.* at 36-37, 144.

29. *Id.* at 21 (emphasis omitted).

30. *See* JAE WAN CHUNG, THE POLITICAL ECONOMY OF INTERNATIONAL TRADE 104 (2006) (detailing the responsibilities of the Office of the U.S. Trade Representative, including "[a]ll matters within the WTO.").

31. 19 U.S.C. § 2412(a)(1) (2008).

32. *See* SHAFFER, *supra* note 19, at 39-40, 49, 60. For a generalized review of the political power disparities between the United States and European Communities on the one handand developing WTO member countries on the other throughout the dispute settlement process, see Andrea M. Ewart, *Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement*, 35 SYRACUSE J. INT'L L. & COM. 27, 34-37 (2007).

33. SHAFFER, *supra* note 19, at 65-66.

34. Gregory Shaffer, *What's New in EU Trade Dispute Settlement?: Judicialization, Public-Private Networks, and the WTO Legal Order*, 13 J. EUR. PUB. POL'Y 832, 834, 840 (2006).

35. European Commission Market Access Database, Online Complaint Register, http://mkaccdb.eu.int/madb_barriers/complaint_home.htm (last visited Jan. 24, 2009).

public-private networks and encouraging active trade dispute resolution.[36] The European Commission and EU Trade Directorate have been quite successful in motivating European firms to communicate about potential violations by WTO member states. For example, the Market Access Unit received five to ten new contacts each month regarding alleged trade violations in 2005.[37] Proactive development of relationships with non-state actors by the European Commission Trade Directorate-General differs from the United States model because private firms in Europe have been reluctant to engage with transnational authorities.[38] The Trade Barrier Regulation has enabled European businesses to directly petition the European Commission for an investigation of trade violations by WTO member states, and has convinced non-state actors in the EU to work closely with European Commission authorities to report potential barriers to trade.[39]

These efforts have coincided with developments in the law of the European Union and expanded formal networks. Public-private networks have been encouraged under Article 133 of the Treaty Establishing the European Community of 1958, as amended by the Treaty of Amsterdam in May 1999.[40] Under Article 133, the European Commission is empowered to seek informal approval from EU member states prior to litigating alleged trade violations before dispute settlement panels.[41] Although the straight-forward operation of Article 133 requires formal consultation between the European Commission and a committee of representatives from EU member states (known as the Article 133 Committee), the *de facto* process involves direct consultation between representatives of European industry and the European Commission, requiring only informal consent by a majority of state representatives before the European Commission initiates WTO trade dispute litigation.[42]

Formal legal mechanisms such as those provided under Article 133 and the Trade Barrier Regulation have empowered European firms and industry representatives to directly complain about foreign trade barriers to authorities in the European Commission and work closely with European Commission authorities to prepare trade litigation before formal dispute settlement commences pursuant to the DSU.[43]

An example of the way that public-private networks place developing member states at a disadvantage involves disputes between the United States, Indonesia, the EC, and Argentina over duties on footwear and apparel that were promulgated by the Argentinean government in the late 1990s.[44] The United States

36. SHAFFER, *supra* note 19, at 69.

37. Shaffer, *supra* note 34, at 838.

38. SHAFFER, *supra* note 19, at 71-72, 101.

39. *Id.* at 74.

40. *Id.* at 75 n.26.

41. Shaffer, *supra* note 34, at 839.

42. SHAFFER, *supra* note 19, at 78-79.

43. *Id.* at 86; Shaffer, *supra* note 34, at 839.

44. *See* Moyer, Jr. & Shapiro, *supra* note 24, at 53; *see also* Request for Consultations by the United States, *Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, WT/DS56/1 (Oct. 15, 1996) [hereinafter DS56 Request for Consultations]. *See* Request for

initiated a WTO complaint against Argentina regarding duties on imports in October 1996.[45] U.S. companies and the U.S. Trade Representative disputed the application of duties on textile, apparel, and footwear imports by the Argentinean government. The United States brought action under the DSU and successfully litigated a complaint before a dispute panel.[46]

Non-state actors in the American export industry became noticeably involved in the course of dispute settlement after the Argentinean government imposed duties on footwear from non-MERCOSUR countries.[47] The president of the Footwear Distributors and Retailers of America made a public statement to the effect that the organization "[would] utilize all available means to fight [Argentinean duties on footwear]."[48] Efforts by representatives of the industry did not stop with the U.S. Trade Representative, but also included efforts to influence the behavior of other governments, specifically the government of Indonesia. Lobbying by representatives of the U.S. footwear industry resulted in a separate complaint by Indonesia against Argentina.[49] The United States and Indonesia sought consultations with representatives of the government of Argentina to protest duties which allegedly prevented footwear exports from entering Argentinean markets.[50] Just as members of the footwear export industry in the United States petitioned the U.S. Trade Representative to formally dispute Argentinean duties on imported footwear, European industry associations were similarly able to petition the European Commission to take action against the leather export industries of Japan and Argentina following release of a study on the impact of foreign trade barriers to the European leather industry.[51]

Following requests for formal dispute settlement by the EC, the U.S., and Indonesia, representatives of the U.S. footwear industry continued to document the actions of the Argentinean government and informed the U.S. Department of Commerce of their continuing interest in the matter.[52] At the end of 2002, the Senior Vice President for the American Apparel and Footwear Association

---

Consultations by the United States, *Argentina-Measures Affecting Imports of Footwear*, WT/DS164/1 (Mar. 4, 1999) [hereinafter DS164 Request for Consultations]; Request for Consultations by Indonesia, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS123/1/Add.1 (Jan. 11, 1999) [hereinafter DS123 Request for Consultations]; Appellate Body Report, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Dec. 14, 1999) [hereinafter DS121].

45. *See* DS56 Request for Consultations para. 2; *see also* John Maggs, *U.S. Set to Penalize Argentina for Piracy; Duty-Free Trade Imports Targeted as Administration's Patience Ebbs*, J. COM., Jan. 6, 1997, at 1A; *see also* Moyer, Jr. & Shapiro, *supra* note 24, at 53.

46. Moyer, Jr. & Shapiro, *supra* note 24, at 53.

47. *See* Maggs, *supra* note 45; *see generally* DS164 Request for Consultations, *supra* note 44.

48. Maggs, *supra* note 45, at 1A.

49. *See* DS123 Request for Consultations, *supra* note 44; *see also Government Considering Taking Argentina to WTO Panel*, JAKARTA POST, Sept. 30, 1998, at 8.

50. DS164 Request for Consultations, *supra* note 44, para. 2; DS123 Request for Consultations, *supra* note 44, para. 3.

51. SHAFFER, *supra* note 19, at 88.

52. *See* Letter from Stephen Lamar, Senior Vice President, Am. Apparel & Footwear Assoc. to U.S. Dept. of Commerce, Office of Trade & Econ. Analysis (Dec. 13, 2002), *available at* https://www.apparelandfootwear.org/letters/nteaafacomments021216.pdf.

addressed a memorandum to the Office of Trade and Economic Analysis under the U.S. Department of Commerce concerning duties imposed by the Argentinean government that allegedly continued to violate WTO obligations.[53] Although no panel was composed for the U.S.-Argentina case,[54] and the Indonesian government decided not to pursue its request for a dispute settlement panel,[55] the example nevertheless demonstrates how well-connected non-state actors, in this case representatives from the U.S. footwear industry, utilized formal and informal methods to convince WTO member states to initiate dispute settlement proceedings against one developing country. The example is not unique. In other WTO member countries, non-state actors have recognized the influence exercised by strong public-private networks in the United States and the European Union. As a result, responses in developing countries such as Brazil have included efforts by non-state actors to more assertively influence dispute settlement.[56]

2. Challenges for Private Non-state Actors in Developing Countries

Formal and informal networks that enable non-state actors to exercise influence over dispute settlement are not readily available in developing countries.[57] Although examples suggest that non-state actors have begun to organize public-private collaboration, those efforts may not be enough to ensure that the WTO dispute settlement system works for developing countries.

Even if non-state actors established basic infrastructure for public-private networks within developing WTO member states, non-state actors would still face significant obstacles before they could actively assert and defend their interests. Developing countries that have recently joined the WTO occupy the least favorable position with respect to their ability to secure favorable outcomes in dispute settlement. Resources necessary for establishing public-private networks in developing countries are limited. If resources were expended to develop public-private networks, it is uncertain that non-state actors would ultimately exert the same influence in WTO dispute litigation and overall WTO policy-making that was pioneered by private actors in the United States. An alternative to more effectively level the playing field for non-state actors in developing countries

53. *Id.*

54. World Trade Organization, Summary of the Dispute to Date, Dispute DS 164 Argentina--Measures Affecting Imports of Footwear, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds164_e.htm (last visited Oct. 31, 2008).

55. World Trade Organization, Summary of the Dispute to Date, Dispute DS 123 Argentina--Safeguard Measures on Imports of Footwear DS, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds123_e.htm (last visited Oct. 31, 2008).

56. Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?*, 23 WIS. INT'L L. J. 643, 680 (2005); *see also* Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L. J. 383, 446 (2008).

57. *See* Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies, in* TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM IN THE WTO, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV., RESOURCE PAPER NO. 5, at 1, 27-29 (Victor Mosoti ed., 2003), *available at* http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf; *see also* Shaffer, *supra* note 56, at 650; Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON L. 861, 871 (2005).

constitutes the central focus of this article. Bypassing public-private networks not only serves as a foundational premise of the proposal discussed in the later parts of this article, but also distinguishes the proposal from alternatives explored by other authors who have considered this subject. The proposal calls for changes that would affect all WTO member countries, and is not predicated solely on attempts by non-state actors or government authorities in developing countries to change the WTO dispute settlement system. Such a systemic alteration to the dispute settlement system has the potential to improve the ability of non-state actors to advance their interests from a top-down, organizational perspective. By considering the challenges facing non-state actors in developing countries that have recently joined the WTO, the advantages of modifying dispute settlement with consequences for the rights of private actors under the DSU will be illustrated, along with discussion about why potential disadvantages are not significant enough to undermine the rationale for implementing modifications.

III. PRIVATE RIGHTS OF ACTION AS A STRATEGY TO BENEFIT DEVELOPING COUNTRIES

A. Basic Background to the Proposal

The dispute settlement system of the WTO provides for dispute settlement exclusively between member states. However, enabling non-state actors to assert complaints and independently settle trade disputes would confer substantial benefits upon non-state actors in developing countries, particularly those in new WTO member states. Various proposals to provide non-state actors with direct access to dispute settlement proceedings were contemplated from the very beginnings of the WTO.[58] Past proposals were based on amendments to the DSU that would enable firms, industry organizations, and other private entities that have been adversely affected by trade policies to initiate complaint procedures under the

58. *See* Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 348-50 (1996) (focusing on the ability of NGOs to file amicus briefs as a practical proposal and identifying standing for NGOs as an interesting future legal question); Philip M. Moremen, *Costs and Benefits of Adding A Private Right of Action to the World Trade Organization and the Montreal Protocol Dispute Resolution Systems*, 11 UCLA J. INT'L L. & FOREIGN AFF. 189, 189, 191, 203-04 (2006) (concluding that private rights of action in the WTO dispute settlement system would ultimately force states to defect from the WTO trade system) [hereinafter Moremen--Costs and Benefits]; Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587, 628, 631-32 (1998); Schleyer, *supra* note 7, at 2277, 2294, 2296, 2308-09 (arguing in favor of private standing and a commission to filter "meritless claims" and mitigate political disturbances between member states); Shell, *supra* note 9, at 903, 910, 913; Shell, *supra* note 3, at 377-78. *See also* Philip M. Moremen, *International Private Rights of Action: A Cost-Benefit Framework*, 8 SAN DIEGO INT'L L. J. 5, 14, 31 (2006) (assessing the costs and benefits of promoting private rights of action in international law); Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 302-03 (1996) (arguing against a proposal to expand WTO standing to private parties which would enable them to argue before the DSB and Appellate Body); Sykes, *supra* note 18, at 641 (asserting that negative responses to the participation of private parties as amicus curiae in WTO disputes indicates private standing would not be supported by WTO member states).

DSU.[59] As Gregory Shaffer succinctly describes, "[non-state actors] would act as private attorneys general to ensure governments' respect of WTO obligations. They would hold rights analogous to those held by private parties against state legislation under the commerce clause of the U.S. Constitution, and against European member state legislation under Article 28 of the EC Treaty."[60]

The proposal outlined in this article resembles past proposals to improve the ability of developing WTO member states to utilize dispute settlement procedures in some respects. Under this proposal, non-state actors would have a right to independently consider whether policies enacted by WTO member states violated international trade law. After determining that a violation had indeed taken place and impacted their businesses, non-state actors would also have the choice to initiate adjudication of alleged violations through the WTO dispute settlement system, instead of being limited to presenting their concerns to domestic authorities responsible for asserting trade dispute claims. Adjudication of alleged violations initiated by non-state actors would be predicated upon challenging the policies and activities of WTO member states. Non-state actors would be considered parties negatively affected by policies and practices of WTO member states in violation of obligations under international trade law. This outcome would logically follow from evaluating the current process of WTO dispute settlement, where member states challenge trade measures enacted by other member states that negatively impact non-state actors and constituents. Practically speaking, these reforms would reduce the importance of public-private collaboration between private actors and government representatives, providing non-state actors in developing countries with a way to directly challenge trade measures that impede their interests.

B. Practical Features of the Proposal

The proposal in this article differs from other works that advocate the ability of non-state actors to independently litigate WTO dispute settlement claims. First, the proposal is intended to keep reforms of the DSU at a minimum while maximizing the ability of non-state actors to challenge policies and practices implemented by WTO member states. Second, this article explores the benefits of the proposal with emphasis on the ramifications for non-state actors in *developing countries*. Third, the proposal supports the expansion of an existing but little-used feature of the WTO dispute settlement system. Non-state actors, particularly from developing countries that have recently joined the WTO, are the intended beneficiaries of the proposal and would have an opportunity to independently raise their own claims against alleged violations by WTO member states before

59. *See* Trachtman, *supra* note 18, at 542-45; Ernst-Ulrich Petersmann, *Why Rational Choice Theory Requires A Multilevel Constitutional Approach to International Economic Law*, 2008 U. ILL. L. REV. 359, 380 (arguing that domestic courts could offer remedies for violations of WTO rules); Ragosta, *supra* note 2, at 746-48; Joel P. Trachtman, *The WTO Cathedral*, 43 STANFORD J. INT'L L. 127, 162 (2007) (remarking on the potential use of a WTO attorney general that would be responsible for asserting trade complaints on the basis of public interest for all member states).

60. SHAFFER, *supra* note 19, at 144.

arbitration panels.[61] Under the proposal, the DSU would be amended to create arbitration panels to adjudicate alleged violations. Non-state actors in all WTO member states would have the right to request the formation of an arbitration panel. Non-state actors would initially request informal consultations with WTO member states that have implemented policies with allegedly negative impacts. This would preserve the imperative toward informal dispute resolution that has been enshrined in the DSU.

If consultations failed to resolve disputes, complainants would be able to petition for an arbitration panel under a slightly modified version of DSU Article 25. In its current form, Article 25 provides for the establishment of arbitration panels to resolve trade disputes following procedures that have been mutually accepted by member states.[62] Under this proposal, Article 25 would be modified to provide arbitral proceedings between WTO member states and non-state actors modeled after other forms of international arbitration. A key difference between other forms of international arbitration and this proposal is that arbitrators would be determining whether WTO member states violated obligations listed in Annex 1 agreements, and whether non-state petitioners would be entitled to remedies from offending WTO member states. The process of settling disputes through arbitration bridges the gap between the current WTO dispute settlement system and international legal processes that may already be familiar to public and private actors in many countries. Examples include international arbitration proceedings where public and private actors commonly resolve a wide array of commercial and economic disputes.[63] If the arbitration panel formed under Article 25 concluded in favor of non-state complainants, the decision that a violation had taken place would be binding on non-state complainants and WTO member state respondents, just as an arbitral award binds parties in other forms of international arbitration.[64] In the case of a favorable final decision, non-state complainants would seek alteration of problematic policies as a remedy. The suggested reform would prevent unsustainable growth in the number of disputes resolved by dispute settlement panels, and provide a decentralized approach to handling a potentially large growth in the total number of disputes resolved under the DSU.

Although the process may provide benefits for non-state actors with minimal changes to the DSU, it would also provide significant benefits for actors in the

---

61. *See generally* Shaffer, *supra* note 56 (arguing that development and the interests of developing countries can be strengthened by greater participation in the WTO).

62. DSU art. 25.2.

63. John Beechey, *International Arbitration: Evolving National Laws and Institutional Processes*, *in* AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON INTERNATIONAL ARBITRATION & ADR 21, 23 (Thomas E. Carbonneau et al. eds., 2006) (arguing that governments, arbitration practitioners, and arbitral institutions recognize international arbitration as the preferred means of resolving international commercial disputes as long as arbitration "remains relevant to the needs of international commerce.").

64. The first arbitration under Article 25.2 of the DSU was conducted in November 2001. *See* Award of the Arbitrators, *United States-Section 110(5) of the U.S. Copyright Act-Resource to Arbitration under Article 25 of the DSU*, ¶ 21, WT/DS160/ARB25/1 (Nov. 9, 2001). Three arbitrators appointed by the Director-General determined that jurisdiction was proper "subject to mutual agreement of the parties." *Id.* ¶ 2.4.

developing world. To explore the reasons why the proposal would benefit developing countries, a case study involving a country that recently joined the WTO, Vietnam, is examined in Part IV.

IV. CASE STUDY: VIETNAM'S GARMENT EXPORT INDUSTRY

Vietnam's garment export industry provides an ideal subject for considering the advantages of private rights of action under the DSU. Vietnam joined the WTO on January 11, 2007, becoming the 150th member state of the WTO.[65] According to information gathered by the WTO, Vietnam did not appear as a complainant or as a respondent in any WTO dispute proceeding in its first year of WTO membership, although it did participate as a third party in two dispute settlement cases in 2007.[66]

Vietnam exported US$8 billion in goods to the United States in 2006.[67] Vietnamese garment exporters earned US$5.8 billion in 2006, with US$3.1 billion generated from export trade with the United States.[68] Export manufacturing is very important to the Vietnamese economy. Over sixty percent of the workers in the top 200 Vietnamese firms are employed by 42 footwear, textile, garment, and seafood processing companies.[69] Vietnamese firms are eager to compete in the global market for clothing, fabrics, housewares, and sundry manufactured fiber goods.[70] However, Vietnamese firms are not entering the world export market on the same footing as some of their competitors, particularly those based in developed countries such as the United States. Unlike politically-connected garment exporting firms and industry associations that command the resources necessary to advance their interests in global trade, garment firms based in

---

65. Press Release, World Trade Org., Viet Nam joins WTO with Director-General's tribute for true grit, (Jan. 11, 2007), http://www.wto.org/english/news_e/news07_e/acc_vietnam_11jan07_e.htm (last visited Nov. 9, 2008).

66. World Trade Organization, Dispute Settlement Gateway--Disputes by Country, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited on Nov. 9, 2008); World Trade Organization, Member Information-Viet Nam and the WTO, http://www.wto.org/english/thewto_e/countries_e/vietnam_e.htm (last visited Nov. 9, 2008); Panel Report, *United States--Measures Relating to Shrimp from Thailand*, ¶ 1.9, WT/DS343/R (Feb. 29, 2008), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds343_e.htm; Request for Consultations by the United States, *India--Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/1 (Mar. 3, 2007), *available at* http://www.wto.org/english/tratop_e /dispu_e/cases_e/ds360_e.htm.

67. Trade and Tourism Promotion Center of Phu Tho Province, *Vietnam Exports to US Expected to Rise 30%*, (Feb. 7, 2007), http://www.phuthotrade-tourism.gov.vn/Newsen.asp?Subid= 13&LangID=2&NewsID=385&MenuID=0 (last visited Oct. 15, 2008); Press Release, World Trade Org., Working Party Completes Viet Nam's Membership Talks, (Oct. 26, 2006), http://www.wto.org/english/news_e/news06_e/acc_vietnam_26oct06_e.htm (last visited Nov. 9, 2008).

68. VIVEK SURI & VIET TUAN DINH, TAKING STOCK: AN UPDATE ON VIETNAM'S ECONOMIC DEVELOPMENTS 6 (2007), *available at* http://go.worldbank.org/OX50TFE870.

69. SCOTT CHESHIER & JAGO PENROSE, TOP 200: INDUSTRIAL STRATEGIES OF VIET NAM'S LARGEST FIRMS 6 (2007), *available at* http://www.undp.org.vn/undpLive/digitalAssets/7884 _Top200_e.pdf.

70. Asem Connect, Vietnam Trade Information Center, http://asemconnectvietnam.gov.vn/Companies (last visited Nov. 9, 2008) (select from "Activities" to access firms in specific export industries).

Vietnam lack the same resources and level of organization. As the country prepared to join the WTO, Vietnamese firms faced a steep learning curve with respect to understanding the complexities of the dispute settlement system. Instead of preparing to actively exercise influence in the WTO dispute settlement system, Vietnamese firms were advised to avoid trade disputes and anticipate possible challenges from WTO member states. For example, in 2007, the Mutual Trade Policy and Assistance Program (MUTRAP) toured Vietnam to provide background information on WTO dispute settlement and assist participants in gaining experience to "avoid possible trade disputes."[71]

More importantly, government officials in Vietnam lack comparable resources to those applied by the U.S. Trade Representative and U.S. Department of Commerce to monitor compliance of trade law regulations, solicit complaints from private parties, and initiate complaints against foreign governments for violations of international trade law.[72] Prior to WTO accession in early 2007, scholars highlighted Vietnam's need to "train and establish a team of highly competent, multidisciplinary experts (covering a wide range of expertise including English law, economics, and accounting) to study the anti-dumping law and to prepare for any potential anti-dumping disputes against Vietnam at the WTO."[73]

WTO accession was only one of the challenges facing state and non-state actors in Vietnam. Vietnam's rapid transition from a top-down command economy to global exporter left the country at a distinct disadvantage with respect to public-private collaboration, limiting the country's readiness to successfully initiate and defend against dispute settlement claims.[74] Beginning in 1986, Vietnam undertook fundamental political and economic reforms labeled *doi moi* (or "new changes") with the goal of transitioning the economy away from a central command model and towards a market-based model.[75] As a result of the considerable range of internal political and economic reforms, the Vietnamese government no longer exercised direct control over the economy, but retained influence through state-owned enterprises.[76] The reforms also included a transition towards formalized state oversight in the operation of the economy. Prior to the

71. *WTO dispute settlement seminar held in HCM City*, VIETNAM NEWS BRIEF, May 18, 2007.

72. *See* Press Release, Vietnam Ministry of Foreign Affairs, Local Lawyers Taught to Deal with WTO Disputes Told to Settle Early (Nov. 10, 2007), http://www.mofa.gov.vn/en/tt_baochi/nr060726082726/ns071113101427 (last visited Nov. 9, 2008).

73. Binh Tran-Nam, *Vietnam: Preparations for WTO Membership*, 2007 SOUTHEAST ASIAN AFF. 398, 401.

74. *See* CIVICUS WORLD ALLIANCE FOR CITIZEN PARTICIPATION, THE EMERGING CIVIL SOCIETY: AN INITIAL ASSESSMENT OF CIVIL SOCIETY IN VIETNAM 10 (Irene Norlund, ed. 2006), *available at* http://www.un.org.vn/undp/undp/docs/2006/06%20undp%2033120e%2001e%20Civicuc%20report.pdf (describing historical and contemporary conditions limiting the input of the private sector in Vietnam's economic development).

75. *See* Valerie Clemen, Note, *A Briefing for American Businesses Looking to Invest in Vietnam*, 2 HASTINGS BUS. L.J. 507, 509 (2006); U.N. DEV. PROGRAMME [UNDP], UNDP VIET NAM POLICY DIALOGUE PAPER 2006/3, THE STATE AS INVESTOR: EQUITISATION, PRIVATISATION, AND THE TRANSFORMATION OF SOEs IN VIET NAM 2 (2006), [hereinafter UNDP DIALOGUE PAPER 2006/3] *available at* http://www.undp.org.vn/undpLive/digitalAssets/6155_HP_paper__E_.pdf.

76. *See* UNDP DIALOGUE PAPER 2006/3, *supra* note 75, at 1.

initiation of *doi moi*, the actual weakness of the state's involvement in the Vietnamese economy was masked by ideological primacy of the state in central economic planning.[77] Despite Vietnam's successful economic diversification and privatization efforts, cooperation and interaction between the Vietnamese government and Vietnam's fledgling civil society and private business interests still needed considerable development, particularly in the context of Vietnam's single-party political system. The struggle for political accountability and competent state involvement has included a fight to reduce latent corruption that flourished in lieu of organized political opposition to Vietnam's one-party national government.[78] Although avenues for dialogue between various levels of government and members of the business community exist, a one-way "monologue" has effectively prevented business representatives from fully communicating their complaints to government authorities.[79] This barrier is related to the government's interest in retaining significant levels of control and involvement as the major investor and capital-holding entity in a variety of economic sectors.[80] As a result of government control over industries and large firms in the Vietnamese economy, significant impediments to public-private collaboration between the government and private industry have persisted following Vietnam's accession to the WTO.[81] For example, a 2007 survey of

77. *Id.* at 2.

78. *See* CIVICUS WORLD ALLIANCE FOR CITIZEN PARTICIPATION, *supra* note 74, at 11 ("In the last decade, Vietnam has experienced an active integration into the world economy and a multiplication of organizations within all fields of activity. The [Stakeholder Assessment Group] assessed state effectiveness as high given Vietnam's level of development. However, the general level of corruption is also deemed very high and causes problems even within organisations that handle large budgets."). *See also* Clemen, *supra* note 75, at 521.

79. GTZ-MPI SME Development Program, Provincial Business Dialogue (Sept. 17, 2007), http://www.sme-gtz.org.vn/index.php?option=com_alfadocman&&lang=en_BG (select "2007" from dropdown menu on upper right corner of the screen).

80. *See* UNDP DIALOGUE PAPER 2006/3, *supra* note 75, at 10, 23; *see also* Martin Gainsborough, *Globalisation and the State Revisited: A View from Provincial Vietnam*, 37 J. CONTEMP. ASIA 1, 14 (2007) ("Similar reservations underlie some of the arguments made about the strength of international institutions in relation to the state. [Writers] cite scholars who view state power as increasingly 'juxtaposed' with the 'expanding jurisdiction of institutions of international governance' and the constraints and obligations of international law, citing the activities of the World Trade Organisation (WTO) as an example . . . . However, this . . . seems inappropriate when trying to capture the influence of transnational actors in Lao Cai and Tay Ninh [provinces], who, like their counterparts in the foreign business community, are as inclined to highlight the obstacles to their activities put in their way by the state, including at the subnational level. This was as commonplace for the World Bank as it was for international non-governmental organisations (NGOs) . . . .").

81. CHESHIER & PENROSE, *supra* note 69, at 40. Impediments have also affected the effectiveness of collaboration between authorities and local entrepreneurs. *See also* John Gillespie, *Localizing Global Rules: Public Participation in Lawmaking in Vietnam*, 33 LAW & SOC. INQUIRY 673, 674 (2008) ("Evidence suggests that Vietnamese lawmakers are enacting a commercial legislative framework that primarily reflects international treaty provisions and the interests of an elite group of state-owned enterprises (SOEs) and foreign investors. Most domestic entrepreneurs, on the other hand, struggle to communicate their preferences to lawmakers.")

Vietnam's largest domestic firms indicated that the Vietnamese government lacked the organizational resources to effectively support the expansion of Vietnamese firms in foreign export markets:

> Industrial firms have worked hard to establish themselves in foreign markets. The success of some [General Corporations] ... suggest that the state has a role to play. Industry associations are also playing an increasingly important role.... However, more needs to be done, particularly in export markets themselves. *The government can increase the effectiveness of representatives overseas to raise the profile of Vietnamese industries as a whole. The government can also provide assistance to firms seeking to meet regulations and standards specific to individual markets.*[82]

Historical obstacles to collaboration between government ministries and business leaders in the garment industry have been exacerbated by challenges posed by Vietnam's accession to the WTO. In order to join the WTO, traditional subsidies to Vietnam's textile and garment industries were reduced.[83] At the same time, tariffs against imported textiles and footwear were substantially reduced.[84] Although Vietnamese garment exports surged for four months following Vietnam's WTO accession, the rapid pace of change facing the garment export industry reinforced the observation that establishing private-public collaboration between the Vietnamese government and non-state members of the Vietnamese export industry would be very difficult, even under the best of circumstances.[85] One indicator of the government's struggle to develop adequate resources for successfully litigating WTO trade disputes already suggests that the government may lack resources needed to fully develop effective public-private networks in the future. The Vietnamese Ministry of Justice announced a program in early 2008 to train Vietnamese experts in law and international trade at the cost of US$6.8 million.[86] Given the level of experience possessed by domestic legal experts in Vietnam during the year of the country's WTO accession, it would be inaccurate to say that the level of sophistication required to successfully manage an international trade claim existed in Vietnam at the time of accession, and that the situation would be better for developing countries that plan on joining the WTO in the future.

---

82. CHESHIER & PENROSE, *supra* note 69, at 40 (emphasis added). General Corporations are "a form of business group in which an apex or umbrella organisation supervises the activities of member companies" within the same industrial sector. *Id.* at 10.

83. Vu Long, *Textile Support Ending with WTO*, VIETNAM INVESTMENT REV., June 19-25, 2006, at 4.

84. INT'L MONETARY FUND, COUNTRY REPORT NO. 07/385, VIETNAM: SELECTED ISSUES 3-4 (2007), *available at* http://www.imf.org/external/pubs/ft/scr/2007/cr07385.pdf.

85. For an overview of the difficulties faced by small and medium enterprises in building influential connections with Vietnamese authorities through business associations, *see generally* Gillespie, *supra* note 81, at 683, 690.

86. *Ministry unveils plan to internationally train JDs*, VIETNAM NET BRIDGE, Feb. 15, 2008, http://english.vietnamnet.vn/biz/2008/02/768727 (last visited Nov. 9, 2008).

By taking into consideration the challenges faced by Vietnamese government ministries and members of the garment industry following WTO accession, it is reasonable to conclude that neither private nor public actors in Vietnam were especially well-positioned to lodge complaints under the DSU or challenge violations of international trade law at the WTO.[87]

In a hypothetical situation where firms, industry associations, and cooperative groups in the Vietnamese garment industry sought to challenge trade barriers erected by the United States or other WTO member states, what recourse would those organizations have for effectively initiating a complaint? For instance, various medium-sized garment export firms in Vietnam may be forced to curtail imports to the United States. Anti-dumping policies by the United States would force garment manufacturers to limit exports to the United States after the imposition of heightened tariff rates.[88] Indeed, additional tariffs on Vietnamese exports may have been an outcome of a review conducted in May 2008, when the U.S. Department of Commerce concluded that Vietnamese manufacturers were not dumping clothing, apparel and unfinished textile products on United States markets.[89] However, if the Department of Commerce concluded differently and the United States raised tariff rates, Vietnam would have grounds to dispute the decision made by trade officials in the United States.

Just as in the United States and other WTO member countries, non-state actors in Vietnam would work to make their complaint known to representatives of the Vietnamese government. Representatives for Vietnam would then have authority and discretion to formally initiate dispute settlement proceedings pursuant to the DSU.[90] As explained above, formal and informal methods that would otherwise allow Vietnamese garment exporters to petition the country's legal representatives were in developmental stages during the first year of Vietnam's WTO accession. Programs designed by international experts to educate local actors in the Vietnamese economy suggest that the amount of growth which would have been necessary to match the sophistication of public-private networks in the United States would have been quite substantial.[91] Although public-private networks in Vietnam would doubtlessly increase in size and sophistication over time, resources were not available at the time of accession to provide for complete preservation of the interests of private actors in Vietnam. The absence of methods

87. China's experience as a newcomer to the WTO supports the concept that new WTO member states are not generally prepared to aggressively pursue dispute settlement. *See generally* Junji Nakagawa, *No More Negotiated Deals?: Settlement of Trade and Investment Disputes in East Asia*, 10 J. INT'L ECON. L. 837, 853 (2007).

88. This has occurred between the EU and exporters in the leather footwear industry. Minh Quang, *EU duties severely cramp shoes industry,* THANH NIEN NEWS, Aug. 31, 2008, http://www.thanhniennews.com/business/?catid=2&newsid=41615 (visited Sept. 10, 2008).

89. *See* Press Release, Int'l Trade Admin., Commerce Completes Second Review of Vietnam Import Data, (May 6, 2008) http://www.trade.gov/press/press_releases/2008/vietnam_050608.asp. A similar situation has taken place with respect to Vietnamese shoe exports and the European Union.

90. SURI & DINH, *supra* note 68, at 8 (discussing a complaint by the Vietnamese steel industry about Chinese dumping).

91. *See* Shaffer, *supra* note 57, at 39.

for effectively organizing affected industry members and challenging foreign trade policies would have left firms and industry groups in Vietnam vulnerable, particularly during the first year of Vietnam's WTO membership.

V. ARBITRATION AS A SOLUTION FOR NON-STATE ACTORS

The challenges faced by developing countries like Vietnam and private actors in particular export industries are compounded by the vagaries of social, economic, and political history that are unique to each WTO member state, as illustrated in the case of Vietnam.

Instead of solely supporting the efforts of trade officials in developing countries to create formal and informal methods of public-private collaboration that would allow exporters to effectively petition the government to seek relief at the WTO, an alternative method allowing non-state actors to directly challenge policies that violate international trade law would provide several distinct advantages. The advantages that would accrue to developing countries may be considered within several conceptually distinct categories.

A. Equality

The most important set of advantages is based on the concept of equality. Non-state actors in developing countries would be placed on an equal footing with well-organized public-private networks utilized by private actors in developed countries. Allowing non-state actors to independently resolve alleged violations would enable them to organize support, consolidate resources, and obtain private legal counsel as a way to challenge discriminatory policies and practices by WTO member states. Arbitration would help non-state actors coordinate affected parties seeking to challenge policies of WTO member states that violate international trade law, especially when domestic authorities do not have the resources or experience to manage a similar campaign.[92] Even if non-state actors struggled to effectively organize opposition to trade policies enacted by developed countries such as the United States, the opportunity for private actors to initiate dispute settlement claims would nevertheless formally equalize their standing with private actors from WTO members like the EU and the United States.

Adjudication of alleged violations would also prevent developed states from disregarding their obligations as member states of the WTO. Powerful WTO member states lengthen dispute settlement proceedings to frustrate the ability of member states with fewer resources to sustain dispute settlement claims.[93] For instance, the United States pursued this strategy with respect to textile safeguard disputes with Costa Rica and Pakistan in the late 1990s and early years of the twenty-first century.[94] Reforming the dispute settlement system may eliminate the value that developed countries derive from foot-dragging tactics. With much greater numbers of potential non-state complainants and a greater number of

92. *See* Schneider, *supra* note 58, at 629 (suggesting that private parties need not rely on states or external oversight in deciding when it is appropriate to raise a complaint).

93. Shaffer, *supra* note 57, at 14-15, 19, 39.

94. *Id.* at 39-40.

potential cases to manage, powerful WTO member states may find it more costly and time-consuming to ward off disputes from a much larger and diverse range of complainants. Foot-dragging would also become more costly because authorities in developed states would be forced to grapple with an increased number of complaints about alleged violations and an accumulation of unresolved cases.

B. Independent Decisions by Non-state Actors

Non-state actors in the developing world would gain an advantage by exercising independent authority over the decision to initiate complaints over alleged violations of international trade law. Instead of working to convince domestic and ministerial authorities to initiate WTO complaints, non-state actors could decide to independently act upon substantial trade infringements and would exercise the initiative to decide whether formal arbitration best suited their needs and interests.

Providing all non-state actors with the ability to participate in dispute settlement would avoid the politically-charged task of distinguishing between special rights granted to private actors in developing and least-developed WTO member states.[95] Although non-state actors in developed countries would be afforded the same opportunity to challenge alleged violations in the WTO dispute settlement system, many of those actors already exercise considerable influence over trade dispute settlement.[96] As a result, private actors worldwide would have similar opportunities to independently challenge policies that violate member states' obligations under international trade agreements without being hindered by historical circumstances particular to each WTO member state.

C. Credibility and Transparency in the WTO system

Adjudication before arbitration panels would also bolster the credibility and transparency of the WTO dispute settlement system for a number of reasons. If this proposal were adopted, the WTO dispute settlement system would involve a far larger range of actors as potential complainants.[97] This would likely increase the total number of complaints, leading to an overall increase in the amount of scrutiny directed at the trade practices of all WTO member states.[98] This would also result in an overall increase in available information on trade policies enacted by WTO member states. An increase in the available information on international trade policies would result in greater overall transparency in the WTO dispute settlement system. WTO dispute settlement would also become more transparent because affected parties would have the opportunity to gain first-hand knowledge through involvement in adjudication. WTO dispute settlement would gain credibility not only as a result of direct participation by non-state actors, but also because the dispute settlement system would be more responsive to those who are directly affected by final decisions under the DSU. As a result of greater involvement by affected actors, along with greater visibility for international trade

95. *See id.* at 13, 40-41.

96. *See supra* text accompanying notes 20-56.

97. *See* Moremen--Costs and Benefits, *supra* note 58, at 189, 207-08.

98. *See e.g.* Shell, *supra* note 3, at 377-78.

dispute settlement, the WTO would become more transparent and credible to those who are most profoundly affected by trade policies and practices of WTO member states.[99]

D. Counterarguments

Although participation in trade dispute settlement would confer benefits for private non-state actors in developing countries, arguments may be raised suggesting that reforms would do little to remove the obstacles facing non-state actors in developing countries.

1. Scarcity of Resources Available to Non-state Actors

Public finances, political capital, and sustained levels of expert attention must be spent in significant quantities by ministerial authorities to commence dispute settlement proceedings under the DSU. Still greater resources must be spent to successfully conclude a full course of WTO dispute settlement. All member states of the WTO struggle to allocate resources in the most efficient and effective manner possible to preserve and assert interests in WTO dispute settlement proceedings. Non-state actors, especially those in new WTO member states, are unlikely to possess the same quantity of resources available to state ministries responsible for WTO matters. The logic of allowing non-state actors to independently litigate WTO complaints may seem weak, particularly if those actors are materially, politically, and experientially unprepared to independently challenge policies of WTO member states.[100] However, if non-state actors were provided the opportunity to directly contemplate the merits of formal arbitration, aided by affordable private counsel and unburdened by domestic political considerations, the difficulty of challenging violations of international trade law may be significantly reduced.

Resistance from ministerial authorities regarding dispute settlement by non-state actors may be unavoidable, particularly in situations where state authorities fear international political ramifications from actions taken by non-state actors located in their countries. However, non-state actors may be able to afford private legal counsel and allocate resources to preserve interests in the most important trade dispute scenarios. Additionally, as evident in the case of Vietnam, many of the commodities that firms export, such as garments, are relatively inelastic and require exporters to engage in robust competition.[101] Therefore, exporting firms in Vietnam and other developing WTO member states may be highly motivated to preserve their presence in international markets and commercial interests through active participation in dispute settlement and resolution.

Another variation of this argument approaches the same issue from a different direction. If non-state actors from developing countries lack experience in

99. Ragosta, *supra* note 2, at 750-52.

100. Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adoption*, 5 WORLD TRADE REV. 177, 185 (2006).

101. HARVARD VIETNAM PROGRAM, CHOOSING SUCCESS: THE LESSONS OF EAST AND SOUTHEAST ASIA AND VIETNAM'S FUTURE 34 (2008), *available at* http://www.innovations.harvard.edu/cache/documents/982/98251.pdf.

weighing the merits of trade dispute claims, what would prevent the dispute settlement system from becoming saturated with an overwhelming number of meritless claims? Would some threshold be necessary to ensure that non-state actors chose to pursue claims with unmistakable merit? Even if non-state actors became sophisticated complainants over time, would the system be abused by powerful private actors?[102]

Concerns about the ability of non-state actors to discern the merit between potential trade dispute claims are worth considering, particularly in the early period of implementing reforms to the DSU. However, even when non-state actors have not accrued significant first-hand experience in the WTO dispute settlement process, a number of factors would enable non-state actors in developing countries to avoid anticipated difficulties. It is likely that non-state actors would seek assistance from private counsel to determine the value of adjudication under the DSU, and also to determine whether claims would be worth litigating at the onset of representation. As a result of consultation with experienced legal experts, private actors may identify and avoid disputes without merit. The pressure to selectively direct resources towards adjudicating only the most promising claims would ease concerns that the WTO dispute settlement process would become encumbered with claims from non-state actors.[103]

2. Non-state Actors and the WTO

Non-state actors do not have standing to pursue complaints in the WTO dispute settlement system. Some authors have stated that simply lacking standing presents a formidable legal barrier against participation by non-state actors in WTO dispute settlement, even if the DSU was formally amended.[104] However, a number of other multilateral conventions already allow non-state actors to take action against state actors. Under the Convention on the Settlement of Investment Disputes Between States and Operation of the International Centre for the Settlement of Investment Disputes (ICSID), private actors that invest internationally may challenge actions taken by countries that violate obligations outlined in bilateral investment treaties between two states.[105] NAFTA's Chapter 11 provides the same opportunity to private actors in the United States, Canada, and Mexico.[106] Just as states must abide by international obligations to private actors under the ICSID Convention and multilateral free trade agreements like NAFTA, WTO member states should be expected to abide by agreements undertaken upon joining the WTO, regardless of the type of actor that challenges policies and practices that violate international trade law.

---

102. Nichols, *supra* note 58, at 327.

103. *See* Schneider, *supra* note 58, at 629.

104. *See* Trachtman, *supra* note 18, at 538; *see also* Nichols, *supra* note 58, at 327-28.

105. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 36, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

106. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993). "An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach." *Id.* art. 1116.

Although the DSU would have to be reformed to allow for private rights of action, Article 25 of the DSU sets forth the basic method for making adjudication by non-state actors a feasible possibility. Although commentators have even supported the ability of domestic courts to decide WTO trade disputes,[107] domestic courts in developing countries may be subject to the same shortcomings that hamper government authorities in developing countries from initiating trade disputes under the DSU. To avoid oversaturation of dispute settlement panels and overloading courts at the domestic level, international arbitration based on models in other multilateral agreements and on Article 25 may be the best way to balance the benefits that arise from modifying standing for private actors in the WTO dispute settlement system.

3. Internal Conflicts in Developing Countries

Domestic authorities may be unwilling or politically unprepared to share control with non-state actors over the types of complaints that may be initiated in WTO dispute settlement proceedings.[108] The same political considerations that hinder authorities in countries like Vietnam from asserting trade complaints and organizing effective public-private collaboration may cause authorities to fear that they will relinquish sovereignty and lose political significance if non-state actors are free to participate in dispute settlement under the DSU.[109] For domestic authorities in developing member states, non-state actors located in the same country would likely pose the same level of political threat as non-state actors based in developed countries.

It should be noted that governments in developing countries also stand to gain from economic benefits achieved by non-state actors that open new or existing foreign markets by successfully resolving trade disputes and successfully challenging violations of international trade law. Although authorities in developing countries may fear a decline in their own political credibility if non-state actors are allowed to initiate formal adjudication of alleged violations, the rewards of successfully completing dispute settlement and increased export trade may ease their concerns, particularly if they lack experience in managing complaints under standard WTO dispute settlement proceedings.

---

107. Trachtman, *supra* note 18, at 538.

108. For an indication of the political disruption that non-state actors have already created for authorities in developing WTO member states with respect to the WTO dispute settlement process, see James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*, 11 REV. INT'L POL. ECON. 542, 564 (2004) ("[D]eveloping countries are by far the most strident opponents of nonstate submissions, which they view as an instrument of political influence for organizations based disproportionately in advanced industrial states.").

109. For an explanation of developing state authorities' objections to the involvement of non-state actors in the WTO, see Patrizia Nanz & Jens Steffek, *Global Governance, Participation and the Public Sphere*, 39 GOV'T & OPPOSITION 314, 332 (2004) ("As many critics have remarked, the danger of 'benevolent patronizing' is imminent whenever northern-based organizations speak on behalf of the developing world. Not only but not least for this reason, official representatives of developing countries have been [skeptical] about strengthening the role of nongovernmental organizations in world trade governance.").

Governments in developing countries may also fear that powerful business interests will predominate over the rights and interests of democratically elected governments and their constituents. For instance, government authorities may argue that empowering non-state actors would reduce the authority of officials otherwise responsible for litigating dispute settlement claims. The result would be a diminution of the power exercised by elected representatives in favor of non-state actors that are not accountable to the interests of all members of society.[110] The criticism would apply not only in countries where non-state actors initiate dispute settlement claims, but also in countries where domestic authorities turn out to be unsuccessful respondents that are forced to change trade policies as a result of complaints made by non-state actors. The credence of such an argument would be even more important in developing countries with cultural sensitivity to the influence of multinational corporations and post-colonial legacies.[111]

Non-state actors may have a difficult time responding to negative public opinion and attacks from governments in various WTO member states. However, the rationale for allowing non-state actors to adjudicate complaints is based on the ability to maximize the benefits of formalized dispute settlement. Concerns about the broader influence of powerful multinational firms and private interests may be diminished if private actors in developing countries experience the greatest benefits of challenging trade law violations. Additionally, significant political influence is already exercised by non-state actors in the United States and European Union. The proposed reform would do little to expand the powers that non-state actors based in developed countries already possess. However, the proposal would make it possible for non-state actors in the developing world to compete in global markets without allocating considerable resources toward improving public-private networks or leveraging their own political influence.

4. Government Accountability in Developing Countries

The proposal may seem to place a disproportionate amount of responsibility on the shoulders of non-state actors. This perception is supported by the argument that governing authorities in developing countries are the most appropriate recipients of aid and capacity-building programs with regard to managing dispute settlement.[112] The argument that governments in developing countries should be encouraged and supported in their activities in the WTO is compelling. This proposal does not directly conflict with the argument because both methods emphasize the need to improve the WTO dispute settlement system for developing countries. Even if extremely rapid reform were achieved by governments in

110. *See* Nichols, *supra* note 58, at 310-12.

111. *See* Maki Tanaka, *Bridging the Gap Between Northern NGOs and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO under the Rio Principles*, 30 ECOLOGY L. Q. 113, 115-16, 128 (2003) (arguing that friction between developing states and NGOs over environmental issues is intensified by historical legacies of colonial rule and decolonization).

112. *Cf.* Shaffer, *supra* note 57, at 40-44 (discussing ways to improve the capabilities of developing country governments in the WTO dispute settlement process); Shaffer, *supra* note 56, at 649-51; Bown & Hoekman, *supra* note 57, at 873, 875-77, 886, 888-89.

developing countries as a result of aid and capacity-building measures, it is uncertain whether governments in developing countries would directly meet the needs of non-state actors in those countries. Enabling non-state actors to challenge violations may counteract unaccountable policy-making in the area of global trade by governments in developing countries. As a result, the proposal may help trade authorities in developing countries become more responsive to the needs of private actors. Governments would have an incentive to remain relevant by providing significant amounts of assistance and by using their own resources to create public-private networks to reduce the need for arbitration to be initiated by non-state actors. The concept applies to new WTO member states like Vietnam, where authorities at the national level have traditionally exercised unilateral control over policy and have only begun to seek input from private actors. By improving their competence and relevance following the advent of private rights of action, governments in developing countries may ultimately benefit from this proposal by proving that, in the end, non-state actors have more to gain by utilizing public-private collaboration than by challenging violations independently.

VI. CONCLUSION

Although the WTO dispute settlement process created new opportunities for developing countries to compete in global trade, non-state actors in developing countries and especially new WTO member states are placed at a disadvantage when defending their interests and exercising influence in the formal dispute settlement process. Governments and non-state actors in developed countries are already adept at using formal and informal methods to prevail in trade disputes. In developing countries, such methods are underdeveloped or unavailable, and may be unlikely to improve in time to help non-state actors fully preserve their interests.

Non-state actors in developing countries may be provided an opportunity to initiate dispute settlement without having to spend the time and energy necessary to build public-private networks that would otherwise increase the likelihood of favorable outcomes in WTO dispute settlement. Empowering non-state actors to independently raise trade dispute claims against WTO member states would require modifications to the current WTO dispute settlement system but would ultimately create benefits. As one of the newest states to join the WTO, Vietnam is no exception to the disadvantages facing developing countries with respect to dispute settlement. Vietnam faces additional challenges due to its unique political development and rapid introduction to global trade since the mid-1980s. However, as discussed earlier in this article, firms and affiliated groups in Vietnam's garment export industry would benefit from modifications enabling them to assert influence by challenging violations by WTO member states. In the event that a discriminatory trade policy diminished the value of an important market for Vietnamese garment exporters, exporting firms and industry groups would have the opportunity to raise claims under the DSU, avoiding the time and effort required to facilitate cooperation with government authorities that would otherwise be necessary to effectively challenge the problematic trade measure.

As more developing countries seek to join the WTO, reforming the dispute settlement process would provide a practical way to ensure that the WTO system stays relevant for all member states. By freeing non-state actors to complain about

violations of international trade law with the prospect of receiving timely resolution, reformation of the DSU may achieve those goals and ultimately reinforce the salience of the post-Bretton Woods international trading regime.

MULTILATERAL ENVIRONMENTAL AGREEMENTS: FROM MONTREAL TO KYOTO – A THEORETICAL APPROACH TO AN IMPROVED CLIMATE CHANGE REGIME

Sean Cumberlege[*]

"[T]here is no durable treaty which is not founded on reciprocal advantage, and indeed a treaty which does not satisfy this condition is no treaty at all, and is apt to contain the seeds of its own dissolution. Thus the great secret of negotiation is to bring out prominently the common advantage to both parties of any proposal, and so to link these advantages that they may appear equally balanced to both parties." François de Calliéres, De la Maniere de Negocier Avec les Souverains (1716).

I. INTRODUCTION

Stratospheric ozone depletion and climate change are the two most significant environmental challenges facing the world today. There is no longer any doubt that an ambitious global plan must be crafted to address and reverse catastrophic environmental harm. However, the level of government cooperation that is needed and the fundamental change that is required in human economic and social behavior makes climate change and ozone depletion difficult to reverse.[1] The causes of climate change and its adverse impacts are closely linked to industrialization, economic development, poverty alleviation and energy security – necessitating an approach to climate mitigation that is sensitive to these concerns. Moreover, both climate change and ozone depletion cannot be reversed without a global effort involving all countries, and hence mandate that multilateral environmental agreements (MEAs) form the basis of any potential solution.[2]

---

[*] University of Denver Sturm College of Law, JD expected 2009, Managing Editor of the Denver Journal of International Law and Policy. This paper was the winning submission in the Leonard V. B. Sutton international law writing competition. As part of the award, the author was presented with a scholarship to attend the Hague Academy of International Law in the Netherlands during the summer of 2008. I would like to thank the Denver Journal of International Law and Policy, not only for its diligent work on this note, but also for providing me with some of my most precious law school experiences. In addition, I would like to thank Professor Ved Nanda for all his support and guidance. Most importantly, to my parents - Charmain and Peter – let me simply say that no son could ever ask for more; your sacrifice and unwavering support has made my dreams a reality. I dedicate this note to both of you.

1. Cass R. Sunstein, *Of Montreal v. Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 2 (2007).

2. *See id.*

While climate change and ozone depletion are manifestations of different harmful processes, they share four fundamental similarities: (1) both present serious issues of international equity in that developed countries are the primary contributors to both environmental problems and, hence, need to assume predominant roles in mitigation efforts; (2) both problems involve extremely serious difficulties due to intergenerational equity, as future generations are likely to face greater environmental risks than current generations; (3) both environmental concerns involve the tragedy of commons problem, in that states are encouraged to simply "free ride" on the efforts of other states by benefiting from the significant costs borne by parties that comply with their obligations; and (4) both problems need the active participation of the United States (U.S.) for any solution to be lasting and effective.[3]

Despite these similarities, the two MEAs that currently address ozone depletion and climate change, respectively, have enjoyed very different levels of success. The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) has been ratified by 193 countries around the world.[4] In addition, the parties to the Montreal Protocol are complying with their obligations, and as a result, ozone-depleting substances (ODSs) have been drastically reduced, and monitoring of the ozone layer indicates that the ozone is recovering.[5] Due to the enormously successful efforts of the parties to the Montreal Protocol, the treaty is frequently hailed as the most successful environmental treaty ever devised.[6]

The global effort to mitigate climate change, however, presents an altogether different story. Despite the fact that the Kyoto Protocol to the Convention on Climate Change entered into force in 2005 and has been ratified by 174 countries[7], it has been largely ineffective in mitigating climate change.[8] Indeed, despite high participation (with the notable exception of the United States), it is widely known that many parties to the Kyoto Protocol may not be complying with their obligations.[9] The marginal results achieved under the Kyoto Protocol have led to

---

3. *See id.* at 3; *see also* Laura Thomas, *A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Design*, 41 COLUM. J. TRANSNAT'L L. 795, 797-99 (2003).

4. Ozone Secretariat, United Nations Environment Programme (UNEP), Status of Ratification (2008), http://ozone.unep.org/Ratification_status/.

5. The Scientific Assessment Panel of the Motreal Protocol on Substances that Deplete the Ozone Layer, *Executive Summary of the Scientific Assessment of Ozone Depletion: 2006 (WMO/UNEP)*, 1-3 (Aug. 18, 2006), http://ozone.unep.org/Assessment_Panels/SAP/index.shtml (suggesting that there is clear evidence of a decrease in the atmospheric burden of ozone-depleting substances in the lower atmosphere and in the stratosphere, and that early signs of recovery are also evident).

6. RICHARD E. BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET 1 (2nd ed. 1998); *see also* Thomas, *supra* note 3, at 797.

7. *See* Kyoto Protocol, Status of Ratification, http://unfccc.int/files/kyoto_protocol/background /status_of_ratification/application/pdf/kp_ratification.pdf (last visited Nov. 5, 2008).

8. Laurie Goering, *UN: Time is now to fix warming Ahead of bid to replace Kyoto pact, urgent action urged*, CHI. TRIB., Nov. 18, 2007.

9. *See, e.g.*, Sunstein, *supra* note 1, at 21; *see also* Congressional Research Service, *Greenhouse Gas Emissions: Perspectives on the Top 20 Emitters and Developed Versus Developing Nations*, at 12,

significant academic criticism of the climate change regime and has increased public demand for more effective international cooperation to reverse the significant environmental degradation that has been allowed to continue unchecked.[10]

This paper, therefore, attempts to develop a dynamic theory of multilateral environmental treaty creation that builds on legal, economic and international relations theory. Based on the theoretical framework developed, this paper also seeks to outline why the Montreal Protocol has been extremely effective in curtailing the production of ODSs, and why the Kyoto Protocol has been ineffective in reducing greenhouse gas (GHG) emissions. This paper will also recommend possible improvements and changes to the Kyoto Protocol to transform it into a viable vehicle for lasting climate change alleviation. In doing so, this paper makes the assumption that states act predominantly out of self-interest. Thus, within the cooperation continuum, my analysis will be based somewhat on political economic theory within the Realist school of thought.

Section II will propose a theoretical framework for lasting and effective multilateral environmental agreements. In doing so, this paper goes beyond mere formal treaty provisions by discussing, from a political economic perspective, extra-legal strategies to encourage participation and compliance. It incorporates basic game theory to illustrate the complexity of multilateral treaty creation. Against this backdrop, section III will examine the Montreal Protocol and highlight some of its unique mechanisms and approaches that make it an effective MEA. Section IV will examine the Kyoto Protocol by describing the negotiations leading up to its creation and highlighting the approaches and mechanisms that undermine its effectiveness and efficacy. Section V will conclude with recommended changes to the existing climate change regime, based not only on its obvious weaknesses, but also on some of the theories and approaches developed in this paper.

II. MULTILATERAL ENVIRONMENTAL TREATIES: A THEORETICAL FRAMEWORK

A. The Complex Nature of Environmental Protection

International environmental concerns, along with any resulting call for global action, raise a unique problem within the field of international relations. Specifically, each country does not want to pay to protect the environment, but each country also recognizes that if every other country takes this stance, the environmental implications would be catastrophic. To make matters worse, even if nations feel obliged to act, unilateral action will not work where the solution to an international environmental risk is dependent on what other countries do to advance the problem, and what other countries will do to solve the same problem.[11] In other words, actions and choices of any given state frequently affect the welfare of other states, whether positively or negatively. In this way, most environmental

---

RL32721 (2008) (*prepared by* Larry Parker & John Blodgett), *available at* https://ncseonline.org/NLE/CRSreports/08Feb/RL32721.pdf.

10. *See, e.g.*, Sunstein, *supra* note 1, at 4; Thomas, *supra* note 3, at 797.

11. SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 50-52 (2003).

problems involve multilateral externalities, namely environmental effects felt from activity outside a country's border, and actions that need to be taken outside a given country's realm of direct control.[12] While many externalities are bilateral, and hence easier to overcome, in the case of climate change and ozone depletion, the multilateral externalities are reciprocal in a sense that (to varying degrees) each country imposes externalities on the other countries sharing the same resource.[13] Despite varying levels of emissions, every country emits ozone depleting substances and GHGs, and, more importantly, every country is susceptible to harmful effects caused by these emissions. But, to the extent that externalities exist in ozone and climate change concerns, they can be characterized as asymmetric because they affect nations differently.[14] Also, it is in the nature of global environmental problems that the damage each country suffers is never proportional to its share of global emissions.

Ultimately, solutions to transnational environmental problems are difficult to create because they invariably involve (and mostly conflict with) the principle of sovereignty.[15] Thus, the absence of a world government forces states to create a system of rules and a system of incentives to change state behavior. Indeed, states are forced to negotiate and cooperate to simultaneously minimize joint costs and collectively maximize joint benefits. Reality, however, presents a difficult working environment within which to come to lasting agreement. Specifically, transaction costs are unequal, information is imperfect, bargaining power remains asymmetrical and states remain wary of "opportunism through actual or threatened intentional noncompliance."[16] Despite these impediments to cooperation, states nevertheless frequently recognize that cooperation is the only available option. The key consideration, then, necessarily becomes the means with which to achieve such cooperation. Ideally, participation in an environmental treaty must be voluntary, targets must be accepted by consensus, and obligation must be implemented and enforced by the parties to the treaty.[17] History has shown, however, that this is not easy to achieve.

---

12. *Id.* at 52.

13. *Id.*

14. *Id.* (citing as examples: island states, coastal states, and those countries near the poles because all have more to lose than many other states).

15. *See id.* at xiii-xiv (assuming that states act primarily out of self-interest and, hence, approach solutions to transnational problems with the view that any action needs to maximize this self interest); VED P. NANDA & GEORGE PRING, INTERNATIONAL ENVIRONMENTAL LAW FOR THE 21ST CENTURY 17-18 (2003); Michael Weisslitz, *Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 473, 484 (2002) (highlighting that developing countries were reticent to assume even voluntary commitments at the negotiations leading up to the signing of the United Nations Framework Convention on Climate Change out of fear that such commitments would infringe with their sovereign right to economic development).

16. Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679, 692 (2003).

17. Christoph Bohringer & Michael Finus, *The Kyoto Protocol: Success of Failure?, in* CLIMATE-CHANGE POLICY 258 (Dieter Helm ed., 2005).

B. Restructuring Incentives to Encourage Participation and Compliance

The object of any MEA is ultimately to change state behavior to mitigate harmful environmental degradation. In doing so, however, MEAs cannot rely exclusively on moral necessity to encourage cooperation. Instead, MEAs that seek to fundamentally alter state behavior and encourage widespread participation have to restructure incentives to overcome constraints imposed by sovereignty.[18] Treaty design becomes a key consideration, and ultimately plays a determining factor in the lasting efficacy of any agreement. Despite similarities between various environmental concerns, no two treaties can be alike. Indeed, an examination of existing international legal institutions suggests that a one-size-fits-all approach is doomed to fail.[19] The larger question therefore becomes: under what circumstances, or under what treaty design, can lasting environmental mitigation be encouraged? Scott Barrett, a prominent scholar within the Rationalist school of thought, articulates three broad requirements:

> First, a treaty must be *individually rational.* This means that no party to the treaty can gain by withdrawing, given the choices made by every other country, and that no non-party (if any) can gain by acceding .... It also means that no party can gain by failing to comply, given the treaty's design. And it means that no non-party (again, if any) can gain by changing its behavior (by polluting more or less, say), given every other country's behavior.... Second, a treaty must be *collectively rational.* This assumption recognizes negotiation to be a collective activity, and requires that it not be possible for parties to gain collectively by changing their treaty.... Finally, a self-enforcing treaty must be "fair." Put differently, it must be perceived by the parties as being legitimate.[20]

It is because of these three broad requirements that no two MEAs can be alike, because each multilateral agreement needs to be both rational to individual countries and to the collective group. For each environmental concern, an agreement will therefore have to create a different incentive structure to ensure both participation and compliance, and to minimize the problems associated with the "tragedy of commons," or "free-riding."[21] Closely associated is the necessity of creating favorable cost-benefit structures for each prospective party to a MEA. Indeed, the treaties that effectively deter non-participation and non-compliance enjoy the most success.[22]

The process of creating, or at least restructuring, incentives, however, is not easy. One variable is the nature of the good or the behavior that is being regulated and the means by which the regulation is put into place. Regulating a public good

18. Barrett, *supra* note 11, at 18.

19. Frischmann, *supra* note 16, at 689.

20. Barrett, *supra* note 11, at xiii-xiv.

21. Frischmann, *supra* note 16, at 693-95.

22. An example is the North Pacific Fur Seal Treaty where both participation and compliance was encouraged by creating a treaty that maximized joint payoffs and, hence, created incentive. For an in-depth discussion on the success of this treaty *see* Barrett, *supra* note 11, at 19-39.

such as pollution creates difficulty in that there is an increased incentive for states to "free-ride" on the collective efforts of other states.[23] Thus, a high degree of participation becomes key. Once a treaty enjoys adequate participation, the necessity of effective enforcement measures becomes self-evident: non-compliance with a treaty undermines its ultimate purpose. Hence, where states agree that collective action is required, any resulting MEA has to create a system of incentives that would dissuade a state from non-compliance. George Downs maintains that "the level of threatened punishment needed to dissuade a State from violating an agreement depends on the benefits that the State would gain from defection."[24] Specifically, he maintains:

> The larger the amount [of benefits from defection], the greater the incentive to defect and the greater the threatened punishment that is necessary to deter it. For example, to prevent a State from violating an environmental agreement where the violation would save the State twenty million dollars in pollution abatement costs requires more aggressive enforcement and a larger penalty than is necessary to prevent a violation that would save it only two million dollars.[25]

C. Using Game Theory as a Model to Understand Rational Choice

This section introduces a game theoretical approach to international environmental treaty creation. Scholars frequently use game theory as a theoretical model through which to examine and predict individual and group behavior. Specifically, game theory attempts to analyze behavior in situations where the utility of a state's available choices depends on the choices of other states, or at least the perceived choices of other states.[26] Game theory therefore provides a useful framework for analysis of international treaty building and the primary concerns that impede lasting and effective cooperation.[27] In this context, game theory assumes that states are unitary rational actors that seek to maximize their "individual" welfare by making decisions based on an expected payoff structure[28] associated with each choice it could make.[29] A central tenet of game theory is that the choice of one state can affect the welfare of the other state.[30]

---

23. Barrett, *supra* note 11, at 83, 219.

24. George W. Downs, *Enforcement and the Evolution of Cooperation*, 19 MICH. J. INT'L L. 319, 324 (1998).

25. *Id.*

26. For a more thorough explanation of Prisoner's Dilemma *see* EconPort, Beginner's Guide, http://www.econport.org/econport/request?page=man_gametheory_exp_prisondil (last visited Nov. 26, 2008).

27. *See, e.g.*, Frischmann, *supra* note 16, at 700.

28. *Id.* at 704 (maintaining that "payoffs associated with cooperation are generally diffuse, widespread, long-term, and arguably more closely linked to perceptions of national welfare, while the payoffs associated with defection are generally concentrated among particular industry groups, short-term, and more closely linked to the welfare of politicians and special interests.").

29. For a successful application of game theory to the environmental treaty regime, states are presumed to be the dominant actors in international relations.

30. Frischmann, *supra* note 16, at 706.

In its most basic form, game theory is illustrated in a simple two-player game called Prisoner's Dilemma.[31] In the context of environmental treaty negotiation, we can assume, therefore, that two states are presented with a situation where they have the choice to abate (stop polluting) or to continue polluting. In essence, state A and B each face a decision regarding whether to cooperate with each other, without being certain as to what the other state will choose. To make matters less certain, different outcomes lead to different payoff structures, illustrated in the following example by simple monetary figures to represent overall economic benefits associated with each choice. For example, in the classic Prisoner's Dilemma, if both states choose to cooperate and abate, they will both enjoy a net payoff of $5, for a total of $10. If, however, both players choose to continue polluting, they each receive a payoff of only $3, for a total of $6. Last, if one state chooses to cooperate by abating and the other state chooses to pollute, the cooperating state receives a payoff of $2, while the polluter receives a payoff of $7, for a total of $9. Thus, one can see that the best possible outcome is that both states abate and receive a combined payoff of $10. However, when making their choice, each state recognizes that if they cooperate and the other state defects, their net payoffs will be less than it would be had they chosen to defect (compare a payoff of $2 with a payoff of $3). In this way, uncertainty and the nature of the problem force states to accept that polluting is their dominant strategy because the individual payoffs are higher, whether the other state chooses to cooperate or abate.

Based on the situation in a Prisoner's Dilemma, it therefore becomes necessary for the parties to give each other mutual assurances before "the game," and for states to create a situation where the dominant strategy is to abate. In reality, states are forced to try and manipulate the nature of the game by tying their hands and committing to cooperate by creating mechanisms and institutions to encourage, monitor and enforce participation and compliance.[32] In this way, the institution or regime can reward cooperators or punish defectors, and hence,

31. The classical Prisoner's Dilemma (PD) is as follows:
Two suspects, A and B, are arrested by the police. The police have insufficient evidence for a conviction, and, having separated both prisoners, visit each of them to offer the same deal: if one testifies for the prosecution against the other and the other remains silent, the betrayer goes free and the silent accomplice receives the full 10-year sentence. If both stay silent, both prisoners are sentenced to only six months in jail for a minor charge. If each betrays the other, each receives a five-year sentence. Each prisoner must make the choice of whether to betray the other or to remain silent. However, neither prisoner knows for sure what choice the other prisoner will make. So this dilemma poses the question: How should the prisoners act? Keep in mind that the best option for both is to keep silent; however, remaining silent puts the silent prisoner at risk of a ten-year sentence if the other prisoner decides to cooperate. In this way, each would likely decide to betray each other because, at worst, they will only receive a five-year sentence, compared to the worst case scenario of receiving a ten-year sentence for remaining silent. Thus, the Prisoners Dilemma is used by scholars to rationalize the choices states make in deciding whether to abate or continue polluting in light of the payoffs of each option. In the classic Prisoners' Dilemma story, the payoffs refer to the expected length of jail sentences depending on each outcome. Payoffs, in the context of this note, refer simply to the measure of utility of each choice faced by countries engaged in treaty negotiation.

32. Frischmann, *supra* note 16, at 719.

directly influence the payoff structure of present and future iterations (games).[33] This, in turn, leads to different choices and outcomes. Take for example, the radically different outcome in the counterpart to Prisoner's Dilemma, a game aptly referred to as Harmony.

In Harmony, if both states choose to cooperate and abate, they both enjoy a net payoff of $6, for a total of $12. If, however, both players choose to continue polluting, they each receive a payoff of only $2, for a total of $4. Last, if one state chooses to cooperate by abating and the other state chooses to pollute, the cooperating state receives a payoff of $4, while the polluter receives a payoff of $3, for a total of $7. Like Prisoner's Dilemma, the best possible outcome is created when both states abate and receive a combined payoff of $12. However, when making their choice, each state recognizes that the individual payoff associated with abatement is higher regardless of what the other state does. In this way, abatement becomes each state's dominant strategy.

While these games may be too simple to completely capture the complexities inherent in treaty negotiation and creation, they nonetheless provide insightful illustrations of the basic choices and outcomes that are important variables in the MEA negotiation process. In addition, the illustrations above suggest that in order to encourage participation and compliance, states can jointly restructure payoffs and incentives by either punishing non-cooperation, or creating positive payoffs for cooperation.

Frischmann identifies three stages of the game, as it relates to MEAs. The first stage involves *framing the game* whereby states recognize an interdependent problem and propose potential solutions.[34] This stage may involve varying levels of scientific, political and economic uncertainty.[35] The second stage involves the *forming of the game*, whereby states negotiate an agreement and create monitoring and compliance procedures.[36] Indeed, it is here that states change the payoff structure of cooperation by creating commitments, making concessions, and establishing compliance procedures.[37] The third stage is where states *play the game*.[38] Here, states implement and enforce the agreement, and individual participants choose to either cooperate or pollute.[39] At this stage, a well-crafted agreement should include the flexibility to respond to exogenous influences that change the nature of the game. For example, scientific uncertainty may slowly dissolve, transaction costs may diminish, and technological advancements may be revealed.[40] In this way, parties to an agreement need not go back to the drawing board to *reform* and *reframe* the game – a process that we shall see, is extremely difficult.

---

33. *Id.* at 681, 683.
34. *Id.* at 723.
35. *Id.* at 724
36. *Id.* at 724-25.
37. *Id.*
38. *Id.* at 727.
39. *Id.* at 728.
40. *Id.* at 729-30.

Indeed, a close examination of the Montreal Protocol provides an example of how states successfully *framed* the game; changed the *formation* of the game by negotiating the implementation of effective treaty mechanisms; and continue to *play* the game by changing payoffs through both positive incentive and punishment, and jointly encouraging participation and compliance.

III. THE MONTREAL PROTOCOL: A MODEL OF SUCCESS?

A. Negotiations Leading up to the Montreal Protocol

In 1974, Marion Molina and Sherwood Rowland published a scientific paper suggesting that the stratospheric ozone layer was being destroyed by chlorofluorocarbons (CFCs), a man-made chemical substance.[41] Although the causal link between the release of CFCs and the depletion of the ozone was largely unproved in the late 1970s, many countries began to unilaterally reduce and restrict CFC production and consumption.[42] However, despite significant unilateral action on the part of major contributors, such as the United States, CFC production and consumption began to rise in the 1980s, necessitating the need for international cooperation in protecting the ozone layer by phasing out the use of harmful ozone depleting substances.[43] In 1981, United Nations Environment Programme (UNEP) established a Working Group of legal and technical experts to agree on and draft a global framework convention.[44] The resulting Vienna Convention for the Protection of the Ozone Layer (Vienna Convention) was adopted and signed by twenty countries plus the European Union, and entered into force on September 22, 1988.[45] Although the convention included no binding controls on the production and emission of ozone depleting substances, the Vienna Convention played a pivotal role in creating a foundation on which significant progress has been made. Indeed, at the Convention the parties agreed to: (1) conduct further scientific research and assessments to overcome uncertainty, (2) to exchange information for the benefit of all participants, and (3) to adopt "appropriate measures" to deal with the problem.[46]

---

41. Mario J. Molina & F. S. Rowland, *Stratospheric Sink for Chlorofluoromethanes: Chlorine Atomcatalysed Destruction of Ozone*, 249 NATURE 810 (1974); *see also* DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 567-69 (3rd ed. 2007) (discussing the basic science of ozone depletion). When released CFCs rise to the stratosphere, long exposure to solar radiation causes the CFCs to break down and release chlorine, which is the source of ozone depletion, not the CFCs themselves. The consequence of ozone destruction is both life-threatening and massive in scale because it is the ozone layer that absorbs harmful ultraviolet radiation. An excess of UV radiation would result in increased cases of skin cancer and eye cataracts, lower yields in agriculture and fisheries, and an accelerated increase in ground level ozone (smog), among other disastrous effects.

42. Barrett, *supra* note 11, at 223.

43. *Id.*

44. Edith Brown Weiss, *The Five International Treaties: A Living History, in* ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 89, 136 (1998).

45. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293 [hereinafter Vienna Convention].

46. *See also id.* arts 2-7, annex I-II; Frischmann, *supra* note 16, at 792.

Frischmann maintains that this was an important first step "because it broadly *framed* the relevant issues at a time where the underlying problem and potential solutions were relatively uncertain and States were understandably hesitant to undertake specific commitments."[47] Indeed, parties to the convention "fully expected that their commitments would evolve over time,"[48] and articulated that a protocol with more specific obligations and targets would be negotiated in the future.

B. The Montreal Protocol: An Assessment

On September 16, 1987, twenty-four states signed the Montreal Protocol, which expanded the goals of the Vienna Convention by creating a treaty that obligated parties to reduce their ozone depleting substance emissions in relation to 1986 base-levels.[49] From the outset, the negotiating parties to the Montreal Protocol recognized the existence of scientific uncertainty and, hence, placed no specific limit on any of these harmful substances. However, the negotiators did create a separate limit for the total amount of ozone depletion caused by the parties to the Protocol.[50] In this way, the negotiators built sufficient flexibility into the functioning of the Montreal Protocol. Richard Benedick, the chief U.S. negotiator to the Montreal Protocol, also maintains that the Montreal protocol was designed to be flexible "to be reopened and adjusted as needed, on the basis of the periodically scheduled scientific, economic, environmental, and technological assessments."[51] Thus, as scientific data progressed, the parties began to implement direct controls on specific substances through subsequent amendments.[52]

The Montreal Protocol also implemented two important provisions during the framing of the agreement. The first was the ability to "adjust" reduction targets, ideally by consensus, but if necessary, by two-thirds majority of the parties representing at least half of the total consumption of all the parties.[53] Such adjustments are binding on all parties even on non-consenting parties.[54] The

47. Frischmann, *supra* note 16, at 792 (emphasis added).

48. *Id.*

49. Protocol on Substances that Deplete the Ozone Layer, art. 2, Sept. 16, 1987, *reprinted in* 52 Fed. Reg. 47515, 26 I.L.M. 1541 (1987) (entered into force Jan 1, 1989) [hereinafter Montreal Protocol]; *see also* Nanda & Pring, *supra* note 15, at 259. Interestingly, 1986 was chosen as a base-level to avoid strategic maneuvering by states to increase their production so as to change their bargaining positions. Had a future year been chosen, this might have encouraged many countries to increase their production levels immediately to establish a higher basis from which subsequent cuts would have to be made. In subsequent amendments, the base-level year was changed for many controlled substances as a response to scientific data.

50. Nanda & Pring, *supra* note 15, at 259-60.

51. Benedick, *supra* note 6, at 99. We can see that this has indeed happened and the assessments still form a major part in process of decision-making.

52. To date, the Montreal Protocol has undergone many transformations: Adjusted in Vienna (1995); amended in Beijing (1999); adjusted and amended in London (1990), Copenhagen (1992), and Montreal (1997). Therefore, a country that joins the Montreal Protocol today is joining a very different treaty from the one negotiated in 1987. *See* Weiss, *supra* note 44, at 140-44; Barrett, *supra* note 11, at 153.

53. Montreal Protocol, *supra* note 49, art. 2, ¶ 9.

54. *See* Barrett, *supra* note 11, at 226.

second provision was that the ability to broaden the agreement to include new substances would have to be included through treaty amendments and, hence, would be legally binding on parties to any such amendment.[55] In this way, the parties created institutional mechanisms that would adjust commitment levels and payoff structures in response to unforeseen developments without requiring renegotiation of the underlying game.[56]

From the beginning, the Montreal Protocol also created a weighted list of chemicals with ozone depleting potentials.[57] As a result, the Montreal Protocol created incentives to reduce the more harmful ozone depleting substances at a higher rate than those that were less damaging to the ozone. In creating emissions "offsets," the weighted list effectively lowered the cost of compliance associated with binding obligations.[58] Additionally, since 1987, as scientific knowledge has improved, the parties to the Montreal Protocol have increased the number of controlled substances from eight to ninety-six.[59]

1. Trade Leakage Concerns

A major concern for the negotiators of Montreal was the potential for "trade leakage," whereby the production of ozone depleting substances would merely shift from the parties to the Protocol to non-parties, in other words, from the industrialized countries to the developing countries.[60] Under such a scenario, the Montreal Protocol would only serve to redistribute, rather than reduce, the production and consumption of ozone depleting substances. In this way, trade leakage would merely serve to increase the payoffs for non-cooperation, and hence, would undermine participation and compliance. From the outset of negotiations, the parties therefore worked hard to include measures to stop trade leakage.[61] Negotiations, focused on two solutions: (1) to create incentives for developing countries to also assume obligations for the public good, and (2) to implement tough trade measures to encourage participation.[62] However, this did not prove to be easy. Specifically, developing countries felt that they were responsible for only a small portion of the ozone problem, and therefore argued

---

55. *See* Montreal Protocol *supra* note 49, art. 2, ¶ 9(d). This is helpful in that if, at the time of negotiation, parties are uncertain as to the future environmental implications, and if at the time parties expect this uncertainty to diminish, then countries may wish to negotiate an initial agreement that keeps the option of renegotiation open in the future.

56. Recall Frischmann's three stages of the treaty negotiation game, *supra text* section II(C).

57. Montreal Protocol, *supra* note 49, annex A.

58. Benedick, *supra* note 6, at 78.

59. Montreal Protocol, *supra* note 49, annex A C. The most common controlled substances include: Halo carbons, notably chlorofluorocarbons (CFCs) and Halons; Carbon tetrachloride; Methyl chloroform (1,1,1 trichloroethane); Hydrobromofluorocarbons (HBFCs); Hydrochlorofluorocarbons (HCFCs); Methyl bromide (CH3Br); and Bromochloromethane (BCM), a new ozone-depleting substance that some companies sought to introduce into the market in 1998, which has been targeted by the 1999 Beijing Amendment for immediate phase-out to prevent its use.

60. Barrett, *supra* note 11, at 231; *see also* HUNTER, SALZMAN & ZAELKE, *supra* note 41, at 584-85.

61. Benedick, *supra* note 6, at 91-92.

62. Barrett, *supra* note 11, at 231, 313, 321, 346-49 (discussing the specific mechanisms introduced to address these concerns).

that they should not be held to the same standards as the industrialized countries.[63] After lengthy negotiations, the parties settled on mechanisms such as "basic domestic needs," under which developing counties (Article 5 countries) could increase their ozone depleting substances production to specified levels for ten years, after which they were subject to a fifty percent reduction for the next ten years.[64] In 1992, the parties to the Montreal Protocol also created a comprehensive funding mechanism to support efforts to develop "cleaner" technology.[65] These actions simultaneously strengthened control measures by creating incentive for developing countries to ratify, and increased the number of parties to the Montreal Protocol by improving the cost-benefit positions of most developing countries.[66] As a result, we can see that the parties to the Montreal Protocol ensured that payoffs for participation and compliance increased, and payoffs for non-cooperation diminished. Importantly, these incentives effectively countered the Prisoner's Dilemma, and subtly helped to shift states' dominant strategy from one of defection (continued pollution) to one of abatement.

2. Trade Restriction Mechanisms

The parties also managed to create robust trade restriction measures that effectively created favorable cost-benefit structures for states that were considering whether to join the Montreal Protocol.[67] In this way, the trade restriction mechanism made participation *individually rational* for countries.[68] Again, by implementing these restriction mechanisms the parties to the Montreal Protocol diminished the potential payoff structure of non-cooperation and reformulated the environment (or game) within which countries had choose to cooperate or not. Ultimately, trade restriction effectively deterred free-riding and restructured

63. Sunstein, *supra* note 1, at 16.

64. *Id.* at 17. The phase out schedules for developed countries are as follows: Phase out Halons by 1994; phase out CFCs, carbon tetrachloride, methyl chloroform, and HBFCs by 1996; reduce methyl bromide by 25% by 1999, 50% by 2001, 70% by 2003, and phase out by 2005; reduce HCFCs by 35% by 2004, 65% by 2010, 90% by 2015, and 99.5% by 2020, with 0.5% permitted for maintenance purposes only until 2030; phase out HBFCs by 1996 and phase out BCM immediately. *See* Multilateral Fund for the Implementation of the Montreal Protocol, About the Multilateral Fund: History, http://www.multilateralfund.org/history.htm.

65. Sunstein, *supra* note 1, at 17. Currently, the Multilateral Fund for the Montreal Protocol is administered by an Executive Committee of seven developed and seven developing countries chosen by the Parties on annual basis. The Fund has been replenished six times: $240 million (1991-1993), $455 million (1994-1996), $466 million (1997-1999), $440 million (2000-2002), $474 million (2003-2005) and $400.4 (2006-2008). The total budget for the 2006-2008 triennium is $470 million. $59.6 million of that budget is from the 2003-2005 triennium and $10 million will be provided from interest accruing to the Multilateral Fund during the 2006-2008 triennium. As of March 2007, the contributions made to the Multilateral Fund by some forty-nine industrialized countries (including Countries with Economies in Transition or CEIT countries) totaled over U.S.$ 2.2 billion. *See* Multilateral Fund for the Implementation of the Montreal Protocol, About the Multilateral Fund: History, http://www.multilateralfund.org/history.htm.

66. Nanda & Pring, *supra* note 15, at 265-66.

67. Montreal Protocol, *supra* note 49, art. 4.

68. Recall Barrett's three requirements for a successful environmental treaty, *supra* text section I. Barret, *supra* note 11, at xiii-xiv.

incentives to encourage broad and deep participation.[69] Specifically, the Montreal Protocol prohibits parties from importing controlled substances and products *produced* with controlled substances from non-parties.[70] In addition, the Montreal Protocol bans parties from exporting controlled substances unless the recipient country can show full compliance with the Protocol's reduction schedules.[71] To discourage countries from holding out for short-term competitive advantage, the parties also agreed that the Protocol would only enter into force when eleven countries, representing two-thirds of global ozone depleting substances consumption, had ratified.[72]

3. Implementation and Non-compliance

In 1997, in the Copenhagen Amendments, focus shifted from target setting to effective implementation.[73] The parties focused on increasing participation, limiting the growth of emissions by developing countries, promoting universal compliance, and controlling the emerging black market trade in CFCs.[74] Indeed, the Montreal Amendments created institutional mechanisms to determine, and effectively deal with, non-compliance, thereby making it *collectively rational* for the parties to comply with their obligation.[75] Specifically, the parties created an Implementation Committee that has both a dispute resolution element and an implementation element to make compliance issues *fair* to all the parties.[76] Measures that can be taken under the Montreal Protocol for non-compliance include:

> (1) assistance [in the form of financial and technological assistance];
>
> (2) "issuing cautions"; and
>
> (3) suspension... of specific rights and privileges under the Protocol... including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanisms and institutional arrangements.[77]

---

69. Also, because of such enforcement mechanisms, the Montreal Protocol suffers from virtually no free-riding. Indeed, after the trade restrictions were put into place, the number of developing countries that joined the Montreal Protocol increased rapidly.

70. HUNTER, SALZMAN & ZAELKE, *supra* note 41, at 584-85.

71. *Id.*

72. *E.g.*, *id.* at 586. As it turned out, the initial participation far exceeded this number in that 30 parties representing 83 percent of global consumption were founding parties to the Montreal Protocol.

73. Barrett, *supra* note 11, at 237. Again, recall Barrett's three requirements for a successful environmental treaty, *supra* text section I.

74. *See* Adjustments and Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer Adopted at Copenhagen, Nov. 25, 1992, S. TREATY DOC. No. 103-9, 32 I.L.M. 874 (1993) (entered into force June 14, 1994) [hereinafter Copenhagen Amendments].

75. HUNTER, SALZMAN & ZAELKE, *supra* note 41, at 603-06.

76. *See* Copenhagen Amendments, *supra* note 74.

77. Barrett, *supra* note 11, at 288; UNEP, *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Annex V, UNEP/OzL.Pro.4/15 (November 25, 1992), *available at* http://www.unep.org/ozone/4mop_cph.shtml.

Indeed, by approaching the Implementation Committee, a party can request assistance from other parties to meet its obligations.[78] This approach, therefore, recognizes the need for collective action *and* assistance in solving the ozone problem. In addition, the Montreal Protocol requires that parties submit reports with data on import, exports and production of controlled substances to the Implementation Committee.[79] The Implementation Committee has worked extremely hard to enforce this reporting requirement, frequently threatening to withhold critical financial assistance to Article 5 countries (developing countries) that do not comply with the reporting requirement.[80]

Thus, we can see that the framers of the Vienna Convention and the accompanying Montreal Protocol *framed* and *formed* the game to maximize payoff structures of cooperation. In addition, the parties to the Montreal Protocol created an agreement that allows each party to continue to *play* the game, with a high level of certainty that other states will do the same. Indeed, despite what other countries may chose to do, each country's dominant strategy under the Montreal Protocol remains participation and full compliance. As a result, there is almost full compliance and participation in the Montreal Protocol and its subsequent amendments continue to increase.[81]

IV. THE KYOTO PROTOCOL

A. Similarities with Montreal Protocol

This paper has already described the similarities between the nature of ozone depletion and climate change. Despite these similarities, it should be noted that climate change mitigation raises a much greater challenge than that presented by ozone depletion. First, climate change is a much more difficult phenomenon to regulate because it is more scientifically complex than ozone depletion and is still characterized by high uncertainty and sharp asymmetrical vulnerabilities.[82] Indeed, this uncertainty still plagues global efforts to reach consensus on lasting climate change alleviation.[83] Perhaps more important, is the fact that climate change mitigation affects core global economic activity and inherently involves issues of

78. Montreal Protocol, *supra* note 49, art. 10.

79. *Id.*, art. 7; *see also* Barret, *supra* note 11, at 149.

80. The Montreal Protocol has a discrete approach to non-compliance and monitoring. Suspected instances of non-compliance must be brought to the Implementation Committee, which reviews the evidence and considers the circumstances that may have precipitated the non-compliance. It then makes recommendations regarding actions to be taken. In a sense, therefore, the process may encourage non-compliance, but the careful exercise of discretion may also prevent the punishment of a country that has a legitimate reason beyond its control for non-compliance. *See generally* Barrett, *supra* note 11, at 150-51.

81. As of June 2008, 193 countries have ratified the Montreal Protocol. Ratifications of the amendments are: 189 countries for the London Amendments, 184 for the Copenhagen Amendments, 167 for the Montreal Amendments, 144 for the Beijing Amendments. Ozone Secretariat, *supra* note 4.

82. Thomas, *supra* note 3, at 823; *see also* Sunstein, *supra* note 1, at 2-4, 45.

83. Thomas, *supra* note 3, at 824. It should be noted that while scientific uncertainty within the climate change regime has diminished with time, a significant obstacle to a lasting agreement is still presented by a high degree of uncertainty regarding the economic impacts associated with proposed global responses.

competition between nations.[84] Specifically, climate change alleviation implicates multiple sectors of the global economy, particularly those that have, throughout modern history, served as the backbone to industrial growth and development.[85] While it is conceptually accepted that mitigation of climate change calls for the restructuring of our global energy-based society, this in itself is not enough. Indeed, it is the necessity of cheap energy as a foundation to growth and development in less-developed countries that illustrates a particularly acute problem, at least in climate change negotiation.[86]

Despite the differences between climate change and ozone depletion, the response to the two environmental challenges nevertheless share many common elements. First, the extent of scientific cooperation and involvement in climate change negotiations has been just as great, if not greater, than that of the ozone regime.[87] Second, climate change negotiation also followed an incremental approach through the use of a convention-protocol scheme, and the creation of targets and timetables to create binding emissions reduction standards.[88] Third, like Montreal, the negotiators of the Kyoto Protocol advanced the "common but differentiated responsibility" principle, and created multiple mechanisms to encourage and aid developing countries to participate.[89] As we shall see, however, despite these similarities between the two Protocols, key differences have exposed many fundamental problems with the current Kyoto regime. Specifically, differences concerning treaty negotiations, structure, and institutional mechanisms have led to a vastly different outcome that must be addressed and amended in order to sustain lasting climate change mitigation.

B. The Early Response to Climate Change

Despite the remarkable response to the problems of ozone depletion, the world has yet to adequately respond to climate change - the "defining ecological issue of the 21st century."[90] Over the past two decades, scientific consensus has established that increasing levels of man-made greenhouse gases being released into the atmosphere are causing global warming and changing the earth's fragile climate.[91] Even before such consensus was reached, many scientists called for

84. *Id.* at 823.

85. *See id.* at 812.

86. *Id.* at 824-25.

87. *Id.* at 817; *see also* JORGEN WETTESTAD, DESIGNING EFFECTIVE ENVIRONMENTAL REGIMES: THE KEY CONDITIONS 221-23 (1999) (noting that the climate change has an "extraordinarily well-developed scientific-political complex, with several organizational entities and bodies fulfilling advisory and communicatory functions.").

88. Nanda and Pring, *supra* note 15, at 293-94.

89. For a discussion on the common but differentiated responsibility approach, *see* Kyle Danish, *An Overview of the International Regime Addressing Climate Change*, 7 SUSTAINABLE DEV. L. POL'Y 10 (2007).

90. HUNTER, SALZMAN & ZAELKE, *supra* note 41, at 631.

91. Climate change refers to the change in the earth's climate brought about by increased concentrations of greenhouse gases, which at normal levels are actually indispensable to life on earth. However, due to man-induced pollution problems, the delicate balance of greenhouse gases is being affected, and is, in turn, causing the earth's temperature to rise. These gases earn their name because, much like a greenhouse, they allow sunlight to pass through the atmosphere while trapping heat, or

international action back in the 1970s and 1980s.[92] Indeed, after the danger of man-made greenhouse gases became more apparent, many industrialized countries committed to reducing emissions of greenhouse gases, but unlike the same unilateral commitments for ODSs, many countries did not follow through with concrete action.[93] The first major effort to regulate climate change took place in 1992, with the creation of the Framework Convention on Climate Change (FCCC), signed at the 1992 Rio Earth Summit.[94] The FCCC did not include any binding measures or obligations, but it did establish a general framework on which further action was taken.[95] In 1997, in response to scientific evidence that emphasized the need for binding targets and timetables, the parties to the FCCC negotiated the Kyoto Protocol to the Convention on Climate Change.[96] As we shall see, however, the Kyoto Protocol has been the target of widespread criticism, and has had very little success at mitigating climate change.

C. The Kyoto Protocol: An Assessment

In February 2005, the Kyoto Protocol entered into force without the participation of the United States.[97] Despite U.S. withdrawal, the parties hailed this as a milestone in the global effort to mitigate climate change.[98] This does not, however, deter scholars from severely criticizing the Kyoto Protocol. Specifically, scholars argue that under the current provisions of the Protocol, impacts on global emissions will be negligible. For example, Olmstead and Stavins maintain: "[b]ecause the Kyoto Protocol's ambitious targets apply only to the short term (2008-2012) and only to industrialized nations, the agreement will impose relatively high costs and generate only modest short-term benefits, while failing to provide a real solution."[99] While this condemnation has enjoyed widespread support among scholars, the most common criticism of the Kyoto Protocol can be summarized in four propositions:

---

infra-red radiation, close to the earth's surface. Thus, an increase in the concentration of greenhouse gases leads to increased warming, which in turn is adversely effecting the earth's fragile environment. Harmful chemicals that have led to increased greenhouse gas concentrations include: carbon dioxide, methane, nitrous oxide, halocarbons (regulated by Montreal), and other halogenated substances such as CFCs and HCFCs.

92. HUNTER, SALZMAN & ZAELKE, *supra* note 41, at 632.

93. Barrett, *supra* note 11, at 367.

94. UN Framework Convention on Climate Change, *opened for signature* May 29, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 24, 1994), [hereinafter *UNFCCC*].

95. Nanda & Pring, *supra* note 15, at 290-94 (noting that the basis for international law to address climate change is Principle 21 of the Stockholm Declaration).

96. HUNTER, SALZMAN & ZAELKE, *supra* note 41, at 632.

97. Kyoto Protocol to the United Nations Framework Convention on Climate Change, *adopted* Dec. 11, 1997, 37 I.L.M. 22 (entered into force Feb. 16, 2005) [hereinafter Kyoto Protocol]. As of October 16, 2008, there were 182 Parties to the Kyoto Protocol. *See* Kyoto Protocol, Status of Ratification, *supra* note 7.

98.

99. Robert N. Stavins & Sheila M. Olmstead, *An International Policy Architecture for the Post-Kyoto Era,* 96 AM. ECON. REV. PAPERS AND PROCEEDINGS 35, 35 (2006), *available at* http://belfercenter.ksg.harvard.edu/publication/4014/international_policy_architecture_for_the_postkyoto_era.html.

1. Negotiations leading up to the Kyoto Protocol were politically motivated and led to diluted targets that will have very little effect on climate change.[100]

2. The non-inclusion of developing countries in binding targets undermines the efficacy of the Kyoto Protocol.[101]

3. The cost-benefit structure of the Kyoto Protocol undermines its effectiveness and encourages non-participation.[102]

4. Ineffective enforcement mechanisms help to encourage lackluster results and encourage free-riding and trade leakage.[103]

1. Negotiations Leading up to The Kyoto Protocol

Right from the start of negotiations, the Kyoto Protocol presented a more complex political problem than that experienced during the Montreal negotiations. However, it wasn't until the U.S. made public its intention not to become a party to the agreement that the real problems associated with the negotiations started to surface.[104] In 2001, after several years of negotiations between the U.S. and the other parties to the Kyoto Protocol, President George W. Bush withdrew the U.S. from the Kyoto Protocol, invoking great dissatisfaction from the rest of the world.[105] The U.S. maintained that it would not sign the Kyoto Protocol (1) unless developing countries were included, and (2) as long as the U.S. considered it to be harmful to its economic interests.[106] The U.S. Senate concluded that any "exemption for Developing Country Parties is inconsistent with the need for global action on climate change and is environmentally flawed" and strongly believed that proposals leading up the Kyoto Protocol "could result in serious harm to the

100. *See, e.g.,* Barrett, *supra* note 11, at 371-74.

101. *See generally* Sunstein, *supra* note 1, at 4-7; Anita M. Halvorssen, *Common, But Differentiated Commitments in the Future Climate Regime: Amending the Kyoto Protocol to Include Annex C and the Annex C Mitigation Fund*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 247, 248-51 (2007).

102. *See, e.g.,* Barrett, *supra* note 11, at 377-80.

103. *See* Bohringer & Finus, *supra* note 17, at 279, 284, 294 (highlighting that more realistic and effective punishments can provide incentives for compliance, and that strategic links among countries can counter trade leakage). Recall discussion, *supra* text section III(B)(1).

104. *See generally Oh no, Kyoto*, THE ECONOMIST, April 7, 2001. (discussing the reactions after the U.S. withdrawal from Kyoto, and the difficulties that soon became apparent after the withdrawal).

105. Barrett, *supra* note 11, at 371; *see also* Sunstein *supra* note 1, at 28 (suggesting that leading up to the creation of the final draft of the treaty, it was common knowledge that the U.S. could never join the treaty as drafted).

106. S. Res. 98, 105th Cong. ¶ 1 (1998), *available at* http://thomas.loc.gov/cgi-bin/query/D?c105:1:./temp/~c105F6Lwz2::. It should be noted that, despite the frequent accusations of partisan political approaches, the U.S.'s involvement was virtually doomed from the start, even before President Bush came into office. In fact, even during the Clinton Administration the Senate voted 95-0 against joining the Kyoto Protocol. Despite this, however, it should be recognized that many scholars argue that it was the way in which President Bush withdrew that increased the dissatisfaction felt by other parties at the U.S. withdrawal. *E.g.,* Barrett, *supra* note 11, at 371.

United States economy, including significant job loss, trade disadvantages, increased energy and consumer costs, or any combination thereof."[107]

Despite the obvious problems associated with the non-participation of the U.S. in a global action to mitigate climate change,[108] several prominent scholars also point to the resulting concessions made in an effort to save the Kyoto Protocol from an early death.[109] Specifically, in the wake of the U.S. withdrawal, many Annex 1 countries enjoyed significantly more bargaining power and effectively renegotiated the Kyoto Protocol, resulting in a vast downgrade of original targets.[110] Such downgrading included large concessions concerning "sinks" and "hot air" trading.[111] With the addition of hot air trading, the Kyoto Protocol allows countries to purchase credits from countries that have achieved surplus reductions. While many defend this as an effective mechanism to encourage participation, allowances have been subject to vast abuse and mismanagement.[112] For example, after the U.S. withdrew, Russia was able to negotiate double the amount of sink credits permitted toward calculations of its emissions.[113] In this way, the hot air trading scheme undermines the effectiveness of the Kyoto Protocol by merely shifting excess surplus to countries that are not meeting target reductions, with the end-result being that total emissions reduction is significantly diluted.[114] Ironically, the determination of the remaining parties to make Kyoto work also led to concessions on a number of issues that the U.S. had lobbied for prior to its withdrawal.[115]

Another example of how politics drove the negotiations leading up to Kyoto is that choosing the year 1990 as the base level for reductions conferred significant advantages for many of the negotiating parties.[116] Specifically, during the

---

107. S. Res. 98, *supra* note 106, paras. 10-11.

108. *See* Parker & Blodgett, *supra* note 9, at summary (showing that the U.S. emits roughly 20 percent of global GHGs); *see also Oh no, Kyoto*, *supra* note 104.

109. *See, e.g.*, Barrett, *supra* note 11, at 371-74; *see also* Thomas, *supra* note 3, at 821.

110. *See* Scott Barrett, *Kyoto Plus*, *in* CLIMATE-CHANGE POLICY, *supra* note 16, at 295.

111. Barrett, *supra* note 11, at 371. Another example of the weakening of the Kyoto Protocol is that countries like Canada, in acceding, have actually unilaterally claimed credits (in the case of Canada – 30 percent credit for exports of "clean" energy to the U.S.). Hot air refers to the surplus of emission reduction for the former communist countries of Europe. For example, Russia is required to stabilize (0% increase) its emissions under the Kyoto agreement, but. in actual fact its emissions in 2000 were roughly 70 percent of the 1990 level. With the surplus emission reduction, other countries can trade with Russia to comply with their obligation; in other words, not by reducing emissions, but by paying Russia to transfer a portion of its surplus. Barrett, *supra* note 110, at 294.

112. *See* Barrett, *supra* note 11, at 371-74.

113. Thomas, *supra* note 3, at 821.

114. *Id.*

115. Barrett, *supra* note 11, at 371; *see also* Nanda & Pring, *supra* note 15, at 294-300 (discussing the U.S.'s position during the Kyoto negotiations and its subsequent decision to withdraw from Kyoto).

116. Richard Benedick, *Morals and Myths: A Commentary on Global Climate Policy*, 109 WZB-MITTEILUNGEN 15, 15 (2005). The UK's official target was 8 percent, but in 1997 its emissions were actually 5 percent lower than 1990. In addition, Russia's target was 100 percent of 1990, but its actual emissions were at least 30 percent below that level due to the collapse of communism. In contrast, the United States, which was enjoying a period of huge economic boom, was by 1997 emitting greenhouse gases at a 12 percent increase from 1990 levels. Interestingly, this created a desire by the United States

negotiations of the Kyoto terms, a group of thirty industrialized nations agreed to reduce their combined GHG emissions by five percent of 1990 levels by 2012. However, in 1997, the combined emissions of these countries were already three percent below 1990 levels.[117] Indeed, many nations at the time knew they would not have to undergo significant reductions to meet the target, with the exception of the United States, which had enjoyed a period of economic boom in the 1990s.[118] Richard Benedick believes that the basic underlying problem with Kyoto was

> a lack of genuine political will on all sides. After years of wrangling over further weakening its provisions, the treaty finally became law in 2005, but the self-congratulations could not disguise that its impact on global emissions is negligible and its short-term orientation makes it impossible for industry to plan long-term investments.[119]

In sum, because of the negotiation process, the parties to the Protocol eventually signed and ratified a significantly diluted treaty. Moreover, unlike the successful *framing* of the game which created a conducive environment during the early days of the Montreal Protocol, the parties to the Kyoto Protocol have created an environment where costs are significantly different for states, where the U.S. has a dominant strategy to continue polluting, and where even participating countries have incentive to ignore their obligations.

2. The Exclusion of Developing Countries from Binding Targets

The Kyoto Protocol currently imposes quantitative restrictions on industrialized countries, but does not impose similar obligations on developing countries.[120] Although the Montreal Protocol had to overcome the same difficulties with regards to developing nation participation, the Montreal Protocol was successful in adopting a more rational sequential approach to negotiations. First, the parties to Montreal focused on creating binding targets for industrialized nations and hence tackled the most pressing issue first.[121] Only then did the parties turn to the sensitive but secondary issue of developing world participation. The negotiators therefore managed to solve the common but differentiated responsibility dilemma by separating the two fundamental issues of industrial commitments and developing world commitments. At the Kyoto negotiations, however, the issue of developing world participation became entangled with negotiations over binding targets in the industrial world. As Laura Thomas states, "the climate change negotiations have taken an 'inclusive' approach in which both

---

to secure an emissions trading scheme, so that it could essentially make up for its projected inability to comply with the targets by buying emissions credits from Russia. At the same time, the EU opposed (and correctly so) such a scheme under the pretext that it would easily meet its emissions targets. However, after U.S. withdrawal, the parties to the Kyoto Protocol nevertheless included an emissions trading scheme. Then, when it became clear that the EU would not likely meet its obligatory targets, it actively enticed Russia to ratify in order to gain access to its excess emissions credits. *Id.*

117. *Id.* at 15.

118. *Id.* at 16.

119. *Id.* at 17.

120. Kyoto Protocol, *supra* note 97, annex B; *see also* Barrett, *supra* note 11, at 370.

121. Thomas, *supra* note 3, at 837-39.

industrialized and developing nations have been involved in the negotiating process."[122] Compounding the problem, many industrialized nations have been reticent to agree to meaningful binding targets without the simultaneous participation of developing countries.[123] In this way, misplaced focus on the developing world undermined and significantly diluted negotiations that should have been focused solely on binding targets for industrialized countries. Indeed, involvement of developing countries in the initial negotiations undermined the parties' ability to *form* and *frame* a clear and foreseeable series of iterations (or games representing different stages of agreement), through which uncertainty would not have undermined cooperation.

The inclusion of binding targets for the developing world, albeit at a later stage, is necessary to the long run effectiveness of the Kyoto Protocol. The argument for imposing mandatory obligations on developing countries is not that their exclusion is unfair, but rather, that a partial agreement (one not including developing countries) is environmentally ineffective and costly at the same time because the Annex 1 industrial countries would presumably undertake significant costs only to see emissions migrate to developing countries.[124] In addition to concerns for production shifting, many critics point out that without the participation of developing nations, particularly those with high growth rates, the Kyoto Protocol will have a negligible effect on global greenhouse gas emissions.[125] It is significant that eight of the top twenty emitter countries are rapidly industrializing, highly competitive "developing" countries.[126] Moreover, India's greenhouse gas emissions exceed Germany's, those of South Korea exceed France, and China recently became the largest emitter of greenhouse gases in the world.[127] Yet, none of these countries is obligated to comply with the Kyoto Protocol. While many development scholars argue that the industrialized countries need to lead by example, Barrett counters that leading by example is fundamentally flawed because, if the current parties obligated under Kyoto *do succeed* in reducing their emissions substantially, the costs paid by their respective industries will rise and the incentive for other countries (developing countries) will fall because of a shift in comparative advantage, or leakage.[128] In addition, it is generally the case that

122. *Id.* at 839.

123. *Id.*

124. Barrett, *supra* note 11, at 305. The concept of trade leakage is discussed *supra* text section III(B)(1).

125. *See* Thomas, *supra* note 3, at 821-22.

126. *See* Parker & Blodgett, *supra* note 9, app. A.

127. *Id.*; *see China Tops U.S. in Greenhouse Gas, Group Finds*, N.Y.TIMES, June 21, 2007, at A; *see also* Michael P. Vandenbergh, *Climate Change: The China Problem*, 81 S. CAL. L. REV. 905 (2008) (discussing how to create incentives for China and the United States to make prompt, large emissions reductions in light of the fact that they are the two largest emitters of GHGs).

128. Barrett, *supra* note 110, at 283-84. It should be noted that the author does not mean to undermine the reality that the industrialized countries are certainly responsible for the vast majority of the increase in GHG emissions over the past few decades, and that they need to take on significant costs as a result. This paper merely seeks to point out that developing nations collectively will soon overtake the industrialized (Annex 1) countries in global GHG emissions, and hence, must become part of a long-term solution.

wider participation in environmental treaties significantly lowers the cost to each individual country participant.[129] To put the exclusion of developing nations into perspective, Scott Barrett highlights that:

> [T]he Kyoto Protocol would only limit the emissions of about 30 of the world's 200 or so countries by only about 5 per cent for a period of just 5 years. Even if Kyoto worked as intended, the emissions of the countries unconstrained by the agreement would rise, making it very unlikely that Kyoto would even stabilize global emissions, let alone reduce them, even over such a short period.[130]

3. Unfavorable Cost-benefit Structures of Participation

Undoubtedly, one of the largest factors undermining the Kyoto Protocol is that, under the current terms, the treaty has an unfavorable cost-benefit structure. Mitigating climate change will present the industrialized nations with "unprecedented challenges, because it can only be achieved through extraordinary changes in the production and consumption of energy, thus affecting virtually all areas of economic activity..."[131] This cost cannot be avoided, and must be undertaken by the global community to begin to reverse the effects of global warming. However, under the current climate change regime, incentives are not structured to minimize non-cooperation payoff structures and do not coincide with the optimum cost-benefit positions.[132] Bohringer and Finus argue that "decision-making in climate policy requires balancing total costs of greenhouse-gas-emission abatement and total benefits of avoided undesirable consequences of global warming."[133] They also note that abatement costs are equalized across time.[134] That is, abatement should be undertaken when it is cheapest and most effective, taking into account that such abatement costs can lower as technology progresses. Such arguments suggest that the Kyoto should create targets and timetables that are sensitive to the immediate high costs of such reductions, with the aim of increasing target reductions as costs start to fall.

To add to this, Barrett and Sustein argue that the Kyoto Protocol needs to restructure its payoffs to create incentives for wide participation and to encourage compliance.[135] This is based on the premise that the current climate change regime presents a Prisoner's Dilemma, where the dominant strategy is to pollute (or fail to comply). Instead, the parties to the Kyoto Protocol need to create an environment that is more reflective of that present in a game of Harmony, where the dominant strategy is cooperation or abatement. Remember, in a choice between continuing to

---

129. *Id.* at 304.

130. Barrett, *supra* note 110, at 288.

131. *See* Rudiger Wolfrum & Jurgen Friedrich, *The Framework Convention on Climate Change and the Kyoto Protocol, in* ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS: A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA 53, 53 (Ulrich Beyerlin, Peter-Tobias Stoll & Rudiger Wolfrum eds., 2006).

132. Bohringer & Finus, *supra* note 17, at 254-55 (discussing optimum cost-benefit positions).

133. *Id.* at 254.

134. *Id.* at 255.

135. *See* Barrett, *supra* note 11, at 389.

pollute and abating pollution, countries will choose to do that which presents a higher payoff.[136] It is, therefore, imperative that the climate change regime improve incentives to cooperate or diminish payoffs associated with non-cooperation.

One suggestion is the inclusion of trade restriction mechanisms similar to those under the Montreal Protocol.[137] Article IV of the Montreal Protocol successfully led to increased country participation by providing market incentives to join and diminishing the payoff structure of non-cooperation by deterring trade leakage. Indeed, because the industrialized countries did not have to worry about trade leakage, they were far more willing to accept binding targets with the knowledge that trade restrictions, coupled with financial incentives, would encourage broader participation at a later stage.[138] The Kyoto protocol, however, includes no such trade restrictions, and industrialized countries do not enjoy the security of assured mutual participation. The inclusion of trade restriction mechanisms would ultimately *reform* and *reframe* the game by assuring higher expectations of compliance in others. In this way, the Prisoner's Dilemma faced by most parties to the Kyoto Protocol, could be changed to represent a situation more like the game of Harmony.

An examination of the underlying reasons for the U.S. withdrawal from the Kyoto Protocol offers convincing proof of the need for renewed incentives to encourage participation. Sustein argues that the cost-benefit of participating and complying with the Kyoto Protocol suggest that the U.S. should not comply with the Kyoto Protocol even if all other countries do. Sustein states:

> To the United States, the monetized benefits of the Montreal Protocol dwarfed the monetized costs, and hence the circumstances were extremely promising for American support.... The Kyoto Protocol presented a radically different picture... the monetized benefits of the Kyoto Protocol would be dwarfed by the monetized costs...Hence the circumstances were unpromising for a successful agreement – and they were especially unpromising for American participation...[139]

It is plausible to suggest that the U.S. will only participate in an agreement that leads to at least a convergence of the perceived domestic costs of emission reductions with that of the perceived domestic benefits from such reduction.[140] In

---

136. For a more complete discussion on the Prisoner's Dilemma and its application to multilateral environmental treaties *see generally* Barrett, *supra* note 11, at 53-61, 196, 290.

137. It should be noted, however, that a trade restriction mechanism would be far more difficult to create and manage than that created for ODSs; however, some scholars have proposed that it is certainly possible. One thing is clear – the Kyoto Protocol could certainly benefit from "a better integration of the two competing realms of international trade and environmental law." Thomas, *supra* note 3, at 850.

138. *Id.*

139. Sunstein, *supra* note 1, at 5-6. This cost-benefit analysis also helps to explain why there are different levels of compliance between the Montreal Protocol (which enjoys near perfect compliance) and the Kyoto Protocol (which is known to suffer from widespread non-compliance).

140. WILLIAM NORDHAUS & JOSEPH BOYER, WARMING THE WORLD 162-68 (2000). Norhaus and Boyer tabulated the costs associated with the U.S. involvement in Kyoto. According to them, for the U.S., under a treaty that involves a trading scheme, the cost of compliance would be roughly $325

this regard, convergence will take place when the climate change regime creates incentives that either increase the benefits of participation (mitigating the cost of participation) or increase the cost of *non-participation*. It is in the latter notion of increasing the costs of non-participation that the current regime can affect the most change. Again, a good example is the inclusion of trade restriction measures like those under the Montreal Protocol, which effectively create an incentive for countries to participate, and impose significant costs on non-participation.

4. Unfavorable Cost-benefit Structures of Compliance

With the notable exception of the U.S., and the non-binding obligations imposed on developing countries, the Kyoto Protocol enjoys a significant participation with 174 parties. But is this enough? The majority of literature devoted to answering this question maintains that it is not. Indeed, several critics point to the fact that despite the broad participation in the Kyoto Protocol by industrialized nations, compliance remains largely weak.[141] The larger point is, therefore, that despite significant participation, climate change issues are not being adequately solved, bringing the efficacy of the Kyoto Protocol into question.

Thus, in addition to broad participation, an effective multilateral environmental agreement necessarily needs to "deepen" cooperation.[142] Indeed, many scholars argue that broad participation can, in fact, be a product of mostly shallow cooperation.[143] To deepen cooperation, a treaty or MEA must necessarily design an effective compliance system to enforce commitments. Compliance systems therefore play an important role in *framing* the rules of the game. Scholars devoted to the study of compliance and enforcement advance two general approaches to maintaining compliance: (1) an "enforcement approach" where non-compliance is deterred through the use of threats, sanctions and other methods of punishment; and (2) a "management approach" where the parties clearly delineate obligations and use positive incentives to encourage compliance with these obligations.[144] While both approaches seek the same outcome, they use very different means of ensuring such an outcome. Frischmann describes how the enforcement approach uses a variety of "hard" sanctions (such as trade sanctions or economic penalty), whereas the management approach uses a variety of "soft" sanctions (such as noncompliance reports and privilege suspension).[145] A closer look at the Montreal Protocol, however, illustrates that the two approaches are not

billion. In the same light, the benefits of complying with the Kyoto Protocol are estimated to be roughly $12 billion. For the world as a whole, the costs are actually lower, standing at about $217 billion. On the other hand, according to estimates, the cost of climate change globally stands to be around $4 trillion. As a result, it is difficult to doubt that any treaty that has the potential to mitigate such costs is not a worthy goal; however, in the case of Kyoto, the net benefits are at best marginal because it will only have a small effect on aggregate emissions worldwide.

141. *See, e.g.*, Sunstein, *supra* note 1, at 4; *see also* Parker & Blodgett, *supra* note 9, at 12.

142. *See* George Downs et al., *Is the good news about compliance good news about cooperation?*, 50 INT'L ORG. 379, 383 (1996).

143. *See, e.g.*, David G. Victor, *Enforcing International Law: Implications for an Effective Global Warming Regime*, 10 DUKE ENVTL. L. & POL'Y F. 147, 152 (1999).

144. *See, e.g.*, Frischmann, *supra* note 16, at 737.

145. *Id.* at 738-39.

necessarily mutually exclusive. In fact, the Montreal Protocol's use of both enforcement approaches ultimately plays a large role in ensuring almost full compliance. For example, the trade restriction mechanism (hard sanction) helps to encourage participation, while reporting requirements and technical assistance (soft sanctions) help to undermine uncertainty and encourage compliance.[146] Why then, can the Kyoto Protocol not adopt the same approach?

Shallow cooperation, at least concerning the Kyoto Protocol, is encouraged because of the fact that enforcement mechanisms are not legally binding and can only become legally binding by an amendment.[147] Since any party can decline to ratify an amendment, it can avoid being punished for failing to comply.[148] Moreover, the current compliance mechanisms under the Kyoto Protocol, agreed on in Bonn in 2001, are fundamentally flawed. It is even suggested that they merely encourage *non-compliance* and might actually encourage *non-participation*.[149] Currently, if a party does not meet its obligations it can be "punished" in two ways: (1) by accepting additional reductions in its emissions during the control period following the period in which the country failed to comply, and (2) by being excluded from the emission trading scheme.[150] Thus, the enforcement mechanisms merely delay punishment and actually ignore the fact that delayed penalties increase participation costs with each control period. In this way, the non-compliance measures make non-participation *more* attractive.[151] This does not mean that the Kyoto Protocol is incorrect for trying to encourage states to comply with their obligations. On the contrary, "coercive enforcement measures are sometimes needed, particularly when the cooperation is deep and incentives to defect are high."[152] This would suggest that there is a trade-off between encouraging participation and deepening cooperation. The Montreal Protocol provides a good example of a treaty that established a healthy balance between the two: creating an optimum cost-benefit structure to encourage participation through incentives, including adequate enforcement mechanisms to deepen cooperation. Kyoto, on the other hand, has large participation, a sub-optimal cost-benefit structure and inadequate enforcement mechanisms to encourage deeper cooperation.

146. *See id.* at 797-804; Weiss, *supra* note 44, at 147, 152-53.

147. Kyoto Protocol, *supra* note 97, art. 20. Article 20 states that an amendment requires at least three-fourths of the parties present and voting at the meeting.

148. Barrett, *supra* note 11, at 384.

149. *Id.* at 384, 386.

150. *Id.* at 386.

151. *Id.* Another flaw is that compliance relies on self-punishment, in that it is only legally binding if a nation chooses to ratify any such amendment. Countries that are most likely to fall short of compliance will be the very countries that are least likely to approve such an amendment.

152. Teall Crossen, *Multilateral Environmental Agreements and the Compliance Continuum*, 16 GEO. INT'L ENVTL. L. REV. 473, 493; *see also* Victor, *supra note* 143, at 151.

V. CONCLUSION AND RECOMMENDATIONS

Scott Barrett sums up participation in the Kyoto Protocol as follows:

> The USA failed to participate (at least in part) because the costs of participation were high. Other countries agreed to participate (at least in part) because the costs to them of participating were low (as is true for some EU states), zero (as is true for all non-Annex I states) or even negative (as is true for the states given 'hot air' allowances). The Annex I countries likely to have the hardest time complying (Canada and Japan) agreed to participate only on the condition that their initial reduction obligations be diluted.[153]

Thus, one can see that the negotiations leading up to the creation of the Kyoto Protocol ultimately led to a diluted agreement that has done very little to curb GHG emissions, and will continue to do very little unless significant changes are made. On the contrary, the Montreal Protocol is a model of efficacy and effectiveness in that it enjoys near perfect compliance and has done a great deal to reverse damage to the ozone layer.[154] While the two agreements were created to address the two most significant environmental threats facing mankind, their structure, provisions, and respective mechanisms have led to radically different outcomes.

The goal of any MEA is to encourage both broad participation and deep cooperation. However, the Kyoto Protocol exhibits mostly broad participation, along with shallow cooperation and weak compliance. This was a result of the failed negotiation process that created a settlement for the lowest common denominator of the parties to the agreement.

However, to encourage deeper cooperation, the Kyoto Protocol needs to restructure incentives to ensure participation *and* compliance. Such incentives include encouraging participation and then discouraging "defection" by implementing coercive compliance mechanisms that change the cost-benefit structure of potential defection. Such a treaty would satisfy the following criteria introduced at the start of this paper:

> *Individually rational*: such individual rationalism comes about when the cost-benefit assessment is favorable for a nation to gain (or at least not lose significantly) from treaty participation, either through the costs of non-participation or direct benefits of participation.
>
> *Collectively rational*: such rationalism is created when countries are encouraged to participate *and* comply with the obligations imposed by the treaty by creating a system of incentives, constrained by the credibility of threats or enforcement mechanisms to discourage defection.

---

153. Barrett, *supra* note 110, at 295.

154. Indeed the Montreal Protocol has even had a substantial effect on climate change mitigation because ODSs also contribute to climate change and, hence, their phase-out has provided substantial climate change mitigation. Donald Kaniaru et al., *Strengthening the Montreal Protocol: Insurance Against Abrupt Climate Change*, 7 SUSTAINABLE DEV. L. & POL'Y 3, 3 (2007).

Fair: in that it must be perceived by the parties as being legitimate, reinforcing the individual and collective rationality of the agreement.[155]

To date, there has been significant legal scholarship on proposed alternatives to the Kyoto Protocol. However, some of the most common proposals can be listed as follows:

(1) Broader participation by industrial and developed nations is needed to address the global commons problem effectively and efficiently. Such proposals include measures such as "growth targets"[156] or creating an annex for fast-growing developing countries like China, India and Brazil.[157] Moreover, industrialized countries can also create a similar fund to that created under the Montreal Protocol in order to lower the cost to developing countries through direct and in-kind transfers. In this way, the offer of side payments can be a strategic choice in that the transfer of money and technology can help ensure that countries that would have lost by participating, can now reap the benefits of participation.

(2) Include a more comprehensive and fully integrated global emission trading scheme that would allow businesses instead of governments to decide for themselves how to spend money on cutting emissions by setting a variable carbon price.[158] In the alternative to a trading scheme, a viable carbon taxing system would likely provide the same amount of flexibility. Any foreseeable agreement on this raging debate would likely include both measures.[159]

(3) Include measures and mechanisms in the Kyoto Protocol to prevent trade leakage. Indeed, it was the trade restrictions, along with the

155. *See* Barrett, *supra* note 11, at xii-xiv.

156. Olmstead & Stavins, *supra* note 99, at 35.

157. *See generally* Halvorssen, *supra* note 101, at 248.

158. *See* Fiona Harvey, *UN carbon tax advocacy opens old wounds*, FIN. TIMES, Nov. 28, 2007. The targets and timetables approach of the Montreal Protocol served to put producers and the relevant industries on notice that alternative technology was going to have to be developed in light of eventual cuts, or even complete phase-outs. In this way, the parties gave private business the go-ahead to start investing in alternatives to CFCs. The resulting incentive then became for producers to be the first to produce and market CFC alternatives to be sold around the world. Indeed, once substitutes became available, developing nations were more inclined to use such technology over obsolete CFC technology. An example of how this process worked is illustrated by Dupont's announcement one year prior to the Montreal Protocol that it believed it could produce an alternative within five years, but the regulatory environment had not given them enough incentive to justify the required investment. By late 1988, Dupont and several other companies had created alternative chemicals. Currently there are a growing number of companies that view climate change regulation as inevitable, and some are even starting to propose that the US ratify the Kyoto Protocol to create conditions of investment certainty. In addition, many companies are now taking the position that the Kyoto Protocol could offer market opportunities and are pressing the US to reconsider its position. *See generally* Thomas, *supra* note 3, at 810 (noting that the targets and timetables approach adopted by the Montreal Protocol had the additional benefit of sending signals to CFC producing businesses that investments in alternatives would be profitable).

159. *See* Editorial, *Groundhog Day*, FIN. TIMES, Nov. 278, 2007.

compensation mechanisms to developing countries for incremental costs that led to a much broader participation among the developing world in the Montreal Protocol. While such a provision would undoubtedly be harder to administer under Kyoto, a "hybrid" version could be created to ensure adequate administration and enforcement. Trade restrictions do two things: (1) punish those that do not cooperate, and (2) correct for losses in "competitiveness" of the countries that do participate. Also, trade restrictions encourage participation, and with higher participation, the detrimental concerns of competitiveness are lower.

(4) Kyoto should facilitate more technology transfer and joint research and development (R&D) on a global scale.[160] The Montreal Protocol encourages the sharing of R&D between participants and even between participants and non-participants.[161] In addition, improving the technological capacity of all countries encourages participation because the cost of participation is lowered if a country is given a leg-up in the form of cleaner technology before joining an agreement that obliges it to undertake significant emissions reductions.

(5) Improve compliance and enforcement mechanisms to encourage compliance from the industrialized countries. Here, it might be proactive to include the ability to adjust compliance mechanism without party ratification, as is required for an amendment.

The Parties to the Kyoto Protocol met in Bali between December 3 to December 14 of 2007 to discuss a successor to the Kyoto Protocol.[162] Politics did, and will continue, to inevitably play a large role in the future of climate change mitigation. However, to have a significant and lasting impact on GHG emissions, the successor to the Kyoto Protocol must include adequate incentives to encourage broad participation, deepen cooperation, and encourage widespread compliance. The fate of the earth's fragile climate is at stake, and with the Kyoto Protocol's relatively lackluster impact on mitigating climate change, politics needs to give way to efficient, efficacious, and lasting solutions that can turn the corner in a somewhat stalled climate change regime.

160. For a complete discussion of what type of research and development measures should be incorporated into the Kyoto Protocol, and what role such measures could play, *see* Barrett, *supra* note 11, at 391-98.

161. Montreal Protocol, *supra* note 49, art. 9; *see also* Barrett, *supra* note 11, at 309-10, 393-94 (noting that an indication of the lack of effectiveness behind Kyoto is that in many of the most pro-Kyoto countries, government funded energy R&D actually decreased). Indeed a reverse relationship exists too: creating more of an incentive for Kyoto participation through effective compliance will undoubtedly speed up R&D for alternative technology.

162. *See* Fiona Harvey and John Aglionby, *Bali near deal to save forests*, FIN. TIMES, Dec. 12, 2007.